CHAPTER THREE

THE EXECUTIVE

3.1 In the traditional tripartite model, the Constitution provides for three organs of government, the executive, the legislature and the judiciary. Though the Constitution makes a broad distribution of powers, it does not envisage separation of powers in its rigid form. The executive is responsible to Parliament and remains at the helm of affairs so long as it enjoys the confidence of the majority in Parliament. It exercises some legislative power and performs certain adjudicative functions.

3.2 The executive is composed of the President, the P rime Minister and a Council of Ministers. The executive determines the policies of the government and supervises the execution of the policies and enforcement of the laws. The actual work of execution of the policies and enforcement of the laws is done by the members of the services of the Republic.

PRESIDENT

3.3 The President is the Head of the State and of the executive government.[1] He is elected by the members of Parliament in accordance with law for a term of five years and he cannot be elected for more than two terms, whether or not the terms are consecutive.[2] Notwithstanding the expiration of his term, the President shall continue in his office until his successor enters upon office. During the term of office, the President shall not be qualified for election as a member of Parliament and if a member of Parliament is elected as President, he shall vacate his seat in Parliament on the day he enters upon office as President.[3] Before entering the office, the President has to take oath in terms of art.148.[4]

3.4 *Qualification:* To be qualified for election as President, a person must be at least 35 years of age and qualified for election as a member of

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[1] Art. 48

[2] Art. 50

[3] Art.50(4)

[4] For remuneration, privileges and other terms and conditions of the office, see Para 6.59B

Parliament and must not have been removed from the office of President by impeachment[1]. By Act no.XXVII of 1991 provisions have been made for election of the President by the members of Parliament by open ballot. The open ballot system was challenged as being undemocratic, violative of art.39 and contrary to the principles of State policy under art.11. But the contention has been rejected by the High Court Division.[2]

3.5 *Resignation and vacancy:* The President may resign his office by writing under his hand addressed to the Speaker.[3] If a vacancy occurs in the office of President or if the President is unable to discharge his functions on account of absence, illness or any other cause, the Speaker shall discharge those functions until a President is elected or until the President resumes the functions of his office.[4]

3.6 *Immunity from process of the court:* The President is not answerable in any court including the Supreme Court for anything done or omitted to be done in the exercise or purported exercise of the functions of his office. This does not mean that a citizen affected by his action cannot have any remedy; he can sue the government for appropriate relief. No civil proceeding can be initiated against the President of India for his personal acts unless a prior notice of two months is served on him. But there is no such limitation in the Constitution. During the term of his office, no criminal proceedings can be instituted against the President[5] and no process for his arrest or imprisonment can issue from any court. If there be any criminal proceeding pending against him when he entered upon the office of President, it shall be stayed.[6]

3.7 *Impeachment and removal:* Before the expiry of the term of office, the President can be removed only by impeachment in Parliament on a charge of violation of the Constitution or of grave misconduct. The notice of motion of impeachment containing the particulars of the charge signed by at least a majority of the total number of members of Parliament has to be delivered to the Speaker. If Parliament is not in session, the Speaker shall summon Parliament and the motion shall be debated between the 14th and 30th day after delivery of the notice to the

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[1] Art.48(4)
[2] *Abdus Samad Azad v. Bangladesh*, 44 DLR 354
[3] Art.50(3)
[4] Art. 54
[5] *H.M. Ershad v. State*, 43 DLR (AD) 50 (Immunity is available while in office)
[6] Art.51

Speaker. The President shall vacate his office if a resolution is passed in Parliament by votes of not less than two-thirds of the total number of members declaring that the charge has been substantiated.[1] The President has the right to appear and to be represented during the consideration of the motion. In the same process, the President may be removed from the office on the ground of physical or mental incapacity. In such a case, Parliament shall by resolution constitute a medical board for examination of the President and if the President submits to medical examination by that board, the motion shall not be put to vote until the medical board has been given an opportunity of reporting its opinion to Parliament.[2]

PRIME MINISTER, CABINET AND OTHER MINISTERS

3.8 A constitution generally provides for a Council of Ministers which is a large body consisting of the Prime Minister and all Ministers including the State Ministers and the Deputy Ministers. All important decisions are taken by a small body called Cabinet headed by the Prime Minister.[3]

3.9 The President appoints as Prime Minister the member of Parliament who appears to him to command the support of the majority of the members of Parliament[4] and he appoints such other Ministers, Ministers of State and Deputy Ministers as may be determined by the Prime Minister[5], on the advice of the Prime Minister. No one can be appointed as Minister, State Minister or Deputy Minister unless he is qualified to be elected as a member of Parliament and at least nine-tenths of their number shall have to be appointed from among the members of Parliament.[6] Before entering the office, the Prime Minister and other Ministers are to take oath in terms of art.148.[7]

3.10 The office of the Prime Minister becomes vacant if he resigns from office or ceases to be a member of Parliament, but he can continue

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[1] Art. 52
[2] Art. 53
[3] Art.55(1)
[4] Art.56(3)
[5] Art.56
[6] Art.56(2)
[7] For remuneration, privileges and other terms and conditions of the office, see Para 6.59B

until his successor enters upon office.[1] Other Ministers hold their office during the pleasure of the Prime Minister who can ask any Minister to resign and can ask the President to terminate his appointment if he fails to resign.[2] Their office shall become vacant if they resign, or, becoming Ministers as members of Parliament, cease to be members of Parliament[3], or if the Prime Minister resigns or ceases to hold the office[4]; but these events previously did not disqualify them for holding office during any period in which Parliament stood dissolved.[5] After the Thirteenth Amendment of the Constitution, once Parliament is dissolved or stands dissolved, the Prime Minister and other Ministers continue in their office till the appointment of the Chief Adviser by the President in terms of art.58C(2).[6]

POWERS AND FUNCTIONS OF THE EXECUTIVE

3.11 *The President:* The President is the constitutional head of the State and of the executive government. The office of the President is a ceremonial one like the British Sovereign.[7] The government has been structured in the British model and guidance may be had from the British constitutional conventions so far as those are not inconsistent with the Constitution and can be applied.[8]

3.12 In the form of government that we have, the President is normally vested with the executive power of the State which, in fact, is to be exercised by the Council of Ministers and the President is to act on the advice of the Ministers. But having regard to the past performance of the constitutional heads in this country, the framers of the Constitution thought it necessary to specifically provide that the executive power of

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[1] Art.57
[2] Art.58(2)
[3] Art.58(1)
[4] Art.58(4)
[5] Art.58(3)(4)
[6] See Para 3.49B
[7] This question was dealt with in several decisions of the Indian Supreme Court. See the decision of *Shamser Singh v. Punjab*, AIR 1974 SC 2192 in which the Court reaffirmed that the President is the constitutional head. The question does not arise in our country as the relation between the President and the Ministers has not been left to be determined by conventions and has been specifically spelt out in Art.48(3); see *Bangladesh v. Md. Habibur Rahman*, 31 DLR (AD) 152
[8] *U.N.R. Rao v. Indira Gandhi*, AIR 1971 SC 1002

the Republic shall be exercised by and under the authority of the Prime Minister.[1] Art.55(4) requires that all executive actions of the government shall be taken in the name of the President. The President shall by rules specify the manner in which the orders and other instruments made in his name shall be attested or authenticated and the validity of any order or instrument so attested or authenticated shall not be called in question in any court on the ground that it was not duly made or executed.[2] This, however, does not oust the jurisdiction of the court to examine the validity of such an order or instrument on any other ground. Under art.55(6) the President is to make rules for allocation and transaction of business of the government which are called the Rules of Business. These rules determine which authority is to perform what function of the government.[3] Rule 33 of the Rules of Business, 1996 provides that the Prime Minister may in any case or class of cases permit or condone a departure from these rules to the extent he deems necessary.

3.13 The term 'executive action' is wide enough to include statutory functions even if it may be of a quasi-judicial nature.[4] In *Khair Ahmed v. Ministry of Home*[5] an order extending the period of preventive detention was issued in the name of the government and the High Court Division observed, "If making and signing of a Government order do not conform with the provisions of the Constitution and the Rules of Business, then it suffers from inherent defect and cuts at the root of an executive action". It is submitted that the observation is open to question. Considering the principles evolved for determining the mandatory or directory nature of a provision[6], the mode of making and signing of a government order is to be treated as directory. The Indian Supreme Court has held that the requirement of taking action in the name of the President is directory and a substantial compliance is enough.[7] It is submitted that in *Khair*

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[1] Art.55(2); *Bangladesh v. Md. Habibur Rahman*, 31 DLR (AD) 152

[2] Art.55(5)

[3] *Bangladesh v. Hon'ble Judge*, 34 DLR (AD) 212 (Ministry of Law filed application before the Prize Court for direction to allocate and transfer Prize Fund to the Public Account of the Republic. Under the Rules of Business the Ministry of Law was not authorised and hence had no *locus standi*.)

[4] *Nageswara Rao v. APSRTC*, AIR 1959 SC 308, 326; *Dattatraya v. Bombay*, AIR 1952 SC 181

[5] 40 DLR 353 (this decision has been distinguished in *Sekendar Ali v. Bangladesh*, 42 DLR 346. The observation of the court in *Sekendar Ali* that an order of extension of the period of detention is not an executive action is questionable)

[6] see Para 1.66

[7] *Dattatraya v. Bombay*, AIR 1952 SC 181; *E.C. Barsay v. Bombay*, AIR 1961 SC

Ahmed the order stating 'By order of the Government' was a substantial compliance of the provision of the Constitution.[1] In *Saleh Ahmed Khan v. Additional Secretary*[2] another Division Bench of the High Court Division agreed with the observation in *Khair Ahmed*, but a careful reading of the decision shows that their lordships were more concerned with the competence of the person signing the order than with the form of authentication and the discussion indicates that their lordships would have upheld the order, notwithstanding the defect in the form of authentication, if it was passed by a competent person and this has been so held by the Appellate Division[3]. When an order is not authenticated in terms of art.55(4) the immunity from challenge under art.55(5) does not attach and the validity of the execution can be challenged, but evidence can be led to show that it was the decision of the government.[4] When an order is not duly authenticated and not shown to have been passed by a competent authority, the order will be bad. The ultimate question is whether the person who has signed is competent to sign under the Constitution or the Rules of Business.[5] An order of the Minister which is not expressed in the name of the President and was not communicated to the individual concerned, does not create a right in favour of the individual and may be rescinded.[6] Internal exercises of the government by way of noting in the file which have not been communicated to an individual cannot create a legal right for him.[7] Inter-ministerial communications are merely policy guidelines which do not create any legal right for enforcement by the court.[8] A letter from a Secretary of the government is not a legal instrument.[9]

3.14 In the exercise of all functions assigned to him by the Constitution or any law, the President is required to act on the advice of

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1762; *Rajsthan v. Sripal Jain*, AIR 1963 SC 1323; *Chitralekha v. Mysore*, AIR 1964 SC 1823; *U.P. v. Om Prakash Gupta*, AIR 1970 SC 679

[1] see *U.P. v. Om Prakash Gupta*, AIR 1970 SC 679

[2] 41 DLR 210

[3] See *Shahinur Alam v. Bangladesh*, 50 DLR (AD) 211

[4] *L.G. Chaudhari v. Secy., L.S.G. Deptt.*, AIR 1980 SC 383.

[5] *Bangladesh v. Md. Habibur Rahman*, 31 DLR (AD) 152; *Saleh Ahmed Khan v. Additional Secretary*, 41 DLR 210

[6] *Kedar Nath v. Punjab*, AIR 1979 SC 220; *Bachittar v. Punjab*, AIR 1963 SC 395

[7] *Bangladesh v. Dhaka Steel Works*, 45 DLR (AD) 69; *Secretary, IRD v. Nasrin Banu*, 48 DLR (AD) 171

[8] *Abul Bashar v. Bangladesh*, 50 DLR (AD) 11; *Nur Hossain v. Secy. Ministry of Land*, 52 DLR 275

[9] *Kazi Aftabuddin v. Bangladesh*, 49 DLR 42

the Prime Minister except that he shall act in his own discretion in the matter of appointment of the Prime Minister under art.56(3) and of the Chief Justice under art.95(1).[1] When a member of Parliament commands the support of the majority in Parliament, he is required to appoint such member of Parliament as the Prime Minister and call upon him to form the government and his discretion is only nominal. His discretion comes into play when no political party has a clear majority in Parliament. He is then to be satisfied as to which combination of parties can form a government and which of the persons vying for the leadership is acceptable to such parties as the Prime Minister. In the case of appointment of the Chief Justice he is expected to appoint the senior-most Judge of the Appellate Division. Only in the most exceptional circumstances he may choose to appoint any other Judge of the Appellate Division as the Chief Justice, but it is unlikely that he will exercise his discretion without consulting the Prime Minister. Art.48(3) provides that the question whether any, and if so what, advice has been tendered by the Prime Minister to the President shall not be inquired into by any court as it is politically undesirable to have a disclosure of the advice tendered. Because of this provision there can be no remedy in court if a President chooses to act without or against the advice of the Prime Minister. It is true that the possibility of impeachment for violating the Constitution will act as a deterrent, but "this fear in the world of political intrigues that are incidental to the game of power-politics, is not, after-all such an effective brake upon the designs of an irresponsible President."[2] If the government produces the papers showing the advice tendered, the court may look into such papers and can come to its findings on the basis of such papers.[3]

3.15 The President has been given the power of pardon and reprieves under art.49.[4] The supreme command of the defence services is vested in the President and its exercise is to be regulated by law.[5] He has the power of summoning, prorogation and dissolution of Parliament on the written advice of the Prime Minister. Art.57(2) provides that if the Prime Minister ceases to retain the support of the majority of the members of Parliament, he shall either resign his office or advise the President in

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[1] Art.48(3)
[2] A.K. Brohi - Fundamental Law of Pakistan, 1958, p.109
[3] *India v. Jyoti Prakash*, AIR 1971 SC 1093
[4] See Para 3.45-3.49
[5] Art.61

writing to dissolve Parliament, and if he is so advised the President shall, if he is satisfied that no other member of Parliament commands the support of the majority of the members of Parliament, dissolve Parliament. The Prime Minister can only resign or advise dissolution of Parliament. He cannot do both at the same time. In view of the fact that art.48(3) makes only two exceptions when the President can exercise his own discretion, it may be urged that in exercise of the power of dissolution of Parliament on the advice of the Prime Minister who ceases to retain support of the majority in Parliament, the President is bound by the advice of the Prime Minister. But such a contention, if accepted, would render the expression "if he is satisfied that no other member of Parliament commands the support of the majority of the members of Parliament" in art.57(2) totally nugatory and surplusage. The President has a discretion when the Prime Minister ceases to retain the support of the majority members of Parliament and instead of resigning, advises the President to dissolve Parliament. The President will act on the advice of the Prime Minister only if he is satisfied that no other member of Parliament can command the support of the majority members of Parliament, but if he is satisfied that some other member of Parliament can command the necessary support, he will appoint that member as the Prime Minister instead of dissolving Parliament. It may be a very embarrassing situation if, after the decision of the President not to dissolve Parliament, no one is able to form the government. The President is not expected to ignore the advice of the Prime Minister for dissolution of Parliament unless the situation clearly demonstrates that some other member of Parliament is capable of forming the government with the support of the majority members of Parliament.[1]

3.16 In the matter of summoning and prorogation of Parliament, it is mandatory that not more than sixty days should pass between the last day of a session and the first day of the next session. The President may address Parliament and may send message thereto. At the commencement of the first session after a general election and at the commencement of the first session of each year he shall address Parliament and Parliament shall discuss the matters referred to in the address.[2] No Money Bill nor any Bill involving expenditure from public

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[1] An interesting discussion on the convention relating to dissolution of legislature by the constitutional head can be found in Brohi's Fundamental Law of Pakistan, 1958, at pp.123-136.

[2] Art.73

fund can be introduced in Parliament without the recommendation of the President. When Parliament stands dissolved or when it is not in session, the President may promulgate Ordinance if he is satisfied that immediate action is necessary.[1] The President may proclaim emergency in the whole or part of Bangladesh with prior counter signature of the Prime Minister in the Proclamation of Emergency[2] which will have the effect of suspending some fundamental rights.[3] And with the written advice of the Prime Minister he can suspend enforcement of other fundamental rights.[4] The President has the power of appointing the Judges of the Supreme Court, Attorney General, Chief Election Commissioner and other Election Commissioners, Comptroller and Auditor General, Chairman and members of the Public Service Commission and judicial officers and magistrates exercising judicial functions. All these functions are to be discharged with the advice of the Prime Minister.

3.17 The President is entitled to be informed by the Prime Minister on matters of domestic and foreign policy. He may request the Prime Minister to submit any matter for consideration of the Cabinet.[5] On paper this may not appear to be a power at all, but it has considerable importance. A man of high stature, integrity and experience holding the office of the President can exert great influence on the executive government by way of advice and counselling and play a great role in building a bridge between the government and the opposition.[6]

3.17A A question arises whether in case of extreme necessity the President has any power beyond what is apparent from the provisions of the Constitution. In 1996 the non-cooperation movement of the opposition parties brought the society to a standstill to the immense suffering of the people. As the political parties could not come to terms, the question arose whether the President has any discretionary or residuary power to save the situation. Reference was made to the discretionary or residuary power of the Indian President. In the Indian Constitution the areas of discretion have not been spelt out and having regard to the British convention and the oath taken by the Indian President to preserve, protect and defend the constitution, the Indian

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[1] Art.93
[2] Art.141A
[3] Art.141B
[4] Art.141C
[5] Art.48(5)
[6] Seervai - Constitutional Law of India, 3rd ed., p.1732

Supreme Court implied certain discretionary powers of the President of India.[1] But the areas of discretion have been specified in art.48(3) of the Constitution. From the language of art.57(2) another area of discretion can be found out. At the same time the President has taken mandatory oath in terms of art.148 to preserve, protect and defend the Constitution which is not just a matter of formality or rituals. The oath creates an obligation or duty for the President to act to preserve, protect and defend the Constitution. In spelling out the nature of the duty involved in the oath it must be kept in mind that in view of the past performance of the titular Heads in this country, the framers of the Constitution made a departure from the usual constitutional provisions and conventions in providing in art.55(2) that all executive power of the Republic shall be exercised by or under the authority of the Prime Minister and it can be argued that the framers did not intend to give any further discretionary powers to the President other than those which are expressed and those which may be apparent from the express language of the Constitution. At the same time it cannot be said that the framers did not intend to concede any discretionary power which in a given situation must be exercised by the President to save the country or the Constitution from destruction. The President having the duty to preserve, protect and defend the Constitution, it is difficult to deny him the necessary authority in discharging the duty of preserving, protecting and defending the Constitution. In the context of history and the provisions of the Constitution, the area of implied discretionary power of the President is narrower than such power of the Indian President. The oath taken by the President in terms of art.148 obliges him to see that the Constitution is preserved and protected. Thus he will not be bound to act on an advice of the Prime Minister if such advice is *ex facie* unconstitutional. For example, if the Prime Minister loses the confidence of the majority in Parliament, but to perpetuate in the office refuses to advise the President to summon Parliament even after expiry of sixty days from the date of prorogation of Parliament, the President has the discretionary power, nay the constitutional duty, to ask the Prime Minister to give the written advice for summoning Parliament as required by art.72 and if the Prime Minister refuses so to advise the President, to summon Parliament without the advice of the Prime Minister. It is the very necessity of continuity of the Constitution and the democracy that the President should be conceded the authority to summon Parliament without the

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

advice of the Prime Minister.[1] The President cannot promulgate any Ordinance without being advised in this behalf by the Prime Minister. But situation may arise where promulgation of an Ordinance becomes a necessity for the preservation of the Constitution or the continuity of the constitutional process. The President may promulgate such Ordinance without being so advised by the Prime Minister and the doctrine of necessity will render such Ordinance valid.[2]

3.18 *The Prime Minister:* In the parliamentary form of government adopted by the Constitution, the Prime Minister occupies the central position. He is the leader of the majority party in Parliament as well as the leader in the Cabinet and the Council of Ministers. He is the mouthpiece and the real chief executive of the government. He co-ordinates the government policies. He is the channel of communication between the President and the Ministers. The Ministers hold office during the pleasure of the Prime Minister who can ask any Minister to resign so long as it does not affect his support and leadership in the party. But this power may not be so extensive as it appears on paper. The policies adopted by the Prime Minister, particularly with respect to appointment and termination of appointment of influential Ministers may destroy his support in the party and as such he is to act adroitly so as not to wither away the confidence of the party members in him. The Prime Minister is the principal spokesman of the Cabinet and its defender in Parliament. His resignation automatically terminates the appointment of other Ministers. He may also advise dissolution of Parliament and in most cases dissolution will follow. The entire constitutional machinery revolves round him and he wields great power, influence and prestige.

3.19 The Prime Minister, though the repository of all executive power of the Republic, cannot afford to be an autocrat. There are inherent limitations on his power. He cannot act without the aid of his colleagues in the Cabinet and Council of Ministers and to a great extent he has to depend on them and he has to take responsibility for their acts. If he disregards the views of his colleagues without demonstrably valid reasons, discontent is bound to follow not only affecting the efficiency of the government, but also eroding the confidence and support of the party and he may be dislodged from the party leadership which will

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[1] see *Reference by Governor General*, 7 DLR (FC) 295 (The Federal Court of Pakistan held that the Governor General could dissolve the Constituent Assembly in 1955 as it failed to give a constitution and turned it into a perpetual legislature)

[2] See Para 1.96

compel him to tender resignation. Even though the Constitution places the Prime Minister in a position of great power and influence, there will always be a question as to how far his colleagues in the Cabinet will be dependent on him and how far he will have to lean on his colleagues. An answer to the question will to a great extent depend on his personality and his position in the party. So long as he can manage a majority in the parliamentary party and thus ensure his party leadership, he remains the undisputed master of the situation. "Given a solid party backing and confidence among party leaders, a Prime Minister wields an authority that a Roman Emperor might envy as a modern dictator strive in vain to emulate".[1]

3.20 *The Cabinet:* The Cabinet is the ultimate policy and decision making organ of the executive government of which the Prime Minster is the head. All members of the Council of Ministers are not members of the Cabinet. Generally full-fledged Ministers are included in the Cabinet. A Minister of State or a Deputy Minister may attend the Cabinet meeting when matters pertaining to his department are going to be discussed. The Cabinet decides the major questions of policy and its decisions are binding on all Ministers. The various departments carry out the Cabinet decisions by administering the law and devising measures for enactment of laws in Parliament. A Minister may himself dispose of routine matters without reference to the Cabinet, but in all matters of major policy or of great political importance, he is to seek the guidance from the Cabinet. The Cabinet is thus in full control over the direction of public affairs in the country and is instrumental in formulating the policy of the administration, piloting legislation in Parliament and co-ordinating and supervising all administrative actions. As the Cabinet is composed of the leading members of the majority party in Parliament, the Cabinet virtually controls Parliament and the Cabinet really runs the show in the executive and legislative branches provided it enjoys the support and confidence of the majority party in Parliament.

COLLECTIVE AND INDIVIDUAL RESPONSIBILITY OF MINISTERS

3.21 The principle of collective responsibility of the Cabinet is the essence of responsible government and is fundamental to the working

[1] Sir Ivor Jennings - Cabinet Government, 1951, p.183

of a parliamentary form of government. The principle developed in England as a constitutional convention. But art.55(3) specifically lays down that the Cabinet shall be collectively responsible to Parliament. It means that the Cabinet as a body is responsible to Parliament for the general conduct of the affairs of the government. All Ministers shall stand or fall together and the government is carried on as a unity. The Ministers work as a team, the decision of the Cabinet is the joint decision of all Ministers and the Cabinet commands confidence of Parliament as a body. Inside the Cabinet, the Ministers may express their individual views freely, but once the decision is taken, all the Ministers are to support it and it is absurd for a Minister to oppose it or give an impression that he did not agree to it. It is his duty to stand by it and support it both within and outside Parliament. He cannot disown responsibility for any cabinet decision so long as he remains a Minister. If a Minister is morally convinced that a decision taken is absolutely wrong and he cannot support it, he has only the option of tendering resignation. If Parliament passes a vote of no-confidence, the Prime Minister has to resign and with him the entire Council of Minsters falls.

3.22 The collective responsibility of the Cabinet does not mean that every Minister must take part in the formulation of policies or that he should be present in the Cabinet meeting where the decision is taken. It ensures that the Cabinet presents a united front in Parliament. In addition to the oath of office to faithfully discharge the duties of the office and to preserve, protect and defend the Constitution[1] every Minister including the Prime Minister is to take oath of secrecy swearing that he will not directly or indirectly communicate or reveal to any person any matter which shall be brought under his consideration or shall become known to him as Minister except as may be required for the due discharge of his duties as Minister[2]. As a result, the deliberations in the Cabinet meeting are kept secret and confidential. The consequence of this secrecy is far-reaching. It enables the Cabinet to preserve the united front and at the same time it enables the Ministers to express their views freely during the deliberations.

3.23 Together with the collective responsibility of the Cabinet goes the individual responsibility of each Minister to Parliament. An individual Minister is responsible to Parliament for every action taken or omitted to be taken in his Ministry, but this again is a political

[1] Art.148 and the Third Schedule
[2] Ibid

responsibility and not his personal responsibility.[1] This individual responsibility of a Minister is exemplified in the resignation tendered by Lal Bahadur Shastri as the Minister of Railways in India following a serious railway accident. When an individual Minister is criticised in Parliament, the principle of collective responsibility requires that the Cabinet comes to his rescue and defend his action. But this is not an absolute rule. A Minister does take approval of the Cabinet on important matters, but in many cases he acts on his own. When the act criticised has been done with the approval of the Cabinet, the principle of collective responsibility is attracted and he can claim to be defended by the Cabinet. In other cases, it depends upon the exigencies of the situation. On occasions, the Cabinet may feel bound to defend him, but sometimes the Cabinet decides to withdraw support, in which case the Minister has to resign as happened with Krisna Menon, the Defence Minister of India, after the debacle of the Indian Military Forces in Sino-Indian War of 1962.

3.24 There is an important convention in England that a Minister is responsible for the acts of the civil servants of his Ministry even though the Minister cannot attend to every business in his Ministry and has to leave the execution of the policies and programmes with the civil servants after laying down the principles and programmes himself. This convention is applicable in our country as without such responsibility of the Minister Parliament cannot effectively perform its role as the critic of the executive government. "The principle of vicarious liability is in the highest traditions of parliamentary government, but in modern administration it is becoming more and more difficult to observe it in practice. Because of the vast expansion of administrative responsibilities of each Minister, chances of error of his subordinates have very much increased and it cannot, therefore, be asserted that the Minister must resign for every lapse of his subordinates. The limits of this responsibility are hard to define."[2]

RELATIONSHIP BETWEEN EXECUTIVE AND PARLIAMENT

3.25 In a presidential form of government the executive and the legislature are independent and distinct organs of the government and rigid separation of powers is the theme of that form of government. In

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[1] *A. Sanjeevi v. Madras*, AIR 1970 SC 1102

[2] M.P. Jain - Indian Constitutional Law, 4th ed., p.106

the absence of necessary political culture, the system operated in the U.S.A. cannot be smoothly run in any other country. Even in the U.S.A. serious confrontation takes place when the President is elected from one party and another party holds the majority in Congress. But in a parliamentary form of government no such confrontation can be envisaged.

3.26 The Constitution requires that at least nine-tenths of the number of members of the Council of Ministers must be from among the members of Parliament. And of course the Prime Minister and other Ministers are the leaders of the majority party in Parliament. This helps co-operation between the executive and Parliament. The Prime Minister and other Ministers can stay in office for so long as they enjoy the support of the majority members of Parliament. Parliament may call on the Ministers to account for the executive actions, keep watch on the executive actions, elicit important information on matters of public importance and through debate may influence the policy-making process. Defeat of the Ministry in Parliament on a major question of policy is counted as an expression of want of confidence which leads to the resignation of the Ministry. The Rules of Procedure of Parliament provide for moving a motion of no-confidence which, if passed, results in the fall of the government. The opportunities of Parliament to oversee the executive actions are many. Though the executive has the power of summoning, prorogation and dissolution of Parliament, a period exceeding sixty days cannot pass between the end of a session and the first sitting of the next session of Parliament.[1] Bills for legislation must be presented before Parliament. Taxation and appropriations are not authorised without an Act of Parliament. Annual budgets are to be placed before and demands for grants must be made to Parliament. All these offer innumerable opportunities to Parliament to discuss, question, criticise and debate the governmental policies, the conduct of the administration and the execution of laws. No money can be spent without an Appropriation Act and Parliament is empowered to fix the emoluments, allowances and privileges of the President, Prime Minister and other Ministers. This gives Parliament an opportunity to control the executive. The members of Parliament are the direct representatives of the people and by making the executive responsible to Parliament responsibility of the executive to the people is maintained.

3.27 The above discussion may lead the reader to believe that the

[1] Art.72(2)

executive is subservient to Parliament. But this is not the complete picture. The Prime Minister is not only the head of the Cabinet, he is also the leader of the House. On his hand lies the power of dissolution of Parliament and unless the situation is very serious the members of Parliament will not elect to push the Prime Minister to a position where he may be willing to advise dissolution of Parliament. Election is now a costly affair and the members of Parliament do not usually want to face it before the expiry of the normal term. The help of the party is necessary to contest in the election and the members must have good relationship with the leaders of the party who are often the members of the Cabinet. The executive may require reconsideration of a legislation passed by Parliament. Practically all legislations are sponsored by the executive. No Money Bill or Bill for expenditure from public accounts can be presented before Parliament without the recommendation of the executive. The power of dissolution not only brings about cohesion and discipline within the party in power, but also instills responsibility in the political opponents who cannot create a crisis on every issue by defeating the Ministry as they know that the Ministry may appeal to the electorate and seek a verdict. The political opponents will have less favourable response from the electorate if they cause a fall of the government on issues with which the electorate has no sympathy. The result is that while Parliament is supreme in the sense that it can make and unmake a Ministry, a Ministry once in power tends to lead and control Parliament provided it continues in the process to enjoy the support of the majority members in Parliament. Art.70 of the Constitution, which prohibits floor crossing and compels the members of the majority party on pains of losing membership of Parliament to vote according to the direction given by the leader of the party, further strengthens the position of the Ministry of the majority party in Parliament. Mutual controls and checks between the executive and Parliament generate mutual interdependence and co-operation with the prospect of smooth running of the affairs of the government

EXECUTIVE POWER

3.28 Art.55(2) declares that the executive power of the Republic shall, in accordance with the Constitution, be exercised by or under the authority of the Prime Minister. The Constitution does not define or enumerate the executive power or function. "Executive functions are incapable of comprehensive definition, for they are merely the residue

of functions of government after legislative and judicial functions have been taken away. They may, however, be said to entail the formulation or application of general policy in relation to particular situation or cases, or the making or execution of individual discretionary decisions."[1] They include the execution of law and policy, the maintenance of public order, the management of State property and nationalised industries and services, the direction of foreign policy, the conduct of military operations, and the provision or supervision of such services as education, public health, transport and national insurance[2] and other welfare measures.

3.29 In the exercise of its functions, the executive cannot ignore the provisions of the Constitution and its actions must not contravene the constitutional provisions.[3] It cannot spend money from the Consolidated Fund without an Appropriation Act passed by Parliament[4] nor can it encroach upon any sphere assigned to other instrumentalities like Parliament or judiciary. If there is a law in respect of any particular matter, the executive must conform to the law and cannot act against the statute or exceed its statutory powers. But the question arises whether the executive can do all that is not prohibited by the Constitution and law or the executive can do only what is permitted by the Constitution and the law. Stated in another way, the question is whether the executive has inherent power to act without the backing of a law passed by the legislature.

3.30 In the American jurisdiction, one Terry, a dissatisfied litigant, threatened to kill Field J. The Attorney General assigned Neagle, a federal marshal, to act as Field's bodyguard. When Terry attacked Filed J in a rail station, he was shot dead by Neagle. Neagle was prosecuted for murder. The case came up before the Supreme Court on Neagle's application for *habeas corpus*. Neagle claimed to have acted on the order of a superior. But it was contended that the order of the Attorney General itself had no legal backing since it was not based on any federal law. The Supreme Court held that though there was no specific law

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[1] Halsbury's Laws of England, 4th ed., vol.8, Para 814; *Jayantilal Amritlal v. F.N. Rana*, AIR 1964 SC 648; see also *Bangladesh v. Shafiuddin Ahmed*, 50 DLR (AD) 27, 38

[2] Halsbury's Laws of England, 4th ed., vol.8, Para 814; *Jayantilal Amritlal v. F.N. Rana*, AIR 1964 SC 648

[3] *Wazir Chand v. H.P.*, AIR 1954 SC 415

[4] Art.90(3)

authorising the protection given to Field J, this did not mean that no such protection can be given and there is power inherent in the government to protect its own officials.[1] In 1894 there was a strike in Pullman Company in Chicago which led not only to stoppage of work, but also serious violence. It paralysed the railway traffic operating out of Chicago. Injunction obtained against the union leaders ordering them not to obstruct the mails and interstate commerce was of no avail and the situation went out of hand. The federal marshal then notified the federal government that an emergency had arisen and he could not cope with it. The President ordered troops into Chicago to re-establish order and restore railway operation. The Supreme Court upheld the President's power to act. If the emergency arises, the President may employ the power of the nation to enforce the rights of the public and preserve the peace.[2] The executive's inherent power to act became subject of detailed consideration by the American Supreme Court in *Youngstown Sheet & Tube co. v. Sawyer.*[3] President Truman, to head off a strike, directed seizure of the nation's steel industry. He declared that the action was necessary to ensure continued availability of steel and to avoid the adverse effects upon national defence and the economy that the steel strike would entail. His action was without any authorisation of law. The opinion of the Court was delivered by Black J and he held that the President cannot act without Congressional authority in an area where Congress can clothe him with an authority to act. Four other majority Justices held the view that the Presidential seizure was incompatible with the expressed will of Congress in that Taft-Hartley Act of 1947 contains provisions to deal with nation-wide strikes and it was open to the executive to seek the relief of injunction in accordance with the provisions of that Act. Thus in two cases, it was held that the executive has inherent power to deal with situations and in the third case the majority of the Judges can be said to have agreed at least that inherent power cannot be exercised in a field which has been covered by law and the remedy prescribed by law should be pursued.

3.31 In the Indian jurisdiction, in *Ram Jawaya Kapur v. Punjab*[4] the petitioner contended that the executive power of the State did not extend to carrying on the trade of printing, publishing and selling text books for

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[1] *In re Neagle*, 135 US 1
[2] *In re Debs*, 158 US 564
[3] 343 US 579
[4] AIR 1955 SC 549

schools, unless such trade was authorised by law. The Supreme Court rejected the contention and observed that the functions of a modern State are not confined to collection of taxes or maintenance of laws and protection of the realm from external or internal enemies; a modern State is expected to engage in all activities necessary for the promotion of social and economic welfare of the community; the executive government cannot go against the provisions of the constitution or of any law, but it does not follow from this that in order to enable the executive to function, there must be a law already in existence and that the powers of the executive are limited merely to the carrying out of these laws; specific legislation may indeed be necessary if the government requires certain powers in addition to what they possess under ordinary law in order to carry on a particular trade or business and when it is necessary to encroach upon private rights in order to enable the government to carry on their business, a specific legislation sanctioning such course would have to be passed. But by entering into competition with the citizens, the government does not infringe their rights and the government could prescribe textbooks in exercise of its executive power so long as it did not infringe the right of anyone.[1] In some other decisions also, the Indian Supreme Court held relying on *Ram Jawaya Kapur* that executive action prejudicially affecting rights of any citizen must be authorised by law.[2] When executive power was pleaded to justify an encroachment on a citizen's right, the High Court of East Pakistan emphatically stated, "Any invasion upon the right of citizens by anybody, no matter whether by a private individual or by a public official or body, must be justified with reference to some law of the country, otherwise, such invasion would be illegal."[3] Under the Constitution the same legal position emerges. The executive can take action without any authority of law provided it does not thereby encroach upon the right or liberty of an individual. To affect any citizen or any resident of Bangladesh, the executive will need a legal backing and this position has been put beyond any doubt by art.31.[4]

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[1] *Naraindas v. M.P.*, AIR 1974 SC 1232. This question cannot arise in Bangladesh as art.144 stipulates that the executive authority of the Republic shall extend to the carrying on of any trade or business.

[2] *M.P. v. Bharat Singh*, AIR 1967 SC 1170

[3] *Md. Hossain v. General Manager, E.B. Railway*, 14 DLR 874; *Ghulam Zamin v. A.B. Khandoker*, 16 DLR 486.

[4] *Md. Shoib v. Bangladesh*, 27 DLR 315; *Ragib Ali v. Bangladesh*, 34 DLR 185

ORDINANCE MAKING POWER

3.32 In order to meet emergent situations, the executive has been given power to make law for short duration by promulgating Ordinance under art.93.[1] If Parliament stands dissolved or is not in session and the President is satisfied that circumstance exists which renders immediate action necessary, he may make and promulgate an Ordinance to meet the emergent situation.[2] Two conditions must be fulfilled before an Ordinance can be promulgated - (i) Parliament stands dissolved or is not in session and (ii) the President is satisfied that an emergent situation requires making of the law. The first does not present any difficulty as it is for every body to see if Parliament stands dissolved or is not in session. The question is whether the satisfaction of the President regarding the existence of the emergent situation is justiciable. In *Bhagat Singh v. Emperor*[3] the petitioners challenged the existence of the emergent situation for validity of an Ordinance promulgated by the Governor General under s.72 of the Government of India Act, 1919. The Privy Council, in holding that the satisfaction regarding existence of emergent situation is not justiciable, observed -

> A state of emergency is something that does not permit of any exact definition. It connotes a state of matters calling for drastic action which is to be judged as such by someone. It is more than obvious that someone must be the Governor-General and he alone. Any other view would render utterly inept the whole provision. Emergency demands immediate action, and that action is prescribed to be taken by the Governor-General. It is he alone who can promulgate the Ordinance.

3.33 In *A.K. Roy v. India*[4] the question was again raised. The government raised the plea that the satisfaction of the President regarding the existence of emergency is a political question which, according to the government, is outside the pale of judicial consideration. The doctrine of political question originated in the American jurisdiction. The Indian Supreme Court considered the American system of government and the treatment given to the doctrine

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[1] Neither the British Crown nor the American President has any power to promulgate Ordinance. The President of India and Pakistan have the power.

[2] See Para 4.49E in respect of power of the President while care-taker government is operating.

[3] AIR 1931 PC 111. Same view was taken in *Emperor v. Benoarilal*, AIR 1945 PC 48, and *Lakhi Narayan Das v. Province of Bihar*, AIR 1950 FC 59.

[4] AIR 1982 SC 710

in the American jurisdiction[1] and observed-

> We see the force of the contention that the question whether the pre-conditions of the exercise of the power conferred by Art.123 are satisfied cannot be regarded as a purely political question.[2]

The reasons given by the Indian Supreme Court in rejecting the doctrine of political question are all available in our constitutional dispensation. The doctrine cannot be accepted in our jurisdiction for still another reason. Art.7 mandates that all powers in the Republic shall be exercised under and by the authority of the Constitution and thus no authority within the Republic can transgress the limits and conditions set by the Constitution. If the executive promulgates an Ordinance where on the face of it there was no necessity of taking immediate action, the Supreme Court has the power, nay the duty, to prevent the executive from overstepping the limits set by the Constitution. The American doctrine of political question cannot be imported to dissuade the court from performing its duty.[3]

3.34 After negativing the doctrine of political question, the Indian Supreme Court held-

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[1] Ibid, p.724 (The doctrine of political question was evolved in the United States of America on the basis of its Constitution which has adopted the system of rigid separation of powers, unlike ours. In fact, that is one of the principal reasons why the U.S. Supreme Court had refused to give advisory opinions ... Brennan J said that the doctrine of political question was 'essentially a function of the separation of powers'. There is also a sharp difference in the position and powers of the American President on the one hand and the President of India on the other. The President of the United States exercises executive power in his own right and is responsible not to the Congress but to the people who elect him, In India, the executive power of the Union is vested in the President of India, but he is obliged to exercise it on the aid and advice of his Council of Ministers. The President's "satisfaction" is therefore nothing but the satisfaction of his Council of Ministers in whom the real executive power resides. It must also be mentioned that in the United States itself, the doctrine of the political question has come under a cloud and has been the subject matter of adverse criticism. It is said that all that the doctrine really means is that in the exercise of the power of judicial review, the Courts must adopt a 'prudential' attitude, which requires that they should be wary of deciding upon the merit of any issue in which claims of principle as to the issue and claims of expediency as to the power and prestige of Courts are in sharp conflict. The result, more or less, is that in America the phrase "political question" has become a little more than a play of words.); see also Seervai's Constitutional Law of India, 3rd ed., 2205-2213.

[2] Ibid, p.724

[3] For further discussion on political question, see Para 5.16-5.17

> It is arguable that the 44th Constitution Amendment Act leaves no doubt that judicial review is not totally excluded in regard to the question relating to the President's satisfaction.[1]

The court, however, refused to go further into the question of justiciability of the Presidential satisfaction as the Ordinance in question was replaced by an Act of Parliament[2] and sufficient materials were not placed on record to determine whether the conditions for promulgation of the Ordinance were not fulfilled. In two subsequent decisions, the Indian Supreme Court treating the power of making Ordinance as a legislative power held that an Ordinance cannot be struck down on the ground of *mala fide* or want of application of mind in promulgating the Ordinance.[3] In *Ahsanullah v. Bangladesh*[4] the High Court Division held that the satisfaction of the President regarding the existence of the circumstance requiring immediate action cannot be questioned in court.

3.35 The satisfaction of the Governor General or Governor under the Government of India Act, 1919 or 1935 was that of the Governor-General or Governor and of no body else. But under our constitutional dispensation, the requisite satisfaction is really that of the executive government on whose advice the President has to act and there is no reason why this satisfaction like all other satisfaction of the executive should not be justiciable and why an Ordinance shall not be declared void if it becomes absolutely clear that there was no emergency or that it was promulgated *mala fide*. Unlike the President of India and the President of Pakistan, the President of Bangladesh is not a part of

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[1] Ibid (By 38th Amendment of the constitution the satisfaction was made final and conclusive, but the said provision was omitted by 44th Amendment.)

[2] Appellate Division also refrained from deciding the issue when an Ordinance in the meanwhile was replaced by an Act of Parliament. See *Kudrat-E-Elahi v. Bangladesh*, 44 DLR (AD) 319. Seervai rightly criticised the refusal of the court to decide the question of justiciability of satisfaction on the ground that the Ordinance was replaced by an Act of Parliament. He strongly argued, "The Constitution puts limitations on the President's powers ... and if the powers are transgressed, as for example, by the promulgation of an Ordinance *mala fide*, the rights of the people are affected illegally ... and it would be an abdication of judicial power to give to the Council of Ministers, in substance, immunity from illegality if it takes the form of an Ordinance." He pointed out that on many occasions the court departed from the rule of not deciding a constitutional point unless absolutely necessary. - Constitutional Law of India, 3rd ed., p.828.

[3] *Venkata Reddy v. A.P.*, AIR 1985 SC 724; *Nagaraj v. A.P.*, AIR 1985 SC 551

[4] 44 DLR 179

Parliament.[1] Parliament's power of legislation is not subject to any condition precedent, but the power of the President to promulgate Ordinance is subject to two conditions precedent and the fulfilment of a condition precedent is ordinarily justiciable.[2] It is true that a law enacted by Parliament cannot be set aside on the ground of *mala fide*; it is also true that any action taken by the executive government can be challenged on the said ground. *Mala fide* or collateral purpose cannot be urged against Parliament because Parliament having plenary power of legislation, it is only a question of competence and the issue of motive is totally irrelevant. But the power of legislation by the executive being conditional the issue of *mala fide* or collateral purpose cannot be excluded. Under our constitutional dispensation there is no reason to hold the satisfaction of the President in the matter of promulgating Ordinance non-justiciable. Every functionary under the Constitution has power limited and circumscribed and the Constitution professing rule of law cannot be construed as having conferred an absolute discretion on any functionary irrespective of the nature of the power exercised. When the framers of the Constitution wanted to impart finality to any act, they used the proper language and ousted the jurisdiction of the court[3], but no such language has been used in respect of the satisfaction of the President regarding emergency. Ordinance-making is an exercise of the legislative power. But that does not make an Ordinance an Act of Parliament. It will have the force and effect of an Act of Parliament only when it is validly made and it is the power, nay the duty, of the court, when challenged, to see that the conditions imposed by the Constitution are fulfilled. Of course, when an Ordinance is challenged on the ground of absence of emergency, the court will start with a presumption of the existence of an emergency and the person who challenges the Ordinance will have a great burden of showing the absence of emergency which is not easily discharged as the executive's assertion of the existence of emergency will be given due and proper weight. Every casual and passing challenge to the existence of the necessary circumstances cannot be entertained.[4] It is to be noted that quite a number of times allegations of abuse of the power of promulgating Ordinance have been made and in one case one Ordinance was alleged to have been ante-dated to find justification for an alleged illegal executive action of closure of the

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[1] See Para 4.2

[2] Seervai - Constitutional Law of India, 3rd ed., p.826

[3] Arts.48(3), 66(4), 78(1), 81(3)

[4] *A.K. Roy v. India*, AIR 1982 SC 710, 725

University of Dhaka.[1]

3.36 An Ordinance once made and promulgated has the force of law as an Act of Parliament. The expression 'promulgate' connotes two ideas - (i) making known of an order and (ii) the means by which it is made known must be something done openly and in public; private information will not be a promulgation.[2] Promulgation of an Ordinance means publication for the information of the public. When for the commencement of an Act of Parliament there is a requirement of publication in the official Gazette in the absence of any commencement date given in the Act[3], promulgation of an Ordinance should normally mean publication in the official Gazette as no other mode of publication is known to have been adopted in our country. Thus without such publication an Ordinance cannot have the force of law.[4]

3.37 The proviso to art.93(1) provides that an Ordinance cannot make any provision which cannot be made by an Act of Parliament or, in other words, an Ordinance cannot make a provision which Parliament is not competent to enact.[5] By logical conversion it means that an Ordinance can make any provision which Parliament can make under its plenary legislative power and thus, subject to the fulfilment of the conditions mentioned in art.93, the power of making Ordinance is co-extensive with the power of Parliament to make laws.[6] As an Ordinance once made has the like force of law as an Act of Parliament, tax can be levied and collected by or under the authority of an Ordinance even though art.83 of the Constitution permits levy or collection of tax only by or under the authority of an Act of Parliament.[7] An Ordinance cannot also be made altering or repealing any provision of the Constitution or for continuing in force any provision of an Ordinance earlier made.[8] An Ordinance can be challenged on any ground an Act of Parliament can be challenged.

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[1] Writ Petition no. 2273 of 1990, *Dr. Anwar Hossain v. Bangladesh.* The High Court Division issued Rule, but the Rule became infructuous as with the fall of Ershad Government the Ordinance lapsed with the efflux of time.

[2] *State v. Tugla*, AIR 1955 All 423; *Nandalal v. State*, AIR 1968 Cal 523.

[3] S.5 of the General Clauses Act, 1897

[4] See *Harla v. Rajasthan*, AIR 1951 SC 467

[5] *Garg v. India*, AIR 1981 SC 2138

[6] Ibid; *Sat Pal & Co. v. Lt. Governor*, AIR 1979 SC 1950

[7] *Sat Pal & Co. v. Lt. Governor*, AIR 1979 SC 1950; *Garg v. India*, AIR 1981 SC 2138

[8] Art.93(1) Proviso

3.38 An Ordinance authorising expenditure from the Consolidated Fund can be made only when Parliament stands dissolved. Such an Ordinance shall have to be placed before Parliament as soon as may be and the provisions of arts. 87, 89 and 90 shall, with necessary adaptation, have to be complied with within 30 days of the reconstitution of Parliament.[1] All Ordinances other than the one authorising expenditure from Consolidated Fund shall have to be laid before Parliament at its first meeting following the promulgation of the Ordinances and, unless earlier repealed, shall cease to have effect at the expiration of 30 days after it is so laid, or if a resolution disapproving the Ordinance is passed by Parliament before such expiration, upon passing of such resolution.[2] The constitutional scheme of art.93 shows that if an Ordinance is intended to be continued it must be placed before Parliament for approval. Hence in such a case the executive government cannot resort to a device of not placing the Ordinance before Parliament and re-promulgating it when Parliament is prorogued. This will simply be a case of fraud on the Constitution.[3] But re-promulgation of the Ordinance may not be open to attack where due to shortage of time or because of too much legislative business in the particular session a Bill containing the same provisions as in the Ordinance could not be introduced and pushed through in Parliament.[4] Instead of placing the Ordinance before Parliament, the President may repeal an Ordinance. The expression 'cease to have effect' does not mean that the Ordinance on expiration of the period or on disapproval by Parliament shall become void *ab initio*.[5] Like any other temporary laws, an Ordinance on expiry or disapproval shall be deemed never to have existed except for the past and closed transactions.[6] A mere disapproval by Parliament cannot revive a closed and completed transaction. Thus if certain post was abolished by an Ordinance, the post is not revived because that Ordinance lapsed, unless Parliament passes an Act to that effect or creates a new post of like nature.[7]

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[1] Art.93(3)(4)
[2] Art.93(2)
[3] *Wadhwa v. Bihar*, AIR 1987 SC 579
[4] Ibid
[5] *Venkata v. A.P.*, AIR 1985 SC 724
[6] *Orissa v. Bhupendra*, AIR 1962 SC 945
[7] *Venkata v. A.P.*, AIR 1985 SC 724

RULE MAKING POWER

3.39 The Constitution has conferred power on the President to make rules on specified subjects. These rules are of two categories. In the first category falls the rules specifying the manner in which orders and instruments made in the name of the President are to be attested or authenticated[1] and the rules of business allocating different departments of the government to different Ministries and laying down the procedure to be followed by the different Ministries in the exercise of the executive functions[2]. In this category also falls the rules to govern the appointments of judicial officers and magistrates exercising judicial functions.[3]

3.40 In the second category falls the rules which may be made by the President until Parliament makes provisions in respect of the matters dealt with by these rules. Thus the President has power to frame rules to regulate the procedure of Parliament until such time Parliament makes its own rules of procedure and once Parliament has made the rules, the rules made by the President will cease to have any effect.[4] The President can also in consultation with the Speaker make rules regulating the recruitment and conditions of service of persons appointed to the Secretariat of Parliament and these rules would hold the field until Parliament makes provisions in this regard.[5] The custody of public money and their payment into and withdrawal from the Consolidated Fund and Public Account of the Republic shall be regulated by rules framed by the President until an Act of Parliament is passed.[6] Art.133 provides that the service of the Republic shall be regulated by rules made by the President until Parliament makes laws to regulate the appointment and conditions of service of persons in the service of the Republic. The President may also make regulations in respect of consultation with the Public Service Commission and such regulations must not only conform to the provisions of the Constitution, but must also be consistent with the laws made by Parliament.[7]

3.41 Apart from the power of making rules conferred by the

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[1] Art.55(5)
[2] Art.55(6)
[3] Art.115; see Para 6.19
[4] Art.75(1)
[5] Art.79(3)
[6] Art.85
[7] Art.140(2)

Constitution, the executive is entrusted with rule making function by Acts of Parliament. Because of intricacies and technical complications in various fields and because of vast expansion of the functions of a welfare State, Parliament today does neither have the expertise nor the time to go for extensive legislation on all subjects. More often than not Parliament makes a skeleton law providing guideline and leaving the details of the rules to be framed by the executive. This is a necessity of modern time and cannot be avoided and it is not practicable to do away with this delegation of legislative power which has been specifically sanctioned by the Constitution.[1] This enables the government to obtain the help of persons who are experts in the field and this also saves the time of Parliament. But the usual check which we find in the British constitutional system, that is, the requirement of parliamentary approval, is lacking in our country. The rules are usually drafted by the civil servants who may have their own interest to secure. Behind the curtain lobbies of vested interests often influence the rule-making exercise. The law conferring rule-making power to the executive should provide for publication of the draft rules and public hearing and parliamentary approval of the rules made.[2]

EMERGENCY POWER

3.42 The President may with the prior counter signature of the Prime Minister issue proclamation of emergency if he is satisfied that a grave emergency exists in which either the security or the economic life of Bangladesh or any part thereof is threatened by (a) war or external aggression or (b) internal disturbance.[3] Counter signature is not necessary when the care-taker government operates.[4] The proclamation of emergency may be revoked by the President by a subsequent proclamation. The proclamation of emergency must be laid before Parliament and it shall cease to be operative at the expiration of 120 days unless before the expiration Parliament approves it by a resolution. If the proclamation is issued at a time when Parliament stands dissolved or the dissolution of Parliament takes place during the period of 120 days after issuance of the proclamation, it shall cease to be operative at

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[1] see art.65

[2] For discussion on delegated legislation see Para 4.30-4.40

[3] Art.141A. In view of art.58E no counter signature is necessary when care-taker government is operating.

[4] Art.58E

the expiration of 30 days from the date of the first meeting of the re-constituted Parliament unless before expiry of that period of 30 days Parliament approves it by a resolution. For issuance of the proclamation actual occurrence of armed conflict is not necessary for war situation may exist even before actual armed hostility and may continue even after armed hostility has stopped, but in case of proclamation of emergency for internal disturbance, there must be actual disturbance which threatens the security or economic life of Bangladesh. It may be noted that art.352 of the Indian Constitution provides an explanation that emergency may be proclaimed even before actual occurrence of war, external aggression or internal disturbance if there is imminent danger of such war, aggression or disturbance. But in the Constitution there is no such explanation provided.

3.43 The issuance of the proclamation shall automatically suspend the operation of the fundamental rights guaranteed by arts.36, 37, 38, 39, 40 and 42 and a law made during the continuance of the emergency shall not be void because of inconsistency with the provisions of these articles[1] for so long as the proclamation remains operative. Apart from this, the President, with the written advice of the Prime Minister, may by order suspend the enforcement of any or all of the other fundamental rights guaranteed in Part III of the Constitution and such a suspension shall remain in force for so long as the proclamation remains in force.[2] Every order suspending the fundamental rights must be placed before Parliament.

3.44 The validity of a proclamation of emergency depends upon the satisfaction of the executive about the existence of two things - (1) there is war, external aggression or internal disturbance and (2) security or economic life of Bangladesh or any part thereof is threatened by such war, external aggression or internal disturbance. The question is whether the satisfaction of the executive as to the existence of the two things is justiciable. The case of non-justiciability of the Presidential satisfaction for promulgation of an Ordinance is based on two grounds - (1) Ordinance-making is an exercise of legislative power which cannot be challenged on the grounds on which exercise of executive power can be challenged and (2) satisfaction regarding existence of emergent situation is a political question which is not amenable to judicial determination. The first ground is not available as proclamation of emergency is purely

[1] Art.141B
[2] Art.141C

an executive act. The second ground is also not available as in our constitutional system the doctrine of political question has no application.[1] The Pakistan Supreme Court delivered two judgments[2] wherein the court accepted the doctrine of political question while dealing with revocation of the proclamation of emergency under art.30 of the Pakistan Constitution of 1962.[3] That constitution introduced a sort of a presidential form of government comparable with the American system and those two decisions cannot have any application in respect of interpretation of art.141A of the Constitution. It is submitted that satisfaction of the President which in reality is the satisfaction of the Prime Minister and the Cabinet is not outside the purview of judicial scrutiny. In *Teh Cheng Poh v. Public Prosecutor*[4] the power of the Ruler under the Malaysian Constitution to make certain proclamation came up for consideration. Lord Diplock observed -

> The power to proclaim an area as security area ... is discretionary one. It is for (the Ruler) (again, in effect, the cabinet) to form an opinion whether public security in any area of Malaysia is seriously disturbed or threatened by the causes referred to in the section, and to consider whether in his opinion it is necessary for the purpose of suppressing organised violence of the kind described. But, as with all discretion conferred upon the executive by Act of Parliament, this does not exclude the jurisdiction of the court to inquire whether the purported exercise of the discretion was nevertheless ultra vires either because it was done in bad faith (which is not in question in the instant appeal) or because as a result of misconstruing the provision of the Act by which the discretion was conferred upon him (the Ruler) has purported to exercise the discretion when the conditions precedent to its exercise were not fulfilled or, in exercising it, he has taken into consideration some matter which the Act forbids him to take into consideration or has failed to take into consideration some matter which the Act requires him to take into consideration.

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[1] See Para 3.33 & 5.16-5.17

[2] *Abdul Baqui Baluch v. Pakistan*, 20 DLR (SC) 249; *Mansur Ali v. Ardhendu*, PLD 1969 SC 37

[3] See the change in the attitude of Pakistan Supreme Court on the doctrine of political question in *M.K. Achakzai v. Pakistan*, PLD 1997 SC 426, while dealing with the provisions of the Pakistan Constitution, 1973 which introduced a parliamentary system of government.

[4] [1980] AC 458

The satisfaction of the President as regards proclamation of emergency is justiciable for the same reason the satisfaction of the President in respect of emergent need for promulgating an Ordinance is justiciable. However, it should be kept in mind that the Constitution has committed the matter to the discretion of the executive and Parliament has been given the authority to approve or disapprove it. In such a situation it is not for the court to question the adequacy or sufficiency of the grounds of satisfaction or the correctness of the facts upon which the satisfaction is based. But the satisfaction as to emergency being a condition precedent to the exercise of the power, the validity of the proclamation of emergency can be challenged on the ground that there was no satisfaction at all or that it was wholly *mala fide* or based on totally irrelevant or extraneous grounds.[1] The Pakistan Supreme Court held that once a proclamation had been validly issued and Parliament approved it, the question whether the emergency had ceased to exist and therefore the proclamation had to be withdrawn was outside the competence of the court to decide.[2] In our constitutional dispensation this may not be the correct statement of the law. The court will not lightly deal with the decision of the executive in this regard and will be very cautious in upsetting the decision of the executive in respect of revocation of the proclamation of emergency, but the court's jurisdiction to issue *mandamus* cannot be questioned where it is plainly clear that the emergency has ceased to exist. While dealing with the question whether the court is powerless when the Ruler fails to revoke the proclamation Lord Diplock observed -

> If (the Ruler) fails to act the court has no power itself to revoke the proclamation in his stead. This, however, does not leave the courts

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[1] *Teh Cheng Poh v. Public Prosecutor*, [1980] AC 458; *Minerva Mills Ltd. v. India*, AIR 1980 SC 1789, 1838 (Per Bhagwati J); while dealing with emergency power under art.232 of the Constitution of Pakistan, 1973, the Pakistan Supreme Court observed in *Farooq A. K. Leghari v. Pakistan*, PLD 1999 SC 57, 76, "notwithstanding the ouster of jurisdiction of the Court and that the formation of opinion in terms of the relevant provision of the Constitution or of a statute is to be based on the satisfaction of a State functionary mentioned therein, the Court has jurisdiction to examine whether the prerequisites provided for in the relevant provision of the Constitution/statute for the exercise of the power thereunder existed, when the impugned order was passed. If the answer of the above question is in the negative, the exercise of power will be without jurisdiction calling for interference by the Court."

[2] *Abdul Baqui Baluch v. Pakistan*, 20 DLR (SC) 249; *Mansur Ali v. Ardhendu*, PLD 1969 SC 37

> powerless to grant to the citizen a remedy in cases in which it can be established that a failure to exercise his power of revocation would be an abuse of his discretion. Article 32(1) of the Constitution makes (the Ruler) immune from any proceedings whatsoever in any court. So mandamus to require him to revoke the proclamation would not lie against him; but since he is required in all executive functions to act in accordance with the advice of the cabinet, mandamus could, in their Lordships' view, be sought against the members of the cabinet requiring them to advise (the Ruler) to revoke the proclamation.[1]

3.44A The executive has the power to declare war or to participate in any war, but art.63 mandates that the power must be exercised with the assent of Parliament. If at the relevant time Parliament stands dissolved, the President has to summon the dissolved Parliament for the purpose of obtaining the assent required under art.63.[2]

POWER OF PARDON AND REPRIEVES

3.45 For the peace and good government it is sometimes necessary to pardon a convicted person. Furthermore, even though finality has come from judicial pronouncement, the fallibility of human judgment being undeniable even in the most trained mind, it is considered appropriate that in the matter of life and personal liberty, the protection should be extended by entrusting power further to some high authority to scrutinise the validity of the threatened deprivation of life or personal liberty.[3] The British sovereign as also the American and Indian Presidents have such a power. Art.49 of the Constitution provides that the President shall have power to grant pardons, reprieves and respites

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[1] *Teh Cheng Poh v. Public Prosecutor*, [1980] AC 458, 473

[2] Art.72(4)

[3] *Kehar Singh v. India*, AIR 1989 SC 653, 657; Exparte *Grossman*, 267 US 87 (Executive clemency exists to afford relief from undue harshness or evident mistake in the operation or enforcement of the criminal law. The administration of justice by the courts is not necessarily always wise or certainly considerate of circumstances which may properly mitigate guilt. To afford a remedy, it has always been thought essential in popular governments, as well as in monarchies, to vest in some other authority than the courts power to ameliorate or avoid particular criminal judgments. It is a check entrusted to the executive for special cases. To exercise it to the extent of destroying the deterrent effect of judicial punishment would be to pervert it; but whoever is to make it useful must have full discretion to exercise it.)

and to remit, suspend or commute any sentence passed by any court, tribunal or other authority.[1] The power so entrusted is a power belonging to the people and is reposed in the highest dignitary of the State. Since the power flows from the Constitution, it cannot be modified, abridged or diminished by Parliament.[2] Like other powers, the President has to exercise this power on the advice of the Prime Minister.[3]

3.46 The power of pardon includes the power of granting general amnesty.[4] Marshall CJ of the American Supreme Court held that a pardon is a private act of the grantor analogous to transfer of property or commercial transaction and acceptance by the grantee is essential to its validity.[5] This holding gave rise to an interesting situation. In *Burdick v. US*[6] the defendant refused to answer questions before a federal grand jury on the ground of self-incrimination. The President offered him a full and unconditional pardon, but the defendant refused to accept the pardon. He was proceeded in contempt on the ground that there was no possibility of his being prosecuted. The American Supreme Court reversed the conviction for contempt holding on the basis of Marshall reasoning that the pardon offered had no validity for non-acceptance by the defendant. In *Biddle v. Perovich*[7] the defendant was convicted of murder and sentenced to death. The President commuted the sentence to life imprisonment. The defendant challenged the legality of the order pleading that he did not accept the commutation. The Supreme Court did not overrule *Burdick* but rejected the contention of the defendant holding that *Burdick* reasoning was not applicable in case of commutation. This decision given by a celebrated judge, Holmes J, was criticised as not being correct.[8] The question may not arise in our country as apart from art.49 s.402A read with s.402 of the Code of Criminal Procedure specifically confers power on the President to

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[1] The power under art.49 is independent of the power given by ss.401, 402 and 402A of the Code of Criminal Procedure in respect of suspension and remission of sentences and commutation of punishment. See *State v. Eliadah McCord*, 2 BLC (AD) 1 (where the law prescribes a minimum sentence, the court cannot reduce it; only the President or the government can do it)

[2] *Schick v. Reed*, 419 US 256; *Punjab v. Jogindar Singh*, AIR 1990 SC 1396

[3] *Kehar Singh v. India*, AIR 1989 SC 653, 657, 659.

[4] Schwartz - Constitutional Law, 1979, p.198

[5] *US v. Wilson*, 7 Pet. 150

[6] 236 US 79

[7] 274 US 480

[8] Brett, 20 Modern Law Review 131

commute sentence of death without the consent of the person sentenced. In English law pardon is an executive act of the State and should not be treated as being analogous to a contract and is not dependant upon acceptance of the subject of the pardon.[1]

3.47 The President may exercise the power either before or after conviction and need not wait for the verdict of the court.[2] In granting pardon, the President may scrutinize the evidence on record of the criminal case and can come to a different conclusion from that recorded by the court. In doing so he does not amend, modify or supersede the judicial record. The judicial record remains wholly in tact and undisturbed.[3] In invoking the power under art.49, the accused or convict has no right to claim oral hearing. The manner of disposal of the matter is entirely in the discretion of the President and it is for him to decide how best he can acquaint himself with all the necessary information.[4]

3.48 A pardon may be conditional or unconditional. An unconditional pardon wipes out both the conviction and sentence and restores all the civil rights of the individual concerned as if he had never been convicted of the offence.[5] But it does not restore offices forfeited or property or interest vested in others in consequence of the conviction.[6] While a pardon can expunge past offences, a power of pardon cannot be used to dispense with the criminal responsibility for an offence which has not been committed at the time of granting pardon.[7] A pardon can be subject to lawful conditions.[8] The President may grant pardon on condition that a fine first be paid[9], or that the

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[1] *A.G. of Trinidad and Tobago v. Phillip*, [1994] 1 AC 396

[2] *Ex p. Garland*, 18 L. Ed. 366

[3] *Kehar Singh v. India*, AIR 1989 SC 653, 658

[4] Ibid, p.661

[5] *Ex p. Garland*, 18 L. Ed. 366; but see *R v. Foster*, [1985] QB 115 (Unconditional pardon removes the pains, penalties and punishments which flow from the conviction, but does not eliminate the conviction itself); *Phillip v. Director of Public Prosecution*, [1992] 1 AC 545 (The effect of pardon is to blot out, so far as the subject of the pardon is concerned, any responsibility which he has for any offences which are covered by the pardon)

[6] *Ex p. Garland*, 18 L. Ed. 366

[7] *A.G. of Trinidad and Tobago v. Phillip*, [1994] 1 AC 396

[8] Ibid; *Schick v. Reed*, 419 US 256

[9] *In re Ruhl*, 20 Fed. Cas. 1335

grantee be deported and not return to this country[1] or that the grantee should not claim certain property[2]. When the grant of pardon is conditional, the protection provided by the pardon is not available until the condition is complied with and the pardon becomes valueless due to non-compliance with a condition to which it is subject[3] and the grantee may be made to suffer the punishment he was originally sentenced. The question is whether the power of pardon can reach a sentence for criminal contempt of court. One Grossman was sentenced for contempt of court to imprisonment and fine. The President granted pardon on condition that he paid the fine. Grossman accepted the condition and paid the fine. But the court committed him to serve out the sentence of imprisonment holding that contempt of court was not an offence against the United States and extending the power of pardon to contempt of court was an invasion on the judicial power. The Supreme Court rejected both the contentions and held that the power of pardoning extended to contempt of court as well.[4] In case of remission of sentence, nothing is wiped out. The court's order of conviction and sentence remains undisturbed as it was passed; only the convict is not required to undergo the sentence remaining to be served. When a law disqualifies a person convicted and sentenced to imprisonment of two years from being a candidate for an elective office, the disqualification does not cease when, because of the remission granted, he served the sentence for less than two years.[5]

3.49 The question is whether at all and how far the exercise of power under art.49 is justiciable. The court may examine the nature, extent and scope of the power and inquire whether the exercise of the power falls within the ambit of art.49.[6] The court may inquire whether fraud has been committed in procuring the pardon.[7] On the question whether a pardon can be challenged on the ground of duress, the Privy Council observed that where the head of the State has made a formal decision which in normal circumstances would constitute a pardon, it is important that the state should not be able to resile from the terms of that pardon

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[1] *Kavalin v. White*, 44 F.2d 49

[2] *Semmes v. US*, 91 US 21

[3] *A.G. of Trinidad and Tobago v. Phillip*, [1994] 1 AC 396

[4] *Ex p. Grossman*, 267 US 87

[5] *Sarat Chandra v. Khagendra Nath*, AIR 1961 SC 334, 337

[6] *Kehar Singh v. India*, AIR 1989 SC 653, 659; see *A.G. of Trinidad and Tobago v. Phillip*, [1994] 1 AC 396

[7] *Phillip v. Director of Public Prosecution*, [1992] 1 AC 545

except in the most limited of circumstances and to challenge the validity of a pardon at least an action in the nature of direct physical violence, or pressure, or actual imprisonment of the grantor of pardon would be required to establish duress.[1] Beyond this, the exercise of this constitutional power on its merits is not subject to judicial inquiry. But where rule of law is a constitutional mandate, no exercise of power can be arbitrary or discriminatory. Arbitrariness or capricious criteria will void the exercise of the power. In *Maru Ram v. India*[2] Krisna Iyer J gave the example of a Chief Minister releasing every one in the prison in his State on his birth day and stated that it will be an outrage on the Constitution to let such madness survive. On the other hand, if a brutal murderer has been sentenced by a court with strong observations about his bestiality, it may be arrogant and irrelevant abuse of power to remit his entire life sentence the very next day after the conviction merely because he has joined the party in power or is a close relation of a high up. The court recommended framing of rules for guidance in the exercise of the power and observed -

> Consideration for exercise of power under Article 72/161 may be myriad and their occasions protean, and are left to the appropriate Government, but no consideration nor occasion can be wholly irrelevant, irrational, discriminatory or mala fide. Only in these rare cases will the court examine the exercise.[3]

In *Kehar Singh v. India*[4] the Indian Supreme Court, however, observed that there is sufficient indication in the terms of art.72 and in the history of the power enshrined in that provision as well as existing case law, and specific guidelines need not be spelt out and held that the exercise of the power under art.72 cannot be subjected to judicial review on its merits except within the strict limitations defined in *Maru Ram*. In *Harbans Singh v. U.P.*[5] the petitioner, Jeeta and Kashmira were convicted of multiple murder and sentenced to death. Jeeta's petition for leave to

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[1] *A.G. of Trinidad and Tobago v. Phillip*, [1994] 1 AC 396

[2] AIR 1980 SC 2147

[3] Ibid, p.2175; *Swaran Singh v. U.P.*, AIR 1998 SC 2026, 2028 (If such power was exercised arbitrarily, mala fide or in absolute disregard of the finer canons of constitutionalism, the by-product order cannot get the approval of law and in such case, the judicial hand must be stretched to it.); *Satpal v. Haryana*, AIR 2000 SC 1702 (The court can quash the order of pardon when the governor had not applied his mind to the material on record and mechanically passed the order.)

[4] AIR 1989 SC 653

[5] AIR 1982 SC 849

appeal was rejected and he was executed. Kashmira's leave petition was admitted and ultimately his sentence was commuted to imprisonment for life. The petitioner's leave petition was rejected and the President rejected his mercy petition. The petitioner filed a writ petition under art.32 and obtained a stay of execution. In the hearing it appeared that no distinction at all can be made between the part played by Kashmira and the part played by the petitioner and it would be discriminatory to maintain the death sentence of the petitioner. The court has enough power to commute the death sentence, but as in the meanwhile the President considered the mercy petition and rejected it, the court in the interest of comity between the powers of the court and the powers of the President recommended that the President may be so good as to exercise the power of pardon to commute the death sentence of the petitioner into imprisonment for life.

NON-PARTY CARE-TAKER GOVERNMENT

3.49A For filling up a vacancy in the Fifth Parliament a by-election was held in Magura. The opposition parties alleged massive rigging in the election and started movement for holding election under a non-party care-taker government. They refrained from contesting in the election of the Sixth Parliament and claimed the constitution of the Sixth Parliament to be illegal. In the face of the movement, the Sixth Parliament passed the Constitution (Thirteenth Amendment) Act, 1996 providing for a non-party care-taker government consisting of one Chief Adviser at its head and not more than ten Advisers for a limited period during which parliamentary election is to be held.

3.49B Art.58B provides that when Parliament is dissolved or stands dissolved there shall be a non-party care-taker government headed by the Chief Adviser from the date the Chief Adviser is appointed by the President till the date a Prime Minister enters upon his office after the constitution of Parliament. The President is to appoint the Chief Adviser from among the retired Chief Justices and the Judges of the Appellate Division in order of priority mentioned in art.58C. If none of the specified persons are available for appointment, the President shall, after consultation with the major political parties, appoint a qualified citizen of Bangladesh as the Chief Adviser and if this is also not possible, the President shall assume the functions of the Chief Adviser. Ten Advisers shall be appointed by the President on the advice of the Chief Adviser. The President shall appoint Advisers from among the persons who are

(a) qualified for election as members of Parliament, (b) not members of any political party or of any organisation associated with or affiliated to any political party, (c) not, and have agreed in writing not to be, candidates for the ensuing election of members of Parliament, and (d) not over seventy-two years of age.[1] The Chief Adviser shall have and shall be entitled to the remuneration and privileges of a Prime Minister and an Adviser shall have the status of and shall be entitled to the remuneration and privileges of a Minister.[2] The Chief Adviser is to be appointed within fifteen days after Parliament is dissolved or stands dissolved and during the period between the date Parliament is dissolved or stands dissolved and the date on which the Chief Adviser is appointed the Prime Minister and his Cabinet who were in office immediately before Parliament is dissolved or stood dissolved shall continue to hold office as such.[3]

3.49C *Functions of non-party care-taker government :* The idea of care-taker government is that during the period parliamentary election is held, the affairs of the government should be run by neutral persons so that no political party can utilise the governmental machinery and resources, monetary or otherwise, to influence the parliamentary election. The care-taker government is to hold the balance between the political parties and ensure that the Election Commission is able to hold a free and fair parliamentary election. The care-taker government is not supposed to take any policy decision which will have to be taken by the elected representatives of the people. Hence art.58D provides that the care-taker government shall function as an interim government and shall discharge the routine functions; it shall not take any policy decision unless it becomes necessary to take it for the purpose of carrying out the routine functions. The Amendment has not made it clear which functions can be said to be routine functions. The term 'routine function' has to be interpreted and its expanse determined having regard to the fact that the care-taker government is an interim government and consists of non-elected persons. The embargo on taking policy decision is not absolute and policy decision may be taken in respect of a routine function if it becomes necessary for the performance of such function. Before the dissolution of the Seventh Parliament, the Appellate Division gave certain directions in *Secretary, Ministry of Finance v. Masdar*

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[1] Art.58C(7)
[2] Art.58(11)
[3] Art.58C(2)

Hossain[1] relating to recruitment, control and supervision of the members of the subordinate judiciary and the magistrates exercising judicial functions and fixed the time limit for compliance. Compliance of the directions of the Appellate Division necessitated taking a policy decision and the care-taker government took the policy decision. However, the principal objective of the care-taker government is to assist the Election Commission in holding a free and fair election and even though art.126 stipulates the duty of all executive authorities to assist the Election Commission in the discharge of its functions, to emphasise this role of the care-taker government, art.58D(2) specifically provides, "The Non-Party Care-taker Government shall give to the Election Commission all possible aid and assistance that may be required for holding election of members of Parliament peacefully, fairly and impartially." Thus the care-taker government is required to take all measures to assist the Election Commission in holding free, fair and peaceful election and in taking such measures the care-taker government does not have the limitation relating to policy decision provided in art.58D(1). The provision of art.58D(2) is not in any way controlled by the provision of art.58D(1).

3.49D Transfer of the members of the services of the Republic is a routine function of the government performed in the public interest and on consideration of administrative exigencies. The government pursues certain policies and issues instructions in this regard. The care-taker government cannot change the policy and the instructions unless such change is necessary for the performance of the routine functions or to assist the Election Commission to hold a free and fair parliamentary election. The care-taker government constituted on dissolution of the Seventh Parliament undertook a policy of large scale transfer of the civil servants including those who were not in any way involved in the parliamentary election process. It was contended that the care-taker government transgressed its constitutional limit. No straight answer can be given in this regard without going into the nature of the transfers ordered and without coming to a conclusion as to whether the public interest and administrative exigency or holding of free and fair election necessitated such large scale transfers, but, at the same time, the criticism against the care-taker government in this regard cannot readily be dismissed as untenable.

3.49E Question has also arisen as to whether the President can during

[1] 2000 BLD (AD) 104

this interregnum period promulgate an Ordinance under art.93 amending the law relating to parliamentary election. In a writ petition[1] filed before the High Court Division, the petitioner contended that art.124 provided that subject to the provisions of the Constitution, Parliament may by law make provisions as to elections, the power under art.93 does not extend to making any provision regarding parliamentary election. Furthermore, though art.93 authorises the President to promulgate an Ordinance, the President exercises the power on the advice of the Prime Minister, an elected representative of the people and he cannot exercise the power when there is no Prime Minister to advise him. The contention is untenable inasmuch as art.93 not only stipulates under what circumstances the President can promulgate an Ordinance, but also clearly specifies the provisions which cannot be made by an Ordinance. If Parliament is or stands dissolved and the President is satisfied that immediate action is necessary, he can make and promulgate an Ordinance and that an Ordinance shall have the like force of law as an Act of Parliament. Thus the power of the President to make law by an Ordinance is co-extensive with the power of Parliament in making law except as otherwise provided in the Proviso to art.93. Secondly, Parliament being conscious about the advice of the Prime Minister required for of making an Ordinance, specifically provided in art.58E that during the period the care-taker government functions, the provision of the Constitution requiring the President to act on the advice of the Prime Minister shall be ineffective. Though promulgation of an Ordinance involves taking of a policy decision, the limitation, in view of the provision of art.58D(2), cannot apply in case of promulgation of an Ordinance to ensure free and fair election.

3.49F It is mentioned in art.58B(2) that the care-taker government shall be collectively responsible to the President. Does it mean that the Chief Adviser and the Advisers are collectively answerable to the President and they are to discharge their duties as desired by the President? Generally, the political executive is responsible to the people through Parliament. It may be argued that the Constitution contemplates governance of the country through the representatives of the people and during the interregnum period the President being the only elected representative of the people, though elected by an indirect election, the care-taker government, constituted with persons not elected by the

[1] *Syed Badruddin Hossain v. Bangladesh*, W.P. No.3963 of 2001 (The petition, after some hearing, was rejected as not pressed.)

people, has been made accountable to the President and the collective responsibility of the care-taker government is not affected by the provision of art.58B(3) that the executive power of the Republic during this interregnum period shall be exercised by and on the authority of the Chief Adviser and shall be exercised by the Chief Adviser in accordance with the advice of the care-taker government. On the other hand, it may also be argued that the Constitution contemplates a parliamentary form of government in which the President is a titular head and a presidential form of government during the interregnum period is not contemplated. The Chief Adviser and the Advisers have been respectively given the status of Prime Minister and Ministers and thus the Chief Adviser shall be in the position of the Prime Minister in performance of the governmental functions and the care-taker government has been made responsible to the President in the sense that the President may ask for information about their activities. Art.58E provides that while the care-taker government is functioning, the provisions of arts.48(3), 141A(1) and 141C(1) requiring the President to act on the advice of the Prime Minister shall remain ineffective. It does not, however, say that the President shall have to act on the advice of the Chief Adviser during this period. The view that the care-taker government is accountable to the President seems to be more weighty, but an authoritative interpretation in this regard is necessary.

3.49G The Thirteenth Amendment has modified the provision of art.61 by adding the expression 'and such law, during the period in which there is a Non-Party Care-Taker Government under art.58B, be administered by the President' at the end of that article. Article 61 deals with military service. The provision of art.58B(3) to the effect that all executive authority of the Republic shall be exercised by the Care-taker government is a general provision, while art.61 is a special provision relating to the military service. If it was intended that art.58B(3) would be applicable in respect of the military service, the amendment of art.61 was unnecessary. Hence, it has to be taken that the administration of the laws relating to the military service has been taken out of the purview of art.58B(3) and has been placed in the hands of the President.

3.49H It has been contented in a writ petition that the Thirteenth Amendment seeking to amend art.56 of the Constitution, a referendum under art.142(1A) was necessary before it could be assented to by the President and this having not been done, the Amendment is void. The government, filing an affidavit-in-opposition, contended that the Amendment did not seek to amend art.56 and at any rate the Fifth

Amendment being void art.142(1A) inserted by Martial Law Proclamation and validated by the Fifth Amendment is also void. The writ petition is pending final adjudication.

LOCAL GOVERNMENT

3.50 It is a unique feature of the Constitution that specific provisions for local government have been made.[1] In the earlier constitutional dispensations the administration outside the capital was left with the civil servants and the people had practically no participation in the administration. The scheme of local government was a matter to be decided by the legislature. Local government bodies had little part to play in the administration of the country. In their anxiety to have a truly democratic set up involving the people including those at the grass-root level, the framers incorporated arts.9 and 11 as two important fundamental principles of State policy. Art.9 provides that the State shall encourage local government institutions composed of representatives of the areas concerned, while art.11 provides that the Republic shall be a democracy in which effective participation by the people through their elected representatives in administration at all levels shall be ensured. To give effect to these fundamental principles of State policy art.59 has provided that local government in every administrative unit of the Republic shall be entrusted to bodies composed of persons elected in accordance with law and Act of Parliament shall prescribe the functions of the local government bodies which may include functions relating to administration and the work of public officers, the maintenance of public order and the preparation and implementation of plans relating to public services and economic development. Art.60 provides that for the purpose of giving effect to the provisions of art.59, Parliament shall, by law, confer powers on the local government bodies including the power to impose taxes for local purposes, to prepare their budgets and to maintain funds. The idea is that the central government should deal with matters which concern the nation as a whole and other matters including the administration in the district and lower levels should be controlled to a good measure by the local government bodies composed of the representatives of the people. The change cannot be brought in overnight. Therefore, the framers indicated the direction of the change and reform and left it with Parliament to decide upon the time and the

[1] *Kudrat-E-Elahi v. Bangladesh*, 44 DLR (AD) 319, 341

manner of doing it. Otherwise Parliament having been conceded the plenary power of legislation there was no necessity of enumerating the functions which may be prescribed for the local government bodies. Arts.59 and 60 remained repealed for a good period of 16 years from 1975 and were restored in 1991 by the Twelfth Amendment.

3.51 The expression 'administrative unit' in art.59 has been defined in art.152(1) to mean a district or other areas designated by law for the purpose of art.59. No designation by law is necessary in case of a district as art.152(1) itself designates districts as administrative units, but designation by law is necessary in case of areas other than district to qualify as 'administrative unit' within the meaning of art.59.[1] The intention of the framers of the Constitution was the establishment of local government bodies composed of elected representative of the people. Hence local government bodies cannot be set up in any area without designating it as administrative unit so as to circumvent the requirement of art.59 that such bodies in an administrative area be composed of representatives of the people of the locality.[2] The Constitution simply does not contemplate local government bodies in any area outside the ambit of arts.59 and 60.[3] Arts. 59 and 60 are limitations on the plenary legislative power in the field of local government.[4] Parliament may or may not set up a local government body in an administrative unit, but if a local government body is set up two conditions must be fulfilled - (1) it is constituted in an administrative unit and (2) it is composed of elected persons.[5] Accordingly, the Appellate Division gave direction to bring the existing local government bodies in conformity with the provision of art.59.

3.52 Apart from providing representative local government bodies, the Constitution does not delineate the structure of the local government bodies, its different tiers and its functions and left it to be determined by Parliament. Different local government bodies pre-existed the Constitution and some were created afterwards. When Parliament abolished Upazila Parishads, it was contended in *Kudrat-E-Elahi v. Bangladesh*[6] that having regard to the provisions of art.59 read with

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[1] *Kudrat-E-Elahi Panir v. Bangladesh*, 44 DLR (AD) 319
[2] Ibid
[3] Ibid, p.342
[4] Ibid, pp.338 & 342
[5] Ibid, p.336
[6] Ibid

arts.9 and 11 of the Constitution, Parliament cannot abolish an existing tier of local government. The Appellate Division rejected the contention holding that the Upazila Parishads were not local government bodies in conformity with the provisions of art.59 and no provision of the Constitution has been violated by the abolition. The court further held that local government is an integral part of the democratic polity of the country and the local government institutions may be altered, re-organised or re-structured and their powers and functions may be enlarged or curtailed by Act of Parliament[1], but the system as a whole cannot be abolished.[2] Dealing with the abolition of a tier of local government, M. Kamal J held that the abolition of the tier must be a total abolition, that is, it must not be a subterfuge to vest the powers and functions of the abolished tier with non-representative person or body. The learned Judge observed, "... the Government or for that matter, any person or body, not elected in the area according to law, cannot upon abolition of a local government institution of that tier, take over the authority, powers, functions and privileges of a local government institution of that tier even for a temporary period or as a stop-gap arrangement."[3] In the facts of that case, that is, in case of abolition of a tier of local government, the observation of the learned Judge is correct. But where no such abolition of tier is involved, and the government is satisfied that the elected representatives of the people of a local government institution misconducted themselves necessitating supersession of the elected body and appointment of administrator pending fresh election, will the provision of law permitting supersession of the elected body and appointment of an administrator be inconsistent with the provisions of arts.59 and 60? Art.59 speaks of the composition of a local government body and does not deal with such a situation, yet

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[1] See *City of Worcester v. Worcester Consolidated Street Rly C0*, 196 US 539, 550 (in the absence of any constitutional restriction the legislature may at any time repeal the charter of a municipal corporation or otherwise terminate its existence and provide other and different means for the government of the territory lying within the limits of the former municipality); *W.W. Atkins v. Kansas*, 191 US 207, 221 (As legislature may create a municipality, so it may abridge and control); *U.S. v. Baltimore & Ohio R.R. Co.*, 21 L. Ed. 597.

[2] *Kudrat-E-Elahi v. Bangladesh*, 44 DLR (AD) 319, 329 (These bodies made great contribution to the country's democracy, which is now a basic structure of the Constitution. with the revival of the constitutional backing for `Local Government' these old institutions cannot be abolished without damaging the democratic fabric of the country. - per S. Ahmed CJ)

[3] Ibid, at p.346

if we consider the tenor of art.59 read with arts.9 and 11 it may be contended that a non-representative person or body cannot be appointed as an administrator; only a person or body having representative character like a member of Parliament or another local government body of the area concerned may be appointed as an administrator to function till persons elected to the local government body enter their office. However, it has been held that the provision for interim council to be appointed by the government for the Chittagong Hill Districts is not unconstitutional as such a council will, in fact, come in aid of and facilitate the implementation of arts.59 and 60 of the Constitution.[1]

3.53 Art.83 authorises imposition and collection of taxes and duties by or under the authority of an Act of Parliament and this article does not put any limitation on the power of Parliament to make the law. But art.60 creates a limitation in that Parliament cannot make any law authorising imposition and collection of taxes for local purposes by anybody except the local government bodies referred to in art.59.

ATTORNEY GENERAL

3.54 The highest law officer of the Republic is the Attorney General who is appointed by the President under art.64. To be appointed as the Attorney General one must be qualified to be appointed as a Judge of the Supreme Court. A person reaching the age of sixty five years cannot act as a Judge of the Supreme Court and therefore cannot be appointed as such Judge. Hence a person beyond the age of sixty five cannot be appointed as the Attorney General. This limitation is only with regard to the appointment to this office. Once appointed a person can continue to act as the Attorney General even after reaching the age of sixty five years.[2] Neither the Constitution, nor any law, prescribes any age of retirement from the office of the Attorney General. The Attorney General has to perform such duties as may be assigned to him by the President. He shall hold office during the pleasure of the President which virtually means the pleasure of the Prime Minister. However, he has a right to resign from the office. The office of the Attorney General is not an office of profit and holding this office a person is not debarred

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[1] *Ziaur Rahman Khan v. Bangladesh*, 49 DLR 491; see also *Abul Kalam Azad v. Bangladesh*, 3 BLC 139 (For a newly constituted Paurashava, appointment of Administrator as an interim arrangement is not violative of art.59)

[2] See *Binay Tripathi v. India*, AIR 1994 SC 502

from being elected as a member of Parliament.

3.55 A question is often asked whether the office of the Attorney General is a political office. Upon consideration of the duties of the office, it cannot be said that the office is a political one. Though the Attorney General is a link between the executive and the judiciary, he has no specific role to play in the formation of the policies of the government. Apart from appearing on behalf of the Republic in important cases in the Supreme Court, he is required to render opinion, whenever asked, on important constitutional and legal issues. Art.64 confers on him a right of audience in all courts which means he can appear in any case in any court for which he is not required to produce any authority from any of the parties in the case. The Attorney General is appointed from among the senior advocates practising in the Supreme Court and because of the constitutional position of the office, the Appellate Division and the High Court Division sometimes want to hear the Attorney General on important constitutional and legal issues. Though there is nothing in the Constitution requiring the Attorney General to appear on being asked by the court, it has become an invariable convention that the Attorney General either personally appears or sends one of the senior law officers of the Republic to represent him in the court which desires his appearance.

3.56 The Attorney General acts as the *ex officio* Chairman of the Bangladesh Bar Council and is the leader of the entire Bar of Bangladesh.

CHAPTER FOUR

THE LEGISLATURE

4.1 Art.65 provides for a unicameral legislature called Parliament (Jatiya Sangshad) in which is vested the legislative power of the Republic. The dominant characteristic of the British Constitution is the supremacy of the parliament which means the power of the British Parliament in enacting laws is without any fetter or restraint. It can legally pass any law. The British courts cannot hold any Act of Parliament invalid or refuse to enforce it.[1] But they have the power to interpret the law and in the exercise of this power they remove any unjust or unreasonable element in an Act of Parliament stating that the parliament cannot be ascribed an intention of prescribing something unreasonable or arbitrary. Under our constitutional dispensation, it is the Constitution, and not Parliament, which is supreme. Parliament's legislative power is subject to the provisions of the Constitution and any law to the extent of inconsistency with the provisions of the Constitution is void.[2] The Supreme Court has been given the power of judicial review to see that Parliament does not overstep the limits set by the Constitution.

COMPOSITION AND DURATION OF PARLIAMENT

4.2 Art.79 of the Indian Constitution provides that the parliament shall consist of the President and the two Houses. The Pakistan Constitution of 1956 and 1962 in the same way provided for the central legislature with the President and a single House. But art.65 provides that Parliament shall consist of a number of members and does not include the President. Thus in India the President is, and under the Constitution of Pakistan of 1956 and 1962 the President was, a part of the central legislature, but the President of Bangladesh is not. Parliament for Bangladesh is to consist of three hundred members to be directly

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1 See *R. v. Transport Secretary. ex p. Factortame Ltd.*, [1990] 2 AC 85, and Bradley & Ewing's Constitutional and Administrative Law, 12th ed., pp 75-77, as regards primacy of European Community law in case of inconsistency with national law.

2 Arts. 7 and 26; see Para 4.24

elected on the basis of adult franchise[1] from three hundred constituencies in accordance with law[2]. The Constitution as originally adopted reserved, in addition to the three hundred seats, fifteen seats for women for ten years. By amendment the number of the reserved seats was increased to thirty and the period was extended. The Constitution (Tenth Amendment) Act, 1990 extended the period for ten years from the date of commencement of the next Parliament. The members in the reserved seats were to be elected by the aforesaid three hundred members of Parliament in accordance with law[3]. It was contended that the Tenth Amendment extending the period of reservation is void. But the contention was rejected by the Appellate Division.[4] The law did not provide for proportional representation. Each member of Parliament was to cast vote for a candidate in each of the thirty seats and the candidates securing majority votes in each seat were elected. Thus these thirty seats were practically bonus for the party or parties which could muster support of the majority of the three hundred members of Parliament. The reserved seats did not preclude any woman from contesting the election in the general seats[5]. The period for which the reservation of seats was to continue expired on the dissolution of the Seventh Parliament.

4.3 The normal tenure of Parliament is five years from the date of its first meeting unless it is earlier dissolved by the President[6]. After a general election, Parliament has to be summoned within thirty days after declaration of the result of the polling. While the the provision for reservation of seats was operative, Parliament could not sit unless the election for the reserved seats was held. The election of the reserved seats could not wait on the ground that some persons elected to the general seats had not made and subscribed the oath[7] as otherwise even a single member of Parliament could delay the sitting of Parliament by not making and subscribing the oath.[8] When the Republic is at war, the

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[1] Art.122(1)

[2] Representation of the People Order, 1972

[3] Representation of the People (Seats for Women Members) Order, 1973

[4] *Dr. Ahmed Hossain v. Bangladesh*, 44 DLR (AD) 109; *Fazle Rabbi v. Election Commission*, 44 DLR 14

[5] Art. 65(3) Proviso

[6] Art.72. For a discussion on the power of the President to dissolve Parliament, see Para 3.14 and 3.27

[7] Members of Parliament must take oath in terms of art.148 before participating in the proceedings of Parliament.

[8] *Fazle Rabbi v. Election Commission*, 44 DLR 14

tenure of Parliament may be extended by an Act of Parliament by not more than one year at a time and is not be extended in any case beyond six months after the termination of war[1]. Art.72(4) provides, "If after a dissolution and before holding of the next general election of members of Parliament the President is satisfied that owing to the existence of a state of war in which the Republic is engaged it is necessary to recall Parliament, the President shall summon the Parliament that has been dissolved". Because of the expression 'engaged in war' in the proviso to art.72(3) the tenure of Parliament in terms of that proviso cannot be extended by an Act of Parliament unless there is existence of actual hostilities. For summoning a dissolved Parliament under art.72(4) the Republic need not be 'engaged in war', but there must exist a 'state of war'. A state of war may, however, exist without the existence of actual hostilities.[2]

MEMBERSHIP OF PARLIAMENT: QUALIFICATION, DISQUALIFICATION AND REMUNERATION

4.4 To be qualified for parliamentary election a person must fulfil two conditions - (1) he must be a citizen of Bangladesh and (2) he must have attained the age of 25 years[3], and he must not be otherwise disqualified for election as, or for being, a member of Parliament. A person is disqualified for election as, or for being, a member of Parliament if (1) he is declared by a competent court to be of unsound mind, (2) he is an undischarged insolvent, (3) he acquires the citizenship of, or affirms or acknowledges allegiance to, a foreign State, (4) he has been convicted for a criminal offence involving moral turpitude and sentenced to suffer imprisonment of two years or more unless a period of five years has elapsed since his release, (5) he holds an office of profit in the service of the Republic other than an office which is declared by the Constitution or any other law not to disqualify its holders, or (6) he is disqualified for such election by or under any law[4]. The expression 'undischarged insolvent' cannot be given a wide general meaning; to be disqualified a person has to be an undischarged insolvent within the meaning of the Bankruptcy Act.[5]

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[1] Art.72(3)

[2] For discussion on the justiciability of the existence of state of war, see Para 3.44

[3] Art.66(1)

[4] Art.66(2)

[5] *Thampanoor v. Charupara*, AIR 1999 SC 3309

4.5 *Acquisition of citizenship of another State:* When the Constitution was originally adopted, a citizen of Bangladesh could not acquire citizenship of another State without losing the citizenship of Bangladesh. After the amendment of the citizenship law in 1978 a Bangladeshi can acquire citizenship of a specified State without losing his citizenship of Bangladesh. Even then a Bangladeshi acquiring citizenship of such a specified State shall be disqualified to be or to continue as a member of Parliament because the disqualification is not predicated upon loss of citizenship, but on acquisition of citizenship and as such a person acquiring the citizenship of a foreign State shall, whether or not he loses the citizenship of Bangladesh thereby, incur the disqualification. Furthermore, acquisition of citizenship of a foreign State involves affirmation or acknowledgement of allegiance to a foreign State and a person affirming or acknowledging allegiance to a foreign State cannot become or continue as a member of Parliament. The reason is clear. A person who is to discharge the high duty of a member of Parliament must have allegiance only to Bangladesh and the disqualification has been stated in wide terms to ensure it. A person affirming or acknowledging allegiance to a foreign State, whether by acquisition of citizenship of that State[1] or by taking employment of that State or in any other way, shall be disqualified to be, or to continue as, a member of Parliament.

4.6 *Conviction involving moral turpitude:* All criminal convictions do not attract the disqualification. It must be a conviction for offence involving moral turpitude. In the widest sense all convictions involve moral turpitude. But the expression 'moral turpitude' has been used in a narrow sense, otherwise the use of this expression would be meaningless. At the same time the expression should not be narrowly construed to mean sexual offences only. In order to constitute moral turpitude, there must be an element of baseness and depravity in the act leading to the conviction. The act must be vile and harmful to the society in general or contrary to the accepted rules of morality[2]. The test of determining moral turpitude will be - (1) whether the act leading to a conviction was such as could shock the moral conscience of the society

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[1] *Abdul Halim v. Abul Hasan Chowdhury*, 2001 BLD 391

[2] *Chandgi Ram v. Election Tribunal*, AIR 1965 Punj 433; *Durga Singh v. Punjab*, AIR 1957 Punj 97; *Baleswar v. District Magistrate*, AIR 1959 All 71; *In Re P, An Advocate*, AIR 1963 SC 1313 (Whenever a conduct ... is contrary to honesty, or opposed to good morals, or is unethical, it may safely be held that it involves moral turpitude.)

in general; (2) whether the motive which led to the act was a base one; and (3) whether on account of the act having been committed the perpetrator could be considered to be a man of depraved character or a person who was to be looked down upon by the society.[1] If the answer is in the affirmative, the act involves moral turpitude. H.M. Ershad was convicted for committing criminal misconduct under the provision of the Prevention of Corruption Act, 1947. The Appellate Division found it to be an offence involving moral turpitude stating –

> ... when a person of such a position has been convicted and sentenced for such offence it shook the moral conscience of the society in general. None can think of an act of such nature committed by a person who was at the relevant time the President of the country which was being run under the Presidential form of Government.[2]

In order to attract the disqualification, the conviction must be by a regular criminal court as distinguished from a Martial Law Court[3].

4.6A A question arises as to the interpretation of the expression 'conviction' in art.66(2)(d) – whether it means conviction by the trial court or it means conviction which has become final and conclusive on appeal to the highest court. When H.M. Ershad became a candidate for the parliamentary election in 1996 while he was serving his sentence during the pendency of the appeal before the High Court Division, the question arose as to whether he was disqualified because of his conviction. The Returning Officer found his nomination paper valid and the matter came up before the Appellate Division in *Mayeedul Islam v. Bangladesh Election Commission*[4], but the court did not answer the question and merely observed that it was for the Election Commission to decide as an election dispute. The conviction was upheld in appeal on 24 August 2000 and on 30 August the Parliament Secretariat published the Gazette Notification of the vacation of the seat of H.M. Ershad. H.M. Ershad challenged the validity of the notification in writ jurisdiction and one of the grounds taken was that the disqualification could not start until the conviction became final and conclusive. The leave petition filed after the notification was pending before the Appellate Division. Though the two learned Judges of the High Court Division hearing the matter

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[1] *Risal Sing v. Chandgi Ram*, AIR 1966 Punj 393.

[2] *H.M. Ershad v. Zahedul Islam Khan*, 2001 BLD (AD) 142, affirming *Zahedul Islam Khan v. H.M. Ershad*, 6 BLC 301

[3] *Monoranjan Mukherjee v. Election commission*, 41 DLR 484

[4] 48 DLR (AD) 208

agreed to declare the notification to be without lawful authority, they differed on this issue.[1] Md. Joynul Abedin J citing some Indian decisions and *Serajul Huq Chowdhury v. Nur Ahmed Company*[2] held that the disqualification starts when the conviction becomes final and conclusive. The Indian decisions do not support the view of his Lordship. The Indian decisions have taken the view that the disqualification starts on conviction by the trial court in case of a candidate for the election, but in terms of the specific provision of s.8(3) of the Representation of the People Act, the disqualification would start on conclusion of the appeal in case of conviction of a sitting member. Art.66 having not made any such distinction, there is no question of final and conclusive conviction even in the case of a sitting member. It can be seen that besides conferring power to grant bail on appeal, the Code of Criminal Procedure has made provision for suspension of conviction and sentence because grant of bail does not take away the effect of conviction and civil consequences like disqualification for election or termination of service may ensue in spite of the convict being enlarged on bail.[3] If a person wants to avoid the civil consequences of conviction he has to apply for and obtain suspension of the order of conviction under s.426 read with s.561A of the Code of Criminal Procedure. The East Pakistan High Court in *Serajul Haq Chowdhury* did not notice the provisions in the Code of Criminal Procedure while taking the view that the disqualification cannot operate when an appeal is preferred. The decision is *per incuriam*. In rendering the opinion, Md. Joynul Abedin J reasoned that if 'conviction' is interpreted to mean conviction by trial court in case of a sitting member, it may create an anomaly in that there may be two members in one seat if the conviction is set aside . It is submitted that there is no question of any anomaly because if the conviction of a sitting member is set aside, the acquittal dates back from the date of conviction by the trial court[4] and thus there being no vacancy in the seat, the by-election held prior to acquittal will be void by operation of law. His Lordship could not agree with the decision in *Mahboobuddin Ahmed v. Election Commission*[5], stating –

> One reason being that the notification for by-election was not and indeed

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[1] *H.M. Ershad v. Abdul Muqtadir Chowdhury*, 53 DLR 569

[2] 19 DLR 766

[3] See *Rama Narang v. Ramesh Narang*, (1995) 2 SCC 513; *T.N. v. Jaganathan*, AIR 1996 SC 2449

[4] *Vidya Charan Shukla v. Purshattam Lal*, AIR 1981 SC 547

[5] 50 DLR 517 (see Para 6.4A for the fact of the case)

> could not be issued by the Election Commission with the condition that the candidates for the by-election were to contest the election subject to the result of the election dispute case pending in respect of the same seat which fell vacant because of the death of the returned candidate Dr. Nasim. Any notification under Article 123(4) by the Election Commission for holding by-election with condition would be unconstitutional being inconsistent with the provisions and spirit of the said Article.[1]

The reasoning, it is submitted, is not valid. The Election Commission is not required to publish the notification with the condition that the candidates for the by-election were to contest the election subject to the result in the election petition; the by-election would be void by operation of law. His Lordship did not notice the compelling situation in *Mahboobuddin*. If the by-election was deferred till the result in the election petition, there would be violation of the mandatory provision of art.123(4) which requires holding of the by-election within ninety days of the occurrence of vacancy.

4.6B The Rules of Procedure[2] require that a court convicting a member of Parliament should inform the Speaker about the conviction and the Speaker is to intimate the fact of conviction to the House. If the member raises any dispute on the question of vacation of seat, the Speaker is to refer the dispute to the Election Commission for decision. In *H.M. Ershad v. Abdul Muktadir Chowdhury*[3], the High Court Division held the notification declaring vacation of seat of H.M. Ershad to be without lawful authority as there was no communication from the court and the Speaker did not inform the House. In *Zahedul Islam Khan v. H.M. Ershad*[4], the court issued the Rule calling upon H.M. Ershad to show cause as to under what authority he was claiming to hold the office of Member of Parliament and as to why he should not be refrained from acting as member of Parliament. H.M. Ershad was convicted on 7.6.1993, that is, before he was elected as a member of Parliament in 1996. Hence, when the High Court Division held that the offence of which he was convicted involved moral turpitude, the disqualification started from the date of conviction and the court ought to have declared his election as a member of Parliament void and the question of vacation

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[1] 53 DLR 569, 574-575
[2] Rule 172, 173, 176 and 178
[3] Ibid
[4] 6 BLC 301

of seat could not arise. The question of vacation of seat upon compliance of the Rules of Procedure arises only in case of a sitting member.

4.7 *Holding office of profit:* The embargo on the holders of office of profit in the service of the Republic has been put to ensure that Parliament does not have as its members persons who are obligated to the government and may be amenable to its influence. An office of profit means an office capable of yielding profit. If a person does not hold an office, he is not disqualified even if he is making a profit[1]. Again a mere holding of office will not attract the disqualification if the office does not carry any profit. An office will be an office of profit if it entails a pecuniary gain for the holder of the office. A member of a government appointed Committee who draws a fee to meet his out-of-pocket expenses to attend the Committee meeting, does not hold an office of profit.[2] A member of a certain Board was entitled to a sitting fee per day for the days he attended the meeting, but he could not draw the sitting fee as well as the daily allowance and he had to draw one of the two. The court held the sitting fee to be a compensatory allowance, and not a pecuniary gain.[3] In *Karbhari Bhimaji v. Shankar Rao*, the respondent as a member of Wage Board was entitled to an honorarium of Rs.25/-for each day of meeting attended by him. The court held, "The question has to be looked at in a realistic way. Merely because a part of the payment made to the 1st respondent is called honorarium and part of the payment daily allowance, we cannot come to the conclusion that the daily allowance is sufficient to meet his daily expenses and the honorarium is a source of profit." The court observed, "The law regarding the question whether a person holds an office of profit should be interpreted reasonably having regard to the circumstances of the case and the times with which one is concerned, as also the class of person whose case we are dealing with and not divorced from reality. We are thus satisfied that the 1st respondent did not hold an office of profit."[4] But when an honorarium of Rs.1750/- per month was being paid for an office along with certain other allowances and perquisites, the court held that the honorarium was a pecuniary gain for the holder of the office and

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[1] *Kanta Katuria v. Manak chand*, AIR 1970 SC 694 (a lawyer engaged by the government to appear in a case on its behalf and received fees from the government)

[2] *Ravanna v. Kageerappa*, AIR 1954 SC 653; *Shahid Nabi v. Chief Election Commr*, PLD 1997 SC 32

[3] *Shivamurthy v. Sanganna*, (1971) 3 SCC 870

[4] *Karbhari Bhimaji v. Shankar Rao*, AIR 1975 SC 575

treated the office as an office of profit.[1] All the holders of office of profit are not disqualified. The office of profit must be in the service of the Republic. The service of the Republic is defined as 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 service of the Republic[2]. Art.12 of the Representation of the People Order, 1972 as amended up to August, 2001 extends the disqualification to the holders of office of profit in the service of all statutory public authorities and thus employees of all statutory authorities are disqualified to be members of Parliament. Art.66(2A) specifically provides that the office of the President, Prime Minister, Minister, Minister of State or Deputy Minister shall not be deemed to be office of profit for the purpose of art.66(2) and the holders of these offices shall not be disqualified to be members of Parliament. But art.50(4) provides that the President during his term of office shall not be qualified for election as member of Parliament. There is thus a conflict between art.50(4) and art.66(2A). Art.50(4) being a specific provision relating to the President shall prevail over the general provision of art.66(2A) in respect of office of profit.

4.8 *Contracts with government:* Art.12(1)(b) of the Representation of the People Order, 1972 further extends the disqualification to a person who, whether by himself or by any person or body of persons in trust for him or for his benefit or on his account or as member of a Hindu undivided family, has any share or interest in a contract for the supply of goods to, or for the execution of any contract or the performance of any services undertaken by, the government.[3] A contract between a co-operative society and the government is excepted from this provision. The disqualification will not be attracted where (i) the share or interest in the contract devolves on the person by inheritance or succession or as a legatee, executor or administrator until the expiration of six months after the devolution or such longer period as the President may in a particular case allow; (ii) where the contract has been entered into by or on behalf of a public limited company of which the person is a shareholder, but not a managing agent or director holding an office of profit; or (iii) where the person is a member of a Hindu undivided family

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[1] *Shibu Soren v. Dayananda*, AIR 2001 SC 2583

[2] Art.152(1)

[3] *Sewaram v. Sobaran Singh*, AIR 1993 SC 212 (A candidate continuing contract work through the proxy of his brother is disqualified)

and the contract has been entered into by any other member of that family in course of his separate business in which the person has no share or interest. The question arises whether a contract which did not comply with the formality of art.145 will attract the disqualification.[1] In *Chatturbhuj v. Moreswar*[2] the Indian Supreme Court held that a candidate would be disqualified if the contract was authorised but not in form. Subsequently, the court held that a contract not in form would not disqualify a candidate where the government refused to ratify the contract[3], but the position would be otherwise where the government ratified the contract[4]. In applying the bar two considerations arise - one that the right to stand in the election is a valuable right which should not be readily defeated, and the other that a candidate for an elective office must be free to perform his duties without any personal motive or interest.[5] It may be argued that when an agreement has been made by an authorised officer, the protection of the public interest does not require strict compliance of the formality of art.145 and if the parties act as if the contract is an enforceable one even though not in proper form, there is no reason why the bar shall not be applied.[6] The bar is applicable when on the date of submission of the nomination paper the contract subsists and the question arises as to when a contract can be said to subsist. A contract for supply of goods or for the execution of works or the performance of any service undertaken does not cease to subsist until payment is made and the contract is fully discharged by performance on both sides.[7] In a contract for construction of roads the contract does not cease to subsist merely because the contract work has been finished and payment made when the contractor is under a contractual obligation to maintain the road for certain period and some minor works are to be finished.[8] However, when the payment has been made after completion of the work, but the contractor has no yet withdrawn the security money, the contract should be taken to have come to an end though technically

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[1] For discussion on enforceability of such a contract, see Para 6.56-6.59

[2] AIR 1954 SC 236

[3] *Laliteswar v. Bateswar*, AIR 1966 SC 580

[4] *Abdul Rahman v. Sadashiv*, AIR 1969 SC 302

[5] *Konappa v. Viswanath*, AIR 1969 SC 447; see also *Mostafa Hossain v. S.M. Faruque*, 40 DLR (AD) 10

[6] *Abdur Rahman v. Sadasiv*, AIR 1969 SC 302

[7] *Mostafa Hossain v. S.M. Faruque*, 40 DLR (AD) 10; *Laliteswar v. Bateswar*, AIR 1966 SC 580

[8] *Konappa v. Viswanath*, AIR 1969 SC 447

the accounts have not been closed.[1] The question is whether the respective rights and obligations have been settled. A candidate may be disqualified if there is a subsisting contract between the government and a partnership firm of which he was a partner but retired from it before submission of the nomination paper if the retirement has not become effective by public notice given under s.72 of the Partnership Act.[2]

4.8A *Default in payment of bank loans:* By an amendment of art.12 of the Representation of the People Order made in 1996 further disqualification has been added and it has been provided that a loanee, other than a loanee who has taken loan for construction of a house for residential purpose, has defaulted in repaying any loan or instalment thereof on the date of submission of nomination paper or a person who is a director of a company or a partner of a partnership firm which has defaulted in repaying any loan or installment thereof on the day of submission of nomination paper or a person being a director of a financial institution as defined in Artha Rin Adalat Act, 1990 has defaulted in payment of any loan or installment thereof on the date of submission of nomination paper will be disqualified. By amendment of the Order in August, 2001 Explanation V has been added stating that a person or a company or a firm shall be deemed to have defaulted in repaying a loan or an installment thereof if he or it is a defaulter within the meaning of Bank Companies Act, 1991. The exclusion of the loanees who took loan for building houses for residential purposes without any limit with respect to the amount of loan may be found unreasonable and discriminatory when we take into consideration the recent business of developers who take loan from the banks in crores for building houses for residential purposes.[3]

4.8B *Other disqualifications under the Representation of People Order:* Under art.12 of the Representation of the People Order as amended in August, 2001 the following persons are disqualified for parliamentary election –

(i) a person who is convicted of an offence punishable under arts.73, 74, 78, 79, 80, 81, 82, 84 and 86 of the Order and sentenced to imprisonment for a term of not less than two years, unless a period of five years has elapsed since the date of his release;

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[1] *Mostafa Hossain v. S.M. Faruque*, 40 DLR (AD) 10; See *Munishamappa v. Venkatarayappa*, AIR 1981 SC 1177

[2] *Mahmudun Nabi v. Mafizur Rahman*, 42 DLR (AD) 120

[3] See para 4.9B

(ii) a person whose election to a seat is declared void on any of the grounds mentioned in art.63(1)(c)(d)(e) of the Order, unless a period of five years has elapsed since the ate of such declaration; and

(iii) a person who has been dismissed or removed or compulsorily retired from the service of the Republic or of any statutory public authority on the ground of corruption, unless a period of five years has elapsed since his dismissal, removal or compulsory retirement.

