

**The
Constitution of
The People's Republic of
Bangladesh**
with
Comments & Case-Laws

Justice Latifur Rahman

Mullick Brothers

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The People's Republic of Bangladesh
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Comments & Case-Laws**

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Justice Latifur Rahman
Former Chief Justice
and
Former Head of the Non-party Caretaker Government

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Mullick Brothers

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