4.9 ***Vacation of seat:*** Art.67(1)(a) provides that a member of Parliament shall vacate his seat if he fails, within the period of ninety days from the date of the first meeting of Parliament after his election, to make and subscribe the oath or affirmation prescribed for a member of Parliament in the Third Schedule unless the Speaker, before the expiration of that period, extends the period for good cause. Art.71(2) permits a person to contest an election from more than one constituency. However, a person having been elected as a member of Parliament from more than one constituency shall cease to be a member from all of those constituencies if he fails to intimate the Chief Election Commissioner within the stipulated period of thirty days the constituency which he wishes to represent as in terms of art.71(1) he cannot remain a member of Parliament in respect of two or more constituencies. He cannot also make or subscribe the oath or affirmation of a member of Parliament until he gives the aforementioned intimation to the Chief Election Commissioner.

4.9A A member of Parliament shall vacate his seat if he absents from Parliament, without the leave of Parliament, for ninety consecutive sitting days.[1] In *Special Reference No.1 of 1995*[2] a question arose whether walk-out from Parliament and thereafter boycotting the sessions of Parliament by all the opposition members of Parliament would constitute absence from Parliament without leave of Parliament within the meaning of art.67(1)(b). The Appellate Division opined that the word 'absent' cannot receive different interpretations in different circumstances, and walk-out and boycott, by whatever name it is called, means 'not present'. Hence, walk-out and boycott constitute 'absence' and when continued for ninety consecutive sitting days results in vacation of seat of the members concerned. The Appellate Division further held that in computing ninety consecutive sitting days, the period

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[1] Art.67(1)(b)

[2] 47 DLR (AD) 111

between two sessions and even adjournments in a particular session should be excluded as otherwise the provision of art.67(1)(b) would be nugatory. The Rules of Procedure is silent about computation and determination of the period of absence, but as the Speaker is vested with the function of bringing the fact of absence to the notice of the House, if in session, or informing the House, if not in session, immediately after the House reassembles, it is reasonable to hold that the Speaker has the responsibility to get the computation done with the help of his Secretariat.[1]

4.9B Members of Parliament shall vacate their seats upon dissolution of Parliament. A member of Parliament shall vacate his seat if he has incurred a disqualification for election as member of Parliament stipulated in art.66(2).[2] In terms of art.66(2) the disqualification applies not only for contesting in the election, but also for continuing as member of Parliament. Thus a member of Parliament will vacate his seat if he incurs the disqualification after the election. However, the disqualification of a defaulter in payment of bank dues had been framed in such a way that a member of Parliament would not be disqualified if he became a defaulter after his election because the relevant law made default in payment of bank loan a disqualification for being elected, and not a disqualification for continuing, as a member of Parliament. The law was amended in 1996 to preclude defaulters from holding the office of member of Parliament. But the deficiency in the drafting permitted a defaulter to obtain rescheduling of his loan by making certain payment before the election and thereafter be free for the entire term of Parliament. The deficiency has been cured by Ordinance No.I of 2001 and now a person cannot continue as a member of Parliament, if he defaults in payment of bank loan after being elected.

4.9C Art.70 provides that a member of Parliament shall vacate his seat if he resigns from the party which nominated him as the candidate in the election or votes in Parliament against that party. The term 'resign' may have an extended meaning. Joining the Ministry formed by one party after being elected on the nomination of another party may sometimes constitute resignation from the latter party within the meaning of art.70.[3] A member of Parliament shall be deemed to have voted against the party which nominated him if he being present in

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[1] Ibid, p.130

[2] See para 4.4 supra

[3] See Para 5.10B

Parliament abstains from voting or absents himself from any sitting of Parliament ignoring the direction of that party.[1] Violation of any direction of the party will not lead to vacation of seat. The direction must be one relating to the two specified matters. Violation of a direction of the party to refrain from attending the sittings of Parliament will not attract the mischief of art.70. As the Constitution contemplates the duty of the members to attend the sittings of Parliament and provides for vacation of seat for absence from Parliament for a specified number of sitting days[2], there cannot be any constitutionally valid direction to refrain from attending the sittings of Parliament. The direction of the party means the direction given by the leader of that party. If any dispute arises as to who is the leader of a party, the Speaker is to settle the dispute in the manner prescribed by art.70(2). If a member of Parliament was elected as an independent candidate and then joined any party, he shall be deemed to have been elected as a nominee of that party.

4.10 If any dispute arises as to whether a member of Parliament has, after his election, become subject to any disqualification mentioned in art.66(2) or as to whether he should vacate his seat in terms of art.70, the dispute shall be referred to the Election Commission to hear and determine it and the decision of the Commission shall be final[3] This finality, however, cannot altogether exclude judicial review by the Supreme Court, but finality having been attached by the Constitution itself, the judicial review will be confined to jurisdictional errors only, viz., infirmities based on violation of constitutional mandate, *mala fide* or non-compliance with the principles of natural justice.[4] Parliament may by law make provisions empowering the Election Commission to give full effect to the provision of art.66(4)[5]. The disqualification may arise before or after the election. The Election Commission has power to decide the question of disqualification only if the disqualification has

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[1] Explanation to Art.70(1)

[2] Art.67(1)(b)

[3] Art.66(4)

[4] *Kihota Hollohon v. Zachilhu*, AIR 1993 SC 412 (Tenth Schedule of the Indian Constitution imparts finality to the decision of the Speaker in respect of dispute relating to floor crossing and the Indian Supreme Court held that the Speaker's decision is subject to judicial review on limited grounds); *Jamal Shah v. Election Tribunal*, 18 DLR SC 1 (Judicial review is available on limited grounds in spite of constitutional finality of the decision of Election Tribunal under art.171 of the Pakistan Constitution of 1962)

[5] Art.66(5)

arisen after the election. The language 'has, after the election, become subject to the disqualification' in art.66(4) makes it clear that the Election Commission has no power to decide if the disqualification arose before the election[1]. If no election petition has been filed challenging the candidature of a person who was disqualified for the election, the remedy lies by way of a writ of *quo warranto*[2].

4.10A Article 66(4) is silent as to the authority who is to refer the dispute to the Chief Election Commissioner. However, rule 178 of the Rules of Procedure provides that the Speaker shall make the reference to the Chief Election Commissioner. Art.66(5) provides that Parliament may make law empowering the Election Commission to give full effect to art.66(4). In terms of art.66(5), the Members of Parliament (Determination of Dispute) Act, 1980 has been enacted and it requires the Speaker to prepare a statement regarding such a dispute and refer it to the Election Commission for determination and decision of the dispute. It *prima facie* appears that any member of Parliament can raise the dispute on the floor of Parliament for the Speaker to take notice of the disqualification. But from that it does not follow that the question can be raised only by a motion on the floor of the House or for that matter by a member only. The Speaker can act *suo moto* and in a proper case he may be directed by the Supreme Court to make a reference where he had refused to do so and a petition for that relief has been brought.[3]

4.10B In the seventh Parliament two persons were elected on the nomination of Bangladesh Nationalist Party and they were appointed as Ministers by the ruling party. They did not resign from Bangladesh Nationalist Party, but Bangladesh Nationalist Party wrote letters requesting the Speaker to publish notification under rule 178 stating that they vacated their seats as members of Parliament as their conduct amounts to resignation from Bangladesh Nationalist Party. The Speaker refused to publish the notification or to refer the matter to the Election Commission. The Speaker took the stand that there was no allegation of

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[1] *Election Commission v. Saka Venkata,* AIR 1953 SC 210; *Farzand Ali v. West Pakistan,* 22 DLR (SC) 203

[2] *Farzand Ali v. West Pakistan,* 22 DLR (SC) 203; *Zahedul Islam Khan v. H.M. Ershad,* 6 BLC 301, affirmed in *H.M. Ershad v. Zahedul Islam Khan,* 2001 BLD (AD) 142

[3] *Mustafa Khar v. Chief Election Commissioner,* PLD 1969 Lah 602; *Secy. Parliament v. Khandker Delwar Hossain,* 1999 BLD (AD) 276

resignation or voting against Bangladesh Nationalist Party and as such there was no dispute to be referred to the Election Commission. The Appellate Division, affirming the judgment of the High Court Division[1], held that the facts and circumstances of the case disclosed a dispute regarding the alleged resignation of the two members and the Election Commission is the authority designated by the Constitution to determine the question as to what is meant by resignation and whether the two members resigned, and accordingly directed the Speaker to refer the matter to the Election Commission. The Appellate Division further held that in dealing with the matter the Speaker was not acting as the constitutional head of the legislature, but as a statutory authority and the Supreme Court can give the necessary direction to the Speaker.[2] The Speaker then referred the matter to the Election Commission which held that joining the Ministry of the ruling party constituted resignation from Bangladesh Nationalist Party attracting the mischief of art.70. But another member elected on the nomination of Jatiyo Party did not fall within the mischief of art.70 by joining the Ministry of the ruling party as the said member joined the consensus government of the ruling party with the consent of Jatiyo Party and its leader and the reference of the matter by the Speaker to the Election Commission was found to be without lawful authority.[3]

4.10C *Remuneration and privileges:* Art.68 provides that the members of Parliament shall be entitled to such remuneration, allowances and privileges as may be determined by an Act of Parliament, or until so determined, by order made by the President. Accordingly, the Members of Parliament (Remuneration and Allowances) Order, 1973 was made. By the Members of Parliament (Salaries and Allowances)(Second amendment) Act, 1987 art.3C was inserted whereby provision was made allowing the members of Parliament are allowed to import car or jeep free of duty and taxes. This amendment was challenged, but the court rejected the contention of the appellant stating –

> A Member of Parliament is entitled to such privileges as the Parliament may determine and the determination is an act of discretion, propriety and sense of decency on the part of Parliament. The import of a car or

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[1] *Khandokar Delawar Hossain v. The Speaker*, 1998 BLD 45

[2] *Secretary, Parliament v. Khondker Delwar Hossain*, 1999 BLD (AD) 276; see also Para 4.9C

[3] *Anwar Hossain v. Election Commission*, 53 DLR 546

jeep free from duty etc. may offend the sense of decency and dignity of a section of the people outside of the Parliament but if the Parliament thinks that it is commensurate with the quality and quantity of work of the Member of Parliament in the discharge of his/her duties as a Member of Parliament, the outsider may bemoan the lack of sense of decency on the part of Parliament to enact such a legislation, but it is certainly cannot be said to be unconstitutional. What looks indecent to others may in fact be constitutionally permissible.[1]

RESIGNATION BY MEMBERS OF PARLIAMENT

4.10D Art.67(2) confers a right to a member of Parliament to resign and provides that a member of Parliament may resign his seat by writing under his hand addressed to the Speaker and the seat shall become vacant when the writing is received by the Speaker or, if the office of the Speaker is vacant or the Speaker is unable to perform his function, by the Deputy Speaker. Thus the members of Parliament, like the holders of other constitutional posts and offices, have the unilateral right of resignation, effectiveness of which is not dependent on the acceptance of the resignation by any authority.[2] If the resignation letter contains a future date of effectiveness, the resignation takes effect on the stipulated date and the resignation may be withdrawn before that date.[3] The entire resignation letter need not be in the hand of the member concerned; it is sufficient if it is signed by him.[4] To be effective the formalities must be complied with, that is, the resignation must be signed by the member of Parliament concerned, addressed to and reach the Speaker, and the resignation must be genuine and voluntary[5]. The Pakistan Constitution of 1962 required the resignation letter to be addressed to the Speaker and when a member of National Assembly of Pakistan addressed his resignation letter to the President without any request to transmit it to the Speaker and sent a letter to the Speaker withdrawing the resignation letter before it reached the Speaker, the Pakistan Supreme Court held

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[1] *Dr. Ahmed Hossain v. Bangladesh*, 51 DLR (AD) 75

[2] see *India v. Gopal Chandra*, AIR 1978 SC 694; *Fazlul Quader Chowdhury v. Shah Nawaz*, 18 DLR (SC) 62

[3] Ibid; *Kunja Krisna v. Speaker*, AIR 1964 Kerala 194

[4] *Rafique (Md.) Hossain v. Speaker*, 47 DLR 361

[5] *Rafique (Md.) Hossain v. Speaker*, 47 DLR 361; *Thankamma v. Hon'ble Speaker*, AIR 1952 TC 166; *Tahir Beg v. Kausar Ali*, PLD 1976 SC 504

that the resignation was not effective.[1] Arts.101 and 190 of the Indian Constitution provided that a member of a legislature might resign by writing under his hand addressed to the Speaker. A question arose whether the resignation letter would be effective only when the Speaker is satisfied as to the genuineness of the resignation letter. The Indian Constitution did not designate any authority for determination of any dispute as to the genuineness of a resignation letter. The Indian High Courts held that a resignation letter would be effective when the Speaker is satisfied about its genuineness.[2] Subsequently, arts.101 and 190 were amended in 1974 to provide that the resignation would be effective on acceptance of it by the Speaker. But no such provision for acceptance of resignation by the Speaker is there in the Constitution. Hence a resignation letter of a member of Bangladesh Parliament will be effective when it properly reaches the Speaker without any requirement of acceptance by the Speaker.[3] However, if any dispute arises or there appears any doubt as to the genuineness or validity of the resignation, the Constitution having not designated any authority to decide the dispute, the Speaker will have to be conceded the power to make the enquiry and the resignation shall take effect from the date it reaches the Speaker, once the Speaker finds the resignation letter to be valid and genuine.[4] The resignation letter should not contain any reason for resignation, but if any member gives any reason or introduces any extraneous matter, the Speaker may, in his discretion, omit such words, phrases or matter and the same shall not be read out in the House.[5] The Speaker has to bring the resignation to the notice of the House, if it is in session, or when Parliament is not in session, to inform Parliament

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[1] *Fazlul Quader Chowdhury v. Shah Newaz*, 18 DLR (SC) 62

[2] *Thankamma v. Hon'ble Speaker*, AIR 1952 TC 166; *Surat Singh v. Sudama Prasad*, AIR 1965 All 536

[3] Rule 177(2) of the Rules of Procedure

[4] *Tahir Beg v. Kausar Ali*, PLD 1976 SC 504 (Where the genuineness or validity of resignation is challenged or *ex facie* is doubtful, the Speaker shall be under a duty to enquire into the matter, before he allows the resignation to take effect. This is notwithstanding that the resignation takes effect automatically once it reaches the Speaker for it is implicit in the provision that the resignation is genuine and voluntary and was intended to reach the Speaker.... What will be the magnitude of the enquiry or whether, in a particular case, any such enquiry will at all be necessary, will depend on the facts of each case and it is not possible, nor even desirable to lay down a criterion for general application.); see *Rafique (Md.) Hossain v. Speaker*, 47 DLR 361

[5] Rule 177(1) of the Rules of Procedure

immediately after the House reassembles[1] and thereafter the Secretary to Parliament has to cause notification published in the Gazette and forward a copy of the notification to the member concerned and the Election Commission.[2] Information given to the House and publication of notification are merely consequential steps. When there is nothing to find the resignation to be not genuine or not voluntary the resignation takes effect irrespective of whether those consequential steps are taken or not. On getting information the House is not required to debate or take decision on the resignation and hence resignation and its effectiveness has nothing to do with the proceedings of Parliament. Furthermore, a dispute relating to resignation involves the question of title of a member of Parliament. As such art.78(1) of the Constitution does not stand as a bar to determination of any dispute relating to resignation of a member of Parliament by the Supreme Court.[3]

4.10E In 1995 two writ petitions were filed before the High Court Division, one challenging the validity of resignation of 147 members of Parliament and the other seeking a *mandamus* upon the Speaker for giving decision on the validity of those resignations. Both the petitions were dismissed as being premature as the Speaker had not yet taken the decision as regards genuineness and voluntariness of the resignations.[4] The resignations were tendered on 28.12.1994 and the Rules were issued by the court on 18.1.1995. Art.67(2) read with rule 177(2) of the Rules of Procedure clearly show that a resignation letter shall take effect when it reaches the Speaker. There is no provision for acceptance of the resignations by the Speaker and effectiveness of resignation is not dependent on its acceptance by anybody. On interpretation it is found that no resignation can be effective unless it is genuine and voluntary and as such some body must determine the genuineness and voluntariness if such a question arises or is apparent. Hence, the Speaker is conceded the power for the smooth working of the relevant provision of the Constitution. In this context it cannot be held that the Speaker can sit over the resignations tendered. In view of the provision that a resignation shall take effect when it reaches the Speaker, it cannot but be held that the Speaker must decide the question, if any arises or is apparent, immediately and if he has not taken a decision for a

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[1] Rule 178(3) of the Rules of Procedure

[2] Rule 178(4) of the Rules of Procedure

[3] *Rafique (Md.) Hossain v. Speaker*, 47 DLR 361; *Special Reference Case no.1 of 1995*, 47 DLR (AD) 111

[4] *Rafique (Md.) Hossain v. Speaker*, 47 DLR 361

considerable number of days, it may be taken that the Speaker has refused to treat the resignation valid and the Supreme Court will have jurisdiction to entertain a petition and decide the dispute. It is submitted that the finding of prematurity of the writ petitions is open to exception.

4.10F Following the allegation of massive rigging in Magura by-election, the members of the opposition parties in the Fifth Parliament resigned *en masse* on the ground of "the failure of the ruling party to introduce a bill to Parliament for amending the Constitution to provide for holding general elections to Parliament under neutral, non-partisan government comprising nominated persons."[1] The Speaker informed the House that in his view *en masse* resignations on such ground is not contemplated by art.67(2). It is submitted that when the members of Parliament have individually the right to resign, that right cannot be denied when it is exercised together with others. As the word 'absent' cannot have different meaning because of walk-out and boycott[2], resignation cannot have different meaning only because the right has been exercised *en masse*. It may be argued that resignation *en masse* by the members of a political party may be a legitimate exercise of their right to force the party in power to hold general election or by-election to seek the mandate of the people, the ultimate sovereign, on a particular issue. The Speaker cannot go beyond the question of genuineness and voluntariness of the resignation and cannot raise any further question.[3] As regards the reasons given in the resignation letters, rule 177(1) permits the Speaker to omit the words he finds objectionable, but for that reason he cannot refuse to treat the resignation letters as valid resignations unless he has materials before him to decide that the resignations were not genuine and voluntary.[4]

OFFICERS Of PARLIAMENT

4.11 The Speaker is the chief officer of Parliament. Parliament at the first session after a general election has to elect from among its members a Speaker and a Deputy Speaker. If either office becomes vacant, Parliament at its first meeting after the occurrence of the vacancy has to

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[1] *Special Reference No.1 of 1995*, 47 DLR (AD) 111, 115

[2] see *Special Reference No.1 of 1995*, 47 DLR (AD) 111

[3] *Rafique (Md.) Hossain v. Speaker*, 47 DLR 361 (*per K.E. Hoque J*)

[4] see *Rafique (Md.) Hossain v. Speaker*, 47 DLR 361 (K.E. Hoque J held the formality of rule 177 to be directory)

elect one of its members to fill the vacancy[1]. The Speaker or the Deputy Speaker shall vacate his office - (1) if he ceases to be a member of Parliament; (2) if he becomes a Minister; (3) if Parliament passes a resolution (after not less than 14 days' notice has been given of the intention to move the resolution) supported by the votes of a majority of all the members of Parliament, requiring his removal; (4) if he resigns his office by delivering a letter of resignation to the President; (5) if after a general election another member enters upon that office; or (6) in the case of the Deputy Speaker, if he enters upon the office of the Speaker[2]. But notwithstanding the occurrence of the incidents mentioned in art.74(2), the Speaker or, as the case may be, the Deputy Speaker, shall be deemed to continue to hold office until his successor enters upon office[3]. The Speaker and the Deputy Speaker are to take oath in terms of art.148 before entering upon office.[4]

4.12 If the office of the Speaker is vacant or if the Speaker is acting as the President or if it is determined by Parliament that the Speaker is otherwise unable to perform his function, those functions shall be performed by the Deputy Speaker or if the Deputy Speaker's office is also vacant, the function of the Speaker shall be performed by such member of Parliament as may be determined by or under the Rules of Procedure of Parliament. During the absence of the Speaker from any sitting of Parliament the Deputy Speaker or, if he is also absent, such person as may be determined by or under the Rules of Procedure, shall act as the Speaker[5]. The Speaker or the Deputy Speaker shall not preside over any sitting of Parliament in which a resolution for his removal from office is under consideration and such a sitting shall be presided over in accordance with the provision of art.74(3) as if he is absent[6]; but he shall have the right to speak in, and otherwise to take part in the proceeding and shall be entitled to vote only as a member of Parliament[7].

4.13 The office of the Speaker enjoys great prestige, position and authority within Parliament. He has extensive powers to regulate the proceedings of Parliament under the Rules of Procedure. The ordinary

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[1] Art.74(1)
[2] Art.74(2)
[3] Art.74(6)
[4] For remuneration, privileges and other terms and conditions of the office, see Para 6.59B
[5] Art.74(3)
[6] Art.74(4)
[7] Art.74(5)

interpretation of the procedural laws, rules and customs of Parliament is his function and he allows no debate or criticism of his rulings except on formal resolution. He is responsible for the orderly conduct of Parliament's proceedings and maintains discipline and order in Parliament. Following the British practice, the Constitution has provided that the certificate given by the Speaker that a Bill is a Money Bill is conclusive for all purposes and shall not be called in question in any court[1] "The Speaker is the representative and spokesman of Parliament in its collective capacity, he presides at the meeting of the House, and declares and interprets the law. He does not claim power to make or alter the law, merely to be its exponent. But where the precedents, rulings, and the orders of the House are insufficient or uncertain guides, he has to consider what course would be most consistent with the usage, traditions and dignity of the House, and the rights and interests of its members, and on these points his advice is usually followed, and his decisions are very rarely questioned."[2] If any vacancy occurs in the office of the President or if the President is unable to discharge his functions on account of absence, illness or any other cause the Speaker functions as the acting President until a President is elected or until the President resumes his functions[3].

4.14 To ensure independence and impartiality of the office of the Speaker and the Deputy Speaker, it has been provided that their remuneration, privileges and other terms and conditions of service shall be determined by an Act of Parliament and once determined shall not be varied to their disadvantage during the term of their office[4]. Their remuneration shall be charged upon the Consolidated Fund which may be discussed but shall not be submitted to the vote of Parliament[5].

4.15 Parliament has its own secretarial staff. The terms of recruitment and conditions of service of persons appointed to the secretarial staff of Parliament are to be regulated by an Act of Parliament and until such law is made, the President may in consultation with the Speaker make rules regulating the recruitment and conditions of service of persons appointed to the secretariat of Parliament and those rules shall have effect subject to the provisions of law[6].

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[1] Art.81(3)
[2] Ilbert - Parliament, 1953, p.125
[3] Art.54
[4] Art.147
[5] Arts. 88 and 89
[6] Art.79

MEETING OF PARLIAMENT

4.16 The power to summon Parliament to meet has been vested in the President[1] who shall act in accordance with the written advice of the Prime Minister. After a general election Parliament must be summoned to meet within thirty days after declaration of the results of the election[2]. Thereafter between two sessions a period exceeding sixty days must not intervene between the end of one session and the first meeting of the next session. The President is to summon Parliament by public notification specifying the time and place of the first meeting.

4.17 The President may address Parliament and may send message to Parliament. But at the commencement of the first session after a general election and at the commencement of the first session of every year the President shall have to address Parliament and Parliament shall thereafter discuss the matters referred to in such address or message of the President[3]. The requirement of the President's address at the beginning of the first session is mandatory and Parliament cannot be said to have met and it cannot transact its business unless this preliminary has been done[4]. But the position will be different if he failed to address due to disturbance and left the House laying the address on the table of the House and he will be deemed to have addressed Parliament.[5] The President has to act on the advice of the Prime Minster and the address of the President is in reality the government's address to Parliament delivered through the President. The President's address fulfills two functions, namely, it provides a ceremony with which Parliament begins its session and it underscores the government's responsibility to Parliament as the President's address contains a general statement about the government's foreign and domestic policies and outlines the government's plans for the principal business of the session. In the discussion that follows, the members of Parliament may raise any question of general policy, public administration and political situation.

4.18 *Rules of procedure:* Subject to the provisions of the Constitution, the procedure of Parliament shall be regulated by the rules of procedure made by Parliament and until such rules are made, by the

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[1] Art.72(1)
[2] Art.72(2)
[3] Art.73
[4] *Syed Abul Mansur v. West Bengal Legislative Assembly*, AIR 1966 Cal 363
[5] Ibid

rules of procedure made by the President[1]. In making the rules of procedure Parliament cannot alter the quorum which has been fixed at sixty members by art.75(2) which incorporated the British practice of not taking notice of the lack of quorum until some member draws attention of the lack of quorum to the person presiding over the meeting. On such attention being drawn the person presiding over the meeting shall either suspend the meeting until at least sixty members are present or adjourn the meeting. This gives the advantage of transacting formal business even without quorum. The decision in Parliament are taken by majority of votes of the members present. The person presiding can cast his vote only when there is equality of votes[2]. In such a situation of equality of votes, voting is not optional with him; he must cast vote to arrive at a decision. Every Minister shall have the right to speak and take part in the proceeding, but he shall not be entitled to vote or to speak on any matter not related to his Ministry if he is not a member of Parliament[3].

4.19 No proceeding in Parliament shall be invalid only because there is vacancy in the membership thereof or a person who was not entitled to be present was present at, or voted or otherwise participated in the proceeding[4]. But this provision will not save a proceeding of Parliament in which total strangers or intruders without any colour of right had participated in the proceeding and the decision taken will be struck down by the court.[5] In such a case art.78(1) which precludes the court from questioning the proceedings of Parliament cannot be pressed in aid to avoid interference of the court as it is a question affecting the constitution of Parliament and is not a matter which pertains either to the regulation of the proceedings of Parliament or the conduct of its business or maintenance of order of Parliament or any matter affecting any of its privileges.[6]

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[1] Art.75(1)
[2] Art.75(1)(b)
[3] Art.73A
[4] Art.75(1)(c)
[5] *Farzand Ali v. West Pakistan*, 22 DLR (SC) 203; see also *Pakistan v. Ali Ahmed*, PLD 1955 FC 522
[6] Ibid

TERMINATION OF PARLIAMENT

4.20 The power of prorogation of Parliament vests in the President who acts in this matter on the advice of the Prime Minister. Prorogation brings an end to the session of Parliament. It does not put an end to the existence of Parliament. Parliament meets again after prorogation. In England prorogation terminates all business pending in Parliament, but not in Bangladesh. Any Bill or any other business pending in Parliament or pending assent of the President does not lapse by the prorogation[1]. Contempt of Parliament committed in one session can be dealt with and punished in another session[2].

4.21 An adjournment terminates a sitting of Parliament. While the power of dissolution and prorogation lies with the President, the power of adjournment lies with Parliament itself and, in practice, is exercised by the Speaker or the Speaker *pro tempore*. Parliament may adjourn its sitting for such time as it pleases; it may adjourn for less than a day, for a day or from day to day and sometimes over the holidays intervening in the course of the session. Parliament may adjourn *sine die* without naming a day for re-assembly. An adjournment does not affect the unfinished work before Parliament which may be taken up on resumption of the sitting after the adjournment[3].

4.22 Dissolution, however, puts an end to a Parliament and leads to a general election for composition of a new Parliament. The power of dissolution of Parliament is vested with the President to be exercised in accordance with the written advice of the Prime Minister[4]. On dissolution, all business pending before Parliament at the time of dissolution comes to an end, but a Bill already passed by Parliament and awaiting assent of the President does not lapse[5].

FUNCTIONS OF PARLIAMENT

4.23 Parliament is a legislative and deliberative body. Its functions are - (a) legislation, (b) control of public finance, and (c) deliberation and discussion. Further art.142 of the Constitution confers power of amendment of the Constitution on Parliament.

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[1] *Purushattaman v. Kerala*, AIR 1962 SC 694
[2] *Sharma v. S.K. Sinha*, AIR 1960 SC 1186
[3] *Siddaveerappa v. Mysore*, AIR 1971 Mys 200
[4] See Para 3.14 and 3.27
[5] *Purshottaman v. Kerala*, AIR 1962 SC 694

4.24 ***Legislation:*** Subject to the provisions of the Constitution, art.65 vests the legislative power of the Republic in Parliament . Parliament has the plenary power of legislation over all subjects except those in respect of which the power of legislation has been entrusted by the Constitution to some other functionary. Thus Parliament cannot pass any law relating to appointment of the staff of the Supreme Court and appointment of judicial officers and magistrates exercising judicial functions.[1] Parliament cannot make any law inconsistent with the provisions of Part III of the Constitution relating to the fundamental rights and any law inconsistent with those provisions shall, to the extent of inconsistency, be void.[2] Parliament cannot also make laws contrary to the other provisions of the Constitution.[3] For example, it cannot make a law providing for any local government institution composed of persons not elected by the people[4], or curtailing the doctrine of pleasure relating to the services of the Republic[5], or making a law which may permit removal of a holder of a civil post in the service of the Republic by an authority subordinate to him or without service of notice as provided by art.135, or changing the terms and conditions of service of the holders of offices mentioned in art.147 to the disadvantage of the holders of those offices during the term of their office. In exercise of the power, Parliament may legislate prospectively or retrospectively, provided it does not thereby violate any of the fundamental rights[6]. Parliament may grant or withdraw an exemption from a law[7]. It may make permanent or temporary Act. It may also delegate the function of making subordinate legislation to another authority, provided such a delegation does not amount to delegation of essential legislative function.[8] The power of legislation includes the power of repeal, modification or alteration of the existing laws without contravening the provisions of the Constitution[9]. A legislature cannot by legislation bind its successor and thus Parliament

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[1] Art.113 and 115; *Secy. Ministry of Finanace v. Masdar Hossain*, 2000 BLD (AD) 104

[2] Art.26

[3] Art.7

[4] Art.59; *Kudrat-e-Elahi v. Bangladesh*, 44 DLR (AD) 319

[5] Art.134

[6] For detailed discussion see Para 2.109 and 2.110

[7] *MDC Bank v. ITO*, AIR 1975 SC 2016

[8] Art.65; see Para 4.33 – 4.36

[9] *Sajjan Singh v. Rajasthan*, AIR 1965 SC 845

cannot pass any unamendable or irrepealable law.[1]

4.25 Making of laws is the major function of Parliament. But the modern complex society requires very complicated and extensive laws for which Parliament has not the time. Parliament often legislates in skeleton leaving the details to be filled up by the executive departments and other authorities. The proposed law originates in Bill form and its passage is regulated by the rules of procedure framed by Parliament[2]. Before a Bill is presented before Parliament considerable time is spent in the executive department. After the Cabinet decides to go for the legislative proposal, the Bill is drafted by the government draftsman and the draft is considered by the Cabinet or a committee of the Cabinet. Expert opinion is often obtained and in the light of the opinion the Bill in final form is prepared. The Bill passes through three stages before being passed. The first is the introduction stage[3] and by convention no discussion takes place at this stage unless the Bill is very controversial. Notice of motion for leave to introduce the Bill is given and if the motion that 'the Bill be taken into consideration' is passed the second stage is reached. At this stage a general discussion of the principles and provisions of the Bill follows and the general discussion takes place on a motion either that the Bill be taken up for consideration or that it may be referred to a Standing Committee or that it may be referred to a Select Committee or that it be circulated to elicit public opinion[4]. An important or complex Bill is generally referred to a Standing or Select Committee. When referred the Committee is required to examine the Bill in the light of the discussion that took place in Parliament and report to Parliament. After the Committee sends its report to Parliament, the Bill is discussed clause by clause. Amendments to clauses may be moved at this stage[5]. At the final stage, after a brief general discussion, the Bill is finally passed[6] and the Bill is sent to the President for his assent[7]. The President has no power to veto a Bill passed by Parliament. The President may within fifteen days of the presentation of the Bill either assent to the Bill or return it to Parliament with a message requesting that the Bill or any particular provision thereof be reconsidered and that any amendment

[1] *Shahriar Rashid Khan v. Bangladesh*, 1998 BLD (AD) 155, Para 54
[2] Rules of Procedure of Parliament were framed on 22 July 1974
[3] Rule 75 of the Rules of Procedure
[4] Rule 77 of the Rules of Procedure
[5] Rules 81-89 of the Rules of Procedure
[6] Rules 90-94 of the Rules of Procedure
[7] Rule 96 of the Rules of Procedure

specified by him be considered. If the President fails to do either of the two, the Bill is deemed to have been assented to by him on the expiry of the period of fifteen days after presentation of the Bill to him. If the President returns the Bill, Parliament is to reconsider it and if it passes the Bill with or without amendment, the President has to assent to the Bill within seven days of presentation of the Bill to him and if he fails to do so, the Bill is deemed to have been assented to by him.[1] On the actual or constructive assent of the President, the Bill passed by Parliament becomes an Act of Parliament.

4.26 An important characteristic of the parliamentary system is the predominance of the Cabinet which virtually monopolizes the business in Parliament. So long as the party in power commands the majority support in Parliament, the Cabinet is in full control of Parliament and it is the Cabinet that decides what shall be discussed in Parliament, when it shall be discussed, how long the discussion shall take place and what the decision shall be. Practically all the Bills that ultimately pass through Parliament are sponsored by the Ministers who are under the constant pressure of organised groups and interests seeking redress through legislation. A member of Parliament who is not a Minister may sponsor a Bill[2]. But the private member's Bill has little chance of being passed without the government's support. The power of the private members is extremely limited and not much scope is left for their individual enterprise and initiative. Most of the parliamentary time is consumed by the government's business and only one day in a week is reserved as private members' day. The problem before a modern government is one of time and there are always a number of government Bills waiting in the line for passage by Parliament. Consequently, the private member's Bill is more often sidetracked to accommodate the government's business.

4.27 *Colourable legislation:* Where the power of the legislature is limited by the Constitution or the legislature is prohibited from passing certain laws, the legislature sometimes makes a law which in form appears to be within the limits prescribed by the Constitution, but which in substance transgresses the constitutional limitation and achieves an object which is prohibited by the Constitution. It is then called a colourable legislation and is void on the principle that what cannot be done directly cannot also be done indirectly. The underlying idea is that

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[1] Art.80

[2] Rule 72 of the Rules of Procedure

although a legislature in making a law purports to act within the limit of its powers, the law is void if in substance it has transgressed the limit resorting to pretence and disguise. The essence of the matter is that a legislature cannot overstep the field of its competence by adopting an indirect means. Adoption of such an indirect means to overcome the constitutional limitation is often characterised as a fraud on the Constitution. This happens more frequently in a federal system than in a unitary system as the legislature tries to overcome the limitation of the distribution of powers between the centre and the provinces.[1] In *A.G. for Ontario v. Reciprocal Insurers*[2] the Dominion legislature of Canada tried to control contracts of insurance by the Insurance Act, 1910 which was declared *ultra vires*. The Dominion legislature then passed a law making it an offence for any person to solicit or accept any insurance risk except on behalf of a company licensed under the Insurance Act, 1917. The Dominion contended that the law was made in its unfettered power of legislating on criminal law. The Privy Council rejected the contention observing -

> ... In accordance with the principle inherent in these decisions their Lordships think that it is no longer open to dispute that the Parliament of Canada cannot, by purporting to create penal sanctions under s.91, head 27, appropriate to itself exclusively a field of jurisdiction in which, apart from such a procedure, it could exert no legal authority, and that if, when examined as a whole, legislation in form criminal is found, in respects and for purposes exclusively within the Provincial sphere, to deal with the matters committed to the Provinces, it cannot be upheld as valid ...

4.28 The doctrine of colourable legislation does not, however, involve any question of *bona fide* or *mala fide* on the part of the legislature. It is not permissible for a court to impute malice to the legislature in making laws which is its plenary power.[3] The entire question is one of competence of the legislature to enact a law. A law will be colourable legislation if it is one which in substance is beyond the competence of the legislature. If a legislature is competent to do a

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[1] *Union Colliery Company of British Columbia v. Bryden*, [1899] AC 580; *W.R. Moran Pty Ltd v. Deputy Commissioner of Taxation*, [1940] AC 838

[2] [1924] AC 328; *Wadhwa v. Bihar*, AIR 1987 SC 579 (An Ordinance was re-promulgated without being placed before the State legislature was struck down as fraud on the Constitution)

[3] *Shahriar Rashid Khan v. Bangladesh*, 1998 BLD (AD) 155, Para 37

thing directly, then the mere fact that it attempted to it in an indirect manner will not render the law invalid.[1]

4.29 In *Kudrat-E-Elahi v. Bangladesh*[2] the Bangladesh Local Government (Upazila Parishad and Upazila Administration Re-organisation) (Repeal) Ordinance, 1991 was challenged. By this Ordinance Upazila Parishads were abolished and the rights, powers, authorities and privileges of the abolished Parishads were vested in the government. Art.59 of the Constitution provides that local government in any administrative unit of the Republic shall be entrusted to bodies composed of persons elected in accordance with law. It was urged on behalf of the appellants that the Ordinance was a colourable legislation inasmuch as by vesting the rights, powers, authorities and privileges of the abolished Parishads in the government indirectly local government functions of the Upazila Parishad were sought to be entrusted to persons who are not elected by the people. The court seems to have accepted the principle of colourable legislation. On the facts of the case M. Kamal J came to the finding that though any person or body, not elected in the area according to law cannot upon abolition of a local government tier take over those rights, powers, authorities and privileges of a local government institution, those powers, functions etc. which the government ceded to the Upazila Parishads will eventually go back to the government upon its abolition and the government will exercise those powers, functions etc. as governmental powers and not as powers, functions etc. belonging to the erstwhile Parishads and hence Parliament cannot be accused of colourable legislation. A.T.M. Afzal J rejected the challenge upon a similar view. S. Ahmed CJ, however, observed -

> It appears to us that the legislative drafting of section 2(2)(Kha), particularly the words in Bengali, "rights, powers, authorities and privileges of the abolished Parishad" has apparently created an impression that those attributes of the Parishads have remained to be enjoyed by the Government. If these words are deleted then no confusion is left.

It is submitted that when a legislature uses certain words in the law, the question of deletion of those words is a matter for consideration of the legislature and not of the court. If those words create unconstitutionality,

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[1] *Gajapati Narayan Deo v. Orissa*, AIR 1953 SC 375; *Kudrat-E-Elahi v. Bangladesh*, 44 DLR (AD) 319; See also *Bihar v. Kameswar Singh*, AIR 1952 SC 252; *Maharana Jaybhantsinghji v. Gujrat*, AIR 1962 SC 821.

[2] 44 DLR (AD) 319

the words should be declared *ultra vires*, provided those words are severable, otherwise the whole law is to be declared *ultra vires*. In Para 41 the learned Chief Justice held that the Ordinance is valid and not *ultra vires* except the words "rights, powers, authorities and privileges". Conversely, it means that the words "rights, powers, authorities and privileges" are *ultra vires;* but the learned Chief Justice did not pass any consequential order and it is not understood what is his definite conclusion in this regard.

4.30 ***Delegated legislation:*** The doctrine of separation of powers requires that the work of legislation should be exclusively done by the legislature and no other organ of the State should have the power of legislation. But it will be seen that measured in volume, more legislations are produced by the executive government than by the legislature in modern States. Emergence of welfare States together with vast technological developments has enormously increased the function of the State requiring huge amount of legislation. Legislature has no time to make all these laws in detail. Often the laws require dealing in complicated technical matters which can only be done by professionals and experts and legislators in general cannot have the necessary expertise. For example, an aviation law will run into so much technical details that it is not possible for the legislators to provide it. Welfare oriented legislations often give rise to manifold administrative difficulties which it is not possible to foresee and it is not possible to have frequent recourse to the legislature to amend the laws. Again, in times of emergency, the administration needs to move quickly and it is not possible for the legislature to act that quickly. Thus the practical necessity has given rise to a mode adopted by the legislature in legislating a framework of a law leaving it to the administration to fill up the details. Professor Wade comments -

> If we look at the practical side, it is at once plain that administration must involve a great deal of general law-making, and that no theory which demands segregation of these functions can be sound. Parliament can lay down that cars must carry suitable lights, or that the price of eggs shall be fixed, or that there shall be free health service, or that national insurance benefit shall be payable in certain cases. But where, as happens so frequently, such legislation can be properly administered only by constantly adjusting it to the needs of the situation, discretion has to be allowed. This is the work of the administration, in the clearest sense of the term, and the fact that it may also be said to be legislation is of no relevance. Flexibility is essential, and it is one of the advantages

of rules and regulations that they can be altered much more quickly and easily than can Acts of Parliament.[1]

4.31 *England and U.S.A.:* The question is whether there is any limitation on the power of delegation. In England there is no question of such a limitation inasmuch as the British Parliament is supreme and there is no constitutional limitation on its power. "The constitutional problem presented by delegated legislation is not that it exists, but that its enormous growth has made it difficult for Parliament to watch over it."[2] Because of the written constitution and particularly because of the doctrine of separation of powers the question of limitation arises in the American jurisdiction. The needs and realities of the situation compelled the American Supreme Court to concede to Congress extensive power of delegation of legislative function to administrative bodies stating that Congress can delegate its legislative power to administration prescribing standard for delegated legislation.[3] If there is no standard in the statute to limit delegations of power, it is the delegatee, rather than Congress, that is the primary legislator. S.9(c) of the National Industrial Recovery Act empowered the President to prohibit the transportation in interstate commerce of oil in excess of the amount permitted by State law. In *Panama Refining Co. v. Ryan*[4] the Supreme Court held the delegation invalid because Congress had not stated whether or in what circumstances or under what conditions the President was to exercise his prohibitory authority. Cardozo J dissented stating that the law provided the standard as s.1 declared the policy of Congress of removing obstruction to commerce, promoting industrial organisation, and eliminating unfair competition. Shortly thereafter, the Supreme Court again struck down a congressional delegation in *Schechter Poultry Corporation v. U.S.*[5]. S.3 of the National Industrial Recovery Act authorised the President to approve codes of fair competition for the governance of trades and industries. The President's power was as wide as the field of industrial regulation and he could impose any regulatory requirement he chose on the business concerned. *Schechter* involved the broadest delegation Congress had ever made and it involved abdication of commerce power by Congress. Since *Panama* and *Schechter*, the

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[1] Administrative Law, 6th ed., p.848
[2] Ibid, p.849
[3] *U.S. v. Chicago, M, St.*, 282 U.S. 311
[4] 293 U.S. 388
[5] 295 U.S. 495

American courts have moved in the direction of Cardozo dissent. Except in cases of personal rights of citizens, the Supreme Court permitted wide delegation even when there was no legislative standard set out in the statute[1] and as a result the executive has been vested with virtual blank cheque unrestrained by legislative controls.[2] But when it came to personal rights the Supreme Court asked for adequate standard. In *Kent v. Dulles*[3] the court dealt with the power of the Secretary of State to grant passport. That power impinged on the right to travel abroad. It was held, "If that `liberty' is to be regulated, it must be pursuant to the law-making functions of the Congress ... And if that power is delegated, the standards must be adequate to pass scrutiny by the accepted tests." The same was held when the First Amendment freedom was involved[4].

4.32 *British India:* In 1869 an Act was passed to remove Garo Hills from the system of law courts prevailing therein and to vest the administration of justice there in such officers as the Lt. Governor of Bengal might appoint. The law also authorised the Lt. Governor to extend to Garo Hills any law which might then be in force in other territories under him. The law was challenged on the ground of impermissible delegation of legislative power. The Privy Council upheld the Act stating -

> The proper Legislature has exercised its judgment as to place, persons, laws, powers; and the result of that judgment has been to legislate conditionally as to all these things. The condition having been fulfilled the legislation is now absolute. Where the plenary powers of legislation exists as to particular subjects, whether in an imperial or in a Provincial Legislature they may be well exercised, either absolutely or conditionally. Legislation conditional on the use of particular powers, or on the exercise of a limited discretion, entrusted by the Legislature to a person in whom it places confidence is no uncommon thing; and, in many circumstances, it may be highly convenient. The British Statute Book abounds with examples of it; and it cannot be supposed that the Imperial Parliament did not when constituting the Indian Legislature, contemplate this kind of conditional

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[1] *Fahey v. Mallonee*, 332 U.S. 245; *Yakus v. U.S.*, 321 U.S. 414; *Amalgamated Meat Cutters v. Connally*, 337 F. Supp. 737

[2] Schwartz - Administrative Law, p.57

[3] 357 U.S. 116

[4] *Shuttlesworth v. Birmingham*, 394 U.S. 147

> legislation as within the scope of the legislative powers which it from time to time conferred.[1]

Such a legislation is generally called 'conditional legislation' as distinguished from delegated legislation.[2] Power to apply a law to a particular area or power to extend the duration of a law is as much a legislative power as the making a law in respect of particular persons or subjects and there is practically no difference in principle between a conditional legislation and delegated legislation, the difference in the two legislations being only in respect of the extent of delegation. In *Hodge v. Queen*[3], the Privy Council upheld a delegation of legislative power observing-

> It is obvious that such an authority is ancillary to legislation, and without it an attempt to provide for varying details and machinery to carry them out might be oppressive, or absolutely fail. The very full and very elaborate judgment of the Court of Appeal contains abundance of precedents for this legislation, entrusting a limited discretionary authority to others, and has many illustrations of its necessity and convenience.

As per decision of the Privy Council there was no difference in power between the Indian legislature and the British Parliament in this regard. It may be stated here that the Privy Council consistently upheld delegated legislation as 'conditional legislation' and did not authorise delegation of legislative power in the strict sense of divestiture by legislature of its powers and conferring them on another body.[4]

4.33 *India and Pakistan:* After independence, the Indian Supreme Court had to deal with the question of delegation of legislative power in *Re Delhi Laws Act*[5]. The Judges differed in their views. One of the views was that Parliament was free to delegate its legislative power to any extent subject to the limitation that it did not thereby efface itself or abdicate its powers which meant that Parliament should never give up its

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[1] *R. v. Burah*, 4 Cal 172; *Shohan Ajmee v. Commr. of Customs*, W.P. No.1882 of 2000 (Unreported)

[2] *Dacca Picture Palace Ltd. v. Pakistan*, 18 DLR 442. *King Emperor v. Banwarilal*, 72 I.A. 57, *Inder Singh v. Rajsthan*, AIR 1957 SC 510, and *Basanta Kumar v. Eagle Rolling Mills*, AIR 1964 SC 1260, offer examples of such conditional legislation.

[3] LR 9 A.C. 117

[4] Seervai - Constitutional Law of India, 3rd ed., p.1848

[5] AIR 1951 SC 332

ultimate control over the delegatee.[1] The other view was that Parliament could not delegate essential legislative function to another agency which meant that Parliament should itself formulate the policy before leaving it to the delegatee to fill up the details.[2] Subsequent decisions upheld the second view that Parliament cannot delegate its essential legislative function.[3] The same view has been taken by the Pakistan Supreme Court. In *East Pakistan v. Sirajul Huq* H. Rahman J observed -

> ... the Legislature cannot abdicate altogether from its legislative functions or totally efface itself but where the Legislature sufficiently expressed its will and exercised its judgment as to the territorial extent, scope and subject-matter of the legislation, the provision of details, particularly when such details are by their very nature incapable of being laid down by the Legislature itself, can well be left to be done by another agency in whom the Legislature place confidence.[4]

Dealing with the extent of permissible delegation of legislative power, Murshed CJ deduced the following principles:-

> (1) Legislation being the exclusive function of the Legislature, it cannot abdicate such function.
>
> (2) The Legislature, after having enunciated the essential legislative principles and standards, is, however, entitled to delegate to outside agencies such functions which are essential to an effective exercise of the legislative power with which it has been endowed by the Constitution.
>
> (3) The legislature, however, cannot efface itself and delegate all its functions to an extraneous agency.[5]

4.34 In India and Pakistan the point thus boiled down to one question - what is essential legislative function. Essential legislative function is stated to be the determination of the legislative policy and its formulation as a rule of conduct.[6] Parliament cannot delegate to another

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[1] Per Fazal Ali, Sastri and Das JJ

[2] Per Kania CJ and Mahajan and Mukherjee JJ

[3] *Vasantalal v. Bombay*, AIR 1961 SC 4; *Corp. of Calcutta v. Liberty Cinema*, AIR 1965 SC 1107; *Devi Das v. Punjab*, AIR 1967 SC 1895

[4] 19 DLR (SC) 281, Para 122; *East & West Steamship Co. v. Pakistan*, 10 DLR (SC) 52

[5] *Ghulam Zamin v. A.B. Khandker*, 16 DLR 486, 495

[6] *Vasantalal v. Bombay*, AIR 1961 SC 4; *Makhan Singh v. Punjab*, AIR 1964 SC 381; *Khambalia Municipality v. Gujarat*, AIR 1967 SC 1048; *East and West Steamship Co. v. Pakistan*, 10 DLR (SC) 52.

agency the exercise of its judgment as to what the law should be. If Parliament makes a delegation of legislative power without indicating the policy behind the statute, the delegation shall be unconstitutional.[1] To be immune from challenge, the policy declared must be clear[2]. In order to see whether a statute contains a clear legislative policy, the court will have to consider the provisions of the statute as well as its preamble.[3] Where the impugned Act replaces another Act, the court may even look into the provisions of the replaced Act to determine whether Parliament has conferred an unguided and uncanalised power.[4] Once the essential legislative function is performed by Parliament by declaring the policy, the extent of delegation is a matter for Parliament to decide and the court cannot go into the question whether Parliament should have provided a different standard.[5] The Indian Supreme Court held that the power to modify an Act in its essential particulars so as to involve a change of the policy declared by Parliament involves delegation of essential legislative function and thus conferment of power on the executive to modify an Act without any limitation on the power to modify is an impermissible delegation of essential legislative function.[6] But if the delegation of the power to modify does not involve the change of policy stated by Parliament, but only matters of details which are not considered to be essential legislative function, the delegation is constitutional.[7] The Pakistan Federal Court, however, held that a legislature cannot delegate its power of making, modifying or repealing any law or to extend the operation of a law to an external authority as it would thereby create a parallel legislature.[8] The Indian Supreme Court held that Parliament can delegate to the administration the power to bring individuals, bodies or commodities within, or to exempt them

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[1] Ibid; see also *Pir Mohammad & Brothers v. Khulna Municipal Committee*, 19 DLR 55

[2] *Makhan Singh v. Punjab*, AIR 1964 SC 381; *Devi Das v. Punjab*, AIR 1967 SC 1895.

[3] *Harishankar Bagla v. M.P.*, AIR 1954 SC 465; *Vasantalal v. Bombay*, AIR 1961 SC 4; *India v. Bhanmal*, AIR 1960 SC 475; *Dacca Picture Palace Ltd. v. Pakistan*, 18 DLR 442.

[4] *Bhatnagar v. India*, AIR 1957 SC 478

[5] *India v. Bhanmal*, AIR 1960 SC 475

[6] *Rajnarian v. Chairman, Patna Admn.*, AIR 1954 SC 569

[7] Ibid

[8] *Sobho Gyanchandani v. Crown*, PLD 1952 FC 29

from, the purview of a statute[1] or to amend the Schedule of a statute[2] or to expand or restrict the operation of a statute[3] by providing guideline or policy for the exercise of the power. The court held the same view in respect of 'power to remove difficulties' in giving effect to an Act.[4] There is no uncanalised delegation where Parliament permits the administration at it discretion to adopt the existing statutes to apply them to new area provided thereby the policies of the statutes are not changed.[5]

4.35 The power to impose and assess a tax is an essential legislative function. Parliament must therefore either prescribe the rate of taxation itself or formulate a policy for fixation of the rate by the delegatee[6]. But no unconstitutional delegation is involved where Parliament fixes a maximum rate of imposition and authorises the administration to determine the rate not exceeding the maximum fixed by Parliament according to the exigencies of public revenue[7], or where Parliament delegated the power to fix the rate of taxation giving guidance to the delegatee as to how the power is to be exercised[8] or laying down the legislative policy[9] or requiring the delegatee to obtain approval of the government or to consult the wishes of local inhabitants before fixing the rate[10] or when Parliament fixes the item and rate of taxation and authorises the government to enforce the rate by issuing notification.[11]

4.36 *Bangladesh:* Whether the Indian and Pakistani position obtains in Bangladesh in respect of delegated legislation is an open question. Art.65 declares that vesting of the legislative power of the Republic in

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[1] *Edward Mills v. Ajmeer*, AIR 1955 SC 25; *Jalan Trading v. Mill Mazdoor*, AIR 1967 SC 691

[2] *Banarsi Das v. M.P.*, AIR 1958 SC 909

[3] *Mohemmadalli v. India*, AIR 1964 SC 980

[4] *Jalan Trading Co. v. Mill Mazdoor*, AIR 1967 SC 691

[5] *Rajnarayan v. Chairman, Patna Administration*, AIR 1954 SC 569

[6] *Corp. of Calcutta v. Liberty Cinema*, AIR 1965 SC 1107; *Devi Das v. Punjab*, AIR 1967 SC 1895

[7] *Sita Ram v. U.P.*, AIR 1972 SC 1168

[8] *J.R.G. Manufacturing Association v. India*, AIR 1970 SC 1589; *Devi Das v. Punjab*, AIR 1967 SC 1895; *Delhi Municipality v. B.G.S. & W Mills*, AIR 1968 SC 1232

[9] *Sita Ram v. U.P.*, AIR 1972 SC 1168

[10] *Delhi Municipality v. B.G.S. & W Mills*, AIR 1968 SC 1232; *Western India Theatre v. Mun. Corp.*, AIR 1959 SC 586; *Pir Mohd. & Brothers v. Khulna Mun. Comm.*, 19 DLR 55

[11] *Shohan Ajmee v. Commr. of Customs*, W.P. No.1882 of 2000 (Unreported)

Parliament shall not prevent it from delegating to any person or authority power to make orders, rules, regulations, bye laws or other instruments having legislative effect. In view of the settled position in the sub-continent that a legislature can delegate its power of legislation by declaring the policy of legislation, there was no necessity of making the declaration. In making this declaration the Constitution does not in any way restrict the power of delegation. It may be argued that the framers of the Constitution wanted to make a departure from the settled position and wanted to put Parliament for Bangladesh in the position somewhat similar to that of the British Parliament in the matter of delegation of legislative power. But it is difficult to accept such an argument as the entrenched provisions of the Constitution limit the plenary legislative power of Parliament for Bangladesh. It may be contended that because of the provisions of art.7 and the vesting of legislative power with Parliament a doubt may arise whether Parliament can at all delegate its legislative power to some other agency and the declaration was made to remove any such doubt as a restatement of the settled position and not to make a departure therefrom. Whatever view may be taken, it cannot be doubted that Parliament cannot delegate its legislative power in a manner which will amount to divestiture of its legislative power.[1]

4.37 Whether or not Parliament can delegate its legislative power without declaring the policy of legislation, there are some subjects in respect of which Parliament cannot delegate its legislative power. It may be noticed that the Constitution requires certain things to be done in 'accordance with law' ; certain things shall be done by 'Parliament by law' and certain other things shall be done by 'Act of Parliament'. When different expressions have been used different meanings are to be given unless any valid reason can be found for doing otherwise. The first expression includes not only an Act of Parliament but all that falls within the definition of law given in art.152. Parliament means Parliament for Bangladesh established under art.65. The second expression shall include an Act of Parliament as also a subordinate legislation made under the authority of an Act of Parliament. 'Act of Parliament' shall mean only the laws passed by Parliament for Bangladesh and nothing else, otherwise there will be no distinction between the second and third expression. Thus where the Constitution

[1] See *Shohan Ajmee v. Commr. of Customs*, W.P. No.1882 of 2000 (Unreported), where the High Court Division went by the settled position in India and Pakistan.

requires anything to be prescribed by an Act of Parliament[1], Parliament cannot delegate the function of making the law to any other authority. It is for this reason that after incorporating art.83, the framers included paragraph 13 in the Fourth Schedule to permit levy and collection of taxes under the pre-constitutional laws.

4.37A *Publication of delegated legislation:* Publication of a delegated legislation is required under the Statutory Instruments Act, 1946 in England and the Federal Register Act, 1935 in the United States. In Bangladesh there is no general provision for publication of delegated legislation. But the rule of law, a basic feature of the Constitution, requires that a law governing the conduct of the individuals must be stated and known to the individuals. An Act of Parliament needs no publication as it is known when the Bill is tabled, discussed and passed in Parliament. Promulgation of an Ordinance involves its publication. The rule of law requires publication of delegated legislation.[2] The delegated legislation may be published in various ways by broadcast, telecast or publication in the newspaper. In our country publication in the official Gazette is the usual mode. Where the delegating statute prescribes the mode, the delegated legislation must be published in that mode. When the delegated legislation is required to be published in the official Gazette, it takes effect from the date of such publication. It is not necessary that it be made known by other modes of publication.[3]

4.38 *Control of delegated legislation:* Delegated legislation, though necessary in modern States, is open to serious objection. It involves an abandonment of the legislative function by Parliament. Parliament often delegates powers without clearly mentioning the policy or standard and sometimes the policy or standard is vague so that the delegatee has almost uncontrolled and unguided powers. Very often the policy or standard is stated in broad and general terms and it is impossible for the court to grant any relief against harsh and unreasonable exercise of power. The system of delegated legislation adds to the powers of the executive correspondingly weakening the status of Parliament. What is more important, the delegated legislation does not get the publicity, consideration and discussion which the passage of a Bill in Parliament gets. It is therefore very important to have some control over the

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[1] Arts.72(3), 78(5), 85, 88(f), 142 and Paragraph 17(3) of Fourth Schedule

[2] *Harla v. Rajasthan*, AIR 1951 SC 467

[3] *Pankaj Jain v. India*, AIR 1995 SC 360; *India v. Ganesh Das*, AIR 2000 SC 1102

delegatee by the delegating Parliament. The rules of procedure of Parliament should provide for a standing committee to examine subordinate legislation and the delegating statute should provide for approval of the delegated legislation by such standing committee.

4.39 Delegated legislation is subject to judicial control. A delegated legislation may be challenged in court on any of the four grounds - (1) it is void because the delegating statute is not constitutionally valid, (2) it is not constitutionally valid, (3) it is *ultra vires* the delegating statute, (4) it is arbitrary or unreasonable. A delegating statute will be void if it is contrary to any provision of the Constitution. The courts hold that a delegating statute will be void if it effects an impermissible delegation involving delegation of legislative function without laying down a clear policy or standard. The courts have repeatedly iterated this principle, but in applying it in specific cases, have taken a very liberal view about the requirement of 'policy' statement. S.2(1) of Inter-Provincial Trade Ordinance, 1964 provided, "Notwithstanding anything contained in the Essential Commodities Act, 1957 (III of 1957), or in any other law for the time being in force, the Central Government, if it so deems necessary or expedient may, by general or special order, regulate the movement and transport of any commodity or class or description of commodities, including imported commodities, between the Provinces." The delegation was held unconstitutional. It was found that the legislature merely made a choice of the subject, that is, regulation of the movement of commodities between the provinces, but has not stated any policy or standard or any limitation on the exercise of the power. It did not indicate any principle for regulation of the movement of the goods. It simply gave unrestricted, undefined and unlimited power to regulate the movement of goods[1]. But this is one of the relatively rare occasions when the court made a real inquiry as to the presence of any legislative policy in the statute. In *Dacca Picture Palace Ltd. v. Pakistan*[2] s.6 of the Censorship of Films Act, 1963 was challenged on the ground of impermissible delegation of legislative power. S.6 provided, "(1) Notwithstanding anything in the Cinematograph Act, 1918 (II of 1918), or in any other law for the time in force, the Central Government shall prescribe the places or class of places licensed for the exhibition of cinematograph films where, and the periods for which, any certified film

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[1] *Ghulam Zamin v. A.B. Khandoker*, 16 DLR 486; see also *Devi Das v. Punjab*, AIR 1967 SC 1895

[2] 18 DLR 442

or class of certified film may be exhibited." It was contended that no policy has been laid down by the legislature and if there has been any policy that is in respect of censorship and decertification only as indicated in the preamble, but s.6 has given power to prescribe the places or class of places licensed for the exhibition of cinematograph films where, and the period or periods for which, any certified film may be exhibited and this is beyond the policy as laid down in the Act. Upon consideration of the provisions of the Act including its preamble, the majority held the opinion that the legislature has formulated the policy, i.e., to safeguard or develop the interest of the local film industry and for carrying out that policy guidance has been given, namely, the Central Government was to effectuate the policy by, amongst others, prescribing places or class of places and period or periods.[1] In *Pir Mohd. & Bros. v. Khulna Mun. Committee*[2] the court in spite of absence of any policy statement upheld the delegation of legislative power regarding levy of taxes by the municipality because of the requirement of governmental sanction and publication. The Pakistan Supreme Court rejected the plea of impermissible delegation by s.17 of the Arms Act empowering the government to make any rule laying down the terms on which licence for possessing fire-arms can be given stating that the nature of the subject required conferment of a wide discretion.[3] The Indian Supreme Court upheld the delegation of legislative power of fixing the rate of municipal tax without providing any guideline saying that the need of the municipal body to realise the tax itself provided the guidance.[4] Lack of guideline did not matter in respect of fixation of rate of tax when the law prescribed the maximum limit which the court considered reasonable.[5] Even when the delegating statute did not provide any guidance, the court upheld it finding that the previous law[6] or the previous practices[7] or the existing rules[8] indicated the guideline or the policy behind the statute. It is submitted that though there is necessity of permitting delegation of legislative power, the court should insist on some sort of meaningful guideline or policy statement which will

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[1] Ibid, Para 15
[2] 19 DLR 55
[3] *D.M. v. Raza Kazim*, 13 DLR (SC) 66
[4] *Corp. of Calcutta v. Liberty Cinema*, AIR 1965 SC 1107
[5] *Devi Das v. Punjab*, AIR 1967 SC 1895; *Sitaram v. U.P.*, AIR 1972 SC 1168
[6] *Bhatnagars & Co. v. India*, AIR 1957 SC 478
[7] *East Pakistan v. Sirajul Haq*, 19 DLR (SC) 281
[8] *Makhan Singh v. Punjab*, AIR 1964 SC 381

compel the executive to act in furtherance of the policy of the statute as also allow a meaningful judicial review of delegated legislation in case of challenge.

4.40 The delegated legislation, like the delegating statute, will be void if it is contrary to any provision of the Constitution.[1] It will be *ultra vires* if it travels beyond the scope of the authority conferred by the delegating statute or is in any way in conflict with the delegating statute.[2] In order to determine whether the subordinate legislation exceeded the power granted by the delegating statute the court has to examine both the statute and the subordinate legislation, but will not construe the subordinate legislation in a manner as to include a separate or independent power.[3] The power expressly granted includes the powers which are incidental or consequential and necessary to give effect to the statute[4]. The delegate while making the subordinate legislation neither can restrict or widen the scope of the delegating statute or its policy[5], nor can go beyond the policy laid down by the delegating statute so as to alter or amend the law[6]. The purpose of subordinate legislation is to carry into effect the existing law and not to change it.[7] Power conferred by a statute cannot be used for a different purpose outside the scope of the statute.[8] Apart from the general scope and purpose of the statute, the substantive provisions of the statute also operate as a limitation on the rule-making authority.[9] Unless the

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[1] *Air India v. Nergesh Meerza*, AIR 1981 SC 1829; *Narendra Kumar v. India*, AIR 1960 SC 430; *Md. Yasin v. Town Area Committee*, AIR 1952 SC 115; *Rashid Ahmed v. Municipal Bd.*, AIR 1950 SC 163

[2] *Bar Council v. Surjeet Singh*, AIR 1980 SC 1612; *Sales Tax Officer v. Abraham*, AIR 1967 SC 1823; *Narendra Kumar v. India*, AIR 1960 SC 430; *Commissioners of Customs & Excise v. Cure & Deeley*, [1961] 3 All E.R. 641; *Aminul Islam v. Bangladesh Biman*, 1982 BLD 1 (Power given in the statute to alter the terms and conditions of service cannot imply the power to make fresh classification of employees as freedom fighters and non-freedom fighters which was not contemplated in the statute. It is submitted that the majority judgment has very narrowly construed the power)

[3] *Durga Prasad v. Superintendent*, AIR 1966 SC 1209

[4] *Khargram P.S. v. W.B.*, (1987) 2 SCC 82; *Khanzode v. R.B.I.*, AIR 1982 SC 917

[5] *Agricultural Market Committee v. Shalimar Chemical Works Ltd*, AIR 1997 SC 2502

[6] *U.S. v. Grimand*, 220 US 506

[7] *Venkateswara v. A.P.*, AIR 1966 SC 629

[8] *Abdur Rahim v. Municipal Commissioners.*, 45 I.A. 125

[9] *Venkateswara v. A.P.*, AIR 1966 SC 828; *I.T. Commissioner v. Chenniappa*, AIR

delegating statute expressly authorises, the subordinate legislation cannot create an offence[1] or bar access to court[2] or give retrospective effect to the subordinate legislation[3] or impose any tax[4] or prescribe a limitation[5] or impart finality to a matter[6]. A subordinate legislation, unless permitted by the delegating statute, cannot override or affect the operation of the provisions of other statutes or general law.[7] In one case the Indian Supreme Court had, however, held that a subordinate legislation will not be invalid even though it is in conflict with the provisions of some general law, if it is within the scope of the delegating statute[8]. The Pakistan Supreme Court held that if the delegating statute has not excluded the principle of natural justice, the delegated legislation providing for exclusion of the principle will be void.[9] It should be noted that in view of the provisions of art.31, the delegating statute cannot exclude or permit delegatee to exclude the requirement of notice and hearing except in case of emergency. A delegated legislation may be invalid for non-compliance of some mandatory procedure prescribed in the delegating statute.[10] If the delegating statute mandatorily required hearing of objections before levy of tax by the municipal body the levy of tax without such a hearing will be void.[11] But if the procedure is not mandatory and failure to comply with the

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1969 SC 1068

[1] *U.S. v. Eaton*, 144 US 677; *Kharak Sing v. U.P.*, AIR 1963 SC 1295

[2] *Pyx Granite Co. v. Ministry of Housing*, [1959] 3 All E.R. 1; *Raymond v. Honey*, [1982] 1 All E.R. 756; *R v. Home Secretary ex p Leech*, [1993] 4 All E.R. 539

[3] *Abdul Hannan v. Collector of Customs*, 40 DLR 273 (Para 18); *Hukum Chand v. India*, AIR 1972 SC 2427; *Alleppy v. Ponnoose*, AIR 1979 SC 385; *India v. Krisnamurthy*, (1989) 4 SCC 689

[4] *Bimal Chandra v. M.P.*, AIR 1971 SC 517

[5] *S.T.O. v. Abraham*, AIR 1967 SC 1823

[6] *Dattatraya v. Probhakar*, AIR 1975 Bom 232

[7] *U.P. v. Hindusthan Aluminium*, AIR 1979 SC 1459; Craies on Statute Law, 7th ed., p.327; *Bangladesh Biman v. Lt. Col (Retd) Zainul Abedin*, 2000 BLD (AD) 230

[8] *T.B. Ibrahim v. Regional Transport Authority*, AIR 1953 SC 79

[9] *Abdur Rahman v. Collector & Deputy Commissioner*, 16 DLR (SC) 470; *East Pakistan v. Nur Ahmed*, 16 DLR (SC) 375

[10] *Eastern Beverage Ind. v. Bangladesh*, 47 DLR 32 (S.3 of the Central Excise and Salt Act authorised the National Board of Revenue to levy capacity tax in lieu of excise duty by notification specifying the guiding principles for determination of production capacity. Notification levying capacity tax was held void because of failure to specify the guiding principles.)

[11] *Rajnarayan v. Chairman, Patna Administration*, AIR 1954 SC 569

procedure has caused no prejudice the delegated legislation cannot be declared void.[1] A delegated legislation may be struck down if it is found to have been made *mala fide* or with an ulterior purpose.[2] But it is extremely difficult to establish a case of *mala fide* or ulterior motive. Coming to arbitrariness or unreasonableness of delegated legislation, the English courts struck down bye laws on the ground of arbitrariness or unreasonableness. In *Kruse v. Johnson*[3] Lord Russell observed -

> If for instance byelaws were found to be partial and unequal in their operation as between different classes; if they disclosed bad faith; if they involved such oppressive or gratuitous interference with the rights of those subject of them as could find no justification in the minds of reasonable men, the Court might as well say, 'Parliament never intended to give authority to make such rules; they are unreasonable and ultra vires'.

A byelaw which forbade playing music, singing or preaching in any street, except under express licence from the mayor, was held to be void as being plainly arbitrary and unreasonable.[4] Similarly, bye laws prohibiting sale of cockles on the beach without the consent of the Corporation[5] or restricting sales by auction in public market[6] were struck down as being unreasonable. Where a byelaw required landlord of lodging houses to clean them annually without having right to access against their lodgers[7] or where a building byelaw required an open space to be left at the rear of every new building so that in many cases it became impossible to build new extensions to existing buildings[8], the court struck down the byelaw as being unreasonable. The question is whether the ground of unreasonableness is available in cases of rules and regulations.[9] In England it was held that the principle of reasonableness would not apply to rules and regulations.[10] But if the

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[1] *Sitapur Municipality v. Prayag Narain*, AIR 1970 SC 58
[2] *McEldowney v. Forde*, [1969] 2 All E.R. 1039
[3] [1898] 2 QB 91
[4] *Munro v. Watson* (1887) 57 LT 366
[5] *Parker v. Bournemouth Corporation*, (1902) 66 JP 440
[6] *Nicholls v. Tavistock* UDC, [1923] 2 Ch 18
[7] *Arlidge v. Mayor of Islington*, [1909] 2 KB 127
[8] *Repton School Governors v. Repton* RDC [1918] 2 KB 133. See also *A.G. v. Denby*, [1925] 1 Ch 596; *London Passenger Transport Board v. Sumner*, (1935) 154 LT 108
[9] *Bangladesh v. Kundeswari Aushadhalaya*, 29 DLR (AD) 128, 134
[10] *Sparks v. Edward Ash Ltd*, [1943] 1 K.B. 223; *Taylor v. Brighton Borough Council*, [1947] 1 K.B. 736

reasoning in *Kruse v. Johnson* is carefully considered there can be no reason to limit that ground to byelaws only. When Parliament delegates legislative function to the administrative agency to make rules or regulations, Parliament cannot be said to have permitted the delegatee to make arbitrary or unreasonable rules or regulations. In *McEldowney v. Forde*[1] a regulation came up for consideration by the House of Lords. Lord Hodson posed the question, "The question may be put in this way - Is the whole regulation too vague and so arbitrary as to be wholly unreasonable as if, to take an example from one of the cases, a person were to be proscribed because he had red hair; or is the regulation, as the majority of the Court held, a legitimate and valid exercise the Minister's power conferred on him by statute?"[2] All the Law Lords considered the reasonableness of the regulation without saying that the principle of reasonableness is not applicable in case of regulations. It has been stated in the text book of Wade and Bradley, "In reviewing the contents of delegated legislation, the Courts do not lightly strike down a statutory instrument but they are now prepared to apply a test of unreasonableness where a regulation is so unreasonable that Parliament cannot be taken as having authorised it to be made under the Act in question."[3] Professor H.W.R. Wade commented, "The same doctrine applies to rules and regulations as well as to byelaws"[4] and cited, among others, the case of *R. Immigration Appeal Tribunal ex p. Begum Mansoora (1986)* where one of the Home Secretary's immigration rules was found invalid being manifestly unjust and unreasonable and partial and unequal in operation as between different classes.[5] Under art.31 of the Constitution a statute must be reasonable and not arbitrary and *a fortiori* a delegated legislation must pass the test of reasonableness.[6]

4.41 ***Control of public finance:*** The control of public finance is an important function of Parliament. It includes imposition of taxes, granting of money to the administration for expenses on public service and authorisation of loans. Through it, Parliament exercises control over

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[1] [1969] 2 All E.R. 1039

[2] Ibid p.1056

[3] Constitutional and Administrative Law, 12th ed., p.623;

[4] Administrative Law, 6th ed., p.869

[5] Ibid, p.870; see also *R. v. Customs and Excise ex p. Hedge and Butler Ltd*, [1986] 2 All E.R. 164

[6] In India the test of reasonableness is applicable to delegated legislation by reason of arts.14 and 19 of the Constitution. See *Air India v. Nergesh Meerza*, AIR 1981 SC 1829 and *Mysore v. Malick Hashim*, (1973) 31 STC 358.

the executive. The executive in Bangladesh can neither levy tax nor spend money all by itself without any authorisation of Parliament. Only Parliament can impose a tax and grant funds to the executive to defray public expenditures. Government's policies and their implementation are invariably brought into focus whenever Parliament discusses financial matters.

4.42 From the point of view of parliamentary procedure, the Constitution makes a distinction between Money Bills and Bills other than Money Bills. Money Bill means a Bill containing only provisions dealing with (a) the imposition, regulation, alteration, remission or repeal of any tax, (b) the borrowing of money or the giving of any guarantee by the government, or the amendment of any law relating to the financial obligations of the government, (c) the custody of the Consolidated Fund, the payment of money into, or the issue or appropriation of moneys from, that Fund, (d) the imposition of a charge upon the Consolidated Fund, or the alteration or abolition of any such charge, (e) the receipt of moneys on account of the Consolidated Fund or the Public Account of the Republic, or the custody of issue of such moneys, or the audit of the accounts of the government, or (f) any subordinate matter incidental to any of the aforesaid matters[1]. A Bill, however, shall not be deemed to be a Money Bill by reason only that it provides for the imposition or alteration of any fine or other pecuniary penalty, or for the levy or payment of a licence fee or a fee or charge for any service rendered, or by reason only that it provides for the imposition, regulation, alteration, remission or repeal of any tax by a local authority or body for local purposes[2]. No Money Bill nor any Bill involving expenditure from public moneys can be introduced in Parliament without the recommendation of the President[3]. But such a recommendation will not be necessary in the case of amendment of the Bill reducing or abolishing any tax.

4.42A Every Money Bill passed by Parliament shall have to be presented to the President for his assent together with a certificate of the Speaker that it is a Money Bill. Art.81(3) stipulates that this certificate is conclusive for all purposes and cannot be questioned in any court[4]. When certified as a Money Bill, the President cannot send the bill back

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[1] Art.81
[2] Art.81(2)
[3] Art.82
[4] Art.81(3)

to Parliament for reconsideration and if the President does not assent to the Bill, it shall be deemed to have been assented to by the President on the expiry of fifteen days from the date of presentation.

4.42B From 1980 onwards several Bills were certified as Money Bill by the Speaker though apparently those Bills were not covered by the definition of Money Bill given in art.81(1). The Bill of Public Safety Ain, 2000 was certified as a Money Bill. Several writ petitions[1] were filed challenging the validity of the statute on the ground of fraud on the Constitution and it was contended that the Bill *ex facie* not coming within the definition of Money Bill, the conclusiveness of the certificate of the Speaker will not take away the power of the court to inquire into the correctness of the certificate and to declare the statute void, particularly when fraud on the Constitution is alleged. The respondent government has taken the stand that the Speaker certified the Bill in question acting as the Speaker and his act of certification forms part of the proceedings of Parliament and in view of the provision of art.78(1) it cannot be challenged in court even if fraud is shown to have been practised on Parliament in making a law.[2] Furthermore, when the Constitution stipulates that such a certificate shall be conclusive for all purposes, all judicial inquiry is foreclosed and any holding otherwise would render the relevant clause redundant and surplusage and the court cannot by interpretation of the provision of the Constitution produce such a result.[3] The writ petitions came up before a Division Bench of the Supreme Court and the two Judges differed in their opinion and the matter is awaiting decision by a third Judge.

4.43 The government cannot make any expenditure without the sanction of Parliament. The mechanism of parliamentary control over appropriation is the Consolidated Fund out of which all governmental expenditure is met. Originally the British Parliament voted taxes to the King who was free to collect it and spend for purposes he liked and often the money was spent for purposes other than the purposes for which he asked it. Parliament then started to levy taxes and appropriate it for specific purposes as a result of which no money would be left for general purposes when it came to passing Budget. To avoid this situation, a single fund was created into which all revenues were

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[1] *Mujibur Rahman v. Bangladesh*, W.P. No.897 of 2001 & other writ petitions.

[2] *British Railways Board v. Pickin*, [1974] AC 765

[3] See *R. v. Registrar of Companies, ex p Central Bank of India*, [1986] 1 QB 1114) for the effect of "conclusive evidence" on judicial review.

deposited and from which all expenditure was met according to the Budget passed by Parliament. In Bangladesh the Consolidated Fund is formed with all revenue receipts, all loans raised by the government and all moneys received by the government in repayment of its loans.[1] No money can be withdrawn from the Consolidated Fund without an Appropriation Act passed by Parliament.[2] Besides the Consolidated Fund, there is the Public Account in which are credited all moneys other than those which are to be put in the Consolidated Fund.[3] Payment of money into and its withdrawal from the Consolidated Fund or the Public Account is to be regulated by an Act of Parliament and if no such Act has been passed, by the rules made by the President.[4] But no Appropriation Act is needed to withdraw money from the Public Account.

4.44 Public expenditures are classified into two categories, namely, expenditure charged on the Consolidated Fund and the charges granted by Parliament on an annual basis. The former category consists of the charges of a permanent nature or charges which it is desirable to keep above controversial party politics. Parliamentary control over these items is very limited as these can be discussed, but cannot be submitted to vote of Parliament[5]. These items are - (a) remuneration of the President and expenditures relating to his office, (b) the remuneration of the Speaker, Deputy Speaker, the Judges of the Supreme Court, the Comptroller and Auditor-General, the Election commissioners and the members of Public Service Commissions, (c) the administrative expenses of, including remuneration payable to, officers and servants of Parliament, the Supreme Court, the Comptroller and Auditor-General, the Election Commission and the Public Service Commissions, (d) all debt charges for which the government is liable, including interest, sinking fund charges, the repayment or amortisation of capital, and other expenditure in connection with the raising of loans and the service and redemption of debt, (e) any sums required to satisfy a judgment, decree or award against the Republic by any court or tribunal, and (f) any other

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[1] Art.84(1)
[2] Art.90(3)
[3] Art.84(2)
[4] Art.85; *Bangladesh v. Hon'ble Judge*, 34 DLR (AD) 212 (Prize Court Fund consists of money payable into the Public Account of the Republic, but in the absence of any Act of Parliament or rules made by the President, the government cannot withdraw the money or deal with it.
[5] Art.89(1)

expenditure charged upon the Consolidated Fund by the Constitution or by an Act of Parliament[1].

4.45 Most of the appropriations made by Parliament are on annual basis. Hence every year the executive has to come before Parliament asking for grants for the ensuing year and Parliament gets the opportunity of criticising and reviewing the activities and the policies pursued by the administration during the preceding year. Annual appropriations go through several stages. It starts with the presentation of an annual financial statement before Parliament, popularly known as Budget, which is presented by the Finance Minster. It is the statement of the estimated receipts and expenditures of the government for the ensuing year (July 1 to June 30). It shows separately the expenditures charged on the Consolidated Fund and other expenditures proposed to be made from the Consolidated Fund.[2] The expenditures charged on the Consolidated Fund are discussed, but not voted upon. Other expenditures which are proposed in the form of demands are discussed and put to vote of Parliament.[3] Parliament may assent to, reject or reduce, but cannot increase, the amount of any demand. No demand for any grant can be made except with the recommendation of the President.[4] A private member cannot suggest any new expenditure, nor propose any increase in the demand. He can only move cut motions to reduce the amount of a demand and through it he can criticise the government and administration, discuss the conduct of the executive and suggest economy of the government expenditure. Cut motions though freely moved by members when demands for grants are being discussed, are seldom pressed for voting as it would not succeed as the government would use its majority to defeat them as the acceptance of a cut motion inevitably involves the fall of the government. It is used only to initiate discussion on the conduct and the policies of the executive. The demands made by the government are invariably accepted by Parliament after a discussion.

4.46 No money can be withdrawn from the Consolidated Fund without an Appropriation Act being passed by Parliament. The sanction given by Parliament to the demands for grants does not authorise the expenditure. Therefore, as soon as the grants under art.89 have been

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[1] Art.88
[2] Art.87
[3] Art.89(2)
[4] Art.89(3)

made a Bill to provide for appropriation out of the Consolidated Fund is to be introduced.[1] No amendment can be proposed to vary the amount or alter the destination of any grant previously agreed or to vary the expenditure charged on the Consolidated Fund[2], the reason being that the grants already voted upon should not be disturbed later.

4.47 The last rite in the annual parliamentary financial procedure is the enactment of the Finance Act to approve the government's taxation proposals for the ensuing year. In order to maintain control over the executive, some of the taxes are imposed on yearly basis and renewed every year. The Finance Act renews the annual taxes, imposes new taxes and makes adjustments in the permanent taxes to raise revenue necessary to meet the appropriations made out of the Consolidated Fund. The taxes sought to be collected can be levied and collected after passing of the Finance Act. The delay in passing the Finance Act may cause loss of revenue and therefore the government is authorised under the Provisional Collection of Taxes Act, 1931 to start collection of duty of customs and other specified taxes at the proposed new rates immediately from the date of presentation of the Finance Bill in Parliament.

4.48 It sometimes happen that the amount authorised to be spent for a particular service for the current year is insufficient or expenditure for some new services not included in the Budget of the year has to be made or the money spent on a service during the year is in excess of the amount granted. In such a case the President has power to authorise expenditure from the Consolidated Fund and to lay before Parliament a supplementary Budget for the assent of Parliament in the manner the Budget is assented to.[3]

4.49 As no expenditure can be made from the Consolidated Fund without parliamentary authorisation by an Appropriation Act, it may create immense difficulty if the Appropriation Act cannot be passed before the commencement of the new financial year. Hence, art.92 permits Parliament to (1) make any grant in advance in respect of the estimated expenditure for a part of any financial year pending the voting of such grant and passing of the Appropriation Act or (2) make a grant for an unexpected demand upon the resources of the Republic when on

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[1] Art.90(1)
[2] Art.90(2)
[3] Art.91

account of the magnitude or indefinite character of the service the service cannot be specified with detail in the Budget or (3) make an exceptional grant which forms no part of the current services of any financial year. Once Parliament assents to these grants, it has to enact a law authorising withdrawal of money from the Consolidated Fund. The procedure prescribed for making annual appropriations has to be followed in making the grant and passing the law under art.92.

4.50 In the event Parliament fails to assent to the demand for grant and pass the Appropriation Act in respect of any financial year without making any grant in advance and passing the law authorising withdrawal of money from the Consolidated Fund before the commencement of the financial year or having made the advance grant with law to withdraw money from Consolidated Fund fails to assent to the demand for grant and pass the Appropriation Act before the expiry of the period for which the advance grant was made, under art.92(3) the President may, on the advice of the Prime Minister, authorise withdrawal of money from the Consolidated Fund to meet the necessary expenditure for a period not exceeding sixty days. The provision is made to meet a contingency. But it may operate as a pressure on Parliament. If Parliament is unwilling to assent to the demand for grant made by the executive, the executive can have Parliament dissolved and this provision permits the executive to overcome the difficulty arising out of the absence of parliamentary sanction.

4.51 It often happens that all the money required for the public expenditure cannot be raised by taxation and the government has to resort to borrowing. Art.144 gives authority to the executive to enter into contract and the government can borrow money for which sanction of Parliament is not necessary. All borrowings in a financial year are shown in the Budget and in approving the Budget Parliament approves the borrowings. In another way Parliament has control over borrowings. All borrowings do form part of the Consolidated Fund[1] and Parliament's authorisation is necessary for expenditure from the Consolidated Fund.

4.52 *Levy and collection of tax:* Art.83 provides that no tax shall be levied or collected except by or under the authority of an Act of Parliament. The article provides a protection against arbitrary or illegal exactions which can be enforced through proper court proceedings. If a tax-payer is made to pay an unconstitutional tax, he can recover the

[1] Art.84(1)

amount paid by filing civil suit or writ petition if the tax is sought to be levied without following the mandatory provisions of the law[1].

4.53 The word 'tax' has been defined in art.152(1) as follows -

> 'taxation' includes the imposition of any tax, rate, duty or impost, whether general, local or special, and 'tax' shall be construed accordingly

Thus the word 'tax' has been used in a comprehensive sense to include all money raised by taxation and includes those known as 'rates' or other charges levied by local authorities under statutory powers.[2] A tax cannot be levied or collected merely by an executive fiat or action without there being a law to support the same[3]. In the Indian jurisdiction there is a conflict of judicial opinion as to whether levy or collection of tax by usage is ruled out[4]. But there is no scope of any such conflict of opinion in Bangladesh as art.83 contains the expression 'by or under the authority of an Act of Parliament'. Under art.83 not only the levy but also the collection of tax must be sanctioned by or under the authority of an Act of Parliament. The expression 'levy' includes creation of liability and fixation of its quantum and the expression collect refers to physical realisation of tax[5]. It was held by the High Court Division that fixation of rate of duty is a function which has to be performed by Parliament and this function cannot be delegated and this constitutional power cannot be shared with any body.[6] It is submitted that the language by or under the authority of an Act of Parliament in art.83 shows that a tax can be levied by an Act of Parliament or by somebody else under the authority of an Act of Parliament.[7] A law for levying tax may be made with retrospective effect[8]. The imposition cannot exceed what the statute

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[1] *Poona City Municipal Corp. v. Dattatraya*, AIR 1965 SC 555; *Bharat Kala Bhander v. Dhamangaon Municipality*, AIR 1966 SC 249

[2] *Gouse v. Kerala*, AIR 1980 SC 271, 275 (The definition of `tax' in the Indian Constitution is the same)

[3] *Kerala v. Joseph*, AIR 1958 SC 296

[4] *Wadhwani v. Rajsthan*, AIR 1958 Raj 138 and *Guruswami Nadar v. Ezhumalai Panchayet*, AIR 1968 Mad 271

[5] *Somaiya Organics (Pvt) Ltd. v. UP*, AIR 2001 SC 1723

[6] *A. Hannan v. Collector of Customs*, 40 DLR 273 (This decision was upheld by the Appellate Division in *Collector of Customs v. A. Hannan*, 42 DLR (AD) 167, on the ground of promissory estoppel and nothing was said about the non-delegability of power of levying tax or duty.)

[7] See Para 4.35

[8] *Chhotabhai v. India*, AIR 1962 SC 1006; *Muhammadbhai v. Gujarat*, AIR 1962 SC

authorises and the tax must fall within the four corners of the statute.[1] Therefore where the statute authorises levy of education tax on the basis of income derived from trade, business or profession, assessment of the tax on the total income of the assessee is illegal.[2] A law imposing a tax should not be contrary to the provisions of the Constitution including those relating to fundamental rights.[3]

4.54 Not only a tax must be validly levied, its collection must also be in accordance with the Act of Parliament. Thus, when an Act of Parliament provides that a tax shall be collected in such manner as may be prescribed by rules, the tax cannot be collected until the rules are made[4]. This article gives protection against arbitrary collection of tax. When an assessment is made in an arbitrary fashion, there is no collection of tax in accordance with an Act of Parliament[5]. In *Zaminur Rahman v. Bangladesh*[6] the question arose whether a private person can be authorised to collect octroi and appropriate it wholly or in part. The Municipal Administration Ordinance, 1960 authorised levy and collection of octroi by the municipalities. The Municipal Committee (Assessment and Collection of Octroi) Rules was amended in 1976 permitting alternative method of collecting octroi by leasing out octroi posts in public auction to private persons who would collect and appropriate octroi. The alternative mode was challenged as violative of art.83. The Appellate Division rejected the contention of the petitioner holding that octroi is not a tax as octroi when collected does not go to the Consolidated Fund and that it is in the nature of a toll or fee. Art.60 provides that Parliament shall by law confer on the local government bodies power to impose tax for local purposes. There is no reason to hold that the word 'tax' in art.83 and art.60 has been used in different senses.[7] It is thus abundantly clear that 'tax' can be levied and collected

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1517; *Prithvi Cotton Mills v. Broach Borough Municipality*, AIR 1970 SC 192 (The Court held that by proper legislation illegal imposition of tax can be validated. See the discussion on validating legislation in Para 2.109-2.110)

[1] *N.K.K. Samaj v. Corporation of Nagpur*, AIR 1956 Nag 152

[2] *Phani Bhushan v. Province of Bengal*, 54 CWN 176

[3] *Chhotabhai v. India*, AIR 1962 SC 1006

[4] *Khurai Municipality v. Kamal Kumar*, AIR 1965 SC 1321

[5] *Appukutty v. STO*, AIR 1966 Ker 55

[6] 31 DLR (AD) 171

[7] Art.83 has not undergone any change by amendment and hence no objection can be taken to interpretation of art.83 with reference to art.60 on the ground that in 1976 art.60 stood repealed.

by the government and local government bodies. Tax levied and collected by the local government bodies for local purposes will go to the fund of the local government bodies and the fact that tax collected by the local government bodies does not go to the Consolidated Fund does not take it out of the definition of tax within the meaning of art.83. It can be seen that art.84 requires all revenues of the government, and not all taxes, to be put into the Consolidated Fund. Again, s.3(42) of the Ordinance defines tax as follows-

> 'tax' includes any toll, rate, fee, or other impost leviable under this Ordinance.

The definition is an inclusive one and it does not necessarily follow from there that octroi is 'nothing but a toll or fee'. Indeed in the Third Schedule of the Ordinance octroi is mentioned in item no.4 as tax on the import of goods for consumption, use or sale in a municipality, while toll is treated differently as taxes in the nature of toll. Fees are separately described there. Presence of *quid pro quo* distinguishes tolls and fees from tax.[1] But in octroi there is no *quid pro quo*. The Constitution has used the expression 'tax' in a wide sense as can be seen from the definition given art.152(1) and, it is submitted, octroi is a tax for local purposes which cannot be allowed to be collected and appropriated even in small quantity by any private person.

4.55 ***Deliberation and discussion:*** Deliberation and discussion is an important function of Parliament. Through it Parliament debates public issues and shapes and influences the government policy and ventilates public grievances. Not only in legislation, but also in making appropriations Parliament has the opportunity of reviewing the government policy and its administration. Debate on the President's address also offers the members opportunity to criticise the government policy and actions. In addition, the rules of procedure provide many other technic for initiating discussion on public issues in Parliament. The members put questions to the Ministers to elicit information on matters of public importance. The parliamentary questions provide a check on day to day administration and help securing redress of individual grievances. This function was aptly described by Mr. Herbert Ashquith, a former British Premier, as the Grand Inquest of the Nation. Speaking about the deliberative function Courtney Ilbert stated -

> There is no more valuable safeguard against maladministration, no more

[1] *Commissioner, H.R. Endowment v. Swamiar*, AIR 1954 SC 282

> effective method of bringing the searchlight of criticism to bear on the action or inaction of responsible Ministers and their subordinates. A Minister has to be constantly asking himself not merely whether his proceedings and the proceedings of those for whom he is responsible are legally defensible, but what kind of answer he can give if questioned about them in the House and how that answer will be received.[1]

4.55A Art.73A provides that a Minister shall not be entitled to vote or speak on any matter not related to his Ministry unless he is a member of Parliament. The Prime Minister may allocate as many portfolios to a non-member Minister, but without such allocation of portfolio a non-member Minister is totally debarred from speaking in Parliament in any matter not connected with his portfolio.[2]

AMENDMENT OF THE CONSTITUTION

4.56 Art.142 of the Constitution confers power on Parliament to amend the Constitution. For such amendment there are some procedural requirements. A Bill for amendment of the Constitution must contain a long title expressly stating that it will amend a provision of the Constitution. It was contended that the long title must specifically mention which provision is sought to be amended, otherwise the amendment passed will be void. The majority decision of the Appellate Division is that the specific provision need not be mentioned in the Bill and the requirement will be fulfilled if the long title states that certain provision or provisions is or are sought to be amended[3]. No such Bill shall be presented to the President for his assent unless it is passed by the votes of not less than two-thirds of the total number of members of Parliament. The President shall within seven days of the presentation of the Bill after being passed in Parliament with the requisite majority assent to the Bill and if he fails to assent within that time he shall be deemed to have assented to the Bill. But if the Bill seeks to amend the Preamble or any of the provisions of arts.8, 48, 56 or 142 the President shall within seven days of presentation of the Bill for his assent cause it to be referred to a referendum and if the majority votes in the referendum are in favour of the amendment the President shall be

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[1] Parliament, 1953, p.98

[2] *Nazmul Huda v. Secretary, Cabinet Affairs*, 2 BLC 414

[3] *Anwar Hossain Chowdhury v. Bangladesh*, 1989 BLD (Spl) 1, Para 411, 415, 608 and 615

deemed to have assented to the Bill, otherwise the President shall be deemed to have withheld his assent from the Bill. The procedural requirements are mandatory and non-compliance of the requirements will render the amendment void.

4.57 Art.142 gives power to Parliament to amend any provision of the Constitution by way of addition, alteration, substitution or repeal. Addition, alteration, substitution or repeal are merely modes of amendment and if the act done does not come within the meaning of 'amendment', it will not be valid, notwithstanding that all the procedural requirements have been fulfilled. Amendment means a change in some of the existing provisions of a statute[1] and a law is amended when it is in whole or in part permitted to remain and something is added to, or taken from it, or it is in some way changed or altered in order to make it more complete, or perfect, or effective[2]. An amendment is not the same thing as a repeal, although it may operate as a repeal to a certain degree[3]. When a constitution is enacted it is the result of political consensus of the people who agree on certain basic fundamentals about their political organisation and the details are formulated to give body and content to such political organisation. A constitution is meant to be permanent, but as all changing situations cannot be envisaged and amendment of the constitution may be necessary to adopt to the future developments, provision is made in the constitution itself to effect changes required by the changing situations. When a legislature, which is a creature of the constitution, is given the power of amendment, it is a power given not to subvert the constitution, but to make it suitable to the changing situations. The question, therefore, arises whether the legislature, in exercise of the power of amendment granted by a constitution, can alter any basic structure or feature of the constitution. This question arose in the Indian jurisdiction and the Indian Supreme Court held that Parliament in exercise of the power of amendment cannot alter the basic structure or feature of the constitution[4]. The same question arose in our

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[1] *Sheridan v. Salem*, 14 Ore 328

[2] *U.S. v. Lapp*, 244 Fed 377; Crawford - The Construction of Statutes, 1940, p.170

[3] *State v. Hubbard*, 148 Ala 391

[4] *Keshavananda v. Kerala*, AIR 1973 SC 1461; *Indira Gandhi v. Raj Narayan*, AIR 1975 SC 2299; *Minerva Mills Limited v. India*, AIR 1980 SC 1789; *Waman Rao v. India*, AIR 1981 SC 271; *Sampath Kumar v. India*, AIR 1987 SC 386; *Sambamurthy v. A.P.*, AIR 1987 SC 663; initially the Pakistan Supreme Court rejected the theory of basic structure, but later trend showed a leaning towards acceptance of the theory – see *Wukula Mahaz v. Pakistan*, PLD 1998 SC 1263, 1310 and the decisions referred to in

jurisdiction in *Anwar Hossain Chowdhury v. Bangladesh*[1]. By Martial Law Proclamations six permanent Benches of the High Court Division outside the capital were created. The lawyers started movement against the measure. When the Constitution was revived in 1986 those permanent Benches outside the capital were treated as sessions of the High Court Division. They contended that this was unconstitutional. On 9.8.1988 Parliament amended art.100 of the Constitution setting up six permanent Benches outside the capital and authorised the President to fix the territorial jurisdiction of the permanent Benches by notification and thereby to curtail the territorial jurisdiction of the High Court Division in the permanent seat. Writ petitions were filed challenging the amendment on the principal ground that the basic structure of the Constitution cannot be changed by way of amendment and the amendment of art.100 altered the basic structure of the Constitution as it rendered the High Court Division with plenary judicial power over the entire Republic non-existent. The writ petitions were summarily rejected and the matter came up before the Appellate Division. The court was confronted with two main questions - whether in exercise of power under art.142 Parliament can alter the basic structure or basic features of the Constitution and whether by amendment of art.100 any basic structure or feature of the Constitution had been altered or destroyed. The court answered the first question in the negative and the second in the affirmative. B.H. Chowdhury J found-

> The term 'amendment' implies such an addition or change within the lines of the original instrument as will effect an improvement or better carry out the purpose for which it was framed.[2]
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> * * * *
>
> Now, some of the features are basic features of the Constitution and they are not amendable by the amending power of the Parliament. In the scheme of Article 7 and therefore of the Constitution the structural pillars of Parliament and Judiciary are basic and fundamental. It is inconceivable that by its amending power the Parliament can deprive itself wholly or partly of the plenary legislative power over the entire Republic.[3]

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this decision. Recently, Pakistan Supreme Court, while conceding to the Martial Law Administrator power to amend the constitution, imposed the limitation that such amendment cannot alter the basic features of the constitution, saying that he cannot have that power which the Parliament does not have – see *Zafar Ali Shah v. General Pervez Mosharraf*, PLD 2000 SC 869; *Wasim Sajjad v. Pakistan*, PLD 2001 SC 233

[1] 1989 BLD (Spl) 1 = 41 DLR (AD) 165

[2] Ibid, Para 192

[3] Ibid, Para 255

> To illustrate further, the President must be elected by direct election (Article 48). He must have a council of ministers (Article 58). He must appoint as Prime Minister the member of Parliament who appears to him to command the support of the majority of members of Parliament (Article 58(3)). Both these Articles 48 and 58 are protected and so is Article 80 which says every proposal in Parliament for making a law shall be made in the form of a Bill. Now if any law is inconsistent with the Constitution (Article 7) it is obviously only the judiciary can make such declaration. Hence the constitutional scheme if followed carefully reveals that these basic features are unamendable and unalterable. Unlike some other Constitution, this Constitution does not contain any provision 'to repeal and replace' the Constitution and therefore cannot make such exercise under the guise of amending power.[1]

While coming to this finding the learned Judge referred to the Martial Law amendment of art.142 rendering the preamble and some other articles unamendable without a favourable result in a referendum. Reference to the unamendability of these provisions, it is submitted, is misleading. Apart from the question of validity of such Martial Law amendment, the question of unamendability of basic structure is essentially one connected with the intention of the framers of the Constitution and is therefore a question relating to the original dispensation[2] and it cannot depend on the interpretation of an amended provision. If an amended provision constitutes a basic feature, it certainly has effected a basic change in the original Constitution and must be held void on the very finding of the learned Judge.

4.58 Shahabuddin Ahmed J noted the difference between the constituent power of adopting a constitution and the derivative power of amending the constitution and having regard to the connotation of the term 'amendment' took the view that amendment of the Constitution does not mean its abrogation or destruction or a change resulting in the loss of its identity and character. The learned Judge concluded -

> There is no dispute that the constitution stands on certain fundamental principles which are its structural pillars and if these pillars are demolished or damaged the whole constitutional edifice will fall down.[3] ... As to implied limitation on the amending power, it is inherent in the word 'amendment' in Art.142 and is also deducible from the entire

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[1] Ibid, Para 256

[2] see *Fazle Rabbi v. Election Commission*, 44 DLR 14

[3] 1989 BLD (Spl) 1, Para 376

> scheme of the Constitution. Amendment of the Constitution means change or alteration for improvement or to make it effective or meaningful and not its elimination or abrogation. Amendment is subject to the retention of the basic structure. The Court therefore has power to undo an amendment if it transgresses its limit and alters a basic structure of the Constitution.[1]

4.59 M.H. Rahman J did not reject the contention of the appellants. Rather he was inclined to accept the doctrine. But, according to him, the doctrine of basic structure is in a nascent stage and it may take some time before it gets acceptance from the superior courts of the countries where constitutionalism is prevailing. In other words, time has no yet come to accord full recognition to the doctrine. He, however, held that when Parliament by itself cannot amend the preamble, it cannot indirectly impair or destroy the fundamental aims of our society mentioned in the preamble. He observed –

> ... The people of Bangladesh adopted, enacted and gave to themselves the Constitution pledging in clear terms in the Preamble `that it shall be a fundamental aim of the State to realise through the democratic process a socialist society, free from exploitation - a society in which the rule of law, fundamental human rights and freedom, equality and justice, political, economic and social, will be secured for all citizens' ... the Proclamation Order No.IV of 1978 made the Preamble along with Articles 8, 48, 56, 58, 80, 92A an entrenched provision in the Constitution ... The Preamble has become the touchstone for assaying the worth or the validity of an amendment that may be passed in accordance with clause (1) of Art.142. When the Parliament cannot by itself amend the Preamble it cannot indirectly by amending a provision of the constitution impair or destroy the fundamental aim of our society.[2]
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> The provisions contained in Part VI for the Supreme Court are not entrenched provisions and they can be amended by the legislature under Art.142. but if any amendment causes any serious impairment of the powers and the functions of the Supreme Court the makers of the Constitution devised as the kingpin for securing the rule of law to all citizens, then the validity of such an amendment will be examined on the touchstone of the Preamble.[3]

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[1] Ibid Para 378
[2] Ibid Para 388
[3] Ibid Para 391

The approach of M.H. Rahman J was different. He did not rely on the doctrine of basic structure. He based his decision on the fact that there is an express limitation in the matter of amendment of the preamble and hence by an indirect means the preamble cannot be amended by impairing or destroying any fundamental aim of the State mentioned in the preamble.

4.60 A.T.M. Afzal J though apparently rejected the doctrine of basic structure, it can be seen that having regard to the meaning of the words 'amend' and 'amendment' he accepted the limitation on the amending power of Parliament in a restricted way. He observed -

> The power to amend any provision of the Constitution by way of addition, alteration, substitution or repeal is found to be unlimited except as provided in Art.142 itself. *But there is a limitation inherent in the word 'amend' or 'amendment' which may be said to be a built-in limitation ... Whatever meaning those words may bear, this, in my opinion, cannot be disputed that they can never mean, to 'destroy', 'abrogate', and 'destruction' or 'abrogation'*. It is significant that under Art.142 any provision of the Constitution may be repealed but there is no conferment of power to repeal the Constitution itself as are to be found in the then Constitution of Pakistan of 1956 and the Constitution of Ceylon ... *Therefore in exercise of the power under Art.142 the Constitution cannot be destroyed or abrogated. The destruction of the Constitution will be the result if any of its 'structural pillars', that is, the three organs of the Government, Executive, Legislature and Judiciary is destroyed. The result will also be the same if any of these organs is emasculated and castrated in such manner as would make the Constitution unworkable*[1](Italics supplied).

It can be seen that B.H. Chowdhury, S. Ahmed and A.T.M. Afzal JJ agreed that the expression 'amendment' is a word of limited import and at any rate it does not cover repeal or destruction of the essential pillars of the Constitution. If we carefully consider the observation of Afzal J (quoted in Para 4.62) it will be seen that the difference in the opinion of Afzal J with the opinion of B.H. Chowdhury J and S. Ahmed J is minimal.

4.61 Coming to the question whether the amendment of art.100 affected the basic structure of the Constitution, three learned Judges found that the High Court Division with plenary judicial power over the

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[1] Ibid, Para 562

entire Republic is a basic structure of the Constitution and the amendment having destroyed the plenary judicial power of the High Court Division altered the basic structure of the Constitution and is, therefore, void. B.H. Chowdhury J held-

> The amended sub-Article (5) has disrupted structural balance that was carefully erected in Part VI of the Constitution ... If sub-article (5) attempted to create two new sets of Courts by a device terming them as 'permanent Benches' and the 'Bench at the permanent seat' then ... the least that can be said is that it is hit by Article 114 which enables the legislature for setting up subordinate courts of law but such must not be of co-ordinate jurisdiction or compete with Article 44 ... Sub-article (5) has clearly destroyed the structural pillar of the Constitution as given in Article 94 and thus has violated the mandate of the Constitution and further brought itself within the mischief of the provisions of Article 7(2).[1]

Shahabuddin Ahmed J observed -

> The High Court Division as an integral part of the Supreme Court has lost its original character as well as most of its territorial jurisdiction. Seven judicial bodies, by whatever name they are called, Benches or Courts, are, to all intents and purposes, independent courts having no relation with each other except a thin link through the Chief Justice ... The 'High Court Division' sitting in the permanent seat is not the original High Court Division with jurisdiction over the whole of the Republic, it is a court with limited territorial jurisdiction - that is, the jurisdiction over what is called the `residuary area' in clause (5) of the impugned Article ... High Court Division, as contemplated in the unamended Article is no longer in existence and as such the Supreme Court, one of the basic structures of the constitution, has been badly damaged, if not destroyed altogether.[2]

According to M.H. Rahman J -

> One of the fundamental aims of our society is to secure the rule of law for all citizens and in furtherance of that aim Part VI and other provisions were incorporated in the Constitution. Now by the impugned amendment that structure of rule of law has been badly impaired, and as a result the High Court Division has fallen into sixes and sevens - six at

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[1] Ibid, Para 139-141
[2] Ibid, Para 378

the seats of the permanent Benches and seven at the permanent seat of the Supreme Court.[1]

The learned dissenting Judge, A.T.M. Afzal J held -

> It is clear that in matters of exercise of judicial power, the High Court Division has been treated separately in the Constitution and the impugned amendment is but only an extension of such treatment. What is important to remember is that no other Article of Chapter I has been amended (except 107(3) which is consequential) it must be presumed that the integrity of the Supreme Court/High Court Division with its unlimited territorial jurisdiction has not been impaired and the High Court Division has remained one as before and therefore the impugned amendment has to be construed in harmony with all other provisions of Chapter I.[2]

4.62 Before coming to the conclusion that the amendment did not impair the integrity of the High Court Division with its unlimited territorial jurisdiction, the learned dissenting Judge commented –

> ... the entire argument on behalf of the appellants rests on an assumption ... that by assigning the areas to the permanent Benches and leaving the residue to the High Court Division sitting at the permanent seat, the jurisdiction of the Judges on those Benches have been limited to the areas thus assigned (territorially limited) and as such they have ceased to be Judges of the High Court Division exercising plenary power through out the Republic as envisaged under the Constitution. If this assumption or interpretation is correct, I shall have no hesitation to accept the argument elaborated for days together that the High Court Division, a structural pillar of the constitution, has ceased to exist ...

The learned Judge drew a distinction between jurisdiction in relation to an area and jurisdiction within an area. It is submitted that the distinction is really not material. Sub-art.(5) provided that the President would assign the area in relation to which each permanent Bench would have jurisdiction and the area not assigned would be the area in relation to which the High Court Division at the permanent seat would have jurisdiction. This made it clear that the jurisdiction of the High Court Division at the permanent seat would be limited to the unassigned area, while the jurisdiction of a permanent Bench would not extend to the area not assigned to it. The rules framed made the position further clear

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[1] Ibid, Para 456
[2] Ibid, Para 580

highlighting the exclusivity of the jurisdiction. It may also be seen that there was no provision in the amended art.100 for transfer of cases from one permanent Bench to another or to the High Court Division in the permanent seat and *vice versa.* This was crucial and the learned Judge also agreed when he said that the absence of any authority to transfer cases would amount to creation of seven High Court Divisions with mutually exclusive jurisdiction which is entirely outside the contemplation of the Constitution.[1] The learned Judge was of the view that though authority to transfer cases has not been given to any body, the Chief Justice could always make rules providing for transfer of cases in his discretion when sub-art.(6) conferred power on him to make rules providing for all incidental, supplemental or consequential matters relating to permanent Benches. Transfer of cases, it is submitted, cannot be treated as an incidental, supplemental or consequential matter. When the place of suing is determined by law, transfer of a case from its legal forum is inconsistent with the law, unless the law itself provides for such a transfer. Therefore, power to transfer is always expressly given. In this case, an express provision for transfer of cases was necessary because exercise of such a power would conflict with the exclusivity created by sub-art.(5).[2] Any rule providing for transfer of cases would be inconsistent with the assignment of area under sub-art.(5) and would be *ultra vires,* unless the Constitution itself expressly permitted making of such a rule. In order to overcome the difficulty, the learned Judge placed reliance on *Shamsuddin v. Gauhar Ayub*[3], but this decision had no application in this case. In *Shamsuddin* the Chief Justice of the West Pakistan High Court was empowered to make provision for assigning areas to Benches at Karachi and Peshawar. Power to assign area included the power to modify the assignment. Transfer of a case is nothing but modification of such assignment in a particular case. Thus the Pakistan Supreme Court had no difficulty in finding the power of transfer in favour of the Chief Justice even though there was no express grant of such power. But in the instant case, sub-art.(5) conferred the power of assignment of area on the President and as such in the absence of any specific provision in the Constitution, the question of the Chief Justice modifying the assignment in particular cases could not arise and

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[1] Ibid, Para 596

[2] In *Sk. A.K.M. Abdul Mannan v. Raj Textile Mills*, 42 DLR (AD) 11, the Appellate Division held that it could not transfer a civil case from one permanent Bench to another in exercise of power under Art.104 in the absence of any statutory provision.

[3] 17 DLR (SC) 384

any such exercise of the power of transfer, whether by making rules or otherwise, would be *ultra vires* amended art.100.

4.63 It was one of the contentions of the appellants that the amendment setting up permanent Benches with territorial limits destroyed the plenary jurisdiction of the High Court Division throughout the entire Republic and particular reference was made to the Admiralty jurisdiction of the High Court Division. It is to be noted that in many matters the Admiralty jurisdiction does not admit of territorial limitation. In case of collision, the High Court Division had jurisdiction in the Admiralty side even when the ships were foreign ships and the collision took place in foreign waters.[1] The amendment having imported the limitation areawise, the High Court Division at the permanent seat or any permanent Bench could not assume jurisdiction in respect of the offending ship inasmuch as the collision was not one which could be said to be a matter in relation to an area assigned. Again, the concept of area was invariably linked with territory. The High Court Division at the permanent seat or any permanent Bench could not have any jurisdiction in respect of a ship anchored outside Bangladesh territorial waters or waiting in the economic zone of Bangladesh. The learned Judge met the point stating -

> The jurisdiction of the High Court Division under the Courts of Admiralty Act, 1891 was considered by this Division in the case of *Al-Sayer Navigation v. Delta Int. Traders*[2], and it has been held that the jurisdiction conferred by this Act on the High Court of Admiralty may be exercised by proceedings in rem or by proceedings in personam. In keeping with the Admiralty practices as described in the British Shipping Laws Vol.I 1964 Ed.p.28, wherever the cause of action may arise, the res must be within the jurisdiction of the High Court Division (within the assigned area of any Bench) in order that an order for arrest may be effective in an Admiralty action in rem.

To fully understand the issue it is necessary to quote the relevant portion from the cited volume of the British Shipping Laws which is as follows-

> As stated, most Admiralty actions are either in rem or in personam. Usually it is for the plaintiff's solicitor to decide which to choose. In certain circumstances, the procedure in personam may be used in preference to the issue of a writ in rem, for example where a

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[1] Halsbury's Laws of England, 3rd ed., vol.1, Para 124

[2] 34 DLR (AD) 110

> nationalised industry is to be defendant, or where there is no res to be served, or security is not required and the writ can be served on the defendant without difficulty.
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> A consideration which may lead a plaintiff to sue in personam is that service of a writ in rem can only be effected within the jurisdiction. This means that although a writ in rem and a warrant of arrest may be issued even if the res is not within the jurisdiction, in order for either to be effective the res to be proceeded against must be, or come, within the jurisdiction unless service is accepted by a solicitor, whereas the service of a writ in personam can often be effected abroad provided that the conditions laid down in the Rules of the Supreme Court are satisfied.

The above passages do not establish that the mere presence of a vessel within the territorial jurisdiction of a Bench can give it jurisdiction. Such a presence makes arrest possible where the Bench has jurisdiction. It can also be seen that for taking cognizance of an action *in rem* it is not necessary that the *res* should be within the jurisdiction of the court. An action could be started when the offending vessel was in the high seas and the arrest might be made when it came within the territorial water or even economic zone of Bangladesh. The concept of jurisdiction having been tied to the concept of area, none of the permanent Benches, nor the High Court Division at the permanent seat could take cognizance of an action *in rem* while the offending vessel waited in the economic zone of Bangladesh or in the high seas. Furthermore, prior to the amendment of art.100 the Admiralty jurisdiction was not tied to the concept of area and the High Court Division's warrant of arrest could be executed in the economic zone. We can take up another case of a vessel carrying cargo for both Chittagong port and Mongla port. The cargo delivered at Chittagong port was found damaged, but before the Chittagong Bench could take cognisance and arrest the vessel, the vessel reached Mongla port. The cargo delivered at Mongla port was undamaged. Neither the Chittagong Bench could arrest the vessel at Mongla which was within the territorial jurisdiction of the Jessore Bench, nor the Jessore Bench could arrest the vessel as it could not take cognisance of a matter which was undoubtedly a matter in relation to the area assigned to the Chittagong Bench.

4.64 For better understanding of the power of amendment we may keep certain facts in view. Having regard to the history of the

constitutional development in our country, the framers of the Constitution declared the supremacy of the Constitution in the preamble and in art.7 without relying on the general principle of constitutional law that in a written constitution with entrenched provisions the constitution is the supreme law. Art.7 clearly mandated that all functionaries in the Republic will have power limited and circumscribed by the Constitution. In the light of these facts, the framers cannot be thought to have given such power of amendment to Parliament which in an opportune moment could be exercised to substitute the supremacy of the Constitution by the supremacy of Parliament or to do something more drastic. If the power of amendment be taken to be unlimited and unqualified, it was possible for a Parliament having the requisite majority support (before the Marital Law amendment of art.142[1]) to amend art.142 itself so as to enable Parliament to amend the provisions of the Constitution by simple majority[2] and thus making Parliament supreme in place of the Constitution. The framers seeking to adopt a permanent document for our political organisation and specifically providing for a limited government, cannot be ascribed an intention to confer such a power to an authority which they wanted to have only limited power. In the face of this manifest intention of the framers, there was no scope of construing the power of amendment in the manner advocated by the respondent.

4.65 In dealing with the doctrine of basic structure, the Indian Supreme Court had gone to the question of implied limitation on the power of amendment. That there are implied limitations on the power conferred on different organs of the government cannot be denied. Parliament has implied limitation in providing for local government bodies and in delegating the power of legislation. Parliament cannot pass a legislative judgment or confer on the executive a power which partakes judicial character. The relevant question is what is the nature of an act which can qualify as an amendment, or, in other words, what is the connotation of the expression 'amendment'. The Appellate Division went for the meaning of the word 'amendment' and concentrated on the extent of the power that may be exercised by Parliament in the name of amendment of the Constitution. Because of this approach the learned

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[1] To ascertain the intention of the framers we are to consider the provisions of the Constitution as originally adopted.

[2] After amendment of art.142 by Martial Law Proclamation, it will require an affirmative voting in a referendum.

dissenting Judge, even after rejecting the theory of implied limitation, was impelled to hold that the power of amendment did not include the power to abrogate, destroy or emasculate any structural pillar of the Constitution. The government placed strong reliance on the observation of the Privy Council in *R. v. Burah*[1] deprecating implied limitation. But this statement was made in the context of legislative power, as had been rightly pointed out by the learned dissenting Judge. Even in that case the Privy Council found implied limitation on the creation of new legislative authority. If the Constitution is read as a whole and its scheme carefully considered, it must be said that the Appellate Division rightly struck down the amendment of art.100.

4.66 What is the nature of an Act of Parliament which amends a provision of the Constitution? It was contended in *Anwar Hossain Chowdhury* that such an Act of Parliament is 'any other law' within the meaning of art.7 and will therefore be void if it is inconsistent with the essential scheme of the Constitution. The majority of the learned Judges refused to treat an amendment of the Constitution as 'any other law' within the meaning of art.7 pointing out that it is passed in exercise of constituent or derivative constituent power conferred by the Constitution.[2] By the Constitution (Third Amendment) Act, clauses were inserted in art.26 and in art.142 stating that art.26 will not apply to any amendment of the Constitution. But no such amendment was made to say that art.7 will not apply to an amendment of the Constitution. Their Lordships, however, did not place any importance to this omission. Having treated an amendment of the Constitution to be an exercise of the constituent power different from ordinary legislative power, their Lordships rejected an important contention that the constituent power cannot be delegated by Parliament to any other authority. The High Court Division at the permanent seat had the plenary judicial power over the entire Republic. The amended art.100 authorised the President to determine the territorial jurisdiction of the permanent Benches by notification and thereby to curtail and redefine

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[1] 4 Cal 172 (If what has been done is legislation, within the general scope of the affirmative words which give the power, and if it violates no express condition or restriction by which that power is limited ... it is not for any court of justice to inquire further, or to enlarge constructively those conditions or restrictions.)

[2] Subsequently, in *Kudrat-E-Elahi v. Bangladesh*, 44 DLR (AD) 319, 346, Mustafa Kamal J held to the contrary saying, "this Constitution taken as a whole is a law, albiet the supreme law and by 'any other law' and 'that other law' the Constitution refers to the definition of 'law' in Article 152(1), including a constitutional amendment".

the territorial jurisdiction of the High Court Division at the permanent seat. It was contended that defining or redefining the territorial jurisdiction of the High Court Division at the permanent seat already conferred by the Constitution amounts to an exercise of constituent power and by allowing the President to do it by notification Parliament delegated the constituent power to the President which is unconstitutional. There can be no doubt that the act of defining or redefining the territorial jurisdiction of the High Court Division at the permanent seat amounted to an amendment of arts.101 and 102 of the Constitution. Their Lordships were of the view that by the amended art.100(5) Parliament did not delegate an essential legislative function and therefore the amendment was not unconstitutional. Their Lordships thereby meant that this was a permissible delegation of legislative function not amounting to abdication of the power of legislation. Delegation of legislative function is permissible so long as it does not amount to abdication of the power of legislation[1]. This is recognised in art.65 which enables Parliament to delegate the function of making subordinate legislation to some other authority. The imperatives which compel the legislature to delegate legislative function to the administrative bodies and persuade the court to uphold such delegation are not there when it comes to the exercise of the constituent power in amending the Constitution. There is no principle of constitutional law to permit delegation of the constituent power, essential or unessential, and art.65 does not permit any such delegation. In fact, the power of amendment is not dealt with in the Part which deals with the composition, powers and functions of Parliament and art.65 is not applicable in case of amendment of the Constitution under art.142. Constituent power is exclusively given to Parliament to be exercised in a different manner and it is by its very nature such that it cannot be delegated at all.[2]

4.67 The Appellate Division having held that the power of

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[1] For discussion on delegated legislation, see Para 4.32-4.37

[2] *A.K. Roy v. India*, AIR 1982 SC 710, Para 50 (In this case the Court upheld the delegation of power to issue a notification for bringing into force the provisions of a constitutional amendment saying that this power is not a constituent power because it does not carry with it the power to amend the constitution. The issue whether power to bring into force a constitutional amendment is a constituent power or not is open to question or is at least debatable, but the point is that to justify the delegation the court had to find that this power is not a constituent power which, according to the court, is non-delegable.)

amendment does not extend to the alteration or change in the basic structure or features of the Constitution, the question is which are the basic structures or features of the Constitution. Having regard to the scheme and objects of the Indian Constitution, the learned Judges of the Indian Supreme Court held different features as basic. Most important of these are - the supremacy of the Constitution[1], rule of law[2], separation of powers[3], judicial review[4], objectives of the Preamble[5], sovereign, democratic and republican structure[6], principle of equality[7], scheme of fundamental rights[8], free and fair election[9], independence of judiciary[10], and effective access to justice[11]. The Preamble of our Constitution is quite explicit in stating the objects of the Constitution and it is comparatively easy to find out the features which constitute the basic structure of our Constitution. The basic theme of our political organisation, as can be found from a reading of the Constitution, is the rule of law and limited government ensured by judicial review by an independent judiciary. Having regard to the scheme and objectives of the Constitution, Shahabuddin Ahmed J included the sovereignty of the people, supremacy of the Constitution, democracy, republican government, unitary State, separation of powers, independence of judiciary and fundamental rights in the list of basic features of our

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[1] *Keshavananda Bharati v. Kerala*, AIR 1873 SC 1461, per Sikri CJ; *Rajsthan v. India*, AIR 1977 SC 1361, per Beg CJ

[2] *Indira Gandhi v. Raj Narayan*; AIR 1975 SC 2299, per Roy CJ, Khanna and Chandrachud JJ; *Sambamurthy v. A.P.*, AIR 1987 SC 663, per Bhagawati CJ.

[3] *Keshavananda v. Kerala*, AIR 1973 SC 1461, per Sikri CJ; *Indira Gandhi v. Raj Narayan*, AIR 1975 SC 2299, per Roy CJ and Chandrachud and Beg JJ

[4] *Minerva Mills Ltd. v. India*, AIR 1980 SC 1789, per Chandrachud CJ and Bhagwati J; *Sampath v. India*, AIR 1987 SC 386, per Bhagwati CJ; *Sambamurthy v. A.P.*, AIR 1987 SC 663, per Bhagwati CJ.

[5] *Keshavananda v. Kerala*, AIR 1973 SC 1461, per Sikri CJ and Shelat, Grover, Hegde, Mukherjee, Reddy and Khanna JJ

[6] *Keshavananda v. Kerala*, AIR 1973 SC 1461, per Sikri CJ and Khanna, Mathews and Chandrachud JJ, *Rajsthan v. India*, AIR 1977 SC 1361, per Beg CJ; *Indira Gandhi v. Raj Narayan*, AIR 1975 SC 2299, per Khanna, Mathews and Chandrachud JJ

[7] *Indira Gandhi v. Raj Narayan*, AIR 1975 SC 2299, per Chandrachud J; *Minerva Mills Ltd. v. India*, AIR 1980 SC 1789, per Chandrachud CJ.

[8] *Waman Rao v. India*, AIR 1981 SC 271, per Chandrachud CJ.

[9] *Indira Gandhi v. Raj Narayan*, AIR 1975 SC 2299, per Khanna and Mathew JJ

[10] *Secretry, Ministry of Finance v. Masdar Hossain*, 2000 BLD (AD) 104; *S.P. Gupta v. India*, AIR 1982 SC 149; *Sampath v. India*, AIR 1987 SC 386

[11] *Central Coal Fields Ltd. v. Jaiswal Coal Co.*, AIR 1980 SC 2125

Constitution[1]. M.H. Rahman J rightly added rule of law to the list[2].

4.68 The Appellate Division having held in *Anwar Hossain Chowdhury* that the power of amendment does not extend to alteration or destruction of the basic structure or features of the Constitution, the question arises whether the amendments made in the Constitution are valid. The first three amendments do not appear to have altered the basic structure of the Constitution. But the Fourth Amendment of the Constitution clearly altered the basic structure of the Constitution and in one case the amendment was found to have so altered the basic structure, but the court did not declare the amendment invalid as, in the opinion of the court, the constitutional process in the country had followed a different course in view of the change of the political system, the people have not resisted it and it has been recognised by the judicial authorities[3]. It is submitted that refusal to declare the invalidity of the amendment was wrong. A change of the political system by unconstitutional method cannot immunise an unconstitutional amendment. There is no judicial decision accepting the amendment as valid and as such the question of judicial recognition cannot arise. A constitutional amendment cannot be avoided by a collateral attack and in the same way validity of a constitutional amendment cannot be established in any collateral proceeding in which the question of the validity of the amendment was not mooted. There cannot be any plea of acquiescence in respect of unconstitutionality[4]. Passage of time cannot impart validity to an otherwise unconstitutional act.[5] "Time does not run in favour of legislation. If it is *ultra vires*, it cannot gain legal strength from long failure on the part of lawyers to perceive and set up its

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[1] *Anwar Hossain Chowdhury v. Bangladesh*, 1989 BLD (Spl) 1, Para 377

[2] Ibid, Para 443

[3] *Hamidul Huq Chowdhury v. Bangladesh*, 33 DLR 381

[4] 16 Am Juris 2d Const. Law, Para 124

[5] *Toronto Electric Commissioners v. Snider*, [1925] AC 396 (statute declared invalid after 18 years); *Proprietary Article Trade Association v. A.G. of Canada*, [1931] All E.R. Rep. 277, 280 (Their Lordships entertain no doubt that time alone will not validate an Act which, when challenged, is found to be *ultra vires*); *Myers v. U.S.*, 272 U.S. 52 (statute held unconstitutional after 58 years); *Walz v. Tax Commission of New York*, 397 US 664, 678 (no one acquires a vested or protected right in violation of the Constitution by long use, even when the span of time covers our entire national existence and indeed predates it.); *Motor General Traders v. A.P.*, AIR 1984 SC 121 (impugned provision of law held unconstitutional after 23 years of operation and in the meanwhile in another case the provision was held valid by a High Court)

invalidity. Albiet, lateness in an attack upon the constitutionality of a statute is but a reason for exercising special caution in examining arguments by which the attack is supported."[1]

4.69 Most of the changes effected by the Fourth Amendment have been undone by the Constitution (Twelfth Amendment) Act, 1991, but importantly the change in respect of subordinate judiciary still continues. During the first Martial Law period, the Constitution was amended on several occasions by Martial Law Proclamations. Those amendments *per se* would have been unconstitutional as the Constitution cannot be amended by any process other than that prescribed under art.142. But by the Constitution (Fifth Amendment) Act, 1979 Paragraph 18 was inserted in the Fourth Schedule (Transitional Provisions) of the Constitution. Paragraph 18 ratified all Martial Law Proclamations amending the Constitution and all actions of the Martial Law authorities, declared all such amendments and acts to have been validly made and precluded all challenges to those amendments and acts in court on any ground. All those amendments and acts were made and done in direct contravention of the provisions of the Constitution and defying the supremacy of the Constitution. Paragraph 18 displaces the Constitution in its operation so far as regards those amendments and acts and it may be said that insertion of Paragraph 18 by amendment is destructive of the supremacy of the Constitution, the most important basic feature of the Constitution. The amendment also alters another basic feature of the Constitution in precluding judicial review. It can also be forcefully contended that this amendment is a fraud on the Constitution inasmuch as no amendment can be made undermining the supremacy of the Constitution and Parliament had resorted to the subterfuge of inserting a provision in the Constitution declaring patently unconstitutional acts as constitutional and precluding judicial review of those acts. Above all, an amendment declaring actions of mutilating the Constitution and whatever it stands for as constitutional is simply beyond the power of Parliament under art.142. This is so even on the reasoning of A.T.M. Afzal J as it will not be an overstatement to say that the amendment has emasculated the Constitution. It may be noted that the amendment was made by Parliament before withdrawal of the Martial Law and the Constitution became operational by its own force.[2] The Constitution

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[1] *Grace Bros. Pty Ltd. v. The Commonwealth*, 72 C.L.R. 269, 289

[2] The amendment was made and published in the official Gazette on 6 April 1979 and thereafter the Proclamation of Withdrawal of Martial Law was issued on the same day

(Seventh Amendment), Act, 1986 followed the pattern of the Fifth Amendment to ratify the actions of Martial Law authorities and to preclude judicial review and it is open to the same objection of destroying the basic structure of the Constitution and fraud on the Constitution.[1]

4.70 The Constitution (Tenth Amendment) Act extending the period of reservation of seats for women in Parliament was challenged as violative of the basic structure of the Constitution, but the High Court Division repelled the contention pointing out that the reservation had been there in the original Constitution and the question cannot arise at all.[2]

4.70A The Thirteenth Amendment of the Constitution providing for non-party care-taker government during the period Parliament stands dissolved was challenged in *Mashiur Rahman v. Bangladesh*[3] on the ground, inter alia, that no referendum was held in terms of art.142(1A). The court rejected the challenge stating that the provisions of the amending Act do not appear to come within the definition of alteration, substitution or repeal of any provision of the Constitution.

PARLIAMENTARY COMMITTEE

4.71 Sir Erskine May spoke about the long prevalent practice of the British Parliament "of delegating to small bodies of Members, regarded as representing the House itself, the consideration of questions, which, as involving points of detail or questions of technical nature, are unsuited to the House as a whole."[4] He narrated, "Each House accordingly now possesses an organized system of committees which comprises committees of the whole House; select committees and committees on private bills; in the House of Lords, Public Bill committees; and, in the House of Commons, standing committees on public bills and other matters. The functions of these committees include the consideration and amendment of public and private bills, inquiries

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and was published in the official Gazette on 7 April 1979.

[1] In *A.Y.B.I Siddiqui v. Bangladesh*, 2000 BLD 75, Paragraph 19 incorporated by the Seventh Amendment was discussed, but the question of validity of the amendment was not raised.

[2] *Fazle Rabbi v. Election Commission*, 44 DLR 14

[3] 1997 BLD 55

[4] Parliamentary Practice, 19th ed., p.604

(sometimes of a quasi-judicial character) into matters which the House refers to them for investigation, and (for domestic purposes) functions of an administrative character."[1] This committee system helps in conserving the time of the legislature, increasing expertise and enabling the legislature to exert control over the government. The legislature discusses policy, but it is in the committees that details can be discussed, administrators made to give evidence and matters examined thoroughly and with the help of technical experts, when necessary. The greatest advantage of the committee system is that in a committee the atmosphere is informal and business-like, almost free of party politics.

4.71A Art.76(1) of the Constitution provides that Parliament shall appoint from among its members the following standing committees:-

(a) a public accounts committee;
(b) a committee of privileges; and
(c) such other standing committees as the rules of procedure of Parliament require.

Art.76(2) further provides that in addition to the committees referred to in art.76(1), Parliament shall appoint other standing committees, and the committees so appointed may, subject to the constitution and any other law, (a) examine draft Bills and other legislative proposals; (b) review the enforcement of laws and propose measures for such enforcement; (c) in relation to any matter referred to it by Parliament as a matter of public importance, investigate or inquire into the activities or administration of a Ministry and may require it to furnish, through an authorised representative, relevant information and to answer questions, orally or in writing; and (d) perform any other function assigned to it by Parliament. Parliament may by law confer on the committees powers for enforcing attendance of witnesses and examining them on oath or affirmation and compelling the production of documents.[2] The rules of procedure of Parliament have made provisions for the appointment of committees, the procedure of their work, the place of their work, the quorum, the formation of sub-committees, the time and manner of making report to Parliament, manner of taking evidence and other relevant matters[3]. Unless the House fixes any time and unless the House extends the time, a committee is required to present its report to the House within one

[1] Ibid
[2] Art.76(3)
[3] Chapter 27 of the Rules of Procedure of Parliament

month from the date on which reference is made.[1] A committee may, if it thinks fit, make available to the government any part of its report before presentation to the House and such report shall be treated as confidential until presented to the House.[2]

4.71B Under its rules of procedure Parliament has instituted an elaborate committee system with a view to better organise its works and discharge its functions effectively. The rules of procedure provide for (A) Business Advisory Committee, (B) Committee on Private Members" Bills and Resolutions, (C) Select Committees on Bills, (D) Committee on Petitions, (D) Standing Committee on Public Accounts, ((F) Committee on Estimates, (G) Committee on Public Undertakings, (H) Standing Committee of Privileges, (I) Committee on Government Assurances, (J) Standing Committees on each Ministry, (K) House Committee, (L) Library Committee, (M) Standing Committee on Rules of Procedure and (N) Special Committee.[3]

4.71C People may present petition to the House with the consent of the Speaker on (i) a Bill which has been published under rule 76 or which has been introduced in the House, (ii) any important matter connected with the business pending before the House, and (iii) any other matter of public importance. But no such matter will be acceptable if (a) it is *sub judice* before any court or any authority discharging judicial or quasi-judicial functions or before any inquiry commission or inquiry court, (b) it can be raised in the House on a substantive motion or resolution, or (c) in respect of which a remedy is available under any law.[4] Such petition on presentation by a member of Parliament or report by the Secretary of Parliament to the House[5] shall stand transferred to the Committee on Petitions[6] unless the House otherwise decides.

4.71D Rule 246 provides for appointment and jurisdiction of the standing committees on each Ministry as follows -

> Parliament shall, as soon as may be, after the inauguration of each new Parliament, appoint the Standing Committees on each Ministries which may, subject to the Constitution and any other law, -

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[1] Rule 209
[2] Rule 210
[3] Chapter XXVII of the Rules of Procedure
[4] Rule 100
[5] Rule 108
[6] Rule 110

(a) examine draft Bills and other legislative proposals;
(b) review the enforcement of laws and propose measures for such enforcement; and
(c) examine any other matter referred to them by Parliament under Article 76 of the Constitution.

These standing committees play important role in the matter of examination of draft Bills and legislative proposals and review of the enforcement of laws by the concerned Ministries. However, a question has recently cropped up whether these standing committees can directly entertain complaints by the people against the actions of the Ministries and other public functionaries. Art.76(2)(C)stipulates that a standing committee may investigate any matter referred to it by Parliament. It is contended that Standing Committees on the Ministries have been provided under the rules of procedure and are covered by art.76(1); these committees not being covered by art.76(2), the authority of these committees to investigate into complaints is not conditional upon reference by Parliament as stipulated in clause (C) of art.76(2). Properly construed, art.76(2)(C) is applicable to standing committees referred to in art.76(1). Even if it is doubted, it can be seen that rule 246 of the rules of procedure, while providing for standing committees on each Ministry, stipulates in clause (C) that such standing committees may "examine any other matter referred to them by Parliament under Article 76 of the Constitution". Thus rule 246 read with art.76(2)(C) makes it clear that a standing committee on a Ministry can investigate a complaint regarding the activities of the Ministry or public functionaries only when it is referred to it by Parliament as a matter of public importance and the standing committee cannot, without a reference from Parliament, entertain any complaint from any person relating to the functions of the Ministry or a public functionary.[1]

OMBUDSMAN

4.72 The evil effect of deficient laws can be mitigated by good officials, but the evil effect of bad administration cannot be surmounted by good laws. It is, therefore, necessary to have a good and efficient

[1] *Major (Retd) Akhtaruzzaman v. Bangladesh*, W.P. no.3774 of 1999 (Unreported)(In this case the High Court Division permitted the proceedings before the standing committee to continue as the government for the sake of transparency had already submitted papers to the Chairman of the standing committee)

administration. Technological development and complex living of today has led to vast expansion of administrative functions and with it has increased administrative abuse of power. Experience shows that normal judicial system is not effective in preventing such abuse of power. Somehow a system must be evolved which will enable proper investigation of the citizens' complaints against abuse of power by the administrative officials and redress made. In many countries the problem has been sought to be solved by establishing the office of Ombudsman.

4.73 Art.77 of the Constitution provides that Parliament may by law establish the office of Ombudsman. Once established the Ombudsman shall have the power to investigate any action taken by a Ministry, a public officer or a statutory public authority and such other powers and functions as may be prescribed by Parliament. The Ombudsman shall prepare an annual report concerning the discharge of his functions and such report shall be laid before Parliament.

4.74 Parliament passed the Ombudsman Act, 1980 and empowered the government to bring it into force by notification in the official Gazette. The Act provides for establishment of the office of Ombudsman and stipulates the terms in conformity with art.77. S.3(2) provides that the Ombudsman shall not be removed from his office except by an order of the President passed pursuant to a resolution of Parliament supported by a majority of not less than two thirds of the total number of members of Parliament on the ground of proved misconduct or physical incapacity. The Ombudsman may investigate any action taken by a Ministry, a statutory public authority or a public officer in any case where a complaint in respect of such action has been made to him. If he finds that injustice has been caused, he shall recommend to the competent authority that the injustice should be remedied. The authority concerned is to report back intimating the Ombudsman the action taken or proposed to be taken. If the Ombudsman is not satisfied with the report of the concerned authority he may make a special report to the President.

4.75 After examining the functioning of the office in several European countries Walter Gelhorn observed, "The mere existence of their offices means little. The men in the office are what counts. Whoever holds responsibility for dealing with citizens' complaints must measure up to a very big job because most assuredly the job of attacking administrative imperfections will not execute itself."[1] As regards the

[1] Ombudsman and Others, 438

performance of the Parliamentary Commissioner (British Ombudsman) Professor Wade commented, "The Commissioner's reports show that he has been able to remedy a great many cases of injustice where, almost certainly, no remedy would otherwise have been obtained. In general he has found that the government departments are willing to pay compensation or otherwise make reasonable amends when he has exposed mal-administration, though in some cases he has had to press hard for it."[1] We have not made the beginning and in our case the question of evaluation does not arise. The Act has not been brought into force and the office of Ombudsman has not been established though more than two decades have elapsed since the passing of the Act. There has been frequent allegation of rampant abuse of power by the public authorities which cannot be investigated for want of legal mechanism. Often, persons feeling aggrieved approach the Supreme Court in writ jurisdiction. Many of their grievances are not amenable to writ jurisdiction and the Supreme Court declines to exercise jurisdiction. In the process there is much waste of time of the Supreme Court which could have been utilised in appropriate cases.

PARLIAMENTARY PRIVILEGES

4.76 For the discharge of the high functions and responsibilities effectively free of any interference or obstruction from any quarter certain privileges and immunities are accorded to the legislature and its members. These privileges are conferred to the legislature collectively so that it may vindicate its authority, prestige and power and protect its members from obstruction in the performance of their parliamentary functions and the members of the legislature are given wider personal liberty and freedom of speech than enjoyed by the ordinary citizens.

4.77 Art.78 of the Constitution provides for privileges and immunities of Parliament and its members. Sub-art.(1) provides that the validity of the proceedings of Parliament shall not be questioned in any court. Sub-art.(2) provides that the members and officers of Parliament shall not in the exercise of their powers relating to regulation of procedure, conduct of the business or the maintenance of order in Parliament be subject to the jurisdiction of any court. Sub-art.(3) protects the members of Parliament against any liability in respect of anything said or vote given by them in Parliament or in a committee of

[1] Administrative Law, 6th ed., p.88

Parliament. In view of sub-art.(4) no person shall incur any liability in respect of any publication by or under the authority of Parliament of any report, paper, vote or proceeding. Sub-art.(5) provides that subject to art.78 the privileges of Parliament, its committees and members may be determined by an Act of Parliament.

4.78 In 1955 the Constituent Assembly (Proceedings and Privileges) Act was passed. This Act provided that the members of the Constituent Assembly would enjoy the same privileges as enjoyed by the members of the British House of Commons. The Constitution of Pakistan, 1956 gave continuity to the existing laws and accordingly this Act was applicable as the constitution provided that subject to the constitution, the privileges of the members of National Assembly may be determined by an Act of Parliament.[1] Art.111 of the Pakistan Constitution, 1962 specified the parliamentary privileges and sub-art.(5) thereof provided, "Subject to this Article, the privileges of an Assembly, of the committees and the members of an Assembly and of the persons entitled to speak in an Assembly may be determined by law". Art.225 gave continuity to the existing laws which included the Constituent Assembly (Proceedings and Privileges) Act, 1955 and on the principle laid down by the Pakistan Supreme Court in *Badrul Huq Khan v. Election Tribunal*[2], the National Assembly of Pakistan and its committees and members were entitled to the privileges enjoyed by the members of the British House of Commons.[3]

4.79 In *Suranjit Sengupta v. Election Tribunal*[4] the question arose whether the Members of the National Assembly (Exemption from Preventive Detention and Personal Appearance) Ordinance, 1963 was applicable in respect of privileges of the members of Parliament. The High Court Division held that in view of the Laws Continuance Enforcement Order, 1971 and art.149 of the Constitution, the Ordinance of 1963 was applicable on the principle laid down in *Badrul Huq Khan*. It is necessary to analyse *Badrul Huq Khan* and *Suranjit Sengupta* in detail as these decisions have far reaching effect on the question of parliamentary privilege inasmuch as on the principle laid down in these decisions all pre-Bangladesh laws relating to parliamentary privileges will be applicable to Parliament, its committees and members.

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[1] A.K. Brohi - Fundamental Law of Pakistan, p.153-154
[2] 15 DLR (SC) 389
[3] M. Munir - Constitution of Pakistan, 1965, p.418
[4] 1981 BLD 132

4.80 The Pakistan National Assembly passed Representation of People Act, 1957 providing for the method and manner of election of the National Assembly and the Provincial Assemblies under the Pakistan Constitution, 1956. On 7 October 1958 the President abrogated the Constitution of 1956 and dissolved the Assemblies. On 10 October 1958 he proclaimed Laws (Continuance in Force) Order, 1958 giving continuity to the laws in existence prior to the abrogation of the constitution. In 1962 the new constitution introducing presidential system of government was proclaimed. In *Badrul Huq Khan* the question arose whether the Representation of Peoples Act, 1957 was a continuing law applicable to the election of the National Assembly under the new constitution. It was contended that the legislatures as set up under the old constitution were abolished by the President and it could not be said that Laws (Continuance in Force) Order, 1958 continued the Act of 1957 relating to those abolished legislatures. The majority decision delivered by Cornelius CJ went for the intention of the President in proclaiming the Laws (Continuance in Force) Order and negatived the contention stating -

> If during the period of Martial Law, it has pleased the President to consider in view of changed and improved circumstances, the possibility of restoring representative Government as provided under Constitution of 1956, which in its other aspects was actively in operation, although from a depressed status, we entertain no doubt that the wish could have been carried to fulfillment with the aid of the laws and the machinery of election already in existence, despite the abrogation of the Constitution. The carrying over all laws as effective instruments from the period prior to the Revolution into the period of Martial Law was effected by Article 3 of the Laws (Continuance in Force) Order, 1958, and it is clear that within the terms of that Article, the Representation of the People Act is one of the laws which continued to be existing law after the 7th October, 1958. We do not see that this can be thought to have been deprived of its force by anything appearing in the Proclamation of the 7th October, 1958.[1]

Kaikaus J pointed out that for the decision in the case what had to be ascertained was the state of mind of the President on 10 October 1958. "If on that date he was not contemplating the holding of fresh elections and, therefore, did not revive the provisions relating to the Assemblies whatever he might have thought afterwards is irrelevant for whether the

[1] 15 DLR (SC) 389, 403

Representation of People Act did or did not become existing law on the 10th October 1958, depends on whether the provisions relating to the Assemblies were or were not revived on the 10th October, 1958".[1] He reasoned that "the Representation of the People Act was intended to apply only to the Assemblies created by the Constitution of 1956 and to no other Assembly. At the same time the Legislature which enacted the Representation of the People Act had jurisdiction to enact such a law only with respect to the Assemblies which were created by the Constitution of 1956." Kaikaus J was of the opinion that the President in abrogating the Constitution did not merely dissolve the legislatures constituted under the Constitution but, in effect, abolished it.

4.81 The common ground in both the judgments was that continuity of the Act of 1957 depended on the intention of the President in proclaiming the Laws (Continuance in force) Order, 1958 and the two differed in finding that intention. The view of Kaikaus J appears to be more reasonable and logical, but there is no need to discuss which view is correct as it will be seen that even the majority view cannot support *Suranjit Sengupta.*

4.82 Even though the old legal order was destroyed in 1958, there was no disintegration of the State of Pakistan, and, arguably, as had been held by the majority in *Badrul Huq Khan*, there was a possibility of revival of the old legal order. So far as East Pakistan was concerned in 1971, not only the old legal order was destroyed, a new State emerged. The Constitution of 1962 was abrogated in March, 1969 and the Provisional Constitutional Order proclaimed on 4 April 1969 provided for a new legal order following the scheme of the Laws (Continuance in Force) Order, 1958. Thereafter, the Legal Framework Order proclaimed in May, 1970 confirmed the destruction of the old legal order by providing for the composition of a new National Assembly to enact a new constitution. Then came the Proclamation of Independence on 10 April 1971 which stated -

> We, the elected representatives of the people of Bangladesh ...
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> * * * * * * *
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> do hereby affirm and resolve that till such time as a Constitution is framed, Banga Bandhu Sheikh Mujibur Rahman shall be President of the Republic ... and that the President ...

[1] Ibid, p.412

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shall have power to summon and adjourn the Constituent Assembly, and do all other things that may be necessary to give to the people of Bangladesh an orderly and just Government.

The Proclamation of Independence is the definitive statement of the establishment of the new State of Bangladesh and of a new legal order. Hence there could not be any further question of revival of the old legal order or the defunct legislatures on the date the Laws Continuance Enforcement Order, 1971 was proclaimed. There can be no two views that continuation of the pre-Bangladesh laws relating to the defunct legislatures of Pakistan was inconsistent with the Proclamation of Independence. Consequently, in making the Laws Continuance Enforcement Order, 1971 in conformity with the Proclamation of Independence, the Acting President cannot be imputed with an intention to continue the pre-Bangladesh laws relating to the defunct legislatures of Pakistan. The legal and political situation in 1971 was so radically different from the situation in 1958 that the rationale of the majority decision in *Badrul Huq Khan* cannot be applied in determining the continuity of the pre-Bangladesh laws relating to the defunct legislatures of Pakistan. It is submitted that reliance on *Badrul Huq Khan* in *Suranjit Sengupta* was inappropriate and the High Court Division was not correct in holding that till the promulgation of Ordinance III of 1980[1] the Ordinance IX of 1963 continued in force. As it cannot be said that the Laws Continuance Enforcement Order, 1971 intended to continue the pre-Bangladesh laws relating to defunct legislatures of Pakistan, promulgation and lapse of Ordinance III of 1980 were of no legal relevance.

4.83 The scheme of art.78 has to be noticed. Sub-arts.(1) to (4) specify the privileges of Parliament and its committees and members. Thereafter, sub-art.(5) provides that subject to this article the privileges of Parliament, its committees and members may be determined by Act of Parliament. It clearly means that in addition to the privileges specified,

[1] This Ordinance sought to repeal Ordinance IX of 1963. Subsequently a Bill dealing with the privileges of members of Parliament and seeking repeal of the Ordinance of 1963 was placed before Parliament, but it was not passed and Ordinance III of 1980 lapsed. Statement of objects and reasons of the Bill stated that Ordinance IX of 1963 and East Pakistan Act no.IX of 1965 were not operative in Bangladesh as 'existing law' inasmuch as any interpretation of their continued operation would not be consistent with the facts of emergence of Bangladesh as independent sovereign state.

further privileges may be granted by an Act of Parliament which by definition[1] means an Act of Bangladesh Parliament constituted under art.65. Read in the proper context, it is doubtful if any extended meaning can be given to the expression 'Act of Parliament' so as to include any pre-Bangladesh law as 'Act of Parliament'.

4.84 ***Validity of proceedings:*** Parliament has the exclusive right to regulate its own internal proceedings and to adjudicate upon matters arising there. The validity of the proceedings within Parliament cannot be challenged in court even when Parliament does not strictly follow its rules of procedure as Parliament reserves the right to suspend any rule of procedure in respect of a particular business.[2] The court will not interfere with the legislative process of Parliament in the formative stages of law-making or with the presentation of the Bill to the President for assent.[3] A member cannot be restrained from presenting a Bill or moving a resolution in Parliament.[4] It is only when a Bill is assented to by the President that the court can pass on its validity. When the election of the Speaker in the Provincial Assembly was challenged in court on the allegation that some members of the Assembly were prevented by force from casting their vote, the Pakistan Supreme Court held that the election of the Speaker was part of the proceedings of the Assembly and the court's jurisdiction was ousted.[5], Parliament has power to enforce discipline in Parliament and to suspend or expel any member who conducts himself in a manner unbecoming of a member of Parliament and the court will not interfere with the resolution of Parliament suspending or expelling a member of Parliament.[6] Parliament has the exclusive power of interpreting a law so far as the regulation of its own proceedings within its four walls is concerned and the court has no jurisdiction to interfere with it.[7] So wide is the immunity that in one case the English court refused to convict the members of the Kitchen Committee of the House of Commons for breach of the licensing law for selling liquor without a licence in the precincts of the House of Commons.[8] It is, however, unlikely that our Supreme Court will take the

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[1] Art.152
[2] *M.S. Sharma v. Sinha*, AIR 1960 SC 1186
[3] *Bihar v. Kameswar*, AIR 1952 SC 252; see Para 4.42
[4] *Hem Chandra v. Speaker*, AIR 1956 Cal 378
[5] *Pakistan v. Ahmed Saeed Kirmani*, PLD 1958 SC 397
[6] *Bradlough v. Gossett*, 12 QBD 271
[7] Ibid; see Para 4.43B
[8] *R. v. Graham Campbell*, [1935] 1 KB 594

immunity to such an extent as ordinary crimes committed within the precincts of Parliament should not be treated as part of the internal proceedings of Parliament. The immunity available to Parliament from judicial scrutiny is also available to its committees as those committees are agencies or instruments through which Parliament functions.[1] The court will not issue a writ of prohibition to restrain the Committee of Privileges from considering a privilege matter.[2]

4.85 Under the Indian Constitution the proceedings of the Indian Parliament cannot be challenged in any court on the ground of any irregularity in such proceedings. But if the proceeding is illegal and not merely irregular, the proceeding will be open to attack. Absence of the words "on the ground of irregularity" in art.78 of the Constitution does not, however, enlarge the immunity.[3] In order to oust the jurisdiction of the court, it must be a matter which can fairly be described as internal proceedings relating to the proper business of Parliament or its committees.[4] Referring to English cases H. Rahman CJ observed -

> The test indicated by Sir Erskine May in his book on Parliamentary Practice is whether what is said or done "forms part of a proceeding of the House in its technical sense, i.e. the formal transaction of business with the Speaker in the chair or in a properly constituted committee." It be neither possible nor desirable to attempt any exhaustive classification of the matters that may be comprised within the term "internal proceedings" but will be sufficient for my purpose to indicate that whatever is not related to any "formal transaction of business" in the House cannot be said to be a part of its "internal proceedings".[5]

If the proceedings are outside the purview of the Constitution, or if any act is done which is contrary to any provision of the Constitution, it cannot qualify as a proceeding of Parliament and the court's jurisdiction is not ousted. Thus if a law is passed in a sitting when there was no quorum and the lack of quorum was pointed out to the Speaker by any member, the immunity will not be available as under the Constitution the sitting cannot pass as a proceeding of Parliament and the law can be declared to be invalid because of the lack of quorum. A decision given

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[1] *Ramchandra v. A.P. Regional Committee*, AIR 1965 AP 306

[2] *C. Subramaniam v. Speaker*, AIR 1969 Mad 10

[3] *Farzand ali v. West Pakistan*, 22 DLR (SC) 203

[4] *Pakistan v. Ahmed Saeed Kirmani*, PLD 1958 SC 397

[5] *Farzand Ali v. West Pakistan*, 22 DLR (SC) 203, 218; see also *Special Reference no.1 of 1995*, 47 DLR (AD) 111; *Rafique (Md.) Hossain v. Speaker*, 47 DLR 361

by the Speaker as to the right of a Minister to address Parliament is immune from interference of the court.[1] But a decision given by the Speaker on a point of order on the question whether a member of Parliament has vacated his seat due to resignation from the party which nominated him is not immune from challenge in court as the Constitution has committed the matter to the judgment of the Election Commission and the Speaker in discharge of his statutory function has to refer the matter to the Election Commission.[2] Neither submission of resignation to the Speaker by a member of Parliament, nor the action or inaction of the Speaker in this regard, is a part of the proceeding of Parliament.[3] A question relating to the title of a person to be a member of Parliament or to continue to sit therein is a question affecting the constitution of Parliament which is not barred from inquiry by the court under art.78(1).[4] Interpretation of some expression in the Constitution, even though the expression has been used in relation to Parliament, is not the exclusive business of Parliament to disentitle the exercise of jurisdiction by the Appellate Division under art.106.[5] If total strangers or intruders, without any colour of title, had participated in Parliament, that proceeding will not be valid and the court is entitled to question the validity of such a proceeding.[6] The authority of Parliament is conferred and circumscribed by the Constitution and Parliament overstepping the limitation cannot set up the plea of privilege to avoid judicial review of its unconstitutional act.

4.86 ***Privileges of members and officers:*** The members and officers of Parliament are not amenable to the jurisdiction of the court in respect of acts done by them in exercise of powers granted to them by the Constitution or by law including the rules of procedure of Parliament to regulate the procedure in Parliament or to conduct the business of Parliament or to maintain order in Parliament. The court will not interfere with the functioning of the Speaker inside Parliament in the matter of regulation of the conduct of business of Parliament.[7] The

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[1] *Nazmul Huda v. Secretary, Cabinet Division*, 2 BLC 414

[2] *Secretary, Parliament v. Khondakar Delwar Hossain*, 1999 BLD (AD) 276

[3] *Rafique (Md.) Hossain v. The Speaker*, 49 DLR 361

[4] Ibid; *Special Reference Case no.1 of 1995*, 47 DLR (AD) 111, Para 32

Ibid

[5] *Special Reference no.1 of 1995*, 47 DLR (AD) 111

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

Ibid

[7] *Surendra v. Nabakrisna*, AIR 1958 Orissa 168

Speaker cannot be sued for damages for wrongful arrest of a person under warrant issued by him on a charge of contempt of the legislature as the Speaker in issuing the warrant was acting in performance of his duties connected with the internal affairs of the legislature.[1] In *Bradlough v. Gossett*[2] the plaintiff's action against a Sergeant-at-Arms, who ejected the plaintiff, a member of the House of Commons, from the House of Commons was dismissed on the ground that the Sergeant-at-Arms was acting under a resolution of the House of Commons and was protected.

4.87 ***Freedom of speech of members:*** The Pakistan Constitution of 1962 provided the privilege of absolute freedom of speech in the legislature not only to members of the legislature but also to any person entitled to speak in the legislature. But the Constitution grants this privilege only to the members of Parliament. Hence a Minister who is not a member of Parliament does not enjoy this privilege and he can be sued for a defamatory statement made in Parliament.

4.88 A member of Parliament has unqualified and absolute immunity in respect of any speech made by him in Parliament and in any committee thereof.[3] The immunity is not lost merely because the speech is telecast or published in newspaper.[4] The court has no jurisdiction to proceed against him for what he said in Parliament or in any committee of Parliament, whether the statement is true or false and whether the statement is made in good faith or maliciously.[5] If the members of Parliament were granted only that much of freedom of speech inside Parliament as is enjoyed by the ordinary citizens, then art.78(3) would be unnecessary.[6] A person aggrieved by a speech of a member of Parliament is without any remedy in court.[7] If a member exceeds the limit imposed on this freedom by the Constitution or the rules of procedure of Parliament, he can be dealt with by the Speaker, but not by the court. In view of the provision of art.94(4) a member of Parliament cannot criticise a Judge of the Supreme Court in respect of his judicial functions in Parliament, but if he transgresses this limit he cannot be

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[1] *Homi D. Mistry v. Nafisul Hassan*, ILR 1957 Bom 218
[2] 12 Q.B.D. 271
[3] *Ataur Rahman v. Md. Nasim*, 52 DLR 16
[4] Ibid
[5] *Powell v. McCormack*, 395 US 486; *Cyril Sikdar v. Nazmul Huda*, 46 DLR 555
[6] *In Re Art.143*, AIR 1965 SC 745
[7] *Tej Kiran Jain v. Sanjiva Reddy*, AIR 1970 SC 1573

dealt with by the court for contempt[1]; it is for the Speaker to stop the member. Unfortunately, the Speaker of Parliament did not perform his job when the members of Parliament criticised the Judges of the Appellate Division for the judgment in the Eighth Amendment case in improper language. A Minister, who was not a member of Parliament and was not therefore immune, went so far as to allege personal interest of the Judges of the Appellate Division[2] though the allegation was clearly false inasmuch as the Judges of the Appellate Division were not in any way affected by the Eighth Amendment of the Constitution. The Appellate Division showed great patience and thus averted a grave constitutional crisis.

4.89 A member of Parliament is protected for what he says in Parliament, but not for anything said outside Parliament except when the utterances are in essential performance of his duty as a member of Parliament, for example, a conversation on parliamentary business in a Minister's house. Though a slanderous speech inside Parliament is protected, publication of that speech by the member outside Parliament is not protected.[3] It does not mean that a member cannot publish his speech made in Parliament, but for such publication he cannot claim immunity.[4] But a member of Parliament will not be liable for what he said in a proceeding of Parliament which was telecast and published in newspapers under the authority of Parliament.[5]

4.90 ***Publication in relation to proceedings of Parliament:*** A publication of reports, papers, votes or other proceedings is protected only when it is done by or under the authority of Parliament. In *Stockdale v. Hansard*[6] publication of libel under the authority of the House of Commons was not held protected. As a result, Parliamentary Papers Act, 1940 was passed making publication of reports, papers, votes or other proceedings completely privileged. But a publication will not be privileged if it is not by or under the authority of Parliament. In *Wason v. Walter*[7] the court dismissed an action in libel in respect of a

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[1] *Ataur Rahman v. Md. Nasim*, 52 DLR 16; *A.K. Subbiah v. Karnataka Legislative Council*, AIR 1979 Kant 24

[2] Report of proceedings of Parliament in Daily Ittefaq of 25 January 1990

[3] *Doe v. McMillan*, 412 US 306; *Jatish Chandra v. Hari Sadhan*, AIR 1961 SC 613

[4] *Suresh v. Punit*, AIR 1951 Cal 176

[5] *Ataur Rahman v. Md. Nasim*, 52 DLR 16

[6] [1839] 8 LJQB 294

[7] LR 4 QB 73

publication of debate in the House of Lords containing disparaging allegations against the plaintiff holding that the advantage to the community from publication of the proceedings of a House is so great that the occasional inconvenience to individuals arising from it must yield to the general good. But art.78(4) does not protect any such publication without the authority of Parliament. A newspaper not being a publication authorised by Parliament is not protected if it published a report of debate of Parliament which contained matters disparaging to the character of any individual or amounting to contempt of court.[1]

4.91 ***Breach of privilege and contempt of Parliament:*** There was a long conflict between the House of Commons and the English courts on the question of privilege. The House of Commons claimed exclusive right to determine the limits of its privileges and also exclusive jurisdiction to deal with the breach of privileges, while the courts denied such rights. Ultimately, a balance has been struck and the position that emerged is that while the courts deny to the House of Commons the right to determine the limits of its privileges, they allow it exclusive jurisdiction to deal with the breach of privileges and contempt of Parliament within the established limits. If the House mentions specific grounds for holding a person guilty of its contempt or breach of privilege, the court can go into the validity of the committal, but if the warrant is in general terms without specifying the grounds, the court cannot question the validity of the committal.

4.92 In view of the provisions of arts.105(3) and 194(3) the Indian Parliament and State legislatures were entitled to the privileges enjoyed by the House of Commons at the commencement of the Indian Constitution. The tussle between the House of Commons and the courts was re-enacted when the Allahabad Legislative Assembly passed resolution requiring two Judges of the Allahabad High Court to be brought before the Assembly as, according to the Assembly, they committed contempt of the Assembly by entertaining *habeas corpus* application and ordering release on bail of one Keshav Singh who was

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[1] *Jatish Chandra v. Hari Sadhan*, AIR 1956 Cal 433 (a member of State legislature submitted certain question which were disallowed by the legislature; subsequently he got those questions published in a periodical; the questions were defamatory and proceedings of criminal defamation was initiated; the High Court rejected the claim of privilege first because the questions having not been allowed did not form part of the proceedings of the legislature and secondly the publication was not by or under the authority of the legislature)

imprisoned under a warrant of the Assembly for committing contempt of the Assembly. The Judges of the High Court filed a petition before the High Court contending that the resolution of the Assembly amounted to contempt of court. The Full Bench of the High Court ordered by a notice restraining the Speaker from issuing the warrant in pursuance of the resolution of the Assembly. At that stage, the President of India referred the matter for advisory opinion of the Supreme Court.[1] In the opinion rendered, the Supreme Court denied the right of the legislature to commit the judges of the superior courts for its contempt and opined that in the matter of privilege the legislature is not free from all fundamental rights. According to the Supreme Court, the legislature cannot be the final judge of the limit of its privilege; the House of Commons enjoys the privilege to commit a person for contempt by a non-justiciable general warrant as a superior court of record and not as a legislature, but the Indian Parliament and State legislatures cannot claim such privilege. A legislative order punishing a person for its contempt is not conclusive, but having regard to the status of the Indian Parliament and State legislatures the court would interfere with the legislative order only in a very extreme situation and only on the narrow ground that the legislative order is *mala fide*, capricious or perverse.[2]

4.93 Parliament for Bangladesh is not entitled to the privileges enjoyed by the House of Commons. Its privileges are specified in art.78 and further privileges may be granted by an Act of Parliament. Art.78 is silent about the breach of privileges and contempt. But the absence of any provision is not conclusive. Privileges will have no meaning at all unless Parliament is conceded the power to take action against the breach of privilege. Thus the question is not one of existence but of the extent of the power. It may be noted here that the British Parliament is not only treated as a court of record, but is actually the supreme governmental authority having no constitutional fetter on its power of legislation. But in Bangladesh no organ of the government is supreme. The supremacy is that of the Constitution. Bangladesh Parliament is not a court of record and its power of legislation is limited by the entrenched provisions of the Constitution. In this regard Bangladesh Parliament is comparable with the American Congress and it may be worthwhile to consider the power of Congress in respect of breach of privilege and contempt of legislature.

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[1] *In Re Art.143*, AIR 1965 SC 745

[2] Ibid; *Keshav Singh v. Speaker, Legislative Assembly*, AIR 1965 All 349

4.94 Art.1 sec.5 of the American Constitution confers power on each house of Congress to punish its members for disorderly behaviour. But from it cannot be implied that Congress has no power to punish nonmembers for contempt.[1] As an inherent adjunct of its legislative power, Congress has the power to punish nonmembers for contempt if the conduct occurred in a proceeding strictly of a legislative character or in the course of an inquiry within the legitimate scope of the legislative functions where such conduct has the effect of obstructing such proceedings or inquiry.[2] But Congress does not have the power to punish for contempt any act which does not directly obstruct its legislative process or the performance of its duties as a legislature[3]. Thus a person cannot be punished for slanderous attack on the members of Congress which presents no immediate obstruction to legislative processes.[4]

4.95 The Supreme Court is vested with the power and duty to oversee that no public functionary oversteps the limit set by the Constitution. The limit of privileges depends upon interpretation of art.78 which is in the exclusive domain of the Supreme Court. As such Parliament cannot claim to be the final arbiter of its privileges. In the absence of any constitutional bar, the Supreme Court has the jurisdiction under art.102 to examine the validity of any action of any public functionary on the application of an aggrieved person. Thus the Supreme Court shall have jurisdiction to examine the validity of any action of Parliament relating to the privileges unless barred by art.78 or any other provision of the Constitution though having regard to the high constitutional status of Parliament an action of Parliament will carry strong presumption of validity and the court will not interfere unless a very clear case of illegality is made out.

4.96 Rule 16 of the Rules of Procedure of Parliament permits Parliament to expel any of its members for the current session of Parliament if he defies the authority of the Speaker and repeatedly and deliberately obstructs the functioning of Parliament. Under art.78(1) the court has no jurisdiction to interfere with such an action, it being a part

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[1] *Anderson v. Dunn*, 5 L Ed 242

[2] 17 Am Juris 2d, Contempt Para 125; *Jurney v. MacCracken*, 294 US 125 (ignoring the process); *McGrain v. Dougherty*, 273 US 135 (refusing to appear before a committee); *Anderson v. Dunn*, 5 L. Ed. 242 (attempting to bribe a Congressman)

[3] *Jurney v. MacCracken*, 294 US 125

[4] *Marshall v. Gordon*, 243 US 521

of the proceedings of Parliament. Under rule 15 the Speaker may expel a member of Parliament for the day of a session for serious disorderly conduct and under art.78(2) such exercise of power by the Speaker is not subject to the jurisdiction of the court. Under rule 313 the Speaker may direct any nonmember to leave the precincts of Parliament and in such matter the jurisdiction of the court is ousted by art.78(2). Parliament has not been given any power to punish any nonmember for contempt for any act done outside the precincts of Parliament which has not the effect of obstructing the performance of duties of Parliament and the court will have jurisdiction to determine whether the questioned act outside the precincts of Parliament had the effect of obstructing the performance of the duties of Parliament.

4.97 Like the American Congress, the Bangladesh Parliament, it is submitted, may not punish a person for publishing contumacious statement about Parliament or its members unless it has the effect of obstructing the performance of the duties of Parliament. In the case of a court, the position is different for obvious reason that the court, a totally non-political institution, cannot publicly defend itself and there is a social necessity in preserving the confidence of the people in the administration of justice. On the other hand, Parliament, being a political body, can meet the situation politically. In a democratic society there is always a social and political imperative for freedom of speech and expression and Parliament should not be oversensitive to public criticism.

4.98 ***Fundamental rights and privileges:*** Often a question arises as to whether the fundamental rights guaranteed by Part III in any way control the privileges of Parliament and its committees and members. There have been a number of decisions in the Indian jurisdiction.[1] But those decisions lack consistency and the position seems rather anomalous. One author summarised the position stating, "Thus, the position appears to be that it is wrong to suppose that no Fundamental right applies to the area of legislative privileges. Some Fundamental Rights, like art.19(1)(a), do not apply. Perhaps, arts.19(1)(b) to 19(1)(g) would also not apply. On the other hand, some Fundamental Rights, e.g., art.21 do apply, while the position with regard to others, e.g. arts.22(1) and 22(2), is not clear. There is, however, no doubt that if

[1] *Gunupati v. Nafisul Hassan*, AIR 1954 SC 636; *M.S.M. Sharma v. Sinha*, AIR 1959 SC 395; *In Re Art.143*, AIR 1965 SC 745; *Kesav Singh v. Speaker Legislative Assembly*, AIR 1965 All 349

Parliament were to enact a law defining its privileges, as is envisaged by art.105(3), then such a law would not be free from the controlling effect of the Fundamental Rights."[1]

4.99 In the American jurisdiction Congressional privileges are subject to the fundamental rights to the extent guaranteed by the Constitution.[2] There is no reason why the same position shall not obtain in Bangladesh. Citizens, having been guaranteed certain fundamental rights, may claim enforcement of it unless the Constitution expressly or by necessary implication creates a bar. The inquiry will be to what extent art.78 bars enforcement of specific fundamental rights. The rules of procedure made by Parliament under art.75 is a law within the meaning of art.26 and must conform to the provisions of Part III. Similar will be the position of a law, if made, in terms of art.78(5).[3] No fundamental right can be claimed in respect of anything which is part of the internal proceedings of Parliament as in such case art.78(1) ousts the jurisdiction of the court. Art.78(2) grants immunity to the members and officers of Parliament in respect of exercise of the power vested for regulation of procedure, the conduct of business or maintenance of order without laying down any procedure for the exercise of the power. If the power is exercised without giving the affected person any opportunity of being heard, the affected person can complain of violation of art.31. Violation of fundamental right may be urged by a citizen regarding any action taken in respect of anything happening outside the precincts of Parliament which is not a part of the proceedings of Parliament. If a person is punished for contempt for an act done outside Parliament's precincts without an opportunity of being heard, the person may complain violation of art.31. A citizen may claim his freedom of speech and expression regarding publication in respect of the proceedings of Parliament and Parliament cannot prohibit such publication unless the proceeding is of a secret session under rule 181 of the Rules of Procedure.

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[1] Jain - Indian Constitutional Law, 4th ed., p.66

[2] Schwartz - Constitutional Law, 1979, pp.84-86; *Eastland v. U.S. Servicemen's Fund*, 421 US 491; *Quinn v. U.S.*, 349 US 155; *Watkins v. U.S.*, 354 US 178; *Dombrowski v. Eastland*, 387 US 82.

[3] *In Re Art.143*, AIR 1965 SC 745

CHAPTER FIVE

THE JUDICIARY

5.1 Part VI of the Constitution deals with the judiciary. Art.7 provides that all powers in the Republic shall be effected only under and by the authority of the Constitution. The responsibility of seeing that no functionary of the State oversteps the limit of his power is, of necessity, on the judiciary. This does not render the judiciary a superior organ of the State; it remains as a co-ordinate and co-equal organ with the other two organs of the State, though it has to perform the delicate task of ensuring compliance with the provisions of the Constitution by all the organs of the State.

5.2 The Constitution vests the executive power of the Republic in the Prime Minister and the legislative power of the Republic in Parliament. But it is silent about the vesting of the judicial power of the Republic. Even then the judicial power is exercisable by the judiciary.[1] There cannot be any doubt that the judicial power of the Republic is vested in the courts with the Supreme Court at the apex.[2] The question arose whether the administrative tribunal set up under the provisions of art.117 has been invested with any judicial power. The majority in *Bangladesh v. A.K.M. Zahangir*[3] held that any tribunal which is not invested with some part of the judicial power of the Republic is outside the ambit of art.102(5). Art.102(5) refers to the administrative tribunal constituted under art.117 and it logically follows that the administrative tribunal exercises the judicial power of the Republic. In *Mujibur Rahman v. Bangladesh* M.H. Rahman J took the same view[4], but M. Kamal J took the contrary view that the administrative tribunal is not a wielder of the judicial power of the State.[5]

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[1] *Hinds v. The Queen*, [1976] 1 All E.R. 353

[2] *Mujibur Rahman v. Bangladesh*, 44 DLR (AD) 111; M. Kamal J - Bangladesh Constitution: Trends and Issues, p.16

[3] 34 DLR (AD) 173, 205

[4] 44 DLR (AD) 111, 120 (The Constitution made provisions in Article 117 for conferring State's judicial powers on some tribunals and integrating them in the judiciary ...)

[5] Ibid, p.128; for discussion on judicial power, see Para 5.239-5.241

5.3 Art.94 provides for the Supreme Court of Bangladesh comprising two divisions - the Appellate Division and the High Court Division. Because of the previous constitutional dispensation of having two superior courts, the High Court and the Supreme Court, one is always prompted to think that the two divisions are two courts under one compendious name. But this is not correct. The Supreme Court is, in fact, one court with two divisions. If the scheme of Part VI is closely examined, it will be found that in hearing cases the two divisions sit separately, one acting as the appellate side of the other in the same way the Division Benches of the High Court used to hear appeals from the decisions of the Single Benches of the High Court under Letters Patent, which did not render the Single Benches and the Division Benches of the same court different courts. In other matters, the two divisions function as one court and this peculiar feature of the Supreme Court has been noted in *Anwar Hossain Chowdhury v. Bangladesh*[1].

CHIEF JUSTICE AND OTHER JUDGES OF SUPREME COURT

5.4 *Appointment of Judges:* The Chief Justice and other Judges of the Supreme Court of both the divisions are appointed by the President. In the matter of appointment of the Chief Justice the President is not required to act on the advice of the Prime Minister or the Cabinet, but the President is to act on the advice of the Prime Minister in the matter of appointment of the puisne Judges.[2] The Constitution, as originally framed, contained a provision requiring the President to consult the Chief Justice in the matter of appointment of the puisne Judges, but this provision was omitted by the Fourth Amendment. In the early part of 1994, the government appointed some additional Judges to the High Court Division without consultation with the Chief Justice. The Chief Justice objected to such a method of appointment. The executive government denied any constitutional requirement of consultation. It was pointed out from the Bar that the process of consultation has been followed consistently from the time of the British Rule even though there was no constitutional or legal requirement of consultation. Such consultation is absolutely necessary for the independence of the judiciary which is one of the basic features of the Constitution. As such the convention of consultation is a part of the constitutional law of the

[1] 1989 BLD (Spl) 1

[2] Art.48(3)

country.[1] The government ultimately had to accept the contention of the Chief Justice and the Bar.[2] Such a consultation is not a formal matter. It must be an effective consultation and the recommendation of the Chief Justice should not be by-passed unless there be very cogent reasons for it.[3] The Chief Justice and other Judges of the Supreme Court are to take oath in terms of art.148 before entering upon office.

5.5 If the office of Chief Justice becomes vacant or if the President is satisfied that on account of illness, absence or any other cause the Chief Justice is unable to perform his functions, the functions of the Chief Justice shall be performed by the next senior most Judge until some other person enters that office or , as the case may be, the Chief Justice resumes his duties.[4] If at any time the President is satisfied that the number of Judges in any of the divisions should be increased, he may appoint additional Judges for a period not exceeding two years or require any of the Judges of the High Court Division to sit in the Appellate Division as an *ad hoc* Judge.[5] Such additional Judges may be appointed as permanent Judges or as additional Judges for a further period.

5.6 A person shall not be qualified to be appointed as a Judge of the Supreme Court unless he is a citizen of Bangladesh, and he (a) has been an advocate of the Supreme Court for at least ten years, (b) has held judicial office in the territory of Bangladesh for at least ten years, or (c) has such other qualifications as may be prescribed by law for appointment as a Judge.[6] Holding of the office of Chief Election Commissioner is not a bar to the appointment of a person as Judge of the Appellate Division.[7]

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[1] see Para 1.5. The fact that the provision of consultation was omitted by the Fourth Amendment is not of great significance as notwithstanding the amendment the process of consultation was continued and what is more important is that the Fourth Amendment in this regard affecting the independence of judiciary is of doubtful validity.

[2] The decision of the Indian Supreme Court in *S.C. Advocates-on-Record v. India*, AIR 1994 SC 268, in this regard is instructive. The Indian Constitution contains specific provisions for consultation.

[3] Ibid; see *Secretary, Ministry of Finance v. Masdar Hossain*, 2000 BLD (AD) 104, for the meaning and content of consultation.

[4] Art.97

[5] Art.98

[6] Art.95(2)

[7] *Shamsul Huq Chowdhury v. Justice Abdur Rouf*, 1996 BLD 126

5.7 *Tenure of the Judges and Supreme Judicial Council:* The Judges of the Supreme Court other than the additional Judges shall hold office until they attain the age of sixty five years and shall not be removable except upon a report of the Supreme Judicial Council.[1] The Supreme Judicial Council shall consist of the Chief Justice and two next senior Judges. The Council shall prescribe a Code of Conduct to be observed by the Judges, and shall inquire into the capacity or conduct of the Judges. If upon information received from the Council or from any other source, the President has reason to apprehend that a Judge is incapable of performing his functions because of physical or mental incapacity or has been guilty of gross misconduct, the President may direct the Council to inquire into the apprehended incapacity or misconduct. If the Council upon inquiry makes a report that in its opinion the Judge is so incapacitated or has been guilty of gross misconduct, the President shall remove the Judge from office. If the Judge in respect of whom an inquiry is to be made is a member of the Council or a member of the Council is absent or is unable to act due to illness or any other cause, the Judge who is next in seniority shall act as such member.[2] A Judge may resign his office by writing under his hand to the President.[3] A Judge of the Supreme Court other than an additional Judges after his retirement, resignation or removal cannot plead or act before any court or authority or hold any office of profit in the service of the Republic not being a judicial or quasi-judicial office except that a Judge of the High Court Division can plead and act only before the Appellate Division.[4]

5.8 *Independence of the Judges:* Art.121 of the Indian Constitution provides that no discussion shall take place in Parliament with respect to the conduct of any Judge of the Supreme Court or High Court in discharge of his duties except in a proceeding of his impeachment in Parliament. The Indian Supreme Court observed, "The Constitution-makers attached so much importance to the independence of the Judicature in this country that they thought necessary to place them beyond any controversy, except in the manner provided in Art.121".[5] In order to maintain independence of the Judges of the Supreme Court, the framers of the Constitution not only provided under art.147[6] that the

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[1] Art.96(2)
[2] Art.96(3), (4) & (5)
[3] Art.96(2)
[4] Art.99
[5] In Re Under Art.143, AIR 1965 SC 745, Para 63
[6] See Para 6.59B

remuneration, privileges and other terms and conditions of their service shall be not varied to their disadvantage during their term of office[1], but also expressly declared in art.94(4) that the Chief Justice and the other Judges of the Supreme Court shall be independent in the exercise of their judicial functions. It, therefore, naturally follows that the conduct of the Judges of the Supreme Court cannot be discussed by the executive government or by the members of Parliament. The Rules of Procedure provide that no question, motion or resolution which contain reflection on the conduct of any judge of the Supreme Court shall be admissible.[2] The immunity under art.78 of the members of Parliament in respect of what they say in Parliament cannot be construed as allowing them to make any statement or comment which may directly or indirectly undermine the independence of the Judges of the Supreme Court. Art.94(4) is an implied limitation on the freedom of speech of the members of Parliament. But enforcement of this limitation is in the hands of the Speaker[3] as in terms of art.78 the validity of the proceedings of Parliament cannot be questioned in any court, nor a proceeding can be initiated against a member of Parliament for what he said in Parliament.[4] Apart from the conduct of a judge, the work of the courts is not outside the scope of political discussion in Parliament[5] and referring to the comments made in the House of Commons, it was commented –

> Instant political reaction to events such as these may sometimes be ill-informed or exaggerated, but a corrective is needed when judges are seriously insensitive to changing social opinion.[6]

5.9 *Disabilities of the Judges:* Art.99 originally provided that a person who has held office as a Judge (otherwise than as an additional Judge pursuant to the provisions of art.98) shall not after his retirement or removal plead or act before any court or authority or be eligible for any appointment in the service of the Republic. The President does not hold an office in the service of the Republic and as such there is no bar

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[1] *Commissioner of Taxes v. Justice S. Ahmed*, 42 DLR (AD) 163 (Salary of the Supreme Court Judge is exempted from income tax and this position cannot be affected by notification issued under the Income Tax Act)

[2] Rules 53, 63 and 133 of the Rules of Procedure

[3] *Tej Kiran v. Sanjiva*, AIR 1970 SC 1573

[4] See *Ataur Rahman Khan v. Md. Nasim*, 52 DLR 16

[5] Bradley & Ewing – Constitutional and Asdministrative Law, 12th ed., p.423

[6] Ibid, p.424

to the election of a retired Judge of the Supreme Court to the office of the President.[1] "The purpose behind this prohibition was that the high position and dignity of a Judge of the Supreme Court should be preserved and respected even after his retirement and, further that if any provision was made for holding of office, after retirement, then a Judge, while in the service of the Supreme Court might be tempted to be influenced in his decisions in favour of the authorities keeping an eye upon a future appointment."[2] Subsequently this article was amended permitting appointment of the Judges in a judicial or quasi-judicial office and permitting a Judge of the High Court Division to practise in the Appellate Division. One retired Judge of the High Court Division was appointed Chairman of the Court of Settlement on contract under the Public Servants Retirement Act, 1974. But the government terminated his service with one month's notice in terms of the contract and he challenged the order of termination in the writ jurisdiction. The Appellate Division opined that the provisions of the Act of 1974 were not applicable, but held, "The petitioner's contract of service has been terminated in terms of the contract to which he was a party and since his appointment has been cancelled we do not think that writ jurisdiction under article 102 of the Constitution is attracted to his case."[3] The court made an important observation -

> The concept of judicial independence suggests that his appointment along with terms and conditions of service be governed under Article 96 of the Constitution, as in the case of a sitting Judge. But in the absence of any specific provision to this effect we find it difficult to hold that the petitioner's service as Chairman of the Court of Settlement is governed by Article 96. But when Article 99 has provided for appointment of a retired Judge in a judicial or quasi-judicial office, some statutory provision should also be made for giving minimum security of his service ... If it is not thought to be expedient to make any statutory provision in the case of such appointment, it is better that the original Article 99 be restored putting total ban on appointment of a retired Judge to any public office whatever.[4]

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[1] *Abu Bakr Siddique v. Mr. Justice Shahabuddin Ahmed*, 49 BLD 1

[2] *Abdul Bari Sarker v. Bangladesh*, 46 DLR (AD) 37, 38

[3] Ibid p.39

[4] Ibid.

SEAT OF THE SUPREME COURT

5.10 Art.100 originally provided that the permanent seat of the Supreme Court shall be in the capital, but sessions of the High Court Division may be held at such other place or places as the Chief Justice may, with the approval of the President, from time to time appoint. The scheme of the Constitution in providing for 'session' outside the capital is that Benches of the High Court Division may sit temporarily in any place outside the capital if it is found necessary or convenient by the Chief Justice in the interest of the administration of justice without thereby affecting the jurisdiction of the court conferred by the Constitution. Art.100 never contemplated holding of permanent sessions at fixed places.[1] After proclamation of Martial Law in 1982 permanent Benches of the High Court Division with exclusive territorial jurisdiction were set up at different places and in order to confer validity on such fragmentation of the High Court Division amendment of art.100 was made in June 1988 setting up six permanent Benches and authorising the President to determine the territorial jurisdiction of these Benches by notification in the official Gazette. The amendment was challenged in *Anwar Hossain Chowdhury v. Bangladesh*[2]. The Appellate Division by a majority of 3:1 held that the amendment was void as the High Court Division as an integral part of the Supreme Court with plenary judicial power of the Republic had been rendered non-existent and thereby the basic structure of the Constitution had been altered.[3] As a result, the old position stands restored. The Chief Justice has to decide if in the interest of the administration of justice it is necessary to arrange the holding of sessions of the High Court Division at any place outside the capital. The approval of the President is necessary because such a holding of sessions involves extra expenditure and other logistic problems which cannot be solved without the assistance of the executive government. The discretion, however, is that of the Chief Justice as to whether such session is to be held outside the capital and the holding of sessions can in no case affect the jurisdiction of the High Court Division at its permanent seat.

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[1] *Anwar Hossain Chowdhury v. Bangladesh*, 1989 BLD (Spl) 1

[2] Ibid

[3] For detailed discussion, see Para 4.57-4.63

JURISDICTION OF HIGH COURT DIVISION

5.11 Art.101 provides that the High Court Division shall have such jurisdiction as are conferred on it by the Constitution and by other laws. The main sources of legal jurisdiction of the High Court Division are the Codes of Civil and Criminal Procedure which provide appellate and revisional jurisdictions. There are a number of other laws which confer on the High Court Division jurisdiction to adjudicate disputes.[1] Previously the constitutional jurisdiction used to be defined by reference to writs as those are known in English law. The jurisdiction used to be invoked by application of the aggrieved parties and those applications were known as writ petitions and the constitutional jurisdiction was popularly called the writ jurisdiction. Now after codification of the power and jurisdiction of the High Court Division by art.102, the jurisdiction is still called writ jurisdiction and the applications under art.102 are called writ petitions.

POWER OF JUDICIAL REVIEW

5.12 The remedy of judicial review is different from the remedy of appeal. In appeal, the appellate authority goes into the merit of the case either on a point of law or on points both of law and fact, re-assess the evidence and can substitute its own decision for that of that of the body appealed from. Thus, if the appellate authority thinks that the victim of a motor accident has been given too small an amount of damages for injuries inflicted by the negligence of the defendant, it can increase the amount. In judicial review the court is concerned with the question whether the action under review is lawful or unlawful and the basic power of the court in relation to an illegal decision is to quash it. If the matter has to be decided again, it must be done by the original deciding authority. Courts exercise the power of judicial review on the basis that powers can be validly exercised only within their true limits and a public functionary is not to be allowed to transgress the limits of his authority conferred by the constitution or the laws. For example, if an election tribunal sets aside an election holding, upon consideration of the evidence adduced, that the successful candidate has been guilty of corrupt practices, the appellate authority upon re-assessment of the

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[1] Among those laws the important ones are the Companies Act, 1913, the Court of Admiralty Act, 1891, the Income Tax Ordinance, 1984, the Trade Marks Act, 1940, the Patent and Designs Act, 1911, and the Contempt of Courts Act, 1926.

evidence can set aside the finding of the election tribunal. If no appeal is provided for, the court on judicial review cannot re-assess the evidence. But if the election dispute has been decided upon an application made by a voter (though the election law permits trial of election disputes upon application only by a candidate) or the election tribunal has proceeded on erroneous view of the law or ignoring a material fact, the court exercising the power of judicial review can quash the decision of the election tribunal because of want of authority or illegality. In the same way, the court can exercise the power of judicial review if the decision is *mala fide* or in violation of the principles of natural justice. The role of the court in judicial review is essentially supervisory and the principle here at work is basically that of *ultra vires*, which is synonymous with 'outside jurisdiction' or 'in excess of powers'.[1] The duty of the review court is to confine itself to the question whether the authority (i) has exceeded its powers; (ii) committed an error of law; (iii) failed to consider all relevant factors or taken into consideration irrelevant factors, (iv) failed to observe the statutory procedural requirements and the common law principles of natural justice or procedural fairness; (v) reached a decision which no reasonable authority would have reached, or (vi) abused its powers.[2] Other grounds like the doctrine of legitimate expectation are in the process of emerging.

5.13 Appeal is a creation of statute and no appeal will lie unless it is provided by a statute. Judicial review is a common law remedy in England. "The courts of law have inherent jurisdiction, as a matter of common law, to prevent administrative authorities from exceeding their powers or neglecting their duties."[3] In our country s.9 of the Code of Civil Procedure permits the civil court to try all suits of civil nature

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[1] H.W.R. Wade - Administrative Law, 6th ed., p.280; *Shamsul Huda v. BTMC*, 32 DLR 114

[2] See *Tata Cellular v. India*, AIR 1996 SC 11, para 93 (The court quoted the observation of Lord Brightman in *Chief Constable of the North Wales Police v. Evans*, [1982] 3 All E.R. 141, 154, "Judicial Review is concerned, not with the decision, but with the decision making process. Unless that restriction on the power of the Court is observed, the Court will, in my view, under the guise of preventing the abuse of power, be itself guilty of usurping power.")Lord Diplock summarised the grounds of review as illegality, irrationality and procedural impropriety in *CCSU v. Minister for the Civil Service*, [1985] AC 374. It is a question whether all the grounds of judicial review are covered by these three categories.

[3] H.W.R. Wade - Administrative Law, p.280

unless expressly or by necessary implication[1] barred by law and the relief to be given is principally governed by the provisions of the Specific Relief Act, 1877. By virtue of these provisions the civil courts can exercise the power of judicial review. But this power can be taken away by legislation.[2] The power of judicial review of the superior courts has been a matter of constitutional conferment in our country and it cannot be taken away or abridged by ordinary legislation.[3] The power of judicial review conferred by art.102 is a basic feature of the Constitution and in view of the decision in *Anwar Hossain Chowdhury*[4] it cannot be taken away or curtailed even by amendment of the Constitution. Even where the Constitution originally made provision ousting the jurisdiction of the Supreme Court in certain matters, it is for the Supreme Court to interpret the ouster clause and, notwithstanding the ouster clause, the Supreme Court has the power to declare an action to be without lawful authority if it is totally without jurisdiction (*coram non judice*) or is vitiated by *mala fide* or bad faith.[5] Art.102(1) of the Constitution confers

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[1] The power of judicial review of a civil court is not subject to the pre-condition of exhaustion of efficacious remedy, but where a statute provides for a right or liability and also provides for a remedy, the remedy created by the statute is exclusive and the jurisdiction of the civil court to exercise the power of judicial review is impliedly barred because of the special remedy provided by the statute. See *Jogesh Chandra v. Bangladesh*, 30 DLR 219; *Dost Textile Mills v. S.B. Nath*, 40 DLR (AD) 45; *Woolverhampton New Water Works v. Hawkes*, (1859) 6 CB (NS) 336; *Novel v. London Express Newspapers*, [1919] AC 368. In *Younus Chokder v. Election Commn*, 46 DLR 395, the High Court Division sought to apply the principle to bar a remedy under art.102, but the principle cannot be so applied as the writ jurisdiction can only be ousted by a specific provision of the Constitution and the proper principle to apply in this case is the bar created by the existence of efficacious remedy provided by the relevant provisions of the law.

[2] With respect to *mala fide*, the jurisdiction of civil court can never be taken away for a *mala fide* act is in its very nature an illegal and void act. No legislature while granting power to take action contemplate a mala fide exercise of power. *Abdur Rouf v. Abdul Hamid*, 17 DLR (SC) 515; *Secretary of State v. Mask*, 44 CWN 709.

[3] *Farzand Ali v. West Pakistan*, 22 DLR (SC) 203; *Fazal Din v. Custodian of Evacuee Property*, PLD 1971 SC 779

[4] 1989 BLD (Spl) 1

[5] *Jamil Huq v. Bangladesh*, 34 DLR (AD) 125; *Khandker Mostaque Ahmed v. Bangladesh*, 34 DLR (AD) 222; *Khandker Ehteshamuddin*, 33 DLR (AD) 154; *Saheda Khatun v. Administrative App. Tribunal*, 3 BLC (AD) 155; *Jamal Shah v. Election Tribunal*, 18 DLR (SC) 1; *Shahriar Rashid Khan v. Bangladesh*, 49 DLR 133; *Mohammadullah v. Secretary, Home Affairs*, 1996 BLD 18; *Wukula Mahaz v. Pakistan*, PLD 1998 SC 1263

power on the High Court Division to enforce fundamental rights, while art.102(2) confers power of judicial review in non-fundamental right matters.

5.13A Art.102 is inextricably linked with the genesis of the Constitution and cannot be construed independently of the scheme and objectives of the Constitution, particularly those explicated in the preamble and fundamental principles of State policy.[1]

5.14 Art.102 does not specifically grant any power of judicial review of legislation on the ground of contravention of the provisions of the Constitution other than the provisions of Part III of the Constitution. However, judicial review of laws is implicit in any written Constitution providing for a limited government, that is, a government in which powers of all functionaries are limited and circumscribed by the Constitution, and absence of express power of judicial review is of no consequence.[2] When art.102 is read with art.7 there is no difficulty in finding the power of the Supreme Court to declare void any provision of law on the ground of inconsistency with any provision of the Constitution and the Supreme Court has been exercising that power in applications filed under art.102.[3]

PRINCIPLES FOLLOWED BY COURT IN JUDICIAL REVIEW

5.15 Ours is a controlled constitution with entrenched provisions which has circumscribed the power of Parliament in making laws and has reposed on the Supreme Court the constitutional responsibility to adjudicate upon the validity of the laws.[4] In deference to the co-equal status of the legislature, the court, in deciding the constitutionality of any law passed by the legislature, follows certain principles in keeping with the necessity of harmonious working of the different organs of the State. These principles are stated below:-

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[1] *Dr. Mohiuddin Farooque v. Bangladesh*, 49 DLR (AD) 1

[2] *Marbury v. Madison*, 1 Cranch 137; *Fazlul Quader Chowdhury v. Abdul Haq*, 18 DLR (SC) 69 (per Cornelius CJ, "... on a more general ground, namely, the ground that a written constitution necessarily connotes the existence of Courts which will ... examine and fully decide the questions which are certain to arise in great number, of whether ... a law passed by a law-making authority under the Constitution is, or is not, in contravention of the Constitution" (Para 8)

[3] *Kudrat-E-Elahi v. Bangladesh*, 44 DLR (AD) 319

[4] *Anwar Hossain Chowdhury v. Bangladesh*, 1989 BLD (Spl) 1

(1) When the constitutionality of a law is challenged, the court is to begin with a presumption of constitutionality of the law[1] and the person challenging the validity of the law must show that the law is clearly unconstitutional.[2] If an Act of Parliament would be valid only in the event certain circumstances exist, it will be presumed that all such circumstances do exist.[3] Thus all circumstances which may lead to the finding of the validity of the law must be presumed by the court and must be shown not to exist by the person challenging the validity of the law.[4] In case of reasonable doubt as to whether the law is unconstitutional, the court will resolve the doubt in favour of constitutionality of the law[5], or in other words, in no doubtful case will the court pronounce a legislation to be unconstitutional.[6] But doubt as to constitutionality must not be pressed to the point of disingenuous evasion when the legislative intention is clearly revealed.[7]

(2) Where the constitutionality of a law is assailed and there are two possible interpretations, one of which would render the law constitutional, while the other unconstitutional, the former interpretation is to be preferred and the constitutionality of the law upheld.[8] In *Re Hindu Women's Right to Property Act*[9] the validity of that Act was in question. In that Act Hindu women were given the right of succession to property. It was a central Act which could not deal with agricultural property, a provincial subject under the Government of India Act, 1935. Hence, if the law was interpreted to cover both agricultural and urban property, the law would be void for want of competence of the central legislature, but the law would be valid if it was held that the central legislature intended to deal with urban property only. The second interpretation was accepted to hold the law valid.[10] The principle of

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[1] *Davis Warehouse Co. v. Bowles*, 321 US 144; *East Pakistan v. Sirajul Haq*, 19 DLR (SC) 281, 343; *Keramat Ali v. Bangladesh*, 50 DLR 372

[2] *Home Tel & Tel Co. v. Los Angels*, 211 US 265; *V.M. Syed Mohammad & Co. v. A.P.*, AIR 1954 SC 314; *Madhubhai Gandhi v. India*, AIR 1961 SC 21; *Chiranjitlal v. India*, AIR 1951 SC 41

[3] *Alabama State Federation of Labour v. McAdory*, 325 US 450

[4] *Rameshlal v. Union of India*, AIR 1970 Cal 520

[5] Cooley - Constitutional Limitations, 1927, p.372

[6] *Toombs v. Citizens Board of Wynesboro*. 281 US 643

[7] *Hopkins Federal Saving & Loan Association v. Cleary*, 296 US 315

[8] *U.S. v. Harriss*, 347 US 612; *U.S. v. C.I.O.*, 335 US 106

[9] AIR 1942 FC 72

[10] See the decisions in *Macleod v. Attorney General for N.S.W*, (1891) A.C. 455; *Joti*

narrowing down the scope of a provision of law is sometimes called the doctrine of reading down. This doctrine cannot, however, be applied where the provision in question is cast in definite and unambiguous language and its intention is clear or where reading down of the statute involves extensive additions or deletions. Not only is it no part of the court's duty to undertake such an exercise, it is beyond its jurisdiction to do so.[1]

(3) The court gives its opinion in concrete cases and does not answer academic questions.[2] The court will not pass on constitutional question and pronounce a statute invalid unless a decision on that very point becomes necessary to the determination of the cause.[3] Hence, if the case may be decided on either one of the two grounds and one of those grounds does not involve the constitutionality of the law, the court will decide on the latter ground.[4] This principle was enunciated by the American Supreme Court which also made exceptions for important reasons.[5] The principle cannot be universally applied, and the application of the principle will depend on the nature of the unconstitutionality and the nature and extent of its impact on the rights of the citizens. One of the reasons assigned for departing from this principle is that the constitutional rights of the citizens should be

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Timber Mart v. Calicut Municipality, AIR 1970 SC 264; *Jagadish Pandey v. Chancellor, Bihar University*, AIR 1968 SC 353.

[1] *Delhi Transport Corporation v. D.T.C. Mazdoor Congress*, AIR 1991 SC 101; see *Chintaman Rao v. State of M.P.*, AIR 1951 SC 118 (if the language employed in the statute is wide enough to cover restriction both within and outside the limits of constitutionally permissible legislation affecting fundamental right and so long as the possibility of the statute being applied for purposes not sanctioned by the Constitution cannot be ruled out, the statute must be struck down as *ultra vires*)

[2] *Kudrat-e-Elahi v. Bangladesh*, 44 DLR (AD) 319, 340

[3] Cooley - Constitutional Limitations, 1927, p.338; *Kudrat-e-Elahi v. Bangladesh*, 44 DLR (AD) 319, 340

[4] Cooley - Constitutional Limitations, 1927, p.339; *Shahriar Rashid Khan v. Bangladesh*, 1998 BLD (AD) 155, 173; *Viterelli v. Seaton*, 359 US 535; *Basheshar Nath v. C.I.T., Delhi*, AIR 1959 SC 149

[5] *Silver v. Louisville*, 213 US 175; see 16 Am Juris 2d, Const. Law, Para 172 (Notwithstanding repeated statements to the effect that the first principle of constitutional adjudication is to avoid constitutional adjudication, there have certainly been occasions where the court has not hesitated to speedily decide certain constitutional issues.); *New York ex rel Bryant v. Zimmerman*, 278 US 63; *U.S. v. Raines*, 362 US 17; see also the comments of Seervai on this rule in Constitutional Law of India, 3rd ed., p.827-829.

adjudicated as quickly as possible and delay often results in a denial of rights.[1] The principle was applied by K. Hussain CJ and reiterated by S.Ahmed J in *Dr. Nurul Islam v. Bangladesh*[2], but the majority of the Judges did not adhere to this principle and declared the law in question to be unconstitutional even though they also found the impugned action of the government compulsorily retiring the appellant to be *mala fide* and a decision on constitutionality could have been avoided. Having regard to the nature of invasion on the right of service holders and the fact that the question of constitutionality of the law relating to compulsory retirement frequently arises, the majority Judges thought it right not to apply the principle of avoiding adjudication on constitutional issues, though, of course, they did not assign any reason for departing from this principle.[3]

(4) The court will not decide a larger constitutional question than is required by the case which means that the court will decide a constitutional question only when, and to the extent, necessary for the disposal of a case.[4] The court will not formulate a rule of constitutional law broader than is required by the precise facts presented on record.[5] But in *Kazi Mukhlesur Rahman v. Bangladesh*[6] the Appellate Division went into the question of the extent of executive power under arts.55(2) and 143(2) even after holding that the writ petition was premature.

(5) The court will not hear an objection regarding the

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[1] *Jeffers v. Whitley* (MD NC) 197 F Supp 84

[2] 33 DLR (AD) 201; see also *Bangladesh v. Dr. Nilima Ibrahim*, 1982 BCR (AD) 177 (High Court Division found the order of Government dissolving Bangladesh Mahila Samity under P.O. 117 of 1972 to be illegal and also declared the law ultra vires Art.38 of the Constitution. On appeal, the Appellate Division also found the order to be without lawful authority and observed, "On consideration of the facts and the applicability of the law to them we do not consider it necessary to enter into a discussion relating to the constitutionality of President's Order no.117 of 1972".

[3] See *Idrisur Rahman v. Shahiduddin*, 1999 BLD 291 (Court went into the question whether the respondent could be posted as Chief Metropolitan Magistrate by the executive without consultation with the Supremen Court even though he was transferred)

[4] *U.S. v. Raines*, 362 US 17; *Basheshar Nath v. C.I.T., Delhi*, AIR 1959 SC 149; *Suruj Mall Mehta v. A.V. Visvanatha Sastri*, AIR 1954 SC 545; *M.M. Pathak v. India*, AIR 1978 SC 803

[5] *Garner v. Louisiana*, 368 US 157

[6] 26 DLR (AD) 44

constitutionality of a law by a person who has not been affected by it.[1] This principle has undergone considerable modification and is now directed against challenge by a person who has no sufficient interest in the matter and is just a busybody.[2]

(6) A law cannot be held unconstitutional on the ground that it violates one or more of the principles of liberty, or the spirit of the constitution unless such principles or the spirit are found in terms of the constitution.[3] In the same way a law cannot be declared void on the ground that it is harsh.[4]

(7) In deciding the constitutional validity of a law, the court is not concerned with the wisdom and justice of the law and the law, even though harsh, will be held valid if it is not prohibited by the provisions of the constitution.[5] But if a law is unnecessarily harsh or unreasonable in the context of the legitimate governmental objective sought to be achieved a question may arise whether the law is *ultra vires* art.31 or 32 of the Constitution.[6]

(8) The constitutionality of a statute will not be determined by the court as a hypothetical question as constitutional questions are not to be decided in the abstract or as an academic discussion.[7] Hence, ordinarily, the court will not pass on the validity of a law or part of a law which has not yet been brought into operation as it will be a mere academic question.[8]

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[1] Cooley - Constitutional Limitations, 1927, p.339; *Hans Muller Nurenberg v. Superintendent, Presidency Jail, Calcutta*, AIR 1955 SC 367

[2] See Para 5.155-5.164

[3] Cooley - Constitutional Limitations, 1927, p.351; *Gopalan v. Madras*, AIR 1950 SC 27; *Keshavan v. Bombay*, AIR 1951 SC 128

[4] *Bangladesh Krishi Bank v. Meghna Enterprise*, 50 DLR (AD) 194 (The proposition has been too broadly stated when the Appellate Division also held that a law cannot be declared void on the ground of it being arbitrary or not in consonance with the principles of natural justice. It is submitted that on these two ground a law may be held violative of art.31 of the Constitution. See Para 2.105 and 2.07)

[5] Cooley - Constitutional Limitations, 1927, p.341; *Bombay v. Balsara*, AIR 1951 SC 318

[6] See Para 2.105-2.108

[7] *Kudrat-E-Elahi v. Bangladesh*, 44 DLR (AD) 319, 340 & 354; *U.S. v. Raines*, 362 US 17; *Government and Civil Employees Organising Committee v. Windsor*, 353 US 364

[8] *Chandra Sekhar v. Orissa*, AIR 1972 SC 486

(9) If a law is found bad in part and the bad part can be severed from the good part, the court will declare void the bad part only.[1]

5.15A In judicial review of administrative actions, the court has to start with the presumption of regularity of the official act and the burden of proof is on the person who alleges the contrary.[2] Whenever a power is given by a statute to an authority, whatever may be fairly regarded as incidental to or consequential upon things authorised by the legislature should not be declared *ultra vires*.[3]

5.16 *Doctrine of political question:* In *Dulichand v. Bangladesh*[4] the Appellate Division observed, "As regards the argument of Constitutional legitimacy of Yahya Khan all that need be said is that, this is a political question which the court should refrain from answering, if the validity or legality of the law could otherwise be decided." Many constitutional issues have political overtones, but that cannot take them out of the purview of the judicial scrutiny. Nor was the constitutional legitimacy of Yahya Khan a political question. The Pakistan Supreme Court found him to be a usurper.[5] So also the Privy Council found the government of Ian Smith unconstitutional.[6] The doctrine of political question has its origin in the American jurisdiction where because of the rigid practice of separation of powers the American Supreme Court evolved it to stay its hands off in matters which, according to the Supreme Court, were committed to the judgment of the other branches of the government by the constitution.[7] Questions relating to foreign relations, existence of state of war or belligerency, employment of armed forces, organisation and procedure of the legislative department etc are treated as political questions. The doctrine has been criticised. The American Supreme Court refused to treat the legislative membership[8] and legislative

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[1] See Para 2.235-2.236

[2] *Mustafa Kamal v. Commissioner of Customs,* 51 DLR (AD) 1; *IRC v. Rossminster Ltd,* [1980] 1 All E.R. 80

[3] *A.G. v. Great Eastern Rly Co.*, [1880] 5 App Cas 473

[4] 1981 BLD (AD) 1

[5] *Asma Jilani v. Punjab*, PLD 1972 SC 139

[6] *Madzimbamuto v. Lardner-Burke*, [1968] 3 All E.R. 561

[7] *Baker v. Carr*, 369 US 186, 217; *Elrod v. Burns*, 427 US 347, 351; *Luther v. Borden*, 12 L.Ed 581 (the Court can never with propriety be called on officially to be the umpire in questions merely political')

[8] *Powell v. McCormack*, 395 US 486

apportionment[1] as political questions. Speaking about the doctrine Schwartz commented-

> The political-question doctrine is itself an anomaly in a system in which governmental acts may ordinarily be weighed in the judicial balance and, if necessary, found constitutionally wanting. A good case can be made for restricting the doctrine to the field of foreign affairs. It is one thing to hold that there must be judicial self-limitation in cases bearing directly on the transaction of external relations. It is quite another to use the political question doctrine as a formula to avoid decision in cases involving only internal affairs. *If there is one principle that is fundamental in the constitutional system, it is that of having the judiciary as the ultimate arbiter on all domestic constitutional questions*. That, indeed, is what Americans normally mean by the rule of law.[2] (italics supplied)

In India the doctrine was sought to be applied to a domestic constitutional question.[3] The Indian Supreme Court refused to apply the doctrine in respect of the question of justiciability of the satisfaction of the President regarding the existence of emergency.[4] In an earlier case, Shah J rightly observed, "Constitutional mechanism in a democratic polity does not contemplate existence of any function which may qua the citizens be designated as political and orders made in the exercise whereof are not liable to be tested for their validity before the lawfully constituted Courts."[5]

5.17 Ours is a parliamentary form of government and we do not have rigid separation of powers so that the question of deference to the other branches of the government cannot get the primacy. The question whether a particular government is legitimate is essentially a constitutional question to be decided with reference to the constitution and such a question like other constitutional questions should not be decided unless the controversy between the parties requires resolution of the question. In *Abdul Baqui Baluch v. Pakistan*[6] the Pakistan Supreme

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[1] *Baker v. Carr*, 369 US 186

[2] Constitutional Law, 2d ed., p.44 (Quoted with approval in *Special Reference no.1 of 1995*, 47 DLR (AD) 111)

[3] *Rajasthan v. India*, AIR 1977 SC 1361

[4] *A.K. Roy v. India*, AIR 1982 SC 710, Para 26; see Para 3.33-3.34

[5] *Madhav Rao Scindia v. India*, AIR 1971 SC 530

[6] 20 DLR (AD) 249, 262.

Court held that the question whether an emergency has ceased to exist is a political question which is outside the competence of the courts to decide. At that time the country had a presidential form of government, but while dealing with the provisions of the Constitution of 1973, which introduced a parliamentary system of government, the Pakistan Supreme Court observed, "This 'political question doctrine' is based on the respect for the Constitutional provisions relating to separation of power among the organs of the State. But where in a case the Court has jurisdiction to exercise power of judicial review, the fact that it involves political question, cannot compel the Court to refuse its determination".[1] In our constitutional system there is no justification for the application of the doctrine of political question. In cases like proclamation of emergency, the court will attach great weight to the views of the executive government, but that is something different from saying that the court has no competence to decide because of the doctrine. The President acts on the advice of the Prime Minister and there may be occasions when the executive government may not revoke the proclamation of emergency even though clearly there is no emergency. Recently in a Malaysian case, the Privy Council observed that the executive government may be directed to advise the President to revoke the emergency.[2] There is no need to adopt and apply the doctrine of political question. Instead we can follow the hint of Schwartz and stress the principle of "judicial self-limitation in cases bearing directly on the transactions of external affairs." Taking into consideration the American cases and the comments of some authors, the Appellate Division pronounced -

> ... there is no magic in the phrase `political question'. While maintaining judicial restraint the Court is the ultimate arbiter in deciding whether it is appropriate in a particular case to take upon itself the task of undertaking a pronouncement on an issue which may be dubbed as a political question.[3]

Whenever the right of a citizen is affected, the Constitution has mandated adjudication of the right by the court. Of course, it has to be recognised that there may be issues even in domestic affairs which are by nature not suitable for judicial determination. It should be left to the

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[1] *M.K. Achakzai v. Pakistan*, PLD 1997 SC 426, 518; see also *Farooq A.K. Leghari v. Pakistan*, PLD 1999 SC 57

[2] *Teh Cheng Poh v. Public Prosecutor*, [1980] AC 458

[3] *Special Reference no.1 of 1995*, 47 DLR (AD) 111

court to identify such issues as and when presented and no question should escape judicial scrutiny when there are judicially manageable standards for such determination.[1] For deciding an issue, lack of judicially manageable standards strengthens the conclusion that there is a textually demonstrable commitment of the issue to another co-ordinate branch of the government.[2]

WRIT JURISDICTION : ENFORCEMENT OF FUNDAMENTAL RIGHTS

5.18 ***Nature of the remedy:*** Like art.32 of the Indian Constitution, art.22 of the Pakistan Constitution of 1956 conferred power on the Supreme Court to enforce fundamental rights and made the right to apply to the Supreme Court for enforcement of fundamental rights itself a fundamental right. The High Courts of the provinces had also power to enforce fundamental rights, but this power was discretionary while the power of the Supreme Court was not discretionary and once a law or an administrative action was found to be violative of a fundamental right, it was obligatory for the Supreme Court to grant relief to the aggrieved person. In the Constitution of Pakistan of 1962, the original jurisdiction of the Supreme Court was omitted and the aggrieved persons were to move the provincial High Courts for redress and the Supreme Court had jurisdiction to hear appeals from the judgments of the High Courts. The power of the High Courts to enforce fundamental rights remained a discretionary power as the right to move for enforcement of fundamental right was no longer a fundamental right. Under the Constitution, the High Court Division has power under art.102(1) to pass necessary orders to enforce fundamental rights and under art.44(1) the right to move the High Court Division under art.102(1) is itself a fundamental right. The position of the High Court Division in respect of enforcement of

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[1] Powell v. McCormack, 395 US 486.

[2] *Nixon v. US*, 506 US 224 (In the impeachment of Judge Nixon, under the Rules a committee of Senators was to hear the evidence, but the rule was challenged as the constitution provided that the "Senate shall have the sole Power to try all Impeachment". The Supreme Court held that the expression 'try' in the Impeachment Trial Clause lacks sufficient precision to afford any judicially manageable standard of review which strengthens the conclusion that there is textually demonstrable commitment of the issue to a coordinate branch.)

fundamental rights is the same as that of the Indian Supreme Court with the difference that its decision is not final and is subject to appeal under art.103. Thus it is not discretionary with the High Court Division to grant relief under art.102(1). Once it finds that a fundamental right has been violated, it is under constitutional obligation to grant the necessary relief.[1] Under art.32 the Indian Supreme Court entertains only disputes involving breach of the fundamental rights. If a person wants to challenge any State action on various grounds including breach of the fundamental rights he shall have to seek the remedy under art.226 which is discretionary. Under our constitutional dispensation, a petitioner does not have this problem; he can by one petition enforce his right under art.44 and at the same time press other grounds of *ultra vires* in respect of a State action.

5.18A A question arises as to the extent of application of art.102(1) in relation to the enforcement of the right under art.31. Art.31 makes it a fundamental right for the citizens and residents of Bangladesh to be treated in accordance with law. This article is attracted whenever an illegality is committed. It may be contended that whenever an authority acts illegally or commits an error of law a person's fundamental right to be treated in accordance with law is violated and the remedy under art.102(1) can be availed. If this contention is accepted, the provisions of art.102(2)(a) virtually become redundant as all cases covered by art.102(2)(a) may be dealt with under art.102(1). None of the provisions of the Constitution can be interpreted in a way which renders some other provision redundant and in such a situation it is necessary to give a harmonious interpretation which will not create any redundancy. It has to be seen that when an authority acts illegally or commits an error of law, the person aggrieved has a remedy under art.102(2)(a) and in such a situation enforcement of fundamental right is not necessary. Enforcement of fundamental right is necessary only when an action is legally valid and operative, but constitutes violation of a fundamental right and art.102(1) is attracted in all such cases.[2] In relation to art.31, the question of enforcement of fundamental right under art.102(1) will arise when a law is found to be unreasonable and thus violative of art.31.

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[1] *Kochuni v. Madras*, AIR 1959 SC 725; *Romesh Thapar v. Madras*, AIR 1950 SC 124

[2] See *Bangladesh v. Mohammad Faruque*, 51 DLR (AD) 112, 116 (Violation of all kinds of laws are not violative of fundamental right

5.19 *Disputed questions of fact:* In view of the provision of art.44, the High Court Division cannot refuse to entertain an application under art.102(1) on the ground that the petition involves resolution of disputed question of fact[1]; if necessary, in appropriate cases, the court will have to take evidence, either itself or by issuing commission, to resolve any disputed question of fact to determine whether a fundamental right has at all been violated.[2] It may be noted that the Rules of the High Court of East Pakistan was amended in 1956 after the commencement of the Constitution of Pakistan, 1956 making provision for taking evidence in the writ jurisdiction and the said Rules are applicable in respect of the proceedings before the High Court Division.[3]

5.20 *Nature of the relief to be granted:* The Constitution does not stipulate the nature of the relief which may be granted. It has been left to the High Court Division to fashion the relief according to the circumstances of a particular case.[4] It need not be confined to the injunctive relief of preventing the infringement of a fundamental right and in an appropriate case it may be a remedial one providing relief against a breach already committed.[5] Speaking about the power of the court under art.32 of the Indian Constitution (which corresponds to our art.44), the Supreme Court said that in granting relief in case of a violation of fundamental rights the court is not helpless and it should be prepared to forge new tools and devise new remedies and, if necessary, to develop new principles of liability for the purpose of vindicating those precious fundamental rights.[6] In fact, the Indian Supreme Court did not rest merely giving declarations or direction; where the situation demanded, it granted exemplary costs[7] and even damages[8] for violation of fundamental rights relating to life and personal liberty. In *Nilabati*

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[1] *Kochuni v. Madras*, AIR 1959 SC 725.

[2] Ibid ; *Nilabati Behera v. Orissa*, AIR 1993 SC 1960 (Supreme Court caused an inquiry to be held by a District Judge to settle the disputed questions of fact and on the basis of inquiry report granted damages for violation of the fundamental right to life).

[3] See Para 5.140 & 5.142

[4] *Bangladesh v. Ahmed Nazir*, 27 DLR (AD) 41

[5] *Mehta v. India*, AIR 1987 SC 1086, 1091

[6] *Khatri v. Bihar*, AIR 1981 SC 928; *Union Carbide Corp. v. India*, AIR 1992 SC 248; *Nilabati Bahera v. Orissa*, AIR 1993 SC 1960

[7] *Sebastian Hongray v. India*, AIR 1984 SC 1026 (Rs.1 lac to each of the petitioners)

[8] *Rudul Shah v. Bihar*, AIR 1983 SC 1086; *Bhim Singh v. J & K*, AIR 1986 SC 494; *Rural Litigation and Entitlement Kendra v. U.P.*, AIR 1991 SC 2216

Behera v. Orissa[1] a suspect was beaten to death while in police custody and on the application of the mother of the suspect, the court had an inquiry made by a district judge and granted damages to the mother. The court referred to its earlier decisions[2] and the decision of the Privy Council in *Maharaj v. A.G. of Trininad*[3] and observed -

> The contrary view would not merely render the court powerless and the constitutional guarantee a mirage, but may, in certain circumstances, be an incentive to extinguish life, if for the extreme contravention the court is powerless to grant any relief against the State, except by punishment of the wrongdoer for the resulting offence, and recovery of damages under private law, by ordinary process. If the guarantee that deprivation of life and personal liberty cannot be made except in accordance with law is to be real the contravention of the right in case of every contravention must also be possible in the constitutional scheme, the mode of redress being that which is appropriate in the facts of each case. This remedy in public law has to be more readily available when invoked by the have-nots, who are not possessed of the wherewithal for enforcement of their rights in private law, even though its exercise is to be tempered by judicial restraint to avoid circumvention of private law remedies where more appropriate.[4]

It may be seen that in India the government can be sued in tort only for non-sovereign acts[5]. Even then the Indian Supreme Court granted the relief of compensation by making a distinction between public law remedy and private law remedy. The provisions of art.146 of the Constitution do not make any distinction between the sovereign and non-sovereign acts nor makes any reference to the extent of liability of

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[1] AIR 1993 SC 1960

[2] *Rudul Shah v. Bihar*, AIR 1983 SC 1086; *Sebastian v. India*, AIR 1984 SC 571, 1026; *Bhim Singh v. J & K*, AIR 1986 SC 494; *Saheli v. Commr. of Police*, AIR 1990 SC 513; *Maharashtra v. Ravikant*, [1991] 2 SCC 373; *Chairman Rly. Board v. Chandrima Das*, AIR 2001 SC 988; *Ahluwalia v. India*, AIR 2001 SC 1309

[3] [1978] 2 All E.R. 670 (The Privy Council directed the High Court to assess compensation to be paid by the State for incarceration of a lawyer by judicial order for contempt of court in violation of the right to life and liberty guaranteed by the constitution of Trinidad and Tobago holding that the jurisdiction to hear and determine any application and make orders and directions for the purpose of enforcing the right may include payment of compensation.)

[4] AIR 1993 SC 1960, para 19

[5] See Para 6.61

the government in British India. In coming to the decision in *Nilabati Behera*, the Indian Supreme Court relied on its power to do complete justice. The High Court Division does not have that power. But it should not make any difference as the power to grant compensation is not barred by any provision of the Constitution or any law and the enforcement of fundamental right includes payment of compensation as held by the Privy Council in *Maharaj*. In every case of violation of fundamental rights, damages may not be given by the High Court Division. But there is no reason why the relief should be denied in a case of clear and blatant violation of fundamental rights involving life or liberty of the citizens. The High Court Division awarded compensation where it found the detention of citizens to be completely without any basis on record or the result of utter negligence.[1]

5.21 ***Procedure and practice:*** The Constitution has not stipulated any procedure for the remedy and it is for the court to adopt its own procedure. The High Court Division follows certain rules of procedure and practice in respect of all writ petitions whether one involves enforcement of fundamental rights or not and those rules have been discussed in Para 5.140 - 5.152. Here we discuss some rules of procedure which are particularly applicable in respect of writ petitions for the enforcement of fundamental rights.

5.22 In matters of enforcement of fundamental right the person aggrieved[2] has to apply and it is the obligation of the High Court Division to adjudicate upon and enforce fundamental rights. The only limitation placed by the Constitution is that the High Court Division cannot *suo motu* declare any law or action violative of fundamental right. Though it is the obligation of the court to enforce fundamental rights, it will not, in exercise of the jurisdiction, ignore the laws of procedure, evidence, limitation, *res judicata*, and the like.[3] The Indian Supreme Court held that the doctrine of waiver is not applicable in respect of fundamental rights.[4] The court will not allow any person to agitate stale claims[5] and may refuse to entertain an application filed after

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[1] *Bilkis Akhtar Hossain v. Secy. Ministry of Home*, 2 BLC 257 (under appeal); *Shahnewaz v. Bangladesh*, 50 DLR 633

[2] See Para 5.155-5.164

[3] *Tilokchand v. H.B. Munshi*, AIR 1970 SC 898; *Amalgamated Coal Fields v. Janapad Sabha*, AIR 1964 SC 1013

[4] *Basheshar Nath v. CIT*, AIR 1959 SC 149; *Olga Tellis v. Bombay*, AIT 1986 SC 180

[5] *Deodhar v. Maharashtra*, AIR 1974 SC 259

an inordinate delay.[1]

5.23 *When application for enforcement of fundamental right can be maintained:* A person may apply for enforcement of a fundamental right when there is a threat to infringe it[2] and need not wait till the threat is carried out.[3] The threat must be real and mere apprehension that the petitioner may be deprived of his fundamental right is not sufficient to invoke the jurisdiction of the court.[4] A distinction is made between a statute which immediately on enactment affects the right and a statute which does not so affect, but requires some steps to be taken by the executive under the statute to affect the right. In the former case the affected person may immediately apply to the court[5], but in the latter case the court will not entertain a petition unless the executive has taken some step to enforce the statute. The court generally does not pass on the constitutionality if in the meantime the threat to the right is over or the petition becomes infructuous in any other way, but this is merely a rule of the court and the court has often decided the question of constitutionality having regard to the nature of the right, the frequency of the violation or the possibility of repetition of the violation.[6]

5.24 *Pleadings and burden of proof:* In view of the presumption of constitutionality of laws and State actions, the burden of proof of showing that a provision of law or a State action is violative of a fundamental right is on the person who alleges it. In discharging the burden, the allegation of the person aggrieved in the writ petition must be specific, clear and unambiguous, disclosing how a right has been infringed[7] and he must adduce evidence in support of the allegations

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[1] *Rabindra v. India*, AIR 1970 SC 470; See Para 5.122 for discussion as to when delay is fatal.

[2] *Kochuni v. Madras*, AIR 1959 SC 725

[3] *D.A.V. College v. Punjab*, AIR 1971 SC 1731

[4] *Maganbhai v. India*, AIR 1969 SC 783

[5] *Kochuni v. Madras*, AIR 1959 SC 725 (the statute had the effect of divesting the petitioner of a right)

[6] *Himatlal v. Police Commr.*, AIR 1973 SC 87; *Madhu Limaye v. Ved Murti*, AIR 1971 SC 2481

[7] *Bank of Baroda v. Nagachaya Debi*, AIR 1989 SC 2105; *Amritlal v. Collector*, AIR 1975 SC 538; see also *Secretary of Aircraft Engineers v. Registrar, Trade Union*, 45 DLR (AD) 122, 128 (The court observed that the validity of the impugned law could be considered if the trade union wanted to survive as trade union *simpliciter*, but the court did not consider this aspect of the law as no such case was made out in the petition)

Alternative dispute resolution
A D R

made. Once the petitioner succeeds in showing that the impugned law or action constitutes a denial or restriction of his fundamental right, he has no further onus of showing negatively that the legal provision putting the restriction on the exercise of the right is not reasonable.[1] Then the burden of showing that there has been no denial of the fundamental right or that the restriction is on a permissible ground, within permissible limits and is reasonable is on the respondent.[2] The harsher the restriction, the heavier is the burden of proving that the restriction is reasonable.[3]

5.25 *Exhaustion of efficacious remedy:* Previously, the superior courts used to refuse to entertain a writ application if the petitioner did not avail of an alternative remedy. This was a self-imposed rule of the court. Now it is a constitutional requirement of art.102(2) that a writ petition for judicial review of any action shall not be entertained if the petitioner does not, before coming to the High Court Division, exhaust any efficacious remedy available to him under any law. But there is no requirement of exhaustion of efficacious remedy for enforcement of fundamental right under art.102(1) and a petition under art.102(1) cannot be turned down on the ground of non-exhaustion of efficacious remedy.[4]

5.26 ***Alternative forum for enforcement of fundamental rights:*** Art.44(1) provides that the right to move the High Court Division under art.102(1) is itself a fundamental right and provides that without prejudice to the powers of the High Court Division under art.102, Parliament may provide for any other court to exercise any or all of those powers. As per art.152 'court' means 'court of law' and it does not

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[1] *Saghir Ahmed v. U.P.*, AIR 1954 SC 728, 738; *Bachan Singh v. Punjab*, AIR 1980 SC 898, 916

[2] *Municipal Corp. v. Jan Md.*, AIR 1986 SC 1205; *Deena v. India*, AIR 1983 SC 1155; *Sukhanandan v. India*, AIR 1982 SC 902; *Md. Faruk v. M.P.*, AIR 1970 SC 93; *Khyerbari Tea Co. v. Assam*, AIR 1964 SC 925

[3] *Nawabkhan v. Gujarat*, AIR 1974 SC 1471 (Para 6)

[4] *Bangladesh v. Syed Chand Sultana*, 51 DLR (AD) 24; *Sarwari Begum v. Bangladesh*, 45 DLR 571; *Rahimuddin Bharsha v. Bangladesh*, 46 DLR 130; *Rafique-ul Huq v. Bangladesh*, 44 DLR 398; *Jobon Nahar v. Bangladesh*, 49 DLR 108; *Saleha Begum v. Court of Settlement*, 49 DLR 243; *Sazedur Rahman v. Secy. Ministry of Establishment*, 50 DLR 407 affirmed in 3 BLC (AD) 188; contra - *Serajul Islam v. Director General of Food*, 43 DLR 237, and *Abdul Hannan v. Ministry of Home Affairs*, 43 DLR 131, not correctly decided.

include a tribunal[1]. Hence, in addition to the High Court Division, Parliament is authorised by the Constitution to set up any other court, not tribunal, for the enforcement of fundamental rights. The expression "without prejudice to the powers of the High Court Division" shows that any such court cannot be granted exclusive jurisdiction, nor can finality be attached to the decision of such court.

5.27 The Administrative Tribunal Act, 1981 has been passed providing for administrative tribunals to deal with disputes regarding service matters. Parliament does not call it a court, nor has conferred on it the power of enforcement of fundamental rights. In *Mujibur Rahman v. Bangladesh*[2] the Appellate Division found the administrative tribunal to be a tribunal and not a court. Even then it has been held in that decision, "A person in the service of the Republic who intends to invoke fundamental right for challenging the *vires* of a law will seek remedy under article 102(1), but in all other cases he will be required to seek remedy under article 117(2)".[3] In other words, in the matter of infringement of fundamental rights by administrative action (and not by law), the jurisdiction of the High Court Division is ousted and the administrative tribunal has the exclusive jurisdiction. It is submitted that the decision is open to question. First, the administrative tribunal not being a court cannot be construed to have the power of enforcement of fundamental rights, whether administrative action or law is impugned and, in fact, Parliament has not conferred that power. In view of the provisions of art.44(2) there should be explicit conferment of such power. Secondly, conferment of such jurisdiction cannot be in derogation of the power of the High Court Division. Thirdly, the jurisdiction of an ordinary court, not to speak of a superior court, is not taken away except by express provision or by necessary implication. The Constitution has nowhere taken away the jurisdiction of the High Court Division to enforce fundamental rights in respect of service matters by express provision and such jurisdiction having not been conferred on the administrative tribunal by express language, the question of ouster of the

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[1] *Jamal Shah v. Election Tribunal*, 18 DLR (SC) 1, Para 57

[2] 44 DLR (AD) 111

[3] Ibid, p.123; *Bangaldesh v. Shafiuddin Ahmed*, 50 DLR (AD) 27; *Delwar Hossain v. Bangladesh*, 52 DLR (AD) 120; *M.M. Shahidur Rahman v. Bangladesh*, 41 DLR 187; *Abul Bashar v. Bangladesh*, 50 DLR(AD) 11; *Ali Hossain Fakir v. Bangladesh*, 50 DLR 231; contra *Aftabuddin v. Bangladesh*, 48 DLR 1 (Writ petition held maintainable when the petitioner challenged the action of the government in promoting some members of judicial service in contravention of art.116)

High Court Division's jurisdiction by necessary implication does not arise. It may be argued that jurisdiction to deal with matters relating to the terms and conditions of service includes the jurisdiction to adjudicate upon infringement of fundamental right in relation to service. But such an interpretation will create a conflict between art.44 and art.117 which, on accepted principles of interpretation, should be avoided and harmonious interpretation given. Art.117 may prevail in case of an irreconcilable conflict in view of the *non-obstante* clause in art.117. But the court held that the *non-obstante* clause freed art.117 from the other provisions of Part VI and art.44 falls outside Part VI. Furthermore, before finding an irreconcilable conflict effort must be made for harmonious construction. In the matter of fundamental rights art.44 is a specific provision which operates in its proper field. There will be no conflict if art.117(1)(a) is interpreted to cover all service disputes except those relating to fundamental rights and such an interpretation is in conformity with the historical context in which the constitutional scheme was adopted. Previously, the Supreme Court was the final court in respect of service disputes, whether originating in the civil or writ jurisdiction. Now art.117 imparting finality to the decision of the administrative tribunal and ousting the jurisdiction of the High Court Division under art.102(5), it is difficult to conceive that the framers intended to entrust the administrative tribunal with the duty of interpreting and applying the provisions of the Constitution relating to fundamental rights to the exclusion of the High Court Division, particularly in view of the language used in art.44. The Appellate Division also felt the same way as otherwise it would not exclude infringement of fundamental rights by law from the purview of the tribunal. No rationale can be found for such a division; if disputes relating to the 'terms and conditions' in art.117(1)(a) include disputes relating to fundamental rights, any infringement of fundamental right, whether by law or by administrative action, should be within the jurisdiction of the tribunal. It is submitted that the administrative tribunal cannot be accorded the jurisdiction to enforce fundamental rights and, at any rate, there is no scope for the dichotomy of violation of fundamental right by law and by administrative action under the provisions of the Constitution, far less any exclusivity of jurisdiction of the administrative tribunal in respect of infringement of fundamental rights by administrative action.

WRIT JURISDICTION : MATTERS OTHER THAN FUNDAMENTAL RIGHTS

5.28 Art.170 of the Pakistan Constitution of 1956 conferred power of judicial review on the provincial High Courts by way of issuing writs in the nature of *mandamus, certiorari*, prohibition, *habeas corpus* and *quo warranto*. The Indian Constitution also confers power of judicial review on the High Court of every state in the same language.[1] The Indian and Pakistani courts in exercise of the power of judicial review keep in view the principles applied by the English courts in issuing writs. The Pakistan Constitution of 1962 did not mention these English prerogative writs in art.98 and instead codified the jurisdiction incorporating the essence of the English writ jurisdiction of High Court of England. Subsequently the Pakistan Constitution of 1973 in art.199 retained the formulation of art.98 of the former constitution.

5.29 Art.102(2) of the Constitution confers power of judicial review on the High Court Division in the same language as used in art.98 of the Pakistan Constitution of 1962. Art.102(2)(a)(i) empowers the High Court to issue orders in the nature of prohibition and *mandamus*, art.102(2)(a)(ii) empowers the High Court Division to issue orders in the nature of *certiorari*, art.102(2)(b)(i) vests the power to issue orders in the nature of *habeas corpus* and art.102(2)(b)(ii) invests the High Court Division with the power to issue orders in the nature of *quo warranto*. The codification of the remedies has effected considerable change, enlarging in some respects and narrowing in some other respects the scope of the remedies. For facility of reference the names of *certiorari*, prohibition, *mandamus, quo warranto* and *habeas corpus* will be used.

5.30 Writs of *certiorari* and prohibition are intended to prevent public functionaries from exceeding their power, the difference between the two being that prohibition is issued when the act or proceeding is not completed, while *certiorari* is issued when the act or proceeding has been completed. *Mandamus* is issued to compel a public functionary to do what he is under a legal duty to do when he is refusing to do it. *Habeas corpus* is intended to ensure that no person is detained or confined illegally or in an unlawful manner. *Quo warranto* is directed to ensure that no one occupies a public office without any lawful authority. In discussing the power of judicial review of the High Court Division we shall look at the principles applied by the English courts in this

[1] Art.226

regard. Courts in the Indian and Pakistani jurisdictions have to a large extent applied the English principles. But in considering the English decisions it must be kept in mind that in order to remove the technical difficulties and limitations of the prerogative writs, reform has been made in England by the Supreme Court Act, 1981 which now provides for the relief of declaration and injunction in addition to the orders of *mandamus, certiorari* and prohibition. In order to understand the scope of judicial review under art.102(2) we must be guided essentially by the language of art.102(2) and even though the English and Indian decisions may be considered, the language of art.102(2) will have primacy. Again, art.102(2) cannot be interpreted in isolation and the aims and objectives and other provisions of the Constitution will have to be considered. As we proceed we shall find that many of the English decisions are inapplicable in view of the provisions of Part III in general and art.31 in particular.

5.31 ***Writ of Certiorari:*** *Certiorari* at common law in England used to be issued either from the King's Bench or the Chancery, for the purpose of exercising superintending control over inferior courts.[1] Gradually, the jurisdiction was enlarged to include within its fold all authorities performing judicial or quasi-judicial functions. Yet later the distinction between judicial and quasi-judicial functions and administrative functions has been abandoned and writ of *certiorari* is issued against administrative authorities also. In India this distinction is gradually withering away and writs have been issued against administrative authorities for violation of the principles of natural justice.[2] Art.98 of the Pakistan Constitution of 1962 did away with this distinction, so has done art.199 of the Pakistan Constitution of 1973. Art.102(2) does not also recognise this distinction and an order under art.102(2)(a)(ii) can be passed against any authority, irrespective of the nature of the function, if he is performing the function in connection with the affairs of the Republic or any local authority.[3] The term 'local

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[1] Ferries - The Law of Extra-ordinary Remedies, Para 156 & 157; *Shahida Mohiuddin v. Bangladesh*, W.P. No.530 of 2001 (Unreported). In criminal conviction habeas corpus proceeding is taken, but in certiorari the Court can declare a conviction to be without lawful authority in an appropriate case - see *State v. Zahir*, 45 DLR (AD) 163; *Rajab Ali v. East Pakistan*, 10 DLR 385 (Certiorari is available against an order of conviction from which no appeal or revision is available)

[2] *Kraipak v. India*, AIR 1970 SC 150; *Eurasian Equipments v. West Bengal*, AIR 1975 SC 266

[3] 'Local authority' is not defined in the Constitution, Art.152 having made General

authority' implies a public duty authorised by law or by the government to carry on some administrative functions. A public corporation is entrusted with some portion of the sovereign function of the government which is to be performed by the corporation for the benefit of the public and such a corporation is undoubtedly a person performing functions in relation to the affairs of the Republic.[1] The National Bank of Pakistan which was established by an Ordinance was held not to be a local authority as it bore no resemblance to the recognised concept of a local authority; a local authority is ordinarily charged with functions of self-government and has power to impose tax and maintain and administer local funds.[2] But in *A.Z. Rafique v. Bangladesh Council of Scientific and Industrial Research*[3] the resolution of the government constituting the Council was treated as a legal instrument having the force of law and the Council so established was held to be a local authority.[4]

5.32 In England as also in India a writ of *certiorari* is issued when an

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Clauses Act, 1897 applicable in respect of interpretation of the Constitution, we shall have to refer to the definition of 'local authority' given in that Act and that definition runs thus: "'local authority' shall mean and include a Paurashava, Zilla Parishad, Union Panchayet, Board of Trustees of a port or other authority legally entitled to, or entrusted by the Government with, the control or management of a municipal or local fund, or any corporation or other body or authority constituted or established by the Government under any law" - s.3(28)

[1] *B.S.I. Corporation v. Mahbub Hossain*, 29 DLR (SC) 41

[2] *Deputy Managing Director of National Bank of Pakistan v. Ataul Haq*, 17 DLR (SC) 74

[3] 32 DLR (AD) 83

[4] The point does not seem to have been correctly decided. The petitioner, an employee of the Council, filed the writ petition in 1977 challenging his removal from service. In February, 1978 Ordinance no.V of 1978 was passed establishing Bangladesh Council of Scientific and Industrial Research and the undertaking of the earlier Council established by the government resolution dated 16.11.1973 was transferred to the statutory Council. The Ordinance revoked the resolution. From the fact of revocation of the resolution by the Ordinance the Court came to the conclusion that the resolution had statutory force. As the undertaking of the earlier Council was transferred to the statutory Council, it was necessary to revoke the resolution and this mere fact of revocation cannot lead to the conclusion that the resolution was an instrument having statutory force. Any notification, order or resolution of the government to have force of law must be issued or made pursuant to a statute, but the resolution in question was passed as an administrative act and not in exercise of any power under any statute. It is submitted that the resolution cannot be treated as having the force of law and as such at the time of passing the order of removal of the petitioner, the Council was not a statutory body and could not be treated as a local authority.

authority acts without jurisdiction, in excess of jurisdiction or commits an error of law apparent on the face of the record. But art.98 of the Pakistan Constitution of 1962 codified the jurisdiction of the High Courts in issuing orders in the nature of *certiorari* in the same language as used in art.102(2) of the Constitution. Art.98(2)(a)(ii) conferred jurisdiction on the High Courts to declare that "any act done or proceeding taken ... has been done or taken without lawful authority and is of no legal effect". Interpreting the two expressions 'without lawful authority' and 'of no legal effect', Kaikaus J of the Pakistan Supreme Court observed that an order in the nature of *certiorari* can be issued only when a public functionary has committed jurisdictional error rendering his action or decision a nullity.[1] There are subsequent decisions of the same court expressing substantially the same view.[2] But there are a number of decisions of the Pakistan Supreme Court in which the remedy has not been confined to jurisdictional errors. Sometimes relief has been given without saying anything as to whether the error which impelled the court to give relief was at all a jurisdictional error and sometimes relief has been given by extending the traditional meaning of jurisdiction and jurisdictional error. From these decisions it is difficult to discern how the court is drawing the line between jurisdictional and non-jurisdictional error. Where the court saw injustice, the court interfered without bothering very much about the existence of jurisdictional error. In *Jamal Shah* the court refused to accept the question of rejection of certain ballot papers as going to the root of the jurisdiction, but in *Akbar Ali v. Raziur Rahman*[3] the court interfered, treating the question of wanton rejection of certain ballot papers as one going to the root of the jurisdiction. The same thing happened in our Supreme Court and as we proceed we will find a lack of consistency in the decisions on the question of jurisdictional errors. It is good a sign to

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[1] *Jamal Shah v. Election Tribunal*, 18 DLR (SC) 1 (Had this paragraph only used the words 'without lawful authority' the matter would have been easy. But the paragraph also says 'and is of no legal effect'. A simple finding that an act is without lawful authority is insufficient. It must further be found that the act or proceeding 'is of no legal effect'. When we say that something is of no legal effect, we mean it is nullity ... If an order is passed in the illegal or irregular exercise of jurisdiction can it be said that it is 'without legal effect'? It is only acts without jurisdiction as have no legal effect - Para 45 & 46)

[2] *Raunaq Ali v. Chief Settlement Commissioner*, PLD 1973 SC 236; *Md. Hossain Munir v. Sikander*, PLD 1974 SC 139

[3] 18 DLR (SC) 426

see the courts reacting to manifest injustice and trying to remedy it. But then there should be consistency in principle, otherwise there will be disconcerting unpredictability in litigations which the Indian Supreme Court deprecated as being an element usually associated with gambling.[1]

5.33 Art.102(2)(a)(ii) empowers the High Court Division to issue an order declaring an act done or proceeding taken to be without lawful authority and of no legal effect. In other words, the High Court Division can interfere only when the person proceeded against has committed an error going to jurisdiction, that is, when the act done or proceeding taken is vitiated by lack of jurisdiction or by being in excess of jurisdiction.[2] This provision does not permit the High Court Division to interfere on the ground of error of law on the face of the record. In *Ayesha Salahuddin v. Chairman, Second Labour Court*[3] the Appellate Division observed that the High Court Division can issue a writ in the nature of *certiorari* "where there is an error apparent on the face of record". It is submitted that the observation is not correct. However, this is inconsequential since, as we will find, for the purpose of art.102(2) there is no distinction between jurisdictional and non-jurisdictional error of law and all errors of law affect jurisdiction.

5.34 *Want of jurisdiction:* No authority can exceed the power given to it. Any action taken by an authority outside the power conferred is invalid and *ultra vires*.[4] However, in going to determine whether an

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[1] *Ramappa v. Bojjappa*, AIR 1963 SC 1633, 1637 (The Supreme Court made the comment in connection with the High Court's failure to adhere to the limitations of s.100 of the Code of Civil Procedure in second appeals.)

[2] *Hosne Ara Begum v. Court of Settlement*, 46 DLR (AD) 9

[3] 32 DLR (AD) 68, 71 (this is a case of 'no evidence' which is treated as an error of law)

[4] *Bangladesh v. Dr. Nilima Ibrahim*, 1981 BCR (AD) 175 (the government dissolving an institution set up after 1.1.1972 in exercise of power under a statute permitting dissolution of any institution set up before 1.1.1972 acts without lawful authority); *Abdul Khaleque v. Court of Settlement*, 44 DLR 273 (law authorising inclusion in the list of abandoned properties only the properties in respect of which notice had been issued, inclusion of non-notified property is without lawful authority); *Amela Khatun v. Court of Settlement*, 46 DLR 18; *Hamidul Huq Chowdhury v. Bangladesh*, 33 DLR 381 (When Bangladesh Press Administration Order, 1972 permitted taking over of printing establishment on the failure of the directors and managers of such establishment to publish the newspaper, taking over of the printing establishment when the newspaper was being regularly published was without lawful authority); *Nazmul Hossain v. State*, 48 DLR 417 (Conviction under MLR though the allegation does not disclose any

authority exceeded the power, it is held that conferment of power by a statute must be construed reasonably and whatever may reasonably be regarded as incidental to, or consequential upon, the things which the law authorised must be held to be within the power conferred.[1] Lack of jurisdiction may occur when an authority acting has no power over a party. Thus when an authority having power to deport an illegal entrant deports a person who has a valid entry permit, the act is without jurisdiction.[2] An action will be found *ultra vires* if the authority taking the action has no jurisdiction over a territory.[3] No legislature in granting power to take action contemplates a *mala fide* exercise of power and a *mala fide* action is by its nature an act without jurisdiction.[4] Again, if a tribunal or authority is improperly constituted, its action will be without lawful authority. Thus where the Chairman of a Union Council was removed by a resolution of a Committee in a meeting in which three members not entitled to vote participated, the resolution was invalid.[5]

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offence under MLR); *London County Council v. Att.-Gen.*, [1905] AC 165 (the Council having statutory power to purchase and work tramway ran omnibus, the House of Lords held it *ultra vires); White and Collins v. Minister of Health*, [1939] 2 KB 838 (local authority having power to compulsorily acquire land other than park land acted in excess of power in acquiring park land); *R. v. Hackney (etc) Rent Tribunal ex p. Keats*, [1951] 2 KB 15 (a rent tribunal having power to reduce rent of a dwelling house acts *ultra vires* by reducing rent of a house let for business); *Newspaper Ltd. v. State Industrial Tribunal*, AIR 1957 SC 532 (he government having referred a dispute (not being an industrial dispute) to industrial tribunal, the reference was invalid and the tribunal lacked power to make a valid award); *Chetker v. Viswanath*, AIR 1970 SC 1832 (Chancellor of a University upon misconstruction of the law and the University statutes annulling a resolution of the Syndicate acts without jurisdiction); *J.K. Chowdhury v. R.K.Dutta*, AIR 1958 SC 722 (Governing Body of the college dismissed the Principal; University acted without jurisdiction in directing reinstatement of the Principal when it could interfere with the decision of the college only in case of a teacher)

[1] *Att. Gen. v. Great Eastern Railway*, [1880] 5 AC 473; *Grindlays Bank v. Central Government, Industrial Tribunal*, AIR 1981 SC 606

[2] *R. v. Home Secretary ex p. Khawaja*, [1984] AC 74

[3] *Grameen Bank Karmachari Union v. Labour Appellate Tribunal*, 51 DLR 179

[4] *Abdur Rouf v. Abdul Hamid Khan*, 17 DLR (SC) 515; *Khondker Mostaque Ahmed v. Bangladesh*, 34 DLR (AD) 222; *Jamil Huq v. Bangladesh*, 33 DLR (AD) 125; *Khandker Ehtashamuddin v. Bangladesh*, 33 DLR (AD) 154

[5] *Abdur Rahman v. Collector and Deputy Commissioner*, 16 DLR (SC) 470; *Md. Nurul Huda Mia v. WASA*, 44 DLR 527 (inquiry in the disciplinary proceeding being conducted by an officer junior in rank to the accused officer where the rule requires inquiry by an officer senior in rank to the accused officer, the disciplinary action taken

Where the law requires that a labour court will be constituted with one Chairman and two members, total absence of the members renders the labour court improperly constituted and its decision is without lawful authority.[1] Lack of jurisdiction may also be found if the authority passes a kind of order which he has no authority to pass.[2] An authority having once exercised a statutory power may lack jurisdiction to exercise it again. Thus a transport authority having once issued permit with conditions stated is not competent to impose a new condition of fitting auto-rickshaw with taxi meter of approved make.[3]

5.35 *Waiver and acquiescence:* What happens if an authority acts in a matter over which it has no jurisdiction and the person fails to raise any objection? "It is a fundamental principle that no consent can confer on a court or tribunal with limited statutory jurisdiction any power to act beyond that jurisdiction, or can estop the consenting party from subsequently maintaining that such court or tribunal has acted without jurisdiction."[4] Thus in a planning case concerning a caravan site, the English Court of Appeal held that the site-owner could apply for declaration that the planning authority's enforcement notice was bad in law, even though previously he pleaded guilty to contravention of the notice in the criminal proceedings.[5] By mere submission before an

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is without lawful authority); *Ram Bharosey v. Har Swarup*, AIR 1976 SC 1739 (where disciplinary committee of the Bar Council under the Advocates Act consisted of three members, but only two were present, the tribunal was not properly constituted); *United Commercial Bank v. Workman*, AIR 1951 SC 230

[1] *General Manager, Jamuna Oil Company v. Golap Rahman*, 34 DLR (AD) 166 (absence of any member from any sitting after the Court is properly constituted will not vitiate the proceeding as the law provides for such absence); *National Bank of Pakistan v. Golam Mostafa*, 27 DLR 158; *Project in charge, Paruma (Eastern) Ltd. v. Mr. Aminur Rahman Khan*, 31 DLR 124; *Secretary. Ministry of Works v. Court of Settlement*, 51 DLR 396 (Judgment delivered by Chairman and one of the two members)

[2] *Muzibur Rahman Talukdar v. AKM Musa*, 47 DLR 21 (Public servant evicting a person from tenanted house let out to him by private landlord); *Hotel Metropole Ltd. v. Employees Union*, PLD 1964 SC 633 (where conciliation officer instead of issuing failure certificate as required by law refers a labour dispute to his superior, the reference is without lawful authority);

[3] *M.Y. Baig v. Regional Transport Authority*, PLD 1965 Dac 33

[4] *Essex Incorporated Congregational Church Union v. Essex C.C.*, [1963] AC 808; *Legard v. Bull*, [1886] 11 AC 648; *Mahmudul Haque v. Shamsul Alam*, 36 DLR(AD)179; *Aswini Kumar v. Hari Mohan*, 36 DLR (AD) 1

[5] *Munnich v, Godstone RDC*, [1966] 1 WLR 427; see Para 5.120

authority as respondent, a litigant cannot be taken to have conferred jurisdiction on the authority which it did not have.[1] But this rule is subject to various qualifications. Want of jurisdiction has been classified into two categories - (1) patent want of jurisdiction, that is want of jurisdiction which is apparent on the face of the proceeding and (2) latent want of jurisdiction, that is, want of jurisdiction which is not so apparent from the face of the proceeding, but becomes manifest in the course of the proceeding. In the former case, no amount of consent, waiver or acquiescence can cure the defect, but in the latter case it can so cure.[2] Where the jurisdiction is contingent, that is, dependent on fulfillment of certain conditions, a litigant cannot raise the plea of want of jurisdiction if he failed to raise the objection at the proper time.[3] The court will refuse to interfere where the alleged jurisdictional defect depends on some facts in the knowledge of the applicant.[4] Even if the party has no such knowledge but has materially benefited from the proceeding in question, he may be precluded from raising the plea of want of jurisdiction while he is still enjoying the benefit.[5]

5.36 *Excess of Jurisdiction - Error of Law:* We have so far dealt with cases where there is lack of jurisdiction. These are rather straight forward cases which present no difficulty in finding the jurisdictional error. But difficulty arises when the authority has initial jurisdiction to do the act or start the proceeding and is alleged to have stepped out of jurisdiction thereafter by doing certain things.[6] In order to have an understanding about excess of jurisdiction we must first understand what is meant by 'jurisdiction' and much will depend upon the meaning in which we use the expression.

5.37 'Jurisdiction' is an expression used in a variety of senses and takes its colour from its context.[7] In the broad sense it simply means

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[1] *Md. Afzal v. Board of Revenue*, 19 DLR (SC) 266

[2] *Farquharson v. Morgan*, [1894] 1 QB 552; R v. *Comptroller-General of Patents*, [1953] 1 All E.R. 862; *Ghulam Mohiuddin v. Ch. Settlement Commr*, 16 DLR (SC) 654; *Altaf Hossain v. Ch. Settlement Commr*, 18 DLR (SC) 164

[3] *Jones v. James*, (1850) 19 LJQB 257; *Moore v. Gamgee*, (1890) 25 QBD 244; *Ghulam Mohiuddin v. Ch. Settlement Commr*, 16 DLR (SC) 654; *Altaf Hossain v. Ch. Setlement Commr*, 18 DLR (SC) 164

[4] *R. v. Comproller-General of Patents*, [1953] 1 All E.R. 862

[5] *Evans v. Bartlane*, [1937] AC 473

[6] *Mir Md. Kashem Ali v. Administrator of Waqfs*, 3 BLC 519; *Abdur Rahman v. Bangladesh*, 49 DLR 344

[7] *Anisminic Ltd v. Foreign Compensation Tribunal*, [1968] 2 QB 862, 889

'power'. In the context of judicial and quasi-judicial functions it has the narrow meaning of 'power to decide' or 'power to determine'.[1] In the narrower sense it is stated in Halsbury's Laws of England -

> Where the proceedings are regular on their face and the inferior tribunal had jurisdiction, the superior court will not grant the order of certiorari on the ground that the inferior tribunal had misconceived a point of law. When the inferior tribunal has jurisdiction to decide a matter, it cannot (merely because it incidentally misconstrues a statute, or admits illegal evidence, or rejects legal evidence, or misdirects itself as to the weight of the evidence, or convicts without evidence) be deemed to exceed or abuse its jurisdiction.[2]

Thus when a rent tribunal had power to reduce a rent where it appeared that premium had been paid and the payment made to the landlord in respect of the work done is not in law a premium, the error of law in holding the payment as premium was jurisdictional and the decision was quashed.[3] But if the payment is disputed and the tribunal decided on inadmissible evidence in respect of payment to the landlord, the error committed will be a non-jurisdictional error of law and no certiorari will lie. Lord Reid sitting in the House of Lords stated,

> If a magistrate or any other tribunal has jurisdiction to enter on an inquiry and to decide a particular issue, and there is no irregularity in the procedure, he does not destroy his jurisdiction by reaching a wrong decision. If he has jurisdiction to go right he has jurisdiction to go wrong. Neither error in fact nor error in law will destroy his jurisdiction.[4]

In the same way Sir Barnes Peacock stated in the Privy Council,

> If it appears that [i.e. the Judges] had perfect jurisdiction to decide the question which was before them, and they did decide it, whether they decided it rightly or wrongly, they had jurisdiction to decide the case; even if they decided wrongly they did not exercise their jurisdiction illegally or with material irregularity.[5]

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[1] H.W.R. Wade - Administrative Law, 6th ed, p.280

[2] 4th ed. Vol.1, Para 57

[3] *R. v. Fullham (etc) Rent Tribunal ex p. Philippe*, [1950] 2 All E.R. 211

[4] *R. v. Governor of Brixton Prison ex p. Armah*, [1968] AC 192, 234

[5] *Raja Amir Khan v. Sheo Baksh Singh*, 11 I.A. 237; *Malkarjun v. Narahari*, 27 I.A. 216; *R. v. Nat Bell Liquors*, [1922] 2 AC 128 ("To say that there is no jurisdiction to convict without evidence is the same thing as saying that there is jurisdiction if the

The same opinion was expressed in the Indian and Pakistani jurisdictions.[1] Referring to Lord Sumner's observation in *Nat Bell Liquors* and Lord Reid's observation in *Governor of Brixton Prison*, Professor Wade commented, "In their own time and context these statements were unexceptionable: they expressed the traditional doctrine that so long as jurisdiction existed, mere error as such would not destroy it. But it does not in the least follow that no sort of error made in course of the proceedings can affect jurisdiction. Some questions may arise which the tribunal is incompetent to determine, or some point may be decided in bad faith or in breach of natural justice or on irrelevant grounds or unreasonably, all of which faults go to jurisdiction and render the proceedings a nullity."[2] In another place he commented, "It is the word 'jurisdiction' which is the stumbling-block here: if 'power" were substituted, there would be less difficulty. Judges sometimes think of 'jurisdiction' as meaning merely the authority to inquire into and determine a case, as opposed to what is done in the course of the proceeding."[3] The difficulty was, in fact, felt by the House of Lords when a 'no certiorari' clause in the statute precluded judicial review on the ground of error of law on the face of the record. The majority of the Law Lords apparently adopted the broader meaning of jurisdiction to grant certiorari. Lord Pearce observed,

> Lack of jurisdiction may arise in many ways. There may be an absence of those formalities or things which are conditions precedent to the tribunal having any jurisdiction to embark on an inquiry. Or the tribunal may at the end make an order that it has no jurisdiction to make. Or in the intervening stage, while engaged on a proper inquiry, the tribunal may depart from the rules of natural justice; or it may ask itself the wrong questions; or it may take into account matters which it was not directed to take into account. *Thereby it would step outside its jurisdiction.* It would turn its inquiry into something not directed by Parliament and fail to make the inquiry which Parliament did direct. Any of these things would cause its purported decision to be a

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decision is right, and none if the decision is wrong.")

[1] *Ujjam Bai v. U.P.*, AIR 1962 SC 1621; *Santosh Kumar Saha v. D.M. Faridpur*, PLD 1959 Dac 738 (a court which had jurisdiction over a subject-matter had jurisdiction to decide wrongly as well as rightly); *Badrul Haq Khan v. Election Tribunal*, 15 DLR (SC) 389, Para 59

[2] H.W.R. Wade - Administrative Law, 6th ed., p.294

[3] Ibid, p.44

nullity.[1](emphasis supplied)

Anisminic was both applauded and criticised.

5.38 Prior to *Anisminic*, a difference was made between jurisdictional error of law and non-jurisdictional error of law, the latter being not reviewable. In its application considerable difficulty was found in clearly defining the distinction between the two types of error of law. In *Pearlman v. Keepers and Governors of Harrow School*[2] Lord Denning said that the distinction was very fine and was being eroded and suggested that the distinction should be abandoned and the new rule should be that no court or tribunal has jurisdiction to make an error of law on which the decision of the case depends. Lord Diplock in *Re Racal Communications Ltd*[3] stated, "The breakthrough made by *Anisminic* was that, as respects administrative tribunals and authorities, the old distinction between errors of law that went to jurisdiction and errors of law that did not was for practical purposes abolished." But three other Law Lords did not accept this position and on the contrary, Lord Edmund-Davis quoted with approval the observation of the dissenting judge, Geoffrey Lane LJ, in *Pearlman* which runs thus -

> The judge is considering the words ... which he ought to consider. He is not embarking on some unauthorised or extraneous or irrelevant exercise. All he has done is to come to what appears to this court to be a wrong conclusion on a difficult question. It seems to me that, if the judge is acting outside his jurisdiction, so then is every judge who comes to a wrong decision on a point of law. Accordingly, I take the view that no form of certiorari is available to the tenant.[4]

The Privy Council also rejected the observation of Lord Denning regarding the abandonment of the distinction between jurisdictional and non-jurisdictional error of law.[5] In a subsequent decision Lord Diplock stated that the distinction between jurisdictional and non-jurisdictional error of law would no longer apply to inferior courts also.[6] Later a Divisional Court followed this analysis holding that the court could

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[1] *Anisminic Ltd. v. Foreign Compensation Tribunal*, [1969] 2 AC 147, 195

[2] [1979] 1 All E.R. 365

[3] [1980] 2 All E.R. 634

[4] [1979] 1 All E.R. 365, 376

[5] *S.E. Asia Fire Bricks v. Non-Metalic Union*, [1980] 2 All E.R. 689

[6] *O'Reilly v. Mackman*, [1982] 3 All E.R. 1124, 1129 (the whole House concurring in general terms)

review the finding of a coroner's inquest on the basis that any significant mistake of law would destroy jurisdiction.[1] Before *Anisminic* was decided Lord Denning held that a minister's decision could be quashed "if he has given a wrong interpretation of the words of a statute or has otherwise gone wrong in law"[2]; the court would quash the decision if a minister "plainly misdirects himself in fact or in law".[3] This statement was approved by Lord Wilberforce in *Secretary of State for Education and Science v. Tameside MBC*[4]. Lord Diplock in *Council of Civil Service Union v. Minister of the Civil Service*[5] observed that "the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it". Again in *R. v. Inland Revenue Commissioners ex p. Preston*[6] Lord Templeman said that judicial review is available where decision-making authority commits error of law. Finally, the House of Lords in *R. v. Hull University Visitors, ex p. Page*[7] came out with a clear statement that the distinction between the jurisdictional and non-jurisdictional error of law is no longer tenable.

5.39 The term 'jurisdiction' is generally used with reference to judicial and quasi judicial bodies and not with reference to administrative bodies. When *certiorari* was limited to judicial and quasi-judicial bodies, 'jurisdiction' could be used in the narrow sense of power to decide or power to determine. But when it has been extended to administrative acts also, there is no reason to adhere to the narrow connotation of 'jurisdiction'. In our constitution, the power of judicial review has been codified and we are to interpret the language of art.102 keeping view the other relevant provisions in the Constitution. Whatever be the position in other jurisdictions, in the context of our constitution, 'jurisdiction' should mean 'power'. It is to be seen that art.102(2)(a)(ii) uses the expression 'lawful authority' which has reference to 'power'

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[1] *R. v. Greater Manchester Coroner ex p. Tal*, [1985] QB 67

[2] *Ashbridge Investments Ltd. v. Minister of Housing and Local Government*, [1965] 1 WLR 1320

[3] *Secretary of State for Employment v. ASLEF* (No.2), [1972] 2 QB 455; *Smith v. Inner London Education Authority*, [1978] 1 All E.R. 411

[4] [1977] AC 1014; see also *R. v. Chief Immigration Officer ex p. Kharazi*, [1980] 3 All E.R. 373 (determination by immigration officer was quashed because he had interpreted the law very narrowly)

[5] [1985] AC 374, 410

[6] [1985] AC 835, 862

[7] [1993] AC 682, 701

rather than 'jurisdiction' and *Anisminic* fits in with our constitutional language. There is another compelling reason to read 'lawful authority' as 'power'. It is the fundamental right of every citizen and every other person staying in Bangladesh for the time being to be treated in accordance with law. That means it will be a violation of fundamental right if a person is treated differently (by misinterpretation of law) from what the law prescribes. One may argue that Parliament in conferring power to decide has permitted a tribunal to conclusively decide and treat a person in a way not contemplated by that law. To produce such an effect, the language of the statute must be very clear leaving nothing for implication.[1] But what is more important is that such a provision in a statute may be struck down as unconstitutional as Parliament has no power to curtail the constitutional power of judicial review of the High Court Division. Furthermore, such a provision will be violative of art.31 of the Constitution as being unreasonable and rendering the protection of art.31 illusory.[2] Under our constitutional dispensation, an authority committing error of law in exercise of power will be taken to have stepped outside jurisdiction and his action will be without lawful authority. An authority by misinterpreting the law, whether it goes to the root of jurisdiction or not in the strict sense of the term, acts without lawful authority. Whether the error of law is apparent on the face of the record or not is of no consequence and the Indian and earlier Pakistani decisions are not relevant. The position in our jurisdiction is thus similar to that in the American jurisdiction.[3] In a recent Pakistani decision it was held, "When the Tribunal goes wrong in law, it goes outside jurisdiction that was conferred on it because the Tribunal has the jurisdiction to decide rightly and not the jurisdiction to decide wrongly. Accordingly ... a determination of the Tribunal which is shown to be erroneous on a point of law can be quashed under the writ jurisdiction on the ground

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[1] *Md. Jamil Asghar v. Improvement Trust, Rawalpindi*, 17 DLR (SC) 520

[2] The decision of the Privy Council in *S.E. Asia Fire Bricks* need not bother us. That decision is from Malaysian jurisdiction where Parliament has power to oust the jurisdiction to issue writ of certiorari and the relevant law in clear language made the decision of the Industrial court final and conclusive and was thus immune from challenge on the ground of error of law on the face of the record. Under our constitutional dispensation no such ouster of power of judicial review of the Supreme Court is permissible.

[3] B. Schwartz - Administrative Law ("Where a question of law is at issue, the court determines the *rightness* of agency answer on its own independent judgment. If the agency answer does not square with that which the court considers the right one, its finding of law should not be upheld.) (p.596)

that it is in excess of jurisdiction."[1] In *Fazlur Rahman Chowdhury v. Bangladesh*[2] the High Court Division held that there can be no interference in the writ jurisdiction on the ground of erroneous interpretation of certain laws, rules and orders unless the authority acted without jurisdiction or the order was passed *mala fide*. It is submitted that the statement seems to be too broad and is to be understood in the light of the fact that the petitioner challenged the decision of the administrative appellate tribunal and the bar of art.102(5) was attracted. In *Md. Mustakin Ali v. Abdul Mutaleb* the High Court Division made a distinction between error of law within jurisdiction and error of law affecting jurisdiction.[3] It does not appear that the recent decisions of the English jurisdiction were placed before the court or any argument as to the effect of art.31 was made. It should be kept in mind that any and every error of law will not call for interference. It must be a mistake which has influenced the ultimate decision and but for the mistake the decision of the administrative authority could have been otherwise.[4]

5.40 *Errors of law and fact:* Making a clear-cut distinction between error of law and error of fact is a difficult task and the opinion of the judges often vary. A decision-making process entails three stages: (a) fact-finding which involves ascertainment of primary facts, (b) rule-stating and (c) application of the rule for disposal of cases. The meaning of a statutory term or a statutory provision is unquestionably an issue of law. The question whether a sale of machineries as an isolated transaction amounted to 'trade' for tax purposes was treated as an issue of law by the House of Lords.[5] Though the meaning of a word or phrase

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[1] *Utility Stores Corporation v. Punjab*, PLD 1987 SC 447, 452

[2] 39 DLR 314

[3] 45 DLR 733 (The court would be empowered to prevent a Tribunal from going wrong in law, but that is not the same thing as correcting a decision or an order merely because it is erroneous. A Tribunal may decide a point of law or pass an order in deciding issues before it keeping within jurisdiction though deciding it erroneous. That error would not be an error for interference under certiorari though it can be examined in appeal.)

[4] *R. v. Hull University Visitor*, ex p Page, [1993] AC 682, 702

[5] *Edwards v. Bairstaw*, [1955] 3 All E.R. 48; *Singer Sewing Machine Co. v. C.I.T.*, 17 DLR (SC) 332 (income tax authority refused exemption from tax upon erroneous view of law that an assembly business is not a manufacturing process and was not an 'industrial undertaking' within the meaning of s.15-B of Income Tax Act). But see *Custodian of Evacuee Property v. Abdul Shakur*, AIR 1961 SC 1087 (where Indian Supreme Court refused to treat the question whether a person is an evacuee within the meaning of a statutory provision as an issue of law)

in a statute is a question of law; it is a question of fact whether the given circumstances fall within such meaning.[1] But Lord Parker said in *Farmer v. Cotton Trustees*[2], "where all the material facts are fully found and the only question whether the facts are such as to bring the case within the provisions properly construed of some statutory enactment, the question is one of law only." Lord Denning also said in the same way, "In many of these cases the primary facts are not in dispute. The question is what is the correct conclusion to be drawn from them. This involves the interpretation of statute and is therefore a question of law."[3] But insufficiency of evidence, appreciation of documentary evidence, errors or omission in drawing inferences are issues of fact rather than of law.[4]

5.41 Appreciation or weight of evidence is an issue of fact and a finding of fact is generally not reviewable[5], nor shall the reviewing court interfere when disputed questions of fact are involved.[6] In exercising the power of judicial review the court does not assume the function of an appellate authority.[7] No interference is called for when the authority

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[1] *Ransom v. Higgs*, [1974] 3 All E.R. 949; *O'Kelly v. Trusthouse Forte*, [1983] 3 All E.R. 456;

[2] [1915] AC 922; see also *Great Western Railway v. Bater*, [1923] AC 22

[3] *Woodhouse v. Brotherwood Ltd.*, [1972] 2 All E.R. 92, 95; *Carl Still m.b.h. v. Bihar*, AIR 1961 SC 1615 (Sales Tax authority sought to tax materials supplied in execution of a contract contending that the supply amounted to sale. The Supreme Court held that on a true construction of the agreement in question, it was a contract entire and indivisible for the construction of specified works for a lump sum and not a contract for sale of materials)

[4] *Nagendranath Bora v. Commissioner of Hills Division*, AIR 1958 SC 398; *Kaushalya Debi v. Bachitar Singh*, AIR 1960 SC 1168; *Madras v. G. Sundaram*, AIR 1965 SC 1103; *A.P. v. Sree Rama Rao*, AIR 1963 SC 1723; *Imtiaz Ahmed v. Ghulam Ali*, 15 DLR (SC) 283

[5] *M.D., BMTF v. Chairman, Labour Court*, 44 DLR (AD) 272; *Yusuf Sk. v. Appellte Tribunal*, 29 DLR (SC) 211; *Shahidun Nabi v. University of Dhaka*, 45 DLR 20; *Abdul Latif Howladar v. ADC (Revenue)*, 50 DLR 638; *Abdul Hashim v. Election Commn.*, 48 DLR 490

[6] *Tofazzal Hossain v. East Pakistan*, 15 DLR (SC) 139; *Imtiaz Ahmed v. Ghulam Ali*, 15 DLR (SC) 283; *East Pakistan v. Kshiti Dhar* Roy, 16 DLR (SC) 457; *Kaushalya Devi v. Bachitar*, AIR 1960 SC 1168; *Orissa v. Muralidhar*, AIR 1963 SC 404.

[7] *Bangladesh v. Md. Jalil*, 48 DLR (AD) 10 (In writ jurisdiction the High Court Division can interfere with finding of fact only if it can be shown that the tribunal had acted without jurisdiction or made any finding on no evidence or without considering any material evidence/facts causing prejudice to the complaining party or it had acted

arrives at a finding upon proper appreciation of facts.[1] In academic matters, particularly in matters of study and holding of examinations, the University is the sole judge and the court will not generally interfere with the decision of the University unless there has been any manifest illegality in arriving at the decision.[2] But a finding of fact based on no evidence is treated as an error of law.[3] "'No evidence' does not mean only a total dearth of evidence. It extends to any case where the evidence, taken as whole, is not reasonably capable of supporting the finding; or where, in other words, no tribunal could reasonably reach that conclusion on that evidence. This 'no evidence' principle clearly has something in common with the principle that perverse or unreasonable action is unauthorised and ultra vires."[4] In *P.T. Services v. State Industrial Court*[5], the Labour Commissioner dealing with a dismissal case found from the absence of signature of the Inquiry Officer on the paper that no inquiry had been held by the employer. The Indian Supreme Court held that no reasonable judge of facts could have come to this conclusion. Where the facts found are wholly insufficient to sustain a finding of fact, it will be a case of no evidence and it will not be a finding for which protection against judicial examination can be claimed.[6] A finding of fact is liable to be interfered with if it is not based

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mala fide or in violation of any principle of natural justice) ; *Bangladesh v. Ashraf Ali*, 49 DLR (AD) 161; *Mostafa Kamal v. First Court of Settlement*, 48 DLR (AD) 61; *Manager, Jute Plastic Plant v. Labour Court*, 47 DLR 182; *Managing Director, Contiforms Ltd. v. Labour Appellate Tribunal*, 50 DLR 476; *Asma Begum v. Bangladesh*, 3 BLC 238; *High Court, Bombay v. Shashikanta*, AIR 2000 SC 22 (If there is some legal evidence on which the findings can be based, then adequacy or even reliability of that evidence is not a matter to be canvassed)

[1] *Bangladesh v. Court of Settlement*, 2 MLR (AD) 378; *Sirajul Islam v. Bangladesh*, 53 DLR 127

[2] *Badrunnessa v. Vice Chancellor*, 30 DLR 268; *Enamul Huq v. Dhaka University*, 43 DLR 507 (evaluation of academic attainment of a student being the sole function of the University, the court will be very much slow to interfere)

[3] *Bangladesh v. Md. Jalil*, 48 DLR (AD) 10; *R. v. Agricultural Land Tribunal ex p. Bracey*, [1960] 1 WLR 911; *Subal Chandra v. M.S. Huq*, Magistrate, 12 DLR 220; *Kaushalya Devi v. Bachitar*, AIR 1960 SC 1168; *Syed Yakoob v. Radhakrisnan*, AIR 1964 SC 477; *Basappa v. Nachappa*, AIR 1954 SC 440; *Rahim Shah v. Chief Election Commissioner*, PLD 1973 SC 24

[4] H.W.R. Wade - Administrative Law, 6th ed., p.320

[5] AIR 1963 SC 114

[6] *East Pakistan v. Amir Hossain*, 15 DLR (SC) 110

on material evidence[1] or the trier of the facts failed to properly consider the legal effect of material pieces of evidence.[2] On questions of fact the court adopts the test of reasonableness and the court inquires whether on consideration of the facts a reasonable man would have come to the finding arrived at by the authority.[3] If on the facts brought on record two conclusions are equally possible, the court will not interfere with the finding of fact of the administrative authority even though the court would have come to the other finding had it acted as the trier of the facts. A conclusion of fact is, however, reviewable when some relevant and material evidence has been excluded from consideration[4] or some irrelevant or inadmissible evidence has affected the decision.[5] In the words of Lord Wilberforce -

> If a judgment requires, before it can be made, the existence of some facts, then although the evaluation of those facts is for the Secretary of State alone, the court must inquire whether those facts exist, and have been taken into account, whether the judgment has been upon a proper self-direction as to those facts, whether the judgment has not been made on other facts which ought not to have been taken into account. If those requirements are not met, then the exercise of judgment, however bona fide it may be, becomes capable of challenge.[6]

In the ultimate analysis, on the question of fact, our position approximates the American position that "where a question of fact is at issue, the court determines only the *reasonableness* of the agency answer. If the agency answer is reasonable, even though it is not necessarily the one which the court would have given had it sat as the

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[1] *Minarul Islam v. Bangladesh*, 49 DLR 615

[2] *Lalima Begum v. Court of Settlement*, 49 DLR 325

[3] *East Pakistan v. Abdus Sobhan Sowdagar*, 16 DLR (SC) 38, Para 9; *Abdul Baqui Balooch v. Pakistan*, 20 DLR (SC) 249 ("It is not the purpose of judicial authority reviewing executive actions to sit on appeal over the executive or to substitute the discretion of the Court for that of the administrative agency. What the Court is concerned with is to see that the executive or the administrative authority had before it sufficient materials upon which a reasonable person would have come to the conclusion that the requirements of the law were satisfied." (Para 20)

[4] *Chittagong Chemical Complex v. Labour Court*, 46 DLR (AD) 182; *Bangladesh v. Md. Jalil*, 48 DLR (AD) 10; *Akhtari Begum v. Court of Settlement*, 2 BLC 341

[5] *East Pakistan v. Abdus Sobhan Sowdagar*, 16 DLR (SC) 38; *Syed Yakoob v. Radhakrisnan*, AIR 1964 SC 477; see the observation of Lord Pearce in Para 5.36.

[6] *Secretary of State for Education and Science v. Tameside MBC*, [1977] AC 1014, 1047

trier of fact, the agency finding of fact should be upheld."[1]

5.42 *Jurisdictional fact:* Though review of facts is limited as stated above, full review is allowed in respect of facts which are called 'jurisdictional' or 'collateral' facts.[2] These are facts the existence of which is the pre-condition to the exercise of jurisdiction by public functionaries.[3] It is a general rule that "no court of limited jurisdiction can give itself jurisdiction by a wrong decision on a point collateral to the merits of the case upon which the limits of its jurisdiction depends."[4] When the licensing justices are empowered to grant extension of hours of work on 'special occasions' exercise of that power is conditional upon the existence of special occasion and the court will review whether there was really special occasions within the meaning of the law.[5] In *R. v. Fulham (etc) Rent Tribunal ex p. Zerek*[6] Lord Goddard observed –

> ... if a certain state of things has to exist before an inferior tribunal have jurisdiction, they can inquire into the facts in order to decide whether or not they have jurisdiction, but cannot give themselves jurisdiction by a wrong decision upon them; and this Court may, by means of proceeding for certiorari, inquire into the correctness of the decision. The decision as to these facts is regarded as collateral because, though the existence of jurisdiction depends on it, it is not the main question which the

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[1] B. Schwartz - Administrative Law, p.596

[2] *A.P. v. Merit Enterprises*, (1998) 8 SCC 749

[3] *Anisul Islam Mahmood v. Bangladesh*, 44 DLR 1 (the court treated the materials on the basis of which detention order was passed as jurisdictional fact. This does not seem to be correct: Had the existence of those materials been jurisdictional facts, the court would have allowed full review of such facts, but as we will see, the Supreme Court does not go into the question of adequacy of such materials on the basis of which detention order is passed. See Para 5.95. The decision, however, is correct inasmuch as the detention order having been declared without lawful authority, no prosecution can be maintained for disobedience of the order.)

[4] *Bunbury v. Fuller*, [1853] 9 Ex 111; *Khizar Hayat v. Zainab*, 19 DLR (SC) 372; *Mehr Dad v. Settlement & Rehabilitation Commr.*, PLD 1974 SC 193; *Raza Textitles v. I.T. Officer*, AIR 1973 SC 1362

[5] *R. v. Sussex JJ*, [1933] 2 KB 707; see also *R. v. Metropolitan Police Commissioner ex p. Rexton*, [1972] 1 WLR 232; *R. v. Liverpool City Council ex p. Liverpool Taxi Fleet Operations Association*, [1975] 1 WLR 701; *R. v. Home Secretary ex p. Mehta*, [1975] 1 WLR 1087

[6] [1951] 2 KB 1, 6

tribunal have to decide.[1]

Kaikaus J in *Md. Jamil Asghar v. Improvement Trust, Rawalpinidi*[2] explained the position stating -

> A purely administrative officer who is empowered to pass an order of certain circumstances exist has no jurisdiction to determine those circumstances and the objective existence of those circumstances is an essential condition of the validity of his order.[3] In respect of every order passed by him the Court can make an enquiry and if it finds that all the circumstances needed for passing the order were not present it will declare the order to be void. Of course, although the officer has been granted no jurisdiction to determine any facts he will have to ascertain whether the requisite circumstances exist for otherwise he cannot pass the order but his conclusion as to the existence of those circumstances binds no body and it is open to any person affected to challenge his act on the ground that those circumstances do not in fact exist. An administrative officer or authority may be given jurisdiction to determine some facts on proof of which he can pass an order and in that case he will act in a quasi-judicial manner for the determination of those facts and his determination validly reached will support his order in relation to those facts. For instance the government may be empowered to acquire property if it is 'satisfied' of the existence of a public purpose for such acquisition. If the government validly reaches a conclusion as to the existence of a public purpose its order will be legal provided of course that the circumstances which it has found to exist do in law constitute a public purpose. The government still will have no jurisdiction to determine the connotation of 'public purpose' and it will not be able to validate an acquisition by a

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[1] see also *R. v. Lincolnshire Justices ex p. Brett*, [1926] 2 KB 192; *R. v. Pugh (Judge) ex p. Graham*, [1951] 2 KB 623; *Re Purkins Application*, [1962] 1 WLR 902; *Anisminic Ltd v. Foreign compensation Tribunal*, [1969] 2 AC 147; *R. v. Croydon etc Rent Tribunal ex p. Ryzewska*, [1977] QB 876; *R. v, Camden LB Rent Officer ex p. Ebiri*, [1981] 1 WLR 881; *Calcutta Discount Co. v. I.T. Officer*, AIR 1961 SC 372; *Amina Begum v. Md. Nazir*, PLD 1985 SC 260.

[2] 17 DLR (SC) 520

[3] Kaikaus J observed in *Jamal Shah v. Election Commission*, 18 DLR (SC) 1, Para 48, "It is a distinction attaching only to judicial tribunals that their acts within jurisdiction though illegal are not null and void. So far as administrative officer and authorities are concerned there is no distinction between illegality and want of jurisdiction. When an administrative officer acts illegally he acts without jurisdiction. An administrative officer has authority to pass order or to take action if certain facts exist. If those essential facts do not exist his order or action is void."

> misinterpretation of 'public purpose'. It is the Court which will determine what is meant by 'public purpose'.

In the same way Professor Wade observed, "In administrative cases the prescribed statutory ingredients will more readily be found to be collateral. This is probably because, in contrast to judicial cases ... the central question committed to the administrative authority will commonly be whether to exercise some discretionary power, and the prescribed statutory ingredients will more naturally be regarded as preliminary or collateral questions."[1]

5.43 In many cases, it is not easy to identify such jurisdictional facts. Speaking about the English position Professor Wade commented, "there are borderline cases where the question may, on a true view, be part of the matter which the administrative authority is empowered to decide conclusively, so that it is squarely within its jurisdiction."[2] Dealing with such a case Lord Esher laid down his famous dictum of `enabling power'-

> It [Parliament] may in effect say that, if a certain state of facts exists and is shown to such tribunal or body before it proceeds to do certain things, it shall have jurisdiction to do such things, but not otherwise. There it is not for them conclusively to decide whether that state of affairs exists, and, if they exercise the jurisdiction without its existence, what they do may be questioned, and it will be held that they have acted without jurisdiction. But there is another state of things which may exist. The legislature may intrust the tribunal or body with a jurisdiction, which includes the jurisdiction to determine whether the preliminary state of facts exists as well as the jurisdiction, on finding that it does exist, to proceed further or do something.[3]

This may happen when the collateral question is inextricably connected with the central question which the authority is assigned to determine.[4]

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[1] H.W.R. Wade - Administrative Law, 6th ed, p.288

[2] Ibid, p.286

[3] *R. v. Special Commissioner of Income Tax*, [1888] 21 QBD 313

[4] *R. Lincolnshire Justices ex p. Brett*, [1926] 2 KB 192; *Livingstone v. Westminister Corporation*, [1940] 2 KB 109; *R. v. Woodhouse*, [1906] 2 KB 501; *Ashbridge Investments Ltd. v. Minister of Housing*, [1965] 1 WLR 1320; *Lake v. Bennett*, [1070] 1 QB 663; *Lilavati v. Bombay*, AIR 1957 SC 521; *R & R Ltd. v. Madras*, AIR 1956 SC 463; *Ebrahim v. Custodian General*, AIR 1952 SC 319; *Raunaq Ali v. Chief Settlement Commr.*, PLD 1973 SC 236

5.44 The distinction drawn by Lord Esher is not workable in practice as the parliamentary intent in this regard is rarely, if ever, clearly manifested[1] and it is not clear on what basis certain facts are classed apart as jurisdictional fact. It is difficult to see why the doctrine should be applied to rent tribunal cases[2] and shall not be applied in cases of reinstatement tribunal[3]. It may be argued that in one case Parliament had conferred the power to decide conclusively the jurisdictional fact and in others it had not done so. But Parliament had not conferred such power expressly and one has to search in vain for an implied legislative intent which may be said to be present in reinstatement case, but not in rent tribunal cases. Because of this difficulty the Pakistan Supreme Court observed, "It is possible, of course, that special tribunal may be made the judge of its own jurisdiction, but this would be a very exceptional provision and one should be made by altogether clear words."[4] One such method adopted by legislature is by way of providing for conclusive presumption as in the case of *Lilavati v. Bombay*[5] where a law empowered the government to requisition premises which remained vacant for a specified period and made a provision to the effect that a declaration of such vacancy after such inquiry as the government deemed fit shall be conclusive evidence of such vacancy. The court held that the finding of the government on the question of vacancy is not reviewable as the legislature has conferred final power of determining the question on the government. Another method of making the administrative authority the final judge of the jurisdictional fact is to leave the finding of the jurisdictional fact to the subjective satisfaction of the administrative authority.[6] But this doctrine of 'enabling power', whether implied or express, endows a public functionary with uncontrolled powers and renders him a law unto himself and it definitely

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[1] Dr. Fazal - Judicial Control of Administrative Action in India, Pakistan and Bangladesh, 2nd ed., p.101

[2] *R. v. Hackney (etc) Rent Tribunal ex p. Keats*, [1915] KB 15 (Rent Tribunal having jurisdiction to reduce rent of a dwelling house, its order reducing rent is *ultra vires* as it wrongly found a house let for business purpose as a dwelling house.)

[3] *R. v. Ludlow, ex p. Barnsley corporation*, [1947] 1 KB 634 (where the corporation having been ordered by Umpire to reinstate a former employee, applied for certiorari on the ground that it was made without jurisdiction as the person ordered to be reinstated was not its employee, the court held that Parliament had given the tribunal power to decide the jurisdictional fact also)

[4] *Md. Jamil Asghar v. Improvement Trust, Rawalpindi*, 17 DLR (SC) 520, Para 7

[5] AIR 1957 SC 521

[6] *Hubli Electricity Company v. State of Bombay*, AIR 1949 PC 136

undermines the doctrine of *ultra vires* on which the power of judicial review is firmly established. It is open to doubt whether under our constitutional dispensation the doctrine of enabling power is acceptable. It may be argued that in terms of art.7 no public functionary can exercise power unless the condition for such exercise is truly fulfilled and the functionary cannot be allowed to exercise the power by wrongly assuming that the requisite condition does exist. It is both the power and the duty of the High Court Division to examine and ensure that a public functionary has power to take certain action or proceeding. Application of the doctrine will mean that even though in the facts of a given case a public functionary cannot affect the right of a citizen, a public functionary may by wrong assumption of facts assume jurisdiction and affect the right of that citizen and thus the citizen will be treated otherwise than in accordance with law in violation of the guarantee provided by art.31. Furthermore, a provision for conclusive presumption as found in *Lilavati* will in most cases be unreasonable and therefore violative of the provision of art.31.

5.45 There is often difficulty in separating jurisdictional from non-jurisdictional fact. But the solution does not lie in allowing the administrative agency the power to determine conclusively the facts on which its jurisdiction depends and thereby make an inroad in the doctrine of *ultra vires*. In *Crowell v. Benson*[1] while dealing with an award made by the Compensation Commission, the American Supreme Court in permitting full review of the jurisdictional fact observed, "if the agency determination on this question were final, it would sap the judicial power as it exists under the Federal Constitution and ... establish Government of bureaucratic character alien to our system ...". However, the difficulties inherent in the jurisdictional fact doctrine evoked vigorous dissent by Brandeis J who asserted that under the relevant statute the agency's power to act was dependent on the finding that the claimant was an employee and the existence of an employment relationship was but one of many facts on which the administrative power to award compensation depended. According to him, application of the doctrine of jurisdictional fact would leave the agency powerless to hear and determine any issue of asserted non-liability under the statute in question. *Crowell* has not been subsequently followed, nor has been overruled and "it lingers in the limbo of apparently discredited but not

[1] 285 US 22

wholly deceased decisions."[1] This, however, has not freed the agency finding of jurisdictional fact from judicial review because of the substantial evidence rule[2] followed in the American jurisdiction. To avoid the difficulty inherent in the application of the jurisdictional fact rule our courts may adopt the American substantial evidence rule which will not be inconsistent with the scheme and objectives of our Constitution as the High Court Division will retain control over the jurisdictional fact though in a lesser degree.

5.46 *Failure to exercise jurisdiction:* Failure to exercise jurisdiction is an error going to the root of jurisdiction. The principle is well established that if a statutory tribunal fails to exercise jurisdiction vested in it by law, such a failure will be open to correction in exercise of the power of judicial review.[3] If in the exercise of jurisdiction a tribunal fails to decide a material issue which may affect the ultimate decision, it will be an error going to jurisdiction. The reviewing court may either remit the case to the tribunal or determine the matter itself if the relevant material is already there.[4]

5.47 *Other ways of stepping out of jurisdiction*: Apart from committing jurisdictional error by committing error of law or error of jurisdictional fact or by failing to exercise jurisdiction vested in it, an authority may step out of jurisdiction in various ways by not complying with the statutory procedures, or by violating the principles of natural justice or by acting in bad faith, dishonestly or for improper motive or purpose or by exercising the power on wrong grounds or by acting unreasonably, arbitrarily or capriciously. The authority may also act without lawful authority by taking into consideration extraneous or irrelevant circumstances or acting in disregard of public policy. All these cannot be conveniently grouped under one head, nor can they be in a clear-cut way treated as separate grounds. What is unreasonable may be said to have been done in bad faith or when relevant circumstances are left out of consideration, the action may be said to be unreasonable.

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[1] B.Schwartz - Administrative Law, p.635

[2] "The reviewing court may not weigh the evidence, substituting its judgment for that of the agency on the facts; but neither is it to rubber-stamp fact-findings simply because they are supported by a scintilla of evidence. Substantial evidence means something between the weight of the evidence and a mere scintilla." - Ibid, p.593

[3] *Khizar Hayat v. Zainab*, 19 DLR (SC) 372; *Hasina Begum v. East Pakistan*, 24 DLR 6

[4] *Abdul Jabbar v. Abdul Wahed*, PLD 1974 SC 331, 339

When an action is taken for a purpose not authorised by law the court treats the vitiating factor sometimes as a wrong ground, sometimes as an improper purpose and sometimes as a colourable exercise of power. Dealing with the validity of a condition of licence under the Cinematograph Act, 1909 banning children from cinema house on Sundays, Lord Greene made the following observation about overlapping grounds which has now become a classic statement -

> When discretion of this kind is granted the law recognises certain principles on which that discretion must be exercised, but within the four corners of those principles the discretion, in my opinion, is an absolute one, and cannot be questioned in any court of law. What then are those principles?
>
> Bad faith, dishonesty - those of course stand by themselves - unreasonableness, attention given to extraneous circumstances, disregard of public policy and things like that have all been referred to, according to the facts of individual cases, as being matters which are relevant to the question. If they cannot all be confined under one head, they at any rate overlap to a very great extent. For instance we have heard in this case a great deal about the meaning of the word 'unreasonable'.
>
> It is true that discretion must be exercised reasonably.[1] Now what does that mean? Lawyers familiar with the phraseology commonly used in relation to exercise of statutory discretion often use the word 'unreasonable' in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said , and often is said, to be acting 'unreasonably'. Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority. Warrington L.J. in *Short v. Poole Corporation*[2] gave the example of the red-haired teacher, dismissed because she had red hair. That is unreasonable in one sense. In another it is taking into consideration extraneous matters. It is so unreasonable

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[1] Lord Macnaghten's statement in *Westminster Corporation v. London & North Western Rly Co.*, [1905] AC 426, 430

[2] [1926] Ch. 26

that it might almost be described as being done in bad faith; and, in fact, all these things run into one another.[1]

5.48 *Procedural ultra vires:* An authority may go wrong in law for non-compliance of statutory procedures, breach of the principles of natural justice or acting contrary legitimate expectation. Statutes conferring power on public functionaries often impose conditions relating to procedure for exercise of the power, e.g. notice, hearing, time-limit etc, but rarely stipulate the consequence of non-compliance with such conditions. The question then arises whether non-fulfilment of the conditions renders the exercise of power a nullity. Answer to it depends on whether compliance with such conditions is mandatory or directory. Non-compliance of mandatory conditions is fatal to the validity of the action taken by a public functionary, while non-observance of directory conditions does not affect the validity of the action.

5.49 It is, however, difficult to make a clear-cut distinction between the two types of conditions. Where a condition is imposed as a procedural safeguard for the benefit of the person sought to be affected by the exercise of the power, such a condition is normally held to be mandatory.[2] Thus where there is a statutory duty to consult persons to be affected, this must be generally done and reasonable opportunity for comments has to be given.[3] A demand for a payment is void if it is signed by a borough treasurer where the law requires it to be signed by the town clerk.[4] In *Howard v. Bodington*[5] a Bishop received a complaint

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[1] *Associated Provincial Picture House Ltd. v. Wednesbury Corporation*, [1948] 1 KB 223; see also Para 5.12

[2] *State v. Zahir*, 45 DLR (AD) 163 (non-supply of statement of witnesses recorded under s.161 of the Code of Criminal Procedure to the accused); *Abdul Quddus v. M.S. Khan*, 13 DLR 213 (misjoinder of charges); *Emdadul Haque v. Bangladesh*, 42 DLR 110 (suspension of chairman of Upazila Parishad without holding enquiry mandated by law set aside; *Virendra Kumar v. India*, AIR 1981 SC 947 (order of termination of service on ground of health was set aside for failure of non-compliance with procedural rules); *Eastern Beverage Ind. Ltd. v. Bangladesh*, 47 DLR 32 (Notification levying capacity tax held void for failure to specify "guiding principles".

[3] *Grunwick Processing Lab. v. ACAS*, [1978] AC 227; *Agricultural Training Bd. v. Aylesbury Mushroom*, [1972] 1 WLR 190; *Re Union of Benefices of Whippingham*, [1954] AC 245; *Port Luis Corp. v. A.G. of Mauritius*, [1965] AC 1111; *Banwarilal v. Bihar*, AIR 1961 SC 849; *Kalipada v. India*, AIR 1963 SC 134

[4] *Graddage v. Harringey London Borough Council*, [1975] 1 WLR 241

[5] [1877] 2 PD 203

against a clergyman but failed to send him a copy of it within the statutory time and as such the subsequent proceeding was held void.[1] Where exercise of power affects private rights entailing penal consequences, strict compliance with the statutory requirement is normally demanded.[2]

5.50 In the same statute or in the same set of provisions some provisions may be mandatory while others may be directory. The Education Act, 1944 in England provided for notice by the local authority with the object of giving an opportunity of objections to be made by the people of the locality to the Minister before he confirms a scheme of the local authority and the Minister cannot confirm the scheme until the statutory procedure is complied with. The court observed -

> ... it is imperative that the procedure laid down in the relevant statutes should be properly observed. The provisions of the statutes in this respect are supposed to provide safeguards for Her Majesty's subjects. Public Bodies and Ministers must be compelled to observe the law; and it is essential that bureaucracy should be kept in its place.[3]

This Act also required the specifications of schools to be approved by the Minister. The local authority proceeded with the scheme without the approval of the Minister, but in the absence of objection by the Minister, the court held the requirement to be directory. The Co-operative Societies Ordinance, 1984 requires that the election of the Managing Committee shall be held before the expiry of two years' term in the manner as may be prescribed by the rules. Rules were not framed, but as the term was going to expire election was held by a co-operative society. The Registrar issued a memorandum treating the election void as no rules were framed till then. The court held the requirement of holding the election within stipulated time mandatory as the object of

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[1] *Shrinivasa Reddy v. Mysore*, AIR 1960 SC 350 (statute requiring that application for stage carriage permit shall be made not less than six months before the date on which it was desired that the permit shall take effect, it would be wrong to grant a permit on application made during a period shorter than the prescribed time); but see *Belayet Hossain v. Bangladesh*, 6 BLC (AD) 60 (Where short notice was not fatal as it caused no prejudice)

[2] *Agricultural Ind. Training Bd. v. Kent*, [1970] 2 QB 19; *London & Clydeside Estates Ltd. v. Aberdeen DC*, [1980] 1 WLR 182; *Bangadesh v. Amela Khatun*, 53 DLR (AD) 55

[3] *Bradbury v. Enfield LBC*, [1967] 1 WLR 1311

the statute would otherwise be defeated and treated the requirement of holding the election in the manner prescribed by rules directory.[1] Where the requirements are less substantial and more like matters of mere formality, these are treated as directory.[2]

5.51 *Principles of natural justice:* Procedural safeguards are essential elements of rule of law. According to Jackson J of the American Supreme Court, even severe substantive laws can be endured if they are fairly and impartially applied; it may be preferable to live under Russian law applied by common law procedures than under the common law enforced by Russian procedures.[3] The principles of natural justice are applied to administrative process to ensure procedural fairness and to free it from arbitrariness. Violation of these principles results in jurisdictional error. Thus in a sense violation of these principles constitutes procedural *ultra vires*. It is, however, impossible to give an exact connotation of these principles as its contents are flexible and variable depending on the circumstances of each case, i.e., the nature of the function of the public functionary, the rules under which he has to act and the subject-matter he has to deal with.[4] These principles are classified into two categories - (i) a man cannot be condemned unheard (*audi alteram partem*) and (ii) a man cannot be the judge in his own cause (*nemo debet esse judex in propria causa*). The contents of these principles vary with the varying circumstances and it "cannot be petrified or fitted into rigid moulds. They are flexible and turn on the facts and circumstances of each case".[5] It must depend on the circumstances of the case, the nature of the inquiry, the rules under which the authority is acting and the subject matter that is being dealt with.[6] In applying these principles, there is a need to balance the competing interests of administrative justice and the exigencies of

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[1] *Abdul Jabbar Fakir v. Registrar of Co-operative societies*, 1986 BLD 145

[2] *R. v. Board of visitors of Dartmoor Prison ex p. Smith*, [1987] QB 106 (requirement of prison rules that a charge against a prisoner should be laid 'as soon as possible'); *James v. Minister of Housing and Local Government*, [1966] 1 WLR 135 (requirement of local planning authority giving notice of its decision within two months); *U.P. v. Srivastava*, AIR 1957 SC 912

[3] *Shaughnessy v. U.S.*, 345 US 206

[4] *Russell v. Duke of Norfolk*, [1949] 1 All E.R.109; *India v. P.K. Roy*, AIR 1968 SC 850, 858

[5] *Shrikrisna Tikara v. M.P.*, AIR 1977 SC 1691, Para 8;

[6] *Russel v. Duke of Norfolk*, [1949] 1 All E.R. 109, 118

efficient administration.[1] These principles were applied originally to courts of justice and now extend to any person or body deciding issues affecting the rights or interests of individuals where a reasonable citizen would have legitimate expectation that the decision-making process would be subject to some rules of fair procedure.[2] These rules apply even though there may be no positive words in the statute requiring application of these rules.[3] Lord Atkin in *R. v. Electricity Commissioners*[4] observed that the rules of natural justice applied to 'any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially'. The expression 'having duty to act judicially' was used in England to limit the application of the rules to decision-making bodies similar in nature to a court of law. Lord Reid, however, freed these rules from the bondage in the land-mark case of *Ridge v. Baldwin*[5]. But even before

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[1] *Helaluddin v. Bangladesh*, 45 DLR (AD) 1 (where the decision of a proceeding is subject to review and the aggrieved party was given hearing in the main proceeding, fresh hearing at the time of review need not be given); *The Chairman, Board of Mining Examination v. Ramjee*, AIR 1977 SC 965 (An accident in coal-mine resulted in an injury. In the inquiry held by the Regional Inspector in which the shot firer admitted that he allowed an unauthorised person to do the risky job. On the recommendation of the Regional Inspector the Board cancelled the certificate of the shot firer. As the Board did not give notice and hearing to the shot firer, plea of violation of natural justice was accepted by the High Court. In reversing the decision of the High Court, the Supreme Court observed, "Natural justice is no unruly horse, no lurking land mine, nor a judicial cure-all. If fairness is shown by the decision-maker to the man proceeded against, the form, features and the fundamentals of such essential processual propriety being conditioned by the facts and circumstances of each situation, no breach of natural justice can be complained of."); see also *Board of Intermediate & Secondary Edn. v. Rumana Ahmed*, 1992 BLD (AD) 160 (Having regard to the relationship of student and education authority, absence of allegation of malice and the nature of misconduct in the examination, the court did not insist on full-fledged opportunity of hearing)

[2] S.A. de Smith - Constitutional and Administrative Law, 4th ed. p.569; Wade & Bradley - Constitutional and Administrative Law, 10th ed., p.644; *Ridge v. Baldwin*, [1964] AC 40; *University of Dacca v. Zakir Ahmed*, 16 DLR (SC) 722 *Faridsons Ltd. v. Pakistan*, 13 DLR (SC) 233; *East Pakistan v. Nur Ahmed*, 16 DLR (SC) 375; *Abul A'la Moudoodi v. West Pakistan*, 17 DLR (SC) 209; *Kraipak v. India*, AIR 1970 SC 150.

[3] *C.I.T. v. Fazlur Rahman*, 16 DLR (SC) 506; *Abdur Rahman v. Collector and Deputy Commissioner*, 16 DLR (SC) 470; *H.M. Ershad v. Bangladesh*, 2001 BLD (AD) 69; *Regard Chemical Works v. NBR*, 2001 BLD 342;

[4] [1924] 1 KB 171, 205

[5] [1964] AC 40

this decision the rules of natural justice were being applied in our country to administrative proceedings which might affect the person, property or other rights of the parties concerned in the dispute.[1] In all proceedings by whomsoever held, whether judicial or administrative, the principles of natural justice have to be observed if the proceedings might result in consequences affecting the person or property or other right of the parties concerned.[2] These principles have no application in the case of legislative functions.[3] But because of proliferation of delegated legislation the distinction between legislative and administrative functions is fast eroding. Even then the distinction has to be kept in mind for application of the principles of natural justice and the Indian Supreme Court laid down the following test -

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[1] *Faridsons Ltd. v. Pakistan*, 13 DLR (SC) 233 ("Even if therefore the proceedings before the Chief Controller were neither strictly judicial, nor even *quasi*-judicial in character the principle of natural justice ... could be called in aid by the appellants." - p.248

[2] *University of Dacca v. Zakir Ahmed*, 16 DLR (SC) 722 (student's discipline); *Sk. Ali Ahmed v. Secretary, Ministry of Home Affairs*, 40 DLR (AD) 170 (cancellation of gun licence); *Habibullah Khan v. S. Azharuddin*, 35 DLR (AD) 72 (awarding of cost against a stranger to the proceeding); *Hamidul Haq Chowdhury v. Bangladesh*, 33 DLR 381 (taking over of printing establishment); *Farzana Haque v. Dhaka University*, 42 DLR 262; *Basharatullah v. Comptroller and Auditor General*, 21 DLR 526 (unfairness in departmental examination); *Manish Dixit v. Rajasthan*, AIR 2001 SC 93 (Castigating remarks made in judgment against police witness ensuing serious consequence on his future career); *Raghupati v. Bihar*, AIR 1989 SC 620; *Southern Painters v. F & CT Ltd*, AIR 1994 SC 1277 (black-listing of contractor). But see *State v. Joynal Abedin*, 32 DLR (AD) 110, where even though the exercise of the power of transfer of a case deprived the accused of the right of appeal, R. Islam J speaking for the majority held, "Since the power of the Government to transfer a case is neither judicial nor quasi-judicial, the question of contravention of the principle of natural justice does not arise." The observation does not square with the consistent view of the courts of this sub-continent.

[3] Fixation of price under statutory provision is legislative function, *India v. Cynamide India Ltd*, AIR 1987 SC 1802; *U.P. v. Renusagar Power Co.*, AIR 1988 SC 1737; *Bi-Metallic Co. v. Colorado*, 239 US 441 (State Board of Equalization increased the value of all taxable property in Denver without giving opportunity of hearing to tax-payers. The court rejected the due process challenge holding the action to be a legislative act). Contrast the case with *Londoner v. Denver*, 210 US 373 (Tax authorities in Denver ordered paving of a street and assessed the cost upon the abutting landowners. The court required due process hearing.); *Vishakhapatnam Port Trust v. Ram Bahadur*, AIR 1997 SC 1057 (Modification or cancellation of rates in public interest may in certain circumstances require the authority to consider representations of the parties to be affected.)

> Legislation is the process of formulating general rule of conduct without reference to particular cases and usually operating in future; administration is the process of performing particular acts of issuing particular orders or of making decision which apply general rules to particular cases.[1]

5.52 In England, the application of the principles of natural justice have been expanded by introducing the concept of 'fairness'. In *Re Infant H(K)*[2] it was held that whether the function discharged is quasi-judicial or administrative, the authority must act fairly. It is sometimes thought that the concept of 'acting fairly' and 'natural justice' are different things, but this is wrong as Lord Scarman correctly observed that the courts have extended the requirement of natural justice, namely, the duty to act fairly, so that it is required of a purely administrative act.[3] Speaking about the concept, Professor Wade commented, "The 'acting fairly' doctrine has at least proved useful as a device for evading some of the previous confusion. The courts now have two strings to their bow. An administrative act may be held to be subject to the requirements of natural justice either because it affects rights or interests and therefore involves a duty to act judicially, in accordance with the classic authorities and *Ridge v. Baldwin*; or it may simply be held that, 'in our modern approach', it automatically involves a duty to act fairly and in accordance with natural justice, without any of the analysis which has been made into such an unnecessary obstacle."[4] The Indian Supreme

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[1] *India v. Cynamide India Ltd.*, AIR 1987 SC 1802

[2] [1967] 1 All E.R. 226; *R. v. Hull Prison Board of Visitors*, [1979] 1 All E.R. 701 (The Board of Visitors is required to act fairly while enforcing discipline in prison); *R. v. Commission for Racial Equality ex p. Hillingdon LBC*, [1982] AC 779 ("Where an Act of Parliament confers upon an administrative body functions which involve its making decisions which affect to their detriment the rights of other persons or curtail their liberty to do so as they please, there is a presumption that Parliament intended that the administrative body should act fairly towards those persons who will be affected by their decisions." - per Lord Diplock)

[3] *Council of Civil Service Union v. Minister for the Civil Service*, [1984] 3 All E.R. 935, 948; see also Wade - Administrative Law, 7th ed. p.515 (But it is now clearly settled, as is indeed self-evident, that there is no difference between natural justice and 'acting fairly', but that they are alternative names for a single but flexible doctrine whose content may vary according to the nature of the power and the circumstances of the case.)

[4] Administrative Law, 6th ed., p.525; P.P. Craig correctly perceived the judicial attitude when he commented, "The term natural justice is used for that part of the spectrum which requires a relatively wide range of procedural checks, while fairness is

Court adopted this principle holding "... this rule of fair play must not be jettisoned save in very exceptional circumstances where compulsive necessity so demands."[1] The English courts further expanded the horizon of natural justice by importing the concept of 'legitimate expectation' and holding that from promise or from established practice a duty to act fairly and thus to comply with natural justice may arise.[2] Thus the concepts of 'fairness' and 'legitimate expectation' have expanded the applicability of natural justice beyond the sphere of right. Not only in the case of cancellation of licence which involves denial of a right[3], but also in the case of first time grant of licence and renewal of licence the principle of natural justice is attracted in a limited way in consideration of legitimate expectation.[4] An applicant for registration as a citizen, though devoid of any legal right, is entitled to a fair hearing and an opportunity to controvert any allegation against him.[5] An alien seeking a visa has no entitlement to one, but "once he has the necessary documents, he does have the type of entitlement that should now be protected by due process, and the government should not have the power to exclude him summarily."[6] In *Chingleput Bottlers v. Majestic Bottlers*[7] the Indian Supreme Court made certain observations which create an impression that the rules of natural justice is not applicable where it is a matter of privilege and no right or legitimate expectation is involved. But the application of the rules of natural justice is no longer tied to the

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used in those areas either where the nature of the decision-maker renders the term natural justice inappropriate or the set of safeguards tends towards the lower end of the spectrum." - Administrative Law, 3rd ed., p.209; Foulkes, however comments, "A caveat against the use of fairness as a substitute for natural justice must be entered; first fairness can be achieved other than through (the equivalent of) the rules of natural justice (for example through estoppel or the rule against retrospectivity); and second, 'fairness' may suggest that the courts are concerned with the fairness of the *merits* of a decision rather than with the *procedure* by which it is arrived at." – Administrative Law, 8th ed., p.287

[1] *Swadeshi Cotton Mills v. India*, AIR 1981 SC 818, 832

[2] See para 5.63A - 5.63C

[3] *Sk. Ali Ahmed v. Secretary, Ministry of Home Affairs*, 40 DLR (AD) 170; *Bangladesh Telecom Ltd v. BTTB*, 48 DLR (AD) 20

[4] H.W.R. Wade - Administrative Law, 6th ed, p.521, 559; *Fazlul Karim Selim v. Bangladesh*, 33 DLR 406 (A District Magistrate before refusing to authenticate the declaration of a newspaper should give a hearing to the person making the declaration)

[5] *A.G. v. Ryan*, [1980] AC 718

[6] Schwartz - Administrative Law, 1976, p.230

[7] AIR 1984 SC 1030; see also *Nurul Islam v. Bangladesh*, 46 DLR 46

dichotomy of right-privilege. "For the purpose of natural justice the question which matters is not whether the claimant has some legal right, but whether the legal power is being exercised over him to his disadvantage. It is not a matter of property or of vested interests, but simply of the exercise of governmental power in a manner which is fair ..."[1] In the American jurisdiction the right-privilege dichotomy was used to deny due process hearing where no right was involved. But starting with *Gonzalez v. Freeman*[2] the courts gradually shifted in favour of the privilege cases and in the words of Professor Schwartz, "The privilege-right dichotomy is in the process of being completely eroded".[3] Art.31 incorporating the concept of procedural due process, the English decisions expanding the frontier of natural justice are fully applicable in Bangladesh.

5.53 In English law the rules of natural justice perform a function, within a limited field, similar to the concept of procedural due process as it exists in the American jurisdiction.[4] Following the English decisions, the courts of this sub-continent held that the principles of natural justice should be deemed incorporated in every statute unless it is excluded expressly or by necessary implication by any statute.[5] The 'due process' clause of the American Constitution in its procedural aspect requires an impartial tribunal[6] and notice and opportunity to be heard[7] and thus the rules of natural justice enjoy the constitutional sanctity and the legislature does not possess the authority to relieve the administration from the demands of natural justice in the American jurisdiction. Art.31 of the Constitution provides for due process in the sense it is used in the American jurisdiction and thus a law passed by

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[1] H.W.R. Wade - Administrative Law, 5th ed., p.465. In the 6th edition Professor Wade cited some decisions and commented "In none of these cases is there either legal right or interest or promise or established practice. 'Legitimate expectation', which means reasonable expectation, can equally well be invoked in any of the many situations where fairness and good administration justify the right to be heard" - p.522

[2] 334 F.2d 570; *Goldberg v. Kelly*, 397 US 254

[3] Administrative Law, 1976, p.230; *Shapiro v. Thomspon*, 394 US 618, 627 (The constitutional issue is not really answered by the argument that the benefit is only a "privilege" and not a "right")

[4] S.A. de Smith - Judicial Review of Administrative Action, 4th ed., p.156

[5] *Abul A`la Moudoodi v. West Pakistan*, 17 DLR (SC) 209; *Faridsons Ltd v. Pakistan*, 13 DLR (SC) 233; *Swadeshi Cotton Mills v. India*, AIR 1981 SC 818

[6] *Jordan v. Massachusetts*, 225 US 167, 176; *Withrow v. Larkin*, 421 US 35, 46

[7] *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 US 123, 178

Parliament must be reasonable and must shun arbitrariness. It is doubtful if in the absence of a clear and emergent governmental interest arising out of its subject-matter, a law excluding the operation of these principles can pass the due process test of art.31. In case of an emergency, the principles of natural justice can be complied with in certain circumstances after the action is taken.[1] Hence there will rarely be a case of extreme necessity where the application of these principles can be totally excluded.[2] Such a case may arise where a man has to be detained immediately to ensure the security of the State and the facts may be such that the grounds of detention cannot be disclosed without jeopardising the security of the State.[3] The proviso to art.33(5) makes such a provision stating, "the authority making any such order may refuse to disclose facts which such authority considers to be against the public interest."

5.54 *Fair procedure:* The basic principle of fair procedure is that before taking any action against a man the authority should give him notice of the case and afford him fair opportunity to answer the case against him and to put his own case.[4] The person sought to be affected must know the allegation and the materials to be used against him and

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[1] *Bangladesh v. Ghulam Azam*, 46 DLR (AD) 192; *Abul A'la Mouddodi v. West Pakistan*, 17 DLR (SC) 209; *Manneka Gandhi v. India*, AIR 1978 SC 597

[2] *Karnataka P.S.C. v. Vijaya Shanker*, AIR 1992 SC 952 (PSC refused to evaluate a paper of a candidate for writing his roll number inside the answer paper in violation of instruction. The Supreme Court observed that competitive examinations are required to be held in strict secrecy and public interest requires no compromise and absence of expectation coupled with the necessity of avoiding delay in declaring list of successful candidates creates an exception to the rules of natural justice.)

[3] *R. v. Home Secretary ex p. Hosenball*, [1977] 1 WLR 766 (in a case of deportation hearing was not totally denied, but some of the facts on which decision was taken were not disclosed on ground of national security)

[4] S.A. de Smith - Constitutional and Administrative Law, 4th ed. p.572; *Sk. Ali Ahmed v. Secretary, Ministry of Home Affairs*, 40 DLR (AD) 170; *Bangladesh Telecom Ltd. v. BTTB*, 48 DLR (AD) 20 (Facts which constitute the valid basis of cancellation have to be alleged in the show cause notice and cannot be supplemented in affidavit filed in the proceeding challenging the action.); *Tariq Transport v. Sargoda Bus Service*, 11 DLR (SC) 140; *Chief Commr. Karachi v. Dina Sohrab*, 11 DLR (SC) 113; *Faridsons Ltd. v. Pakistan*, 13 DLR (SC) 223; *Abdul Latif v. West Pakistan*, 14 DLR (SC) 300; *Abdur Rahman v. Collector*, 16 DLR (SC) 470; *C.I.T. v. Fazlur Rahman*, 16 DLR (SC) 506; *University of Dacca v. Zakir Ahmed*, 16 DLR (SC) 722; *Abul A`la Moudoodi v. West Pakistan*, 17 DLR (SC) 209; *Abdus Sabur Khan v. Karachi University*, 18 DLR (SC) 422

he must be given a fair opportunity to correct or contradict them.[1] The right to a fair hearing is now of universal application whenever a decision affecting the rights or interest of a man is made. But such a notice is not required where the action does not affect the complaining party.[2]

5.55 Hence a notice is considered to be the minimum obligatory condition.[3] Where a statute requires notice to be given before taking any action, service of notice to the party concerned is mandatory and failure to comply with the requirement renders the action *ultra vires*. Even when a statute is silent, notice has to be given if any person is sought to be affected in his right, interest, property or character.[4] When the statute requires service of notice the authority cannot absolve itself of this duty[5] even if the person going to be affected has *suo motu* filed a representation to the authority.[6] But where the statute does not require service of notice and the person sought to be affected has already filed a representation, the question would arise whether that man has really been prejudiced by the non-service of notice as the essence of the principle is fairness.[7] Failure to issue notice may not be fatal where the person complaining was aware of the proceeding and did not take step to

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[1] *Kanda v. Government of Malaya*, [1962] AC 322; *Chief Constable of the North Wales Police v. Evans*, [1982] 3 All E.R. 141 (The police authority required a police probationer to resign on account of allegation about his private life, but the authority neither informed the police probationer the allegations on which he based his decision, nor did he offer him an opportunity to give explanation and the court found violation of the rules of natural justice)

[2] *Bangladesh Anjuman-E-Ahmedia v. Bangladesh*, 45 DLR 185; *Shamsunnahar Begum v. Bd. of Intermediate and Secondary Edn.*, 1988 BLD 8

[3] *Sk. Ali Ahmed v. Secy. Ministry of Home*, 40 DLR (AD) 170; *Syed Ali v. Nishan Singh*, 19 DLR (SC) 278; *East India Commercial Co. v. Collector of Customs*, AIR 1962 SC 1893; *Municipal Board v. State Transport Authority*, AIR 1965 SC 458

[4] *Abul A'la Moudoodi v. West Pakistan*, 17 DLR (SC) 209; *Maneka Gandhi v. India*. AIR 1978 SC 597; *Abdur Rouf v. Ministry of LGRD*, 43 DLR 33 (Chief Election Commissioner's order for recounting without giving opportunity to the candidate securing highest number of votes an opportunity of hearing is void); *Rahima Food Corp v. Deputy Collector of Customs*, 49 DLR 510 (Demand for the amount short-levied without giving notice to show cause is illegal); *HFDM De Silva v. Bangladesh*, 2 BLC 179 (Black-listing the petitioner and passing order for his deportation, ought to have been given opportunity of hearing)

[5] *Jobon Nahar v. Bangladesh*, 49 DLR 108

[6] *CATA Sales Society v. A.P.*, AIR 1977 SC 2313

[7] *Fazal Bhai v. Custodian General*, AIR 1961 SC 1397

file his objection.[1] There may also be exceptional situations when the court may ignore the non-service of notice, as happened in *U.P. Singh v. Board of Governors*[2] where some students were guilty of gross violence against other students which called for immediate action as it created tension in the area, but notice could not be served in spite of the best efforts of the authority as they had absconded. No notice need be given for termination of the appointment of a Government Pleader who held office at the pleasure of the government and no misconduct is alleged in terminating the appointment.[3]

5.55A Sometimes it is argued that the case against a man is of such incontrovertible nature that it would have made no difference and the same conclusion would have to be reached even if notice and hearing would be given. But the contention is not correct. It is important that the procedure and the merits are kept strictly apart. "If the principles of natural justice are violated in respect of any decision it is, indeed, immaterial whether the same decision would have been arrived at in the absence of the departure from the essential principles of justice. The decision must be declared to be no decision."[4]

5.56 Notice is not a technical requirement or an idle formality.[5] In order to be a valid notice it must be properly served on the person concerned giving him reasonable time[6] to show cause against the proposed action. The notice must not be vague or in bare language merely repeating the language of the statute[7]; it must be a meaningful

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[1] *Abdur Rahman v. Sultan*, 35 DLR (AD) 51 (Where the person complaining knew of holding of local investigation by Advocate Commissioner, but did not take step to file any objection against the report)

[2] AIR 1982 M.P. 59; *Prof. Dr. Md. Yusuf Ali v. Chancellor, Rajshahi University*, 1998 BLD 1 (show cause notice not considered essential); but see *Chittagong Medical College v. Shahryar Murshed*, 48 DLR (AD) 33 (where authority could wait for some time for normalcy to return, failure to give notice was held fatal)

[3] *Kazi Mukhlesur Rahman v. Secretary, Ministry of Law*, 49 DLR 129; *Kazi Abdul Wahab v. Bangladesh*, 31 DLR 332

[4] *General Medical Council v. Spackman*, [1943] AC 627, 644; *R. v. Secretary of State ex p. Brent*, [1982] 2 WLR 693; *John v. Rees*, [1970] Ch 345; *Union Carbide Corp. v. India*, AIR 1992 SC 248, 299 (in the peculiar facts of the case the court refused to set aside the court-assisted settlement without a hearing).

[5] *Bangladesh Telecom Ltd. V. BTTB*, 48 DLR (AD) 20; *Bangladesh v. Tajul Islam*, 49 DLR (AD) 177

[6] *R. v. Thames Magistrates' court ex p. Polemis*, [1974] 2 All E.R. 1219

[7] *Amaresh Chandra v. Bangladesh*, 31 DLR (AD) 240 *Nasir Ahmed v. Assistant*

one[1] and of such detail as would give the person concerned a fair idea of the case or allegation against him so that he has an opportunity of giving a meaningful reply.[2] Where fraud is alleged, the particulars of fraud are to be stated in the notice.[3] There is no fixed standard as to the adequacy of the notice and it will vary from case to case. The test is whether in a given case the person concerned has been prejudiced in presenting his case and the court will inquire whether the person had a fair chance of controverting the allegations against him.[4] Thus, if the notice does not mention the date, time and location of the incident[5], or mentions the charge without mentioning the proposed action[6], or does not mention the grounds or part of the real grounds of the proposed action[7], or mentions one ground but action is taken on some other ground[8] or additional grounds[9], or if the notice mentions several grounds without specifying the particular ground on which action is sought to be taken[10], the notice suffers from vagueness. Again, if one action is proposed in the notice and a different action is taken, the principle of natural justice is violated.[11] *In N.S. Transport v. Punjab*[12] a company

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Custodian, AIR 1980 SC 1157; *Bangladesh v. Tajul Islam*, 49 DLR (AD) 177

[1] *Bangladesh Telecom Ltd. v. BTTB*, 48 DLR (AD) 20 (Alleged show cause notice contained allegations which could not be the basis of cancellation of licence); *U.P. v. Maharaja Dharmendra*, AIR 1989 SC 997, 1010 (Show cause notice was held invalid where it "is an impalpable congeries of suspicions and fears, of relevant or irrelevant matter and has included some trivia.")

[2] *Charan Das v. Asstt. Collector of Customs*, AIR 1968 Cal 28 (the grounds given in the notice should be clear, specific and unambiguous);

[3] *U.P. v. Salig Ram Sharma*, AIR 1960 All 543

[4] *State Bank of Patiala v. Sharma*, AIR 1996 SC 1669 (A distinction has to be made between "no opportunity" and "no adequate opportunity" and in the latter case a decision will not be vitiated if no prejudice is caused)

[5] *U.P. v. Mohd. Sharif*, AIR 1982 SC 937

[6] *Abdul Latif v. Commissioner*, AIR 1968 All 44

[7] *North Bihar Agency v. Bihar*, AIR 1981 SC 1758; *Maradona Mosque (Board of Trustees) v. B. Mahmud*, [1966] 1 All E.R. 545

[8] *Joseph Vilanagandan v. Executive Engineer (PWD)*, AIR 1978 SC 930; *Sabey (H) & Co. v. Secretary of State* , [1978] 1 All E.R. 586 (in a public inquiry a ground which had important bearing on Secretary's decision was not brought to the notice of the party which had no opportunity of controverting it)

[9] *Nasir Ahmed v. Assistant Custodian*, AIR 1980 SC 1157

[10] *Sinha Gavindji v. Deputy Chief Controller of Imports*, (1962) 1 SCJ 93

[11] *Bangladesh Telecom Ltd. v. BTTB*, 48 DLR (AD) 20

[12] AIR 1976 SC 57

had several stage carriage permits for various routes. The authority on receipt of complaint issued a notice to show cause why action to cancel or suspend the permits should not be taken. The court found the notice to be bad as the proposed action had to be particularised with reference to each of the permits detailing particular conditions for breach of which action was sought to be taken in connection with each of the permits. A bald notice covering all the permits could not be issued.

5.57 The statutory provisions may prescribe the form in which the notice is to be issued and ordinarily this form has to be complied with by the authority. But minor deficiencies and technical irregularities will be ignored by the court.[1] In one case, the statute required the issuance of notice mentioning the date, time and place of hearing, but the notice did not mention the place of hearing. The court held that this did not invalidate the proceeding as the party concerned was not a stranger to the place of office of the tribunal.[2]

5.58 The rule requires giving of an opportunity of hearing and it will normally mean an oral hearing[3], but sometimes the requirement is satisfied if the person concerned is given the opportunity of making a written representation and the representation is considered. It is not always necessary that oral hearing has to be given, and a hearing can fairly be concluded by written representation.[4] Where, however, complicated or technical question or controversial issues of fact are involved oral hearing may be necessary and the court will insist on such oral hearing.[5]

5.59 A hearing to be fair must fulfil some conditions: the authority should (i) receive all relevant material which the person concerned produces, (ii) disclose all information, evidence or materials which the authority wants to use against the person in arriving at his decision and (iii) afford opportunity to the man to controvert the information or

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[1] *Orissa v. Chakobhai*, AIR 1961 SC 284

[2] *Ikram Khan v. S.T.A. Tribunal*, AIR 1976 SC 2333

[3] *R. v. Immigration Tribunal ex p. Mehmet*, [1977] 2 All E.R. 602 (tribunal's decision quashed for failure to give oral hearing)

[4] *Local Government Board v. Arlidge*, [1915] AC 120; *Jeff v. New Zealand Dairy Production and Marketing Board*, [1966] 3 All E.R. 863, 870; *Lloyd v. McMohan*, [1987] 1 All E.R. 1118; *Kapur Singh v. India*, AIR 1960 SC 493; *F.N. Roy v. Collector of Customs*, AIR 1957 SC 648

[5] *Travancore Rayons v. India*, AIR 1971 SC 862 (whether a particular goods fall within the list of excisable items); *Dewan Singh v. Haryana*, AIR 1976 SC 1921

material sought to be used against him. The adjudicating authority must give the person concerned the opportunity to produce all relevant evidence in support of his case.[1] When an employee is sought to be punished on a charge of misconduct examination of witnesses in support of the charge should be in the presence of the employee and the employee should be given the opportunity of cross examining the witnesses.[2] However, having regard to the relationship between a student and the education authority, the court did not require examination of witness in presence of the student charged with misconduct in examination when notice to show cause was given and no malice was alleged against the authority.[3] The authority is entitled to proceed exparte if the person concerned fails to appear after getting the notice,[4] but the authority would violate the principle of natural justice if he refuses to hear a person who could not appear in the first hearing, but appeared subsequently during the course of hearing.[5] Natural justice will also be violated if adjournment is not allowed where the party affected is unable to appear for unavoidable reason or where it is necessary in the interest of justice.[6]

5.60 An adjudicatory body has to decide a matter on the basis of materials placed before it in the course of the proceedings. It is a fundamental principle of natural justice that no material should be relied on against a party without giving him an opportunity to controvert or explain that material. Accordingly, non-disclosure of such material to

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[1] *Abdur Rahman v. Collector & Dy. Commr.*, 16 DLR (SC) 470 (refusal to examine witness sought to be produced by the Chairman of Union Committee in a proceeding for his removal on the ground of misconduct); *Dhakeswari Cotton Mills Ltd. v. C.I.T.*, AIR 1955 SC 65 (the income tax authority violated the principle of natural justice by refusing to look into account books which the assessee did not have opportunity of producing earlier due to reasons beyond his control)

[2] *M.A. Hai v. T.C.B.*, 32 DLR (AD) 46

[3] *Masum Iqbal v. BUET*, 1997 BLD 7; *Board of Intermediate & Secondary Edn v. Rumana Ahmed*, 1992 BLD (AD) 160

[4] *Roshan Lal v. Ishwar Das*, AIR 1962 SC 646; *Shahdoodul Haque v. Registrar, Co-operative Societies, Bihar*, AIR 1974 SC 1896

[5] *Sangram Singh v. Election Tribunal*, AIR 1955 SC 425

[6] *Priddle v. Fisher & Sons*, [1968] 3 All E.R. 506; *Rose v. Humble*, [1972] 1 All E.R. 314; *Hanson v. Church Commissioners for England*, [1977] 3 All E.R. 403; *Md. Farooq Imam v. Claims Commissioner*, 16 DLR (SC) 648 (where a party remained absent on account of misapprehension about date of hearing and exparte order was passed, the court quashed the order and remanded the case)

the party to be affected is fatal to the validity of the proceedings[1] except when full disclosure may injure the individual affected[2] or the public interest[3]. The Indian Supreme Court considered it to be an infringement of natural justice when the Income Tax Tribunal decided on the confidential report of a departmental representative unknown to the assessee.[4] But if the gist of the documents against the party affected has been brought to his notice, non-supply of copy of it may not violate natural justice.[5]

5.61 Hearing is to be given by the authority taking the decision.A hearing during on-the-spot inquiry by another authority will not be a sufficient compliance with the principle of natural justice.[6] Where before initiating an action, a preliminary inquiry is made the question arises as to the disclosure of the preliminary inquiry report. Generally, the inquiry report has to be supplied to the party proceeded against.[7] The requirement of natural justice may, however, be satisfied if the substance of the report is supplied.[8] Non-supply of such report will not be material if the inquiry officer in the formal inquiry does not rely on it.[9] The whole question has been aptly dealt with by Lord Loreburne -

> ... they must act in good faith and fairly listen to both sides, for that is a

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[1] *Kanda v. Government of Malaya*, [1962] AC 322 (the adjudicating officer in possession of a report of the board of inquiry not making it available to the accused police officer); *Shareef v. Commissioner for Registration of Indian and Pakistani Residents*, [1966] AC 47; *M.P. v. Chintamon*, AIR 1961 SC 1623; *Orissa v. Binapani*, AIR 1967 SC 1269; *North Bihar Agency v. Bihar*, AIR 1981 SC 1758; *Bishambhar Nath v. U.P.*, AIR 1966 SC 573

[2] *R. v. Kent Police Authority ex p. Godden*, [1971] 2 QB 662 (distressing medical report withheld from the individual, but disclosed to his medical adviser); *Re WLW*, [1972] 1 Ch. 456 (psychiatric reports held back in a case where an infant would suffer, if disclosed)

[3] *R. v. Home Secretary ex p. Hosenball*, [1977] 1 WLR 766

[4] *Dhakeswari Cotton Mills Ltd v. C.I.T.* AIR 1955 SC 65; *Brajlal Manilal v. India*, AIR 1964 SC 1643; *Krishna Chandra v. India*, AIR 1974 SC 1589 (in a disciplinary proceeding the inquiry officer made a private inquiry about property of the accused officer)

[5] *City Corner v. P.A. to Collector*, AIR 1976 SC 143

[6] *Bangladesh v. Commercial Trust of Bangladesh Ltd*, 46 DLR (AD) 89. See, however, *Helaluddin v. Bangladesh*, 45 DLR (AD) 1

[7] *Borhanuzzaman v. Ataur Rahman*, 46 DLR (AD) 94; *Mostafa Mia v. Labour Court*, 46 DLR 373; *Torab Ali v. BTMC*, 41 DLR 138

[8] *Radhakrishnan v. Tamil Nadu*, AIR 1974 SC 1862

[9] *Krishna Chandra v. India*, AIR 1974 SC 1589

> duty lying upon every one who decides anything. But I do not think they are bound to treat such question as though it were a trial ... They can obtain information in any way they think best, always giving a fair opportunity to those who are parties in the controversy for correcting or contradicting any relevant statement prejudicial to their view.[1]

5.62 Notice and hearing are to be given before the decision is taken. There may be several stages before the decision is taken. In preliminary or initiating proceedings the person concerned generally has no right to be heard, particularly when he is entitled to be heard at a later stage.[2] But this is not an absolute rule. Fairness demands an opportunity of hearing where the preliminary steps produce immediate legal consequences to the disadvantage of the person proceeded against.[3] A hearing subsequent to the decision may satisfy the requirement if the subsequent hearing is adequate and the individual affected suffers no substantial injury[4] or in a case of emergency where in the facts and circumstances of a given case it is not possible to hear the affected party before taking the action.[5] The concept of substantial injury or emergency which will permit postponement of notice and hearing will vary depending on the existing values of the society. At one stage, realisation of revenue was considered to be an emergency in the American jurisdiction.[6] In other cases, a post-decisional hearing cannot satisfy the requirement of natural justice.[7] The question, however, arises whether the defect of not giving a hearing may be cured by giving a hearing at the appellate or revisional stage. In *Leary v. National Union of Vehicle*

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[1] *Board of Education v. Rice*, [1911] AC 179, 182

[2] *Rees v. Crane*, [1994] 2 AC 173; *Wiseman v. Borneman*, [1971] AC 297; *Furnell v. Whangarei High School Board*, [1973] AC 660; *Herring v. Templeman*, [1973] 3 All E.R. 569

[3] *Rees v. Crane*, [1994] 2 AC 173; *Re Perfamon Press Ltd.*, [1971] Ch. 388

[4] Schwartz - Administrative Law, 1976, pp.207-209

[5] *Bangladesh v. Ghulam Azam*, 46 DLR (AD) 192; *Abul A`la Moudoodi v. West Pakistan*, 17 DLR (SC) 209; *North American Cold Storage Co. v. Chicago*, 211 US 306 (summary seizure and destruction of putrefied poultry in cold storage); *Adams v. Milwaukee*, 228 US 572; *Ewing v. Mytinger & Caselberry*, 339 US 594; *Goss v. Lopez*, 419 US 565 (suspension of public school student whose presence in school posed continuing danger to persons or property)

[6] *Phillips v. Commissioner*, 283 US 589

[7] *Shephard v. India*, AIR 1988 SC 686, 695 (It is a common experience that once a decision has been taken, there is a tendency to uphold it and a representation may not really yield a fruitful purpose.); *Trehan v. India*, AIR 1989 SC 568

Builders[1] Megarry J held that as a general rule a failure of natural justice in the trial body cannot be cured by sufficiency of natural justice in the appellate body as instead of a fair trial followed by appeal, the procedure is reduced to unfair trial followed by fair trial. But the Privy Council held the 'general rule' to have been broadly stated[2] and the House of Lords in *Lloyd v. McMahon*[3] took the view that a fair hearing at the appellate stage would cure the defect if it is a full appeal (where all the evidence may be examined) as distinct from a limited appeal.[4] The Indian Supreme Court in recent decisions seems to agree with the House of Lords.[5]

5.63 What is the effect of failure to give a fair hearing? Will a decision in breach of *audi alteram partem* be void or voidable? In *Ridge v. Baldwin*[6] the majority held that the failure of fair hearing rendered the dismissal of the Chief Constable void. Though the Privy Council's decision in *Durayappah v. Fernando*[7] created confusion in this regard, later decisions removed any persisting doubt by following *Ridge v. Baldwin*[8]. However Professor Wade observed, "In natural justice cases ... it is essential to remember that `void' is not an absolute but a relative term: a decision or act may be void against one person and valid against another."[9] He referred to the statement of Megarry J in *Hounslow L.B.C. v. Twickenham Garden Development Ltd.*[10]

> A decision reached by a tribunal wholly outside its jurisdiction and in complete defiance of natural justice is about as void as anything can be;

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[1] [1971] Ch. 34; see also *Institute of Chartered Accountants v. Ratna*, AIR 1987 SC 71

[2] *Calvin v. Carr*, [1980] AC 574 (a case of domestic disputes which have to be settled by agreed procedure under contractual rules)

[3] [1987] 1 All E.R. 1118 (a case in which action of a public body was involved)

[4] see *Jordan v. American Eagle Fire Ins.* Co., 169 F.2d 281, 290 (If the court proceeding includes the full right to present evidence, to meet issues, and to explore the evidence and conclusions ..., a federal court cannot invalidate the final ... order because no hearing was afforded in the administrative ... part of the proceeding.)

[5] *Charan Lal Sahu v. India*, AIR 1990 SC 1480; *Union Carbide Corp. v. India*, AIR 1992 SC 248

[6] [1964] AC 40

[7] [1967] 2 AC 337

[8] *Anisminic Ltd. v. Foreign Compensation Commission*, [1969] 2 AC 147; *Hoffman-La Roche v. Secretary of State*, [1975] AC 295; *A.G. v. Ryan*, [1980] AC 143

[9] Administrative Law, 6th ed., p.529

[10] [1971] Ch.233, 259

> but if nobody who is entitled to challenge or question it chooses to do so, it remains in being.

In *Hari Bishnu Kamath v. Ahmed Ishaque*[1] the Indian Supreme Court treated the breach of *audi alteram partem* as an illegality in the exercise of undoubted jurisdiction. In *Nawabkhan v. Gujrat*[2] the court held that such a breach restricting the fundamental right of a citizen will render a decision void *ab initio*, while in other cases 'not all violations of natural justice knock down the order with nullity'. But generally the court held a decision in violation of *audi alteram partem* to be void and a nullity.[3] In a recent decision, the Indian Supreme Court made a distinction between 'no notice/no hearing' and 'no fair hearing' in disciplinary proceedings and held that in case of no fair hearing an order will be struck down only when the employee is prejudiced.[4] It may be argued that *audi alteram partem* is a part of the procedural due process guaranteed by art.31 and in all cases violation of it renders the decision void under art.26 and in view of the procedural due process mandated by art.31, no other conclusion can be reached in our jurisdiction.

5.63A *Legitimate expectation:* The right to a hearing or to be consulted, or generally to put in one's case may arise out of the action of the authority. Thus a promise made in the shape of a statement of policy or a procedure regularly adopted by the authority may give rise to what is called legitimate expectation, that is, expectation of a kind which the court now enforces. Legitimate expectation gives the applicant sufficient *locus standi* for judicial review and in most cases the legitimate expectation is confined to the right of a fair hearing before a decision which results in negativing a promise or withdrawing an undertaking is taken.[5] The doctrine operates in the domain of public law and in an appropriate case constitutes a substantive as well as procedural rights.[6]

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[1] AIR 1955 SC 233

[2] AIR 1974 SC 1471

[3] *Orissa v. Binapani*, AIR 1967 SC 1269; *Shreeram Durga Prasad v. Settlement Commission*, (1989) 1 SCC 628

[4] *State Bank of Patiala v. Sharma*, AIR 1996 SC 1668

[5] *India v. Hindusthan Development Corp*, AIR 1994 SC 988, 1019

[6] *M.P. Oil Extraction v. M.P.*, AIR 1998 SC 145, 158; *National Buildings Construction Corp. v. Raghunathan*, AIR 1998 SC 2779; *Punjab Communications Ltd. V. India*, AIR 1999 SC 1801; *M.D. WASA v. Superior Builders & Engrs Ltd.*, 51 DLR (AD) 56 (see Para 5.134A for comments on the decision); see Wade & Forsythe – Administrative Law, 7th ed. 419

The doctrine can be invoked if the impugned decision affected a person either (a) by altering rights or obligations of that person which are enforceable by or against him in private law; or (b) by depriving of some benefit or advantage which either (i) he had in the past been permitted by the decision-maker to enjoy and which he can legitimately expect to continue to do until there has been communicated to him some rational grounds for withdrawing it on which he has been given an opportunity to comment; or (ii) he has received some assurance from the decision-maker that it will not be withdrawn without giving him first an opportunity of advancing reasons for contending that it should not be withdrawn.[1] In *A.G. of Hong Kong v. Ng Yuen*[2] the government announced a policy of repatriation of illegal immigrants and stated that such persons would be interviewed and each case would be considered on its merit. Ng Yuen was interviewed and asked a few questions, but was not allowed to explain the humanitarian grounds on which he might have been allowed to stay. The Privy Council quashed the order of repatriation on the ground that the government's promise was not redeemed in that Ng Yuen's case was not considered on its merit. On the other hand, in *Council of Civil Service Union v. Minister for the Civil Service*[3] the House of Lords found fault with an instruction of the government that civil servants engaged in certain work would no longer be permitted to be members of trade unions as the instruction was issued ignoring the legitimate expectation of consultation which arose out of the regular practice of consultation with the Union in case of change in the terms and conditions of service.[4] But where unlicensed cab-drivers had frequently been convicted for breaching regulations of Heathrow airport, it was held that they could not have had a legitimate expectation of being heard before bye-laws were made excluding them from the airport.[5]

5.63B Certain principles emerge from the decided cases which are stated below[6]:

(i) The statement or practice giving rise to the legitimate

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[1] *National Buildings Construction Corp. v. Raghunathan*, AIR 1998 SC 2779, Para 20; *Rabia Bashri Irene v. Bangladesh Biman*, 52 DLR 308

[2] [1983] 2 AC 629

[3] [1984] 3 All E.R. 935

[4] *R v. Devon County Council, ex p Baker*, [1995] 1 All E.R. 73

[5] *Cinnamond v. British Airport Authority*, [1980] 2 All E.R. 368

[6] see David Foulkes – Administrative Law, 8th ed., pp.290-291

expectation must be sufficiently clear and unambiguous, and expressed or carried out in such a way as to show that it was intended to be binding.[1] A statement will not be binding if it is tentative[2], or if there is uncertainty as to what was said[3]. Where it was said that a recommendation from X was `almost invariably' accepted there was no legitimate expectation that it would be accepted.[4]

(ii) The statement or practice must be shown to be applicable and relevant to the case in hand. Thus where an offer of an interview had been made in 1986, but action was taken in 1988 without an interview, there was no legitimate expectation of an interview in 1988 as the circumstances then were quite different.[5]

(iii) Legitimate expectations are enforced in order to achieve fairness. Thus where it was argued that a previous practice of giving an oral hearing gave rise to a legitimate expectation of a hearing, the court said that the question was whether the official in question had acted unfairly and in the circumstances the decision on the papers was held fair.[6] Even if a case of legitimate expectation is made out, the decision or action of the authority will not be interfered with unless it is shown to have resulted in failure of justice.[7]

(iv) If the statement said to be binding was given in response to information from the citizen, it will not be binding if that information is less than frank, and if it is not indicated that a binding statement is being sought.[8]

(v) He who seeks to enforce must be a person to whom (or a member of the class to which) the statement was made or the practice

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[1] The foundation for legitimate expectation must be laid in the pleadings and cannot be allowed to be raised at the stage of argument – *National Buildings Construction Corp v. Raghunathan*, AIR 1998 SC 2779

[2] *R v. Board of Inland Revenue ex p MFK Underwriting Agencies Ltd*, [1990] 1 All E.R. 91; *R v. Jockey Club, ex p RAM Racecourses*, [1993] 2 All E.R. 225

[3] *R v. Shropshire Health Authority ex p Duffus*, (1989) Times, 16 August; *North South Property Development Ltd. v. Ministry of Land*, 52 DLR 7 (affirmed by Appellate Division in C.P. no.552 of 1999)

[4] *R v. Home Secretary ex p Sakala*, (1994) Times, 26 January

[5] *R v. Home Secretary ex p Malhi*, [1990] 2 All E.R. 357

[6] *Lloyd v. McMahon*, [1987] 1 All E.R. 1118

[7] *India v. Hindusthan Development Corp*, AIR 1994 SC 988; *North South Property Development Ltd. v. Ministry of Land*, 52 DLR 7

[8] *R v. Board of Inland Revenue, ex p MFK Underwriting Agencies Ltd*, [1990] 1 All E.R. 91

applied.[1]

(vi) Even though a case is made out, a legitimate expectation shall not be enforced if there is overriding public interest which requires otherwise.[2]

5.63C In considering the doctrine of legitimate expectation it must be understood that there is no question of the authority not being able to change its policy.[3] In *Findlay v. Secy. of State for Home Dept*[4] a change of policy had the effect that certain prisoners would have to stay in prison longer than under the previous policy and the court held that the only expectation that Findlay had was that his case would be individually examined and he had no right not to have the policy changed to his detriment. After surveying the Indian and English decisions and referring to *R v. Home Secretary ex p. Hargreaves*[5] the Indian Supreme Court held, "The result is that change in policy can defeat a substantive legitimate expectation if it can be justified on *Wednesbury* reasonableness ... It is, therefore, clear that the choice of the policy is for the decision maker and not for the Court. The legitimate substantive expectation merely permits the Court to find out if the change in policy which is the cause for defeating the legitimate expectation is irrational or perverse or one which no reasonable person could have made."[6] Where a policy has been published it must be applied to cases falling within it[7] and where it has been the practice to publish a policy change, there may be a legitimate expectation that

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[1] *R v. Shropshire Health Authority, ex p Duffus, (1989) Times, 16 August*; *R v. Inland Revenue Commrs*, [1990] 1 All E.R. 173

[2] *India v. Hindusthan Development Corp*, AIR 1994 SC 988 (The protection of such legitimate expectation does not require the fulfillment of the expectation where an overriding public interest requires otherwise. In other words where a person's legitimate expectation is not fulfilled by taking a particular decision then the decision-maker should justify the denial of such expectation by showing some overriding public interest); *Food Corp of India v. Kamdhenu Cattle Feed Industries*, AIR 1993 SC 1601 (The court recognised the legitimate expectation of the highest bidder, but refused relief because of the overriding public interest in getting further higher price obtained through subsequent negotiation with all the bidders.); *North South Property Development Ltd. v. Ministry of Land*, 52 DLR 7

[3] *PTR Exports (Madras) (P) Ltd. v. India*, (1996) 5 SCC 268

[4] [1985] AC 318

[5] [1997] 1 WLR 906

[6] *Punjab Communications Ltd v. India*, AIR 1999 SC 1801, 1814

[7] *R v. Home Secretary ex p Asif Mahmood Khan*, [1984] 1 WLR 1337

changes to it will be published[1]; it may be unfair to make a change in the policy unless the authority announces in advance its intention to do so allowing an affected person to make representations before any change is made.[2]

5.63D In *Bangladesh Soya-Protein Project Ltd v. Secretary, Ministry of MDMR*[3], the government initiated 'School Feeding Programme' and entered into contract with the petitioner for supply of soya-protein biscuits to schools for a fixed period. On the expiry of the contract period, the government discontinued the programme. The High Court Division held that such discontinuance of the programme, violating its own policy, was in gross violation of the legitimate expectation not only of the petitioner but also of the millions of under-nourished children warranting interference of the court and directed the government to implement its policy decision. It is submitted that the decision is open to exception. The judgment does not show that there was any promise in the shape of statement of policy to continue the programme and there could not be any legitimate expectation of anybody of the continuity of the programme. Even if the programme would have been continued, the petitioner could not have any legitimate expectation of having a renewed or fresh contract for the supply of soya-protein biscuits. Furthermore, the government can always defeat a legitimate expectation by change of policy which can be justified on *Wednesbury* reasonableness.

5.63E *Requirement of giving reasons:* General principle of law is that in the absence of statutory requirement, an administrative order need not be a reasoned one[4] except where there is a provision for an administrative appeal[5]. However, the requirement of reasoned decision not only ensures application of mind of the authority, eschews arbitrariness and improves the quality of administrative adjudication, but also ensures fairness and transparency and enables the review court to properly examine the impugned decision.[6] Hence the courts are

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[1] *R v. Home Secretary ex p Ruddock*, [1987] 2 All E.R. 518

[2] *R v. Transport Secretary ex p Richmond on Thames LBC*, [1994] 1 All E.R. 577

[3] 6 BLC 681

[4] *Mahabir Jute Mills v. Saxena*, AIR 1975 SC 2057

[5] *Moti Miyan v. Commissioner*, AIR 1960 MP 157

[6] *S.N. Mukherjee v. India*, AIR 1990 SC 1984; *Breen v. Amalgamated Engineering Union*, [1971] 2 QB 175 (The giving of reasons is one of the fundamentals of good administration - per Lord Denning); see also *Modi Industries Ltd v. UP*, AIR 1994 SC 536

gradually leaning in favour of reasoned decision even when it is not statutorily required. Wade and Forsyth observed:

> Although the lack of a general duty to give reasons is recognised as an outstanding deficiency of administrative law, the judges have gone far towards finding a remedy by holding that reasons must be given where fairness so demands; and the decisions show that may now be the case more often than not. It has been held at first instance that English law has now arrived at the point where the duty to act fairly imparts at least a general duty to give reasons, subject to necessary exceptions, and this conclusion seems well justified.[1]

In *R v. Trade Secretary ex p. Lonrho plc*[2] Lord Keith observed, "if all other known facts and circumstances appear to point overwhelmingly in favour of a different decision, the decision maker who has given no reasons cannot complain if the court draws the inference that he has no rational reason for his decision." In the absence of statutory requirement, the court may imply the requirement of giving reasons where there is a right of appeal[3], or where a failure to give reasons will prejudice the affected person's chances of successfully applying for judicial review[4], or where in the circumstances an inference of misuse of power can be made from the absence of reasons[5], or where legitimate expectations have been created which demand that any departure from that expectation need be explained, or fairness requires reason to be given[6] or where the function is quasi-judicial or fundamental right is affected.[7] But the court will not insist on giving reasons where the function of the State is political or sovereign in character, or where the matter is academic[8] or involves intricacies of trade or commerce.

5.63F *Failure to give any, or adequate, reasons:* Where a statute requires reason to be given, failure to give reason will render the

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[1] Administrative Law, 7th ed., pp.544-45

[2] [1989] 2 All E.R. 609, 620

[3] *R v. Crown Court at Harrow, ex p Dave*, [1994] 1 All E.R. 315

[4] *R v. Home Secretary ex p. Doody*, [1993] 3 All E.R. 92, 111

[5] *Padfield v. Minister of Agriculture*, [1968] AC 997; *Bangladesh v. A.K. Al-Mamun*, 1997 BLD (AD) 77

[6] *R v. Civil Service Appeal Board, ex p Cunningham*, [1991] 4 All E.R. 310

[7] *S.N. Mukherjee v. India*, AIR 1990 SC 1984; *Jafor v. UOI*, (1994) Supp. (2) SCC 1; *Vasant v. Bar Council*, (1999) 1 SCC 45

[8] *R v. Universities Funding Council ex p. IDS*, [1994] 1 All E.R. 651

decision liable to be set aside[1] or the court may order them to be given[2]. A decision may be struck down if the reasons given are improper or do not adequately deal with the principal issues or are unintelligible or obscure. Where the adequacy of the reasons themselves is not attacked, a failure to give them may not invalidate the decision to which they relate. Where a decision is arrived at for a reason which is wrong, but the same decision must as a matter of law have been arrived at if the right reason had been relied on, the decision will not be quashed. Where of the number of reason given some are good and some bad, the decision will be bad if the reasons are impossible to disentangle. But if it is possible to disentangle them and one is bad, the decision will not be upset if the court is satisfied that the decision-maker would have reached the same decision on the valid reasons.[3]

5.64 *Nemo debet esse judex in propria causa*: Lord Coke in *Dr. Bonham*[4] laid down the principle that no man should be judge in his own cause. With a view to strengthening public confidence, it was developed into a jurisdictional principle that no one having any interest or bias in respect of any matter is competent to take part in the decision-making relating to that matter. It was said that it "is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done."[5] Thus whether a judge gave an actually biased judgment is not material, the judgment is vitiated if there is a real likelihood of the judge being biased. We come across three types of bias - pecuniary, personal and official and we shall deal with them.

5.65 Where the decision-maker has a pecuniary or proprietary interest in the subject-matter of adjudication, he is disqualified. In *Dimes v. Proprietors of the Grand Junction Canal*[6] a decree confirmed by Lord Cottenham L.C. on appeal was set aside as he was a shareholder of the

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[1] *Gautam v. UOI*, (1993) 1 SCC 78

[2] *Inveagh v. Minister of Housing and Local Government*, [1961] 3 All E.R. 98

[3] *R v. Broadcasting Complaints Commission*, ex p Owen, [1985] 2 All E.R. 522; see also Foulkes - Administrative Law, 8th ed. p.335

[4] 8 Co. Rep. 113b

[5] Per Lord Hewart CJ in *R. v. Sussex JJ ex p. McCarthy*, [1924] 1 KB 256, 259

[6] [1852] 3 HLC 759; *Shamdasani v. Central Bank of India*, AIR 1938 Bom 431 (court set aside the taxation by the Taxing Master of the bill of costs of the bank as he borrowed money from that bank and did not disclose his interest at the time of taxing the bill)

company in whose favour the decree was passed. It was said:

> No one can suppose that Lord Cottenham could be, in the remotest degree, influenced by the interest that he had in the concern; but, my Lords, it is of the last importance that the maxim that no man is to be a judge of his own cause, should be held sacred. ... And it will have a most salutary influence on [inferior] tribunals when it is known that this high court of last resort, in a case in which the Lord Chancellor of England had an interest, considered that this decree was on that account a decree not according to law, and was set aside. This will be a lesson to all inferior tribunals to take care not only that in their decrees they are not influenced by their personal interest, but to avoid the appearance of labouring under such an influence.

The disqualification attaches however small or insignificant the pecuniary interest may be. Where "a pecuniary interest exists, the law does not allow any further inquiry as to whether the mind was actually biased by the pecuniary interest. The fact is established from which the inference is drawn that he is interested in the decision, and cannot act as a judge."[1] The court also does not inquire into reasonable likelihood of bias. In the case of pecuniary or proprietary interest the law raises a conclusive presumption of bias.[2] The pecuniary interest must be a direct one. But in one case the interest of the father sufficed as a pecuniary interest of the son even though it might not have given rise to a reasonable likelihood of bias.[3] The disqualification will also attach in the same way if the decision-maker is himself involved in the dispute. Thus when the manager of a factory himself conducts an inquiry against a workman on the allegation of assaulting him[4] or when a person sits on the selection board to select persons for a post for which he is a candidate, even though he may not participate in its deliberations when his name is considered[5] the decision is invalid. Recently the House of Lords set aside its judgment as it was found that one of the Law Lords was closely associated in the promotion of human right with an organisation which joined as intervener in the extradition proceedings. The House of Lords held that the principle that a judge was

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[1] *Leeson v. General Council of Medical Education and Registration*, [1890] 43 Ch. 366, 384; *R. v. Cambrone Justices ex p. Pearce*, [1951] 1 QB 41

[2] *R. v. Sunderland JJ*, [1901] 2 KB 357, 371

[3] *Metropolitan Properties Ltd. v. Lanon*, [1969] 1 QB 577

[4] *Meenglass Tea Estate v. Workmen*, AIR 1963 SC 1719

[5] *Kraipak v. India*, AIR 1970 SC 150

automatically disqualified from hearing a matter in his own cause is not restricted to a case in which he has a pecuniary interest in the outcome, but also applies to a case where the decision of the judge would lead to the promotion of a cause in which the judge is involved together with one of the parties.[1]

5.66 Apart from pecuniary or proprietary interest, bias may arise because of decision-maker's attitude of hostility or favouritism towards a party for one reason or another. The person complaining need not show that bias has, in fact, affected the decision. But the English courts were divided in their opinion as to whether a reasonable suspicion of bias or a real likelihood of bias would invalidate a decision. The preponderant view was that the disqualification would be attracted on showing of a real likelihood of the judge being biased.[2] The other view was that invalidity would be attracted if there be only a reasonable suspicion of bias.[3] "In practice the test of 'reasonable suspicion' and 'real likelihood' of bias will generally lead to the same result. Seldom indeed will one find a situation in which reasonable persons adequately apprised of the facts will reasonably suspect bias, but a court reviewing the facts will hold that there was no real likelihood of bias."[4] The House of Lords has now ruled in favour of real likelihood test.[5]

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[1] *R v. BSMS Magistrate ex p Pinochet (No.2)*, [1999] 1 All E.R. 577

[2] *R. v. Cambrone Justices ex p. Pearce*, [1955] 1 QB 41 ("the right test is that prescribed by Blackburn J, namely, that to disqualify a person from acting in a judicial or quasi-judicial capacity upon the ground of interest (other than pecuniary or proprietary) in the subject-matter of the proceeding, a real likelihood of bias must be shown." *Frome United Breweries Co. v. Bath Justices*, [1926] AC 586; *Hannam v. Bradford Corporation*, [1970] 1 WLR 937; *Metropolitan Properties Ltd v. Lannon*, [1968] 3 All E.R. 304 (per Lord Denning); *R. v. Colchester Magistrate, ex p. Beck*, [1979] 2 All E.R. 1035; *U.K. Association of Professional engineers v. Advisory, Conciliation and Arbitration Services*, [1979] 2 All E.R. 478

[3] *Metropolitan Properties Ltd. v. Lannon*, [1968] 3 All E.R. 304 (per Edmund-Davis and Danckwerts LJJ); *R. v. Liverpool City J.J. ex p. Topping*, [1983] 1 All E.R. 570. But *Steeples v. Derbyshire C.C.*, [1984] 3 All E.R. 468 and *R. v. Sevenoaks D.C. ex p. Terry* [1985] 3 All E.R. 226 held real likelihood test applicable to administrative bodies and reasonable suspicion test applicable to judicial and quasi-judicial bodies.

[4] S.A. de Smith - Constitutional and Administrative Law, 4th ed., p.571; see also *R. v. St. Edmundsbury B.C. ex p. Investors in Industry Commercial Properties*, [1985] 3 All E.R. 234

[5] *R. v. Gough*, [1993] AC 646; see Wade & Fortsythe – Administrative Law, 7th ed. 482

5.67 In this sub-continent, however, the real likelihood test is applied.[1] Speaking about bias of a public functionary, the Indian Supreme Court observed -

> The real question is not whether he was biased. It is difficult to prove the state of mind of a person. Therefore, what one has to see is whether there is reasonable ground for believing that he was likely to have been biased. A mere suspicion of bias is not sufficient. There must be a reasonable likelihood of bias.[2]

5.68 Bias is a state of mind in which an adjudicator cannot decide impartially. It may arise in various ways and in a variety of circumstances and it is not possible to exhaust the possibilities. The real likelihood of bias will normally be inferred from close personal relationship[3], professional, business or vocational relationship[4], the relation of employer and employee[5], personal animosity[6] or close

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[1] *Khandker Mostaque Ahmed v. Bangladesh*, 34 DLR (AD) 222; *Akhlaq Hussain v. Pakistan*, PLD 1968 SC 201; *Shahjahan Ali v. D.I.G., Khulna*, 17 DLR 141; *President v. Mr. Justice Shaukat Ali*, PLD 1971 SC 585; *Pakistan v. Abdul Wali Khan*, PLD 1976 SC 57; *Mineral Development Ltd v. Bihar*, AIR 1960 SC 468; *A.P.S.R.T. Corporation v. Satyanarayana Transport (Private) Ltd.* AIR 1965 SC 1303; *U.P. v. Mohd Nooh*, AIR 1958 SC 86; *Manak Lal v. Dr. Prem Chand*, AIR 1957 SC 425; *Kraipak v. India*, AIR 1970 SC 150

[2] *Kraipak v. India*, AIR 1970 SC 150; see also the observation of Sattar J in *Shahjahan Ali v. DIG*, 17 DLR 141, 144; *Punjab v. Khanna*, AIR 2001 SC 343

[3] *D.K. Khanna v. India*, AIR 1973 H.P. 30 (the selection committee to select persons for civil posts included the son-in-law of a selected candidate as member of the committee)

[4] *Manak Lal v. Dr. Prem Chand*, AIR 1957 SC 425 (appellant, an advocate, was charged with misconduct in relation to a proceeding in which the Chairman of the Bar Council Tribunal pleaded for the other side and the court found infirmity in the constitution of the Tribunal); *Gibson v. Berryhill*, 411 US 564 (The Board of Optometry charged licensed optometrists with unprofessional conduct as they were employed by a corporation. By statute, only members of the Optometric Association could be members of the board, and the association barred from its membership optometrists employed by others. The court held that the board was disqualified by personal interest as the action of the board would go to the benefit of the board members since they competed with the optometrists employed by corporations.)

[5] *Kumaon Mondol v. Girija Shankar*, AIR 2001 SC 24 (Managing Director ordering dismissal of General Manager getting the inquiry done in hot haste without supplying documents and passing the order few hours after personal hearing – bias found)

[6] *Parthasarathi v. A.P.*, AIR 1973 SC 2701 (the inquiry officer in a disciplinary

personal friendship. Again, no man can be a judge and witness or prosecutor at the same time.[1] According to Seervai, "Membership of a public authority or a voluntary association does not make an adjudicator a party to the proceeding and so disqualify him as an adjudicator, but he would be disqualified if he had taken an active part in instituting the proceedings, or had voted for the institution of such proceedings, or had shown partisanship in a corporate or private capacity."[2]

5.69 Bias may arise because of the decision-maker's general interest in the subject-matter as a member of the administration in his official capacity. In many adjudicatory proceedings before the bureaucratic authorities, the administration itself is one of the parties. The adjudicator may have sincere convictions on the issues of law or policy and his pre-disposition in respect of such issues of law and policy may raise the question of bias. The Donoughmore Committee on Ministers' Powers (1932) observed -

> Bias from strong and sincere conviction as to the public policy may operate as a more serious disqualification than pecuniary interest. The mind of the judge ought to be free to decide on purely judicial grounds and should not directly or indirectly be influenced by, or exposed to the influences of, either motives of self-interest or opinion about policy or any other considerations not relevant to the issue.[3]

But the House of Lords refused to accept the plea of bias when the objector sought to impugn the Minister's action for bias because the project in question was initiated by the Minister himself and held that the court would not interfere unless the Minister had acted in bad faith

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proceeding having strong personal animosity against the civil servant proceeded against); *Mineral Development v. Bihar*, AIR 1960 SC 468(the Minister with whom the petitioner's proprietor had political rivalry and the Minister also filed criminal case against the petitioner's proprietor, cancelling the licence of the petitioner).

[1] *Mohsin Siddique v. West Pakistan*, 16 DLR (SC) 151; *Shahjahan ali v. DIG, Khulna*, 17 DLR 141; *U.P. v. Mohd Nooh*, AIR 1958 SC 86; *Andhra Scientific Co. v. Seshagiri Rao*, AIR 1967 SC 408; *Murari Mohan Das v. Bangladesh*, 29 DLR 53

[2] H.M.Seervai - Constitutional Law of India, 3rd ed., p.1253; but see *R. v. Altrincham Justices ex p. Pennington*, [1975] QB 549 ((where a prosecution for selling vegetables underweight to a local authority school was heard by a magistrate who was a member of the local authority's education committee, the conviction was quashed on the ground of bias); *R. v. BSMS Magistrate ex p Pinochet (No.2)*, [1999] 1 ALL E. R. 577 (see Para 5.65)

[3] p.78

or for an improper purpose.[1] In this regard Professor Robson observed, "In all civilised countries the judge must, in fact, possess certain conceptions of what is socially desirable, or at least acceptable, and his decisions, when occasions arise, must be guided by these conceptions. In this sense judges are and must be biased ... It is a simple fact that a man who had not a standard of moral values which approximated broadly to the accepted opinions of the day, who had no beliefs as to what is harmful to society and what beneficial ... would not be tolerated as a judge on the bench of any Western country."[2] Decisions of the American Supreme Court and Indian Supreme Court in this regard agree with the view of the House of Lords.[3] In order to remove the difficulty of policy bias, in the U.S.A. a system of having a separate cadre of hearing officers has been introduced. Apart from other problems, for sheer financial reasons we cannot even think of introducing such a system at the present moment though the problem of official or departmental bias is there in our system.

5.70 The Indian Supreme Court dealt with the problem in *Nageswara Rao v. A.P.S.R.T. Corp.*[4] where the scheme to nationalise motor transport in a state was initiated and approved after hearing of the objections by the Secretary of the Transport Department and the decision was challenged on the ground that the person who heard the objections was the person who had initiated the scheme. The court held that the hearing given by the Secretary clearly offended the principles of natural justice. Later the relevant law was amended requiring the Minister to decide upon the scheme. In *Nageswara Rao v. A.P.*[5] again the objection of bias was raised, but the court making a distinction between the Minister and the Secretary, held that the Minister was

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[1] *Franklin v. Minister of Town and County Planning*, [1948] AC 87; *R. v. Amber Valley D.C. ex p. Jackson*, [1984] 3 All E.R. 501 (as a matter of policy majority of a local planning authority were politically predisposed in favour of a development plan, but it did not disqualify them or the authority from taking decision); *R. v. Sevenoakes D.C. ex p. Terry*, [1985] 3 All E.R. 226; *R. v. St. Edmundsbury B.C. ex p. Investors Commercial Properties*, [1985] 3 All E.R. 234. Contra, *Steeples v. Derbyshire C.C.*, [1984] 3 All E.R. 468 (but this decision has not been followed subsequently)

[2] Justice and Administrative Law (1951), p.413

[3] *Federal Trade Commission v. Cement Institute*, 333 US 683; *N.L.R.B. v. Donnelly Garment Co.*, 330 US 219; *W.B. v. Shivananda*, AIR 1998 SC 2050

[4] AIR 1959 SC 308

[5] AIR 1959 SC 1376

competent to give the decision.[1] In a subsequent case the Supreme Court held that the scheme approved by the Minister cannot be challenged on the ground of official bias unless the Minister is shown to have been actually biased.[2] The distinction between the function of the Secretary and the Minister does not appear to be relevant, and in a subsequent case the court refused to hold the Secretary disqualified for hearing even though he was a member of the committee which prepared the scheme.[3] In *Asma Jilani v. Punjab*[4] the Supreme Court of Pakistan, dealing with the question whether Munir CJ after suggesting amendments in the draft of the Law (Continuance in Force) Order, 1958 issued by the Martial Law authority was competent to sit in judgment on the validity of the said Order, held that mere association with the drafting of a law did not disqualify a judge from interpreting it. Hamoodur Rahman CJ observed-

> ... having regard to the long experience of the learned Chief Justice as a member of the various Benches of superior courts in this country and his vast judicial experience I am certain that he was notwithstanding his association in the drafting of the Order, quite capable of keeping an open mind and expressing his independent judgment. Mere association with the drafting of a law does not necessarily disqualify a judge from interpreting that law in the light of the arguments advanced before him.

This was not a case of official bias because Munir CJ had no duty to be associated with drafting a law so that the aforesaid principles in respect of official bias were not applicable and the question was whether there was a reasonable likelihood of bias. A man suggesting modifications (which suggestion was accepted) in the draft will in the usual course be inclined to hold the law valid and it may be contended that the Supreme Court was not right in rejecting the plea of bias without taking into consideration the fact that the Chief Justice was, beyond the call of duty, associated in the drafting of a law prepared at the instance of a usurper who only a day or two before had abrogated the constitution which the Chief Justice was under oath to defend and protect.

5.70A The rule against bias may be applied when the disqualified

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[1] The distinction relied on by the court was that while the Secretary was a part of the Department, the Minister was not part of it and only primarily responsible for the disposal of the business of the Department.

[2] *Narayanappa v. Mysore*, AIR 1960 SC 1073

[3] *Mudaliar v. Tamil Nadu*, AIR 1973 SC 974

[4] PLD 1972 SC 139

adjudicator can be replaced by some one against whom there is no objection. But there may be cases where no such substitution is possible as in the case where the adjudication is entrusted by law to a designated person. In such a case the rule has to give way to necessity.[1] In *Election Commission of India v. Dr. Subramanium*, it was contended that the Chief Election Commissioner was biased in favour of Dr. Subramanium and should not take part in the adjudication of dispute relating to the disqualification of Jaylalita. The Indian Supreme Court held that the dispute should be adjudicated by the other two Election Commissioners and the Chief Election Commissioner can decide only if the two Election Commissioners disagree. The court observed –

> We should have a clear conception of the doctrine, It is well settled that the law permits certain things to be done as a matter of necessity which it would otherwise not countenance on the touchstone of judicial propriety. Stated differently, the doctrine of necessity makes it imperative for the authority to decide and considerations of judicial propriety must yield. It is often invoked in cases of bias where there is no other authority or Judge to decide the issue.[2]

5.70B Bias of the decision-maker is treated as one belonging to the category of latent want of jurisdiction[3] as it does not often appear on the face of the proceeding. In most cases it depends on personal knowledge of the parties and if the parties having knowledge of the facts constituting bias participate in the proceeding without raising objection, the court presumes that the party complaining has waived his right to object.[4] A person cannot be taken to have waived his right to challenge the authority of the adjudicator on the ground of bias by the mere submission to jurisdiction if he was not aware of the facts constituting bias[5]. There is no presumption of waiver if a party is not in a position to object to the jurisdiction on account of fear of antagonising his superiors[6], or "if the disqualified adjudicator failed to make a complete disclosure of his interest, or if the party affected was prevented by surprise from taking the objection at the appropriate time or if he was

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[1] Wade & Forsythe – Administrative Law, 7th ed., p.476

[2] AIR 1996 SC 1810, 1817

[3] See Para 5.35

[4] Wade - Administrative Law, 6th ed., p.266; *Manaklal v. Prem Chand*, AIR 1957 SC 425; *G. Sarana v. Lucknow University*, AIR 1976 SC 2428

[5] *Mahapatra v. Orissa*, AIR 1984 SC 1572

[6] *P. Sreeramulu v. A.P*, AIR 1970 AP 114

not represented by counsel and did not know of his right to object at the time."[1]

5.71 *Improper purpose*: Legislature grants power to the administrative authorities for exercise of it for the purpose sought to be achieved and the administrative authority must exercise the power honestly to further the purpose of the statute. The statute may expressly state what that purpose is, and if it does not, it will have to be inferred from an examination of the statutory scheme. If the authority's action is found to have been directed to achieve some other purpose or for some ulterior motive the authority is taken to have stepped out of jurisdiction and the action is without lawful authority.[2] The government passing an order of compulsory retirement to circumvent the judgment earlier passed in favour of a public servant, the order is without lawful authority.[3] The court can examine whether in a given case the authority has acted bona fide and for legitimate purpose. But when the authority exercises the power to achieve the purpose of the law and incidentally achieves something more, the action is held to be bona fide and reasonable.[4]

5.72 Un*reasonableness*: Russell CJ stated in *Kruse v. Johnson*[5] that if an action taken by an administrative authority is so unreasonable that no reasonable authority could do it, "the court might well say,

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[1] S.A. de Smith - Judicial Review of Administrative Action, 1980, p.275

[2] *Sydney Municipal Council v. Campbell*, [1925] AC 338 (Authority having power to acquire land to carry out improvements, acquired land for the purpose of benefiting from an anticipated increase in the value of the land)

[3] *Dr. Nurul Islam v. Bangladesh*, 33 DLR (AD) 201; *Sajeda Parvin v. Bangladesh*, 40 DLR (AD) 178 (A member of Parliament was detained to prevent him from doing prejudicial activities under the Special Powers Act. The Home Minister declared in Parliament that he was detained to prevent him from escaping from the clutches of law. M.H. Rahman J observed that the detention order was passed for collateral purpose for which it has no sanction in law); *Fawcett Properties Ltd v. Bucks CC*, [1961] AC 636 (local authority having power to compulsorily acquire land for coast protection cannot acquire land for a promenade); *Webb v. Minister of Housing and Local Government*, [1965] 2 All E.R. 193 (power to acquire land to effect civil extension and improvement cannot be exercised to reap the benefit of enhanced value); *Hanson v. Radcliffe U.D.C.*, [1922] 2 Ch. 490 (education authority cannot dismiss a teacher to effect economy).

[4] *Westminster Corporation v. London and N.W. Rly*, [1905] AC 426 (authority having power to construct underground conveniences, provided a subway in addition to the conveniences, the action is upheld).

[5] [1898] 2 QB 91, 99

'Parliament never intended to give authority to make such rules; they are unreasonable and ultra vires'". This was a case where the validity of a byelaw was challenged. But the principle of reasonableness is used in testing the validity of all administrative actions and an unreasonable action is taken to have never been authorised by the legislature and is treated as *ultra vires.*[1] According to Lord Greene an action of an authority is unreasonable when it is so unreasonable that no man acting reasonably could have taken it.[2] This has now come to be known as *Wednesbury* unreasonableness.[3] Where the authority is to grant planning permission 'subject to such conditions as they think fit' and granted permission subject to the condition of constructing an ancillary road over the entire frontage permitting right of passage over it, the court held the condition to be so unreasonable that it was *ultra vires.*[4] Again when the authority authorised to issue site licence 'subject to such conditions as it may think it necessary' issued licence to owners of a caravan site imposing conditions designed to regulate rent, premiums, security of tenure etc, the House of Lords held that the conditions were *ultra vires* as those were unreasonable because of oppressive and gratuitous interference with the rights of the occupiers subject to them.[5] According to Professor Wade, "The principle of reasonableness has become one of the most active and conspicuous among the doctrines which have vitalised administrative law in recent years ... Its contribution to administrative law on the substantive side is equal to that of the principles of natural justice on the procedural side."[6] At the same time he pointed out that the doctrine "has to be reconciled with the no less important doctrine that the court must not usurp the discretion of the public authority which Parliament appointed to take the decision." Lord Diplock expounded -

> The very concept of administrative discretion involves a right to choose between more than one possible course of action on which there is room for reasonable people to hold differing opinions as to which is to be

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[1] *Altaf Hussain v. Shabbir Hussain*, PLD 1961 Lah 449 (order of the settlement authority was quashed as the conclusion arrived at by the authority was so unreasonable that no reasonable person could have ever come to it); *Shafiq Ahmed v. BCIC*, 45 DLR 95; *Agragami Engineers v. Bangladesh Bank*, 45 DLR 134

[2] See Para 5.47

[3] *Associated Provincial Picture v. Wednesbury Corp*, [1948] 1 KB 223

[4] *Hall & company Ltd v. Shoreham -by-Sea U.D.C.*, [1964] 1 WLR 240.

[5] *Chertsey U.D.C. v. Mixnam's Properties Ltd.*, [1964] 2 All E.R. 627

[6] H.W.R. Wade - Administrative Law, 6th ed., p. 398

> preferred.[1]

The action will not be unreasonable when one out of several possible courses of action is adopted. In the same case Lord Denning observed that an exercise of discretion will be unreasonable if it is so wrong that no reasonable person could take that action.[2]

5.73 *Mala fide or bad faith*: It is often said that *mala fide* or bad faith vitiates everything and a *mala fide* act is a nullity.[3] What is *mala fide*? Relying on some observations of the Supreme Court in some decisions, Durgadas Basu J held, "It is commonplace to state that mala fide does not necessarily involve a malicious intention. It is enough if the aggrieved party establishes : (i) that the authority making the impugned order did not apply its mind at all to the matter in question; or (ii) that the impugned order was made for a purpose or upon a ground other than what is mentioned in the order".[4] Later the Indian Supreme Court observed,

> ... mala fide exercise of power does not necessarily imply any moral turpitude as a matter of law. It only means that the statutory power is exercised for purposes foreign to those for which it is in law intended.[5]

In the English jurisdiction also sometimes bad faith (*mala fide*) is used in this wide or rather loose sense[6] and this really creates confusion about the grounds of review. In the above sense, *mala fide* is equated with *ultra vires* exercise of administrative power and is not really an independent ground of review.[7] As an independent ground of attack,

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[1] *Secretary of State for Education v. Tameside MBC*, [1977] AC 1014

[2] Ibid, p.671; see also *Council of Civil Service Unions v. Minster for Civil Service*, [1984] 3 All E.R. 935; *Nottinghamshire CC v. Secretary of Environment*, [1986] 1 All E.R. 199

[3] *Abdur Rouf v. Abdul Hamid*, 17 DLR (SC) 515; *Lazarus Estates Ltd. v. Beasley*, [1956] 1 QB 702 (per Lord Denning, "No judgment of a court, no order of a Minister, can be allowed to stand if it has been obtained by fraud. Fraud unravels everything"); *Khandker Mostaque Ahmed v. Bangladesh*, 34 DLR (AD) 222; *Khandker Ehteshamuddin v. Bangladesh*, 33 DLR (AD) 154; *Jamil Haq v. Bangladesh*, 34 DLR (AD) 125

[4] *Ram Chandra v. Secretary to Government of W.B.*, AIR 1964 Cal 265, 272

[5] *Jaichand v. W.B.*, AIR 1967 SC 483, 485; but see *Regional Manager v. Pawan Kumar*, AIR 1976 SC 1766

[6] *Westminster Corporation v. London and N.W. Rly*,[1904] 1 Ch.759, 767; *Webb v. Minister of Housing and Local Government*, [1965] 1 WLR 755, 784

[7] See H.W.R. Wade - Administrative Law, 6th ed., p.442-443 (These add very little to

mala fide (malice in fact) should be distinguished from *mala fide* (malice in law). The distinction has been best brought out by Viscount Haldane L.C. -

> Between malice in fact and malice in law there is a broad distinction which is not peculiar to any particular system of jurisprudence. A person who inflicts an injury upon another person in contravention of the law is not allowed to say that he did so with an innocent mind; he is taken to know the law, and he must act within the law. He may, therefore, be guilty of malice in law, although so far as the state of his mind is concerned , he acts ignorantly, and in that sense innocently. Malice of fact is quite a different thing; it means an actual malicious intention on the part of the person who has done the wrongful act, and it may be, in proceedings based on wrongs independent of contract, a very material ingredient in the question whether a valid cause of action can be stated.[1]

"The concept of bad faith eludes precise definition, but in relation to the exercise of statutory power it may be said to comprise dishonesty (fraud) or malice. A power is exercised fraudulently if its repository intends to achieve an object other than that for which he believes the power to have been conferred. For example, a local authority committee would exercise in bad faith its power to exclude interested members of the public if it deliberately chose to hold the meeting in a small room. The intention may be to promote another public interest or private interests. A power is exercised maliciously if its repository is motivated by personal animosity towards those who are directly affected by its exercise."[2] To

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the true sense, and are hardly ever used to mean more than that some action is found to have a lawful or unlawful purpose. It is extremely rare for public authorities to be found guilty of intentional dishonesty: normally they are found to have erred, if at all, by ignorance or misunderstanding. Yet the courts constantly accuse them of bad faith merely because they have acted unreasonably or on improper grounds.)

[1] *Shearer v. Shield*, [1914] AC 808; *Dr. Nurul Islam v. Bangladesh*, 1981 BLD (AD) 140, Para 1, 63, 64, 122, 123, 125 & 127; *Regional Manager v. Pawan Kumar*, AIR 1976 SC 1766 (acting on a legally extraneous or obviously misconceived ground of action would be a case of malice in law); *Humayun Kabir v. State*, 28 DLR 259 ("In a case where `mala fide' is alleged it does not mean that improper motive is attributed to the detaining authority. A detention order is made mala fide when there is malice in law although there is no malice in fact; and the malice in law is to be inferred when an order is made contrary to the object and purposes of the Act or when the detaining authority permits himself to be influenced by conditions which he ought not to permit."); *Serajul Islam v. D.G. Food*, 43 DLR 237

[2] S.A. de Smith - Judicial Review of Administrative Action, 4th ed. p.335-336; see also

render an action *mala fide*, "there must be existing definite evidence of bias and action which cannot be attributed to be otherwise bona fide; actions not otherwise bona fide, however, by themselves would not amount to be mala fide unless the same is in accompaniment with some other factors which would depict a bad motive or intent on the part of the doer of the act".[1] In *Dr. Nurul Islam v. Bangladesh*[2] before the emergence of Bangladesh the East Pakistan Government wanted to make the post of Director of the Institute of Post Graduate Medicine a non-practising post and offered the post to the appellant, but the appellant declined the offer. In 1972 the appellant was appointed as Director and Professor of the Institute. The right to continue as Professor of Medicine carried with it the right to private practice. In 1978 the government issued a notification relieving the appellant of his duties and designation of Professor of Medicine and the said notification also made the post of Director a non-practising post. The appellant challenged the notification and the notification was declared to be without lawful authority by the High Court Division.[3] The government thereafter in 1980 compulsorily retired the appellant under the Public Servants Retirement Act, 1974. The appellant challenged the order of retirement. Though from the facts malice in fact can be suspected, because of the difficulty of proving it, the appellant urged malice in law stating that the order was passed to circumvent the earlier decision of the High Court Division in his favour. The Appellate Division found the allegation to be correct and held the order of compulsory retirement vitiated by malice in law. On the other hand, in *Md. Nurul Huda Mia v. Dhaka WASA*[4] the petitioner alleged that he as Commercial Manager of WASA took steps for disciplinary action against an employee of WASA who influenced his relation, the Minister-in-charge of WASA, who got proceedings initiated against the petitioner and the petitioner was ultimately compulsorily retired. The court on the evidence produced found lack of *bona fide* in the entire proceeding and quashed the order of compulsory retirement as being vitiated by *mala fide*. A civil surgeon was granted leave preparatory to retirement, but it was subsequently revoked and he was placed under suspension and a disciplinary proceeding was started against him on the allegation that he had

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Express Newspapers Ltd. v. India, AIR 1986 SC 872, Para 118, 125 and 135.

[1] *Punjab v. Khanna*, AIR 2001 SC 343

[2] 33 DLR (AD) 201

[3] *Dr. Nurul Islam v. Bangladesh*, 1981 BLD 12

[4] 44 DLR 527

accepted bribe from a patient prior to going on leave. The civil surgeon alleged that the proceeding had been started against him at the instance of the Chief Minister to wreak personal vengeance on him as he refused to yield to the illegal demands of the Chief Minister and his family members. From the evidence produced and the absence of any affidavit from the Chief Minister denying the allegation, the court found the allegation made by the civil surgeon to be proved and the action of the government was quashed.[1] Where the government forfeited the lease of land held by a newspaper which was very critical about imposition of emergency in 1975 to prevent the publication of the newspaper, the court held the action *mala fide*.[2] Keeping alive a suspension order for eleven years and departmental proceeding for twenty years followed by an order of premature retirement was found *mala fide*.[3]

5.74 *Abuse of discretion:* "Parliament constantly confers upon public authorities powers which on their face might seem to be absolute and arbitrary. But arbitrary power and unfettered discretion are what the courts refuse to countenance."[4] Douglas J of the American Supreme Court observed in *U.S. v. Wunderlich*[5] , "Law has reached its finest moment when it has freed man from the unlimited discretion of some ruler ... where discretion is absolute, man has always suffered." When Parliament granted discretionary power without any limitation, the House of Lords refused to accept the conferment of the power as unfettered. Refuting the claim of unfettered discretion of the Minister, Lord Upjohn observed -

> My Lords, I believe that the introduction of the adjective `unfettered' and its reliance thereon as an answer to the appellants' claim in one of the fundamental matters confounding the Minister's attitude, bona fide though it be ... But the use of that adjective, even in an Act of Parliament, can do nothing to unfetter the control which the Judiciary have over the executive, namely, that in exercising their powers the latter must act lawfully, and that is a matter to be determined by looking at the Act and its scope and object in conferring a discretion on the

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[1] *Pratap Singh v. Punjab*, AIR 1964 SC 72; see also *Rowjee v. A.P.*, AIR 1964 SC 962; *Punjab v. Gurdial Singh*, AIR 1980 SC 319

[2] *Express Newspapers Ltd. v. India*, AIR 1986 SC 872

[3] *O.P. Gupta v. India*, AIR 1987 SC 2257

[4] H.W.R. Wade - Administrative Law, 6th ed. p.388

[5] 342 US 98

Minister rather than by the use of adjectives.[1]

Under our constitutional dispensation unfettered discretion granted by a statute is violative of art.27 of the Constitution[2] and it may also in certain circumstances be found to be violative of art.31 as being unreasonable.[3]

5.75 An exercise of discretion cannot be sustained if it is found to be arbitrary or capricious[4] or without application of mind.[5] Inconsistency of policy may amount to an abuse of discretion, particularly when undertakings or statements of intent are disregarded unfairly or contrary to a citizen's legitimate expectation.[6] Unfairness in the exercise of power may amount to an abuse of discretion.[7] A public authority must use the discretion in good faith and reasonably.[8] The discretion is to be exercised to promote the purpose of the statute. If the statutory purpose has not been spelt out, the court may read implied limitation into the apparent unfettered grant of power.[9] Exercise of discretion dishonestly will be invalid on the ground of bad faith, but a *bona fide* exercise of it will also be invalid if it is for a purpose not contemplated by the statute.[10] After the Appellate Division declared the original provision of

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[1] *Padfield v. Minister of Agriculture*, [1968] 1 All E.R. 694,718

[2] *Dr. Nurul Islam v. Bangladesh*, 33 DLR (AD) 201 (Government's claim to absolute discretion in compulsorily retiring a public servant was emphatically rejected);

[3] See para 5.80A

[4] *Presiding Officer v. Sadaruddin*, 19 DLR (SC) 516; *Ramana Shetty v. Airport authority*, AIR 1979 SC 1628; *Maneka Gandhi v. India*, AIR 1978 SC 597

[5] *Lutfu Mia v. Bangladesh*, 1981 BLD (AD) 105

[6] Wade & Forsythe - Administratively Law, 7th Ed. p.418 (referring to the decisions of *R. v. Inland Revenue Commr ex p. Preston*, [1985] AC 835, *A.G. of Hong Kong v. Ng Yuen Shiu*, [1983] 2 AC 629 and *R. v. Home Secretary ex p. Ruddock*, [1987] 2 All E.R. 518; see Para 5.63A-63C.

[7] *R. v. I.R.C. ex p. Preston*, [1985] AC 835, 882

[8] *Presiding Officer v. Sadaruddin*, 19 DLR (SC) 516; *C.I.T. v. Manindra & Manindra*, AIR 1984 SC 1182 (Indisputably, it is settled position that if the action or decision is perverse or is such that no reasonable body of persons, properly informed could come to ... the Court would be justified in interfering with the same.); *Barium Chemicals v. C.L. Board*, AIR 1967 SC 295; see also Para 5.47 and 5.72

[9] *R. v. Barnet & Camden Rent Tribunal ex p. Frey Investments*, [1972] 2 QB 372

[10] *Congreve v. Home Office*, [1976] QB 629 (When the Home Office threatened certain television licence holders with revocation of their licence unless they each pay extra five pounds, the court held it to be improper use of the Home Secretary's discretionary power of revocation of the licence inasmuch as the power has not been given to be

s.9 of the Public Servants Retirement Act, 1974 relating to compulsory retirement void for want of any guideline, the provision was amended whereby the discretion conferred on the government is made exercisable in the public interest and the amending law declared that all orders of compulsory retirement made before the amendment should be deemed to have been made in the public interest. Notwithstanding such a declaration, the Appellate Division held that in case of challenge, it would examine whether the order of compulsory retirement had in fact been made in the public interest.[1] If discretion is used for both authorised and unauthorised purposes, the question will be what was the dominant purpose[2] and if the authority used the power for the purpose for which it has been granted, it is immaterial if in the process a subsidiary object has been achieved.[3]

5.76 It is essential that a discretion conferred by a statute should be exercised by the authority upon whom it is conferred and by nobody else.[4] When the licensing authority required films to be certified by the British Board of Films, an unofficial body established by the film industry, it was held to be a surrender of the discretion by the licensing authority.[5] Discretion vested in a particular body or authority cannot be

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exercised as a means of extracting money which Parliament has given no mandate to demand.)

[1] *Mofizur Rahman v. Bangladesh*, 1982 BLD (AD) 120; *Venkataraman v. India*, AIR 1979 SC 49 (court struck down an order of compulsory retirement when government record produced before the court showed nothing to justify retirement in public interest)

[2] *Westminster Corporation v. L & N W. Rly co.*, [1905] AC 426 (The Corporation was authorised to construct public conveniences, but not pedestrian subways. Underground conveniences were designed in such a way that the subway leading to them provided a means of crossing busy street. When challenged the court observed, "It is not enough to show that the corporation contemplated that the public might use the subway as a means of crossing the street. In order to make out a case of bad faith, it must be shown that the corporation constructed the subway as a means of crossing the street under colour and pretense of providing public conveniences not really wanted.")

[3] *R. v. Brighton Corporation ex p. Shoosmith*, [1907] 96 LT 762 (The authority empowered to alter or repair streets, re-surfaced a street, which needed repair, with the hope that it would attract an automobile club to hold racing trials upon it)

[4] *Barnard v. National Dock Labour Board*, [1953] 2 QB 18 (Disciplinary powers of the local Dock Board delegated to the port manager); *Simms Motor Units Ltd. v. Minister of Labour*, [1946] 2 All E.R. 201 (Discretion vested on a subordinate officer cannot be taken away by order of a superior officer)

[5] *Ellis v. Dubowski*, [1921] 2 KB 621; *R. v. Police Complaint Board ex p. Madden*, [1983] 2 All E.R. 353; *Lavender & Sons v. Minister of Housing*, [1970] 2 All E.R. 871

sub-delegated to some other authority unless the statute permits such sub-delegation.[1] In certain cases, of course, such a power of sub-delegation is implied when the nature of the act and the authority entrusted are such that it will be required to be done through a person other than the person on whom the discretion is vested.[2] Where a statute confers powers on a Minister, for exigencies of departmental administration, it may be exercised by officials for whom the Minister is responsible to Parliament[3], but the Minister cannot adopt a policy whereby the decision is effectively made by another Minister.[4] Sub-delegation without statutory authorisation may, however, be immune from attack if the specified authority while delegating the exercise of the discretion retains the ultimate control, say, by making the effectiveness of the exercise conditional upon its approval.[5]

5.77 Exercise of discretion will be invalid even without sub-delegation if the authority exercises it at the dictation of some other person unless that person is empowered by law to give instructions[6], or permits its decision to be influenced by the dictation of others[7] as this would amount to abdication or surrender of its discretion and the discretion exercised would not be that of the authority but of somebody

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[1] *Barium Chemicals v. C. L. Board*, AIR 1967 SC 295

[2] *Carltona Ltd. v. Commissioners of Works*, [1943] 2 All E.R. 560; *R v. Home Secretary, ex p Oladehinde*, [1991] 1 AC 254; *R v. Home Secretary, ex p Doody*, [1994] 1 AC 531

[3] *Local Government Board v. Arlidge*, [1915] AC 120

[4] *Lavender & Sons Ltd. v. Minister of Housing*, [1970] 3 All E.R. 871

[5] *Mills v. London C. C.*, [1925] 1 KB 213

[6] *Authorised Officer v. A.W. Mullick*, 20 DLR (SC) 229 (Planning permission refused at the instance of the Government); *Purtabpur Co. v. Cane Commissioner*, AIR 1970 SC 1896 (Cane Commissioner exercised discretion by merely carrying out the order of the Chief Minister. The Court observed, "The executive officers entrusted with statutory discretion may in some cases be obliged to take into account considerations of public policy and in some context the policy of a Minister or the Government as a whole where it is a relevant factor in weighing the policy, but this will not absolve them from their duty to exercise their personal judgment in individual cases unless explicit statutory provision has been made for them to be given binding instructions by a superior."); *Chandrika Jha v. Bihar*, AIR 1984 SC 322 (Registrar of Cooperatives exercising discretion at the behest of the Minister); *Nagaraj Shivarao v. Syndicate Bank*, AIR 1991 SC 1507 (Discretion of the disciplinary authority of nationalised bank regarding punishment being fettered by the direction of the Ministry of Finance)

[7] *U.P. v. Maharaja Dharmendra*, AIR 1989 SC 997, 1009

else.[1] It may also be illegal if the authority abdicates its discretion by adopting an over rigid policy, because it is given to be exercised in the facts of each case.[2] However, it is permissible for an authority to adopt a general line of policy and adhere to it provided it leaves open consideration of any special case on its merits.[3] Equally an authority cannot fetter its discretion by entering into a contract.[4] But this rule cannot be applied with any rigidity as more often than not public authorities are required to enter into contracts in the ordinary course of business in fulfillment of its policies.[5]

5.78 The doctrine of estoppel cannot be applied to prevent exercise of discretion.[6] But where once discretion has been exercised, the doctrine can be applied to prevent detriment suffered by a party relying on the representation of the authority. Similarly a statutory authority cannot obtain power which does not belong to it merely because the parties agree to it.

5.79 Exercise of discretion will be invalid if the authority in exercise of it has either taken into consideration matters which are not relevant or has left out of consideration matters which are relevant.[7] Where the authority cancelled the purchase of a newspaper because it did not approve the publishers' action in an industrial dispute between the publishers and their employees[8] or where a council decided to award a council house to a councillor influenced by the view of the chairman of

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[1] *Fazlul Karim Selim v. Bangladesh*, 33 DLR 406

[2] *Bromley LBC v. Greater London Council*, [1983] 1 AC 768; *Sagnata Investments v. Norwitch Corp.*, [1971] 1 QB 614

[3] *British Oxygen Co v. Board of Trade*, [1971] AC 610; *Cummings v. Birkenhead Corp.*, [1972] Ch 12; *R v. Windsor Licensing Justices, ex p. Hodes*, [1983] 1 WLR 685

[4] *Ayr Harbour Trustees v. Oswald*, [1883] 8 App. Cas. 623

[5] *Birkdale District Electric Supply Co. v. Southport Corp.*, [1926] AC 355

[6] *Maritime Electric Co. v. General Dairies*, A 1937 PC 114; *Southend-on-Sea Corp. v. Hodgson*, [1961] 2 All E.R. 46

[7] *Padfield v. Minister of Agriculture*, [1968] AC 997; *R. v. Vestry of St. Pancras*, 24 QBD 375; *Saddler v. Sheffield Corp.*, [1924] 1 Ch 483; *Breen v. Amalgamated Engineers*, [1971] 2 QB 175, 190; *Color Photo Services v. NBR*, 3 BLC 78; *Shafiqul Islam v. Administrator of Waqfs*, 2 BLC 57; *Rahima Food Corp v. Deputy Collector of customs*, 49 DLR 510; *Deputy Director v. Deena Bandhu*, AIR 1965 SC 484; *Ram Avatar Sharma v. Haryana*, AIR 1985 SC 915; *Veerarajam v. T.N.*, AIR 1987 SC 695; *U.P. v. Raja Ram Jaiswal*, AIR 1985 SC 1108

[8] *R v. Easling council, ex p Times Newspaper Ltd.*, (1986) 85 LGR 316

the housing committee that it would help the councillor to be re-elected[1], the exercise of the discretion was found illegal. When an employee was compulsorily retired taking into consideration a very old adverse confidential report, but not taking into account recent favourable confidential report, the exercise of the discretion was held vitiated.[2] Where the authorised officer of Dhaka Improvement Trust refused to approve the plan of construction of a cinema house following a government directive without considering whether the plan was in conformity with the rules, the refusal was declared to be without lawful authority.[3] In *U.P. v. Raja Ram Jaiswal*[4] the Cinematograph Act provided that the authority would refuse licence if a cinema building is situated within a stipulated distance or if the authority considers the location of the cinema building to be such that it would not be in the public interest to grant the licence. The authority refused to grant a licence as the Hindi Sammelan Samity which had its head quarter nearby objected that the noise created would disturb their activities. The Indian Supreme Court held that the rejection was vitiated by consideration of extraneous and irrelevant matters pointing out that the cinema building was air-conditioned and sound-proof and any one living in a developed urban area must put up with some noise; the licence could be refused only in the public interest, but the dislike of a body howsoever prestigious it may be, is not an adequate substitute for public interest. Discretion must be exercised taking into account matters mentioned in the statute, or if not mentioned, the matters relevant to the purpose for which the discretion has been conferred.[5] "However, to invalidate a decision it is not enough that considerations have been ignored which *could* have been taken into account: it is only when the statute 'expresly or impliedly identifies considerations *required to be taken into account* by the authority as a matter of legal obligation' that a decision will be invalid because relevant considerations were

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[1] *R v. Port Talbot Council, ex p Jones*, [1988] 2 All E.R. 207

[2] *Baldev Raj v. India*, AIR 1981 SC 70; *Brij Mohan v. Punjab*, AIR 1987 SC 948

[3] *Authorised Officer v. A.W. Mallick*, 20 DLR (SC) 229; *R. v. Birmingham License Planing Committee, ex p. Kennedy*, [1972] 2 QB 140 (The planning committee was held to have taken extraneous considerations into account when it required a hotel company to make payments to brewery companies as a condition for a new hotel); *Shafiul Azam v. Director of Labour*, 44 DLR 582; *C.I.T. v. Manindra & Manindra*, AIR 1984 SC 1182.

[4] AIR 1985 SC 1108

[5] *R v. Somerset County Council, ex p. Fewings*, [1995] 3 All E.R. 20

ignored."[1] Once an authority takes into consideration relevant matters, it is for the auhority to decide what weight is to be given to such matters.[2]

5.80 When an authority, at the dictation of the government, issued notice of revocation of a building plan earlier approved, the Indian Supreme Court quashed the notice in *U.P. v. Maharaja Dharmendra*[3] and quoted with approval the following statement of S.A. de Smith which aptly summarised the principles formulated by the courts in respect of exercise of discretionary power -

> The authority in which a discretion is vested can be compelled to exercise that discretion, but not to exercise it in any particular manner. In general, a discretion must be exercised only by the authority to which it is committed. The authority must genuinely address itself to the matter before it: it must not act under the dictation of another body or disable itself from exercising a discretion in each individual case. In the purported exercise of its discretion it must not do what it has been forbidden to do, nor must it do what it has not been authorised to do. It must act in good faith, must have regard to all relevant considerations and must not be swayed by irrelevant considerations, must not seek to promote purposes alien to the letter or to the spirit of the legislation that gives it power to act, and must not act arbitrarily or capriciously. Nor where a judgment must be made that certain facts exist can a discretion be validly exercised on the basis of an erroneous assumption about those facts. These several principles can conveniently be grouped in two main categories: failure to exercise a discretion, and excess or abuse of discretionary power. The two classes are not , however, mutually exclusive.[4]

In the absence of any vitiating element, an exercise of discretion is not

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[1] Bradley & Ewing - Constitutional and Administrative Law, 12th ed., p 775 citing *CREEDNZ Inc v. Governor General*, [1981] NZLR 172, 183 and *Re Findlay*, [1985] AC 318, 333

[2] *Tesco Stores v. Environment Secretary*, [1995] 2 All E.R. 636, 642 (It is for the courts, if the matter is brought before them, to decide what is relevant consideration.... But it is entirely for the decision-maker to attribute to the relevant considerations such weight as he thinks fit, and the courts will not interfere unless he has acted unreasonably in the *Wednesbury* sense); *R v. Cambridge Health Authority ex p. B*, [1995] 2 All E.R. 129

[3] AIR 1989 SC 997, 1009

[4] Judicial Review of Administrative Action, 4th ed., pp.285-286.

reviewable by the court on merits.[1]

5.80A *Proportionality:* A question often arises whether an exercise of discretionary power may be interfered with for its harshness on application of the doctrine of proportionality. The doctrine confines the limits of exercise of power to means which are proportionate to the objective to be pursued. The doctrine has taken its root in the jurisprudence of the U.S.A. and some European countries. Though this doctrine deals with unreasonableness, it is different from unreasonableness in the *Wednesbury* sense[2]. The doctrine of proportionality requires a stricter scrutiny of the reasonableness of an administrative action in which the court plays a primary role of finding out whether the action taken is disproportionate in relation to the purpose for which the power is conferred, while in applying the principle of unreasonableness in the *Wednesbury* sense the court defers to the exercise of discretion by the administrative authority and interferes only when an action is so out of proportion to the mischief sought to be curbed that no reasonable man can reasonably take it. Even though the English courts have interfered with harsh decisions treating it to be disproportionate and unreasonable[3], and Lord Diplock in *Council of Civil Service Union v. Minister for the Civil Service*[4] had mooted the possibility of adoption of the doctrine of proportionality in common law, the House of Lords refused to treat proportionality as a distinct means for assessing the merits of of an executive decision.[5] In England Human Rights Act, 1998 has been passed and the decisions of the English courts suggest that they will apply the doctrine of proportionality when the administrative action involves human rights.[6] In *Ranjit Thakur v. India*[7] the Indian Supreme Court observed, "The doctrine of proportionality, as part of the concept of judicial review,

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[1] *Raghupathy v. A.P.*, AIR 1988 SC 1681

[2] See Para 5.72

[3] *R v. Barnsley MBC ex p. Hook*, [1976] 1 WLR 1052 (a market trader had his licence revoked for urinating in public, Lord Denning quashed the decision partly on the basis that the penalty was disproportionate to the offence); *R v. Transport Secretary ex p. Pegasus Holdings (London) Ltd.*, [1988] 1 WLR 990, 1001

[4] [1984] 3 All E.R. 935

[5] *R v. Secretary of State for the Home Department ex p Brind*, [1991] 1 AC 696 (even though Lord Ackner pithily asked whether the Secretary of State had used a sledgehammer to crack a nut)

[6] *R. v. Ministry of Defence ex p Smith*, [1996] QB 517

[7] AIR 1987 SC 2386, 2392

would ensure that even on an aspect which is, otherwise, within the exclusive province of the Court-Martial, if the decision of the Court even as to sentence is an outrageous defiance of logic, then the sentence would not be immune from correction. Irrationality and perversity are recognised grounds of judicial review."[1] Though the Indian Supreme Court spoke of the doctrine of proportionality, the use of the expression 'outrageous defiance of logic' suggests that the court was applying the principle of unreasonableness in the *Wednesbury* sense. Subsequently, in *India v. Ganayutham*[2] the Indian Supreme Court observed that to judge the validity of an administrative order or statutory discretion where no fundamental freedom is involved, normally the *Wednesbury test* is to be applied to find out if the decision was illegal or suffered from procedural improprieties or was one which no sensible decision-maker could, on the materials before him, reasonably have arrived at. The court would not, however, go into the correctness of the choice made by the administrator amongst various alternatives open to him, nor could the court substitute its decision to that of the administrator.[3] Recently the Indian Supreme Court clarified the position further by stating that it will apply the doctrine of proportionality when an administrative action is challenged as discriminatory and in other cases it shall go for the relaxed scrutiny of reasonableness in the *Wednesbury* sense.[4] We have seen that the concept of reasonableness under art.31 is really reasonableness in the *Wednesbury* sense and only when deprivation of life or personal liberty is involved in an administrative action, a stricter scrutiny of reasonableness is called for under art.32.[5]

5.81 ***Writ of Prohibition***: Clause (2)(a)(i) of art.102 confers a jurisdiction roughly corresponding to the jurisdiction of issuing writs of prohibition. The jurisdiction is "primarily supervisory, having for its objects the confinement of courts of peculiar, limited or inferior jurisdiction within their bounds; to prevent them from encroaching upon the jurisdiction of other tribunals; to refrain them from exercising jurisdiction where they do not properly possess jurisdiction at all, or else to prevent them from exceeding their limits in matters in which they

[1] See also the decisions of *Mineral Development Ltd. v. Bihar*, AIR 1960 SC 468; *Bhagat Ram v. H.P.*, AIR 1983 SC 454, 460; *India v. Giriraj Sharma*, AIR 1994 SC 215, 216

[2] AIR 1997 SC 3387

[3] See *A.P. v. McDowell & Co.*, AIR 1996 SC 1627

[4] *Om Prakash v. India*, AIR 2000 SC 3689

[5] See Para 2.105 and 2.115

have their cognizance."[1] The writ in the nature of prohibition lies where a tribunal proceeds to act (a) without or in excess of jurisdiction[2], (b) in contravention of some statute or the principles of common law[3], (c) in violation of the principles of natural justice[4], (d) under a law which itself is *ultra vires* or unconstitutional[5], or (e) in contravention of fundamental rights[6]. Writ of prohibition lies against judicial and *quasi*-judicial bodies. But because of the formulation of the jurisdiction in art.102(2) a writ in the nature of prohibition under our constitutional dispensation lies against any person (other than those mentioned in clause (5)) "performing any function in connection with the affairs of the Republic or of a local authority", whether or not he performs a judicial or *quasi*-judicial function. When a public officer of the kind mentioned in art.102(2)(a)(i) is doing an act without or in excess of jurisdiction given by law, a writ may issue without any inquiry as to whether he is acting judicially or *quasi*-judicially.[7] If want or excess of jurisdiction is found no valid objection can be taken that the officer is acting in executive or administrative capacity.[8] No such writ will be available where the officer has jurisdiction, but exercises it irregularly or erroneously as distinguished from illegally.[9] Under our Constitution if the error is one of law it goes to jurisdiction and the writ will issue. The jurisdiction to issue a writ in the nature of prohibition is different from the jurisdiction to issue an injunction. Injunction is issued against any party in a proceeding, but a writ in the nature of prohibition is addressed to the tribunal or public officer whose jurisdiction is challenged.[10]

5.82 This writ lies both for excess of jurisdiction and absence of

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[1] Ferris - The Law of Extra-ordinary Legal Remedies, published by Law Publishing Co., Karachi, Para 305)

[2] *East India Commercial Co. v. Collector of Customs*, AIR 1962 SC 1893; *Sewpujanrai v. Collector of Customs*, AIR 1958 SC 845

[3] *Muhammad Tofail v. Abdul Ghafoor*, PLD 1958 SC 201

[4] *Commissioner, H.R.E. v. Swamiar*, AIR 1954 SC 282; *Carl Still GmbH v. Bihar*, AIR 1961 SC 1615.

[5] *Ibid; Bidi Supply Co. v. India*, AIR 1956 SC 479; *A.G. of Australia v. The Queen*, PLD 1957 PC 115

[6] *Bidi Supply Co. v. India*, AIR 1956 SC 479

[7] *Muhammad Khan v. Additional Commissioner*, PLD 1964 Lah 401

[8] *Inayetullah v. M.A.Khan*, PLD 1964 SC 126

[9] *Narayan v. I.T.O.*, AIR 1959 SC 213

[10] *Hong Kong & Shanghai Banking v. Bhaidas*, AIR 1951 Bom 158

jurisdiction.[1] In *R. v. County of London Quarter Sessions*[2] one Arthur was bound over by the magistrate and was directed to execute personal recognisance bond for good behaviour. Arthur gave notice of appeal to the Quarter Sessions against the order. An application was moved to prohibit the Quarter Sessions from hearing the appeal and as the law did not provide for the appeal, a writ of prohibition was issued.[3] Where the petitioner was being prosecuted under s.7 of the Special Powers Act for the offence of absconding and failing to surrender pursuant to a detention order passed against him, the High Court Division issued a writ of prohibition as the detention order having been found to be without lawful authority, the Special Tribunal had no jurisdiction to proceed with the trial.[4] A writ in the nature of prohibition issues on the same grounds on which a writ in the nature of certiorari is issued; the only difference between the two is in the stage of the proceeding. A writ of certiorari will be issued when the proceeding is closed, while an order of prohibition can be issued only so long as the proceeding remains pending. It cannot be issued after the authority has ceased to exist or becomes *functus officio*.[5] But if a tribunal after becoming *functus officio* assumes jurisdiction to do something further the writ will lie.[6] Where a proceeding is partly within and partly without jurisdiction, the prohibition will lie against doing what is in excess of jurisdiction. Thus when a Collector of Customs imposed an invalid condition for the release of gold on payment of fine in lieu of confiscation, a writ was issued prohibiting the customs authorities from enforcing the invalid condition.[7] An application for an order of prohibition is never too late so long as there is something left for it to operate upon.[8] As regards the use of the remedy Lord Goddard observed –

> It would not be at all desirable to lay down a definite rule when a person should go to the tribunal or when he should come here for prohibition where the objection is that the tribunal has no jurisdiction ... For myself I should say that where there is a clear question of law not depending

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[1] *Govinda Menon v. India*, AIR 1967 SC 1274; *Assistant Collector v. National Tobacco*, AIR 1972 SC 2563

[2] [1948] 1 All E.R. 72

[3] see also *R v. West Kent*, [1951] 2 All E.R. 726

[4] *Anisul Islam Mahmud v. Bangladesh*, 44 DLR 1

[5] *Hari Vishnu Kamath v. Ahmed Ishaque*, AIR 1955 SC 233

[6] *R v. Campbell*, [1953] 1 All E.R. 684

[7] *Sewpujanrai v. Collector of Customs*, AIR 1958 SC 845

[8] *Estate Trust v. Singapore I.T.*, 1937 A.C. 898

> upon particular facts ... there is no reason why the applicant should not come direct to this court for prohibition rather than wait to see if the decision goes against him, in which case he has to move for a *certiorari*.[1]

5.83 ***Writ of Mandamus*** : The second part of clause (2)(a)(i) of art.102 confers power on the High Court Division to issue writs in the nature of *mandamus* to compel a person performing functions in connection with the affairs of the Republic or a local authority to do something that he is required by law to do. According to Ferris, "Generally speaking, it may be said that mandamus is a summary writ, issuing from the proper court, commanding the official or board to which it is addressed to perform some specific legal duty to which the party applying for the writ is entitled of legal right to have performed."[2] The difference between *mandamus* and prohibition is that *mandamus* commands a public functionary to do what he is under legal duty to do, while prohibition is issued to prevent him from doing what he is not permitted by law to do.

5.84 In the English and Indian jurisdictions there was a definite emphasis on the existence of a specific legal right of the applicant to insist upon performance by a public official of a definite legal duty.[3] In *M.S. Jain v. Haryana*[4] the Indian Supreme Court applied the *Lewisham Union* principle and observed, "no one can ask for a mandamus without a legal right. There must be a judicially enforceable right as a legally protected right before one suffering legal grievance can ask for a mandamus." It may be seen that in England the requirement of `specific legal right' of the applicant has been given up and the courts may issue *mandamus* even though the applicant has no specific legal right.[5] In *I.R.C. v. Federation of Self-employed*[6] the House of Lords discarded the *Lewisham Union* principle. Lord Scarman observed –

> The decision of the Divisional Court in *R v. Guardians of Lewisham*

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[1] *R v. Tottenham District Tribunal*, [1956] 2 All E.R. 863, 864-865

[2] The Law of Extra-ordinary Legal Remedies, para 187

[3] *R. v. Guardians of Lewisham Union*, [1897] 1 QB 498; *Hochtief Gammon v. Orissa*, AIR 1975 SC 2226

[4] AIR 1977 SC 276; *Ramesh Prasad v. Bihar*, AIR 1978 SC 327

[5] *R. v. Metropolitan Police Commissioner ex p. Blackburn*, [1968] 1 All E.R. 763; *R. v. Greater London Council ex p. Blackburn*, [1976] 3 All E.R. 184; *R. v. Devon and Cornwall Chief Constable ex p. Central Electricity Generating Board*, [1982] QB 458;

[6] [1981] 2 All E.R. 93

> *Union* ... was accepted as establishing that an applicant must establish ` a legal specific right to ask for the interference of the court' by order of mandamus ... I agree with Lord Denning MR in thinking this was a deplorable decision. It was at total variance with the view of Lord Mansfield CJ. Yet its influence has lingered on, and is evident even in the decision of the Divisional Court in this case. But the tide of developing law has now swept beyond it ...

In *Lakhi Ram v. Haryana*[1] the appellant prayed for *mandamus* challenging the action of the government expunging adverse remarks made in the annual confidential report of an officer claiming that the expungement would prejudice his chance of promotion. The High Court dismissed the application on the ground that the appellant had no *locus standi*. The Indian Supreme Court reversed the decision and remanded the case for disposal on merits. In *Fertilizer Corp. Kamgar Union v. India*[2] some observations have been made which further eroded the application of *Lewisham Union* principle. But the Indian Supreme Court has not clearly discarded that principle. In the Pakistan jurisdiction emphasis on the existence of a legal right of the petitioner to demand performance can be found.[3] In *Masudul Hasan v. Khadim Hussain*[4] the appellant who was a member of a Town Committee applied for *mandamus* for removal of the respondent as member of Town Committee because if the respondent remained a member of the committee it would materially affect the forthcoming election of the Chairman and thereby wrongfully injure the appellant's right. The Pakistan Supreme Court dismissed the appeal saying, "the interest of the petitioner was at best of an indirect nature. Merely as a member of the Town Committee, there did not reside in him a legal right to demand that the Collector should remove another member of the same Committee." But in a later case, the court did not demand of the applicant for *mandamus* a specific legal right and instead held –

> ... the right considered sufficient for maintaining a proceeding of this nature is not necessarily a right in the strict juristic sense but it is enough

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[1] AIR 1981 SC 1655

[2] AIR 1981 SC 344 ("If public property is dissipated, it will require a strong argument to convince the court that representative segments of the public or at least a section of the public which is directly interested and affected would have no right to complain of the infraction of public duties and obligations" - per Chandrachud CJ at p.350)

[3] *Pakistan v. Md. Sayeed*, 13 DLR (SC) 94

[4] PLD 1963 SC 203

> if the applicant discloses that he had a personal interest in the performance of the legal duty which if not performed or performed in a manner not permitted by law would result in the loss of some personal benefit or advantage or the curtailment of a privilege or liberty or franchise.[1]

5.85 In *Talekhal Progressive Fishermen v. Bangladesh*[2] the petitioner challenged the settlement of two fisheries contrary to the government policy on settlement and claimed that it was entitled to the settlement in terms of a certain government memorandum. The government policy had no statutory force and as such there was no question of requiring the public functionary to perform a legal duty. In rejecting the petition, the Appellate Division, however, referred to *Lewisham Union* and observed–

> the petitioner could not point out to any such specific legal right which inheres in him for which he claims the performance of the statutory duties conferred upon the public functionaries.[3]

5.86 In England the *Lewisham Union* principle was given up as it would have the effect of allowing the public functionaries a free hand in ignoring their public duties. In countries like ours it will have a far more serious effect as many instances of non-performance of legal duty by government and public functionaries will remain without remedy, thereby eroding the concept of rule of law and constitutionalism. This principle originated in England and when it has been discarded there, there is no rationale for insisting on the application of this principle in our country. It is submitted that the language of art.102(2) leaves no scope for application of the *Lewisham Union* principle in our jurisdiction. Art.102(2) does not require that the applicant for *mandamus* must have a 'specific legal right'; the only requirement is that he must be an 'aggrieved party'. It is important to note that art.31 provides a guarantee that no person in Bangladesh can be adversely affected except in accordance with law. Thus if a person is going to be affected by the failure of a public functionary to do what he is required by law to do, he can claim performance of the legal duty of the public functionary whether or not he has a specific legal right to claim

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[1] *Fazal Din v. Lahore I.T.*, 21 DLR (SC) 225

[2] 1981 BLD (AD) 103

[3] at p.104; *National Engineers v. Ministry of Defence*, 44 DLR (AD) 179; *Nurul Islam v. Secy. Ministry of Law*, 46 DLR 46

performance of the duty.

5.87 *Mandamus* may issue on any person performing functions in connection with the affairs of the Republic or of a local authority. Such a person must hold office of a public nature[1], that is, an office under the Constitution or a law relating to the affairs of the Republic or of a local authority. It will issue only when that public functionary has a public duty under a law and he refused to perform his legal duty; the duty may be judicial, *quasi*-judicial or purely administrative. The duty sought to be enforced must be a duty of a public nature, i.e., a duty created by the provisions of the Constitution or a statute or some other rule of common law or some rules or orders or notifications having the force of law.[2] The public duty need not, however, be always a statutory duty.[3] No *mandamus* can issue to compel the government to implement its policy[4] nor it can be issued merely on consideration of equity.[5] Inter-ministerial communications are mere policy guidelines which do not create legal right and cannot be enforced.[6]

5.88 Thus mandamus may issue on the government[7] to implement its own decision under certain circumstances[8], to pay leave salary[9], or allowance[10], or future salary[11], to restore seniority of a government servant[12] or to forward to the President a competent appeal of a government servant[13], to issue necessary clearance for delivery of

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[1] *Zainul Abedin v. Co-operative Bank*, 18 DLR (SC) 482

[2] See the definition of 'law' in art.152; *Bihar E.G.F. Co-operative Society v. Sipahi*, AIR 1977 SC 2149; *Chevron Lines v. Chairman*, BOGMC, 43 DLR 218 (Purchase Manual not framed under the authority of law has no statutory force and no mandamus can issue to compel compliance with the requirements of Purchase Manual)

[3] *Anadi Mukta Sadguru Trust v. Rudani*, AIR 1989 SC 1607

[4] *Yunus Mia v. Secy. Ministry of Public Works*, 45 DLR 498

[5] *Abed Ali v. Bangladesh*, 1 BLC 39

[6] *Abul Bashar v. Bangladesh*, 50 DLR (AD) 11; see also *Syeda Rafiqua Chowdhury v. Secy. Ministry of Comerce*, 3 MLD 160; *Kazi Mukhlesur Rahman v. Secy. Ministry of Law*, 2 BLC 286

[7] *Pakistan v. M.A. Hayat*, PLD 1962 SC 28

[8] *Bangladesh v. Amir Hossain*, 48 DLR (AD) 75; *Abdul Gafur v. Secy. Ministry of Establishment*, 1997 BLD 453; *Matiur Rahman v. Bangladesh*, 50 DLR 357

[9] *Mahboob Rabbani v. West Pakistan*, PLD 1963 Lah 53

[10] *Quazi Khan v. The State*, PLD 1965 Pesh 41

[11] *Wasi Haider v. West Pakistan*, PLD 1963 Kar 458

[12] *Pakistan v. Abdul Hamid*, 13 DLR (SC) 100

[13] *West Pakistan v. Mehboob*, PLD 1962 SC 433; *Abdur Razzaque v. Bangladesh*, 2

imported goods[1], on the Deputy Commissioner to implement an order rightly passed by his predecessor in giving effect to an order of the court[2] or to restore possession of property illegally taken over[3], to comply with the direction of the government to complete acquisition process and pay compensation upon settlement with the landowner[4], on Rajdhani Unnayan Kartripakya to mutate the name of a purchaser of land in its records[5], on a statutory Corporation to deliver possession of a firm and its assets to the applicant pursuant to the decision of the government[6], on the Port Authority to refund the rates collected without legal sanction[7], to direct police to prosecute an offender against law[8], on the University authority to comply with the principles of natural justice in disciplinary proceeding against a student[9], on an income tax officer to comply with the direction of the Income Tax Tribunal[10], on the licensing authority to determine an application for licence[11] or to reconsider an application for licence on proper grounds[12], on the Education Department of the government to decide a dispute between local education authorities[13], on an authority to supply certified copy of the order sheet of a proceeding before him[14], on the Presiding officer in an election to corporate, elective or municipal office to declare the candidate obtaining the highest vote as successful without praying for declaration of voidness of the impugned election result[15], on a municipal authority, on the Registrar of Joint Stock Companies[16], on the Registrar

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BLC 369

[1] *Green Pharmacy v. Bangladesh*, 42 DLR 307

[2] *Radha Kanta Banik v. D.C. Rangpur*, 31 DLR 352

[3] *Shahadat Ali v. Deputy Commr.*, 45 DLR 237

[4] *Birendra Kumar Dey v. D.C. Jessore*, Writ Petition No.272 of 1986 (unreported)

[5] *Qazi Kamal v. RAJUK*, 44 DLR (AD) 392; *Imam Dockyard & Engr. Ind.Ltd. v. RAJUK*, 2 BLC 202

[6] *Chairman, Steel Mill Corp. v. Masood Raza*, 30 DLR (AD) 169

[7] *QC Shipping Ltd. v. Chittagong Port Authority*, 51 DLR 64

[8] *Adams v. Metropolitan Police Commissioner*, [1980] RTR 289, cited in Wade's Administrative Law, 6th ed. p.699

[9] *University of Dacca v. Zakir Ahmed*, 16 DLR (SC) 722

[10] *Bhopal Sugar Ind. Ltd v. I.T.O. Bhopal*, AIR 1961 SC 182

[11] *R. v. Tower Hamlets London B.C. ex p. Kayene-Lavenson*, [1975] QB 431

[12] *R. v. London C.C. ex p. Corrie*, [1918] 1 KB 68

[13] *Board of Education v. Rice*, [1911] AC 179

[14] *Naimul Haq v. Deputy Commr.*, 45 DLR 520

[15] *Presiding Officer v. Sadaruddin*, 19 DLR (SC) 516

[16] *R. v. Registrar of Companies*, [1914] 3 KB 1161; *Abdur Rab v. Registrar. J.S.*

of Co-operative Societies[1], on the Registrar of the High Court acting as Taxing Officer[2], on the Port authority to allow exemption from river rates to which the applicants were entitled by virtue of an exemption notification[3] on a court or tribunal, but no writ can issue on a Judge of a superior court even if he is acting in another capacity as a *persona designata*[4] The writ can be issued on a college management constituted under the Trust Act.[5] A *mandamus* will lie to compel the restoration of a person to an office or franchise of a public character of which he has been wrongfully dispossessed.[6] No *mandamus* can issue to enforce an order which has been passed without lawful authority.[7]

5.89 The Constitution envisages separation of powers. Art.65 vests the legislative power of the Republic in Parliament. No other organ of the government can exercise the legislative power except as otherwise provided in the Constitution. Parliament has not been enjoined to act in aid of the Supreme Court in art.112. Consequently, a writ of *mandamus* cannot issue on Parliament to prevent it from considering a Bill which is alleged to be in violation of the Constitution[8], nor can the court issue a mandate to Parliament to enact a particular law.[9] In the same way, a court cannot direct a subordinate legislative authority to make or not to make a rule which it is competent to make.[10] In *Secy. Ministry of Finance v. Masdar Hossain*[11] it has been held that when Parliament or a subordinate legislative authority has made a constitutional deviation, the court can give the necessary direction to bring it back from the constitutional derailment. It is submitted that this holding is open to question. If Parliament has made a constitutional deviation, the court may declare the action to be without lawful authority or make

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Companies, PLD 1960 Dac 541

[1] *Damodor v. Co-op. Seeds Store*, 8 DLR 342

[2] *Mumtaz Mullick v. Taxing Officer*, PLD 1966 SC 753

[3] *Burmah Oil Company v. Trustees, Port of Chittagong*, PLD 1962 SC 113

[4] *Jamal Shah v. Election Commission*, 18 DLR (SC) 1

[5] *Anadi Mukta Sadguru Trust v. Rudani*, AIR 1989 SC 1607

[6] *B.S.I.C. v. Mahbub Hossain*, 29 DLR (SC) 41; *Faiz Ahmed v. Registrar of Co-op. Societies*, 14 DLR (SC) 183; *Zainul v. Multan Co-operative*, 18 DLR (SC) 482; *Zeaul Haq V. E.P. Co-op Society Ltd.*, 19 DLR 498

[7] *K.A. Rouf v. Bangladesh*, 1996 BLD 607

[8] *Chotey Lal v. U.P.*, AIR 1951 All 228

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

[10] Ibid; *J & K v. Zakki*, AIR 1992 SC 1546

[11] 2000 BLD (AD) 104

recommendation for appropriate legislation and good governance requires Parliament to retrace its steps or rectify. But Parliament cannot be dictated and the court has no way of compelling Parliament to comply with the direction. Position with respect to subordinate legislative authority is, however, different. The rule making power of the President is, in fact exercised by the executive which has the constitutional obligation to act in aid of the Supreme Court and can be compelled to comply with the direction of the court. As a writ of *mandamus* is issued to compel performance legal duty, no court can give a direction to the executive government to refrain from enforcing a provision of law.[1]

5.89A The court does not issue writ of *mandamus* where it would be futile. But there may be situation in which refusal to grant the relief may pose serious threat to the polity. Where inertia of the investigating agency in investigating an offence was found because of the alleged involvement of persons holding high offices in the executive, the Indian Supreme Court adopted a method which it called 'continuing mandamus'. The court felt that one-time direction may not cure the inertia and decided to issue directions from time to time keeping the matter pending requiring the investigating agency to report the progress of investigation so that the court could ensure continuance of the investigation.[2] It is not feasible for the court to adopt such a measure generally, but dire situation needs drastic measures and there is no constitutional or legal bar to our Supreme Court adopting the method in appropriate cases.

5.90 *Discretionary power* : If a statute has given a discretion to a public functionary to exercise some power, no *mandamus* can issue to compel him to exercise the power since the existence of an obligatory duty is a precondition to the issuance of *mandamus*.[3] However, a duty to exercise discretion may be implicit in the grant of power. In *Julius v. Lord Bishop of Oxford*[4] Lord Cairns observed –

> ... there may be something in the nature of the thing empowered to be done, something in the object for which it is done, something in the title of the person or persons for whose benefit the power is to be exercised,

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[1] *Narinder v. Lt. Governor*, AIR 1971 SC 2399

[2] *Vineet Narain v. India*, AIR 1998 SC 889

[3] *A.K. Roy v. Union of India*, AIR 1982 SC 710; *Mysore v. Syed Mohammad*, AIR 1968 SC 1113; *Mysore v. Sheshadri*, AIR 1974 SC 460

[4] [1880] 5 App. Cas. 214, 223

> which may couple the power with a duty, and make it the duty of the person in whom the power is reposed, to exercise that power when called upon to do so.

Thus if the discretion granted is of such nature that it can be said to be a discretion coupled with a duty, the court may compel the authority clothed with the discretion to exercise the discretion.[1] S.10 of the Industrial Relations Ordinance, 1969 provides that the Registrar of Trade Unions may cancel the registration of a trade union if it has obtained registration by fraud or by misrepresentation. The Registrar registered a second trade union in one establishment. The first trade union applied to the Registrar for cancellation of registration of the second trade union complaining that the second trade union did not have 30% of the workers of the establishment as its members and had obtained registration by misrepresentation. The Registrar without making an inquiry into the allegation ordered for election for determination of the collective bargaining agent. On the application of the first trade union the High Court Division found that the Registrar had a discretion coupled with duty to take action and directed the Registrar to hold the inquiry.[2] The court cannot, however, dictate how or in which manner the authority is to exercise the discretion.[3] But where the authority having the discretion exercised it on irrelevant or wrong grounds or in exercising the discretion has left any relevant fact or circumstance out of consideration vitiating the exercise of the discretion or otherwise abused the discretion[4], the court may treat it as a failure to exercise discretion and direct the authority to exercise the discretion on consideration of the proper grounds.[5] When the discretion has been exercised properly in good faith, the court will not issue *mandamus* to control the exercise of discretion.[6]

5.91 *Notice demanding justice* : An application for *mandamus* has to be preceded by a demand made to the public functionary concerned for

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[1] *Commr. of Police, Bombay v. Gordhandas*, AIR 1952 SC 16

[2] *Titas Gas Karmachari Union v. Registrar, Trade Unions*, W.P. No.621 of 1990 (Unreported)

[3] *Quabil Ahmed v. Secretary, Ministry of Health*, 44 DLR 385; *Orissa v. Chandrasekhara*, AIR 1965 SC 532

[4] For discussion on abuse of discretion, see Para 5.75-5.80A

[5] *Authorised Officer v. A.W. Mallick*, 20 DLR (SC) 229; *Presiding Officer v. Sadaruddin*, 19 DLR (SC) 516; *Ghulam Mostafa v. Pakistan*, PLD 1966 SC 268

[6] *Vice Chancellor v. S.K. Ghose*, AIR 1954 SC 217

performance of the public duty sought to be enforced. It is only when the public functionary refused to perform or the refusal to perform may be inferred from the conduct of the public functionary, the application will be maintainable.[1] It has, however, been held in some cases that though it is the normal requirement to make a demand before filing an application, such a demand will not be necessary to maintain an application when in the facts and circumstances of a case it appears that making a demand and waiting for reply may seriously affect the interest of the applicant or that such a demand will serve no useful purpose and will be a mere idle ceremony.[2]

5.92 *Enforcement of the writ of mandamus*: Art.112 mandates that all authorities, executive and judicial, in the Republic shall act in aid of the Supreme Court. Thus it is the obligation of the executive government to comply with the direction given by the High Court Division. If it does not comply with the direction given by the High Court Division, the usual method of enforcing the judgment granting a writ of *mandamus* is by committing the concerned authority for contempt. But in order to commit for contempt, the direction must be of an absolute nature and not one allowing any discretion or option on the part of the concerned authority.[3]

5.93 ***Writ of Habeas Corpus*:** Art.102(2)(b)(i) invests the High Court Division with power and obligation to issue a writ in the nature of *habeas corpus* when a case of unlawful detention is made out. It provides that on the application of any person the court may direct the person having custody of another to bring the latter before it so that it can satisfy itself that the detenu is not being held in custody without lawful authority or in an unlawful manner. The expression 'custody' is not confined to executive custody[4] and includes custody of private person also.[5] The High Court Division has power to issue the order of release of a person in custody under s.491 of the Code of Criminal

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[1] *Queen v. Mayor & Justices of Bodin*, [1892] 2 QB 21; *D.M. Lahore v. Raza Kazim*, 13 DLR (SC) 66

[2] *Zamiruddin Ahmed v. Bangladesh*, 1981 BLD 304; *Jhari Sohani v. East Pakistan*, 15 DLR 65; *Abdul Karim v. Deputy Commr.*, 15 DLR 483

[3] *Pakistan v. Mehrajuddin*, 11 DLR (SC) 260; *Pakistan v. Md. Sayeed*, 13 DLR (SC) 94; *Masood Raza v. M.A. Faiz and anr.*, Contempt Petition no. 4 of 1977 (unreported).

[4] *Bangladesh v. Ahmed Nazir*, 27 DLR (AD) 41

[5] *Ayesha v. Shabbir*, 1993 BLD 186; *Abdul Jalil v. Sharon Laily*, 50 DLR (AD) 55

Procedure and this power can be exercised *suo motu.*[1] But this power is hedged with limitation[2] and can be taken away or curtailed by ordinary legislation. In codifying the writ of *habeas corpus*, the framers of the Constitution have freed the jurisdiction from any limitation and have conferred wide power of judicial review[3] which can in no way be curtailed by any legislative device[4]. All illegal detentions by public functionaries involve infringement of fundamental rights guaranteed by arts. 31, 32 or 33 and as such the jurisdiction to issue the writ of *habeas corpus* shall have to be understood with particular reference to these articles of the Constitution. Speaking about this constitutional power, D.C. Bhattacharya J observed –

> The Constitution having highlighted the rule of law and the fundamental human rights and freedom in the preamble of the Constitution, and personal liberty being the subject of more than one fundamental right as guaranteed under the Constitution, a heavy onus is cast by the Constitution itself upon the authority, seeking to take away the said liberty on the avowed basis of legal sanction, to justify such action strictly according to law and the Constitution.[5]

The formulation of this power under art.102(2)(b)(i) is the same as that of art.98 of the Pakistan Constitution of 1962 and the decisions of the Pakistan Supreme Court are apposite in interpreting the provision of art.102(2)(b)(i).

5.94 Prior to the adoption of the Pakistan Constitution of 1962 the power of the High Courts depended on the language used in the statute on the basis of which a person was detained.[6] The question was how far

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[1] *State v. D.C. Satkhira*, 45 DLR 643 (High Court Division took action of the basis of news published in a newspaper)

[2] Sub-section (3) of s.491 provides that s.491 shall not apply to a person detained under any law providing for preventive detention. The High Court Division held that this sub-section will not bar the remedy under s.491 when a detention order is patently illegal or passed in colourable exercise of the detention law - *Panajit Barua v. State*, 50 DLR 399; *Pearu Md. Ferdous Alam v. State*, 44 DLR 603; *Sultanara Begum v. Secy. Ministry of Home*, 38 DLR 93

[3] *Aruna Sen v. Bangladesh*, 27 DLR 122, 142; *Abdul Latif Mirza v. Bangladesh*, 31 DLR (AD) 1; *West Pakistan v. Begum Shorish Kashmiri*, 21 DLR (SC) 1

[4] *West Pakistan v. Shorish Kashmiri*, 21 DLR (SC) 1

[5] *Aruna Sen v. Bangladesh*, 27 DLR 122

[6] For a discussion of the position prior to 1962, see *Aruna Sen v. Bangladesh*, 27 DLR 122

the court could inquire into the legality of detention when an authority was authorised to detain any person on his subjective satisfaction that it was necessary to detain the person to prevent him from doing acts specified in the statute. Dealing with the power of the court under art.98(2)(b)(i) the Pakistan Supreme Court observed –

> Under the Constitution of Pakistan a wholly different state of affairs prevails. Power is expressly given under Article 98 to the superior Courts to probe into the exercise of public power of executive authorities, how high-so-ever, to determine whether they have acted with lawful authority. The judicial power is reduced to a nullity if laws are so interpreted that the executive authorities may make what statutory rules they please thereunder, and may use this freedom to make themselves the final judges of their own `satisfaction' for imposing restraints on the enjoyment of the fundamental rights of citizens. Art.2 of the Constitution[1] could be deprived of all its contents through this process, and the Courts would cease to be guardians of the nation's liberties.[2]

In *Abdul Baqui Balooch v. Pakistan*[3] the Pakistan Supreme Court reiterated this position in law and referring to the expressions 'without lawful authority' and 'in an unlawful manner' observed in *West Pakistan v. Begum Shorish Kashmiri*[4], "The Constitution, it appears, cast a heavy responsibility upon the court to satisfy itself with regard to both these two matters." The Appellate Division affirmed this position in law, while interpreting the nature and extent of the power of the High Court Division under art.102(2)(b)(i) and held that though a statute may give power to the executive authority to detain a person if in the opinion of the authority the condition for the exercise of the power under the statute is fulfilled, the authority must have such materials before it as would satisfy a reasonable person to come to the conclusion which has been reached by the authority and the authority must disclose the materials upon which it has so acted in order to satisfy the court that the authority has not acted in an unlawful manner.[5] The authority may

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[1] The provisions of art.2 of Pakistan Constitution of 1962 (which was not a fundamental right and was only directed against executive actions) have been incorporated in art.31 of our constitution as a fundamental right.

[2] *Ghulam Jilani v. West Pakistan*, 19 DLR (SC) 403, Para 23

[3] 20 DLR (SC) 249, Para 16

[4] 21 DLR (SC) 1, Para 19-20

[5] *Abdul Latif Mirza v. Bangladesh*, 31 DLR (AD) 1, Para 7

refuse to disclose the facts on the basis of which the detention order has been passed asserting privilege under s.132 of the Evidence Act[1], but s.162 of that Act gives the court ample power to inspect the documents in order to determine the validity of the claim of privilege. The privilege is a narrow one and it is lawful for the court to inspect the documents for the purpose of deciding that the privilege is not being claimed inadvisedly, lightly or as a matter of course.[2]

5.95 In examining whether the authority has acted without lawful authority or in an unlawful manner, the court does not act as a court of appeal and hence the court will not be concerned with the adequacy or sufficiency of the materials or grounds of detention and will not interfere to substitute its own opinion in place of the opinion of the detaining authority even if the court views the materials to be insufficient. The court, in exercise of the power of judicial review, will apply the test of reasonableness and inquire whether on the materials produced a reasonable man could have been satisfied or formed the opinion that it was necessary to detain a person.[3] If the answer is in the negative, the court will find the action unlawful. If on the materials produced two views are possible, the court will not interfere, for in that case it cannot be said that no reasonable man would have arrived at the conclusion reached by the detaining authority.

5.96 Now the question is what is meant by the expressions 'without lawful authority' and 'in an unlawful manner'. According to Hamoodur Rahman J, "It is agreed that within lawful authority will be comprised all questions of vires of the statute itself and of the person or persons acting under the statute, i.e. there must be a competent law authorising the detention and the officer issuing such an order must have been lawfully vested with the power"[4], while "in determining as to how and in what circumstances a detention would be detention in an unlawful manner one would inevitably have first to see whether the action is in accordance with law."[5] The same view has been expressed by the Appellate Division in *Abdul Latif Mirza v. Bangladesh*[6]. What has been

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[1] Proviso to art.33(4) permits such a course

[2] *West Pakistan v. Begum Shorish Kashmiri*, 21 DLR (SC) 1

[3] *Abdul Latif Mirza v. Bangladesh*, 31 DLR (AD) 1; *Abdul Baqui Balooch v. Pakistan*, 20 DLR (SC) 249

[4] *West Pakistan v. Begum Shorish Kashmiri*, 21 DLR (SC) 1, Para 20

[5] Ibid, Para 21

[6] 31 DLR (AD) 1, Para 6

stated by Hamoodur Rahman J is correct with reference to the Pakistan Constitution which did not make any provision for judicial review of law and the Pakistan Supreme Court took the view that the power is inherent in the constitution, it being a written one.[1] But art.102(1) makes a specific provision for judicial review of legislation[2] so that the question of *vires* of a statute need not always be covered in an inquiry as to 'lawful authority' which will cover the question whether the authority is competent under a statute to detain a person and the authority having such competence all other questions relating to the exercise of the power will be covered in an inquiry as to 'unlawful manner'. This distinction, however, is insignificant as it does not make any difference in the power of the High Court Division.

5.97 In stating what will be an unlawful action, Hamoodur Rahman J stated,

> Law here is not confined to statute law alone but is used in generic sense as connoting all that is treated as law in this country including even the judicial principles laid down from time to time by the Superior courts. It means according to the accepted forms of legal process and postulates a strict performance of all the functions and duties laid down by law. It may well be, as has been suggested in some quarters, that in this sense it is as comprehensive as the American 'due process' clause in a new garb. It is in this sense that an action which is *mala fide* or colourable is not regarded as action in accordance with law. Similarly, action taken upon no ground at all or without proper application of mind of the detaining authority would also not qualify as action in accordance with law and would, therefore, have to be struck down as being taken in an unlawful manner."[3]

The view of Hamoodur Rahman J has been fully endorsed by our Supreme Court.[4]

5.98 When a detention is challenged the question is whether the

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[1] *Fazlul Quader Chowdhury v. Abdul Haq*, 18 DLR (SC) 69, Para 8

[2] Art.102(1) relates to fundamental rights and all questions of unconstitutionality of a law for contravention of the provisions of the Constitution other than those of Part III can be said to be covered by the general principle of law relating to written constitutions.

[3] *West Pakistan v. Begum Shorish Kashmiri*, 21 DLR (SC) 1, Para 21

[4] *Abdul Latif Mirza v. Bangladesh*, 31 DLR (AD) 1; *Aruna Sen v. Bangladesh*, 27 DLR 122

detention is authorised by any law. According to the Indian Supreme Court, the court is to have regard to the legality of the detention at the time of return and not with reference to the date of the filing of the application[1] and hence if a fresh and valid order is passed by the time of the return of the *rule nisi* the court cannot release the detenu whatever might have been the defect if the order pursuant to which he was initially detained.[2] In another case the Indian Supreme Court observed that the court has to consider the legality of the detention on the date of hearing and if on the date of hearing it cannot be said that the detenu is wrongfully deprived of his personal liberty the writ cannot issue.[3] But the Pakistan Supreme Court held that the court will have to consider the legality of the detention as on the date of commencement of the detention.[4] In *Ghulam Jilani v. West Pakistan*[5] it was held that if the initial detention is illegal, the illegal detention cannot be continued by a subsequent valid and legal detention order. Having regard to the provision of art.2 of the Pakistan Constitution of 1962 (which is now incorporated as a fundamental right in art.31 of the Constitution) the Pakistan Supreme Court was correct in taking this view and the Appellate Division has taken the same view.[6]

5.99 It has been noticed that to avoid the difficulty, the detaining authority often cancelled the initial detention order and passed another legal order claiming that the subsequent order of detention was an independent detention order and the question turned on whether the subsequent order was at all an independent order or not. In *Abdul Latif Mirza v. Bangladesh* the period of detention ordered by the Deputy Commissioner expired and two days thereafter a fresh order by the government was served. The detention for the intervening two days was illegal. The government claimed that the subsequent detention order was

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[1] *Dr. B. Ramchandra v. Orissa*, AIR 1971 SC 2197; *Naranjan Singh v. Punjab*, AIR 1952 SC 106

[2] *Naranjan Singh v. Punjab*, AIR 1952 SC 106; *Gopalan v. India*, AIR 1966 SC 816 ("It is well settled that in dealing with a petition for habeas corpus the Court has to see whether the detention on the date on which the application is made to the Court is legal if nothing more has intervened between the date of the application and the date of hearing" - Para 5)

[3] *Talib Hussain v. J & K*, AIR 1971 SC 62

[4] *Abdul Baqui Balooch v. Pakistan*, 20 DLR (SC) 249, Para 30

[5] 19 DLR (SC) 403; see also *Arbab Md. Hashem Khan v. Crown*, 6 DLR (FC) 1; *East Pakistan v. Rowshan Bijoya Shaukat Ali Khan*, 18 DLR (SC) 214

[6] *Abdul Latif Mirza v. Bangladesh*, 31 DLR (SC) 1

an independent one. But the court rejected the plea, stating -

> We cannot take a too technical and legalistic view on one of the most cherished fundamental human right, that of liberty of an individual ... We, therefore find that an illegal order of detention cannot be continued by a subsequent order of detention even though the latter is otherwise valid. An illegal detention equally cannot be continued by an alleged independent valid order of detention, if it, in effect, continues an illegal detention ... The order of the Government is no doubt an independent order, but it purported to continue the earlier detention. The detenu was not released on the expiry of thirty days of the order of the Deputy Commissioner. He continued in detention without any order whatsoever, and so his detention became an illegal detention, after the expiry of the thirtieth day. The Government continued this illegal detention by its order of 24.5.74. The order is independent but detention is not. There is no correlation between an independent order and the fact of independent detention. The order of detention purporting to continue an illegal detention cannot be sustained.[1]

D.C.Bhattacharya J disagreed with the majority on this point and observed, "... if the subsequent order of detention is completely an independent order and does not purport to continue the previous detention such an order, if otherwise unexceptionable, shall not be bad only because the previous detention was in fact illegal."[2] It is submitted that the majority view is correct and rightly points out that a technical and legalistic view cannot be taken in respect of one of the most cherished fundamental rights. In a *habeas corpus* proceeding, the court is concerned with the detention and looks at the detention order only to determine the validity of the detention as has been very clearly found by the court in *Sajeda Parvin v. Bangladesh*[3]. Unless the detenu is released actually and not merely on paper, a subsequent order of detention howsoever independent in fact continues the detention which is found

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[1] Ibid, para 23 & 24; (the decision in *Khair Ahmed v. Ministry of Home*, 40 DLR 353, apparently seems to be in conflict with *Abdul Latif Mirza*, but the two cases are distinguishable in that in *Khair Ahmed* there was no gap between the earlier and latter orders of detention to render the detention unlawful); *Monwara Begum v. Secy. Ministry of Home*, 41 DLR 35

[2] Ibid, para 67

[3] 40 DLR (AD) 178 ("The fact of detention and not the date of order of detention is the material point. In case of continued detention the aggrieved party has got a running grievance" - per M.H. Rahman J)

illegal. The minority view, it is submitted, is not in consonance with the provisions of art.31. If the minority view is adopted a citizen can be treated otherwise than in accordance with law and the illegal detention can be continued in fact by terming the latter order to be an order independent of the illegal order and the rule of law will be undermined.

5.100 In *Abdul Baqui Balooch v. Pakistan*, the Pakistan Supreme Court, while dealing with the contention of the government that the validity of a detention today has to be judged on the basis of the altered law, observed, "... a law is not to be given retrospective effect unless it is expressly or by necessary intendment made retrospective. This is not the case here ... The validity of that order, has , of necessity, therefore, to be judged on the basis of the law prevailing on that day (the date of detention order)"[1] This observation may create an impression that an illegal detention may be validated by a subsequent legislation with express retrospective effect. But such a legislation, it is submitted, may be violative of arts.31 and 32 of the Constitution.

5.101 An application for *habeas corpus* can be made by any person, who need not be a 'person aggrieved'. We may note here that for enforcement of all fundamental rights the application has to be filed by an aggrieved person and apparently when the detention of a person is challenged as violative of fundamental right guaranteed by art.32 or 33, the application has to be filed by an aggrieved person, but the application can be filed by any person if violation of fundamental right is not alleged or involved. It is very difficult to accept a contention that the condition for enforcement of the fundamental right relating to personal liberty is more onerous than the condition for issuance of an ordinary writ of *habeas corpus*. A reasonable and harmonious interpretation should be given and it should be taken that the requirement of a 'person aggrieved' to apply for the enforcement of fundamental rights is not applicable in respect of a petition involving detention of any person. In fact, the courts have not insisted on an application by an aggrieved person even though the petition for *habeas corpus* alleged violation of fundamental rights.

5.102 Although any person may file an application, the court insists that it should be filed by a person who is acquainted with the facts and circumstances of the detention. If a stranger is allowed to make a petition on behalf of a detenu it may amount to an abuse of the process

[1] 20 DLR (SC) 249, 259

of the court and complications may also arise in that once an order adverse to the detenu is passed, another application may be filed by the detenu or his relations on the ground that the earlier applicant had no authority to make the application. In *Azizul Haq v. East Pakistan*[1] it was held that a petition should normally be made by a relation of the detenu who is sufficiently close to him and/or by a friend who can satisfy the court that there is no one available among the relations of the detenu to challenge the detention and that the petitioner (if he is a friend) is very close to the detenu and knows all the facts and circumstances of the detention. Where a person was detained under a wholly illegal order of conviction, his son was allowed to file the application.[2] In the case of a minor, the application should be filed by a person who is entitled to the custody of the minor and in the absence of such a person by one who is interested in the welfare of the minor.[3]

5.103 As a general rule when a *rule nisi* is returned accompanied by a warrant of arrest or detention and the warrant is valid and proper in that it is relatable to the person arrested or detained and the authority issuing the warrant is authorised by the law under which the arrest is made, the return is a sufficient answer to the allegation of unlawful arrest or detention.[4] When a civil or revenue law provides for arrest or detention for any civil debt or revenue dues, an application for *habeas corpus* will lie on the ground that the requirements of the law have not been complied with[5] or on the ground that the detenu was not liable to be arrested under that law[6]. When a person is committed for contempt of a legislature, he may make an application on the ground of violation of his fundamental right.[7] The writ will lie for the release of a member of Parliament arrested in breach of the privilege against arrest.[8] But the writ cannot be granted in favour of a person committed to jail custody by a

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[1] PLD 1968 Dac 728; see *Kamaladevi Chattopadhya v. Punjab*, AIR 1984 SC 1895 (a social worker was allowed to challenge detention of several persons including children)

[2] *East Pakistan v. Hiralal*, PLD 1970 SC 399 (the son filed a writ of *certiorari* and the question of his locus standi became an issue. While holding in favour of the petitioner, the court further observed that this petition may also be treated as one of *habeas corpus*)

[3] *Raj Bahadur v. Legal Remembrancer*, 47 C.W.N. 507;

[4] *Janardhan v. Hydrabad*, AIR 1951 SC 217

[5] *Collector of Malabar v. Erimmal Ebrahim*, AIR 1957 SC 688;

[6] *Kapurchand v. Tax Recovery Officer*, AIR 1969 SC 662

[7] In Reference Under Art.143, AIR 1965 SC 845

[8] *Ansumali v. West Bengal*, AIR 1952 Cal 632

competent court by an order which *prima facie* does not appear to be without jurisdiction or wholly illegal.[1] It will be a sufficient answer to the *rule nisi* that the detenu is detained in execution of a sentence passed by a criminal court.[2] But if the order of conviction is not placed before the court and the warrant of commitment has been issued by an authority not authorised to issue it, the return showing that the detenu has been convicted is of no avail.[3] If there is any illegality in convicting a person, the remedy is by way of appeal or revision provided by the statute and not by way of writ of *habeas corpus*. The order of the court itself is the lawful authority of the detention. If, however, no appeal or revision is provided by law and the conviction is illegal, the detenu may apply to the High Court Division for a writ of *certiorari*.[4] Where the order of conviction is wholly without jurisdiction, a writ of *habeas corpus* may issue.[5] When a person is serving out a sentence passed by a court or tribunal, the jurisdictional validity of the order of conviction can be looked at.[6] But when the challenge is from an order of a Court Martial set up under the Army Act to enforce Military law, the jurisdiction to interfere is narrower than in the case of other courts or tribunals because of the provision of art.102(5). The High Court Division can interfere with the order of a Court Martial only if a case of *mala fide* or *coram non judice* is made out.[7] Where the detenu was convicted by a magistrate not being a special magistrate as required by the statute creating the offence, the conviction was without jurisdiction and the court observed that the application for *certiorari* by the son may be treated as one for *habeas corpus* and the relief may be given.[8] In the same way an application for *habeas corpus* will be competent when the conviction is void for denial of the constitutional right of the detenu.[9] The writ will lie to give effect to remission of sentence where the

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[1] *Dr. B. Ramchandran v. Orissa*, AIR 1971 SC 2197

[2] Ibid

[3] *Nasrin Kader Siddiqui v. Bangladesh*, 44 DLR (AD) 16

[4] *Rajab Ali v. East Pakistan*, 10 DLR 385; see also *State v. Zakir*, 45 DLR (AD) 163

[5] *Sentu v. Bangladesh*, 50 DLR 220 (where the fcts alleged and proved do not constitute the offence for which the petitioner is convicted)

[6] *Jamil Huq v. Bangladesh*, 34 DLR (AD) 125

[7] Ibid

[8] *East Pakistan v. Hiralal*, PLD 1970 SC 399

[9] *Moslemuddin Sikdar v. Chief Secretary, East Pakistan*, 8 DLR 526 (the detenu was denied the right to assistance of a lawyer)

convict has earned it.[1] The writ is available against any wrongful detention whether by a public functionary or by a private person.[2]Where a mother's lawful custody of minor children is denied, she can avail the remedy under art.102.[3] Detention of a major girl who is neither accused not witness in a case even in judicial custody is illegal.[4]

5.104 When a person is detained under a law providing for detention without trial, a writ of *habeas corpus* will issue if the law is unconstitutional or the law being valid, the detention order is *ultra vires* the law. The law relating to preventive detention may be found unconstitutional for infringement of fundamental rights. When the law is not alleged or found to be violative of any provision of the Constitution, the inquiry regarding legality of the detention is limited to the following

(1) whether the detention order is on the face of it invalid;
(2) whether the authority acting under the law is a competent authority in terms of that law;
(3) whether the authority acted within the limits and fulfilling the conditions prescribed by the law; and
(4) whether the authority in acting violated any provision of the Constitution.

In making the inquiry it is to be remembered that every detention without trial and conviction is *prima facie* unlawful and the onus is upon the detaining the authority to justify the detention by establishing the legality of its action according to the principles of law.[5] Where the liberty of a citizen is concerned, the court will construe the government orders and actions very strictly and always beneficially in favour of the subject, but the court may not set aside the order on a mere technicality which may be the handiwork of a foolhardy official.[6]

5.105 The first inquiry is whether on the face of it the detention order is valid and the detention order has been served on the detenu. If the

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[1] *Lt. Col. Bhattacharya v. State*, 16 DLR (SC) 442; *In Re Madhu Limaye*, AIR 1969 SC 1014

[2] *Ayesha Khatun v. Major Shabbir*, 1993 BLD 186 (writ petition against the father of a child who illegally took away the child from the mother and detained the child)

[3] *Abdul Jalil v. Sharon Laily*, 50 DLR (AD) 55

[4] *Rehana Begum v. Bangladesh*, 50 DLR 557

[5] Per Lord Atkin in *Liversidge v. Anderson*, [1942] AC 206; *West Pakistan v. Begum Shorish Kashmiri*, 21 DLR (SC) 1, 15; *Aruna Sen v. Bangladesh*, 27 DLR 122, 134

[6] *Bangladesh v. Dr. Dhiman Chowdhury*, 47 DLR (AD) 52

detention order has not been served, the detention will be illegal.[1] The detention order will be invalid if it does not refer to the law under which it has been made or if the law referred to does not authorise the detention or if there is no statement in the order about compliance of certain matters which the law requires to be stated in the detention order.[2] The second inquiry is whether the authority which made the detention order is authorised under the relevant law to make the order. In rare cases it will be found that the detention order has been made by a person not competent to pass it. When the detenu alleges that his detention was not ordered by the appropriate person, the government is required to disclose the necessary facts to satisfy the court that the order was passed by the proper person in accordance with the Rules of Business.[3] The detention will also be invalid if the matter has not been referred to the Advisory Board or the Advisory Board has not approved the detention within the time stipulated in the law and at any rate within six months as prescribed by art.33 of the Constitution.[4]

5.106 The next inquiry is whether the detaining authority acted within the limits and fulfilling the conditions of the law. A preventive detention law authorises public functionaries to order detention of a person on being satisfied or on having formed an opinion that the detention is necessary to prevent the person from doing certain acts specified in the law. This satisfaction or opinion must be based on materials. If it is found that the detaining authority has acted mechanically without applying its mind to the question, the detention will be found invalid.[5] When the detention order did not mention that the detention of the detenu was necessary to prevent him from doing any prejudicial act, the detention was held to be without any legal authority.[6] The facts and materials must co-exist with the order of detention and the

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[1] *M.A. Hashem v. Bangladesh*, 1 BLC 5; see also *Mohammad Ali v. Bangladesh*, 47 DLR 350 (A writ of habeas corpus will not be maintainable where the detention order has been passed but the person concerned has not been detained)

[2] *Anwar v. Bangladesh*, 28 DLR 428 (the Court found the detention unlawful as the detention order did not indicate the nature of the prejudicial activity)

[3] *Bangladesh v. Dr. Dhiman Chowdhury*, 47 DLR (AD) 52

[4] *Mansur Ali v. Secy. Ministry of Home*, 42 DLR 272

[5] *Rama Rani v. Bangladesh*, 40 DLR 364 (the detention order was in cyclostyled form (in which the name of the detenu was put) mentioning five different kind of prejudicial activities, the detaining authority not being sure about the exact kind of prejudicial activity for which the detenu was sought to detained)

[6] *Tahera Islam v. Secretary, Home*, 40 DLR 193

satisfaction or the opinion of the detaining authority must be based on such facts and materials. Thus absence of nexus between some of the reasons shown in the detention order and the facts and reasons disclosed in the grounds supplied may lead to the conclusion of non-application of mind by the detaining authority.[1] Where the grounds of detention merely repeat the language of the law and nothing else, it betrays non-application of mind by the detaining authority.[2] In the same way, if the detention order mentions particular provisions of the detention law and the grounds relate to some other provisions of that law, the detention is held illegal.[3] Art.33(4) requires that the detenu will have to be supplied with the grounds of detention and when no grounds are supplied to the detenu the detention shall be unlawful. Where the detention order mentioned five different kind of prejudicial acts and the grounds supplied did not cover one of such prejudicial acts, the detention was held to be unlawful.[4] If the law prescribes that the grounds are to be supplied within a certain period, supply of the grounds within the specified time is mandatory and failure to supply the grounds within the specified period renders the detention unlawful.[5] If the detention law does not prescribe any time for serving the grounds, the requirement of art.33(4) will be fulfilled if the grounds are supplied within a reasonable time. What time will be reasonable will depend on the facts and circumstances of each case, but as the facts and materials must co-exist with the order of detention and as one detention law prescribes 15 days' time, the court may not be inclined to hold more than 15 days' time to be reasonable under any circumstance.[6] It may be argued that even 15 days is too long having regard to the fact that the grounds must co-exist.

5.107 The requirement of supply of the grounds mandated by the Constitution is not a mere formality and is intended as a *post facto* compliance of the principles of natural justice so that the detenu may

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[1] *Khair Ahmed v. Ministry of Home*, 40 DLR 353

[2] *Amaresh Chandra v. Bangladesh*, 31 DLR (AD) 240

[3] *Ranabir Das v. Ministry of Home*, 28 DLR 48; *Tahera Islam v. Secretary, Home*, 40 DLR 193

[4] *Rama Rani v. Bangladesh*, 40 DLR 364

[5] *Abdul Latif Mirza v. Bangladesh*, 31 DLR (AD) 1,14; *Farida Rahman v. Bangladesh*, 33 DLR 130; *Shyam Sunder Rajgharia v. M.A. Salam*, 1988 BLD 127; *Khair Ahmed v. Ministry of Home*, 40 DLR 353; *Sayedur Rahman v. Secretary, Home Affairs*, 1986 BLD 272

[6] see the observation of the Court in *Dr. Habibullah v. Secretary, Ministry of Home Affairs*, 41 DLR 160

have an opportunity of controverting the grounds of detention and disabuse the authority about any misapprehension about any fact. In that view of the matter, the reasons stated in the initial detention order cannot be a substitute of the grounds required to be communicated[1] and the grounds must not be vague or indefinite and must be of such specificity as would enable the detenu to make a meaningful representation to the detaining authority.[2] Thus if the grounds supplied are vague or indefinite and the court is of the opinion that it was not possible for the detenu to make a proper representation, the detention will be unlawful.[3] When the grounds mentioned that the detenu was an active member of a party which had the programme of overthrowing the government and he organised and participated in the prejudicial activities of the party in the district of Pabna and addressed large number of public meetings at different places within Serajganj sub-division and vehemently criticised the fundamental principles of the Government of Bangladesh established by law, but did not give material particulars as to time, place and the nature of the acts, the court found the grounds too vague to sustain the detention order.[4]

5.108 The grounds having been supplied, the inquiry of the court will be whether the grounds are relatable to the provisions of the detention law and whether the grounds are vague and indefinite. A detention for non-payment of loan money was held illegal as it was not a prejudicial act within the meaning of the Special Powers Act.[5] The grounds which form the basis of satisfaction when formulated are bound to contain certain facts, but mostly they are themselves deductions of facts from

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[1] *Chunnu Chowdhury v. D.M.*, 41 DLR 156

[2] *Abdul Latif Mirza v. Bangladesh*, 31 DLR (AD) 1; *Ahmed Nazir v. Bangladesh*, 27 DLR 199 (in this case the Court found that the grounds were not vague); *Mansur Ali v. Secy. Ministry of Home*, 42 DLR 273; *Habiba Mahmud v. Bangladesh*, 45 DLR (AD) 89; *Maksuda Begum v. Secy. Ministry of Home Affairs*, 52 DLR 174

[3] *Ranabir Das v. Ministry of Home*, 28 DLR 48; *Rama Rani v. Bangladesh*, 40 DLR 364; *Shyam Sunder Rajgharia v. M.A. Salam*, 1988 BLD 127 (the grounds stating generally that the detenu was a black-marketeer and indulged in Hundi business and his activities were prejudicial to economic interest of the state and maintenance of law and order without giving any particulars, the grounds were held vague and indefinite); *Khair Ahmed v. Ministry of Home*, 40 DLR 353; *Sekendar Ali v. Bangladesh*, 42 DLR 346; *Azizul Haq v. Bangladesh*, 42 DLR 189; *Mansur Ali v. Secy. Ministry of Home*, 42 DLR 273; *Farzana Haq v. Bangladesh*, 1991 BLD 533

[4] *Abdul Latif Mirza v. Bangladesh*, 31 DLR (AD) 1,12.

[5] *Bangladesh v. Mirza Ali*, 2 MLR (AD) 300

facts. But it is not every detail in the possession of the government in respect of a detenu that must be cited in the grounds furnished. It is not the intention of the Constitution that the grounds to be furnished should be set out with particularity and exactness of a charge of a criminal trial.[1] The document containing grounds must be construed as a whole. It is a fundamental mistake to make a dissection of the grounds which is a composite piece and then to analyse them in isolation finding fault with each dissected part.[2] For failure to procure sufficient quantity of paddy from the Union, its Chairman was detained under the Special Powers Act, but the court held that any activity which may prejudice the supply and services essential to the community did not include the failure to procure paddy and declared the detention to be unlawful.[3] Criticism of an ideology, namely, Mujibbad, cannot be a prejudicial act within the meaning of the Special Powers Act and detention on that ground and on the grounds that the detenu was a critic of the then ruling party was held unlawful.[4] The court will inquire whether the satisfaction of the detaining authority was based on materials[5] and for that matter shall examine the grounds of detention. If necessary, the court may require the detaining authority to produce the materials in support of the grounds before the court.[6] The court shall examine whether the materials are such that a reasonable man could have come to the conclusion reached by the detaining authority.[7] Where the detenu was detained for making prejudicial speech on a particular day as the District General Secretary of J.S.D., but no supporting materials were placed before the court by furnishing the extract of the speech, the court declared the detention to be unlawful.[8] In some cases it has been held that when specific case has

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[1] *Abdul Latif Mirza v. Bangladesh*, 31 DLR (AD) 1

[2] *Bangladesh v. Dr. Dhiman Chowdhury*, 47 DLR (AD) 52

[3] *Naderuzzaman v. Bangladesh*, 27 DLR 304

[4] *Md. Anwar v. State*, 29 DLR 15; *Shamsuddin v. Bangladesh*, 28 DLR 117 (collection of money for construction of Ananda Bazar may under certain circumstances make the detenu liable for breach of trust or fraud, but cannot constitute a ground for preventive detention under special Powers Act)

[5] *Asmatullah v. Bangladesh*, 28 DLR 22; *Faisal Mahtab v. Bangladesh*, 44 DLR 168

[6] *Abdul Latif Mirza v. Bangladesh*, 31 DLR (AD) 1; *Ahmed Nazir v. Bangladesh*, 27 DLR 199; *Faisal Mahtab v. Bangladesh*, 44 DLR 168

[7] *Abdul Latif Mirza v. Bangladesh*, 31 DLR (AD) 1; *Aruna Sen v. Bangladesh*, 27 DLR 122; *Khair Ahmed v. Ministry of Home*, 40 DLR 353; *Habiba Mahmud v. Bangladesh*, 45 DLR (AD) 89; *Farzana Haq v. Bangladesh*, 1991 BLD 533

[8] *Selina Begum v. Bangladesh*, 27 DLR 291; *Md. Asmatullah v. Bangladesh*, 28 DLR 22 (though the Court was speaking about 'sufficient materials', the discussion shows

been started on certain facts, those facts cannot be the basis of preventive detention.[1] The principle is too broadly stated. This may be a correct proposition when it involves minor offences. But where the specific case involves a serious offence and the nature of the act is such that the detaining authority acting reasonably may form an opinion that it is necessary to detain the person to prevent him from doing prejudicial acts, the detention may not be unlawful.[2] Thus if a man is involved in a number of cases of rioting with deadly weapon, it may be the basis of a valid detention order even though a specific case has been started.

5.109 Though the court will not go into the question of adequacy or sufficiency of the materials, the court will interfere if it finds that the order of detention has been passed upon consideration of the grounds which are irrelevant for the purpose of the law or has left out of consideration relevant materials. Where the detenu is detained on the ground that he was an active member of a party whose programme was to overthrow the government and started lawless activities in furtherance of the programme and in the meanwhile that government had been overthrown, the ground is irrelevant for the continued detention of the detenu.[3] The ground that the detenu had committed a crime one year before the order of detention without any further statement that the detenu has since repeated the criminal act or that there is likelihood of his repeating such act is irrelevant as for an individual isolated act of crime preventive detention law cannot be resorted to unless the authority has materials to apprehend recurrence of the crime.[4] If the detaining authority has acted on several grounds some of which are irrelevant, vague or non-existent, the court will hold the detention to be unlawful as it is not possible for the court to determine how far the detaining authority has been influenced by the irrelevant, vague or non-existent grounds and whether the authority would have passed the detention order had it not taken the irrelevant, vague or non-existent grounds into consideration.[5] But if there are materials to hold that the ground which is

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that the Court was applying the reasonableness test)

[1] *Sayedur Rahman v. Secy. Ministry of Home*, 1986 BLD 272; *Shamsuddin v. Bangladesh*, 28 DLR 117; *Shahidul Haq v. East Pakistan*, 20 DLR 1005; *Mansur Ali v. Secy. Ministry of Home*, 42 DLR 273; *Azizul Haq v. Bangladesh*, 42 DLR 189

[2] *Habiba Mahmud v. Bangladesh*, 45 DLR (AD) 89; see *Mominul Haq v. Bangladesh*, 1993 BLD 91

[3] *Abdul Latif Mirza v. Bangladesh*, 31 DLR (AD) 1,11

[4] Ibid; *Habiba Mahmud v. Bangladesh*, 45 DLR (AD) 89

[5] *Abdul Latif Mirza v. Bangladesh*, 31 DLR (AD) 1 (per D.C. Bhattacharya J); *Krisna*

is bad or irrelevant is of inconsequential nature, and that may be in rare cases, then the court may sustain the order of detention, but that will depend upon the facts of a particular case.[1]

5.110 The court will also hold a detention unlawful if the court on materials produced before it comes to a finding that the detention order is vitiated by malice in law or malice in fact. If the court finds that the detention order has been passed for purposes not authorised by law[2] or for mixed purposes, some authorised and others not authorised, the detention will be held unlawful.

5.110A When an order of detention is challenged, the burden of proof that the detention is valid is on the State which has to be discharged by an affidavit and producing the materials. If no affidavit is filed controverting the allegations made in the writ petition, the State will be taken to have failed in discharging the burden.[3] But if it is manifest from the writ petition itself that the cause or the manner of detention stands adequately explained and justified on the face of it, the State may not file an affidavit and may support the detention orally relying on the writ petition.[4]

5.111 In exercising the power under art.102(2)(b)(i) the court is concerned with the detention of the detenu and the court will examine the detention order to find out whether the detention is valid. Thus the writ will lie when the detention continues even after the period mentioned in the detention order has expired. Where the detention order under challenge becomes stale with the lapse of time or is withdrawn and the detention is continued by a fresh order, it is not necessary to file a fresh application challenging the subsequent detention order as the

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Gopal v. Bangladesh, 31 DLR (AD) 145; *Aruna Sen v. Bangladesh*, 27 DLR 122; *Humayun Kabir v. State*, 28 DLR 259; *Hasina Karim v. Bangladesh*, 44 DLR 366; *Jahanara Begum v. State*, 46 DLR 107; *Mahboob Anam v. East Pakistan*, PLD 1959 Dac 774; *Rameswar Lal Patwari v. Bihar*, AIR 1968 SC 1303; *Motilal Jain v. Bihar*, AIR 1968 SC 1509.

[1] *Krisna Gopal v. Bangladesh*, 31 DLR (AD) 145

[2] *Sajeda Parvin v. Bangladesh*, 40 DLR (AD) 178 (Where detention was ordered to prevent the detenu from indulging in prejudicial activities, but the Home Minister stated in Parliament that he has been detained to prevent him from escaping from the clutches of law, the court held that the detention order was passed for collateral purposes and was illegal.)

[3] *Shameem v. Bangladesh*, 47 DLR (AD) 109

[4] *Nasima Begum v. Bangladesh*, 49 DLR (AD) 102

writ petition is maintainable so long as the detention continues whether under the impugned order or under any subsequent order.[1] A *habeas corpus* proceeding is not maintainable if the person concerned has been released. But a *certiorari* proceeding is maintainable after release from detention for declaration that the order of detention was without lawful authority.[2]

5.112 ***Writ of Quo Warranto***: Art.102(2)(b)(ii) provides that on the application of any person the High Court Division may inquire whether a person holding or purporting to hold any public office is holding it under a legal authority. This is a jurisdiction to issue writ in the nature of *quo warranto*. This writ is used to ensure that no one can hold any public office without having a valid claim to that office.[3] The writ lies "against a person who claimed or usurped an office, franchise or liberty, to inquire by what authority he supported his claim, in order that the right to the office or franchise might be determined. It also lay in cases of non-user, abuse, or long neglect of a franchise."[4] "Broadly stated, the quo warranto proceeding affords a judicial inquiry in which any person holding an independent substantive public office, or franchise, or liberty, is called upon to show by what right he holds the said office, franchise or liberty; if the inquiry leads to the finding that the holder of the office has no valid title to it, the issue of the writ of quo warranto ousts him from that office. In other words, the procedure of quo warranto confers jurisdiction and authority on the judiciary to control executive action in the matters of making appointments to public offices against the relevant statutory provisions; it also protects a citizen from being deprived of a public office to which he may have a right."[5]

5.113 In order that this writ may issue, the office must be a public office of a substantive character[6] created by the Constitution, statute or

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[1] *Sajeda Parvin v. Bangladesh*, 40 DLR (AD) 178; *Ahmed Nazir v. Bangladesh*, 27 DLR 199; *Alam Ara Huq v. Bangladesh*, 42 DLR 98 (when brought to the notice of the court each and every order passed while the detention continues will come under scrutiny for satisfaction of the Court that the detenu is not being held in custody without lawful authority or in an unlawful manner)

[2] *Mirza Ali v. State*, 43 DLR 144 affirmed in *Bangladesh v. Mirza Ali*, 2 MLR (AD) 300

[3] *University of Mysore v. Govindrao*, AIR 1965 SC 491

[4] Halsbury - Laws of England, 4th ed., vol.1, para 169

[5] *University of Mysore v. Govinda Rao*, AIR 1965 SC 491

[6] *R. v. Speyer*, [1916] 1 KB 595

statutory power.[1] "A public office is a right, authority and duty, created and conferred by law, by which an individual is vested with some portion of the sovereign functions of the government to be exercised by him for the benefit of the public, for the term and by the tenure prescribed by law"[2] and thus it is an office in which the public have interest. By the expression 'substantive character' is meant that the holder of the office must be an independent official and not merely one discharging the function as a deputy or servant at the will and pleasure of others.[3] But the writ will lie in respect of an office held at pleasure, provided that the office is one of a public and substantive character.[4] It has been held that the office of Speaker of a legislature is a public office and writ can issue to him to inquire by what authority he supported his claim to the office.[5] In *G.D. Karkare v. T.L. Shevde*[6] the petitioner prayed for the writ on the allegation that the respondent was not qualified to be the Advocate-General as he exceeded the age limit and the court held that the office of the Advocate-General is a public office. The membership of Privy Council was held to be a public office though held at the pleasure of the Crown.[7] The office the of Chief Justice or a Judge of the High Court is a public office and a writ may lie against him.[8] The writ will lie against Ministers,[9] members of Parliament[10], Chairman of municipality[11], members of Municipal Board[12], Administrator of Municipal Corporation appointed by the government[13],

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[1] *R. v. Saint Martin's Guardians*, [1851] 7 QB 149

[2] Ferris - Extra-ordinary Legal Remedies, Para 145; *Abdur Rahman v. Group Captain (Retd) Shamim Hossain*, 49 DLR 628 (Member (Administration) of Civil Aviation Authority is not a public office as the tenure is not prescribed by any law and is not invested with any portion of the sovereign functions of the government)

[3] *R. v. Speyer*, [1916] 1 KB 595; *Darley v. R.*, [1846] 12 Cl and Fin 520 = 8 ER 1513

[4] Halsbury's Laws of England, 4th ed. vol.1, para 172

[5] *Anand Behari v. Ram Sahay*, AIR 1952 MB 31

[6] AIR 1952 Nag 330; see *Dr. Kamal Hossain v. Serajul Islam*, 21 DLR (SC) 23

[7] *R. v. Speyer*, [1916] 1 KB 595

[8] *Parameshwaran v. State Prosecutor*, AIR 1951 T.C. 45; *Queen Empress v. Ganga Ram*, ILR 16 All 136

[9] *Fazlul Quader Chowdhury v. Abdul Haq*, 18 DLR (SC) 69

[10] *Farzand Ali v. West Pakistan*, 22 DLR (SC) 203; *Zahedul Islam Khan v. H.M. Ershad*, 6 BLC 301

[11] *Venkataraya v. Shivarama*, AIR 1961 AP 250

[12] *Bindra Ban v. Sham Sunder*, AIR 1959 Punj 83

[13] *Awas Samasya v. M.P.*, AIR 1983 M.P. 12

Chief Engineer of Municipal Board[1] member of Bar Council[2], Chairman or member of Union Parishad[3], member of Senate or Syndicate of a University[4], Dean of a Faculty in a University[5], Chief Metropolitan Magistrate[6], government pleader[7] or against members of civil service[8]. If there was any complaint about the appointment or promotion of an officer who was not eligible under the rules to be appointed or promoted, the proper remedy was to make an application for *quo warranto*.[9] The writ will not issue to question the claim to any office of a private association, institution or college or school or a private corporation.[10] Professors and Readers of Mysore University were not held to be holding any public office and no writ would lie against them.[11] Appointment made as stop-gap arrangement such as an appointment of a Chief Minister pending his election within six months was held not liable to be questioned.[12]

5.114 The person asked to show cause as to his entitlement to the office must be in actual possession of the office.[13] Thus a writ petition in the nature of *quo warranto* questioning the election of the President of the Republic was not maintainable when the President elect had not yet taken oath of office.[14] Similarly, where the election of a Chairman of a local council was challenged after declaration of the result of the election, but before the respondent took oath and entered the office the

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[1] *Asghar Ali v. Dhirendra Nath*, 49 C.W.N. 658

[2] *Dr. Kamal Hussain v. Serajul Islam*, 21 DLR (SC) 23

[3] *Mostafa Hossain v. S.M. Faruque, 40 DLR (AD) 10; Farid Mia v. Amjad Ali*, 42 DLR (AD) 13; *Mohammad Sadeque v. Rafique Ali*, PLD 1965 Dac 330

[4] *Satish Chandra v. University of Rajsthan*, AIR 1970 Raj 18; *Ajoy Kumar v. Saila Behari*, AIR 1957 Orissa 159

[5] *Rameswaram v. University of Jodhpur*, AIR 1974 Raj 255

[6] *Idrisur Rahman v. Shahiduddin*, 1999 BLD 291

[7] *Ram Chandran v. Alagiriswami*, AIR 1961 Mad 450

[8] *Ghulam Hussan v. India*, AIR 1973 SC 1138

[9] Ibid

[10] *Azizur Rahman v. Nasiruddin*, PLD 1965 SC 236; *Jamalpur Arya Samaj v. Daulat Ram*, AIR 1954 Pat 294; *Amarendra v. Narendra*, AIR 1953 Cal 114

[11] *Venkateshwami v. Univ. of Mysore*, AIR 1964 Mys 159; *S.B. Roy v. P.N. Banerjee*, 72 CWN 50

[12] *Har Saran Varma v. Chandra Bhan Gupta*, AIR 1962 All 301

[13] Ferris - Extra-ordinary Legal Remedies, para 146

[14] *Abu Bakr Siddiqui v. Mr. Justice Shahabuddin*, 49 DLR 1 (It was, however, held that the petition could be treated as one of *certiorari*)

application for writ was held non-maintainable.[1] Where a member of a legislature has tendered resignation, but the Speaker has not determined its genuineness, it was held that the writ petition filed before the decision of the Speaker was premature.[2]

5.115 The writ will issue where there is a clear violation of any constitutional provision[3] or any provision having the force of law[4] as distinguished from an administrative instruction[5] in entering or holding the public office. A person will be found to hold the public office without lawful authority if he is not qualified to hold the office[6] or some mandatory provision of law which cannot be cured as an 'irregularity' has been violated in making the appointment or in entering the office[7] or when the appointment has been made by a person who had no authority to appoint.[8] The court will issue the writ in respect of an elective office if the holder of the office is disqualified at the time of election or thereafter[9] or where the election has been held without any authority of law[10], or there was an irregularity resulting in people being unable to express their views properly[11] or the election was held on the basis of an electoral roll prepared in contravention of the mandatory provision of law[12].

5.116 Art.102(2) does not require that the applicant for a writ of *quo warranto* must be an aggrieved party.[13] Any person may apply as the

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[1] *Farid Mia v. Amjad Ali*, 42 DLR (AD) 13; *Warris Miah v. Secy. Ministry of LGRD*, 41 DLR 51; *Parmatma Ram v. Shri Chand*, AIR 1962 H.P. 19

[2] *Surat Singh v. Sudama Prasad*, AIR 1965 All 536

[3] *Fazlul Quader Chowdhury v. Abdul Haq*, 18 DLR (SC) 69; *Baijnath v. U.P.*, AIR 1965 All 151

[4] *Statesman v. Deb*, AIR 1968 SC 1495

[5] *Alex v. Urmese*, AIR 1970 Ker 312

[6] *Mostafa Hussain v. S.M. Faruque*, 40 DLR (AD) 10; *Shamsul Huq Chowdhury v. Justice Abdur Rouf*, 49 DLR 176; *Pentiah v. Muddala*, (1961) 2 SCR 295

[7] *Shamsul Huq Chowdhury v. Justice Abdur Rouf*, 49 DLR 176; *University of Mysore v. Govind Rao*, AIR 1965 SC 491

[8] *Joseph v. Sukumaran*, AIR 1987 Ker 140

[9] *Mostafa Hussain v. S.M. Faruque*, 40 DLR (AD) 10; *Md. Yousuf v. West Pakistan*, 22 DLR (SC) 367; *Zahedul Islam Khan v. H,M, Ershad*, 6 BLC 301

[10] *Kasinath v. Bombay*, AIR 1954 Bom 41

[11] *Bhairulal v. Bombay*, AIR 1954 Bom 116

[12] *Nityananda v. Khalil*, AIR 1961 Punj 105; *Hafiz v. State*, AIR 1967 M.P. 257

[13] *Dr. Kamal Hussain v. Serajul Islam*, 21 DLR (SC) 23; *Mohammad Sadeque v. Rafique Ali*, PLD 1965 Dac 330; *Abu Taher Mia v. Farazuddin*, 41 DLR 543

inquiry relates to a matter in which the public are interested.[1] Any member of the public acting in good faith whose conduct does not disentitle him to an equitable relief may apply for the writ without showing any violation of his legal right.[2] A member of the legislature will have *locus standi* to apply for the writ if he *bona fide* believed that the Speaker of the legislature held his office without lawful authority.[3] The relief is discretionary and hence in an application for *quo warranto* it is legitimate for the court to examine the *bona fide* of the applicant and where the applicant is found to have an ulterior motive[4], or is not playing his own game and filed the writ petition not for vindication of any public right or for redress of public wrong but to redeem the discomfiture of the defeated candidates[5] no relief will be granted. The court will not listen to a relator, as a mere stranger, to disturb a corporation with which he has no concern, nor even to a corporator who has acquiesced or perhaps concurred in the very act which he afterwards comes to complain of when it suits his purpose.[6] It is not a writ of course on sheer technicalities on a doctrinaire approach.[7] Where the title to a corporate office is in question, the court will not grant leave to a relator to file a *quo warranto* information as a matter of course simply because a reasonable doubt as to the legal validity of the title is shown; but the court will take into consideration the consequences, which will be likely to follow if the writ is issued and also all the circumstances of the application[8] unless the illegalities are grave and manifest as distinguished from breach of technical rules.[9] The writ will not be issued where it would be a futile exercise. In *P.L. Lakhanpal v. A.N. Roy*[10] the relator sought the writ of *quo warranto* against the Chief Justice of India who was appointed superseding three senior Judges, but as in the meanwhile all the three judges resigned, the court held that the writ must be refused as the alleged defect in the original appointment could be

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[1] *R. v. Speyer*, [1916] 1 KB 595; *S.M. Wali Ahmed v. Mahfuzul Haq*, PLD 1957 Dac 209

[2] *Sivaramakrishnan v. Arumugha Mudaliar*, AIR 1957 Mad 17

[3] *Nesamony v. Varghese*, AIR 1952 Tr.C. 66

[4] *Farid Mia v. Amjad Ali*, 42 DLR (AD) 13; *R. v. Speyer*, [1916] 1 KB 595

[5] *Dr. Kamal Hussain v. Sirajul Islam*, 21 DLR (SC) 23

[6] *The King v. Clerke*, [1800] 1 East 38; *Cama v. Banwarilal*, AIR 1953 Nag 81

[7] Ibid

[8] *Mohichandra v. Secretary, Local Self-government*, AIR 1953 Assam 12

[9] *Bhairulal v. Bombay*, AIR 1954 Bom 116

[10] AIR 1975 Del 66

cured by re-appointment. The court may also refuse the relief where it would be vexatious.[1]

5.117 A person may hold an office validly or may be an intruder or a *de facto* holder of the office. An intruder is one who has no semblance of title to the office and all acts done by him will be absolutely void. The position of a *de facto* holder of office is in between an intruder and *de jure* holder of office. A holder of office may become a *de facto* holder because of any defect in his election or appointment or because of disqualification or want of qualification. As a matter of public policy, on application of the doctrine of necessity, acts done by a *de facto* holder of office are treated as valid.[2] Speaking about the acts of a *de facto* holder of office, Lord Chancellor St. Leonards observed –

> You will at once see to what it would lead if the validity of these acts, when in such office, depended upon the propriety of their election. It might tend, if doubts were cast upon them, to consequences of the most destructive kind. It would create uncertainty with respect to the obedience to the public officers and it might also lead to persons, instead of resorting to the ordinary legal remedies to set right anything done by these officers, taking the law in their own hands.[3]

A judge *de facto* is one who is not a mere intruder but holds office under a colour of title. Notwithstanding the defect in title to his office all judgments pronounced and orders made by him before his appointment if found invalid will have the same effectiveness as those of a judge *de jure*.[4] When a holder of office having a colour of title is declared to be holding the office without lawful authority, it takes effect from the date of the judgment without affecting the validity of the acts done by him prior to that date.[5]

5.118 The title of a holder of a public office cannot be challenged except by a direct proceeding in which he is a party.[6] Thus his title can be attacked in a proceeding for *quo warranto*, but not in a collateral

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[1] *Mohichandra v. Secretary, Local Self-government*, AIR 1953 Assam 12; *G.D. Karkare v. T.L. Shevde*, AIR 1952 Nag 330

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

[3] *Edwin Ward Scadding v. Louis Lorant*, 10 E.R. 164

[4] *Gokaraju v. A.P.*, AIR 1981 SC 1473

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

[6] Ibid; *Haryana v. Haryana Transport*, AIR 1977 SC 237; *Gokaraju v. A.P.*, AIR 1981 SC 1473

proceeding ,i.e., *mandamus* or *certiorari*[1] or in a proceeding to declare invalid an amendment of the constitution on the ground that some of the members of Parliament who participated in voting were disqualified[2] or in a proceeding to quash conviction ordered by a *de facto* judicial officer[3] or by way of defence in a criminal proceeding[4] or to question the title of the appellate court in an appeal before him[5]. The Indian Supreme Court, however, held that the title of a holder of office can be challenged in a collateral proceeding if in that proceeding the holder of the office is impleaded as a party inasmuch as the proceeding in such case becomes a combined proceeding of *quo warranto* and *mandamus* or *certiorari*.[6] As there is no difficulty under art.102 to combine reliefs, writ of *quo warranto* may issue with a writ of *certiorari* or *mandamus*.

5.119 ***Nature of the proceedings:*** As we have seen, a writ of *habeas corpus* is not discretionary. It is obligatory on the part of the High Court Division to be satisfied that a person is not being held in custody illegally or in an unlawful manner. All other writs are generally discretionary. The avowed purpose of the exercise of writ jurisdiction is to further justice. If in a case it appears to the court that the issuance of the writ prayed for would work injustice or perpetuate illegality[7] or subvert the public interest, the court may refuse to grant the relief. The High Court Division will exercise its discretion in accordance with judicial consideration and well established principles[8] and will interfere where any improper exercise of power or non-exercise of jurisdiction has caused manifest injustice.[9] Where a settlement of dispute between the management and one of the two rival groups of officers of a registered trade union is found to be beneficial to the substantial body of workmen of the factory and the office bearer of the other rival group

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[1] *Parameswaran v. State Prosecutor*, AIR 1951 T.C. 45; *Menon v. State*, AIR 1970 Ker 165

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

[3] *Pulin v. E.K.*, (1912) 15 C.L.J. 517

[4] Ibid

[5] *Parameswaran v. State Prosecutor*, AIR 1951 T.C. 45.

[6] *Haryana v. Haryana Transport*, AIR 1977 SC 237; *Gokaraju v. A.P.*, AIR 1981 SC 1473

[7] *Tufail Md. v. Dawoodi*, 17 DLR (SC) 325; *Raunaq Ali v. Chief Settlement Commr.*; PLD 1973 SC 236; *Md. Baran v. Member (S. & R.)*, PLD 1991 SC 691; *M.D. of Rupali Bank v. Lab. Court*,45 DLR 397; *Abdul Hamid v. East Pakistan*, 24 DLR 142

[8] *Janardhan Reddy v. Hydrabad*, AIR 1951 SC 217

[9] *Kallolimath v. Mysore*, AIR 1977 SC 1980

was present when the settlement was filed and evidence was recorded there, but took no part in the proceeding before the tribunal, the court would not interfere with the award.[1] However, the court will not withhold the relief except where it becomes demonstrably clear that injustice will ensue or the public interest will be jeopardised. Where the public interest was going to be seriously prejudiced, the Appellate Division upheld the order of the High Court Division setting aside an *exparte* judgment even though the respondent was in default in filing affidavit-in-opposition.[2] In a writ of prohibition the relief can be claimed as of right where the defect of jurisdiction is clearly demonstrated and is apparent.

5.120 *Conduct of the applicant:* As the remedy given in writ jurisdiction is equitable, the applicant must come with clean hands and his application may be rejected for his improper conduct. His conduct in three stages may be a disentitling factor, conduct before presenting the application, conduct at the time of presenting the application and conduct after presenting the application. Acquiescence of a party is a fact to be taken into consideration in giving relief in writ jurisdiction. Where before challenging a certificate proceeding, the petitioner submitted to the jurisdiction of the certificate officer and prayed for payment of the certificate dues in instalments[3], or the petitioners did not raise objection to the transfer of their cases and submitted to the jurisdiction of the officer to whom the cases were transferred, the relief was denied.[4] Waiver and election may debar a party from making a certain claim.[5] Thus a public servant who had earlier been dismissed from service and contested in the election to Parliament was held to have accepted his dismissal from service as otherwise he could not contest in

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[1] *Workmen of Government Silk Factory v. Presiding Officer, Industrial Tribunal*, AIR 1973 SC 1423; *Jagan Singh v. State Tribunal, Appellate Tribunal*, AIR 1980 Raj 1 (even if any error of law was committed by the tribunal against whose decision writ is filed, that would not be a ground for invoking the jurisdiction when it is not in furtherance of justice, but would restore an illegal order); *Dahyabhai v. Ramji*, AIR 1971 Guj 232 (an order directing restoration of land to the respondent passed without jurisdiction but not unjust will not be set aside at the instance of the petitioner who has deprived the respondent of the possession of land without due course of law)

[2] *Moni Begum v. RAJUK*, 46 DLR (AD) 154

[3] *Shafiqur Rahman v. Certificate Officer*, 29 DLR (AD) 232

[4] *Pannalal Binjraj v. India*, AIR 1957 SC 397

[5] See 5.35

the parliamentary election.[1] A person having taken benefit under an order cannot turn round and term it as illegal.[2] In *Prasan Roy v. CMDA*[3] the petitioner participated in an arbitration proceeding without any objection and challenged the arbitration proceeding as without jurisdiction on the ground of known disability, no relief was granted. In the matter of acquiescence, however, it should be kept in mind that if there is a patent lack of jurisdiction, failure of a party to raise objection will not be fatal[4] as inherent lack of jurisdiction goes to the very root of the matter and neither consent nor acquiescence can confer jurisdiction.[5] The Pakistan Supreme Court pointed out that if relief is denied on the ground of acquiescence in a case of patent want of jurisdiction, "actions in excess or perversion of public powers would gain enormous access of immunity".[6] But where the want of jurisdiction is latent, failure to raise objection will be fatal.[7] If the applicant is guilty of bad faith, fraud or improper conduct with respect to the matter in controversy, the court may refuse the relief. Thus where the applicant fraudulently obtained a permit which he complains has been illegally cancelled[8] or the applicant is a trespasser in the land and complaining that he is being evicted by an authority which has no authority to evict[9] or the applicant is claiming a property to be his own while previously he admitted that it was a waqf property[10], the application may be rejected by the court. The court found

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[1] *Bangladesh v. Mahbubuddin Ahmed*, 50 DLR (AD) 154; *Akhtar Hossain v. Secy. Ministry of Health*, 1 BLC 549

[2] *Nurul Huq v. Bangladesh*, 51 DLR (AD) 140

[3] AIR 1988 SC 205

[4] *Farquharson v. Morgan*, [1894] 1 QB 552

[5] *U.C. Bank v. Their Workmen*, AIR 1951 SC 230

[6] *Md. Afzal v. Board of Revenue*, 19 DLR (SC) 266

[7] *Prasan Roy v. CMDA*, AIR 1988 SC 205; *Ghulam Mohiuddin v. Ch. Settlement Commr*, 16 DLR (SC) 654,662 (The principle upon which the writ is refused in such cases is not that jurisdiction has been conferred on the Tribunal concerned by waiver and acquiescence but that even though the impugned order is without jurisdiction the person seeking to have it quashed should not be granted that discretionary relief as he had stood by and allowed the Tribunal to usurp a jurisdiction which it did not possess knowing that the Tribunal concerned was committing such an illegality in consequence of something done by the person himself.); *Altaf Hossain v. Ch. Settlement Commr.*, 18 DLR (SC) 164

[8] *Mangilal v. App. Tribunal*, AIR 1957 Raj 167

[9] *Mohiuddin v. State*, AIR 1960 M.P. 265; *Meridian Int'l (Pvt) Ltd. v. RAJUK*, 53 DLR 35

[10] *Hafiz Md. v. U.P.S.C. Board of Waqf*, AIR 1965 All 333

a petitioner precluded from challenging an order which she accepted at the first instance and on the basis of that made application to reap some advantage.[1]

5.121 An applicant will be guilty of improper conduct in presenting an application for writ if he suppresses material facts[2] or if he does not candidly or fairly state the facts, but stated them in such a way as to mislead or deceive the court[3] and the court may refuse to grant the relief. But omission to mention a particular fact does not necessarily disentitle the petitioner to get the relief unless that fact is material to the relief claimed.[4] In the same way, the court may refuse to grant relief to an applicant who after presentation of the application filed an affidavit-in-reply or supplementary affidavit suppressing facts or making statements to mislead the court or has been guilty of any unconscionable conduct in respect of the parties to, or the subject matter of, the proceeding.

5.122 *Delay or laches*: In order to avail the remedy in writ jurisdiction the petitioner is required to come to the court without any delay.[5] Delay in approaching the court is a circumstance disentitling the petitioner in getting the equitable relief in this jurisdiction.[6] The rule that

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[1] *Abdul Majid v. Noor Jahan*, PLD 1967 SC 221; *Poornanandarao v. A.P.*, AIR 1982 A.P. 141

[2] *Awlad Hossain v. Haji Moniruddin*, 40 DLR 427 (petitioner did not disclose in the petition the fact of filing a suit for the same relief and obtained stay order from the vacation Bench); *Abdul Khaliq v. Election Commn.*, 1989 BLD 415; *Ghulam Mohiuddin v. Chief Settlement Commissioner*, 16 DLR (SC) 654; *Haryana v. Karnal Distillery*, AIR 1977 SC 781 (petitioner filed writ petition for renewal of liquor licence suppressing material facts in respect of earlier proceeding before the Supreme Court); *Asiatic Engineering v. Achhru Ram*, AIR 1951 All 746 (obtained interim order supressing facts); *India v. Muneesh Suneja*, AIR 2001 SC 854

[3] *R. v. Kensington I.T.C.*, [1917] 1 KB 486; *Tilokchand v. H.B. Munshi*, AIR 1970 SC 898, Para 36; *Haryana v. Karnal Distillery*, AIR 1977 SC 781; *Ratan Chandra v. Adhar Biswas*, AIR 1952 Cal 72; *Harbans Lal v. Divisional Supdt., Central Rly*, AIR 1960 All 164

[4] *Raghubir Singh v. Municipal Board*, AIR 1956 All 324; *Kalika Prasad v. Addl. Commissioner*, AIR 1956 All 103

[5] *Bangladesh v. Ghulam Azam*, 46 DLR (AD) 192 *Tilokchand v. H.B. Munshi*, AIR 1970 SC 898

[6] *Shafiqur Rahman v. Certificate Officer*, 29 DLR(AD) 232 (even in *certiorari* proceeding the aggrieved party must approach the court promptly where positive steps have been taken to his prejudice); *Abdul Hakim v. Bangladesh*, 49 DLR 438; *Sadekullah v. Bangladesh*, 3 BLC 90 *Mahmudur Rahman v. State*, 48 DLR 94; *Bangladesh v. Court of Settlement*, 48 DLR 502; *Mizan Howladar v. Bangladesh*, 1996

the court may not inquire into belated or stale claims is not a rule of law, but a rule of practice[1] based on sound and proper exercise of discretion. There is no inviolable rule that whenever there is a delay the court must necessarily refuse to entertain the petition. The question is one of discretion to be exercised on the facts of each case.[2] The court is to balance the interest of the party affected by a decision, and the public interests.[3] The principle on which the court proceeds in refusing relief on the ground of delay or laches is that the rights which have accrued to others by reason of the delay in filing the application should not be allowed to be disturbed.[4] The question whether a party is guilty of laches depends upon facts of each case.[5] The petitioner may explain the delay in filing the petition in which case it will not be a disentitling factor.[6] The test is not one of physical running of time. Where the circumstances justifying the conduct exists, the illegality which is manifest cannot be sustained on the sole ground of laches.[7] The exercise of discretion by the court even where the application is delayed is to be governed by the objective of promoting the public interest and good administration; and on that basis it cannot be said that a discretion would not be exercised in favour of interference where it is necessary to prevent continuance of the usurpation of an office or perpetuation of illegality.[8] Often submission of representations to the government or public functionary for redress is taken as sufficient satisfactory explanation of the delay.[9] But the fact that in respect of matters in issue representations were being

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BLD 5; *Yunus Mia v. Secy. Ministry of Public Works*, 45 DLR 498; *Sadequddin v. RAJUK*, 46 DLR 205; *Sarwarjan Bhuiyan v. Bangladesh*, 1993 BLD 209; *Md. Athar v. Pakistan*, 14 DLR (SC) 166; *Oxford Knitting Mills v. Sukkur Municipality*, 1970 SCMR 537; *Suleman v. Board of Revenue*, 1970 SCMR 574; *Sk. Pir Mohd. v. Khulna Mun. Committee*, 19 DLR 55

[1] *Dehri Rohtas Light Rly v. Dist. Board*, AIR 1993 SC 802

[2] *Ramchandra v. Maharashtra*, AIR 1974 SC 259

[3] *Bangladesh v.Golam Azam*, 46 DLR (AD) 192

[4] Ibid

[5] *Tilokchand v. H.B. Munshi*, AIR 1970 SC 898

[6] *Dehri Rohtas Light Rly v. Dist. Board*, AIR 1993 SC 802; *U.P. v. Bahadur Singh*, AIR 1983 SC 845; *Golam Azam v. Bangladesh*, 45 DLR 423

[7] *Dehri Rohtas Light Rly v. Dist. Board*, AIR 1993 SC 802

[8] *Kashinath G. Jalmi v. The Speaker*, AIR 1993 SC 1873

[9] *Bangladesh v. Golam Azam*, 46 DLR (AD) 192; *Pakistan v. A.P. Hasumani*, 14 DLR (SC) 220; *Pakistan v. Abdul Hamid*, 13 DLR (SC) 100, 105; *Sushil Kumar v. India*, AIR 1986 SC 1636

received by the government all the time may not be sufficient to explain the delay. An aggrieved person cannot wait for an indefinite period for the result of his representation.[1] There is a limit to the time which can be considered reasonable for making representations. If the government has turned down a representation, the making of another representation on similar lines will not explain the delay.[2] When the delay is calculated to put the other party to the proceedings to a great loss or prejudice, the relief asked for will ordinarily be refused.[3] The provisions of the Limitation Act is not applicable in respect of writ petitions. In *M.P. v. Bhailal Bhai*[4] the Indian Supreme Court observed that the court may consider the delay unreasonable even if it is less than the period of limitation for civil action for the remedy, but where the delay is more than that period, it will almost always be proper for the court to hold that it is unreasonable.

5.123 ***Efficacious remedy:*** In England prerogative writs particularly writs of *mandamus* were not issued by the court when alternative remedy under the statute was available. This was a self-imposed rule of the court on the ground of public policy. Issuance of writs when alternative remedies were not availed would undermine the subordinate courts and tribunals. Under the Pakistan Constitution of 1956 the Supreme Court and the High Courts in issuing writs in the nature of the prerogative writs used to follow the rule of the English court. It was, however, pointed out that this rule of exhaustion of alternative remedies was a rule of the court and did not affect the jurisdiction of the court to entertain writ petitions.[5] But the Pakistan Constitution of 1962 provided that the High Courts would interfere only when there was no other adequate remedy available to the petitioner. The same position has been maintained in the Constitution which stipulates non-availability of efficacious remedy as a condition for interference by the High Court Division. In *Shafiqur Rahman v. Certificate Officer*[6] the Appellate Division noted the change and observed –

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[1] *Fazlur Rahman Akond v. Bangladesh*, 52 DLR (AD) 116

[2] *Rabindra Nath v. India*, AIR 1970 SC 470

[3] *Hari Singh v. U.P.*, AIR 1984 SC 1020 (the Court refused to condone the delay as it was likely to cause serious public prejudice); *Kadregula Srinivasha v. A.P.*, AIR 1960 A.P. 343

[4] AIR 1964 SC 1006

[5] *Md. Amir Khan v. Controller, Estate Duty*, 13 DLR (SC) 105

[6] 29 DLR (SC) 232

> ... if the alternative remedy is adequate and equally efficacious, in that case such an alternative remedy is a positive bar to the exercise of the writ jurisdiction even though the writ concerned is in the nature of certiorari.[1]

Art.102(2) having incorporated the rule of exhaustion of statutory remedies, existence of efficacious remedy will preclude relief under art.102(2).[2] The bar of efficacious remedy is not attracted when an infringement of fundamental right is alleged.[3] Where the petitioner had no means of knowing that her property was being treated as abandoned property, her failure to approach the Court of Settlement cannot preclude her from filing a writ petition.[4] In *Abdul Mukit Chowdhury v. Chief Election Commissioner*[5] it was stated that where a special forum is created by a statute for enforcement of a special right, the High Court Division should normally decline to exercise the constitutional power. It is submitted that in view of the constitutional mandate in this regard, it was not necessary to resort to this principle of special remedy provided by special law. It is also doubtful if in the absence of any constitutional mandate or practice such a principle can be invoked to prevent the exercise of the constitutional jurisdiction.

5.124 It may be seen that no distinction has been made between the different types of remedies for application of the rule which now applies to all the five types of remedies. Speaking about the rule, the Appellate Division in a later decision observed –

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[1] The observation of the High Court Division in *Tasmina Chowdhury v. Deputy Commr.*, 49 DLR 29, to the effect that the rule of efficacious remedy is not a rule of law, but a rule by which the court regulates its proceeding, it is submitted, is wrong.

[2] *Mahmudul Haque v. Md. Hedayetullah*, 48 DLR (AD) 128; *Controller of Examinations v. Mohiuddin*, 44 DLR (AD) 305; *Prof. Nurul Amin v. Vice Chancellor*, 50 DLR 405; *Dr. M.A. Hadi v. Bangladesh*, 50 DLR 218; *Delicia Dairy Food v. Collector of Customs*, 51 DLR 381; *Abdul Haque Sikder v. Divisional Manager*, 48 DLR 574 *Square Pharmaceuticals v. Bangladesh*, 3 BLC 22 *Trade Channel v. Collector of Customs*, 44 DLR 127; *Badrunnessa v. Vice-Chancellor*, 30 DLR 268; *M.B. Rahman v. D.C.T.*, 39 DLR 33; *Farid Mia v. Amjad ali*, 42 DLR (AD) 13; *Zaker Hossain v. Abdur Rahim*, 42 DLR (AD) 153

[3] *Jobon Nahar v. Bangladesh*, 49 DLR 108; *Saleha Begum v. Court of Settlement*, 49 DLR 243 (Fundamental right being infringed, writ petition filed after statutory remedy becomes barred by limitation is maintainable.); *Sazedur Rahman v. Secy. Ministry of Establishment*, 50 DLR 407

[4] *Secy. Ministry of Works v. Hasner Jahan*, 6 BLC (AD) 111

[5] 41 DLR 57

> In principle, where an alternative statutory remedy is available an application under Article 102 may not be entertained to circumvent a statutory procedure. There are, however, exceptions to the rule. Without attempting an exhaustive enumeration of all possible extraordinary situations we may note a few of them. In spite of an alternative statutory remedy an aggrieved person may take recourse to Article 102 of the Constitution where the vires of a statute or a statutory provision is challenged; where the alternative remedy is not efficacious or adequate; and where the wrong complained of is so inextricably mixed up that the High Court Division may, for the prevention of public injury and the vindication of public justice, examine that complain. It is needless to say that the High Court Division is to see that the aggrieved person must have good reason for by-passing an alternative remedy.[1]

Thus apart from the question as to when a remedy is efficacious, alternative remedy provided by a statute will be no bar to a writ petition if a statute or a provision of a statute under which the impugned action has been taken is itself challenged as unconstitutional or if private and public wrongs are so inextricably mixed up and the prevention of public injury and the vindication of public justice require it that recourse may be had to art.102(2).[2] In the same way, if the impugned action is wholly without jurisdiction in the sense of not being authorised by the statute or is in violation of a constitutional provision a writ petition will be maintainable without exhaustion of the statutory remedy.[3] Where the appeal provided by law was not filed due to misconception as to availability of appeal and the misconception was not unfounded, the High Court found the petition maintainable.[4] The High Court Division

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[1] *Dhaka Warehouse v. Asst. Collector, Customs*, 1991 BLD (AD) 327, Para 12

[2] *Asst. Collector v. Dunlop India*, AIR 1985 SC 330, 332; *Dhaka Warehouse v. Asst. Collector of Customs*, 1991 BLD (AD) 327; *Ahmed Hossain v. Collector of Customs*, 48 DLR 347

[3] *Assessing Officer v. Burmah Eastern*, 1981 BLD (AD) 451; *Amjad Hossain v. Bangladesh*, 50 DLR 458; *Wahidullah Majumdar v. Bangladesh*, 49 DLR 400; *Agrani Bank v. Sultana Jute Mills`*, 47 DLR 37; *Fazlul Haq Chowdhury v. Bangladesh*, 30 DLR 144; *Angana Ranjan v. Director, Tech. Education*, 31 DLR 184; *National Bank of Pak v. Golam Mostafa*, 27 DLR 159; *M.B. Rahman v. DCT*, 39 DLR 33 (the petition was found not maintainable as the impugned order was not without jurisdiction); *Golam Mowla v. East Pakistan*, 15 DLR 125; *Mritunjoy Paul v. East Pakistan*, 14 DLR 568; *Chittagong Engineering v. Certificate Officer*, 17 DLR 404; *Jubilee Syndicate v. Collector of Customs*, 20 DLR 300; *Nagina Silk Mills v. I.T.O.*, 15 DLR (SC) 181

[4] *Inland Navigation v. ITO*, 19 DLR 871

rejected the plea of the bar as the respondent could not show that the demand for payment of short-levied customs duty had been made on substantial compliance of the provision of the law.[1] *Mala fide* vitiates everything and it goes to the root of jurisdiction and if the impugned action is *mala fide* the alternative remedy provided by the statute need not be availed.[2] Another exception has been made in *M.A. Hai v. T.C.B.*[3] where the Appellate Division held that availability of alternative remedy by way of appeal or revision will not stand on the way of invoking writ jurisdiction raising purely a question of law or interpretation of statute.[4] In *Farzana Haque v. Dhaka University*[5] the High Court Division held a writ petition maintainable in spite of non-exhaustion of the remedy of appeal as the University did not supply necessary papers which were necessary for filing the appeal. In *Lutfunnessa v. Bangladesh*[6] the appellant moved the High Court Division challenging the government's action treating a property as abandoned property, but the High Court Division refused to interfere on the ground that she had efficacious remedy before the Court of Settlement. The Appellate Division agreed with the finding of the High Court Division, but granted the relief to the appellant stating, "The High Court Division would have been justified in taking the view that the Government was expected to be upright and fair in dealing with a citizen's property and the very fact that the Ministry of Home Affairs did not care to file an affidavit could be held to be sufficient for the purpose of the present case disentitling the government from claiming possession and making a list including the appellant's

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[1] *Rahima Food Corporation v. Deputy Collector of Custons*, 49 DLR 510

[2] *Shah Alam v. Mujibul Haq*, 41 DLR (AD) 68; *Zaker Hussain v. Abdur Rahim*, 42 DLR (AD) 153; *Manzur Kader v. Bangladesh*, 49 DLR 237

[3] 40 DLR (AD) 206 (The administrative authorities in enforcing the law have often to interpret the law as a matter of course and, it is submitted, that no exception can be made when question of law or interpretation of state is involved, keeping view that exhaustion of alternative remedy is no longer a rule of the court, but a constitutional requirement.)

[4] *Wahidullah Majumdar v. Bangladesh*, 49 DLR 400; *Chittagong Engg. & Electric Supply v. I.T.O.*, 22 DLR (SC) 443 (when an order suffers from patent illegality apparent on the face of record, writ of *certiorari* can issue even though statutory appeal has not been availed of); *Usmania Glass Sheet v. S.T.O.*, 22 DLR (SC) 437 (where the dispute arises between the parties in respect of a fiscal right based upon a statutory instrument and the same can be easily determined in writ jurisdiction, non-exhaustion of statutory remedy will not bar writ petition)

[5] 42 DLR 262

[6] 42 DLR (AD) 86

property under the Ordinance." It is submitted that availability of efficacious remedy is a constitutional bar to entertainment of a writ petition and once the court is satisfied that the remedy under the statute is efficacious, there is no question of going into the merit of the case or asking the question whether the respondent was fair or upright. However, the court may find a governmental action so unreasonable and arbitrary as to attract the mischief of art.31 and grant the relief.

5.125 The question of availability of alternative remedy came up for serious consideration in election disputes. In *Imtiaz Ahmed v. Ghulam Ali*[1] the Pakistan Supreme Court pointed out that where a right or liability is created by a statute which provides a special remedy for it, the remedy provided by the statute is to be availed. Ordinarily the court will decline to interfere in election matter in the writ jurisdiction as it is desirable that the decision of a matter of disputed election should become final as soon as possible. The court, however, said that in certain situations, such as, where actions are characterised as being done in bad faith, the court will interfere. Election is a lengthy process commencing from notification of the election programme and ending with the notification of result. The remedy of election petition comes into play when the result of the election is notified. Dealing with the question of maintainability of writ petition regarding matters at the intermediary stage, the Appellate Division emphatically ruled that the writ jurisdiction cannot be invoked to challenge any step in the process of election except on the very limited ground of total absence of jurisdiction (*coram non judice*) or malice in law. The court observed that the real and larger issue of completion of free and fair election with rigorous promptitude for timely emergence and functioning of the elective bodies must take precedence over settlement of private disputes and all election disputes must wait pending completion of the election and be taken to the special forum created by the election law.[2] The position will be the same after the election result is published and the aggrieved person must pursue the alternative remedy of election petition except in case of total lack of jurisdiction or malice in law or fact. In *Amjad Hossain v. Chief Election Commr.*[3], the High Court Division found a writ petition maintainable

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[1] 15 DLR (SC) 283 (the appeal arose out of a writ petition under art.170 of the Pakistan Constitution of 1956)

[2] *Shah Alam v. Mujibul Haq*, 41 DLR (AD) 73; *Zaker Hossain v. Abdur Rahim*, 42 DLR (AD) 153

[3] 27 DLR 373

even though no election petition was filed when the petitioner alleged and proved on documents serious infraction of law and procedure by the Presiding Officer. The High Court Division refereed to the decision of *Md. Amir Khan v. Controller, Estate Duty*[1] and *Jamal Shah v. Member, Election Commission*[2]. The first decision which held that alternative remedy did not affect the jurisdiction of the court was not applicable as it was a case of 1961 and the second case came up in writ jurisdiction after election petition was filed and disposed of. The High Court Division relied on a Full Bench decision of High Court of West Pakistan at Lahore[3] which held that where the authority declined or neglected to perform its functions properly writ jurisdiction would be attracted to determine the legality of the act done or proceeding taken. It is submitted that all these questions can be appropriately dealt with by the election tribunal and in view of the decisions of the Pakistan Supreme Court and the Appellate Division, it cannot preclude application of the rule of exhaustion of statutory remedy.[4] The facts of the case, however, clearly evinced the bad faith of the Presiding Officer and it may have worked in the mind of the court to find the maintainability of the writ petition, though not expressed in the judgment.

5.126 *When a statutory remedy is not efficacious*: In the Pakistan Constitution of 1962 the expression used was 'adequate remedy' and this expression was interpreted by the courts. Having regard to those decisions, the framers of the Constitution used the expression 'efficacious remedy' which is more apposite. In *Mehboob Ali v. West Pakistan*[5], it was pointed out that the adequacy of the statutory remedy must be judged in relation to three separate considerations - (1) the nature and extent of the relief; (2) the point of time when that relief would be available; and (3) the conditions on which that relief would be available - particularly the conditions relating to the expense and inconvenience involved in obtaining it. Dealing with these considerations Manzur Qadir CJ stated –

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[1] 13 DLR (SC) 105

[2] 18 DLR (SC) 1

[3] *Dost Mohammad v. Returning Officer*, 17 DLR (WP) 126

[4] see *Shahiduddin Iskander v. Election Commision*, 27 DLR 476 (The court held that writ petition will be maintainable even without availing alternative remedy if on mere examination of papers the question can be answered. In view of decision of the Appellate Division, the decision is of doubtful authority)

[5] 15 DLR (WP) 129

(i) If the relief available through the alternative remedy, in its nature or extent is not what is necessary to give the requisite relief, the alternative remedy is not an `an adequate remedy' within the meaning of Article 98

(ii) If the relief available through the alternative remedy, in its nature and extent, is what is necessary to give the requisite relief, the `adequacy' of the alternative remedy must further be judged with reference to a comparison of the speed, expense or convenience of obtaining that relief through the alternative remedy, with the speed, expense or convenience of obtaining it under Article 98. But in making this comparison those factors must not be taken into account which would themselves alter if the remedy under Article 98 were used as a substitute for the other remedy.

(iii) In practice the following steps may be taken :-

(a) Formulate the grievance in the given case, as a generalised category;

(b) Formulate the relief that is necessary to redress that category of grievance;

(c) See if the law has prescribed any remedy that can redress that category of grievance in that way and to the required extent;

(d) If such a remedy is prescribed, the law contemplates that resort must be had to that remedy;

(e) If it appears that the machinery established for the purposes of that remedy is not functioning properly, the correct step to take will be a step that is calculated to ensure, as far lies in the power of the Court, that machinery begins to function as it should. It would not be correct to take over the function of that machinery. If the function of another organ is taken over, that other organ will atrophy, and the organ that takes over, will break down under the strain;

(f) If there is no other remedy that can redress that category of grievance in that way and to the required extent, or if there is such a remedy but conditions attached to it which for a particular category of cases would neutralise or defeat it so as to deprive it of its substance, the Court should give the requisite relief under Article 98;

(g) If there is such other remedy, but there is something so special in the circumstances of a given case that the other remedy while generally adequate, to the relief required for that category of grievance, is not adequate to the relief that is essential in the very special category to which that case belongs, the Courts should give the required relief under Article 98.[1]

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[1] The test laid down in this decision was approved by the Supreme Court in *Anjuman-E*

5.127 Art.102(2) uses the expression 'efficacious remedy is provided by law'. The bar is attracted when a remedy is provided by the statute in invocation of which the impugned order is passed.[1] Unless barred by any law, a suit lies in all disputes of civil nature. If the remedy sought for is in substance a remedy usually available under the general law, the remedy provided by the general law and not the extraordinary remedy by way of writ petition is the appropriate remedy.[2] Thus for a private law dispute regarding property or contract against the government or public functionaries a suit is the proper remedy. Writ jurisdiction is not available for recovery of money and the court cannot give direction for payment of a particular amout of money unless the amount claimed is both an admitted amount as well as a statutory payment.[3] The court in writ jurisdiction will not decide any question of title.[4] Where complicated questions of law and fact were raised the court observed, "If indeed the Managing Committee or the members of the Shia community were serious in their contention that the acquired properties were wakf properties they should have more appropriately moved in the matter by a suit under section 92 of the Code of Civil Procedure in which all the questions could have been thrashed out and finally decided".[5] Except for those in the nature of private law disputes, the expression `efficacious remedy' has reference to the remedies provided by the particular statute which has created the rights and obligations[6] and not a general remedy at law and the remedy by way of suit, which is by no means as inexpensive or speedy or beneficial a remedy as the remedy provided by art.102(2), cannot be considered to be an efficacious remedy.[7] However, the court will not decide a question in writ jurisdiction where the same question is already pending decision in a civil court[8].

Ahmadia v. D.C. Sargoda, 18 DLR (SC) 517, 523

[1] *Bangladesh Telecom Ltd. v. BTTB*, 48 DLR (AD) 20, 24

[2] *Anjuman-E Ahmadia v. D.C. Sargoda*, 18 DLR (SC) 517, 523

[3] *Bangladesh Water Dev. Board v. M/S Shamsul Huq*, 2000 BLD (AD) 41

[4] *New India Tea Co. v. Bangladesh*, 31 DLR (AD) 303; *East Pakistan v. Kshiti Dhar Roy*, 16 DLR (SC) 457.

[5] *East Pakistan v. Azim Rahim*, 20 DLR (SC) 71

[6] *Anjuman-E Ahmadia v. D.C. Sargoda*, 18 DLR (SC) 517; *Bangladesh Telecom Ltd. V. B.T.T.B.*, 48 DLR (AD) 20

[7] *Anjuman-E-Ahmadia v. D.C. Sagoda*, 18 DLR (SC) 517, 523; *Abdul Karim v. Commissioner, Khulna*, 16 DLR (SC) 624

[8] *Dr. M.O. Ghani v. Dr. A.N.M. Mahmud*, 18 DLR (SC) 463; *Md. Idris v. E.P. Timber Merchants*, 20 DLR (AD) 355

5.128 Now the question is whether the remedy provided by the statute under which the impugned action has been taken is efficacious. Applying the aforementioned test, the remedy provided by a statute will not be efficacious in the following cases:-

(1) If the resort to the remedy will not secure the relief which the impugned actions demand, as for example, where interim relief will not be available. Thus where the government purporting to forfeit the lease threatened eviction within a week and the civil court was in vacation so that no suit could be filed and an interim injunction obtained, petitioner's writ petition was held maintainable though a suit was the proper remedy.[1] When the petitioner's licence as customs agent was revoked without any proceeding being initiated, the court held the petition maintainable even though the statutory appeal was not availed, stating, "The result of the impugned order has been that the petitioner's business was immediately put a stop to, and it was, therefore, urgently necessary for him to get the order set aside. The appeal provided under the Rules is not an adequate remedy as it could not provide the petitioner with the relief he is urgently in need of."[2] Where the property of the petitioner was requisitioned and structure thereon was being dismantled, in spite of non-exhaustion of the statutory appeal, the court found the petitioner's writ petition maintainable as the Divisional Commissioner, the appellate authority, had no power of issuing an interim injunction preventing the dismantling of the structure.[3]

(2) When in the facts and circumstances of the case, it would be futile to require the petitioner to avail the statutory remedy[4], for example, when the appellate authority has prejudged the issue or when the authority acted under the dictation or general or special instruction of the appellate authority.[5]

(3) Where the alternative remedy is not a matter of right, for example, in case of revision where it is discretionary with the authority

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[1] *Azharuddin v. A.D.C.(Rev)*, 19 DLR 489

[2] *Jubilee Syndicate v. Collector, Customs*, 20 DLR 300

[3] *Kumudini Welfare Trust v. East Pakistan*, PLD 1963 Dac 136

[4] *Controller of Examination v. Mahimuddin.* 44 DLR (AD) 305 (The High Court Division held that the appeal provided by art.52 of the P.O. No.11 of 1973 was not efficacious as the opinion of the Chancellor, the appellate authority, was dependent on the opinion of the University authority. But the Appellate Division held that the High Court Division's view was based on misconception of law.)

[5] *Authorised Officer v. A.W. Mullick*, 20 DLR (SC) 229

concerned to interfere.[1] In *Fazlul Huq Chowdhury v. Bangladesh*[2] the High Court Division held that review by the President of the Republic provided under the Government Servant (Discipline and appeal) Rules, 1976 was an efficacious remedy. It may be noted that the said Rules conferred absolutely discretionary power on the President who might reject the petition even though he found the impugned action to be illegal. Furthermore, the scope of review is narrower than that of an appeal. As such review may not be held to be an efficacious remedy. It may be that the court did not give sufficient thought to this question as the court found the writ petition maintainable on the ground that the impugned action was *ex facie* void for want of jurisdiction. Remedy under s.561A of the Code of Criminal Procedure has not been held to be an efficacious remedy.[3]

(4) Where the alternative remedy is onerous or burdensome. Thus where a mutawalli before preferring an appeal is required to hand over charge of the waqf[4] or an assessee has to deposit considerably huge sum of money as tax or duty before or at the time of filing the appeal[5], the remedy of appeal is not an efficacious remedy. But when the appellate authority has power to exempt deposit of the duty or fine to maintain the appeal[6], or where the statute only requires deposit of the undisputed

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[1] *Mansur Rahman v. East Pakistan*, 14 DLR 604 (the Court held that generally revision being discretionary remedy would not be treated as an adequate remedy, but where the statutory appeal was dismissed as time-barred and no revision was filed thereafter, the discretionary relief in writ jurisdiction would not be granted.); *Nurul Haq v. Secy. REB*, 45 DLR 666; *Managing Member, Nirmal Industries v. Naseemunddin*, AIR 1967 A.P. 370

[2] 30 DLR 144

[3] *Anisul Islam Mahmud v. Bangladesh*, 44 DLR 1

[4] *Tafijul Haq v. Bangaldesh*, 1998 BLD (AD) 269; *Hasmat Ara v. Administrtor of Waqfs*, 3 BLC 447 *Nuruzzaman v. Secy. Education Dept.*, 17 DLR 46

[5] *Collector of Customs v. Abdul Hannan*, 42 DLR (AD) 167 (It may be noticed that the appellate authority's statutory discretion to exempt the deposit was not pointed out to the court); *Usmania Glass v. Asst. Collector, Customs*, 19 DLR 592; *Himmatlal v. M.P.*, AIR 1954 SC 403; *Customs Collector v. Shantilal*, AIR 1966 SC 197; but in *Zahirul Islam v. National Bank Ltd.*, 46 DLR (AD) 191, the court held the appeal provided by Artha Rin Adalat Act to be efficacious even though 50% of the decretal amount has to be deposited to maintain the appeal. This decision can be explained in terms of the court's reaction to the prevalent default culture in the financial sector.

[6] *Mohammad Brothers v. Collector of Customs*, 48 DLR (AD) 48 (This decision was cited in *Collector of Customs v. Ahmed Hossain*, 48 DLR (AD) 199, where the court

amount of tax or duty to maintain the statutory appeal[1], the requirement will not be considered onerous or burdensome. If the statute requires, for filing of an appeal, deposit of the tax or duty and at the same time empowers the appellate authority to exempt the deposit in its discretion, the refusal to exempt the deposit (where a large sum is involved) may be held arbitrary in which case non-exhaustion of the statutory remedy will not bar the writ petition.[2] A petitioner pursuing the alternative remedy by filing suit, appeal or revision cannot be allowed to continue two parallel proceedings, and the writ petition is to be dismissed.[3] But where the petitioner cannot get an effective remedy in the suit, he is entitled to invoke the writ jurisdiction.[4] Where a person had filed petition before the Court of Settlement, the writ petition ought not to have been entertained during the pendency of the proceeding pending before the Court of Settlement.[5] But a writ petition filed during the pendency of a statutory appeal will be maintainable if the appellate authority has not disposed it of within a reasonable time.[6] A petitioner failing to get relief in revisional jurisdiction under s.115 of the Code of Civil Procedure cannot invoke the writ jurisdiction.[7]

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preferred to rely on *Abdul Hannan* upon a view that the fact pattern of *Ahmed Hossain* is similar to that of *Abdul Hannan*. The judgment does not show that the existence of statutory discretion of the appellate authority to exempt the deposit was pointed out in this case. In *Bangladesh v. Mizanur Rahman*, 2000 BLD (AD) 212, *Mohammad Brothers* has been re-affirmed.) See, however, *Russel Vegetables Oil Ltd. v. Collector of Customs*, 52 DLR 382, where the High Court Division observed that the appeal provided in the Customs Act is not an efficacious remedy as there is no provision for interim relief. The High Court Division failed to note that even in the writ jurisdiction interim relief impeding collection of public revenue, except in special circumstances mentoned in *Commissioner of Customs v. Giasuddin chowdhury*, 50 DLR (AD) 129,cannot be obtained and when such special circumstances are present existence of efficacious remedy is no bar to an application under art.102.

[1] *Athimoolam v. Dy. Com. Tax Officer*, AIR 1953 Mad 10

[2] *Dhaka Warehouse v. Asst. Collector, Customs*, 1991 BLD (AD) 327; *Bangladesh v. Mizanur Rahman*, 2000 BLD (AD) 212; *Collector of Customs v. A.S. Bava*, AIR 1968 SC 13

[3] *Friends Corp. v. Commr. of Customs*, 3 MLR 281; *Rashid & Sons v. I.T. Invest. Commission*, AIR 1954 SC 207; *Sheonath v. Asst. I.T.C.*, AIR 1967 Cal 382

[4] *Anil Kumar v. East Pakistan*, 23 DLR 108

[5] *Bangladesh v. Anwar Ahmed*, 51 DLR (AD) 42

[6] *Salehuddin v. D.C. Food*, 20 DLR 165

[7] *Khawaja Golam Akbar v. Madarbari Conciliation Court*, 20 DLR 160

(5) Where in the facts of the case the petitioner had no reasonable opportunity to avail the statutory remedy.[1]

Where the High Court Division is satisfied by exercising its discretion judicially that the remedy provided by law is not efficacious, the Appellant Division will not interfere with such exercise of discretion.[2]

5.129 ***Disputed questions of fact:*** The proceeding under art.102(2) is a summary one and it is decided on the statements made on affidavits filed by the parties and the documents annexed to the application and the affidavit-in-opposition. Hence it is often held that the court will decline to exercise jurisdiction when the application involves resolution of disputed questions of fact.[3] In this summary proceeding examination of disputed question of fact of a complicated nature is not as a general rule undertaken[4], nor investigation of title to property made[5] and it is neither desirable nor advisable to enter into the merit and record a finding as to disputed question of fact.[6] The court will neither decide the complicated question of title nor disputed questions of fact relating to damages or compensation.[7] The Appellate Division set aside a decision where, in the

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[1] *Nesar Ahmed v. Bangladesh*, 49 DLR (AD) 111; *Mobarak Ali v. Bangladesh*, 50 DLR 10

[2] *Unverity of Dhaka v. Prof. Monwaruddin*, 52 DLR (AD) 17

[3] *New India Tea Co. v. Bangladesh*, 31 DLR (AD) 303; *Abdul Hamid v. Nurul Islam*, 42 DLR (AD) 49; *Farid Mia v. Amjad Ali*, 42 DLR (AD) 13, 15; *Khalilur Rahman v. Bangladesh*, 2000 BLD (AD) 152; *Abdul Mukit Chowdhury v. Chief Election Commn*, 41 DLR 57; *Abdullah-Ar-Rabbani v. T.C.B.*, 42 DLR 258; *Abdul Mannan v. Secy. Ministry of LGRD*, 52 DLR 471; *Nawaza v. Addl. S. & R. Commr.*, 22 DLR (SC) 13; *Abdur Rouf v. Ministry of LGRD*, 43 DLR 29; *Conforce Ltd. V. Titas Gas Co.*, 42 DLR 33; *Nawab Ali v. Amiruddin*, 41 DLR 254; *Abdul Khaliq v. Election Commn*, 1989 BLD 415

[4] *Bangladesh v. Habib Zamil*, 52 DLR (AD) 174

[5] *East Pakistan v. Kshiti Dhar*, 16 DLR (SC) 457; *East Pakistan v. Azim Rahim*, 20 DLR (SC) 71; *Fatema Khatun v. DC Dinajpur*, 3 MLR (AD) 71; *Tasmina Chowdhury v. Deputy Commr.*, 49 DLR 29

[6] *Shamsun Nahar v. Wahidur Rahman*, 51 DLR (AD) 232; *Nafco (Pvt) Ltd. v. BSFI Corp.*, 2 MLR (AD) 402; *Ancient Steamship co. v. Member (Appeal and Revision)*, 2 MLR (AD) 302; *Nuruddin v. Titas Gas Transmission*, 1998 BLD (AD) 273; *Stadmax Ltd. v. General Manager, CIB, Bangladesh Bank*, 50 DLR 594; *Asian Tobacco Co. v. Asstt. Commr. Customs*, 1997 BLD 413; *Abdul Latif Howladar v. ADC (Revenue)*, 50 DLR 638; *Rup Charan Das v. Bangladesh*, 48 DLR 94; *Sultana Nahar v. Bangladesh*, 1998 BLD 363; *Nawab Ali v. Md. Amiruddin*, 41 DLR 254; *Shahiduddin Iskander v. Election Commission*, 27 DLR 476

[7] *Hamidul Huq Chowdhury v. Bangladesh*, 34 DLR 190

absence of a necessary party, a disputed question of fact was attempted to be determined by the High Court Division on inconclusive materials.[1] Where, however, serious allegations are made which the court feels necessary in the interest of justice to investigate, the court may take oral evidence.[2]

5.130 Any fact stated in the petition and denied by the respondent becomes a disputed fact and any respondent by simply denying the facts may preclude the disposal of the petition on merits. But this is not what is meant when the court says that it will not go into the disputed questions of fact. The rule is that the court will decline to exercise the jurisdiction only when the dispute as regards facts is such that the dispute cannot be reasonably resolved on the facts pleaded and documents produced before the court.[3] A mere denial by the respondent of a fact in issue raised by the petitioner does not render that fact a disputed fact unless there are materials to support the denial, but if the assertion made by the petitioner is not supported by materials to the satisfaction of the court, the court may refuse to act on such assertion alone. Where the respondent denies a fact without adducing convincing material in support of such denial, but the court finds it difficult to draw a definite inference or conclusion from the assertion of the petitioner, the court may refuse the relief not because the fact is disputed, but because the petitioner failed to discharge his initial onus of proving his case.[4]

5.131 ***Enforcement of contractual right:*** The government and the public functionaries, in discharging their functions, are often required to enter into various types of contracts. In entering as also in performing the contracts various disputes arise for the resolution of which provisions have been made in the Code of Civil Procedure and the Specific Relief Act. Hence it is generally held that for such disputes private law remedies provided by the Code of Civil Procedure and the Specific Relief Act are appropriate and the writ jurisdiction cannot be

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[1] *Golam Kibria v. Abdul Wadud*, 1979 BSCR 313

[2] See Para 5.142

[3] *North Bengal Sugar Mills v. Dist. Magistrate*, 19 DLR (SC) 228; *Abul Hossain v. Bangladesh*, 34 DLR 255, 260 (though ordinarily an application for restoration of property is not an appropriate remedy where question of title is involved, yet on the basis of patently acceptable documents, writ may issue in appropriate cases); *Moinuddin v. Delimitation Officer*, 17 DLR 181

[4] *Syed Matiur Rob v. Bangladesh*, 42 DLR (AD) 126, 130

invoked for the enforcement of contractual rights.[1] This rule is subject to some exceptions. One is in the field of contract of employment. Though an employment in the service of the Republic initiates in contract, the relationship of the government with the servant is more of a status than contract and is controlled by the provisions of the Constitution and the laws and rules. Because of the provisions of art.117 read with art.102(5) writ jurisdiction cannot be invoked in the matter of terms and conditions of service except when infringement of fundamental right is alleged. There was a question whether employment under the local authorities are controlled by the private law rule of master and servant so that the writ jurisdiction would not be attracted. The question has been finally settled by the Appellate Division in *B.S.I.C. v. Mahbub Hossain*[2] and the court came to the following conclusions:-

(a) If an employee is dismissed or his service is terminated in contravention of a mandatory statutory provision, the employee has a right of action either in a Superior Court in its writ jurisdiction or in a civil court.

(b) If the service of its employee is terminated in violation of the principle of natural justice, the employee has a similar right of action as in (a).

(c) If the office is a statutory one, the holder of the office has similar right of action as in (a) in case of termination of the said office not in accordance with law, under which the said office has been created.

(d) In spite of the office being a statutory one or of public character, terms and conditions of the office may be regulated by contract, and termination of service in contravention of such contract, but otherwise than in the manner mentioned in (a) and (b) is not actionable for the purpose of reinstatement in office.

(e) Terms and conditions of service prescribed by rules, regulations or any other form of delegated legislation made by a body under statutory powers are not contractual, but have a statutory force and the dismissal or termination of service in substantial disregard of them will entitle the employee to a right of action as in (a).

5.132 Coming to contracts other than the contracts of service, we see

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[1] *Momin Motors Co. v. R.T.A. Dacca*, 14 DLR (SC) 102; *Chandpur Mills Ltd. v. D.M.*, 11 DLR (SC) 53; *M. Muzaffaruddin v. Chief S. & R. Commr.*, 1968 SCMR 1136; *Har Shanker v. Dy. Excise & Taxation Commr.*, AIR 1975 SC 1121; *Radhakrisna Agarwal v. Bihar*, AIR 1977 SC 1496; *Punjab v. Balbir*, AIR 1977 SC 1717

[2] 29 DLR (SC) 41; *Rabia Bashri Irene v. Bangladesh Biman*, 52 DLR 308

that a modern government has multifarious activities and in performance of those activities the government has to enter into contracts of various types. But some of these contracts are different in character from others. When the government and public functionaries enter into contracts in performance of their statutory duties, these are acts of a public nature. Having regard to the nature of these contracts, the Indian Supreme Court observed in *D.F.O. South Kheri v. Ram Sanehi*[1] -

> We are unable to hold that merely because the source of the right which the respondent claims was initially in a contract, for obtaining relief against any arbitrary and unlawful action on the part of the public authority he must resort to a suit and not to a petition by way of writ. In view of the judgment of this Court in *K.N. Guruswamy*'s case[2] there can be no doubt that the petition was maintainable, even if the right to relief arose out of an alleged breach of contract where the action challenged was of a public authority invested with statutory authority.

In *Lutfu Mia v. Bangladesh*[3] the government leased out a fishery to the appellant for three years, but later approved the lease for one year. The appellant unsuccessfully moved the High Court Division in the writ jurisdiction. The Appellate Division found the action of the government to be arbitrary and without lawful authority. But the question of maintainability was not raised or answered in this case. The question was, however, raised in *Sharping M.S. Samity v. Bangladesh*[4] and the High Court Division found in favour of the petitioner as it was pointed out that the contract of lease of the fishery was entered into by a public authority invested with statutory power. Later the lease of the fishery having been cancelled, the lessee challenged the cancellation order in writ jurisdiction and the High Court Division this time discharged the Rule holding that contractual rights cannot be enforced in writ jurisdiction.[5] On appeal the Appellate Division reversed the decision stating –

> Review of all these decisions point out that judicial thinking has crystallised on this subject in two clear-cut ways, namely, (i) if it is a pure and simple contract which is entered into by the Government in its

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[1] AIR 1973 SC 205
[2] AIR 1954 SC 592
[3] 1981 BLD (AD) 105
[4] 1981 BLD 189
[5] *Sharping M.S. Samity v. Bangladesh*, 39 DLR 78

> trading capacity for any breach of such contract writ will not be available as remedial measure, (ii) on the other hand, if the contract is entered into by the government in the capacity as sovereign then writ jurisdiction can be invoked for breach of such contract, inasmuch as, Constitution gives the power directing a person performing any function in connection with the affairs of the republic or making an order that any acts done or proceeding taken by a person performing function in connection with the affairs of the republic then he can invoke the jurisdiction.[1]

The Appellate Division mentioned 'sovereign function' and by this expression the court meant functions performed in pursuance of statutory power as can be seen from the following statement –

> Such function can best be appreciated if matters of settlement of hat, bazar, fisheries, khas lands, etc. are kept in view. The Government acts in these affairs in pursuance of some statutory power and any such contract when rooted in statute the Government discharges its sovereign function.

The use of the expression 'sovereign function' may leave one to grope for the dividing line separating the sovereign functions from other functions of the State. But a careful reading of the judgment shows that the writ jurisdiction is held available in respect of contracts rooted in statutes in contra-distinction to other contracts.[2] Because of the presence of the public law element, a contract rooted in a statute is to be distinguished from pure and simple contracts which have been described as trading contracts for facility of reference. Unless the contract has been entered into by a statutory authority pursuant to a statutory provision or no violation of a statutory provision is established, no remedy is available in the writ jurisdiction. A contract would not become statutory simply because it is for construction of public utility and it has been awarded by a statutory body.[3] A statute may expressly or impliedly confer power on a statutory body to enable it to discharge its functions

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[1] *Sharping M.S. Samity v. Bangladesh*, 39 DLR (AD) 85, Para 31; *Nikli AKMS Samity v. Secy. Ministry of Land*, 45 DLR 1; See *Nuruddin v. Titas G.T.D. Co. Ltd*, 1998 BLD (AD) 273 (For any alleged breach of contract which involves determination of questions of fact, the remedy lies in civil court); *Chairman, BRTC v. Nasiruddin*, 3 BLC (AD) 225 (Failure to pay a part of the agreed voluntary retirement benefit is at best a violation of contract for which proper remedy is in civil court)

[2] See *U.P. v. Bridge & Roof Co.*, (1996) 6 SCC 22

[3] *Kerala State Electricity Bd. v. Kurien*, AIR 2000 SC 2573

and in discharge of its functions the statutory body may enter into contracts. Diputes arising out of the terms of such contracts are to be settled by the ordinary principles of law of contract.[1] Private law may involve a State, a statutory authority or a public body in contractual or tort actions. But they cannot be siphoned off into the writ jurisdiction.[2] In *Bangladesh Telecom Ltd. v. BTTB* the appellant challenged an order of the respondent (a statutory authority) canceling an agreement which permitted the appellant to instal cellular telephone in Bangladesh. The Appellate Division held the writ petition maintainable observing –

> Had there been no licence in favour of BTL then the agreement, standing alone, would have been a purely commercial contract, the cancellation of which could not have attracted the writ jurisdiction of the High Court Division but as the agreement merged into the licence (granted under a statutory provision) its terms and conditions no longer remained the terms and conditions of a commercial contract. It became the terms and conditions of the licence itself.[3]

In a recent decision the Indian Supreme Court observed, "If entering into a contract containing prescribed terms and conditions is a must under the statute then that contract becomes a statutory contract. If a contract incorporate certain terms and conditions in it which are statutory then the said contract to that extent is statutory."[4] It has to be seen whether the Appellate Division will go for this restricted meaning of statutory contract. It must be noted that *Ramana Shetty v. Airport Authority*[5] referred to in *Sharping* is a case where the equality clause was invoked. When discrimination is alleged and enforcement of

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[1] Ibid; *ARK Associates Ltd. v. WASA*, 1999 BLD 349; contra decisions in *Conforce Limited v. Titas Gas Transmission & Distribution Co. Ltd*, 42 DLR 33, and *Zaharuddin v. Bangladesh*, 6 BLC 712, do not seem to lay down correct proposition as the authorities therein were not discharging sovereign functions and the contracts involved were not shown to have been authorised by any statute.

[2] *Kulchindar Sing v. Hardayal Sing*, AIR 1976 SC 2216; *Meghna Vegetable Oil v. BOGMC*, 50 DLR 474; *ARK Associates Ltd. v. WASA*, 1999 BLD 349; *Fazlur Rahman v. Agrani Bank*, 51 DLR 350 (Government bank doing banking business); but bank acting as agent of the government in selling saving certificate is under legal obligation to pay and writ petition is maintainable – *Abdus Salam v. Agrani Bank*, 47 DLR 175; *Abu Mohammad v. Bangladesh*, 52 DLR 352 (Writ petition for rectification of mistake in a sale contract entered into by the government is not maintainable)

[3] 48 DLR (AD) 20, 24

[4] *India Thermal Power Ltd. v. M.P.* AIR 2000 SC 1005

[5] AIR 1979 SC 1628

fundamental right is sought, the distinction between contracts having root in statutes and trading contracts is of no consequence as art.102(1) will be available even in case of an ordinary trading contract.[1]

5.133 In a separate judgment S. Ahmed J observed in *Sharping*,

> ... in case of breach of any obligation under a contract between government and a private party, proper remedy lies in a civil suit and not in a writ petition under the extra-ordinary jurisdiction given by the Constitution. But this principle will not apply when the government violates the terms of the contract with a mala fide intention or acts arbitrarily or in a discriminatory manner.

Mala fide as a concept is applicable when an exercise of statutory power is in question and not in respect of contract performance generally, but the observation of S. Ahmed J is right inasmuch as when the government acts *mala fide* the action in respect of a contract, whether entered in the exercise of statutory power or not, is, at the minimum, arbitrary and is, therefore, violative of art.27.[2] Appellate Division held a writ petition maintainable when the impugned cancellation of contract was arbitrary.[3]

5.134 In *Sekendar Ali v. Chairman B.I.W.T.A.*[4] the Appellate Division held that a contractual right based on licence is not amenable to the writ jurisdiction. In this case a licence granted to operate launch ghats for a limited period was cancelled to grant it to Muktijoddha Sangsad. In terms of the licence no notice or compensation for cancellation was given to the licensees. There is a contractual element in the grant of the licence, but the authority granted the licence in terms of authority conferred under s.15(1)(iv) of the Inland Water Transport Authority Ordinance, 1958 and as such the case has similarity with *Sharping* and it cannot be said to be an ordinary commercial contract. Even though no statutory or contractual provision was violated, the question remains whether a State authority under obligation to act

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[1] *Harmindar Singh v. India*, AIR 1986 SC 1527

[2] *Shahadat Hussain v. Executive Engineer*, 44 DLR 420 (the court equated lease of cafetaria with lease of fishery even though lease of cafetaria is merely a commercial contract, but the decision is correct in view of the finding of *mala fide*); *Shafique Ahmed v. BCIC*, 45 DLR 95; *Sonali Fishermen v. Bangladesh*, 46 DLR 402; *Sumikin Bushan Corp. v. C.P.A.*, 6 MLR 251

[3] *M.D. WASA v. Superior Builders & Engrs*, 51 DLR (AD) 56; see Para 5.134A

[4] 40 DLR (AD) 262

reasonably and not arbitrarily as mandated by art.31 in dealing with a monopoly can secure by contract a power to cancel the contract without notice and without compensation (after receiving money from the licensee on the basis highest bid in auction) when Parliament cannot in view of the protection of art.31 exclude the requirement of notice and hearing. Furthermore, there is also the question of arbitrariness when a licence for a very limited period is sought to be cancelled for no other reason than to grant it to another, may be more deserving, body and that too without paying any compensation. Has not the power been exercised for improper purpose? Is not the right to operate the launch ghats, being a franchise or a right under a contract, a property within the meaning of art.31 or 42? However, these questions do not appear to have been raised before the court. In an unreported case the High Court Division issued writ in respect of award of a commercial contract for construction of a Bailey bridge over a river and the Appellate Division refused to grant leave to appeal.[1] A reading of the judgment and order of the two divisions does not show that any objection relating to the maintainability of the writ petition in respect of commercial contract was raised. But the question came up for consideration in another case where the High Court Division issued writ in respect of a tender for sale of self-propelled barges by the government.[2] Though the High Court Division took the view that *Sharping* was not applicable, the writ was issued upon a view that a right having been created in favour of the petitioner, to enforce the right so created by the persons performing the functions in the affairs of the Republic the writ can be issued. The leave petitions of the government and B.I.W.T.C. were dismissed.[3] The Appellate Division did not agree with the above reason of the High Court Division, but found the writ petition maintainable as the action was being taken in compliance with an international obligation of the government and the contract cannot be termed as a mere trading contract. An international obligation is a matter between a State and another State or an international agency with which the individual seeking the award of the contract has no concern. It is submitted that there is no public law element present in the instant case and the contract may not be put

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[1] *Purbachal Drillers Ltd. v. Mesbahuddin Ahmed*, W.P. No.111 of 1993 and C.P.L.A. No.230 of 1993 (Unreported)

[2] *Birds Bangladesh Agencies Ltd. and three others v. Secy. Ministry of Food*, W.P. Nos.198, 277, 278 and 537 of 1994 (Unreported)

[3] *B.I.W.T.C. v. Birds Bangladesh Agencies Ltd* and other petitions, C.P.L.A. Nos.405-408 and 431 of 1994 (Unreported)

outside the category of pure and simple contract. The court further observed-

> When there is a concluded contract in exercise of an international obligation of the Government and the contract is partly performed, the principle of fairness in Government action comes into play and the government cannot be allowed to play the role of a private litigant driving the aggrieved party to sue for compensation.

If the principle of fairness is the determining factor then every ordinary commercial transaction with the governmental authority evincing unfairness would attract the writ jurisdiction.[1] The Appellate Division has extended the boundary of contracts amenable to the writ jurisdiction by adding contracts to fulfil international obligation to the former category.

5.134A In *M.D. WASA v. Superior Builders & Engrs LTd*[2] a commercial contract was involved. WASA illegally terminated the contract. The High Court Division held the writ petition maintainable to give relief. The Appellate Division rejecting the plea of non-maintainability of the writ petition observed, "Basically, the principle is that, a writ petition cannot be founded merely on a contract, but when a contract is concluded the contractor has a legitimate expectation that he will be dealt with fairly." The doctrine of fairness was introduced to give aggrieved persons a right to a hearing. The doctrine of legitimate expectation is a further extension of the fairness doctrine to give a right to hearing. The doctrine is now being pressed in aid to deal with arbitrary change of policy.[3] The doctrine is not meant to confer additional remedy where the law provides a remedy. For a breach of contract the remedy in law is an action for damages. If legitimate expectation can give a person a right to maintain a writ petition, the distinction between commercial contract and statutory contract made in *Sharping* will be obliterated inasmuch as in every case of breach of contract the contractor can press in aid the doctrine of legitimate expectation to maintain his petition under art.102 of the Constitution. The observation of the Appellate Division is open to exception.

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[1] *Ataur Rahman v. Secretary, Ministry of Communications*, 49 DLR 331 (... There is hardly any scope to apply the principle of equity when terms and conditions of the tender documents are there to provide the legal and proper dispensation)

[2] 51 DLR (AD) 56

[3] See Para 63A – 63C

5.135 For the purpose of application of art.102(2), the contracts between individuals and public authorities can be placed in three groups - (i) contracts which are pure and simple contracts having no basis in a statute nor regulated by any statute and violation of the terms of the contract is alleged, (ii) contracts which are regulated by statutes and there is a breach of the statutory provision and (iii) contracts which are entered into in exercise of statutory power and there is violation of some of the terms of the contract. In the case of contracts of the first group, no writ will lie for enforcement of the contractual right unless the case falls within the exception stated by S.Ahmed J. However, in view of the decision in *Birds Bangladesh Agencies Ltd* the writ jurisdiction will be available in respect of contracts of this group if the action of the government is taken in fulfilment of an international obligation. In the case of contracts of the second group, there being a breach of statutory provision, writ will obviously lie.[1] In *Hasna Mansur* the Appellate Division stated that where the lease deed does not authorise extra-judicial method of resumption of possession, forcible dispossession of the lessee by a public functionary can be challenged in writ jurisdiction by the lessee as resumption of possession is not in due course of law. Possibly the correct view has been expressed by the Indian Supreme Court when it stated –

> A lessor, with best of title , has no right to resume possession extrajudicially by use of force, from a lessee even after the expiry or earlier termination of the lease by forfeiture or otherwise. The use of the expression 're-entry' in the lease deed does not authorise extrajudicial methods to resume possession ... a lessee cannot be dispossessed otherwise than in due course of law. In the present case, the fact that the lessor is the State does not place it in any higher or better position. On the contrary, it is under an additional inhibition stemming from the requirement that all actions of Government and Governmental authorities should have a legal pedigree.[2]

There are some laws which provide for the method of recovery of possession of properties of State and local authorities. In all cases not

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[1] *Hasna Mansur v. Secy. Mininstry of Public Works*, 32 DLR (AD) 34; *Bangladesh Telecom (Pvt) Ltd. v. BTTB*, 48 DLR (AD) 20 (Objection was raised on the ground that cancellation of a commercial contract cannot be challenged in writ jurisdiction. the contract, which merged in the licence granted under the Telegraph Act, having been cancelled in exercise of statutory power, the objection was overruled.)

[2] *U.P. v. Maharaj Dharmendra*, AIR 1989 SC 997, 1004

covered by those laws, State or local authorities cannot use force, but must approach the civil court for recovery of possession. In case of contracts of the third group also writ will lie as stated by the Appellate Division in *Sharping*.[1]

5.136 ***Estoppel:*** Estoppel is a doctrine which prevents a party from denying the existence of a fact which he represented as existing and upon such representation another party has been induced to act to his detriment. It is often described as a rule of evidence, but the whole concept has to be viewed as a substantive rule of law because it absolutely precludes a person from asserting what otherwise is his right.[2] Estoppel is generally treated as of three types of which equitable estoppel is relevant for the present discussion.[3] Pomeroy defines equitable estoppel as follows -

> Equitable estoppel is the effect of the voluntary conduct of a party whereby he is absolutely precluded both at law and in equity, from asserting rights which might perhaps have otherwise existed, either of property, of contract, or of remedy, as against another person, who has in good faith relied upon such conduct, and has been led thereby to change his position for the worse, and who on his part acquired some corresponding right, either of property, of contract, or of remedy.[4]

5.137 In running the governmental functions, the public authorities often make representations in the shape of information, instruction and assurance and people invariably rely on those information, instruction or assurance in shaping their conduct. In many cases the public authorities adhere to their representation. But due to various reasons, the public authorities are found to repudiate their representation leaving the people to suffer for their good faith reliance. Doctrine of equitable estoppel is based on notions of morality and justice and it can be argued that a governmental action should exhibit even higher standard of morality and justice. But the government and public authorities invariably claim immunity against estoppel. The reason for claiming immunity is that the government derives the power to govern from the

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[1] *Bangladesh Telecom (Pvt) Ltd. v. BTTB*, 48 DLR (AD) 20;; *T. Islam v. Dhaka Municipal Corp.*, W.P. No.341 of 1990, unreported (Cancellation of allotment of shops made in exercise of statutory power); *Ram Chandra v. M.P.*, AIR 1971 SC 128

[2] Halsbury's Laws of England, 4th ed., vol.16, Para 1501; *Canada Dominion Sugar Co. Ltd. v. Canadian National (West Indies) Steamship Ltd*, [1947] AC 46, 56

[3] Equitable estoppel is also described as promissory estoppel.

[4] Equity Jurisprudence, 4th ed., vol.2, Para 802; see also s.115 of the Evidence Act.

people and this power must be exercised in the public interest and for public good. Through its legislative and executive branch, the government frames policies, enacts laws, promulgates rules and regulations and administer them in the same public interest and for public good. The entire society has a vital concern in the proper exercise of such power and discretion, and the application of the doctrine of estoppel for the mistake, negligence or wrong-doing of the public officials preventing proper exercise of the power and discretion may subvert the public interest and public good. The power and authority of the government and public authorities are circumscribed by the constitution and the laws and none can be allowed to exercise extra-constitutional or extra-legal authority. If the officials can bind the government by their acts, even though such acts are not clearly within the scope of their authority, there is a danger that the officials will exercise power and discretion not conferred on them, knowing that the government will not be able to disavow their acts. The doctrine of estoppel would be used to validate *ultra vires* and illegal acts. In the words of Lord Greene -

> The power given to an authority under a statute is limited to the four corners of the power given. It would entirely destroy the doctrine of ultra vires if it were possible for the donee of a statutory power to extend his power by creating an estoppel.[1]

Secondary justification offered for the governmental immunity against estoppel is that the government with its myriad field of activities cannot feasibly keep track of the activities of its officials and the general application of the law of principal and agent in its relation with its officials will have a harmful effect on the public interest. Because of these considerations there was initial reluctance of the courts in the English and American jurisdictions to apply the doctrine of equitable estoppel against the government and public authorities.[2] Though sticking to the basic objection of want of authority, the courts have now been more inclined to apply the doctrine where the want of authority is not clear or when the public official misrepresented within the scope of his authority.[3] In *M.P. Sugar Mills v. U.P.*[1] the government notified under

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[1] *Ministry of Agriculture and Fisheries v. Hulkin* (unreported) - quoted in *Ministry of Agriculture and Fisheries v. Mathews*, [1949] 2 All E.R. 724

[2] *Howell v. Falmouth Boat construction Co.*, [1951] 2 All E.R. 278; *Southend-on Sea corporation v. Hodgson*, [1961] 2 All E.R. 46; *FCIC v. Merril*, 332 US 380

[3] *Lever Finance Ltd. v. Westminster L.B.C.*, [1970] 3 All E.R. 496 (A builder had

s.4A of Sales Tax Act that new industrial units would be allowed exemption for three years. The appellant company wanted to establish a vegetable oil mill and was assured by the Chief Secretary about the exemption and the appellant company established the mill. Subsequently, the government rescinded its decision to grant exemption. The Supreme Court, upon consideration of a long line of cases in the English, Indian and American jurisdiction, held that the government was bound by the promise if it had been made by an agent having authority to make such promise and if such promise was not contrary to law even though it might relate to its sovereign function. Later in *Jit Ram v. Haryana*[2] the Supreme Court disagreed with the decision in *M.P.Sugar Mills* to hold that estoppel was not available against the executive functions of the State. But the Supreme Court re-affirmed *M.P.Sugar Mills* in *India v. Godfrey Philips*[3].

5.138 The Appellate Division applied the doctrine of promissory estoppel in *Collector of Customs v. Abdul Hannan*[4] where to avoid the

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obtained approval for building a house at a particular location, but wanting to deviate from the approved plan submitted a revised plan for approval. The borough engineer of the planning authority informed the builder that the deviation was not material and required no approval. When the house was near completion according to the revised plan, the planing authority declared that the deviation was material and issued notice for demolition of the house. The court applied the doctrine of estoppel.); *Robertson v. Minister of Pensions*, [1948] 2 All E.R. 767 (the decision was not approved by the House of Lords in *Howell*); *U.S. v. Wharton*, 514 F.2d 406 (U.S. brought an action for ejectment of the defendants from 40 acres of public land. Predecessor of the defendants who originally entered into those lands approached the officials of the Bureau of Land Management to determine what his family could do to gain title to the lands and the government officials misrepresented that there was no way at a time when it was still possible to gain title by filing a new desert-entry application. The court found the misadvice to be affirmative misconduct and estopped the government.)

[1] AIR 1979 SC 621; *Gujrat State Financial Corp. v. Lotus Hotels*, AIR 1983 SC 848 (Corporation entering into agreement in performance of statutory function to advance loan to a company cannot resile after the company relying on the promise undertook to execute its project at a huge cost); *Pournami Oil Mills v. Kerala*, AIR 1987 SC 590 (Government granting package of concessions to new small scale industries in order to boost industrialisation cannot curtail the concessions subsequently after the industry was set up); *Asst. Commr. Commercial Tax v. Dharmendra Trading*, AIR 1988 SC 1247; *India v. Anglo-Afgan Agencies*, AIR 1968 SC 718; *Century Spinning v. Ulhasnagar Municipal Committee*, AIR 1971 SC 1021.

[2] AIR 1980 SC 1285

[3] AIR 1986 SC 806

[4] 42 DLR (AD) 167

crisis of sugar the government issued notification exempting customs duty and sales tax on the import of sugar for a limited period on fulfilment of certain conditions and the respondent relying on the notification imported the sugar within the stipulated period fulfilling the conditions, but before the arrival of the cargo and submission of the bill of entry the government withdrew the notification of exemption. In another case, the government decided to disinvest a specialised textile mill and at its instance the statutory corporation issued a public notice requiring the original shareholders to take certain steps which they took. But the government refused to disinvest the mill. The Appellate Division held that the government was estopped from denying the right of the shareholders to get back the mill.[1] An employee of a corporation applied for retirement before completing the required period of service and he was allowed to retire. The court held that the employee was estopped from raising the plea that the law did not permit the corporation to release the employee.[2] When a corporation holds out to its employees that they would be dealt with in accordance with the government's disciplinary rules, the corporation is estopped from refusing to apply the said rules.[3] Once the government holds out a promise and a citizen acts on it, the government will be debarred from resiling from the promise.[4] In *Grihayan Limited v. Bangladesh*[5] the Appellate Division by a majority judgment refused to apply the doctrine of promissory estoppel on the ground that the promise was conditional and the promisee did not fulfil the condition to bind the promisor to its promise. The majority judgment did not consider the condition attached to the promise in its proper perspective which the minority judgment did and it is submitted that the minority judgment is correct.

5.139 The position as it now stands is that the government may be estopped from resiling from a representation made by any public functionary if the latter in making the representation acted within the scope of his authority. But there can be no application of estoppel to prevent performance of duty enjoined by law or the Constitution,[6] nor

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[1] *Secretary, Industries v. Saleh Ahmed*, 1981 BLD (AD) 91; *Abdur Rahim v. Bangladesh*, 48 DLR 538; see also *Dr. Nurul Islam v. Bangladesh*, 1981 BLD 12, 22

[2] *Bangladesh Parjatan Corp. v. Mofizur Rahman*, 46 DLR (AD) 46

[3] *M.A. Hai v. T.C.B.*, 40 DLR 206

[4] *Abdur Rahim v. Bangladesh*, 48 DLR 538

[5] 47 DLR (AD) 12

[6] *Pillai v. Kerala*, AIR 1973 SC 2641; *Maritime Electric Co. v. General Dairies Ltd*, A

estoppel may operate against the legislature.[1] Promissory estoppel cannot be invoked to enforce a promise contrary to law.[2] The doctrine of promissory estoppel is an equitable doctrine and it must yield when the equity so requires. So the Indian Supreme Court observed in *M.P. Sugar Mills v. U.P.*[3] -

> If it can be shown by the Government that having regard to the facts as they have subsequently transpired, it would be inequitable to hold the Government to the promise made by it, the Court would not raise an equity in favour of the promise against the Government ... the burden would be upon the Government to show that the public interest in the Government acting otherwise than in accordance with the promise is so overwhelming that it would be inequitable to hold the Government bound by the promise and the court would insist on a highly rigorous standard of proof in the discharge of this burden.[4]

Even in the absence of overwhelming public interest, the government or its instrumentalities may resile from the promise if no one is adversely affected thereby or if it provides a reasonsable opportunity to the promisee to resume his position and restoration of *status quo ante* is possible.[5] It being an equitable principle, a person who plays fraud in obtaining a benefit cannot plead estoppel against the withdrawal of the benefit.[6] The courts are still reluctant to invoke the doctrine of ostensible authority for the application of the doctrine of estoppel.[7]

1937 PC 114

[1] *Kerala v. Gwalior Silk Mfg. (Wvg) Co. Ltd.*, AIR 1973 SC 2734

[2] *Asoke Kumar v. UP*, (1998) 2 SCC 502; *Union Terrritory, Chandigarh v. Managing Society, Goswami, GDSDC*, AIR 1996 SC 1759; *Bhadrachalam Paperboards v. Mandal Revenue Officer*, (1996) 6 SCC 634

[3] AIR 1979 SC 621, 644

[4] See *Grihayan Limited v. Bangladesh*, 47 DLR (AD) 12, for a discussion on the equities involved in the application of the doctrine.

[5] *Shriji Sales Corp. v. India*, (1997) 3 SCC 398; *Pawan Alloys & Casting v. UP SEB*, (1997) 7 SCC 251

[6] *Tamil Nadu v. Gurusamy*, AIR 1997 SC 1199

[7] For a detailed discussion on the subject see R. Berger - Estoppel against Government, 21 U.Chi.L.Rev. 680; A.W. Bradley – Estoppel - Statutory Discretion - Informal Delegation, 1971 C.L.J. 3; F.C. Newman - Should Official Advice be Reliable? - Proposals as to Estoppel and Related Doctrines in Administrative Law, 53 Col.L.Rev. 374; McIntire - Authority of Government Contracting Officers: Estoppel and Apparent Authority, 25 Geo.Wash.L.Rev. 162; Spencer Bower & Turner-Estoppel by Representation, 3rd ed; M. Islam-Estoppel against Government, 1981 BLD (Jnl) 12

5.140 ***Procedure and practice:*** A proceeding under art.102 is either a civil or a criminal proceeding depending on the nature of the case. The proceedings in *certiorari*, prohibition, *mandamus* and *quo warranto* are civil proceedings while *habeas corpus* is treated as a criminal proceeding. Under art.107, subject to any law made by Parliament, the Supreme Court may, with the approval of the President, make rules for regulating the practice and procedure of each division of the Supreme Court. No rule regarding the procedure in the writ jurisdiction has been made under art.107. In exercise of the power under the High Courts (Bengal) Order, 1947, certain rules were made and published on 23 December 1958 regarding writ petitions under art.170 of the Pakistan Constitution of 1956. By virtue of s.24 of the General Clauses Act, 1897 those rules are applicable in respect of the writ petitions under art.102 of the Constitution.[1] For writ petitions other than *habeas corpus* the provisions of the Code of Civil Procedure may apply in respect of matters not covered by the High Court Rules of 1960 by virtue of s.117 of the Code of Civil Procedure.[2] In *Moni Begum v. RAJUK*[3] the Appellate Division found the proceedings in the writ jurisdiction to be civil proceedings, but having regard to the summary nature of the proceedings held that s.141 of the Code would not in terms apply. The court observed -

> ... the Court in its discretion can apply the principles as distinguished from the technical provision of the Code of Civil Procedure to meet the exigencies of the situation in appropriate cases on the ground of justice, equity and good conscience. In what situations the principles will be applied and to what extent may perhaps be left to the wise discretion of the Court itself. In other words, barring what is specifically provided for in the Rules themselves, the Court is the master of its own procedure and it will exercise both its procedural and substantive discretion only on the ground of justice, equity and good conscience.

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[1] see Appendix IV of the Rules of the High Court of Judicature for East Pakistan, 1960, vol.1, Chapter XI, pp.253-255. Rules 1-16 of Part I of Appendix IV(A) are applicable in respect applications for writ other than *habeas corpus*. Rule 1 of Part II of Appendix IV(A) provides that the rules prescribed in Chapter XI at pp.156-157 for application under s.491 of the Code of Criminal Procedure shall be applicable in respect of application for writ of *habeas corpus*.

[2] See *Hussain Baksh v. Settlement Commr.*, 21 DLR (SC) 456; *Babubhai v. Nandalal*, AIR 1974 SC 2105

[3] 46 DLR (AD) 154

The court, however, cautioned against steps which would destroy the summary nature of the proceeding and turn it into a proceeding like a suit by lavish use of the provisions of the Code.

5.141 The High Court Rules provide that an application for a writ other than a writ of *habeas corpus* shall be made in the form of a petition setting out in numbered paragraphs the statement of facts and the grounds on which the writ is prayed for and shall be affirmed on oath by the petitioner himself. The rules relating to an application for writ of *habeas corpus* also require that the application shall be verified by affidavit, but are silent as to who has to affirm the affidavit. As a matter of practice, affidavit by the petitioner is required and the petitioner has to be a person who is close in relationship with the detenu to know the circumstances in which the detenu has been detained.

5.142 The rules further provide that "all questions arising for determination of such petitions shall be decided ordinarily upon affidavits. But the Court may direct that such questions as it may consider necessary be decided on such other evidence and in such manner as it may deem fit and in that case it may follow such procedure and make such orders as may appear to it to be just."[1] Thus the rules contemplate a situation where the court may in the interest of justice feel the necessity of taking oral evidence. In *I.T.O. v. M/S Seth Brothers*[2] where serious allegations were made, the Indian Supreme Court held that the High Court has power to take or call for appropriate evidence at any stage of the proceeding when such a course appears to it to be essential for a just decision of the case and the exercise of such power is certainly called for where it seems necessary for the protection of the court against any fraud or deception attempted to be practised upon it. We have come across cases in which a public authority detained persons without serving the order of detention and the court had been reluctant to issue a rule a without proof of detention. Personal liberty is a precious thing and it cannot be jeopardised by the simple device of not serving the detention order. Where a person sufficiently close to the detenu comes and alleges illegal detention by affirming an affidavit, the court may ask the respondent to admit or deny the fact of detention and, if necessary, take oral evidence to ascertain whether the detenu has at all been arrested and detained. In one case, the detaining authority claimed that the detenu escaped from custody and the court required the

[1] Rule 11 at p.254
[2] AIR 1970 SC 292

deponent of the affidavit-in-opposition to take the dock for cross examination.[1]

5.143 *Pleadings and proof:* As regards pleadings, the principles of Order VI of the Code of Civil Procedure will be applicable and all necessary facts are to be pleaded. As the dispute is to be decided mainly on affidavit, it is necessary to state the essential facts to make out a case for interference and except for mentioning the grounds, the statements need not be argumentative. The pleading must be straight and clear.[2] The same rule applies in respect of affidavit-in-opposition. Though a writ petition is expected to be precise, mere wrong mention of the law in the cause title or a mistake in framing the relief sought will not render the writ petition liable to be thrown out.[3] While in suits the plaint and the written statement should contain only facts and not evidence, in the writ petition and the affidavit-in-opposition not only facts but also the evidence in proof of the facts need be pleaded and annexed.[4] If fraud or *mala fide* is pleaded, the burden of proving it is on the person pleading it.[5] All necessary particulars constituting such fraud or *mala fide* must be given[6] and once one kind of *mala fide* is alleged, the petitioner cannot be allowed to prove another kind of *mala fide*.[7] The person against whom an allegation of fraud or *mala fide* is made must be impleaded as a respondent.[8] Where a specific allegation of fraud or *mala fide* is made against a public functionary, and the allegation is of such nature that it can be controverted only by that public functionary, he must himself controvert the allegation, otherwise the court will be entitled to act on the allegation of fraud or *mala fide*.[9] Specific particulars must also be given in support of an allegation of arbitrary exercise of discretion[10] or

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[1] *Mohsin Sharif v. Bangladesh*, 27 DLR 186

[2] *Mostafa Jaglul v. Authorised Officer*, 33 DLR 42

[3] *Abu Bakr Siddique v. Justice Shahabuddin*, 49 DLR 1

[4] *Bharat Singh v. Haryana*, AIR 1988 SC 2181

[5] *Barium Chemicals Ltd. v. C.L. Board*, AIR 1967 SC 295

[6] *Khandkar Mostaque Ahmed v. Bangladesh*, 34 DLR (AD) 222; *Dr. Md. Yusuf Ali v. Chancellor, Rajshahi Univ.*, 1998 BLD 1

[7] *West Pakistan v. Begum Shorish Kashmiri*, 21 DLR (SC) 1; *Jobed Ali Sarker v. Dr. Sultan Ahmed*, 27 DLR (AD) 78; *Pratap Singh v. Punjab*, AIR 1964 SC 72; *Sharma v. Shri Krishna*, AIR 1959 SC 395

[8] *Mozibur Rahman v. Chairman, D.I.T.*, 41 DLR (AD) 131

[9] *Md. Nurul Huda Mia v. Dhaka WASA*, 44 DLR 527; *Pratap Singh v. Punjab*, AIR 1964 SC 72; *Rowjee v. A.P.*, AIR 1964 SC 962

[10] *I.T.O. v. Damodar*, AIR 1969 SC 408, 414

invidious discrimination[1]. Statement of facts made in the petition should be controverted in the affidavit-in-opposition. If any averment is not controverted in the affidavit-in-opposition, the court is to proceed as if such averments have been admitted by the respondent.[2] Fact asserted in the affidavit-in-opposition, if not controverted by an affidavit-in-reply, shall be deemed to have been admitted.[3] As in a suit, pleadings in the writ jurisdiction may be amended within the limits permitted by Or.6 r.17 of the Code of Civil Procedure and in allowing the amendment the court will see that the other party is not prejudiced. A petition cannot be allowed to be amended so as to give it a new and altogether different complexion.[4] The court should ordinarily insist on the parties being confined to their specific written pleadings and the parties should not be permitted to deviate from them by way of modification or supplementation except through the well known process of formally applying for amendment.[5]

5.143A The burden of proof is primarily on the petitioner who is required to bring sufficient materials on record in support of his case. Like the presumption of constitutionality of law, there is a presumption that official business has been regularly performed and the burden to prove the contrary is on the petitioner.[6] Where both the sides have led evidence in support of their respective cases, the question of onus of proof fades into insignificance and the court is to take decision on the preponderance of evidence.[7] In the absence of relevant and reliable materials on both sides, the court may, in certain circumstances, come to a finding as to whether the impugned action is arbitrary or not.[8]

5.144 *Affidavit*: As the petition is to be disposed of on affidavit, it is necessary to comply with the provisions of Or.XIX of the Code of Civil Procedure, particularly those relating to verification. Any affidavit not

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[1] *Katra Education Society v. U.P.*, AIR 1966 SC 1307, 1313

[2] *Naseem Bano v. U.P.*, AIR 1993 SC 2592

[3] *Square Pharmaceuticals v. Bangladesh*, 3 BLC 22; *Bangladesh v. Anwar Ahmed*, 51 DLR (AD) 42

[4] *A.R. Niazi v. Pakistan*, 20 DLR (SC) 196, Para 14

[5] *Sharma v. India*, AIR 1981 SC 588, 591; *Municipal Corp, Jabalpur v. M.P.*, AIR 1966 SC 837; see *Mehta v. India*, AIR 1987 SC 1086 (in a public interest litigation, in exceptional circumstances, the court did not insist on amendment of the pleading)

[6] *Mustafa Kamal v. Commr. Of Customs*, 52 DLR (AD) 1

[7] Ibid

[8] Ibid

complying with those provisions are not acceptable.[1] If necessary, the court may require the deponent to present himself for cross examination by the other side.[2] The affidavit is to be sworn by the person who has knowledge of the facts or who is acquainted with the facts on information received from reliable source. If the averment is not based on personal knowledge, the source of information must be disclosed.[3] However, a person other than the writ petitioner can affirm affidavit only with the leave of the court producing either letter of authority or power of attorney from the writ petitioner.[4]

5.145 *New plea* : A petitioner will not ordinarily be allowed to raise a new plea before the High Court Division which was not raised before the inferior tribunal, particularly when it is a question of fact or a mixed question of fact and law[5] except in special circumstances. Further, a petitioner will not be permitted to travel beyond his pleadings.[6] But a plea though not taken in the petition may be allowed to be urged if it is specifically taken in the affidavit-in-reply giving the respondent sufficient notice of it.[7] A new plea is also allowed to be taken when it had gone to the root of the matter or was otherwise of considerable importance or had something to do with interpretation of statute.[8] This limitation does not apply in the case of a point of law which does not require ascertainment of facts.[9]

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[1] *Vice-chairman v. Shah Ghulam Nabi*, 27 DLR (AD) 156; *Barium Chemicals v. C.L. Board*, AIR 1967 SC 295

[2] Ibid; *A.P.S.R.T. Corp. v. Satyanarayan*, AIR 1965 SC 1303

[3] *Vice-chairman v. Shah Golam Nabi*, 27 DLR (AD) 156; *Barium Chemical Ltd. C.L. Board*, AIR 1967 SC 295

[4] *Bangladesh v. Anwar Ahmed*, 51 DLR (AD) 42

[5] *Abdul Hai v. Chief Election Commr.*, 15 DLR 678; *Sk. Nasim Anwar v. I.T.O.*, 19 DLR 421; *Kochuni v. Madras*, AIR 1960 SC 1080; *Sharma v. Shri Krishna*, AIR 1959 SC 395 (It would not be right to permit the petitioner to raise questions which depend on facts and which were not mentioned in the petition but were put forward in a rejoinder to which the respondents had no opportunity to reply)

[6] *Municipal Corporation v. M.P.*, AIR 1966 SC 837; *T.R. Tewari v. District Board*, AIR 1964 SC 1680

[7] *Pandarasannidi v. Madras*, AIR 1965 SC 1578

[8] *Arunachalam v. Southern Roadways*, AIR 1960 SC 1191; *Bharat Kala Bhandar v. Damangao Municipaliity*, AIR 1966 SC 249; *Gandumogula v. Jagapathiraju*, AIR 1967 SC 647

[9] *M. Noman v. D.I.T.*, 16 DLR 537 (in this case statement contrary to the point of law was made, but the court held that the point of law could be considered as there cannot be any estoppel against the stature.)

5.146 *Parties in the proceeding*: A writ petition must be filed by the person aggrieved[1] and he must affirm the affidavit unless for special reasons the court allows any other person to affirm it. An aggrieved person may, however, have the petition filed or the affidavit affirmed by his constituted attorney.[2] Ordinarily, two or more persons cannot join in a single petition to enforce separate claims or challenge separate orders.[3] But where the right to relief arises from the same act or transaction and there is a common question of law or fact, or where, though the right to relief claimed does not arise from the same act or transaction, the petitioners are jointly interested in the causes of action, one petition is maintainable at their instance.[4] Where the claims of the petitioners are separate and independent, they may be required to pay separate court-fees.[5] All persons, who may be directly affected in the event of the writ being issued, are necessary parties and they must be impleaded as issuance of writ in the absence of such persons will be a violation of the principle of natural justice.[6] A writ petition will not fail for a mere misdescription of a necessary party.[7] Rule 9 of the High Court Rules provides that if at the hearing of the petition the court is of the opinion that a person who ought to have been served with the notice of the petition has not been so served, the court may order that notice be served on such person and adjourn the hearing upon such terms as it thinks proper. In one case in which an order of compulsory retirement was challenged, the High Court Division while making the Rule absolute made a finding of *mala fide* against the Minister-in-charge who was not a party to the proceedings and then issued a *suo motu* Rule upon the Minister to show cause why he should not pay a cost of Tk.10,000/- to the petitioner. After hearing, the court made the Rule absolute. The Appellate Division held that if the High Court Division wanted to proceed against the Minister, r.9 of the High Court Rules ought to have been followed.[8] *Mala fide* cannot be found against a person without

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[1] *Standard Vacuum Oil Co. v. Trustees of Chittagong Port*, PLD 1961 Dac 278; see Para 5.155-5.164 for discussion on `aggrieved party'

[2] *Zamiruddin Ahmed v. Bangladesh*, 1981 BLD 304

[3] *Dhanyalakshmi Rice Mills v. Commr. of Civil Supplies*, AIR 1976 SC 2243

[4] *Anam Adhinarayan v. A.P.*, AIR 1958 AP 16

[5] *Mota Singh v. Haryana*, AIR 1981 SC 484

[6] *Jamir Ali v. Secy. Ministry of Land*, 52 DLR 125; *Udit Narayan v. Addl. Member, Bd. of Revenue*, AIR 1963 SC 786; see Para 6.60A

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

[8] *Habiullah Khan v. S. Azharuddin*, 35 DLR (AD) 72

impleading him in the petition and the Appellate Division quashed the observation relating to *mala fide*. The Appellate Division further held that upon disposal of the petition the High Court Division became *functus officio* and had no legal authority to issue the *suo motu* Rule which was issued as a "belated attempt to regularise the irregular procedure followed in disposing of the writ petition." When a petitioner does not implead a necessary party the writ petition is liable to be dismissed for defect of parties.[1] Where, however, the number of affected parties is too large to be impleaded as respondents individually, it would be permissible to have at least some of them impleaded as respondents in representative capacity.[2] A question arose whether the provisions of Order 1 rule 8 of the Code of Civil Procedure relating to representative suit could be availed of in the writ jurisdiction. Upon a view that the Code is not applicable in respect of writ petitions the High Court of East Pakistan answered the question in the negative.[3] But in *Hussain Baksh v. Settlement Commissioner*[4] it was held that the provisions of the Code are applicable in writ petitions as these are civil proceedings. In *General Manager, South Central Rly v. Siddhanti*[5] the Indian Supreme Court held that non-impleading of affected parties was not fatal when the validity of the policy decision of the Railway Board regulating seniority of staff was challenged on the ground of violation of fundamental right and relief was claimed against the Railway. If a party impleaded is not a necessary or proper party, the court may strike out his name and in a proper case the court may in its discretion add or implead proper parties to decide all questions that may be involved in the controversy either *suo motu* or on the application of any party.[6] On the question of addition of party on an application, the Appellate Division observed, "The scope and purpose of a writ petition are manifestly different from a civil suit

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[1] *Nurul Islam v. Bangladesh*, 46 DLR 46

[2] *Prabodh Verma v. U.P.*, AIR 1985 SC 167; *Nurul Islam v. Bangladesh*, 46 DLR 46

[3] *Razab Ali v. East Pakistan*, 10 DLR 489

[4] 21 DLR (SC) 456; see *Moni Begum v. RAJUK*, 46 DLR (AD) 154

[5] AIR 1974 SC 1755

[6] *Udit Narayan v. Addl. Member, Board of Revenue*, AIR 1963 SC 786; *Abdul Khaliq v. Bangladesh*, 1987 BLD (AD) 121 (a tenant inducted by the government treating the property as abandoned is neither a necessary nor a proper party in a proceeding for release of the property); *Mohsin Kabir v. Bangladesh*, 45 DLR 302; *Mobarak Hossain v. Azad Rahman*, 2 BLC (AD) 180 (where a person's claim to a post depends upon the success of his employer who is already impleaded as a respondent, he is neither a necessary party nor a proper party.)

and the principles relating to addition of party in a civil suit are not protanto applicable to a writ petition. Ordinarily the aggrieved person seeking relief under Article 102 has the right and duty to choose his adversaries and a respondent cannot thrust another into that category whom the writ petitioner does not want, may be to his peril."[1]

5.146A *Award of cost:* The court in disposing of a writ petition can award cost in appropriate cases. In awarding cost, the court must give some reason, otherwise it may appear to be arbitrary.[2] Imposition of a huge cost against the petitioner is not justified when the petition is dismissed in limine and no reason for awarding the cost is given.[3] When respondent auction purchaser suffers loss for not being able to take delivery of goods auction sold due to the action of the petitioner, the High Court Division awarded substantial cost to the auction purchaser.[4]

5.147 *Dismissal of the petition*: If a petition has been dismissed for default of the petitioner or has been allowed exparte, the principles of Or.IX of the Code of Civil Procedure may be applicable and in an appropriate case the court may restore the petition or, as the case may be, re-hear the petition.[5]

5.148 Where the application *prima facie* discloses a case for interference the court should not summarily dismiss the application.[6] In dismissing an application whether summarily or upon hearing all the parties, the court should give reasons for the order.[7] If the respondent has not controverted the averments of the petition and has not even resisted the same, dismissal of the petition is not proper.[8] Where the petitioner has withdrawn his petition without taking leave of the court to file a fresh petition, he cannot file a fresh petition.[9]

5.149 *Commission*: In appropriate circumstances, the court may issue a commission for ascertaining facts as provided by Or.XXVI of the

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[1] *Moudud Ahmed v. Anwar Hossain Khan*, 1995 BLD (AD) 12

[2] *Bangladesh v. Court of Settlement*, 51 DLR (AD) 87

[3] *Al-Helal Rice Mills v. BSRS*, 51 DLR (AD) 51

[4] *Mia Ahmed Kibria v. Bangladesh*, 50 DLR 496

[5] *Moni Begum v. RAJUK*, 46 DLR (AD) 154

[6] *Century Spin. & Mfg. Mills v. Ulhasnagar Municipality*, AIR 1971 SC 1021

[7] *Gram Panchayet v. Collector*, AIR 1991 SC 1082

[8] *Radheshyam v. District Inspector of Schools*, AIR 1987 SC 1628

[9] *Sarguja Transport v. S.T.A.T.*, AIR 1987 SC 88 (the court, however, excepted a petition for *habeas corpus* from this rule)

Code of Civil Procedure.[1] The Indian Supreme Court issued commission for report when there was serious allegation of violation of fundamental right to life and personal liberty of citizens.[2]

5.150 *Res judicata*: A decision given in a writ petition or suit between the same parties on an issue, operates as *res judicata* and no fresh petition or suit can be brought to re-agitate the issue.[3] When the plaint of a suit in respect of an election dispute has been rejected holding that the election tribunal has the exclusive jurisdiction, a writ petition cannot be maintained for deciding that election dispute.[4] In the same way the principle of constructive *res judicata* will be applicable. When a decision has been given on merits, a second petition will not lie on a plea which was available at the hearing of the first petition but was not taken.[5] On the same principle a relief which was prayed for but not granted will be deemed to have been denied.[6] When a proceeding stands terminated by a final decision in a writ petition, the court cannot re-open the proceeding by means of a miscellaneous application in respect of a matter which provides a fresh cause of action.[7] But the principle of *res judicata* will not be applicable if the petition is dismissed as being withdrawn or has not been dismissed on merits[8], or if the petition is rejected on the ground of lack of standing[9], or on the ground of availability of efficacious remedy[10] or where the statutory provision on

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[1] *Kochuni v. Madras*, AIR 1959 SC 725; see rule 11 of the High Court Rules.

[2] *Nilabati Behera v. Orissa*, AIR 1993 SC 1960

[3] *Md. Yakub v. Chief Settlement Commr.*, PLD 1965 SC 254; *Daryao v. U.P.*, AIR 1961 SC 1457; *India v. Nanak*, AIR 1968 SC 1370; *Virudhanagar S.R. Mills v. Madras*, AIR 1968 SC 1196; *Dudani v. S.D. Sharma*, AIR 1986 SC 1455; *Asoke Kumar v. National Insurance*, AIR 1998 SC 2046

[4] *Habibullah v. Election Commn.*, 1989 BLD 496

[5] *Devilal v. S.T.O.*, AIR 1965 SC 1150; *Gulabchand v. Gujrat*, AIR 1965 SC 1153; *Forward Construction v. Probhat*, AIR 1986 SC 391. In *Kirit Kumar v. India*, AIR 1981 SC 1621, it was held that constructive res judicata in matters of fundamental rights would not be applicable where a point was raised in subsequent application under art.32 which was not raised in an aplication under art.226. The same view was re-iterated in *Asoke Kumar v. India* (*supra*). This view cannot hold good in our jurisdiction as the High Court Division has the power and duty to enforce fundamental rights under art.102(1).

[6] *MSRTC v. Babajan*, AIR 1977 SC 1112

[7] *U.P. v. Shri Brahm Dutta*, AIR 1987 SC 943

[8] *Daryao v. U.P.*, AIR 1961 SC 1457; *Tilokchand v. H.B. Munshi*, AIR 1970 SC 898

[9] *Joseph v. Kerala*, AIR 1965 SC 1514; *India v. Nanak*, AIR 1968 SC 1370

[10] *Daryao v. U.P.*, AIR 1961 SC 1457

the basis of which the previous decision was given has been materially altered[1]. The previous decision will not also be a *res judicata* when the second petition is brought on a different cause of action.[2]

5.151 *Futile and premature writs:* The court will not issue a writ where it will be futile.[3] Thus though the cancellation of a contract was found illegal, the Indian Supreme Court in *Guruswamy v. Mysore*[4] instead of issuing the writ awarded cost to the petitioner as in the meantime the period of the contract expired.[5] An Act will not be declared void if during the pendency of the proceeding the Act has been repealed.[6] When the validity of an Ordinance was challenged on the ground that there was no emergent situation necessitating promulgation of the Ordinance, the Appellate Division declined to go into the question as in the meanwhile it was replaced by an Act of Parliament.[7] The Pakistan Supreme Court held that the court would not grant a writ when the law gives power to one of the parties affected by the writ to nullify the court's writ unilaterally.[8] The same proposition was reiterated in *R. Sim & Co. v. D.M. Tippera*[9], but the court took the view that the question of the writ being futile did not arise as even if the authority

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[1] *Amritsar Municipality v. Punjab*, AIR 1969 SC 1100

[2] *Aditya Kumar v. Principal, Rajendra Medical College*, AIR 1971 SC 1005

[3] *Nazmul Huda v. Secretary, Cabinet Division*, 2 BLC 414; See *Idrisur Rahman v. Shahiduddin*, 1999 BLD 291 (Court answered the question as the violation was a continuing one)

[4] AIR 1954 SC 592

[5] *Rashbehari v. Orissa*, AIR 1969 SC 1081; *Mohit Chandra v. District Magistrate*, AIR 1974 SC 2287 (petitioner released pending hearing of *habeas corpus* petition); *Ghyas Siddique v. Bangladesh*, 43 DLR 179 (impugned order having been withdrawn, the court will not go into the legality of the order); *Haryana v. Krishna Rice Mills*, AIR 1982 SC 1106 (petitioner Y challenged levy of sales tax; State lawyer assured withdrawal of the instruction in respect of the levy and the petition was held infructuous); *Suresh v. Vasant*, AIR 1972 SC 1680 (writ petition against a student who was admitted to certain course and was about to complete it successfully was not allowed when the petitioner himself was not eligible); see *Mirza Ali v. State*, 43 DLR 144 (the court decided the issue of legality of the order of detention even after release of the detenu when it appeared in the facts of the case that the detenu would suffer detriment if the order would not be declared illegal).

[6] *Kartar Singh v. Piara Ram*, AIR 1976 SC 957

[7] *Kudrat-E-Elahi v. Bangladesh*, 44 DLR (AD) 319; *A.K. Roy v. India*, AIR 1982 SC 710

[8] *Rahmatuallh v. Dy Settlement Commr.*, 15 DLR (SC) 373

[9] 18 DLR (SC) 543

issued a fresh order of requisition it would give the appellant a valuable right to get compensation at an enhanced rate. It is submitted that the court was not right in laying down the proposition that it would be futile to issue a writ when it could be nullified by the party against whom it is issued. The court is to see to the legality of the action and not to speculate the action to follow and it is only in *Guruswamy* situation that a writ may be futile. The Pakistan Supreme Court, however, stated the correct position in *East Pakistan v. Daulatpur Jute Mills* observing -

> ... the High Court merely pronounces upon the legality or constitutionality of an act of the executive ... no question of rendering the order of the High Court futile or ineffective can arise in these circumstances. The Courts are merely interested in seeing that the executive authority acts in accordance with law and does not take away rights by arbitrary or illegal exercise of power. They are not interested in seeing as to what kind of action will or will not be taken.[1]

5.152 The court will not entertain a writ petition on premature grievances. Thus where an international treaty provided that it would be effective only on exchange of the instruments of ratification, a writ petition challenging the treaty was not maintainable until the instruments of ratification were exchanged.[2] The court will not take cognisance of an action re-opening a dropped disciplinary proceeding until punitive action is taken.[3] A writ petition challenging the recommendation of a candidate by the Public Service Commission on the ground of lack of necessary qualification was rejected as it was open to the appointing authority not to accept the recommendation.[4] But an application can be presented not only after the applicant's legal right has been invaded but also when they have been threatened with an immediate peril.[5]

5.153 ***Power of Review:*** The Constitution has not specifically conferred power on the High Court Division to review its own judgment. The question is whether such a power is available to the High

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[1] 20 DLR (SC) 61, Para 31; *Ghulam Mohiuddin v. Ch. Settlement Commr.*,16 DLR (SC) 654

[2] *Kazi Mukhlesur Rahman v. Bangladesh*, 26 DLR (AD) 44

[3] *Chanan Singh v. Registrar, Co-operative*, AIR 1976 SC 1821

[4] *Kunda Kadam v. Soman*, AIR 1980 SC 881; *Balmadies Plantation v. T.N.*, AIR 1972 SC 2240 (when an Act has not come into force, the question of validity of issuing notice under that Act cannot be gone into by the court).

[5] *Usmania Glass Sheet v. S.T.O.*, 22 DLR (SC) 437; *Bengal Immunity v. Bihar*, AIR 1955 SC 661; *Kochuni v. Madras*, AIR 1959 SC 725

Court Division under the provisions of s.114 of the Code of Civil Procedure. The Pakistan Supreme Court answered the question in the affirmative[1] In *Azra Zaman v. Bangladesh*[2] the High Court Division held that it cannot review its judgment in writ jurisdiction. The view of the court that a proceeding in the writ jurisdiction cannot be safely and exclusively called a civil proceeding really avoided the real issue. The Pakistan Supreme Court pointed out -

> Whether a proceeding is civil or not depends on the nature of the subject-matter of the proceeding and its object, and not on the mode adopted or the forum provided for the enforcement of the right. A proceeding which deals with a right of a civil nature does not cease to be so merely because the right is sought is to be enforced by having recourse to the writ jurisdiction.[3]

The High Court Division found inconsistency in *Hussain Baksh* as the Pakistan Supreme Court found the power of review in writ jurisdiction even after holding that the right of review is a substantive right which is a creature of statute. It is submitted that there is no inconsistency in *Hussain Baksh* inasmuch as the Pakistan Supreme Court found the power by reference to ss. 114 and 117 of the Code only after finding that when matters of civil nature are dealt with in the writ jurisdiction, it is a civil proceeding.

5.154 *Court-fees and costs*: The High Court Rules have provided for court-fees for the petition and for annexing documents and have left the matter of awarding cost to the discretion of the court. But the rules are not detailed. For matters not covered by these rules resort must be had to the provisions of the Code of Civil Procedure. The court in disposing of a petition may award cost. Rule 15 describes the expenses which may be included in the cost. The court has the discretion in awarding cost. But such discretion must be exercised judicially and in accordance with law and practice of the court.[4] The court does not award cost against a person who is not a party to the proceeding, but in view of the language

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[1] *Hussain Baksh v. Settlement Commr.*, 22 DLR (SC) 456; *Shivdeo Singh v. Punjab*, AIR 1963 SC 1909, Para 8 (There is nothing in Art.226 of the Constitution to preclude a High Court from exercising the power of review which inheres in every court of plenary jurisdiction to prevent miscarriage of justice to correct grave and palpable errors committed by it.)

[2] 34 DLR 247; *Omar Faruk v. Bangladesh*, 51 DLR 118

[3] *Hussain Baksh v. Settlement Commr.*, 21 DLR (SC) 456, 459

[4] *Habibullah Khan v, S. Azharuddin*, 35 DLR (AD) 72

of s.35 of the Code of Civil Procedure, the court may award cost even against a stranger to the proceeding provided he is given an opportunity of being heard. Such a hearing must be given in the proceeding itself and not by starting a separate proceeding after disposal of the writ proceeding.[1]

WRIT JURISDICTION : AGGRIEVED PARTY

5.155 Under art.102 except for an application for *habeas corpus* or *quo warranto* a writ petition can be filed only by a 'person aggrieved'. Thus in order to have *locus standi* to invoke the jurisdiction an applicant has to show that he is an aggrieved party in an application for *certiorari, manadamus* or prohibition.[2]

5.156 The leading English case on *locus standi* is *Exparte Sidebotham*[3] where the court held that a person aggrieved is a man "who has suffered a legal grievance, a man against whom a decision has been pronounced which has wrongly deprived him of something, or wrongfully refused him something, or wrongfully affected his title to something." The same view was taken in subsequent cases.[4] The Pakistani and Indian courts were greatly influenced by these English decisions. In *Tariq Transport v. Sargodha-Vera Bus Service*[5] (a petition under art.170 the of Pakistan Constitution, 1956) the Supreme Court observed, "... a person seeking judicial review ... must show that he has a direct personal interest in the act which he challenges before his prayer for review is entertained." The same view was taken in respect of *locus standi* under art.98 of the Constitution of Pakistan, 1962.[6] Therefore, an association, though registered, did not have *locus standi* to vindicate the personal or individual grievance of its members.[7] In *Fazal Din v. Lahore I.T.*[8] the Pakistan Supreme Court took somewhat liberal view stating, "...

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[1] Ibid

[2] *KARIKA v. Secy. LGRD*, 45 DLR 324 (when an order affecting the management of a society is an aggrieved person)

[3] [1880] 14 Ch. D. 458

[4] *Exparte Official Receiver In Re Reed Bowen & Co.*, [1897] 19 QBD 174

[5] 11 DLR (SC) 140, 150

[6] *Abdus Salam v. Chairman, Election Authority*, 17 DLR 191

[7] *Pakistan Steel Re-Rolling Mills Assn. v. West Pakistan*, PLD 1964 Lah 138; the same view was taken in *Bangladesh Electrical Assn. v. Bangladesh*, 46 DLR 221

[8] 21 DLR (SC) 225

the right considered sufficient for maintaining a proceeding of this nature is not necessarily a right in the strict juristic sense but it is enough if the applicant discloses that he had a personal interest in the performance of the legal duty which if not performed or performed in a manner not permitted by law would result in the loss of some personal benefit or advantage or the curtailment of a privilege or liberty or franchise."[1] The Indian Supreme Court also followed the English decisions in the matter of standing both for the enforcement of fundamental rights and for other constitutional remedies.[2]

5.157 In *Kazi Mukhlesur Rahman v. Bangladesh*[3], an advocate challenged the legality of the Delhi Treaty of 1974 regarding demarcation of the land boundary between India and Bangladesh and the Appellate Division took a liberal view of the standing of the appellant stating -

> The fact that the appellant is not a resident of South Berubari Union No.12 or of the adjacent enclaves involved in the Delhi Treaty need not stand in the way of his claim to be heard in this case. We heard him in view of the constitutional issue of grave importance raised in the instant case involving an international treaty affecting the territory of Bangladesh and his complaint as to an impending threat to his certain fundamental rights guaranteed by the constitution, namely, to move freely throughout the territory of Bangladesh, to reside and settle in any place therein as well as his right of franchise. Evidently, these rights attached to citizen are not local. They pervade and extend to every inch of the territory of Bangladesh stretching up to the continental shelf.

But the court continued to stick to the traditional view of *locus standi.* Referring to *Fazal Din*, the High Court Division observed,

> We also are of the opinion that any person who is affected by any order can maintain a petition under article 102 ... In order to show that they have been affected, it is necessary to establish that they have some right in the subject-matter of the dispute and that they are affected by the

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[1] *Mizanur Rahman v. Chittagong Mun. Corp.*, 45 DLR 331

[2] *Chiranjitlal v. India*, AIR 1951 SC 41 (no one except those whose rights are directly affected by a law can raise the question of constitutionality of that law); *Calcutta Gas Co. v. West Bengal*, AIR 1962 SC 1044; *Orissa v. Ram Chandra*, AIR 1964 SC 685; *Venkateswara v. A.P.*, AIR 1966 SC 828; *J.M. Desai v. Roshan Kumar*, AIR 1976 SC 578

[3] 26 DLR (AD) 44

impugned orders ...[1]

5.158 This rule of *locus standi* has an adverse effect on the rule of law. Schwartz and Wade commented -

> Restrictive rules about standing are in general inimical to a healthy system of administrative law. If a plaintiff with a good case is turned away, merely because he is not sufficiently affected personally, that means that some government agency is left free to violate the law, and that is contrary to public interest.[2]

Speaking about this traditional view of *locus standi,* Prof. Theo in his book "Locus Standi and Judicial Review" observed -

> Is the judicial function primarily aimed at preserving legal order by confining the legislative and executive organs of government within their powers in the interest of public (Jurisction de droit objectif) or is it mainly directed towards the protection of private individuals by preventing ilegal encroachments on their individual rights (jurisdiction de droit subjectif)? The first contention rests on the theory that courts are the final arbiters of what is legal and illegal ... Requirements of locus standi are therefore unnecessary in this case since they merely impede the purpose of the function as conceived here.[3]

Before we proceed further in quest of the meaning of 'person aggrieved' in art.102, it will be worthwhile to note the development in other jurisdictions in this regard.

5.159 With the increase of governmental functions, the English courts found the necessity of liberalising the standing rule to preserve the integrity of the rule of law. When a public-spirited citizen challenged the policy of the police department not to prosecute the gaming clubs violating the gaming law, the court heard him though no definite answer to the standing question was given.[4] The court heard Mr. Blackburn challenging the action of the government in joining the European Common Market.[5] Again, Mr. Blackburn was accorded standing in

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[1] *Eastern Hosiery M.S.B.S. Samity v. Bangladesh*, 29 DLR 694, 679; *Dacca Match Workers v. Bangladesh*, 29 DLR 188; *K.S. Employees Union v. G.M. Khulna Shipyard*, 30 DLR 368 (for violation of right of individual worker, the trade union and the collective bargaining agent will have no *locus standi* to invoke writ jurisdiction.)

[2] Legal Control of Government (1972), p.291

[3] Quoted in S.P. Gupta v. India, AIR 1982 SC 149, 190

[4] *R. v. Metropolitan Police Commr. ex p. Blackburn*, [1968] 1 All E.R. 763

[5] *Blackburn v. Att. Gen.*, [1971] 2 All E.R. 1380

enforcing the public duty owed by the police and Greater London Council in respect of exhibition of pornographic films.[1] Lord Denning observed –

> I regard it as a matter of high constitutional principle that, if there is a good ground for supposing that a government department or a public authority is transgressing the law, or is about to transgress it, in a way which offends or injures thousands of Her Majesty's subjects, then any one of those offended or injured can draw it to the attention of the courts of law and seek to have the law enforced, and the courts in their discretion can grant whatever remedy is appropriate.

In all the cases the duty owed by the public authorities was to the general public and not to an individual or to a determinate class of persons and the applicants were found to have *locus standi* as they had 'sufficient interest' in the performance of the public duty. By the time the House of Lords was deciding the case of *I.R.C. v. Federation of Self-Employed*[2], the court was asking whether the applicant had sufficient interest and not whether he was an aggrieved person. Referring to the above quotation, Lord Diplock observed, "The reference here is to flagrant and serious breaches of the law by persons and authorities exercising governmental functions which are continuing unchecked. To revert to the technical restrictions on locus standi to prevent this that were current thirty years ago or more would be to reverse that progress towards a comprehensive system of administrative law that I regard as having been the greatest achievement of the English courts in my judicial lifetime."[3] In concluding his opinion Lord Diplock stated -

> It would, in my view, be a grave lacuna in our system of public law if a pressure group, like the federation, or even a single public spirited taxpayer, were prevented by outdated technical rules of locus standi from bringing the matter to the attention of the court to vindicate the rule of law and get the unlawful conduct stopped ... It is not sufficient, in my view, a sufficient answer to say that judicial review of the actions of officers or departments of central government is unnecessary because they are accountable to Parliament for the way in which they carry out

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[1] *R. v. Metropolitan Police Commr. ex p. Blackburn*, [1973] 1 All E.R. 324; *R. v. Greater London Council ex p. Blackburn*, [1976] 3 All E.R. 184. See also *A.G. v. Independent Broadcasting Authority*, [1973] 1 All E.R. 696

[2] [1981] 2 All E.R. 93

[3] Ibid, p.104

> their functions. *They are accountable to Parliament for what they do so far as regards efficiency and policy, and of that Parliament is the only judge; they are responsible to a court of justice for the lawfulness of what they do, and of that the court is the only judge.*[1](Italics supplied)

In the meanwhile the new Order 53 of the Rules of the Supreme Court was introduced and then came the Supreme Court Act, 1981 recognising the liberalised rule of standing.[2]

5.160 In India the concept of public interest litigation (public spirited citizens bringing matters of great public importance) was initiated by Krishna Iyer J in *Mumbai Kamgar Sabha v. Abdulbhai*[3] stating, "Test litigation, representative actions, *pro bono publico* and like broadened forms of legal proceedings are in keeping with the current accent on justice to common man and a necessary disincentive to those who wish to bypass the real issues on merits by suspect reliance on peripheral, procedural shortcomings ... Public interest is promoted by a spacious construction of *locus standi* in our socio-economic circumstances and conceptual latitudinarianism permits taking liberties with individualisation of the right to invoke the higher courts where the remedy is shared by a considerable number, particularly when they are weaker."[4] In *Fertilizer Corp. Kamgar Union v. India*[5] the Supreme Court allowed the workers' union and two individual workers of a factory to challenge the action of the government in selling the factory. A definite jurisprudential basis was laid down in *S.P. Gupta v. President of India*[6] where several advocates of different Bars challenged the action of the government in transferring some judges of the High Courts. In according standing to the petitioners, Bhagwati J observed -

> Where a legal wrong or a legal injury is caused to a person or to a determinate class of persons by reason of violation of any constitutional or legal right or any burden is imposed in contravention of any constitutional or legal provision or without authority of law or any such legal wrong or legal injury or illegal burden is threatened and such

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[1] Ibid, p. 107

[2] See *R. v. Secy. of State ex p World Development Movement*, [1995] 1 All E.R. 611

[3] AIR 1976 SC 1455

[4] Similar view was expressed by Iyer J in *Sunil Batra v. Delhi Administration*, AIR 1980 SC 1579, *Municipal Council, Ratlam v. Vardichand*, AIR 1980 SC 1622, *Azad Rickshaw Pullers v. Punjab*, AIR 1981 SC 14

[5] AIR 1981 SC 344

[6] AIR 1982 SC 149

> person or determinate class of persons is by reason of poverty, helplessness or disability or socially or economically disadvantaged position, unable to approach the court for relief any member of the public can maintain an application ... seeking judicial redress for the legal wrong or injury caused to such person or determinate class of persons.[1]

In subsequent cases the Supreme Court found in favour of the standing of public-spirited individuals and organisations in bringing matters of grave public importance where there were no particularly affected persons, or where there were, the affected persons were disabled from approaching the court for various reasons.[2]

5.161 The wave of the development also reached Pakistan. In *Benazir Bhutto v. Pakistan*[3] the Supreme Court held that as the provision of art.184(3) (which corresponds to Indian art.32) is open-ended, the proceedings could be maintained by an individual whose fundamental rights are infracted or by a person *bona fide* alleging infraction of the fundamental rights of a class or a group of persons, as there is no rigid incorporation of the notion of aggrieved party in art.184(3). Later the Supreme Court took cognisance of a case on the basis of a telegram for the enforcement of fundamental rights of the bonded labour.[4] It appears that the Supreme Court took advantage of the absence of the expression 'person aggrieved' in art.184(3) to take a liberal view on the question of standing. But the presence or absence of that expression neither concludes, nor forecloses the issue. The question is what meaning is to be given to that expression having regard to the Constitution as a whole.

5.162 In *Bangladesh Sangbadpatra Parishad v. Bangladesh*[5] the association of newspaper-owners challenged an award given by the Wage Board and the High Court Division dismissed the petition holding that the association had no *locus standi*. The Appellate Division upheld the finding of the High Court Division. Dealing with the Indian

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[1] Ibid, Para 17

[2] *Peoples Union for Democratic Rights v. India*, AIR 1982 SC 1473; *D.S. Nakara v. India*, AIR 1983 SC 130; *Bandhua Mukti Morcha v. India*, AIR 1984 SC 802; *H.P. v. Student's Parent, Medical College*, AIR 1985 SC 910 *Bihar Legal Support Society v. Chief Justice of India*, AIR 1987 SC 38; *M.C. Mehta v. India*, AIR 1987 SC 965

[3] PLD 1988 SC 416

[4] *Darshan Masih v. State*, PLD 1990 SC 513

[5] 43 DLR (AD) 126

decisions regarding public interest litigation the Appellate Division observed -

> In our Constitution the petitioner seeking enforcement of a fundamental right or constitutional remedies must be a `person aggrieved'. Our constitution is not at *pari materia* with the Indian Constitution on this point. The Indian Constitution, either in Article 32 or in Article 226, has not mentioned who can apply for enforcement of fundamental rights and constitutional remedies. The Indian courts only honoured a tradition in requiring that the petitioner must be an `aggrieved person'. The emergence in India of *pro bono publico* litigation, that is litigation at the instance of a public-spirited citizen espousing causes of others, has been facilitated by the absence of any constitutional provision as to who can apply for a writ. In England, various tests were applied. Sometimes it was said that a person must be 'aggrieved' or he must have a specific legal right or he must have a 'sufficient interest'. Now after the introduction of the new Rules of the Supreme Court, Order 53 Rule 3, any person can apply for 'judicial review' in England under the Supreme Court Act, 1981 if he has a 'sufficient interest'.
>
> Therefore the decisions of the Indian jurisdiction on public interest litigation are hardly apt in our situation. We must confine ourselves to asking whether the petitioner is an 'aggrieved person', a phrase which has received a meaning and a dimension over the years.

In this case public interest litigation was not involved. There was no difficulty on the part of the newspaper-owners to challenge the award themselves. The Appellate Division was certainly right in denying standing to the association of newspaper-owners. The observation quoted above must be understood in the light of the facts of that case. In *Bangladesh Retired Government Employees Welfare Assn. v. Bangladesh*[1] the High Court Division accepted the standing of the association holding, "Since the association has an interest in ventilating the common grievance of all its members who are retired government employees, to our view, this association is a 'person aggrieved' ..."

5.163 Art.102 speaks about 'person aggrieved'. What is the meaning of this expression? The Constitution has not defined the expression, nor has it mentioned 'personally aggrieved person'. An expression occurring

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[1] 46 DLR 426 (Reversed in *Bangladesh Retired Government Employees Welfare Association*, 51 DLR (AD) 121, on the issue of violation of the equality clause of the Constitution)

in the Constitution cannot be interpreted out of context or only by reference to the decisions of foreign jurisdictions where the constitutional dispensation is different from ours. In interpreting the expression it cannot be overlooked that the English courts which introduced the restrictive rule of standing vastly shifted from their traditional view which was ultimately changed by legislation. The expression has to be given a meaning in the context of the scheme and objectives of the Constitution and in the light of the purpose behind the grant of the right to the individuals and the power to the court. Any interpretation which undermines the scheme or objectives of the Constitution, or defeats the purpose for which the jurisdiction is created is to be discarded. It has to be noted that the framers of the Constitution envisioned a society in which the rule of law, fundamental human rights and freedom, equality and justice, political, economic and social, will be secured for all citizens. They spoke about their vision in the preamble in no uncertain terms. To give full effect to the rule of law, substantive provision has been made in art.7 which states that all powers in the Republic shall be exercised only under and by the authority of the Constitution. The vision of the society was restated in art.8 and elaborated in other articles of Part II. Art.8(2) specifically states that the principles of State policy set down in Part II will be fundamental to the governance of Bangladesh. To ensure the fundamental human rights and freedom, equality and justice the Constitution guaranteed a host of rights in Part III as fundamental rights. And to ensure that the mandate of the Constitution is obeyed, the Supreme Court is given wide power of judicial review. In this background, can the expression 'person aggrieved' be given a meaning consonant with the traditional view of *locus standi* and thereby producing a result deprecated by Schwartz and Wade as inimical to a healthy system of administrative law and contrary to the public interest? The Appellate Division answered in the negative.[1] One may argue that the framers of the Constitution used the expression knowing the judicial interpretation given to it, but by that time the English courts started shifting from the traditional view of standing. In view of the pronounced scheme and objectives of the Constitution it is difficult to accept that the framers of the Constitution intended to allow any public wrong to go without any remedy and used the expression to adhere to the traditional view of standing.[2] Distinguishing *Bangladesh*

[1] *Dr. Mohiuddin Farooque v. Bangladesh*, 49 DLR (AD) 1
[2] Ibid

Sangbadpatra Parishad the Appellate Division held,

> ... when a public injury or public wrong or infraction of a fundamental right affecting an indeterminate number of people is involved it is not necessary, in the scheme of our constitution, that the multitude of individuals who has been collectively wronged or injured or whose collective fundamental rights have been invaded are to invoke the jurisdiction under Article 102 in a multitude of individual writ petitions, each representing his own portion of concern. Insofar as it concerns public wrong or public injury or invasion of fundamental rights of an indeterminate number of people, any member of the public, being a citizen, suffering the common injury or common invasion in common with others or any citizen or an indigenous association, as distinguished from a local component of a foreign organisation, espousing that particular cause is a person aggrieved and has the right to invoke the jurisdiction under Article 102.[1]

5.164 The expression 'person aggrieved' means a person who even without being personally affected has sufficient interest in the matter in dispute.[2] When a public functionary has a public duty owed to the public in general every citizen has sufficient interest in the performance of that public duty.[3] The real question is whether the applicant can show some default or abuse, and not whether his personal rights or interests are involved.[4] It is often argued that such an interpretation will allow a person to espouse the cause of another person and the court will be required to decide the issues without the presence of the proper party. If the affected party is not coming forward for no visible reason, the court may refuse to entertain the application. It has been clearly pointed out that the liberalised rule of standing will be of no avail to busybodies or

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[1] Ibid, para 48 (There are four separate opinions all of which should be read; *Prof. Nurul Islam v. Bangladesh*, 52 DLR 413 (An eminent physician suing in respect of health hazard caused by tobacco consumption)

[2] *Nasiruddin v. Secretary, LGRD*, 51 DLR (AD) 213

[3] Standing accepted in *Parvin Akhtar v. RAJUK*, 1998 BLD 117 (Environment); *Dr. Mohiuddin Farooque v. Bangladesh*, 50 DLR 84 (Flood control); *Sultana Nahar v. Bangladesh*, 1998 BLD 363 (Right to life), while standing denied in *Mostafa Kamal v. Banglaesh*, 2 BLC 207 (Location and sitting of a hat); *Dr. Mohiuddin Farooque v. Bangladesh*, 48 DLR 433 (Appointment of Judge), *Rafique (Md.) Hossain v. Speaker*, 47 DLR 361 (Voter raising issue relating to resignation of members of Parliament); *Rokeya Kabir v. Bangladesh*, 52 DLR 234 (Detention of particular girl who was neither an accused nor a witness)); *Mia Ahmed Kibria v. Bangladesh*, 1998 BLD 459

[4] H.W.R. Wade – Administrative Law, 7th ed., p.712

persons seeking intervention of the court with oblique motive.[1] In a *quo warranto* proceeding there is no requirement of an application by a 'person aggrieved'. Even then the court inquires whether an applicant has an interest in the matter and whether he is approaching the court *bona fide* or with an oblique motive. When an application for *mandamus, certiorari* or prohibition is required to be filed by a 'person aggrieved', the court will have all the more reason to ask why the affected party is not coming forward and what is the motive of the applicant.[2] In *Chairman, Civil Aviation Authority v. K.A. Rouf*[3] the Appellate Division denied standing to a head master of a school challenging the order of the Education Board regarding formation of the managing committee of the school stating -

> The High Court Division should have asked itself as to what interest the writ petitioner had in establishing the character of the school. How is he affected? He did not say in the writ petition that he was filing the petition *pro bono publico* and how being a paid official he can act in the interest of the public?

WRIT JURISDICTION: INTERIM AND FINAL ORDERS

5.165 ***Interim order:*** If a petitioner succeeds in establishing *prima facie* that his fundamental right or any other right has been infringed or is in imminent threat of being infringed, the court may grant an appropriate interim relief by way of stay or injunction order pending final hearing of the petition. Sub-art.(3) of art.102 prohibits issuance of any interim order in relation to any law to which art.47 applies. However, such a prohibition may not be attracted in a case where it

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[1] *Dr. Mohiuddin Farooque v. Bangladesh*, 49 DLR (AD) 1, para 50 (The High Court Division will exercise some rules of caution in each case. It will see that the applicant is, in fact, espousing a public cause, that his interest in the subject matter is real and not in the interest of generating some publicity for himself or to create mere public sensation, that he is acting *bona fide*, that he is not a busybody or an interloper, that it is in the public interest to grant him standing and that he is not acting for a collateral purpose to achieve a dubious goal, including serving a foreign interest.)

[2] *Dr. Mohiuddin Farooque v. Bangladesh*, 49 DLR (AD) 1 ("The Court in considering the question of standing in a particular case, if the affected party is not before it, will enquire as to why the affected party is not coming before it and if it finds no satisfactory reason for non-appearance of the affected party, it may refuse to entertain the application". Para 9)

[3] 46 DLR (AD) 145

becomes clear that refusal to grant interim order would render the final order that may be passed vain and totally ineffective.[1] In cases not covered by sub-art.(3), sub-art.(4) of art.102 mandates issuance of notice on the Attorney General where an interim order prayed for is likely to prejudice or interfere with any measure designed to implement any development programme or work or be harmful to the public interest. In *Commissioner of Customs v. Giasuddin Chowdhury*[2] the Appellate Division held such a notice to be mandatory. The court further held that the notice must be of such reasonable length as to make possible and feasible for the Attorney General to obtain instructions from relevant quarters and appear before the court, and whether or not the Attorney General or any advocate authorised by him appears in court, the court is to satisfy itself before issuing an interim order that such an order is not likely to prejudice or interfere with any measure designed to implement any development programme or work or be harmful to the public interest. The satisfaction need not be recorded and it will be presumed that the satisfaction is latent in the interim order. The High Court Division will not consider whether an interim order will actually prejudice or interfere with the implementation of any development programme or work or will actually be otherwise harmful to the public interest, but will only consider whether such an interim order is likely to have the said effect. To obtain an interim order a writ petitioner must not only make out a *prima facie* case, but a strong *prima facie* case and the balance of inconvenience in his favour shall have to be so strong that it will outweigh the consideration of prejudice to the development work or the public interest.[3] Where the High Court Division has passed an interim order, the Appellate Division will not ordinarily interfere with such order[4] unless it is shown that the conditions precedent for the exercise of the power by the High Court Division are not fulfilled[5] or that the order is arbitrary or perverse[6].

5.166 An interim relief is given in aid of or ancillary to the main

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[1] *Lutfur Rahman v. Election Commn.*, 27 DLR 278

[2] 50 DLR (AD) 129

[3] Ibid; *Frank Shipping Ltd. v. Bangladesh*, 2 MLR (AD) 353

[4] *Amirul Islam v. Golam Mostafa*, 1995 BLD (AD) 21; *Bangladesh v. Khandkar Tajuddin*, 51 DLR (AD) 64

[5] *Commissioner of Customs v. Ghiasuddin Chowdhury*, 50 DLR (AD) 129

[6] *Dr. Waliur Rahman v. Bangladesh*, 50 DLR (AD) 26; *Md. Mohsin v. Bangladesh*, 2 MLR (AD) 109

relief which may be available to the petitioner on final determination of his petition[1], but not as a means to enable the petitioner to initiate an appropriate legal proceeding.[2] The petitioner should not be granted the interim relief in such a way that he practically gets the principal relief which he seeks to obtain on final hearing of the petition.[3] Where the cancellation of dealership licence is challenged, the court should not direct delivery of the required quota of fertilizer to the writ petitioner till the disposal of the Rule.[4] On a mere showing of a *prima facie* case a petitioner cannot get an interim relief as a matter of course.[5] The grant of the interim relief is discretionary with the court and the court will have to take into consideration the questions of balance of inconvenience, irreparable loss and the effect of the relief on the public interest.[6] The court has to strike a balance between the petitioner's injury and the detriment to the public interest.[7] "Where gross violations of the law and injustices are perpetrated or are about to be perpetrated, it is the bounden duty of the Court to intervene and give appropriate interim relief. In cases where denial of interim relief may lead to public mischief, grave irreparable private injury or shake a citizen's faith in the impartiality of public administration, a Court may well be justified in granting interim relief against public authority. But since the law presumes that public authorities function properly and bonafide with due regard to the public interest, a court must be circumspect in granting interim orders of far reaching dimensions or orders causing administrative, burdensome inconveniences or orders preventing collection of public revenue for no better reason than that the parties have come to the Court alleging prejudice, inconvenience or harm and that a prima facie case has been shown."[8] In view of the presumption of

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[1] *Orissa v. Madan Gopal*, AIR 1952 SC 12

[2] Ibid

[3] *India v. Oswald Woollen Mills.*, AIR 1984 SC 1264; *Bank of Maharashtra v. Race Shipping & Transport*, AIR 1995 SC 1368

[4] *BCCI v. Abdul Sattar Shah*, 2 MLR (AD) 313

[5] *Asst. Collector v. Dunlop India*, AIR 1985 SC 330

[6] Ibid; *Morgan Stanley Mutual Fund v. Kartick*, (1994) 4 SCC 225; *India v. Era Educationl Trust*, AIR 2000 SC 1573 (In granting an interim relief the various principles laid down in Or.XXXIX of the Code of Civil Procedure are required to be taken into consideration)

[7] *Siliguri Municipality v. Amalendu Das*, AIR 1984 SC 653

[8] *Asst. Collector v. Dunlop India.*, AIR 1985 SC 330, 334; *Commissioner of Customs v. Giasuddin Chowdhury*, 50 DLR (AD) 129

constitutionality of a statute, the court should not stay the operation of a legislation, particularly a legislation pertaining to economic reform or change unless the provision of the law is manifestly unjust or glaringly unconstitutional.[1]

5.167 Coming to the issue of interim orders impeding the assessment or collection of public revenue, the Appellate Division held that such interim orders are generally harmful to the public interest. In cases where no jurisdictional issues are involved and when the manufacturers, traders or importers usually pass on the burden of new, additional or increased indirect taxation to the consumers, there is absolutely no justification to protect their temporary private interest by an interim order impeding the collection of public revenue. However, interim orders ought to be given (a) to protect private interest when private interest is face to face with extinction or irretrievable damage, (b) when the order under challenge is shown to suffer from an absolute lack of jurisdiction, or clear or patent excess of jurisdiction or patent *mala fide* without requirement of further proof, (c) when gross violation of law is apparent on the face of the application, (d) where grave injustice has been perpetrated or is about to be perpetrated, or (e) where denial of interim relief will lead to public mischief, grave irretrievable private injury or shake the citizen's faith in the impartiality of public administration.[2] Even then an interim order will have to be issued on condition of furnishing bank guarantee to protect the interest of public revenue.[3] The Appellate Division deprecated the issuance of interim order on condition of furnishing personal guarantee as it is a weak and uncertain security.[4]

5.167A In contractual matters, the court should not interfere at the instance of an unsuccessful tenderer unless the public interest is involved or the award of the contract is *mala fide*. In passing an interim order, the court must be very cautious and must make provision for restitution. In *Raunaq International Ltd. v. IVR Construction Ltd.*[5] the Indian Supreme Court rightly held, "The party at whose instance interim orders are obtained has to be made accountable for the consequences of the interim order. The interim order could delay the project, jettison

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[1] *Bhabesh D. Parish v. India*, AIR 2000 SC 2047

[2] *Commissioner of Customs v. Giasuddin Chowdhury*, 50 DLR (AD) 129

[3] Ibid

[4] *Commissioner of Customs v. SARC Enterprise*, 51 DLR (AD) 165

[5] AIR 1999 SC 393

finely worked financial arrangements and escalate costs. Hence the petitioner asking for interim orders, in appropriate cases should be asked to provide security for any increase in cost as a result of such delay, or any damage suffered by the opposite party in consequence of an interim order. Otherwise public detriment may outweigh public benefit in granting such interim orders. Stay order or injunction order, if issued, must be moulded to provide for restitution."

5.168 Not only an interim order may be passed in a proceeding of *certiorari, mandamus* or prohibition, an interim order of bail may also be passed by the court in an appropriate case in a proceeding of *habeas corpus*, though, of course, such an order will be passed in an exceptional situation. In one case the High Court Division granted bail for a limited period in a proceeding of *habeas corpus*. The government went on appeal and urged before the Appellate Division that enlarging the detenu on bail affects the jurisdiction of the court to hear the petition as the detenu is no longer in custody. The Appellate Division negatived the contention and upheld the power of the High Court Division to grant bail.[1]

5.169 ***Final order:*** Art.102(2) states the form of relief that may be given by the High Court Division. But this jurisdiction being essentially an equitable jurisdiction, the court is not debarred from making consequential order to do justice. It will be simply a negative attitude if the court sits back after striking down a scheme of the government leaving it to the concerned persons to find out a solution.[2] The court has to take both private and public interest into consideration and has to grant consequential relief to do justice. Dealing with consequential relief, the Appellate Division observed -

> Any declaration or direction or order to be given must be ancillary to the main relief, but in doing so the superior courts had always placed self-imposed limitation for not raising any new issue which requires adjudication on proper facts for which no foundation was laid by the parties ...[3]

In some cases the court gave direction in respect of promotion and

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[1] *Bangladesh v. Ahmed Nazir*, 27 DLR (AD) 41

[2] *Kerala v. Roshana*, AIR 1979 SC 765; *Azad Reckshaw Pullers' Union v. Punjab*, AIR 1981 SC 14

[3] *Hasan Imam Chowdhury v. Bangladesh*, 1981 BLD (AD) 283

seniority of employees.[1] In *certiorari* proceeding, the court after quashing certain assessment of tax may order fresh assessment.[2] The court cannot order payment of compensation for actionable wrongs.[3] Writ jurisdiction cannot be used for recovery of money and a direction for payment of money cannot be given unless the amount claimed is undisputed and is a stautory payment.[4] The court cannot grant a relief different from the relief prayed for, which does not flow from the right alleged, but from a right which has not been pleaded.[5] The court can grant relief under art.102 only on an application made and cannot give a declaration in favour of respondents.[6]

5.170 *Refund of tax illegally collected:* The question of consequential order comes in respect of refund of money illegally collected. Such a relief is not ordinarily given in the writ jurisdiction as it can be claimed in a suit against an authority where it is open to the authority to raise all possible defences which cannot, in most cases, be appropriately raised in the writ jurisdiction.[7] But in a number of cases such refund was ordered.[8] Refund of tax money was allowed in the writ jurisdiction where the assessment was found to be illegal because the concerned statute was void or the tax was not realisable or the proceeding was for some reasons invalid.[9] Where refund of the tax realised require ascertainment of the amount of tax realised which can be done only in suit, the relief should remain confined to declaration of invalidity of the realisation.[10] In the case of indirect tax, the Indian

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[1] *District Registrar v. Koyyakutti*, AIR 1979 SC 1060; *India v. Jagannathan*, AIR 1987 SC 537

[2] *Grindlays Bank v. ITO*, AIR 1980 SC 656

[3] *Khan Bahadur v. Shujauddin*, 13 DLR (SC) 18; see Para 5.20 in respect of violation of fundamental rights.

[4] *Chairman, Bangladesh Water Development Bd. v. Shamsul Haq & Co.*, 51 DLR (AD) 169

[5] *Pakistan v. Khandker Ali Afzal*, 12 DLR (SC) 38

[6] *Shahriar Rashid Khan v. Bangladesh*, 1998 BLD (AD) 155, 172

[7] *Suganmal v. M.P.*, AIR 1965 SC 1740

[8] *Cawaji & Co. v. Mysore*, AIR 1975 SC 813; *Newabganj Sugar Mills v. India*, AIR 1976 SC 1152; *Shiv Shankar Dal Mills v. Haryana*, AIR 1980 SC 1037 (refund was allowed as the Court felt that it would be unjust to leave small agriculturists to file suits for recovery of small sums)

[9] *Burma Construction v. Orissa*, AIR 1962 SC 1320; *M.P. v. Bhailal Bhai*, AIR 1964 SC 1006

[10] *Collector, Central Excise v. Azizuddin Industries*, PLD 1970 SC 439

Supreme Court held that refund will be refused, on the ground of unjust enrichment, where the tax or the duty has been passed on to third parties.[1] The court observed that the doctrine of unjust enrichment is a just and salutary doctrine. No person can seek to collect the duty from both ends. In other words, he cannot collect the duty from his purchaser and also collect the same duty from the State simply because it has been collected from him contrary to law. The power of the court is not meant to be exercised for unjustly enriching a person.[2] The court further held that in claiming refund of indirect tax illegally levied and collected, the burden of showing that the burden of the tax has not been shifted to a third person is on the person claiming refund.[3] It has to be seen if in our jurisdiction the doctrine of unjust enrichment will be applied to preclude refund of tax or duty illegally collected, but the burden has already been passed on to the third parties.

WRIT JURISDICTION : AGAINST WHOM AVAILABLE

5.171 Writ of *certiorari, mandamus* and prohibition lie against 'any person' performing functions in connection with the affairs of the Republic or of a local authority and not against a private individual or body[4]. Thus the 'person' must be a public functionary.[5] A writ petition will not lie even against a public functionary in respect of functions performed not in connection with the affairs of the Republic or a local authority, but in his private capacity.[6] Writ of *habeas corpus* lies against

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[1] *M.P. v. Vyankatlal,* AIR 1985 SC 901 (Referring to some earlier decisions, the court observed that the principles of unjust enrichment laid down in those decisions were based on specific statutory provisions, but the same principles can be safely applied to the cases where no such statutory provision is involved.); *Roplas (India) Ltd v. India,* AIR 1989 Bom 183

[2] *Mafatlal Industries Ltd v. India,* (1997) 5 SCC 536; *Deputy Commr, Andaman v. Consumer Co-op. Stores,* AIR 1999 SC 696

[3] *Mafatlal Industries Ltd. v. India,* (1997) 5 SCC 536

[4] *Sultana Nahar v. Bangladesh,* 1998 BLD 363; *Khorshed Alam v. Ministry of Commerce,* 47 DLR 209

[5] *Manjurul Haq v. Bangladesh,* 44 DLR 239 (Diabetic Association does not fall within the description of public functionary); *Shahabuddin v. Secy. Ministry of Youth & Sports,* 45 DLR 360 (Bangladesh Football Federation or its appointee is not a public functionary); *Abdur Rahman v. Secy. Ministry of Industries,* 48 DLR 431; *Jiban Kumar v. Abdul Hye,* 48 DLR 569; *Abdul Huq Sikdar v. Div. Manager, BADC,* 48 DLR 574 (writ petition found maintainable)

[6] *Abdul Ahad Chowdhury v. Habibur Rahman,* 1995 BLD 124

any person, be he a public functionary or private person, while *quo warranto* lies against a person holding or purporting to hold a public office.

5.172 Art.102(5) stipulates that the expression 'person' in art.102 includes a statutory authority and any court or tribunal except (i) a court or tribunal established under a law relating to the defence services or any disciplined force and (ii) a tribunal to which art.117 is applicable. The definition of 'person' is both inclusionary and exclusionary. 'Person' thus includes all statutory authorities and courts and tribunals except the ones excluded. Statutory public authorities are defined in art.152 as the authorities whose activities are authorised by statutes or instruments having statutory force. It must also include all authorities whose activities are authorised by the Constitution, otherwise the concept of limited government will be seriously undermined.

5.173 In view of the provisions of art.105(5) a writ will lie against all those who come within the meaning of 'person' except those who have been excluded from the definition for the purpose of exercise of the writ jurisdiction. The definition of 'person' given in art.102(5) is inclusive and not exhaustive. By virtue of art.152 the definition of 'person' and 'local authority' given in the General Clauses Act will be attracted.[1] As such a writ petition will lie not only against a statutory corporation, but also against a company which is a subsidiary of a statutory corporation performing functions assigned by law to the statutory corporation.[2]

5.174 Because of the exclusionary clause no writ will lie against (i) a court or tribunal established under a law relating to the defence services or any disciplined force[3] or (ii) a tribunal to which art.117 applies[4]. Writ petition will, however, lie against the military authorities other than a court or tribunal of the specified kind.[5] The question arose whether a Screening Board constituted under P.O. No.67 of 1972 could be treated as a tribunal established under a law relating to any disciplined force

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

[2] *Conforce Limited v. Titas Gas Co. Ltd*, 42 DLR 33

[3] *Jamil Huq v. Bangladesh*, 34 DLR (AD) 125

[4] *Serajul Islam v. Director General*, 42 DLR (AD) 199; *Dr. Abdul Lahel Based v. Secy., Health*, 38 DLR 409; *Fazlur Rahman Chowdhury v. Bangladesh*, 39 DLR 314; *Ayub Ali v. Bangladesh*, 46 DLR 191

[5] *Major Hafizur Rahman v. Bangladesh*, 29 DLR 34; *Fazlur Rahman v. Ministry of Home*, 41 DLR 459 (writ petition by a member of a disciplined force maintainable when his service is terminated by an individual officer)

when it dealt with a police inspector.[1] The respondent contended that in order to fall within the exclusionary provision the law setting up the tribunal must be one relating to the disciplined force and not one which relates to the government servants in general. By a majority decision the Appellate Division rejected the contention. Munim J speaking for the majority stated, "Though apparently plausible, his contention as it issues from a very narrow and literal construction of the words 'a court or tribunal established under a law relating to ... any disciplined force' would seem to have no sound basis ... The acceptance of his argument would not only be contrary to what has been intended by the makers of the Constitution, but would tantamount to denying the authority of the Screening Board to try the respondent." It is submitted that on the established principles of interpretation of the Constitution the majority view cannot be supported. When a right is given and then exception is provided restricting the right, the exception has to be strictly construed.[2] But the majority did the other way interpreting the exception liberally and not even literally. The majority decision found that the literal construction was apparently plausible, but ran counter to the intention of the makers of the Constitution. Unless there is ambiguity, inconsistency or absurdity, the language expresses the intention.[3] It has not been shown that there is any ambiguity, inconsistency or any absurdity. As such there was no imperative to give the words a meaning different from that the language bears. It is submitted that both the English and the Bengali text of the provision in question support the contention of the respondent and does not support the view taken by the majority. Though claimed, Munim J has not shown how the language of the English and the Bengali text read together support the majority view. 'Law relating to disciplined forces' means a law which deals with the disciplined forces and not a general law relating to all government servants under which a member of disciplined force may also be dealt with. In fact, P.O.No.67 of 1972 does not speak of the 'disciplined force' and has not used the expression 'police' or 'disciplined force'. By a strained construction, the restriction of art.102(5) has been enlarged when the principles of interpretation required a narrow and strict construction of

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[1] *Bangladesh v. Abdur Rob*, 33 DLR (AD) 143

[2] Halsbury's Laws of England, 4th ed., vol.44, Para 882; 73 Am Juris 2d, Statute, Para 313; Crawford - The construction of Statutes (1940), p.610; *Madho Singh v. James Skinner*, AIR 1942 Lal 243

[3] *Anwar Hossain Chowdhury v. Bangladesh*, 1989 BLD (Spl) 1; *Punjab v. Ajaib Singh*, AIR 1953 SC 10

the said restriction. The last objection to the contention of the respondent was that it tantamounted to denying the authority of the Screening Board. But the respondent was not denying the authority of the Screening Board. All that was contended was that the decision of the Screening Board was not immune from judicial review.

5.175 In *Bangladesh v. A.K.M. Zahangir*[1] a question arose as to the meaning of 'tribunal' within the meaning of art.102(5). Applying the principle of *ejusdem generis* the Appellate Division by a majority judgment held that the expression 'tribunal' having been used along with the expression 'court' must be understood in the narrow sense of a tribunal performing *quasi*-judicial functions and opined that the authorities empowered to take disciplinary action against police officers of certain ranks under the Police Officers (Special Provisions) Ordinance, 1976 do not perform *quasi*-judicial functions and cannot be treated as tribunal within the meaning of art.102(5). The majority further held that a tribunal to which art.117 applies is a tribunal which exercises some part of the judicial power of the Republic.[2]

5.176 However, the ouster clause of art.102(5) will not be attracted if the action taken is *mala fide* or *coram non judice* (which means not properly constituted).[3] In *Jamil Huq v. Bangladesh*[4] the decision of a Court Martial was challenged. Notwithstanding the bar the petitioners sought interference of the Supreme Court on the ground of fundamental unfairness in holding the trial and cited the American decision of *Burns v. Wilson*[5] where the prisoners (condemned to death by a Court Martial) urged that they were subjected to illegal detention, coerced confessions had been obtained from them, they were denied counsel of their choice and effective representation, the military authorities had suppressed evidence favourable to them and procured perjured testimony against them and the trial was conducted in a state of hysteria. The conviction by the Court Martial was examined on appeal by the appellate military tribunal. Upon examination of the record the American Supreme Court held,

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[1] 34 DLR (AD) 173

[2] See footnote of para 5.241

[3] *Khandker Ehtashamuddin v. State*, 33 DLR (AD) 154; *Jamil Huq v. Bangladesh*, 34 DLR (AD) 125; *Khandoker Mostaque Ahmed v. Bangladesh*, 34 DLR (AD) 222; *Fazlur Rahman Chowdhury v. Bangladesh*, 39 DLR 314

[4] Ibid

[5] 344 US 137

> The records make it plain that the military courts have heard the petitioners out on every significant allegation which they now urge. Accordingly, it is not the duty of the civil courts simply to repeat that process - to re-examine and re-weigh each item of evidence of the occurrence of events which tend to prove or disprove one of the allegations in the application for *habeas corpus*. It is the limited function of the civil courts to determine whether the military have given a fair consideration to each of these claims.

The decision clearly shows that the court considered the ground of fundamental unfairness as one like *mala fide* or *coram non judice* and the court would have examined the ground had these grounds not been examined and found untenable by the appellate authority. It is submitted that notwithstanding the bar, the Supreme Court may interfere if it is found that there has been fundamental unfairness in a trial on the same reasoning that Parliament in giving power to try to the Court Martial did not contemplate a trial where fundamental fairness is lacking. Whenever such an allegation is made, it is submitted, it is obligatory to examine the record of the trial which cannot be avoided by saying that it is a disputed question of fact. In *Jamil Huq* there was emergency and as such fundamental rights could not be urged. But when there is no emergency, protection of fundamental right can be claimed and the plea of disputed question of fact is not available in case of enforcement of fundamental right. Art.45 confers immunity to the laws relating to the disciplined forces, but not to the actions under those laws.

SUPERVISORY POWER OF HIGH COURT DIVISION

5.177 Art.109 confers an additional constitutional power to the High Court Division stating that this division shall have the superintendence and control over all the courts and tribunals subordinate to it. This constitutional supervisory power has a long history starting from the High Courts Act, 1861.[1] This power is comparable with the revisional power under s.115 of the Code of Civil Procedure and s.439 of the Code of Criminal Procedure. Statutory supervisory power extends to judicial, but not to administrative matters, while the constitutional supervisory power extends to both judicial and administrative matters.[2] The statutory

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[1] *A.T. Mridha v. State*, 25 DLR 335

[2] *A.T. Mridha v. State*, 25 DLR 335 (reversed on different ground); *Waryam v. Amarnath*, AIR 1954 SC 215; *Baldeo Singh v. Bihar*, AIR 1957 SC 612

supervisory power covers only courts, but art.109 covers courts as well as tribunals subordinate to the High Court Division. The statutory power can be taken away by ordinary legislation, but the constitutional power under art.109 cannot be so taken away.[1] In *Hosne Ara Begum v. Islami Bank Bangladesh*[2] the Appellate Division observed, "in a case where a statute bars entertainment of a revision the exercise of supervisory power under Article 109 of the Constitution is not available". It is submitted that the proposition is wrong. The Appellate Division failed to notice that a constitutional provision can be amended only by the exercise of constituent power, that is, by a special procedure prescribed by art.142 and when by ordinary legislative process supervisory power under art.109 of the Constitution cannot be directly taken away or curtailed, the legislature cannot take away or curtail that power indirectly by making a statutory provision barring revisional power of the High Court Division under a statute. Availability of the constitutional supervisory power is not dependent on the existence of any statutory revisional power.

5.178 The power under art.109 differs from the power under art.102; the latter can be exercised only on application by a party, while the former power can be exercised *suo motu* by the High Court Division without any application by any party.[3] Furthermore, the latter power can be exercised irrespective of the question whether the court or tribunal is subordinate to the High Court Division, but the former can be exercised only in respect of courts and tribunals subordinate to it, that is, the courts and tribunals against whose decision either appeal or revision lies before the High Court Division. In view of art.114 any court established by Parliament must be subordinate to the Supreme Court, but there is no such requirement in respect of tribunals and Parliament may create tribunals not subordinate to the High Court Division. The High Court Division will have power under art.102 in respect of tribunals, whether subordinate or not, unless such tribunals come within the exception provided by art.102(5). The word 'tribunal' in art.109 does not include any domestic tribunal. A distinction has to be made between a tribunal deriving authority from the State and vested with judicial power[4] and a

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[1] *Iftekhar Afzal v. Pubali Bank*, 50 DLR 623; *United Commercial Bank v. Freshner Bucket*, 3 BLC 430

[2] 53 DLR (AD) 9

[3] *Fazl-E-Haq v. State*, 12 DLR (SC) 254

[4] See Para 5.240

tribunal set up to decide controversies not objectively, but in conformity with the administrative policy; art.109 will be applicable only in respect of the former kind.[1] Once a tribunal of the former kind is subordinate to it, the High Court Division can exercise the supervisory power irrespective of the question whether an appeal or revision lies in the matter in respect of which supervisory power is exercised.

5.179 The power of superintendence is purely discretionary with the High Court Division and no litigant can invoke the jurisdiction as of right.[2] This power should not ordinarily be exercised if any other remedy is available to the aggrieved party even though pursuing that remedy may be inconvenient.[3] It will not be used as a matter of course to set aside the findings of the court or tribunal properly recorded on the ground of mere error[4] and is not intended to convert the High Court Division into a court of appeal or revision regardless of the limitations of law on those powers. The power is to be exercised most sparingly[5] and only in appropriate cases in order to keep the subordinate court or tribunal within the bounds of their authority and not to correct mere errors.[6] The High Court Division will use the power to see that the court or the tribunal functions within the limits of its authority[7], and thus the High Court Division will interfere only on the ground of want or excess of jurisdiction[8], failure to exercise jurisdiction[9], violation of any mandatory procedure or the principles of natural justice[10], findings based

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[1] *Engineering Mazdoor Sabha v. Hind Cycle*, AIR 1963 SC 874, Para 23; *Associated Cement Companies v. Sharma*, AIR 1965 SC 1595 (Para 45)

[300] *Iftekhar Afzal v. Pubali Bank*, 50 DLR 623; *A.B. Sarin v. B.C. Patel*, AIR 1951 Bom 423

[3] *Iftekhar Afzal v. Pubali Bank*, 50 DLR 623; *Ram Rup v. Biswanath*, AIR 1958 All 456

[4] *D.N. Banerjee v. P.R. Mukherjee*, AIR 1953 SC 58

[5] *Iftekhar Afzal v. Pubali Bank*, 50 DLR 623

[6] *United Commercial Bank v. Freshner Bucket*, 3 BLC 430; *Waryam v. Amarnath*, AIR 1954 SC 215; *Satyanarayan v. Mallikarjun*, AIR 1960 SC 137, 142; *Yunus v. Mustaquim*, AIR 1984 SC 38; *Jijabai v. Pathan Khan*, AIR 1971 SC 315; *B. Misra v. B. Dixit*, AIR 1972 SC 2466

[7] *Nagendra Nath v. Commr. Hill Division*, AIR 1958 SC 398; *Dalmia Airways v. Sukumar*, AIR 1951 Cal 193.

[8] *Gulab Singh v. Collector, Furukkabad*, AIR 1953 All 585

[9] *Waryam v. Amarnath*, AIR 1954 SC 215

[10] *Narayandeju v. Labour App. Tribunal*, AIR 1957 Bom 142

on no materials[1], or an order resulting in manifest injustice[2] The High Court Division will interfere with the findings of fact in exercise of this jurisdiction only when it is perverse or based on no evidence to justify or resulted in manifest injustice.[3]

5.180 ***Power of transfer of cases*** : Art.110 provides that if the High Court Division is satisfied that a substantial question of law as to interpretation of the Constitution or a point of general public importance is involved in a case in a subordinate court, it may withdraw that case and either dispose it of itself or send the case back to that subordinate court or any other court after determining the question of law. The High Court Division has been given the power of transfer of civil suits and criminal cases by the Codes of Civil Procedure and Criminal Procedure under certain circumstances. In addition to this power art.110 confers power of transfer on the High Court Division in respect of constitutional questions and questions of general public importance in order to avoid conflict of decisions and for uniformity. Thus if the High Court Division is satisfied that in a case a substantial question of law as to the interpretation of the Constitution or a point of general public importance is involved and determination of such a question or point is necessary for disposal of the case, it becomes mandatory for the High Court Division to exercise power under this article. The High Court Division must be satisfied as regards the condition for the exercise of the power.[4] If along with a constitutional question or a question of great public importance, there are other questions which are in themselves sufficient to dispose of the case, the power may not be exercised.[5] The High Court Division may decline to withdraw a case until the other questions are determined when it becomes clear whether there is necessity of deciding the constitutional question or the question of great public importance.[6] In the Indian jurisdiction it has been held that where a person has been prosecuted for a statutory offence, no question of validity of the statute may arise until the question whether he has violated the statute is determined and the High Court may wait till the determination of the

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[1] *Orissa v. Muralidhar*, AIR 1963 SC 404
[2] *Trimbak Gangadhar v. Ramchandra*, AIR 1977 SC 1222
[3] *Chandravarker v. Ashalata*, AIR 1987 SC 117
[4] *Mirpur Mazar Co-op Society v. Secy. Ministry of Works*, 1 BLC 79
[5] *Fakir Chand v. Bhagwati*, AIR 1958 Punj 287
[6] Ibid

latter question.[1] But the problem is that such a determination is immediately followed by an order of conviction.

5.181 Once a case is withdrawn, the court has the option either to dispose of the case itself or to determine the question itself and send the case back to the court from where it was withdrawn or to any other court subordinate to it. The power can be exercised *suo motu* by the High Court Division. The subordinate court before whom the case is pending may also refer the case to the High Court Division.[2] Where a scheduled bank sued for recovery of money and the appellant contested the suit on the ground that a particular provision of law allowing relief in respect of debts other than debts due to the scheduled bank is discriminatory, the High Court dismissed the application for transfer on the ground that no constitutional question was involved but a question of statutory construction, that is, whether the offending portion of the definition of 'debt' was severable and if it is not severable the entire definition of 'debt' would fail leaving the appellant without the protection of the law. The Supreme Court reversed the decision holding that the question of severability would arise only when the provision is found unconstitutional and the High Court ought to have exercised the power.[3]

APPELLATE DIVISION : POWER AND JURISDICTION

5.182 The Appellate Division is the appellate side of the Supreme Court of Bangladesh like the Court of Appeal is the appellate side of the High Court of England. But its position is comparable with the House of Lords or the Supreme Court of India and Pakistan.

5.183 Under art.103 an appeal to the Appellate Division from the judgment, decree, order or sentence of the High Court Division lies as of right in three cases - (1) where the High Court Division certifies that the case involves a substantial question of law as to interpretation of the Constitution, (2) where the High Court Division sentences a person to death or to imprisonment for life, and (3) where the High Court Division punishes a person for its contempt. Parliament may by law add to the list other cases in which appeal as of right may be filed[4], but Parliament

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[1] *Narahari Gir v. State*, AIR 1955 Pat 177

[2] see s.113 of the Code of Civil Procedure

[3] *Ganga Pratab v. Allahabad Bank*, AIR 1958 SC 293

[4] S.162 of the Income Tax Ordinance; *Commr. of I.T. v. Gulistan Cinema Co.*, 28 DLR (AD) 14; *Ganesh Oil Mills v. C.I.T.*, 31 DLR (AD) 56.

cannot curtail any. In all other cases appeal shall lie from the judgment, decree, order or sentence of the High Court Division only if the Appellate Division grants leave to appeal.[1] Leave may also be granted in cases where certificate of the High Court Division could have been sought but was not sought or when the prayer for certificate was refused.[2] As the position now stands, there is no scope of seeking leave to appeal to the Appellate Division from the decision of the Sessions Judge.[3] Art.103(4) provides that Parliament may by law declare that the provisions of art.103 shall apply in relation to any other court or tribunal as they apply in relation to the High Court Division. The Administrative Tribunal Act, 1981 as amended makes art.103 applicable in respect of the decision of the administrative appellate tribunal and an appeal from the decision of the administrative appellate tribunal lies in the Appellate Division on leave of the Appellate Division.

5.184 ***Grant of certificate:*** In granting a certificate in terms of art.103(2)(a) the High Court Division should specify the constitutional question involved in the case.[4] When no constitutional question is found to be involved, the appeal is to be dismissed, notwithstanding that a certificate has been given.[5] In *Kazi Mukhlesur Rahman v. Bangladesh* the High Court Division dismissed the writ petition *in limine* and then granted the certificate without specifying the constitutional question which needed determination. If there is a constitutional question which needs consideration, the writ petition is not liable to be dismissed *in limine*.[6] If the writ petition is dismissed *in limine*, the question of granting certificate does not arise. The Appellate Division deprecated this procedure of dismissing a writ petition *in limine* and granting

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[1] See *Maqbul Ahmed v. Ahmed Impex*, 1996 BLD (AD) 133

[2] *Ganesh Oil Mills v. C.I.T.*, 31 DLR (AD) 56

[3] *Sher Ali v. State*, 46 DLR (AD) 67

[4] *Kazi Mukhlesur Rahman v. Bangladesh*, 26 DLR (AD) 44; *Qazi Kamal v. RAJUK*, 44 DLR (AD) 291; *Member, Board of Revenue v. Akhtar Khan*, PLD 1968 SC 270; *Sashi Bhusan v. Asgar Ali*, 20 DLR (SC) 217

[5] *Sashi Bhushan v. Asgar Ali*, 20 DLR (SC) 217 (If a fitness certificate does not disclose a valid basis and is found to have been granted in disregard of the constitutional condition which regulates it, namely, that the case must involve a substantial question of law as to the interpretation of the constitution, this court in the exercise of its powers will strike it down in termination of the proceeding which has been allowed to commence without any foundation and on a wrong lead)

[6] *Rear Admiral Mustafa v. Bangladesh*, 46 DLR (AD) 43.

certificate at the same time.[1] In a certificated appeal only a constitutional question can be decided and no other. If the case does not involve any constitutional question or if the appellant wants to raise any question other than a constitutional question, the proper course is to file a leave petition stating the grounds.[2]

5.185 ***Right of appeal in case of particular sentence:*** Originally art.103(2)(b) allowed a right of appeal in case the High Court Division sentenced a person to death or transportation for life or confirmed a death sentence. It was later amended to exclude confirmation of death sentence. The position as it now stands is the same as it was under the Pakistan Constitution of 1962. The Pakistan Supreme Court held that the expression 'sentenced' referred to a new sentence passed by the High Court and it did not cover a case where the High Court maintained the sentence passed by the Sessions Judge.[3] It held that an appeal as of right would not lie where the High Court reduced the sentence from death to transportation for life as the High Court did not pass a new sentence, but reduced the sentence passed by the Sessions Judge. The Appellate Division in *Moyna Mia v. State*[4] took the same view that `sentenced' means a new sentence passed by the High Court Division; the expression `sentenced a person to death or transportation for life' covers those cases where the High Court Division in exercise of powers under s.439 of the Code of Criminal Procedure enhances the sentence to death or transportation for life. The Constitution (Eighth Amendment) Act, 1988 replaced the word 'transportation' by the word 'imprisonment' in art.103(2)(b).

5.186 ***Grant of leave:*** Art.103(3) invests the Appellate Division with a plenary jurisdiction to hear appeals. The Constitution has not put any limitation on the power of the Appellate Division to grant leave. The matter lies in the discretion of the Appellate Division and the only limitation on the power is the wisdom and good sense of the Judges of the court.[5] It is difficult to state precisely in what circumstances the court will exercise the jurisdiction and the court has not attempted to define its ambit finally and exhaustively. The grant of leave is not, however,

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[1] *Kazi Mukhlesur Rahman v. Bangladesh*, 26 DLR (AD) 44; *Quazi Kamal v. RAJUK*, 44 DLR (AD) 291; *Rear Admiral Mustafa v. Bangladesh*, 46 DLR (AD) 43

[2] See *Qazi Kamal v. Rajdhani Unnayan Kartripakya*, 44 DLR (AD) 291

[3] *Rashid Ahmed v. State*, 21 DLR (SC) 297

[4] 27 DLR (AD) 120

[5] *Bala Krisna Ayer v. Ramaswami Ayer*, AIR 1965 SC 195

hedged about any consideration of technical nature.[1] In *Bangladesh Bank v. Administrative Appellate Tribunal*[2] the Appellate Division observed -

> This Court's power under clause (3) of Article 103 to interfere in suitable cases where miscarriage of justice has occasioned is very wide. It is neither possible, nor would it be expedient to lay down any general rule, but where there is some substantial question of law of public importance which deserves to be decided by this Court, where grave miscarriage of justice has resulted from illegality or from misreading of evidence or from excluding or illegally admitting material evidence or when a person has been dealt with arbitrarily or that a court or tribunal has not given a fair deal to a litigant this Court will not be deterred by any technical hurdles, even by its own rule of limitation under Order XIII rule 1, because it is the duty of this Court to see that an injustice is not perpetrated.[3]

5.187 Leave will not be granted where the grounds suggested cannot sustain the appeal itself and, conversely, appeal will not be allowed on grounds that will not have sufficed for the grant of leave.[4] The court may grant leave not only against final order, but also against interlocutory order in exceptional cases.[5] The article does not impose any restriction as regards the persons who can apply for leave and a person who is not a party to the proceedings may also apply if he is aggrieved by the order of the High Court Division.[6] Once the State filed a leave petition which was dismissed after hearing, there is no scope for hearing a second leave

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[1] *Dhakeswari Cotton Mills v. C.I.T.*, AIR 1955 SC 65; *Hamidullah v. Khurshid Ahmed*, PLD 1958 SC 516

[2] 44 DLR (AD) 239; *Abu Taher Chowdhury v. State*, 42 DLR (AD) 253, Para 23

[3] see *Dhakeswari Cotton Mills v. C.I.T.*, AIR 1955 SC 65; *Murtaza and Sons v. Nazir Mohd.*, AIR 1970 SC 668 (the Supreme Court does not generally grant special leave, unless it is shown that exceptional and special circumstances exist, that substantial and grave injustice has been done and that the case in question presents features of sufficient gravity to warrant a review of the decision appealed against.)

[4] *Ibrahim v. Emperor*; AIR 1914 PC 155

[5] *Commr. Of Customs v. Ghiasuddin Chowdhury*, 50 DLR (AD) 129; *Aminul Islam v. Golam Mostafa*, 1995 BLD (AD) 21; *Bangladesh v. Khandker Tajuddin*, 51 DLR (AD) 65; see Para 5.165

[6] *Syed Ali Bepari v. Nabaran Molla*, PLD 1962 SC 502; *Afsar Khan v. State*, PLD 1964 SC 205; *Siraj Din v. Kala*, 16 DLR (SC) 94; *Abdul Mannan Chowdhury v. Lalmohan*, C.A. 19 of 1978 (unreported)

petition at the instance of the informant.[1] In making an application for leave to appeal and prosecuting the appeal a person must be fair and respectful. If he makes any misleading statement in respect of, or suppresses, any material fact[2] or misconducts himself[3] the court may revoke the leave granted. The court does not hear an appeal on a point on which leave has not been granted, but in exceptional circumstances the court may allow the petitioner to raise such a point.[4] An appellant is free to give up any point which may have been raised at the hearing of the leave petition and in that case the court may not also decide a point even though of law on which leave was granted.[5] When a point was abandoned at the hearing of the leave petition and leave was given on another point, the appeal cannot be heard on the point abandoned.[6]

5.188 *Grant of leave in civil cases* : Even though the scope of interference is not delineated, it can be said from a study of the decided cases that the Appellate Division generally grants leave to decide questions of law. In seeking interference, it has to be shown that there is a question of law on which the decision depends and the High Court Division has wrongly decided the question of law, or the question is not a settled question, or, if settled, in the facts and circumstances needs review. Thus leave will be granted to decide a question of law on which there is no definite judicial precedent[7] or there is conflict of judicial opinion[8], or in an appropriate case to review a judicial precedent[9] or to set aright any substantial error of law committed by the High Court Division[10] or the administrative appellate tribunal[1]. A question of law

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[1] *Mostashir v. Arman Ali*, 42 DLR (AD) 12

[2] *Udaichand v. Shankarlal*, AIR 1978 SC 765; *Punjab National Bank v. India*, AIR 1974 SC 950

[3] *New India Steel Industries v. V.D. Steel Industries*, AIR 1980 SC 1706 (appellant misconducted himself by publishing a public notice under caption "Court Notice", thereby creating an impression that the notice had been given under order of the court)

[4] *Wajear Rahman v. State*, 43 DLR (AD) 25 (death sentence was involved); *Sanaullah Khan v. Safura Khatun*, 52 DLR (AD) 39

[5] *Sonali Bank v. U.C.B.L.*, 44 DLR (AD) 316, 317

[6] *Zahura Khatun v. Rokeya Khatun*, 43 DLR (AD) 98

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

[8] *Pubali Bank v. Chairman, Labour Court*, 44 DLR (AD) 40; *Hanover Fire Insurance v. Muralidhar*, 10 DLR (SC) 136

[9] *Rahima Akhtar v. Asim Kumar*, 40 DLR (AD) 23 *Pradip Das v. Kazal Das*, 44 DLR (AD) 1

[10] *Nasrin Kader Siddiqui v. Bangladesh*, 44 DLR (AD) 16; *Nishat Jute Mills v.*

may arise in many ways, as for example, when there is wrong application or non-application of the provisions of the Constitution[2] or the law[3], or where there is a failure of the principles of natural justice[4], or there is necessity of interpretation of any provision of the Constitution[5] or the law[6], or there is necessity of interpretation of any material document[7], or there is a question of jurisdiction or power of the court or authority to act in any particular manner[8], or where there has been violation or disregard of some rule of procedure which is an essential constituent of a fair trial[9], or where there has been violation or disregard of the rules of evidence materially affecting the ultimate decision.[10]

5.189 The Appellate Division is not inclined to grant leave on a question of fact and does not grant leave particularly when a matter is

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Sanaullah, 40 DLR (AD) 298; *Bangladesh v. Md. Afzal*, 40 DLR (AD) 154; *Abdul Mannan v. Kulada Ranjan*, 31 DLR (AD) 195; *Buxley Paints v. Bangladesh*, 31 DLR (AD) 266; *James Finlay v. Chairman, Labour Court*, 33 DLR (AD) 58; *Bangladesh Biman v. Syed Aftab Ali*, 39 DLR (AD) 151

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

[2] *Bangladesh v. A.K.M. Zahangir*, 34 DLR (AD) 173; *Dr. Nurul Islam v. Bangladesh*, 33 DLR (AD) 201; *Sharping M.S. Samity v. Bangladesh*, 39 DLR (AD) 85; *Jamuna Oil Mill Co. v. S.K. Dey*, 44 DLR (AD) 104

[3] *Alauddin Sardar v. Surendra*, 40 DLR (AD) 257

[4] *Bashir Ahmed v. BJMC*, 44 DLR (AD) 267; *Abdul Wahab v. Ali Ahmed*, 44 DLR (AD) 55; *Sk. Ali Ahmed v. Secy. Ministry of Home*, 40 DLR (AD) 170; *Bangladesh Steamer Assn. v. Bangladesh*, 31 DLR (AD) 272

[5] *Anwar Hossain Chowdhury v. Bangladesh*, 1989 BLD (Spl) 1; *Altaf Hossain v. Abul Kashem*, 45 DLR (AD) 53; *Secretary, Aircraft Engineers v. Registrar, Trade Union*, 45 DLR (AD) 122; *S.A. Sabur v. Returning Officer*, 41 DLR (AD) 30; *Mofizur Rahman v. Bangladesh*, 34 DLR (AD) 321

[6] *Bangladesh v. Shakhipur Islamia High School*, 45 DLR (AD) 23; *Bangladesh v. Dhaka Steel Works*, 45 DLR (AD) 69; *Chand Mia Sowdagar v. S.M.A. Rahman*, 43 DLR (AD) 225; *East Pakistan v. S.A. Khan*, 40 DLR (AD) 202; *Mostafa Hossain v. S.M. Faruque*, 40 DLR (AD) 10

[7] *Somedullah v. Mahmud Ali*, 44 DLR (AD) 83; Abdur Rashid v. Momtaz Ali, 44 DLR (AD) 270

[8] *Insan Ali v. Mir Abdus Salam*, 40 DLR (AD) 193; *Habibullah Khan v. S. Azharuddin*, 35 DLR (AD) 72

[9] *Sharifa Khatun v. Md. Yusuf*, 44 DLR (AD) 285; *Anwara Begum v. Shah Newaz*, 43 DLR (AD) 156; *Sona Mia v. Jamila Khatun*, 41 DLR (AD) 113; *Mobarak Hossain v. Mostafa Hossain*, 40 DLR(AD) 20

[10] *Hazi Waziullah v. A.D.C. Revenue*, 41 DLR (AD) 97

concluded by concurrent findings of fact. The court, however, grants leave to consider whether the finding of fact is arbitrary or perverse in the sense that the conclusion reached does not emerge from the facts proved[1] or the finding of fact has been arrived at ignoring important piece of evidence consideration of which was likely to influence and affect the assessment of evidence[2]. The Appellate Division also granted leave where it was shown that the High Court Division in second appeal or revision interfered with a finding of fact in the absence of any acceptable ground for such interference.[3]

5.190 The Appellate Division generally does not entertain a new plea which was not raised earlier.[4] But if a point of fact plainly arises on the record, or a point of law is material for the decision and can be decided on the basis of the materials already on record, or if the point was urged before the trial court and was rejected but was not urged before the High Court Division, or if the question is of considerable importance and is likely to arise in similar cases or if it goes to the jurisdiction of the lower court, the Appellate Division may permit such new plea to be raised.

5.191 Where the grant of any particular relief is in the discretion of the High Court Division or the subordinate court, or where a particular order has been passed by exercising the discretion judicially, the Appellate Division does not interfere[5] even though the Appellate Division in the facts and circumstances of the case would have exercised it in a different manner. But the position will be otherwise if it can be shown that the exercise of the discretion is plainly arbitrary or unreasonable, or is not in accord with the accepted principles governing its exercise.[6]

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[1] *Erfan Ali v. Joynal Abedin*, 35 DLR (AD) 216

[2] *Joynal Abedin v. Mafizur Rahman*, 44 DLR (AD) 162

[3] *Shamser Ali v. Kafizan*, 44 DLR (AD) 231; *Nurul Alam v. Abdus Sobhan*, 45 DLR (AD) 168; *Korban ali v. Abdul Jalil*, 44 DLR (AD) 80; *Naimuddin Sardar v. Abdul Kalam Biswas*, 41 DLR (AD) 3; *Mir Abdul Ali v. Rafiqul Islam*, 40 DLR (AD) 75; *Sudhir Das v. Harimohan Das*, 39 DLR (AD) 218; *Abul Kashem v. Khodeja Akhtar*, 31 DLR (AD) 316

[4] *Nasrin Kader Siddiqui v. Bangladesh*, 44 DLR (AD) 16; *Bangladesh Telecom Ltd v. BTTB*, 48 DLR (AD) 20; *Abdur Rouf v. Golam Rasul*, 1997 BLD (AD) 141; *Abdul Kaiyum v. Krishnanandan*, 49 DLR (AD) 140; *Narayan Chandra v. Abdul Jabbar Dewan*, 52 DLR (AD) 35

[5] *University of Dhaka v. Prof. Monwaruddin*, 52 DLR (AD) 17

[6] *Controller of Examinations v. Mahimuddin*, 44 DLR (AD) 305 (Appellate Division set aside the judgment of the High Court Division as discretion was exercised upon

5.192 *Grant of leave in criminal cases* : In criminal matters the Appellate Division grants leave in exceptional or special circumstances where substantial and grave injustice has been done, and the case presents special features requiring review of the decision of the High Court Division[1], or where there has been non-compliance of legal procedure such as vitiates the whole trial or in substance amounts to a denial of fair trial[2], or there is serious error in the reasoning and conclusion of the High Court Division[3]. Normally the Appellate Division does not re-appraise the evidence[4] unless the findings are perverse or vitiated by an error of law or there is grave miscarriage of justice[5] or there has been substantial defect in the appraisal of the evidence which has led to the failure of justice[6] or there has been wrong allocation of the burden of proof leading to wrong assessment of the evidence, or where an accused has been convicted on no evidence[7] or on clearly insufficient evidence[8] or where the finding of fact has been vitiated by consideration of totally inadmissible evidence or by non-consideration of material evidence on record[9] or when the findings of fact are based on evidence on which no reasonable court would have arrived at such findings, or where the findings of fact are such as are

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misconception of law relating to availability of efficacious remedy); *Bangladesh Sericulture Board v. Fazlur Rahman*, 41 DLR (AD) 25; *Nazrul Islam Chowdhury v. Abdul Hamid*, 1983 BLD (AD) 136; *Mozaher Sowdagar v. Zahirul Alam*, 40 DLR (AD) 62; *Lutfur Rahman v. Golam Ahmed*, 39 DLR (AD) 243; *Uttara Bank v. Macneil & Kilburn*, 33 DLR (AD) 298

[1] *Ramniklal v. Gujrat*, AIR 1975 SC 1752

[2] *Nannu Gazi v. Awalad Hossain*, 43 DLR (AD) 63 *Harshad Singh v. Gujrat*, AIR 1977 SC 710

[3] *Anand Rao v. Maharashtra*, AIR 1972 SC 1232

[4] *Fazal Khan v. State*, 16 DLR (SC) 117

[5] *Md. Hossain Umar v. K.S. Dalipsingh*, AIR 1970 SC 45; *Fazalan v. Crown*, 8 DLR (FC) 1, *Abdul Kamil v. State*, PLD 1958 SC 12; *Jahan Khan v. State*, PLD 1959 SC 488; *State v. Tayeb Ali*, 40 DLR (AD) 6.

[6] *Nawabul Alam v. State*, 45 DLR (AD) 140; *Babar Ali v. State*, 44 DLR (AD) 10; *Nurul Islam v. State*, 43 DLR (AD) 6; *Abdul Mannan v. State*, 44 DLR (AD) 60; *Mizazul Islam v. State*, 41 DLR (AD) 157; *Ramesh v. U.P.*, AIR 1985 SC 766

[7] *Mofazzal Hossain v. State*, 45 DLR (AD) 175; *Mohinder Singh v. State*, AIR 1953 SC 415

[8] *Abdul Hamid Mollah v. Ali Mollah*, 44 DLR (AD) 223

[9] *Samiruddin v. State*, 41 DLR (AD) 129; *Md. Akram v. State*, 16 DLR (SC) 695 (where conviction was given without considering that the case depended on the evidence of two bad characters)

shocking to the judicial conscience of the court. Where on the facts proved, two reasonable views can be taken, the Appellate Division will not interfere[1] even though it is inclined to take the view discarded by the High Court Division.[2] Where there had been serious defect in the finding of fact arrived at by the High Court Division in manifest disregard of the accepted principles of appreciation of evidence, the Appellate Division will grant leave and re-examine the evidence.[3] Where the appellant is convicted for murder without comprehensive and detailed analysis of the evidence and manifest error in the case is overlooked, the court will interfere.[4] Leave is granted when a substantial question of law is raised[5]. Violation of constitutional right or interpretation of the provisions of the Constitution or law involved in the case[6], applicability of a penal provision on the proved or alleged facts[7], the effect of violation or non-compliance of a legal procedure[8], failure of the principles of natural justice and want of jurisdiction of the court[9] are questions of law. Leave is not granted to raise a technical point when no prejudice is caused to the accused.[10] No new plea is allowed to be raised unless it is jurisdictional or a point of law going to the root of the case. The Appellate Division has granted leave to consider whether the High Court Division properly construed its judgment.[11]

5.193 The Appellate Division does not interfere with the finding of

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[1] *Abdul Hamid Mollah v. Ali Mollah*, 44 DLR (AD) 223

[2] *Chuhar Singh v. Haryana*, AIR 1977 SC 386 (but the court will interfere when it finds it impossible on any fair view to accept the conclusion)

[3] *State v. Abdus Sattar*, 43 DLR (AD) 44; *State v. Khasru*, 43 DLR (AD) 182; *Saidur Rahman v. State*, 45 DLR (AD) 66; *Abu Taher Chowdhury v. State*, 42 DLR (AD) 253

[4] *Mahesh v. State*, AIR 1991 SC 1108

[5] *Sompong v. State*, 45 DLR (AD) 110; *State v. Divisional Special Judge*, 44 DLR (AD) 215; *Samirannessa v. Kamaluddin*, 43 DLR (AD) 175; *Nazir Ahmed v. State*, AIR 1936 PC 253; *Ali Newaz Gardezi v. Md. Yussuf*, 15 DLR (SC) 9

[6] *Abdul Latif Mirza v. Bangladesh*, 31 DLR (AD) 1; *Bangladesh v. Ahmed Nazir*, 27 DLR (AD) 41; *Sajeda Parvin v. Bangladesh*, 40 DLR (AD) 178; *Aminul Islam v. Mujibur Rahman*, 44 DLR (AD) 56

[7] *Islam ali Mia v. Amal Chandra*, 45 DLR (AD) 27; *Rafiqul Islam v. State*, 44 DLR (AD) 264; *Lal MIa v. State*, 41 DLR (AD) 1; *Sadhu Singh v. State*, AIR 1954 SC 271; *Shihab Din v. State*, PLD 1964 SC 177

[8] *Siraj Din v. Kala*, 16 DLR (SC) 94; *Sultan Ahmed v. Haji S. Alam*, 34 DLR (AD) 352

[9] *Abdul Hai Khan v. State*, 40 DLR (AD) 226

[10] *H.M. Ershad v. State*, 6 BLC (AD) 18

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

acquittal, but will grant leave to consider whether it is clearly unreasonable[1] or perverse, or manifestly illegal or unjust[2], or vitiated by glaring infirmity in the assessment of the evidence[3]. The court will not interfere merely because it would take a different view on the evidence.[4] Where the High Court Division appears to have set aside an order of acquittal without justification[5] or upon erroneous view of the law of procedure[6] the court will grant leave to appeal. When the petitioner delays in having the leave petition heard, the Appellate Division is reluctant to grant leave against an order of acquittal.[7]

5.194 The court does not interfere with the legal sentence passed by the lower court or the High Court Division unless it is shown that there is an illegality in it, or it is unduly harsh[8] or unjust in the facts of the case or is unduly lenient and the discretion in passing the sentence has not been judicially exercised.

5.195 Bail is a matter of discretion and the Appellate Division does not generally grant leave in respect of such an exercise of the discretion. But the court grants leave to consider whether the High Court Division in refusing bail has taken an erroneous view of the law[9], or refused bail when there is no *prima facie* case[10] or exercised the discretion improperly or arbitrarily[11] or in granting bail imposed unreasonable condition[12] or where the High Court Division has arbitrarily cancelled the bail[1]

[1] *Maharashtra v. Champalal*, AIR 1981 SC 1675

[2] *State v. Rafiqul Hyder*, 45 DLR (AD) 13; *State v. Mantu*, 44 DLR (AD) 287; *U.P. v. Jasoda Nandan*, AIR 1974 SC 753

[3] *State v. Abdus Sattar*, 43 DLR (AD) 44; *State v. Ashraf Ali*, 43 DLR (AD) 83; *U.P. v. Chet Ram*, AIR 1989 SC 1543 (though there is need for care and restraint in the matter of setting aside a judgment of acquittal, the court will not refuse to interfere if the ends of justice require exercise of the power)

[4] *Punjab v. Balraj*, AIR 1978 SC 1136

[5] *Bhubaneswar v. Bihar*, AIR 1973 SC 399

[6] *State v. Constable Lal Mia*, 44 DLR (AD) 277

[7] *State v. Abu Musa*, 53 DLR (AD) 87

[8] *Fateh Khan v. State*, 15 DLR (SC) 51 (death sentence); *Mathri v. Punjab*, AIR 1964 SC 986

[9] *Madar Chandra v. State*, 44 DLR (SC) 151; *Mosharraf Hossain v. State*, 44 DLR (AD) 246

[10] *Abdul Matin v. State*, 44 DLR (AD) 8

[11] *Sk Shahidul Islam v. State*, 44 DLR (AD) 192; *Dhanu Mia v. State*, 43 DLR (AD) 119

[12] *Iqbal v. State*, 41 DLR (AD) 111

5.196 ***Power to do complete justice*** : Art.104 provides that the Appellate Division shall have the power to issue such orders or directions as may be necessary for doing complete justice in any cause or matter pending before it. This article does not confer a new jurisdiction, but gives a power to the court where it has jurisdiction.[2] This power is not circumscribed by any limiting words. This is an extra-ordinary power conferred by the Constitution only to the Appellate Division[3] and no attempt has been made to define or describe 'complete justice'. Any such attempt would possibly defeat the very purpose of the conferment of such power. "Cases may vary, situations may vary and the scale and parameter of complete jusatice also vary. Sometimes it may be justice accoroding to law, sometimes it may be justice according to fairness, equity and good conscience, sometimes it may be justice tempered with mercy, sometimes it may be pure commonsense, sometimes it may be the inference of an ordinary reasonable man and so on."[4] Speaking about this power the Appellate Division observed -

> Considering the vagaries of legal proceedings and the technicalities involved in adjudication, art.104 of the Constitution has invested as a measure of abundant caution, the last court of the country with wide power, so that it may forestall a failure of justice and to do complete justice in an appropriate case. It is an extraordinary procedure for doing justice for completion of or putting an end to a cause or matter pending before this court. If a substantial justice under law and on undisputed facts can be made so that parties may not be pushed to further litigation then a recourse to the provision of art.104 may be justified. Complete justice may not be perfect justice, and any endeavour to attain the latter will be an act of vanity.[5]

It being an extraordinary power, the Appellate Division cautioned -

> In the name of complete justice if a frequent recourse is made to art.104 then this court will be exposed to the opprobrium of purveyor of 'palm tree justice'. Where social conditions and proprietory relations change, but the laws fail to change, they do change very slowly, the court will even then be required to settle disputes and administer justice, and it

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[1] *Bakul Howladar v. State*, 43 DLR (AD) 14
[2] *K.L. Gauba v. Chief Justice*, AIR 1942 FC 1
[3] *Shahana Hossain v. Asaduzzaman*, 47 DLR (AD) 155
[4] *National Boad of Revenue v. Nasrin Banu*, 48 DLR (AD) 171, 178
[5] *Naziruddin v. Hameeda Banu*, 45 DLR (AD) 38, 44

> will not ask the parties seeking justice before it to wait on Parliament for an appropriate law. In the process a 'Chancellor's Foot' syndrome may occur.[1]

5.197 In *Gannysons Ltd v. Sonali Bank*[2] Sonali Bank obtained a decree in a suit for foreclosure of mortgage of the property of Gannysons (which was being treated as an abandoned property) and levied execution of the decree. Gannysons filed objection against the decree under s.47 of the Code of Civil Procedure and the matter came up before the Appellate Division which decided the dispute in favour of Gannysons. But Gannysons filed a review petition on the ground that the order of the court was not fully in conformity with the decision. In allowing the review, the court in exercise of the power under art.104 gave relief to Gannysons declaring that the property of Gannysons was not an abandoned property. The question arises whether such a relief could be given when Gannysons was not a plaintiff in the suit out of which the proceeding before the Appellate Division arose. The Appellate Division in *Naziruddin v. Hameeda Banu* pointed out –

> In the name of complete justice this court may not grant relief which the court of first instance will not be able under the law to grant, otherwise no litigant, in search of complete justice, will rest till he reaches the end of the long tunnel of litigation in this court.[3]

In this case the appellant during the subsistence of marriage with the defendant built at his own cost a house on the land belonging to the defendant. Subsequently, the relationship became strained and ended in dissolution of the marriage. The appellant's suit for declaration that he is the irrevocable licensee of his wife and the real owner of the suithouse was decreed by the trial court, but was dismissed by the High Court Division. While maintaining the decision of the High Court Division, the Appellate Division held -

> In this case the husband can, by no means, be termed as a trespasser or a stranger. He has built the house with consent, and, in the facts, it is not very difficult to hold, encouragement of the wife ... Though the appellant smartly deposed that he built the house for himself and his children, there can be no gainsaying that the house was built for the

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[1] Ibid, p.44
[2] 37 DLR (AD) 42
[3] 45 DLR (AD) 38, 44

> family - of the wife, the children and the husband as well. Though the appellant's claim on the basis of irrevocable licence has failed, we hold that he had reasonable belief, in the circumstances he was building the house, that he would be entitled to the building in such a way that he will not be disturbed. He has an expectation to reside in that house for the construction of which he expended about taka six lacs, and he is residing there since its construction ... the respondent ... is out of possession since 1980 and she may face a protracted litigation for eviction of the appellant. If liberty is given to the appellant to remove the three storied building and restore the property to its original condition then it may entail serious difficulties. In view of all these, we have decided to make a rough and ready adjustment of the claims of the parties ... Accordingly it is ordered that the appellant will retain his possession of that floor of the suit building where he is now residing, with no right to transfer his possession. The respondent may recover possession thereof any time within one year from date on payment of Taka six lacs in default of which the appellant will have only the right to live in that floor of the suit building where he is now residing during his life time.[1]

When there is a gap in the legislation, the Appellate Division, in exercise of its constitutional obligation, may step in to find a solution till such time the legislature acts.[2]

5.198 The important question is whether the court in exercise of this power can pass an order inconsistent with law. In *Prem Chand Garg v. Excise Commr.* the Indian Supreme Court held that "An order which this court can make in order to do complete justice between the parties, must not only be consistent with the fundamental rights guaranteed by the Constitution, but it cannot even be inconsistent with the substantive provisions of the relevant statutory laws"[3] and that the power to do complete justice does not enable the court to pass an order "inconsistent with the statutory provisions of substantive law, much less, inconsistent with any constitutional provisions". This decision was followed in *A.R. Antulay v. R.S. Nayak*[4]. In the subsequent case of *Union Carbide Corp. v. India*[5] the Indian Supreme Court distinguished *Garg* and *Antulay*

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[1] Ibid, p.45

[2] *Vineet Narain v. India*, AIR 1998 SC 889, 916

[3] AIR 1963 SC 996(Para 12)

[4] AIR 1988 SC 1531

[5] AIR 1992 SC 248

saying that in these two cases the point was one of violation of the constitutional provisions and the observation as to inconsistency with statutory provision was unnecessary. The court observed that in order to preclude the exercise of the constitutional power the prohibition of the statutory law must be "shown to be based on some underlying fundamental and general issues of public policy and not merely incidental to a particular statutory scheme or pattern. It will again be wholly incorrect to say that powers under article 142 are subject to such express statutory prohibitions. That would convey the idea that statutory prohibitions override a constitutional provision. Perhaps, the proper way of expressing the idea is that in exercising powers under Article 142 and in assessing the needs of 'complete justice' of a cause or matter, the apex court will take note of the express provisions in any substantive statutory provision based on some fundamental principles of public policy and regulate the exercise of its power and discretion accordingly."[1] In a subsequent case, the Indian Supreme Court re-affirmed *Garg* stating that the power to do complete justice cannot be construed as authorising the court to ignore the substantive rights of the litigants while dealing with a cause pending before it.[2]

5.199 Whatever be the position in the Indian jurisdiction, in Bangladesh this power has to be understood keeping in view the fundamental right guaranteed by art.31 which requires every person to be treated in accordance with law. And 'law' is not confined to statutory provisions only. Even in India the power to do complete justice cannot derogate from the constitutional provisions guaranteeing fundamental rights. One may say that the Appellate Division exercising the power it becomes a law and the bar of art.31 is not attracted. But it must be noted that any order passed enunciating a principle (so as to make it a declaration of law)[3] contrary to law may amount to judicial legislation. But more importantly, the order of the court before becoming law comes in conflict with art.31 because of repugnancy with the existing law and may not qualify as a law. The Appellate Division observed that it would not be proper to invoke art.104 when it comes in conflict with the express provision of law.[4] In *Nazirudin* the Appellate Division sought

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[1] Ibid, Para 43

[2] *Supreme Court Bar Assoc. v. India*, AIR 1998 SC 1895; *Mehta v. Kamal Nath*, AIR 2000 SC 1997

[3] *Municipal Corp. of Delhi v. Gurnam Kaur*, AIR 1989 SC 38

[4] *H.M. Ershad v. State*, 6 BLC (AD) 30

to remove an injustice caused in the peculiar facts of the case and the existing law did not cover the situation. The court observed that in doing complete justice the Appellate Division may not grant a relief which the court of first instance will not be able under the law to grant. Read in proper context it means that the court will not generally grant a relief which the trial court cannot grant. The power under art.104 is to be sparingly used in exceptional circumstances and to grant a relief which a trial court cannot grant far more exceptional circumstances will be required. It is difficult to reconcile the exercise of the power in *Gannysons* with the exposition of the power in *Naziruddin*. Gannysons not being a plaintiff, the court of the first instance could not have given the declaration in favour of Gannysons and the declaration by the Appellate Division is in conflict with the fundamental principle of our legal system of granting relief only to the person approaching the court seeking it.[1] The court exercised the power in *Gannysons* saying that the Gannysons had already suffered and to compel it to further litigation in the form of a suit for declaration that the properties in question were not abandoned property would result not only in further harassment but also long delay and deprivation of the enjoyment of the property. But this is nothing exceptional; so many of the litigants in this country are facing this predicament. It can be seen that the court in passing the order in the appeal (in respect of which review was sought) protected the interest of Gannysons by allowing stay of the proceedings in the execution case for six months to enable Gannysons to take steps. In *Bangladesh Telecom Ltd v. BTTB*[2] the Appellate Division allowed the writ petition declaring cancellation of agreement by respondent 1 in respect of cellular radio telephone system to be without lawful authority subject to the condition that the appellant would transfer within the stipulated period the relevant licence to respondent 3 with whom it entered into a joint venture agreement to work the licence. Though the order was beneficial to respondent 3, this was a relief given not to respondent 3 but to the appellant with a condition imposed in the exercise of the power to do complete justice to serve the public interest involved in the commercial venture

5.200 Power to do complete justice is an extraordinary power given to the highest tribunal of the land and the power is to be exercised sparingly and in exceptional circumstances to remove manifest and

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[1] *Pakistan v. Khandker Ali Afzal*, 12 DLR (SC) 38

[2] 48 DLR (AD) 20

undoubted injustice. Facts may be of such varied pattern, that it is difficult to lay down any fixed principles for doing complete justice. All that can be said is that 'complete justice' should be done not according to the personal views of the Judges, but in exceptional circumstances on clear showing of injustice for the removal of which the existing laws have not made any provision.

5.201 In exercise of this power the court may clarify its own order[1], expunge passages from the judgment of the High Court Division[2], remand a suit to the trial court[3], ignore technical grounds[4], resort to prospective overruling in granting relief[5], grant relief under one law when application is made under another law[6], mould the relief according to the changed circumstances or events subsequent to the institution of the suit[7] or grant relief when huge cost is awarded in exparte proceeding[8]. At a time when there was no rule permitting review of its own order *suo motu*, the Appellate Division invoked art.104 to hold that it had power to review its decision *suo motu*.[9] As a general rule, the Appellate Division does not interfere with a concurrent finding of fact, but where the situation demands, it will interfere to do complete justice.[10] When gross injustice has been done for no fault of the party who is left with no remedy, the court invoked the power to interfere.[11] Where the High Court committed error in acquitting certain persons even though the criteria laid down in its judgment warranted conviction, the Supreme Court *suo motu* issued notice upon the acquitted persons to show cause why they should not be convicted.[12] In exercise of this power the court can extend to the non-appealing party the benefit of the

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[1] *Keshav Talpade v. Emperor*, AIR 1943 FC 72

[2] *Ali Newaz Gardezi v. Col. Yussuf*, 15 DLR (SC) 9

[3] *Bangladesh v. Dhaka Lodge*, 40 DLR (AD) 86

[4] *Bangladesh v. Court of Settlement*, 53 DLR (AD) 26

[5] *Somaiya Organics (India) Ltd. v. U.P.*, AIR 2001 SC 1723; see *H.P. v. Nurpur Private Bus Operators*, AIR 1999 SC 3880 (the doctrine of prospective overruling is not available to the High Court)

[6] *BWDB v. Labour Court*, 2001 BLD (AD) 117

[7] *Md. Aslam v. Wazir Mohammad*, PLD 1985 SC 46

[8] *Al-Helal Rice Mills Ltd. v. BSRS*, 51 DLR (AD) 51

[9] *Mahbubur Rahman Sikder v. Mujibur Rahman Sikder*, 37 DLR (AD) 145

[10] *Bangladesh v. Mashiur Rahman*, 50 DLR (AD) 205

[11] *Raziul Hasan v. Badiuzzaman*, 1996 BLD (AD) 253

[12] *State v. Md. Nawaz*, 18 DLR (SC) 503

relief given to the party who appealed.[1] In *Manganese Ore (India) Ltd v. Chandi Lal*[2] two groups of workers in Nagpur and Madhya Pradesh claimed relief in respect of two items against the same employer. The labour court in Nagpur gave the full relief, while the labour court in Madhya Pradesh gave relief in respect of one item. The employer went to the Supreme Court in respect of both the decisions, but the workers of Madhya Pradesh did not challenge the decision in respect of the item disallowed. The Supreme Court found that the workers were entitled to both the items and ordered, "It would be a travesty of justice if we do not extend the benefit of this judgment to the workmen employed with the appellants in the State of Madhya Pradesh. Notwithstanding the order of the labour court which has become final, we invoke our powers under art.142 of the Constitution of India and direct that the benefit of this judgment be extended to the workmen of the appellant in the State of Madhya Pradesh." In *Delhi Judicial Service Association v. Gujarat*[3] in a contempt proceeding against some police officials for assaulting, handcuffing and maliciously prosecuting a Chief Judicial Magistrate, the Indian Supreme Court not only convicted and sentenced the police officials but also quashed the criminal proceeding against the magistrate in exercise of the power of doing complete justice. According to the Indian Supreme Court, when there is a vacuum in legislation, it is the duty of the executive to fill the vacuum as its field is co-terminus with that of the legislature and where there is inaction even by the executive, the judiciary must step in, in exercise of its constitutional obligation, to provide a solution till such time the legislature acts.[4]

5.202 *Power of Review* : Art.105 provides that subject to the provisions of an Act of Parliament and any rules made by it, the Appellate Division may review its own judgment or order. The power of review is exercised in two ways - (i) changing the decision of a case by reviewing the judgment originally delivered in that case and (ii) overruling a principle of law enunciated in a previous case. The power has been granted in the same terms as was granted to the Supreme Court under the Pakistan Constitution of 1956 and 1962. In a leading case Kaikaus J observed -

> On a proper consideration it will be found that the principles underlying

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[1] *Nagarajan v. Mysore*, AIR 1966 SC 1942, 1950

[2] AIR 1991 SC 520

[3] AIR 1991 SC 2176

[4] *Vineet Narain v. India*, AIR 1998 SC 889, 916

> the limitations mentioned in Order XLVII, rule 1, Civil Procedure Code, are implicit in the nature of review jurisdiction. While I would prefer not to accept those limitations as if they placed any technical obstruction in the exercise of the review jurisdiction of this Court I would accept that they would embody the principles on which this Court would act in the exercise of such jurisdiction. It is not because a conclusion is wrong but because something obvious has been overlooked, some important aspect of the matter has not been considered, that a review petition will lie. It is a remedy to be used only in exceptional circumstances.[1]

5.203 The Supreme Court of Bangladesh (Appellate Division) Rules, 1988 provide that subject to the law and practice of the court, the Appellate Division may either of its own motion or on the application of a party to a proceeding, review its judgment or order in a civil proceeding on grounds similar to those mentioned in Order XLVII, Rule 1 of the Code of Civil Procedure and in a criminal proceeding on the ground of error apparent on the face of the record.[2] Before the making of these Rules, a question arose as to whether the Appellate Division could *suo motu* review its judgment or order and the Appellate Division answered in the affirmative.[3]

5.204 As the review jurisdiction has been made subject to the practice of the court and the court was reluctant to exercise the jurisdiction except in case of substantial injustice, in seeking review, it is not sufficient to bring the case within the fold of rule 1 of Order XLVII of the Code; it has to be shown that unless the judgment is reviewed a substantial injustice would be done. Cornelius CJ observed-

> If there be found material irregularity, and yet there be no substantial injury consequent thereon, the exercise of the power of review to alter the judgment would not necessarily be required. The irregularity must be of such a nature as converts the process from being one in aid of justice to a process that brings about injustice.[4]

The jurisdiction cannot be utilised for re-hearing of the matter[5] and a

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[1] *Md.Amir Khan v. Controller, Estate Duty*, 14 DLR (SC) 276

[2] Rule 1 of Order XXVI

[3] *Mahbubur Rahman Sikdar v. Mujibur Rahman Sikder*, 37 DLR (AD) 145

[4] *Md. Amir Khan v. Controller, Estate Duty*, 14 DLR (SC) 276

[5] Ibid; *Zobaida Nahar v. Khairunnessa*, 3 BLC (AD) 170 *Idris Ali v. Enamul Huq*, 43 DLR (AD) 12; *Nurul Hossain v. Bangladesh*, 1 BLC (AD) 219; *Manzoor Hasan v. Zohra Bibi*, PLD 1990 SC 924.

decision of the court should be re-opened with the very greatest hesitation and only in a very exceptional circumstance.[1] A wrong decision on interpretation of certain provisions of law or principle laid down in a decision relied upon by the court is no ground for review.[2] Review will not be allowed on a new ground which was not urged in the appeal.[3] A review proceeding cannot be equated with the original hearing of the case, and the finality of the judgment delivered by the court will not be disturbed except where glaring omission or patent mistake or grave error apparent on the face of the record has crept in the earlier decision by judicial fallibility.[4] Where a conscious and deliberate decision is given in the peculiar facts of a case, no review can be allowed merely because the decision does not square up with some provision of law.[5] It is no ground of review that the decision given by the court is at variance with the decision given in some foreign jurisdictions.[6]

5.205 *Review in civil cases* : Rule 1 of Order XLVII of the Code being attracted a review of the judgment or order of the Appellate Division lies on the following grounds :-

(a) Discovery of new and important matter or evidence which, after due exercise of diligence, a party could not produce before the court at the hearing. The new and important matter must be such as might possibly have altered the decision of the court.[7] Where the new materials were placed and the case presented some unusual

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[1] *Akbar Ali v. Iftekhar Ali*, PLD 1956 FC 50; *Lily Thomas v. India*, AIR 2000 SC 1650 (Power of review is not to be exercised to substitute a view)

[2] *Zenith Packages v. Labour Appellate Tribunal*, 52 DLR (AD)160

[3] *Bangladesh Bank v. Abdul Mannan*, 46 DLR (AD) 1, 7; *Zobaida Nahar v. Khairunnessa*, 3 BLC (AD) 170; *Md. Safiullah v. Pakistan*, PLD 1990 SC 79

[4] *Northern India Caterers v. Governor*, AIR 1980 SC 674, 678; *G.M.Jamuna Oil Co. Ltd v. Chairman, Labour Court*, 2000 BLD (AD) 240; *Chandra Kanta v. Sk. Habib*, AIR 1975 SC 1500; *Dayananda Sagar v. Vatal Nagraj*, AIR 1976 SC 2183; *Zobaida Nahar v. Khairunnessa*, 3 BLC (AD) 170; *Srinivasiah v. Balaji Krisna*, AIR 1999 SC 462 (Review is allowed when the judgment reviewed was delivered on mistaken assumption of material fact)

[5] *B.S.R.S. v. M/S Haque Brothers*, 46 DLR (AD) 39; *Md. Safiullah Khan v. Pakistan*, PLD 1990 SC 79

[6] *Manipur Administration v. Tochom Bira*, AIR 1965 SC 87

[7] *In Re Appa Rao*, 13 IA 155; *Azizur Rahman v. Bangladesh*, CRP No.26-32 of 1993 (new materials were produced, but the court was of the view that those materials would not have affected the decision and rejected the review petition)

circumstances the Indian Supreme Court reviewed its earlier judgment.[1] But though the court can take notice of the change of law at the time of hearing an appeal, no review can be sought on the ground of subsequent change of law.

(b) Error apparent on the face of the record. An error apparent on the face of the record exists if of the two or more views canvassed on the point it is possible to hold that the controversy can be said to admit only one of them; if the view adopted by the court in the original judgment is a possible view having regard to what the record states, it is difficult to hold that there is an error apparent on the face of the record.[2] Reversal of conclusions reached by the court after full consideration of the question is not possible in the exercise of review jurisdiction except where the decision was given *per incuriam* (i.e. through oversight) without considering some statute or the like.[3] As the Judges are under oath to preserve, protect and defend the Constitution and the laws of Bangladesh, they are to review a judgment which is in conflict with the Constitution or the laws of Bangladesh.[4] In order that an error may be a ground for review it must be one which is manifest and so clear that no court can permit such an error to remain on record; it may be an error of fact or law, but it must be an error which is self-evident and floating on the surface, and does not require any elaborate discussion or process of ratiocination.[5] The indulgence by way of review may be granted to prevent irremediable injustice being done where by some inadvertence an important statutory provision has escaped notice which, if it had been noticed, might materially affect the judgment.[6] Review can be had also on the ground of error about a material fact which is apparent on the face of the record such as dismissal of a suit where a part of the claim had been admitted by the defendant.[7]

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[1] *Mohindroo v. District Judge*, Delhi, AIR 1971 SC 107

[2] *Northern India Caterers v. Governor*, AIR 1980 SC 674, 678

[3] *Punjab v. Board of Foreign Missions*, PLD 1988 SC 382

[4] *Md. Amir Khan v. Controller, Estate Duty*, PLD 1962 SC 335, 340; *Idris Ali v. Enamul Huq*, 43 DLR (AD) 12, 14 (Review of judgment can be made where there is error apparent on the face of the record or the court's attention was not drawn to any particular statutory provision of law for which an error has crept in the judgment.)

[5] *Z.A. Bhutto v. State*, PLD 1979 SC 741, 768; *Zenith Packages v. Labour Appellate Tribunal*, 52 DLR (AD) 150

[6] Ibid, p.261

[7] *Probhas v. Nithar*, AIR 1924 Cal 1054

(c) Any other sufficient reason which is analogous to discovery of new facts and error apparent on the face of the record.[1]

5.206 *Review in criminal cases* : Review can be had only in case of error apparent on the face of the record. Thus review may granted if the attention of the court was not drawn to a material statutory provision.[2] But it is not a ground of review that some alternative situations were not presented before the court when the case was decided on factual foundation.[3]

5.207 Even though none of the above grounds may be attracted, as the court has power to do complete justice, the court may review its judgment to rectify mistakes introduced in the judgment through inadvertence[4] or accidental slips[5]

5.208 In *Commissioner of Taxes v. Mullick Brothers*[6] the Appellate Division reviewed and set aside its original judgment. The respondent was assessed to income tax under M.L.R. 32 of 1969 and he paid part of the assessed tax. For the balance demand notice was issued. The respondent unsuccessfully challenged the notice of demand in the writ jurisdiction. The Appellate Division after taking note of the President's Order No.147 of 1972 found the notice to be without lawful authority holding that the Martial Law Regulation was not a law which was saved and continued by the Constitution and as such the imposition of the impugned tax was totally unauthorised and lacked legal foundation and no question of debt did arise.[7] The foundation of the judgment was that the Martial Law Regulation had no constitutional basis to become a law in Pakistan which could be saved and continued under the Constitution and the laws of Bangladesh and as such the assessment pursuant to M.L.R.32 could not create any debt. In reviewing the judgment the Appellate Division did not consider whether the legal finding regarding the validity of the Martial Law Regulation in the original judgment was correct. The court proceeded on the assumption that M.L.R.32 was a valid piece of legislation and created a debt within the meaning of the

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[1] *Chajju Ram v. Neki*, AIR 1922 PC 112

[2] *Hebbert v. Purchas*, (1871) 3 PC 664

[3] *Northern India Caterers v. Governor*, AIR 1980 SC 674

[4] *Rajunder v. Bajai*, (1836) 1 MIA 117

[5] *Mysore v. Mysore Spinning & Mfg. Co.*, AIR 1958 SC 1002

[6] 33 DLR (AD) 274

[7] *Mullick Brothers v. Income Tax Officer*, 31 DLR (AD) 165

President's Order no.147 of 1972 which was realisable and reviewed the judgment on the ground that in the original judgment the legislative amendment in the General Clauses Act by President's Order no.147 of 1972 was not considered in "its perspective". It is submitted that the original judgment could not be reviewed without coming to a definite finding that M.L.R.32 was a valid piece of legislation. The Appellate Division stated, "It is irrelevant to consider how this debt was created. The validity of MLR 32 is not an issue nor can it be made an issue, because the tax assessed by operation of law already became a debt to the Government of Pakistan by 15.1.71 ...". It has not been stated in the judgment and it is not understood why the consideration of how the debt was created was irrelevant and why validity of MLR 32 cannot be made an issue and how it can be said that it was not in issue when it was the foundation of the original judgment. The Appellate Division spoke of the creation of debt by operation of law. It is not understood how a debt is created unless something is due and how something may become due unless there is some valid law to make it due. It is also not understood how a debt was created when MLR 32 was held to be invalid. It cannot be said that no possible view can be taken that M.L.R.32 was not a valid piece of legislation and as such the finding in this regard in the original judgment cannot be said to be an error on the face of the record. On the contrary, a Martial Law Regulation is *per se* without legal validity and cannot create any right or liability unless it is imparted legal validity by some sort of constitutional device and there was none in the case of Martial Law Regulations of 1969. The Pakistan Supreme Court found Yahya Khan to be an usurper. So the Martial Law Regulation in question could be saved only if the doctrine of necessity would be applicable. The Appellate Division did not go into that question. It is submitted that the Appellate Division having taken notice of the President's Order no.147 of 1972 in its original judgment, it cannot be treated as *per incuriam* simply because it was "not considered in its perspective".

5.209 In *Gannysons Ltd. v. Sonali Bank*[1], review was sought on the ground that the order of the court in the original judgment was not in conformity with the reasonings given. The review judgment does not indicate any error apparent on the face of the record. The order in the original judgment shows that the court stayed the execution proceeding for six months to enable Gannysons to seek proper remedy and that was

[1] 37 DLR (AD) 42 (facts of the case may be seen in Para 5.197)

complete justice and there may not be any further question of doing a better justice.

5.210 In *Bangladesh v. Azizur Rahman*[1] the decision of the High Court Division declaring some provisions of the Bangladesh Ad-hoc Appointees (Counting and Determination of Seniority) Rules, 1990 *ultra vires* on the ground of violation of art.27 was challenged and the Appellate Division set aside the decision of the High Court Division. In the review petitions[2] it was urged that the court failed to consider that the governmental objective (as disclosed in the affidavit of the government) for the differential treatment was non-existent. The court dismissed the review petitions and stated about the above objection -

> Learned Counsel finds error in our finding that the classification in the case of all Ad-hoc appointees including the petitioners is reasonable and has got nexus with the objectives which it sought to achieve. We have followed, among others, our decision in the case of Abdus Sabur 41 DLR-AD p.30 and found the classification fully justified. Decisions from different jurisdictions were placed before us by both the parties and we accepted those which we found appropriate in the instant case. This is not an error on the face of the record.

It is submitted that *Sk. Abdus Sabur v. Bangladesh* has no bearing in this case inasmuch as the governmental objective in making the classification was very much in existence in *Sk. Abdus Sabur* and the question raised in the instant case was not at all in issue in *Sk. Abdus Sabur*. The court spoke of other decisions, but those decisions did not lay down any proposition that a classification to subserve a disclosed but non-existent governmental objective is valid and, indeed, there cannot be any decision upholding a classification which is not supported by a legitimate governmental objective. Presence of a legitimate objective for making a classification is the very essence of the equality clause under art.27. The court in rejecting the review petitions did not really answer the all important question raised. It is submitted that when there is differential treatment of citizens, a law can escape the challenge only by a showing of legitimate governmental objective to be subserved by the classification and if the court fails to examine this vital question of existence of such governmental objective with reference to the materials produced, not merely the court fails to consider the constitutional issue

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[1] 46 DLR (AD) 19 (fact of the case may be seen in Para 2.34)

[2] *Azizur Rahman v. Bangladesh*, 3 BLC (AD) 205

in "its perspective", but commits an error apparent on the face of the record.

5.210A In *Secy. Ministry of Finance v. Masder Hossain*[1] the Appellate Division gave direction to make law for constitution of a separate Judicial Service Commission and Judicial Pay commission with further observation that the pay etc. of the judicial officers shall follow the recommendation of the Pay Commission. The governement filed a review application raising objection relating to the competence of the court to direct making of a law by Parliament or the President and to the observation of the court that pay etc. of the judicial officers shall follow the recommendation of the Judicial Pay Commission. The appeal[2] arising out of the review petition was dismissed by the court observing–

> A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected. A review lies where an error apparent on the face of the record exists. It is not a rehearing of the main appeal. Review is not intended to empower the Court to correct a mistaken view of law, if any, taken in the main judgment.

It is submitted that the question of rehearing the appeal in the disguise of review was not there in this case. The court failed to notice that there was no prayer in the writ petition for a separate Judicial Service Commission or for making any recommendation of Pay Commission binding on the government and neither the High Court Division went into these questions, nor any argument in this regard was advanced in the appeal from the decision of the High Court Division. The Appellate Division, while delivering the judgment, gave the direction and observation in question. The objections raised in review having not been mooted in the main appeal, the question of rehearing of the appeal was totally irrelevant. The objections raised related to some fundamental constitutional questions relating to the competence of the court under the scheme and framework of the Constitution and those were questions of great public importance. It is submitted that the court was in error in avoiding the issues in a situation where a review was in order.

5.211 *Procedure:* A review application has to be filed within 30 days of the judgment or order[3] and for computing the period of

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[1] 2000 BLD (AD) 104 (see Para 5.234A – 5.234F for comments on this this case)

[2] *Secy. Ministry of Finance v. Masder Hossain*, 2001 BLD (AD) 126

[3] The Supreme Court of Bangladesh (Appellate Division) Rules, 1988, Order XXVI, rule 2

limitation the time taken for obtaining the certified copy of the judgment or order shall be excluded. The application on the ground of discovery of new facts must accompany an affidavit setting forth the circumstances under which the discovery has been made.[1] The application must be signed by a Senior Advocate who shall specify the points upon which the prayer for review is based and shall certify that consistent with the law and practice of the court, a review would be justifiable.[2] Except with the special leave of the court, no application for review shall be drawn up by an advocate other than the advocate who appeared at the hearing and unless his presence is dispensed with by the court, he shall be present at the hearing of the review application.[3] A review application must accompany a cash security of Tk.2000/-.[4]

APPELLATE DIVISION : ADVISORY OPINION

5.212 Art.106 provides that the President may seek the opinion of the Appellate Division on a question of law which has arisen or is likely to arise and which is of such nature and of such public importance that it is expedient to obtain the opinion. It is entirely in the discretion of the President to decide whether the question of law is of the specified kind and whether to ask for the opinion. Once asked by the President, it was an obligation of the Supreme Court to render the opinion under art.59 of the Pakistan Constitution, but under art.106 the Appellate Division may decline to render the opinion.[5] The option has been given to enable the Appellate Division to decline to express opinion if purely socio-economic or political question having no constitutional significance is referred to it. But though it is not obligatory upon the court to give an opinion, it will be unwilling to decline a reference except for good reasons.[6] Having regard to the jurisdictional dimension added to the advisory role in the Constitution, returning the reference without answering the questions must not only be for good reasons, but also for such weighty reasons that the court has no option but to return the

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[1] Ibid, rule 3

[2] Ibid, rules 4 & 5

[3] Ibid, rule 6

[4] Ibid, rule 9

[5] *Special Reference Case no.1 of 1995*, 47 DLR (AD) 111; *In Re Art.143*, AIR 1965 SC 745

[6] *Special Referfence no.1 of 1995*, 47 DLR (AD) 111, 118

reference.[1] The Appellate Division laid down the principles governing the court's discretion in declining to answer a reference stating -

1. When the manner in which the question is framed e.g. broad and general and vague terns, or when it is beyond the power of the court to decide it, it is not possible to answer;

2. Speculative opinion on hypothetical question cannot be asked;

3. Court should decline to answer abstract question;

4. Reference as to validity of an entire Act wholesale should be avoided; and

5. The court may refuse to express its advisory opinion if it is satisfied that it should not express its opinion having regard to the nature of the questions forwarded to it and having regard to the other relevant facts and circumstances, if it finds for valid reason the question is incapable of being answered.[2]

The Appellate Division also stated some broad principles relating to the advisory jurisdiction as follow:-

1. The expediency, bonafides, and motive for making a reference is not justiciable;

2. The court is bound by the recitals in the order of reference and must accept the statement of facts in the Reference as they are. The truth or otherwise of the facts cannot be gone into. The court or the parties appearing in the reference cannot go behind the reference.

3. The President is not bound by the opinion on the Refer but the advisory opinion is entitled to due weight and the opinion may have great pursuasive force;

4. The opinion is not binding on the court rendering the opinion in the Reference; and

5. The advisory opinion is not 'law declared' and is therefore not binding on the High Court Division or subordinate court, yet it is entitled to due weight and respect and normally to be followed.[3]

The Indian Constitution permits the President to seek opinion on questions both of law and fact, but under art.106 only a question of law may be referred to the Appellate Division. If the question of law proceeds on assumption of some facts, the court will proceed to consider

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[1] Ibid p.132

[2] *Special Reference Case no.1 of 1995*, 47 DLR (AD) 111, 119

[3] Ibid, p.118

the question assuming the facts to be correct.[1] The question of law referred should be concrete and not abstract question of law.[2]

5.213 The opinion rendered is essentially in the nature of an advice and is not binding as a judicial pronouncement and is not binding on the referring authority.[3] It is not also binding on any party.[4] The opinion will not prevent the Appellate Division from giving a contrary decision. Even though lacking the binding force, such an opinion proceeding from the highest tribunal of the land will have great persuasive value and have been relied on in subsequent litigation.

BINDING EFFECT OF SUPREME COURT JUDGMENTS

5.214 Art.111 provides that the law declared by the Appellate Division shall be binding on the High Court Division and the law declared by either division shall be binding on all subordinate courts. A judgment of a court binds no body except the parties to the proceeding, but by virtue of this article the judgment of the Supreme Court so far as it settles a point of law is a declaration for the nation as to what the law is.[5] The article recognises that under modern conditions legislative modification of laws is bound to be confined to major changes and gradual and orderly development can only be accomplished by judicial interpretation.[6] What is binding as a law is the *ratio* of a decision and not the finding of fact or the conclusion reached by the court.[7] "The *ratio decidendi* is the underlying principle, namely, the general reasons or the general grounds upon which the decision is based on the test or abstract from the specific peculiarities of the particular case which gives rise to the decision. The *ratio decidendi* has to be ascertained by an analysis of the facts of the case and the process of the reasoning involving the major premise consisting of a pre-existing rule of law, either statutory or judge-made, and a minor premise consisting of the

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[1] *Reference by Governor General*, 7 DLR (FC) 395

[2] *A.G. British Columbia v. A.G. Canada*, [1914] AC 153; *In Re Regulation and Control of Aeronautics*, [1932] AC 54

[3] *In Re Estate Duty*, AIR 1944 FC 73

[4] *In Re Kerala Education Bill*, AIR 1958 SC 956

[5] *Ganga Sugar Corporation v. U.P.*, AIR 1980 SC 286

[6] *Dhanwatey v. C.I.T.*, AIR 1968 SC 683, 696

[7] *Dalbir Singh v. India*, AIR 1979 SC 1384, Para 22; *Krisna Kumar v. India*, AIR 1990 SC 1782

material facts of the case under immediate consideration."[1] In order to be binding, the opinion on the law must be a considered one and therefore a decision given on concession of the parties cannot operate as a law laid down by the Supreme Court.[2] Mere casual expressions carry no weight at all and not every passing expression of a judge, however eminent, can be treated as an *ex cathedra* statement, having the weight of authority.[3] Unless a principle is laid down, a decision given in exercise of the power of doing complete justice under art.104 cannot operate as a binding precedent.[4] But if the statement of the law is a considered opinion, it qualifies as a law binding on the subordinate courts even if it has been given *ex parte*.[5] A decision which is *per incuriam*, that is, a decision given in ignorance of the terms of the Constitution or of a law or of a rule having the force of law, does not constitute a binding precedent.[6] Decisions *sub silentio* which are given on a point of law not perceived by the court or present to its mind are not also binding precedents.[7] Opinions of the Appellate Division rendered under its advisory jurisdiction, though not binding as precedents are entitled to great weight and are normally to be followed by the courts.[8]

5.214A *Overruling by implication:* Where the Appellate Division has applied its mind to the facts of the case before it and the law as declared by it in a previous case, the previous case shall be deemed to have been impliedly overruled if the law declared in the previous case contradicts what has been stated in the latter case even though the previous case has not been expressly overruled.[9]

5.215 Every judgment must be read as applicable to the particular

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[1] *Krishna Kumar v. India*, AIR 1990 SC 1782, 1793; *India v. Dhanwanti*, (1996) 6 SCC 44

[2] *Laksmi Shankar v. State*, AIR 1979 SC 451; *Municipal Corp of Delhi v. Gurnam Kaur*, AIR 1989 SC 38; *Kulwant v. Gurdial Singh Mama*, AIR 2001 SC 1273

[3] *Municipal Corp. of Delhi v. Gurnam Kaur*, AIR 1989 SC 38

[4] Ibid

[5] *Pradyut v. Suryakant*, AIR 1979 Bom 166

[6] *Municipal Corp. of Delhi v. Gurnam Kaur*, AIR 1989 SC 38; *A.R. Antulay v. R.S. Nayak*, AIR 1988 SC 1531; *Fuerst Day Lawson Ltd. v. Jindal Exports*, AIR 2001 SC 2293

[7] *Municipal Corp of Delhi v. Gurnam Kaur*, AIR 1989 SC 38; *U.P. v. Synthetics and Chemicals Ltd*, (1991) 4 SCC 139

[8] In Re *Cauvery Water Disputes Tribunal*, AIR 1992 SC 522

[9] *Rudramurthy v. Barkathulla*, (1998) 8 SCC 275

facts proved or assumed to be proved, since the generality of expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found.[1] But once the Supreme Court settles a question of law, it is not open to the subordinate courts to question the principle enunciated by the Supreme Court, even though they have a right to see whether and how far the principle on which stress is laid applies to the facts of a particular case.[2] While the decision in a judgment of the Supreme Court cannot be assailed on the ground that certain aspects have not been considered or that the relevant provisions were not brought to the notice of the Supreme Court,[3] the subordinate court is free to hold that the facts of the case before it are different from those in the case before the Supreme Court and as such the principle laid down by the Supreme Court is not applicable to the case before it.[4]

5.216 *Obiter dicta* : Statements made by a court in a decision arising out the circumstances of the case, but not necessary for the determination of the dispute is *obiter dictum*[5] and such a statement of law cannot operate as a binding precedent as it was unnecessary for the decision in the case.[6] But if the statement of law has been made in a decision after due consideration, even though unnecessary, it need not fall outside the pale of art.111 and according to the Indian Supreme Court its *obiter dicta* should be treated as binding precedent.[7] Even if a considered *obiter dicta* of the Appellate Division be not held binding as a precedent, it is entitled to full weight being the opinion of the highest tribunal of the land.[8]

5.217 The decisions of the Appellate Division are institutional decisions and the decision of the majority is binding as a law. In case of plurality judgment where each Judge gives his own opinion differing on reasons but agreeing on the result, it becomes difficult to draw the

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[1] *Quinn v. Leathem*, [1901] AC 495

[2] *Mata Prasad v. Nageswar*, AIR 1925 PC 272

[3] *Lalkhani v. Malkapur Municipality*, AIR 1970 SC 1002

[4] *India v. Subramaniam*, AIR 1976 SC 2433

[5] *Krisna v. Mathura*, AIR 1982 SC 686

[6] *A.D.M. v. Shukla*, AIR 1976 SC 1207; *Madhav Rao v. India*, AIR 1971 SC 530

[7] *I.T. commissioner v. Vazir Sultan*, AIR 1959 SC 814; see also *Saiyada Mossarrat v. Hindustan Steel Ltd.*, AIR 1989 SC 406

[8] *Income Tax Officer v. Devinath*, AIR 1968 SC 623

common *ratio decidendi* and to point out the 'law' declared. The law declared by the Appellate Division is not binding on the Appellate Division which is empowered by the Constitution to review its own judgments and orders. But it has been found that the power of review under art.105 is an extra-ordinary power to be used sparingly only in the interest of justice.[1] As compared to other decisions, the Appellate Division would more readily review decisions on constitutional issues if it is satisfied that the previous decision is clearly wrong.[2]

5.218 Now the question is whether the laws declared by the Privy Council, Federal Court and the Supreme Court of Pakistan before the liberation of Bangladesh are binding precedents. Because of the then existing constitutional dispensation the statements of law by these courts formed part of the *corpus juris* of this country and were continued as existing laws by virtue of the Laws Continuance Enforcement Order, 1971 and art.149 of the Constitution and are as such binding on the High Court Division and the subordinate courts until the Appellate Division renders any contrary decision.[3] The Indian Supreme Court made a distinction between principles of substantive law and the principles relating to interpretation of statutes and opined that the former were continued by the Constitution but not the latter.[4] The Indian Supreme Court seems to have rightly made the distinction and it is submitted that art.149 of the Constitution should be deemed to have continued the principles of substantive law laid down by earlier Supreme Courts and Privy Council as part of the 'existing law'.

5.219 *Doctrine of Stare Decisis* : The doctrine of *stare decisis* requires that a long-standing decision of the court which has been consistently followed should not be upturned. When a decision has been followed in several cases up to recently, its binding effect should not be disturbed merely on the ground that any particular aspect had not been expressly considered therein.[5] The rationale behind the doctrine is that

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[1] For discussion on stare decisis, see Para 5.219

[2] *Sajjan Singh v. Rajasthan*, AIR 1965 SC 845; *W.B. v. Corp. of Calcutta*, AIR 1967 SC 997

[3] *Ahmed Nazir v. Bangladesh*, 27 DLR 199, 224; *Pritam Singh v. State*, AIR 1950 SC 169; *Bihar v. Abdul Majid*, AIR 1954 SC 245; *Delhi Judicial Service Assn. v. Gujarat*, AIR 1994 SC 2176, 2202

[4] *Superintendent and Legal Remembrancer v. Corporation of Calcutta*, AIR 1967 SC 997

[5] *Mahesh Kumar v. Nagaland*, (1997) 8 SCC 176

many people have shaped their conduct in faith and reliance on such decision. Once construction of a statute of doubtful meaning has been given and that construction has been accepted for a long time, that construction should not be altered unless the court can say positively that it is wrong and productive of inconvenience.[1] As regards the stand of the House of Lords, Halsbury's Laws of England states as follows –

> In general the House of Lords will not overrule a long established course of decisions except in plain cases where serious inconvenience or injustice would follow from perpetuating an erroneous construction or ruling of law. The same considerations do not apply where the decision, although followed, has been frequently questioned and doubted. In such a case it may be overruled by any court of superior jurisdiction. When old authorities are plainly wrong, and especially where the subsequent course of judicial decisions has disclosed weakness in the reasoning on which they were based and practical injustice in the consequences that must flow from them, it is the duty of the House of Lords to overrule them.
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> When, however, some words of doubtful meaning in a statute have received a clear judicial interpretation and the same words are repeated in a subsequent statute, the legislature must be taken to have read them on the second occasion according to the meaning given to them by that interpretation, and it is not then open to a higher court to reverse that interpretation. This is merely a rule of construction for the guidance of the courts; it is not a presumption which the courts are bound to make.[2]

The doctrine, however, cannot control questions involving the construction and interpretation of the constitution or at least the doctrine does not apply with the same force to the decisions on constitutional questions as to other decisions, even though the previous decisions will not be entirely disregarded and may, in case of doubt, control the views of the court.[3] Douglas J of the US Supreme Court explained, "A judge looking at a constitutional decision may have compulsions to revere past history and accept what was once written. But he remembers above all also that it is the Constitution which he swore to support and defend, not

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[1] *Bourne v. Keane*, [1919] AC 815; *Saurashtra Cement v. India*, AIR 2001 SC 8

[2] Fourth Edition, vol 26, Para 581

[3] Corpus Juris Secundum, vol.21, Para 215; *Asma Jilani v. Punjab*, PLD 1972 SC 139; *Sajjan Singh v. Rajasthan*, AIR 1965 SC 845; *S.C. Advocates-on-Record Assn. v. India*, AIR 1994 SC 268

the gloss which his predecessor may have put on it."[1] This doctrine cannot create any obstacle for the Appellate Division which has been given the specific power under art.105 to review its own judgments and orders and the Appellate Division will not hesitate to alter its decision where manifest error or injustice is shown to have been caused by the earlier decision.[2]

5.220 Art.112 provides that all executive and judicial authorities shall act in aid of the Supreme Court. Those authorities must comply and act in accordance with the orders and directions given by either division of the Supreme Court. Thus "no instrument, circular, direction, notification, advice or other instrument of any kind issued by any Ministry or any department of the Government which has the effect of staying, postponing, delaying, thwarting or superseding an order of the Supreme Court is binding on the functionaries of the country."[3]

CONTEMPT OF THE SUPREME COURT

5.221 As in the earlier constitutions, art.108 of the Constitution declares the Supreme Court to be a court of record. Blackstone defined court of record thus -

> A court of Record is that where the acts of judicial proceedings are enrolled in parchment for a perpetual memorial and testimony which rolls are called the Records of Courts and are of such high and super eminent authority that their truth is not to be called in question.

According to him the power to punish for contempt is an inseparable attendant upon every superior tribunal which are all courts of record.[4] The British Parliament's wide power to punish for contempt is supported on the ground of it being treated as a court of record.[5]

5.222 As a court of record both divisions of the Supreme Court have three main characteristics - (1) their proceedings are preserved permanently as records, (2) these records are conclusive evidence of

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[1] Quoted from Henry J. Abraham's The Judicial Process, 1993, p.326

[2] *Sajjan Singh v. Rajasthan*, AIR 1965 SC 845, 855; *S.C. Advocates-on-Record Assn. v. India*, AIR 1994 SC 268, 303,397; see *Bangladesh v. Mizanur Rahman*, 2000 BLD (AD) 212

[3] *Tahera Nargis v. Shamsur Rahman*, 41 DLR 508, 512

[4] see *Moazzem Hossain v. State*, 35 DLR (AD) 290

[5] see *In Re Art.143*, AIR 1965 SC 745

what is recorded in it and (3) they have inherent summary power to punish for contempt of themselves.[1] However, like art.129 of Indian Constitution this article specifically mentioned the power of each division of the Supreme Court to punish for contempt of itself[2] to remove any doubt. The use of the word 'itself' in art.108 makes it clear that each division may deal with contempt of itself and thus the High Court Division has no jurisdiction to deal with contempt for disobedience of the order of the Appellate Division.[3]

5.223 The Pakistan Constitution of 1962 specifically mentioned what would constitute contempt of court, but art.108 omitted it as the law of contempt of court is a *sui generis* highly developed by judicial precedents and needs no codification. Oswald defined contempt of court as follows -

> To speak generally, Contempt of Court may be said to be constituted by any conduct that tends to bring the authority and administration of law into disrespect or disregard, or to interfere with or prejudice parties litigant or their witnesses during the litigation.[4]

This power has been granted not for the protection of the individual Judges from imputations, but for the protection of the public themselves from the mischief they will incur if the authority of the Supreme Court is impaired.[5] "The dignity and authority of the Courts has a link with the supremacy and majesty of law. Any conduct which is calculated to diminish that dignity or authority is a criminal contempt which the Court is under duty to punish."[6] The power of the Supreme Court to punish for its contempt may be regulated by law.[7]

5.224 ***What constitutes contempt of court*** : In the famous case of *St. James's Evening Post* Lord Hardwicke said, "There are three different sorts of contempt. One kind of contempt is scandalising the Court itself.

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[1] *Vinayak Shamrao v. Moreswar Ganesh*, AIR 1944 Nag 44

[2] Contempt of Courts Act, 1926 confers poser on the High Court Division to deal with contempt of subordinate courts.

[3] *M. Hossain v. K.F. Industries*, 36 DLR (AD) 102 (Anxiety to do justice cannot have free play so as to enable the court to overcome the barrier of jurisdiction)

[4] Contempt of Court, 1910, p.6

[5] *Moazzem Hossain v. State*, 35 DLR (AD) 290; *Brahma Prakash v. U.P.*, AIR 1954 SC 10

[6] *Sir Edward Snelson v. Judges, High Court*, 16 DLR (SC) 535, 552

[7] *Dr. Md. Mahiuddin v. Dr. Hasanuzzaman*, 44 DLR 535

There may be likewise a contempt of this Court, in abusing parties who are concerned in causes here. There may be also a contempt of this Court, in prejudicing mankind against persons before the cause is heard. There cannot be anything of greater consequence than to keep the streams of justice clear and pure, that parties may proceed with safety both to themselves and their characters."[1] Since the days of Lord Hardwicke numerous decisions have been given in respect of contempt of court and following all those decisions, contempt of court can be classified into three broad categories - (1) Scandalisation of the court, (2) disobedience to the orders of the court and breach of undertakings given to the court and (3) interference with the due course of justice.

5.225 *Scandalisation of the court:* Insinuations and comments derogatory to the dignity of the court which are calculated to undermine the confidence of the people in the integrity of the Judges constitute contempt. Here a distinction must be made between derogatory comments about a Judge and derogatory comments about the court. As has been said earlier, this power has been granted not for the protection of the individual Judges from imputations, but for the protection of the public themselves. Thus when a vilification of a Judge is made in his individual capacity, it is not contempt, it is actionable as libel or slander. But when the vilification is against a Judge as a Judge it constitutes contempt[2] as in such case the integrity of the court comes into question. For the protection of organised society and maintenance of the rule of law there is necessity of independent and fearless judiciary in which the public will have full confidence as dispenser of justice. A publication which scandalises the court attributing unfitness or inefficiency to the Judges in discharge of their duty is contempt of court.[3] Scandalising and attacking the court in unbecoming language in open court is a gross contempt.[4] Criticism of the decisions or proceedings of the court does not *ipso facto* constitute contempt of court if it is done honestly and fairly without imputing any motive or inefficiency to the Judges.[5] In this

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[1] (1742) 2 Atk. 469, 471

[2] *B. Mishra v. Registrar, Orissa High Court*, (1974) 1 SCC 314; see *State v. Nazrul Islam*, 37 DLR 200 (where scathing language was used about the performance of a judge in discharge of his judicial function)

[3] *Sir Edward Snelson v. Judges of High Court*, 16 DLR (SC) 535; *Dr. Ahmed Hossain v. Shamsul Huq Chowdhury*, 1 BLC 321 (constructive criticism to protect the neutrality and independence of judiciary, no contempt)

[4] *State v. Nazrul Islam*, 37 DLR 200; *In Re Bholanath*, AIR 1961 Pat 1

[5] *Sir Edward Snelson v. Judges, High Court*, 16 DLR (SC) 535

regard the Privy Council observed -

> ... whether the authority and position of an individual Judge or the due administration of justice is concerned, no wrong is committed by any member of the public who exercises the ordinary right of criticising in good faith in private or public the public act done in the seat of justice. The path of criticism is a public way : the wrong-headed are permitted to err therein : provided that members of the public abstain from imputing improper motive to those taking part in the administration of justice, and are genuinely exercising a right of criticism and not acting in malice or attempting to impair the administration of justice, they are immune. Justice is not a cloistered virtue : she must be allowed to suffer the scrutiny and respectful even though outspoken comments of ordinary men.[1]

The observation of the Privy Council is applicable with greater force in Bangladesh in view of the provisions of art.39 guaranteeing freedom of speech and expression.[2] Fair criticism of a judicial work is permissible and fair criticism is that which while criticising the act of a Judge does not impute any ulterior motive to him.[3] In the absence of any imputation of motive or bias, a severe criticism even on incorrect premises was held not to constitute contempt of court.[4] When no improper motive or bad faith was alleged a very harsh comment about the Supreme Court[5] or a comment that the standard of High Court Judges haven fallen due to wining and dining in the parties of lawyers[6] did not constitute contempt of court.

5.226 In 1998 in two days the High Court Division issued Rule and granted interim bail in large number of cases. Some newspapers mentioned this figure to be 1200 which was wrong and actually Rule and bail were given in 155 cases. In a Press conference the Prime Minister quoting the figure of 1200 questioned how it can be given. She

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[1] *Andre Paul Terence Ambard v. A.G. of Trininad & Tobago*, AIR 1936 PC 141 (145)

[2] See the observation of Abdur Rashid J in *Moinul Hosein v. Sheikh Hasina Wazed*, 53 DLR 138, Para 40. It is to be noted that the impugned speech which was held to be contumacious in *Sir Edward Snelson*, 16 DLR (SC) 535, was delivered at a time when there was no fundamental right in Pakistan.

[3] *Padmahashini v. Srinivas*, AIR 2000 SC 68, 70

[4] *R v. Metroplitan Police Commr. Ex p. Blackburn (No.2)*, [1968] 2 QB 150

[5] *P.N. Duda v. P. Shiv Shanker*, AIR 1988 SC 1208; *Moinul Hosein v. Sheikh Hasina Wazed*, 53 DLR 138, per Abdur Rashid J

[6] *Viswanath v. Venkatramaih*, 1990 (2) Cr.L.J. 2179

further said that this was brought to the notice of the Chief Justice and he only changed the Bench; had he investigated the matter and took further steps judiciary would have been relieved of "অনেক দায়দায়িত্ব". Application was made for drawing up contempt proceedings against the Prime Minister. At the instance of the Appellate Division the Attorney General appeared and he was asked to produce a statement from the Prime Minister which he did produce. No argument was heard. The court by an order admonished the Prime Minister.[1] The court was of the view that the Prime Minister ought to have checked the correctness of the figure 1200 and then observed –

> If upon obtaining correct figures, she had felt even then that bail was being granted in too many cases and expressed her opinion accordingly we would have nothing to say because as the Chief Executive she was entitled to have her own views in the matter having regard to the law and order situation which is the concern of the Executive.

In saying this the court did not consider whether the actual figure of 155 was also too many. Grant of bail in criminal cases was again a subject of comment by the Prime Minister in a Press interview where she commented that the accused persons were granted bail as if the courts are haven for the corrupt and criminal offenders. In the application that followed[2], the High Court Division in line with the decision in re *Habibul Islam*, disposed of the matter expressing the wish that the Prime Minister shall be more careful and respectful in making any statement or comment with regard to the Judiciary or the judges. M.M. Hoque J did not go into the question whether the statement of the Prime Minister constituted contempt of court, but Abdur Rashid J found that the Prime Minister making the statement without any ill motive or intention to scandalise the judiciary, her statement did not constitute contempt of court.[3] A Central Law Minister of India in his speech was very critical of the Supreme Court and stated, among other things, that the Supreme Court composed of the element from the elite class had their unconcealed sympathy for the haves and that the anti-social elements, i.e. FERA violators, bride burners and a whole horde of reactionaries have found their haven in the Supreme Court. The Indian Supreme Court considering the speech in proper context found the speech not to constitute contempt of court as there was no imminent danger of

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[1] In re *Habibul Islam Bhuiyan*, 51 DLR (AD) 57

[2] *Moinul Hosein v. Sheikh Hasina Wazed*, 53 DLR 138

[3] Ibid, p.150

interference with the administration of justice, nor of bringing administration of justice into disrepute. The Chief Justice, however, commented, "The Minister perhaps could have achieved his purpose by making his language mild but his facts deadly."[1]

5.227 *Disobedience to the order of court:* Disobedience to the order of the court or breach of the undertaking given to the court is contempt of court.[2] But failure to obey the process of the court does not constitute contempt unless there is a contumacious disregard of the court's order.[3] In order to constitute contempt the disobedience must be deliberate and intentional.[4] Thus when a party to the proceeding was found to have disregarded the order of the court by a series of acts for several months, it was held that the party was guilty of contempt.[5] Participation in a meeting and in the election held in that meeting in violation of the order of injunction was held to be contempt of court.[6]

5.228 *Interference with the due course of justice:* Where interference with the administration of justice is alleged, the court does not proceed unless there is a real prejudice which can be regarded as substantial interference.[7] The test in such cases is whether the publication complained of tended or was calculated to interfere with the course of justice in any substantial or real manner, either by prejudicing a fair trial or by prejudicing the minds of the public against persons concerned as parties in the cause before the cause is finally heard. In determining the effect neither the intention of the printers or authors nor the truth or falsity of the allegations contained in the publication complained of, is of any consequence, for what a court of law is concerned is that it should not permit any one to poison the fountain of justice before it begins to

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[1] *P.N. Duda v. Shiv Shanker*, AIR 1988 SC 1208, 1222

[2] *Kushtia Co-operative v. Mujibur Rahman*, 44 DLR (AD) 219; *Mahbubar Rahman Sikder v. Mujibur Rahman Sikder*, 35 DLR (AD) 203; *Surendra Mohan Saha v. Bangladesh*, 34 DLR 110; *M.A. Faiz v. Bangladesh*, 1978 BSCR 359; *Tahera Nargis v. Shamsur Rahman*, 41 DLR 508; *Badsha Mia v. Abdul Latif*, 43 DLR (AD) 10; *Momtazuddin Ahmed v. Abdur Rashid*, 34 DLR 113; *Southern Fisheries Ranong Corp. v. Kingfisheries Industries Ltd.*,34 DLR 23.

[3] *S.A.M. Iqbal v. State*, 3 BLC (AD) 125

[4] *Bahawal v. State*, 14 DLR (SC) 273; *Sohel Ahmed Chowdhury v. Salahuddin Ayubi*, Cr.A. No.41 of 2000 (Unreported)

[5] *Mahbubur Rahman Sikder v. Mujibur Rahman Sikder*, 35 DLR (AD) 203; *State v. Md. Abdur Rouf*, 37 DLR 188

[6] *M.A. Zahed v. Moinuddin*, 28 DLR (AD) 165.

[7] *Rizan-ul Hasan v. U.P.*, AIR 1953 SC 185

flow.[1] Lawyers and litigants terrorising or intimating Judges to secure favourable orders commit contempt of court.[2] Publication of a petition containing scandalous allegations against the Judges of the High Court filed before the Supreme Court during the pendency of the proceeding before the Supreme Court[3], publication stirring up public feelings against a party to the proceeding on a question pending for decision before the court[4], or any publication having the tendency of prejudicing mankind against one or the other of the parties involved in a proceeding before a court[5], communication with a Judge for the purpose of influencing him on the subject-matter of a case pending before the Judge[6], any attempt by any of the parties to prejudice the court against the other party in the cause, publication expressing opinion on a question of law which is *sub judice*[7], or any action whereby pressure is put on a party to abandon his case pending or about to be initiated[8] amount to contempt of court. In *Vijavai Pratap Singh v. Ajit Prasad*[9] the plaintiff filed a suit for declaration that the elections to the Congress organisational bodies were void due to irregularities and *mala fide* of the Congress election tribunals. The party stalwarts being annoyed got the plaintiff expelled from the party membership and the defendants filed an application for vacating the stay order on the plea that the plaintiff ceased to be a member of the Congress and the stay order was vacated.

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[1] *A.G. of Pakistan v. Abdul Hamid*, 15 DLR (SC) 96

[2] *Chetak Construction Ltd. v. Om Prakash*, (1998) 4 SCC 577 (The court deprecated forum-shopping stating, "A litigant cannot be permitted choice of forum and every attempt at forum-shopping must be crushed with heavy hand".)

[3] *A.G. of Pakistan v. Abdul Hamid*, 15 DLR (SC) 96

[4] Ibid; *M.A. Awal v. Ehtesham Hydar*, 28 DLR 285

[5] *Saadat Khialy v. State*, 15 DLR (SC) 81; *Advocate General v. Shabir Ahmad*, 15 DLR (SC) 355

[6] *Jawand Singh v. Om Prakash*, AIR 1959 Punj 632

[7] *Advocate General v. Shabir Ahmad*, 15 DLR (SC) 355

[8] *M.H. Khandker v. A.W. Qazilbash*, 20 DLR 945 (Petitioner filed a writ petition to compel DIT to take action in respect of his complaint regarding some unauthorised construction by a neighbour and during the pendency of the Rule issued the neighbour caused notice to be issued by DIT for removal of alleged unauthorised construction on the plot of the petitioner. The court observed that the authorities ought to have stayed their hands even after receiving the complaint from the neighbour of the petitioner and found that the action of the authorities and the neighbour constituted contempt of court being a pressure deliberately put on the petitioner to withdraw from the case or to compromise the matter.)

[9] AIR 1966 All 305

The High Court found it to be a direct and clear interference with the judicial proceedings. Sending threatening letters to the opposite party and demanding withdrawal of certain allegations in the pleadings[1], interference with witnesses attending the court by assault or threat[2] or by any other method[3], misrepresentation of the proceedings in the newspaper[4], or anticipation of the judgment of the court that has been reserved[5] or withholding of a petition to the High Court by the jail authority[6] may constitute contempt of court. When one Upazila Nirbahi Officer sat by the side of a munsif-magistrate in the courtroom and told the munsif in presence of advocates and litigants how to conduct criminal cases, the Supreme Court held it to be an unprecedented and unwarranted interference with the administration of justice and punished the contemner with imprisonment.[7] A person publishing information while a proceeding in respect of confidentiality of the information was pending and an interim injunction was issued restraining publication of the information is guilty of contempt of court even though he was not a party to the pending proceeding and there was no order against him, but knew about the order, as the consequence of the publication before the trial was to nullify the purpose of the trial.[8]

5.229 This power of the superior court to play the role of prosecutor and judge is an extraordinary power which is to be sparingly used and only in the interest of the administration of justice[9], but where the public

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[1] *Rajendra Singh v. Uma Prasad*, AIR 1935 All 117

[2] *Roland v. Samuel*, [1847] 9 LJOS 280

[3] *U.P. v. Sheo Bachan Rao*, AIR 1956 Pat 321 (approaching a witness summoned by the court or by the opposite party for the purpose of discussing the evidence which he should give)

[4] *State v. Editor, Pakistan Observer*, 10 DLR 255

[5] *Abdus Salam v. State*, 10 DLR (SC) 176

[6] *Jyotirmoy Bhattacharjee v. Secy. to Govt. of W.B.*, AIR 1952 Cal 562

[7] *State v. Abdul Karim Sarker*, 37 DLR 26 affirmed in *Abdul Karim Sarker v. State*, 38 DLR (AD) 188

[8] *A.G. v. Times Newspaper Ltd*, [1991] 2 All E.R. 398; *Bangladesh Bank v. Zafar Ahmed Chowdhury*, 2001 BLD (AD) 63 (A person who is aware of an order of the court is bound to obey the same even though he was not a party to that when it affects the result of the earlier order)

[9] *In Re S. Mulgaokar*, AIR 1978 SC 727 ("Action for contempt of Court which is discretionary should not be frequently or lightly used ... It may be better in many cases for the Judiciary to adopt magnanimously charitable attitude even when utterly uncharitable and unfair criticism of its operations is made out of *bona fide* concern for improvement.")

interest demands the court will not shrink from punishing the contemner even by way of imprisonment where imposition of fine would be inadequate.[1] This power is necessary not only for the purpose of retaining the confidence of the public in the administration of justice, it is necessary for enforcement of the orders and directions of the Supreme Court because the orders and directions given by the Supreme Court cannot be executed except by way of moving for contempt of court in case of refusal of the executive authorities to comply with the directions given by the Supreme Court.[2]

5.230 The power under this article is a summary power and the court can *suo motu* initiate a contempt proceeding.[3] Normally contempt proceedings are disposed of on affidavits and evidence is taken only when it is absolutely necessary.[4] The burden of proof is on the person who alleges commission of contempt of court and a proceeding under this extraordinary jurisdiction being quasi-judicial the standard of proof required is that of a criminal proceeding.[5]

5.231 Unless the contempt is of a very gross nature, the court is inclined to accept apology from the contemner. Such an apology to be acceptable must be tendered at the earliest opportunity and should be unqualified. However, on some occasions the court accepted the apology even though tendered at the belated stage.[6] In *M.A. Faiz & another v. Bangladesh*[7] the Appellate Division observed -

> Insofar as the expression of apology or tendering of regrets by the appellants are concerned, had they offered such apology before the High Court Division and also tendered regrets for the contempt they had committed, even at a late stage, (though we are not unmindful of the law requiring such apology to be made at the earliest opportunity) there might have been some scope for considering the merit of the submissions of the learned Counsel ... It is true this Court will neither be vindictive and proceed to punish the contemners whom unconditional apology will be offered in the manner permissible under law nor can it afford to be so

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[1] *Roy v. Orissa, AIR 1960 SC 190*

[2] see *M.A. Faiz v. Bangladesh*, 1978 BSCR 359; *Tahera Nargis v. Shamsur Rahman*, 41 DLR 508

[3] *Sir Edward Snelson v. Judges, High Court*, 16 DLR (SC) 535

[4] *Badsha Mia v. Abdul Latif*, 43 DLR (AD) 10

[5] *Mrityunjoy v. Syed Hashibur Rahman*, AIR 2001 SC 1293

[6] *State v. Nazrul Islam*, 37 DLR 200

[7] 1978 BSCR 359, 376 - 377

> generous as to condone the guilt committed by the contemners who instead of offering apology at the earliest opportunity and still persisting in disobeying the orders of the Court, wait till the end and then, finding no way of escape from the punishment, offer such apology.

The Appellate Division laid down certain principles in the matter of acceptance of apology. According to the court, an apology will be acceptable if (1) the contemner appreciated that his act was within the mischief of contempt, (2) he regretted it, (3) his regret was sincere, (4) the apology was accompanied by expression of the resolution never to repeat again and (5) the contemner made humble submission to the authority of the court.[1] It was pointed out -

> Apology is an act of contrition. If tendered it may not be necessarily accepted and the contemner purged of his contempt. When a contemner tenders apology as an act of contrition the Court must weigh that apology tendered by the contemner. If the apology is found to be a real act of contrition, no action need be taken and a word of warning may be enough but if the apology is qualified, hesitant and sought to be used as a device to escape the consequences of the contemner's action it must be rejected.[2]

RULE MAKING POWER OF SUPREME COURT

5.232 Subject to any law made by Parliament, the Supreme Court may with the approval of the President make rules for regulating the practice and procedure of the High Court Division and the Appellate Division and also of the subordinate courts.[3] Being a power conferred by the Constitution, the rules so framed cannot be contrary to any provisions of the Constitution[4] nor be inconsistent with any law made by Parliament.[5] In terms of art.107(2) the Supreme Court may delegate the function of rule making under art.107(1) or art.113 to a division of the court or to any one or more Judges of the court. The Supreme Court in art.107(2) means all the Judges of both the divisions and the delegation to be valid must not be by the Chief Justice or any division of the

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[1] *Abdul Karim v. State*, 38 DLR (AD) 188, 194

[2] *Shamsur Rahman v. Tahera Nargis*, 44 DLR (AD) 237

[3] Art.107

[4] *Prem Chand v. Excise Commissioner*, AIR 1963 SC 996

[5] *Partha Sarathi v. A.P.*, AIR 1966 SC 38

Supreme Court, but by the full Supreme Court. Art.107(3) provides that subject to the rules framed under art.107(1) the Chief Justice shall determine which Judges are to constitute any Bench of a division and which Judges are to sit for any purpose. The Chief Justice may authorise the next most senior Judge of either division to exercise in that division any of the powers conferred by sub-art.(3) or by rules made under art.107.[1]

SUBORDINATE COURTS

5.233 Chapter II of Part VI makes special provisions relating to the subordinate courts. Reading this chapter with the provision of paragraph 6(6) of the Fourth Schedule, the Appellate Division held that the members of the judicial service and the magistrates exercising judicial functions form a class distinct from the members of other services of the Republic and in making rules relating to their appointment and the terms and conditions of service, this distinct entity of the subordinate judiciary has to be borne in mind and the members of judicial service and the magistrates exercising judicial functions cannot be equated or amalgamated with other services of the Republic.[2] The Appellate Division found the naming of the judicial service as B.C.S.(Judicial) and the inclusion of the judicial service under Bangladesh Civil Service (Re-organisation) Order, 1980 as Bangladesh Civil Service (Judicial) *ultra vires* the Constitution. The court held that when the Constitution has given the name 'judicial service', the nomenclature cannot be changed by a subordinate legislation.[3]

5.233A Art.114 provides that there shall be, in addition to the Supreme Court, such courts subordinate to the Supreme Court as may be

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[1] Art.107(4)

[2] *Secretary, Ministry of Finance v. Masdar Hossain*, 2000 BLD (AD) 104 (The members of judicial service were given certain benefits which were not given to the members of other services of the Republic and on the representation of the members of the other services certain conditions were tagged with the benefits given to the members of judicial service to bring them at par with the members of other services of the Republic. Imposition of the conditions was found to be without lawful authority. It was held that arts.133 and 136 are applicable to the judicial officers and magistrates exercising judicial functions, but they are to be treated as a class apart from other services of the Republic as a distinct entity, never to be treated alike or merged or amalgamated with any other services, except with a service of allied nature.)

[3] Ibid

established by law. The Civil Courts Act, 1887 provides for subordinate civil courts while the Code of Criminal Procedure makes provision for the courts of magistrates and session judges. Parliament may by law establish additional courts, but art.114 operates as a limitation on the plenary legislative power of Parliament in respect of establishment of new courts. Because of this article Parliament cannot create a court which is not subordinate to the High Court Division, nor can amend the existing laws so as to make the existing courts independent of the Supreme Court.[1] When the High Court Division had no appellate or revisional jurisdiction in respect of matters covered by the Special Powers Act, 1974, the Appellate Division, treating the special tribunal constituted under the Act as a criminal court, upheld the jurisdiction of the High Court Division under s.561A of the Code of Criminal Procedure in respect of the proceedings of the special tribunal referring to the provision of art.114.[2] It is to be seen that the supervisory jurisdiction of the High Court Division is attracted in case of a court or tribunal subordinate to the High Court Division. Art.114 is not attracted in the case of other tribunals. The question is whether Parliament can create a special court giving it the name of a tribunal to avoid the application of arts.114 and 109. It is submitted that such a measure will be treated as a fraud on the Constitution and such a measure has been deprecated and it was found that the High Court Division would have the supervisory jurisdiction under art.109.[3]

5.234 The Constitution as originally adopted provided that the district judges would be appointed by the President on the recommendation of the Supreme Court and all other civil judges and magistrates exercising judicial functions would be appointed by the President in accordance with the rules made by him after consulting the Public Service Commission and the Supreme Court.[4] The control (including the power of posting, promotion and grant of leave) and discipline of the persons employed in the judicial service and magistrates exercising judicial functions vested in the Supreme Court.[5]

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[1] *Shahar Ali v. A.R. Chowdhury*, 32 DLR 142

[2] *Bangladesh v. Shahjahan Siraj*, 32 DLR (AD) 1 (It is submitted that if art.114 was applicable in respect of the Special Tribunal, *a fortiori* art.109 providing for supervisory jurisdiction would be attracted.); see *Shahar Ali v. A.R. Chowdhury*, 32 DLR 142

[3] *Shahar Ali v. A.R. Chowdhury*, 32 DLR 142

[4] Art.115

[5] Art.116

These provisions were in conformity with art.22 which incorporated the fundamental principle of State policy of separation of the judiciary from the executive. Art.22 simply provides that there shall be separate judicial service free from the executive control.[1] But the Fourth Amendment of the Constitution in 1975 pushed the matter in the opposite direction by providing for the control of the subordinate judiciary by the executive. Amended art.115 provides, "Appointment of persons to offices in the judicial service or as magistrates exercising judicial functions shall be made by the President in accordance with rules made by him in this behalf". As a result, the President does not require a recommendation of the Supreme Court for appointment of a district judge, nor is he required to consult the Supreme Court and the Public Service Commission in framing rules in exercise of power under art.115. In *Secretary, Ministry of Finance v. Masdar Hossain*[2] the Appellate Division held that the power of making rules relating to appointment includes the power to make rules relating to suspension and dismissal and this power is distinct from the power of the President under art.133 in that this power is not dependent on the contingency of absence of any law made by Parliament. This being a special provision, it shall prevail over the general provision of art.133 and, in fact, Parliament has no power to make laws relating to appointment, suspension and dismissal of judicial officers and magistrates exercising judicial functions.[3] Even though the judiciary cannot direct Parliament to make laws or the President to make rules[4], the Appellate Division held that it can give direction to Parliament or President to follow the mandate of the Constitution in case of deviation from such mandate. The Appellate Division took note of the provision of paragraph 6(6) of the Fourth Schedule[5] and the actions taken for re-organisation of the services of the Republic and directed the executive to make separate rules under art.115 immediately in respect of appointment, suspension and dismissal of the judicial officers and magistrates exercising judicial functions with a further note that the rules should not be so framed as to affect the President's power of control in consultation with the Supreme Court under art.116.

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[1] *Chandra Mohan v. U.P.*, AIR 1966 SC 1987, 1993

[2] 2000 BLD (AD) 104

[3] Ibid

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

[5] Paragraph 6(6) reads, "The provisions of Chapter II of Part VI (which relate to subordinate courts) shall be implemented as soon as practicable ...."

5.234A By the Fourth Amendment, art.116 was amended to vest the control of the subordinate judicial officers and magistrates with the President in place of the Supreme Court and after placing the subordinate judiciary under much greater control of the executive, the Fourth Amendment added a new art.116A declaring, "Subject to the provisions of the Constitution, all persons employed in the judicial service and all magistrates shall be independent in the exercise of their judicial functions." By the Second Proclamation Order No.IV of 1978 art.116 was amended to provide that the President shall exercise control over the subordinate judicial officers and magistrates exercising judicial functions in consultation with the Supreme Court. The consultation with the Supreme Court is mandatory. Therefore, any posting and promotion of, and disciplinary action against, the judicial officers including the district judges and magistrates exercising judicial functions without consultation with the Supreme Court will be void.[1] This consultation is necessary not only when a judicial officer is promoted or transferred to another post in the judicial service, but also when he is promoted or transferred to a post outside the judicial service.[2] A comparison between art.107 and art.116 shows that the Supreme Court as referred to in art.116 means all the Judges of both divisions of the Supreme Court. The consultation under art.116 does not relate to regulation of the practice and procedure of the Supreme Court and as such the function of consultation cannot be delegated to a smaller body of the Judges of the Supreme Court by making rule under art.107 or otherwise. The consultation with the Supreme Court must be a real and effective one[3] and the opinion of the Supreme Court must be given full weight.[4] It is not sufficient that the Supreme Court has given its views in the matter and the government is posted with all the facts. Consultation is not complete or effective before the parties thereto make their respective views known to the other and discuss and examine the relative merits of their views. If one party makes a proposal to the other who has a counter proposal in his mind which is not communicated to the proposer, the direction to give effect to the proposal without anything more, cannot be

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[98] Ibid; *Aftabudin v. Bangladesh*, 48 DLR 1; *Idrisur Rahman v. Bangladesh*, 1999 BLD 291 affirmed in *Bangladesh v. Idrisur Rahman*, 1999 BLD(AD) 291

[2] *Md. Aftabuddin v. Bangladesh*, 48 DLR 1

[3] *Gupta v. J & K*, AIR 1982 SC 1579.

[4] *Hari Dutt v. H.P.*, AIR 1980 SC 1426, 1430

said to have been done after consultation.[1] In the process of consultation, "the end-result shall be the primacy of the views and opinion of the Supreme Court which the Executive shall not disregard, for it is the Supreme Court, not the political executive, which is the best judge of judicial matters and judicial officers."[2]

5.234B Art.116A says that subject to the provisions of the Constitution, all persons employed in the judicial service and all magistrates exercising judicial functions shall be independent in the exercise of their judicial functions. The Appellate Division observed -

> The independence of the judiciary, as affirmed and declared by Articles 94(4) and 116A, is one of the basic pillars of the Constitution and cannot be demolished, whittled down, curtailed or diminished in any manner whatsoever, except under the existing provisions of the constitution. It is true that this independence ... is subject to the provisions of the Constitution, but we find no provision in the constitution which curtails, diminishes or otherwise abridges this independence. Article 115, Article 133 or Article 136 does not give either the Parliament or the President the authority to curtail or diminish the independence of the subordinate judiciary by recourse to subordinate legislation or rules. What cannot be done directly cannot be done indirectly.[3]

What this 'independence' denotes? According to the Appellate Division, the first essential condition of judicial independence is the security of tenure which is ensured by art.135. The second essential condition of judicial independence is the security of salary or other remuneration and, where appropriate, the security of pension. It is desirable that the right to salary and pension of the subordinate judiciary be established by law and there should be no way in which the executive could interfere with that right in a manner to affect the independence of the subordinate court judges.[4] The third essential condition of judicial independence is the institutional independence of the subordinate judiciary especially from Parliament and the executive; it must be free to decide on its own matters of administration bearing directly on the exercise of its judicial

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[1] *Chandramouleswar v. Patna High Court*, AIR 1970 SC 370, 375; *Gupta v. J & K*, AIR 1982 SC 1579

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

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

[4] Note may be taken of the provision of art.133 which permits executive to provide for the terms and conditions of service in the absence of any law made by Parliament

functions. The judiciary must be free from actual or apparent interference or dependence upon especially the executive arm of the government. It must be free from powerful non-governmental interference like pressure from corporate giants, business or corporate bodies, pressure groups, media, political pressure etc. The Appellate Division further held that for ensuring independence recruitment to the judicial service should be by a separate judicial service commission with a majority of members from the senior judiciary and with the objective of achieving equality between men and women; judicial vacancies should be advertised and recommendation for appointment on merit should come from the commission. The next essential condition of judicial independence in the special context of Bangladesh is administrative and financial independence. As the High court Division has a controlling and supervisory role and the Supreme court has a consultative role connected with subordinate judiciary, independence of subordinate judiciary requires financial independence of the Supreme court which can be secured if the funds allocated to the Supreme Court in the annual budget are allowed to be disbursed within the limits of sanctioned budget by the Chief Justice without any interference by the executive.[1]

5.234C After examining the provisions of Chapter II of Part VI along with the provisions of Part IX and other provisions of the Constitution in *Secretary, Ministry of Finance v. Masdar Hossain*[2], the Appellate Division summarised its conclusions with directions as follows -

> 1. The judicial service is a service of the Republic within the meaning of art. 152(1), but it is fundamentally and structurally distinct and separate from the civil executive and administrative services of the Republic with which the judicial service cannot be placed on par on any account and it cannot be amalgamated, abolished, replaced, mixed up and tied together with the civil executive and administrative services.
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> 2. The word "appointments" in art.115 means that it is the President who under art.115 can create and establish a judicial service and also a magistracy exercising judicial functions, make recruitment rules and all pre-appointment rules in that behalf, make rules regulating their suspension and dismissal, but art.115 does not contain any rule-making authority with regard to other terms and conditions of serviced and arts.133 and 136 and the Service (Re-organisation and conditions) Act,

[1] *Secretary, Ministry of Finance v. Masdar Hossain*, 2000 BLD (AD) 104
[2] 2000 BLD (AD) 104

1975 have no application to the above matters in respect of judicial service and magistrates exercising judicial functions.

3. The creation of B.C.S. (Judicial) cadre along with other B.C.S. executive and administrative cadres by Bangladesh Civil Service (Re-organisation) Order, 1980 with the amendment of 1986 is *ultra vires* the Constitution and Bangladesh Civil Service Recruitment Rules, 1981 are inapplicable to the judicial service.

4. The government is directed to take necessary steps forthwith for the President to make rules under art.115 to implement its provisions which is a constitutional mandate and not a mere enabling power. The nomenclature of the judicial service shall follow the constitutional language and shall be designated as the Judicial Service of Bangladesh or Bangladesh Judicial Service. Either by legislation or by executive order having the force of rules a Judicial Services Commission be established forthwith with majority of members from the Senior Judiciary of the Supreme court and the subordinate courts for recruitment to the judicial service on merit with the objective of achieving equality between men and women in the recruitment.

5. Under art.133 law or rules or executive orders having the force of rules relating to posting, promotion, grant of leave, discipline (except suspension and removal), pay, allowances, pension (as a matter of right, not favour) and other terms and conditions of service, consistent with arts.116 and 116A, as interpreted by the appellate Division, be enacted or framed or made separately for the judicial service and magistrates exercising judicial functions keeping in view the constitutional status of such service.

6. The orders impugned in the writ petition imposing conditions are declared to be *ultra vires* the Constitution and the government is directed to establish a separate Judicial Pay Commission forthwith as a part of the rules to be framed under art.115 (*sic*) to review the pay, allowances and other privileges of the judicial service which shall convene at stated intervals to keep the process of review a continued one. The pay etc. of the judicial service shall follow the recommendations of the Commission.

7. In exercising control and discipline of persons employed in the judicial service and magistrates exercising judicial functions under art.116 the views and opinion of the Supreme court shall have primacy over those of the executive.

8. The essential condition of judicial independence in art.116A, elaborated in the judgment, namely, (1) security of tenure, (2) security of salary and other benefits and pension and (3) institutional independence

from Parliament and the executive shall be secured in the law or rules made under art.133 or in the executive orders having the force of rules.

9. The executive government shall not require the Supreme Court of Bangladesh to seek their approval to incur any expenditure on any item from the funds allocated to the Supreme court in the annual budgets, provided the expenditure incurred falls within the limit of the sanctioned budgets, as more fully explained in the body of the judgment. Necessary administrative instructions and financial delegations to ensure compliance with this direction shall be issued by the government to all concerned by 31.5.2000.

10. The members of judicial service are within the jurisdiction of the administrative tribunal.

11. The declaration by the High Court Division that for separation of the subordinate judiciary from the executive no further constitutional amendment is necessary is set aside. If Parliament so wishes, it can amend the Constitution to make the separation more meaningful, pronounced, effective and complete.

12. Until the Judicial Pay Commission gives its first recommendation the salary of judges in the judicial service will continue to be governed by *status quo ante* as on 8.1.1994 vide paragraph 3 of the Order of the same date and also by further directions of the High Court Division in respect of Assistant Judges and Senior Assistant Judges. If pay increases are effected in respect of other services of the Republic before the Judicial Pay Commission gives its first recommendation the members of the judicial service will get increase in pay etc. commensurate with their special status in the constitution and in conformity with the pay etc. that they are presently receiving.

5.234D In *Masdar Hossain* the Appellate Division held that suspension and dismissal of judicial officers and magistrates exercising judicial function should be dealt with in rules framed under art.115 and it logically follows that all other matters relating to discipline would come under the purview of art.133. It seems that the Appellate Division included suspension and dismissal applying the provision of s.16 of the General Clauses Act which provides that the power of appointment includes the power to suspend or dismiss. It is submitted that s.16 of the General Clauses Act deals with the expanse of the executive power conferred in a law and it has no application with regard to any legislative power. If arts. 115 and 116 are read together, it can be seen that the matter of discipline has been dealt with separately from appointment. It is not understood how in the matter of discipline, a composite subject,

suspension and dismissal can be separated from removal and reduction in rank to be dealt with under a different kind of power. Art.135 mentioning dismissal and removal separately, there is no reason to assume that dismissal includes removal. Except for the provision of s.16 of the General Clauses Act, no rationale is apparent from the judgment of the court for the distinction made between dismissal and reduction in rank. If suspension and dismissal are taken to be linked with appointment (the expression used in art.115), why not removal and reduction in rank? Suspension may be necessary in case of removal and reduction in rank as well. In the directions given, the Appellate Division mentioned removal in place of dismissal and even if we assume that the court treated dismissal to include removal, the anomaly stated above is not removed.

5.234E The Appellate Division held that art.140 is not applicable in the case of judicial officers and magistrates exercising judicial functions and has given direction to make law providing for separate Judicial Service Commission. The court having once held that the judicial officers and magistrates exercising judicial function are in the service of the Republic and art.133 is applicable to them in all matters except appointment including suspension and dismissal, it is submitted that the finding that art.140 is not applicable in their case is not correct.

5.234F The Appellate Division directed formation of Judicial Service Commission by legislation or executive order having the force of rules. There is a difference between making of recruitment rules (which is a legislative act) and making selection of candidates applying the recruitment rules (which is an administrative act). Art.137 leaves it to the discretion of Parliament to create by law one or more service commissions and it being a special provision relating to formation of service commissions, art.115 will not be attracted for the very reason art.133 is not attracted in case of recruitment rules for appointment of the judicial officers and magistrates exercising judicial functions. The only way in which a Judicial Service Commission can be created is by law made by Parliament. Irrespective of the question whether separate service commission for subordinate judiciary is to be created by Act of Parliament or rules framed by the President, there is no mandate in the Constitution to create such a separate service commission and hence there is no question of any constitutional deviation necessitating such a direction. In such situation, the Appellate Division, it is submitted, exceeded its powers and violated the principle of separation of powers in directing the creation of separate service commission for the subordinate

judiciary.[1] The government applied for review of this direction, but the prayer for review was rejected by the court stating that the direction to establish another public service commission for judicial and magisterial services in not contrary to any provision of the Constitution and that there is no impediment in the Constitution as to formation of Judicial Public Service Commission.[2] It is submitted that though there is no impediment in the Constitution as to formation of a "Judicial Public Service Commission", it is in the exclusive domain of Parliament to decide whether there should be a provision for a separate Judicial Service Commission. The objection raised related to the competence of the court to give a direction to Parliament or the President to make a law and the Constitution having specifically conferred the power in this regard to Parliament, the direction is contrary to the provision of art.7 and the principles of separation of powers.

5.234G In this case the Appellate Division gave further direction for constitution of Judicial Pay Commission and observed that Pay etc of the members of the Judicial Service shall follow the recommendation of the Pay Commission. True it is that in determining the terms and conditions, Parliament or the President cannot minimise the independence of subordinate judiciary, but such determination is in the exclusive domain of Parliament and the President. Once such determination is made, the court can quash it, if found to be inconsistent with the constitutional mandate. Pay and allowances of the judicial officers and magistrates exercising judicial functions are matters relating to the terms and conditions of their service and are to be governed by art.133 as held by the court. The direction, it is submitted, is open to the same objection relating to the competence of the court to give such a direction. Furthermore, a recommendation is always a recommendation and cannot be made binding on the government. The government sought review of the direction without success.[3]

ADMINISTRATIVE TRIBUNALS

5.235 Art.117(1) empowers Parliament to establish one or more administrative tribunals against whose decisions no writ will lie in view of the provision of art.102(5). Such tribunals may be established to deal

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[1] See Para 1.87A

[2] *Secretary, Ministry of Finance v. Masdar Hossain*, 2001 BLD (AD) 126

[3] Ibid

with matters relating to (a) the terms and conditions of persons in the service of the Republic including matters provided for in Part IX and award of penalties or punishments, (b) the acquisition, administration, management and disposal of any property vested in or managed by the government by or under any law, including the operation and management of, and service in any nationalised enterprise or statutory public authority; and (c) any law mentioned in the First Schedule. Art.117(2) makes the jurisdiction of such a tribunal exclusive[1] and further enacts that Parliament may, by law, provide for appeals from, or review of, the decisions of such tribunals. Pursuant to the provisions of art.117, Parliament passed the Administrative Tribunal Act, 1980 providing for administrative tribunals constituted with district judges to adjudicate upon disputes relating to the terms and conditions of service of persons in the service of the Republic and of some specified bodies. The Act also provides for administrative appellate tribunal constituted with a Chairman and two members. The Chairman must be a person who is or has been or is qualified to be appointed as a Judge of the Supreme Court and of the two members one must be a person who is or has been a member of the service of the Republic not below the rank of joint secretary and the other who is or has been a District Judge.

5.235A Art.117(3) of the Constitution provides that no court shall entertain any proceedings or make any order in respect of any matter falling within the jurisdiction of an administrative tribunal. 'Court' is defined in art.152 to include the Supreme Court and hence the High Court Division cannot entertain any writ petition in respect of any matter falling within the jurisdiction of an administrative tribunal, but the High Court Division sometimes entertain writ petitions in such matters upon a view that the remedy before the administrative tribunal is not efficacious or that in the peculiar facts and circumstances of the cases the writ petitions can be entertained, notwithstanding the availability of

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[1] *Abdul Mannan Talukdar v. HBFC*, 42 DLR (AD) 104; *Junnur Rahman v. BSRS*, 51 DLR (AD) 166; *Bangladesh v. Mohammad Faruque*, 51 DLR (AD) 112 (validity of transfer); *Bangladesh v. Mahbubuddin Ahmed*, 50 DLR (AD) 154 (whether a particular order has become effective is a question which can be decided by the Tribunal); *Mansur Ali v. Janata Bank*, 1991 BLD 23; *Dr. Abdul Lahel Based v. Ministry of Health*, 38 DLR 409; *Ayub Ali v. Bangladesh*, 46 DLR 191; *Serajul Islam Thakur v. Bangladesh*, 46 DLR 318; *Abdul Latif v. Bangladesh*, 43 DLR 446; *Mriganka Prasad v. Ministry of Communication*, 5 BLC 112 (When what is challenged is not the service rule, but administrative interpretation of a service rule, writ petition is not maintainable); *Nurul Islam v. Bangladesh*, 2001 BLD (AD) 562 (Promotion)

efficacious remedy.[1] It is submitted that when the High Court Division has jurisdiction, it refuses to exercise it for non-exhaustion of efficacious remedy provided by law, but in matters in respect of which the jurisdiction is ousted by the Constitution, the question of availability of efficacious remedy is totally irrelevant and as the law now stands, the High court Division cannot entertain any writ petition in respect of any matter relating to the terms and conditions of service of the government servants unless a law is challenged on the ground of violation of the fundamental rights.

5.236 The combined effect of art.102(5) and art.117(2) is that no writ petition is maintainable against the decision of an administrative tribunal and if Parliament would choose not to provide for an appeal, the decision of the administrative tribunal would be final. The Constitution is silent about the administrative appellate tribunal. The question arose in *Mujibur Rahman v. Bangladesh*[2] as to whether a writ petition would be maintainable against the decision of the appellate tribunal. It was urged that the provisions of ss.3 and 5 relating to the composition of the tribunal and the appellate tribunal are *ultra vires* the Constitution. It was contended that the jurisdiction exercisable by the tribunal was being exercised by the High Court Division and from the scheme of the Constitution it was clear that the framers of the Constitution intended that such a tribunal would be equal in status and position with the High Court Division. If any provision is made providing for appeal, it will lie in either division of the Supreme Court. For this reason nothing was said about the appellate forum. During hearing, the Act was amended providing for appeal from the decision of the appellate tribunal to the Appellate Division on leave in terms of art.103(4). The Appellate Division rejected the contention of the appellants. Two concurring judgments were delivered by M.H. Rahman J and M. Kamal J. M.H. Rahman J referred to the majority view in *Hinds v. The Queen*[3] about the necessary implications which are to be made from the subject-matter and structure of the constitution and the circumstances in which it had been made, as also the minority view that though inference may be drawn from the express provisions of the constitution it must not be construed as if it was partly written and partly not. After noting the famous observation of Lord Shankey in *Shell Company of Australia v.*

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[1] *Abdul Awal Munshi v. B.W.D. Board*, 6 BLC 463
[2] 44 DLR (AD) 111
[3] [1976] 1 All E.R. 353

Federal Commr.[1] the learned Judge held that the administrative tribunal exercises the judicial power of the State.[2] He observed that the *non-obstante* clause in art.117 has emancipated the power of Parliament to make the law from any restrictive provisions in Chapter I and II of Part VI and a constitutional enactment conferring legislative powers must be construed in a sense beneficial to the widest possible amplitude. He found –

> There is no command nor any necessary intendment in the Constitution that the Tribunal or the Appellate Tribunal is to be construed as a forum substitute, alternate or co-equal to the High Court Division. The terms and tenure of service of the Judges of the Supreme Court have been expressly provided in chapter I and (sic) Part VI, but no similar provisions are made in the Constitution with regard to the terms and tenure of the persons who will man the tribunals. It is left to the legislature, after establishing the tribunal, to make necessary provisions in this regard for the carrying out of the functions of the tribunals.[3]

As the administrative tribunal is to exercise the judicial power of the Republic and is placed in the Judiciary Part, the learned Judge was impelled to accept the necessary implication that the person presiding over the tribunal must have knowledge of law and skill in adjudication and that there should be an appeal, and he observed -

> There could have been an arguable case of necessary intendment, before the insertion of section 6A by amendment of 1990, that as Chapter III is in Part VI dealing with the exercise of judicial powers of the State the apex court of the country must have the last say in laying down the laws[4]

It has to be noted that the Constitution gave option to Parliament to set up administrative tribunal or not and in the event an administrative tribunal is set up, gave further option to Parliament to provide for appeal or not. In both cases, there is no imperative to construe the word 'may' as 'shall'. It would be perfectly constitutional for Parliament to set up an administrative tribunal without providing for an appeal. Thus the Constitution permitted a situation where the decision of the administrative tribunal could be final.

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[1] [1931] AC 275
[2] 44 DLR (AD) 111, Para 33
[3] 44 DLR (AD) 111, Para 38
[4] Ibid, Para 42

5.237 The learned Judge held that the administrative tribunal can deal with violation of fundamental rights by administrative actions. Even if this power is not taken into consideration, the administrative tribunal in deciding service disputes has to interpret and apply the provisions of the Constitution, particularly, arts.133, 134 and 135. It logically follows that the Constitution permitted the administrative tribunal to finally interpret and apply the provisions of the Constitution. Introduction of s.6A in the Administrative Tribunal Act, 1980 is not a relevant fact in determining the intention of the framers in 1972. Can the framers be ascribed an intention to permit the important task of finally interpreting and applying some of the provisions of the Constitution to be performed by an authority inferior in status and position to the normal authority entrusted to perform the task? If the administrative tribunal cannot be inferior in status and position to the High Court Division, can the framers intend that the appeal shall lie to any authority other than the Appellate Division?

5.238 M. Kamal J concurred with M.H. Rahman J. Referring to the *non-obstante* clause in art.117(1), which, according to him, "applies to all that preceded before in Part VI", the learned Judge observed, "Parliament has been absolved from the duty of setting up a court proper in Chapter III". He relied on the observation of Lord Diplock in *Hinds v. The Queen* to hold that the administrative tribunal does not wield the judicial power of the State as it is a new creation without any express conferment of judicial power on it by the Constitution and consequently, "Parliament has free hand in the selection of persons for manning the Tribunals". Lord Diplock observed -

> As respects the judicature, particularly if it is intended that the previously existing courts shall continue to function, the Constitution itself may even omit any express provision conferring judicial power on the judicature. Nevertheless ... the absence of express words to that effect does not prevent the legislative, executive and the judicial powers of the new state being exercisable by the legislature, by the executive and by the judicature respectively.

Paraphrasing the first sentence of the observation, it comes to this that the Constitution may omit any express provision conferring judicial power on the judicature, particularly if it is intended that the previously existing courts shall continue to function. From this it does not follow that express conferment of judicial power is necessary in the case of a new adjudicative machinery. It is submitted that the question whether

the administrative tribunal has been invested with the judicial power of the Republic has to be answered by examining the nature of judicial power and the power exercisable by the administrative tribunal.

5.239 *Judicial power*: Griffith CJ of the Australian High Court defined 'judicial power' as used in s.71 of the Australian Constitutional Act as "the power which every sovereign must of necessity have to decide controversies between its subjects or between itself and its subjects, whether the rights relate to life, liberty or property."[1] The Privy Council approved this definition as one of the best given.[2] The American Supreme Court defined 'judicial power' as follows -

> Speaking generally, it may be observed that the judicial power of a nation extends to all controversies justiciable in nature, and the parties to which or the property involved in which may be reached by judicial process ...[3]

5.240 The two definitions emphasise the nature of the power and not the nature of the body exercising the power. Whether a power exercised by a body is judicial power or not does not necessarily depend on the nature of the body exercising the power, but on the nature of the power itself.[4] A power exercised by a normal court may not be a judicial power, while a power exercised by a tribunal as distinguished from a court may be a judicial power. As per terms of ss.71 and 72 of the Australian Constitution judicial power cannot be vested in any authority other than a court, the members of which have, in the case of Federal Courts, been appointed in accordance with s.72. Hence the question arose as to the nature of judicial power. We have already noted the definition of judicial power given by Griffith CJ. In *Rola Co. (Australia) Pty. Ltd. v. The Commonwealth* Rich J (dissenting) observed -

> If a person is invested with power, not to create new legal rights or to impose new legal duties or liabilities, but to determine, as between disputants, whether one of them possesses, as against the other, some

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[1] *Huddart Parker Pty Ltd. v. Moorehead*, 8 CLR 330

[2] *Shell Co. v. Federal Commr. of Taxation*, [1930] All E.R. Rep 671, 679

[3] *Kansas v. Colorado*, 206 US 46; *Handlon v. Town of Belleville*, 71 A.2d 624 (Where the administrative tribunal's function partakes of the judicial, its exercise is styled *quasi*-judicial, but it is the exercise of judicial power nonetheless.)

[4] Schwartz - Administrative Law, 1976, p.59 (The power to hear and decide cases is judicial power, whether it be exercised by a court or an administrative agency, such as the Federal Trade Commission.)

> already existing legal right to which he claims to be entitled, or is subject to some already existing liability to the other which the other is claiming against him, then, not only when exercising the power, is he required, amongst other things, to act judicially, but the power itself is judicial power ... On the other hand, if he has no authority to determine the already existing legal rights or liabilities of persons, but is empowered to impose on them new legal duties or liabilities from which they were previously free, or to alter or abrogate legal right to which they were previously entitled, his power is not judicial, although in exercising it he may be, and commonly is, subject to a legal duty to act judicially (that is, to observe the principles of natural justice).[1]

Dr. Wynes started with a definition of judicial power saying, "'Judicial power' may be broadly defined as the power to examine questions submitted for determination with a view to the pronouncement of an authoritative decision as to rights and liabilities of one or more parties."[2] After discussing a number of cases including *Rola (Australia) Pty. Ltd.* he concluded -

> While no inclusive and exclusive definition of "judicial power" can be laid down, generally speaking, the ascertainment of existing rights or liabilities by the judicial determination of issues of fact or law (or both) - i.e., by the application of pre-existing legal standard - is judicial in nature.[3]

In the Indian jurisdiction a question arose whether the State Government deciding an appeal under r.6(6) of the Punjab Welfare Officers Recruitment and Conditions of Service Rules, 1952 (in respect of disciplinary measures) was a tribunal within the meaning of art.136 of the Indian Constitution. Bachawat J (agreeing with Gajendragadkar CJ) observed that "the basic test of a tribunal within the meaning of Art.136 is that it is an adjudicating authority (other than a Court) vested with the judicial power of the State." After considering several decisions of the Indian and Australian jurisdictions, he concluded, "the State Government deciding an appeal under R.6(6) of the Service Rules is vested with the judicial powers of the State, and satisfies the test of a tribunal as contemplated by Art.136 of the Constitution."[4]

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[1] 69 C.L.R. 185, 203-204

[2] Legislative, Executive and Judicial Powers in Australia, 5th ed., p.419

[3] Ibid, p.431

[4] *Associated Cement companies v. Sharma*, AIR 1965 SC 1595, 1610

5.241 Judged in the light of the above definitions and decisions, it is difficult to say that an administrative tribunal set up pursuant to the provisions of art.117 does not exercise the judicial power of the Republic. The administrative tribunal does not create any new right or liability. It adjudicates the rights and liabilities relating to services applying the pre-existing rules laid down by the Constitution, the laws and the rules. Even if these definitions are considered wide in the context of the Bangladesh Constitution, though it is not, it is difficult to say that adjudication of disputes relating to violation of fundamental right by administrative action will not be an exercise of the judicial power. When such adjudicative function is conceded to the administrative tribunal, it is submitted, it cannot be said that it ceases to be a judicial power simply because it is not a pre-existing adjudicative machinery. Apart from the case of violation of fundamental rights, adjudication of disputes relating to terms and conditions of service or penalties or punishments of the members of the service of the Republic will often involve interpretation and application of the provisions of the Constitution, particularly, arts.133, 134 and 135. However narrowly construed, interpretation and application of the provisions of the Constitution will come in the forefront of any enumeration of judicial power. In fact, adjudication of disputes relating to, or arising out of, any of the three items stipulated in art.117(1) will in many, if not all, cases involve exercise of judicial power.[1] The fact that the administrative tribunal exercises judicial power accounts for its placement in the Judiciary Part of the Constitution. It is true that placement of a provision in a particular part of the statute is generally not of much significance in the matter of interpretation.[2] Yet the headings prefixed to a set of sections are regarded as preambles to those sections and though they cannot control the plain words of a statute they can resolve any doubt as

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[1] *Bangladesh v. A.K.M. Zahangir*, 34 DLR (AD) 173, 205 (After holding rightly that the tribunals which are not invested with any part of judicial power of the State, but discharge purely administrative or executive duties, would be outside the ambit of sub-article (5) of Article 102, the court, it is submitted, was wrong in holding that the authority empowered to take disciplinary action under the Police Officers (Special Provisions) Ordinance, 1976 did not perform quasi-judicial function inasmuch as the authority was empowered to determine legal liabilities applying some pre-existing legal rules and thus exercised judicial power. Compare *Associated Companies v. Sharma*, AIR 1965 SC 1595)

[2] See Para 1.64

to any ambiguous words.[1] Even though the different provisions of the Constitution are to be harmoniously interpreted, by treating the administrative tribunal as not part of the Judiciary and at the same time conceding to it the exclusive jurisdiction to decide service disputes involving violation of fundamental rights by administrative action an irreconcilable conflict between art.44 and art.117 has been allowed to surface inasmuch as art.44 permits Parliament to set up any other 'court" (not tribunal) for enforcement of fundamental rights and that too without prejudice to the power of the High Court Division under art.102.

5.242 Conferment of the power of judicial review (which includes interpretation and application of the provisions of the Constitution) on the Supreme Court is a basic feature of the Bangladesh Constitution. Having regard to the scheme of the Constitution in this regard, it is submitted, it is difficult to conceive that the framers of the Constitution intended a body, not co-equal in status and position with at least the High Court Division, to finally interpret and apply the provisions of the Constitution. The very fact that a body has been entrusted with the power of interpreting and applying the provisions of the Constitution with finality leads to the inference that the framers intended that body to be equal in status and position with the body which has undoubtedly been entrusted with the guardianship of the Constitution. Once this conclusion is reached, an appeal from such body can only be to the Appellate Division as it is difficult to conceive that the framers contemplated interpretation and application of some of the constitutional provisions finally by any other body. The provision of art.103(4) lends support to this conclusion and explains why the framers remained silent about the appellate forum. In concluding that Parliament has a relatively free hand in selecting person manning administrative tribunal, M. Kamal J relied on the famous dictum in *R. v. Burah*[2] -

> If what has been done is legislation, within the general scope of the affirmative words which give the power and if it violates no express condition or restriction by which that power is limited ... it is not for any Court of Justice to inquire further or to enlarge constructively those conditions and restrictions.

The learned Judge observed that the soundness of this dictum has not been doubted by the Privy Council in subsequent decisions. H.M.

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[1] Maxwell - The Interpretation of Statutes, 12th Ed., p.11

[2] 4 Cal 172

Seervai, who has also noted that the dictum was not doubted in subsequent decisions[1], commented about it elsewhere in his book -

> First, the word "express" does not exclude what is *necessarily* implied. Secondly, as we have said earlier, though it is not for a court to enlarge constructively the conditions and restrictions contained in the Constitution, the nature of the Constitution may be important on a question of construction. To the illustrations given in para 2.6 may be added the interpretation put by the Privy Council on the constitution of Ceylone in *Liyanage v. R.*[2] That Constitution did not *expressly* vest the judicial power *exclusively* in the judiciary; but, said the Privy Council, that fact was not decisive. The scheme of the constitution, particularly the provisions relating to the judiciary, viewed in the light of the fact that judicial power had always been vested in courts, led the Privy council to hold that the Constitution vested the judicial power *exclusively* in the judiciary.[3]

[1] Constitutional Law of India, 3rd ed., p.69

[2] [1967] AC 259; See also *A.G. for Ontario v. A.G. for Canada*, [1896] AC 348 (the Privy Council refused to go for literal construction having regard to the scheme of the constitution in respect of provincial autonomy)

[3] Constitutional Law of India, 3rd ed., p.2669-70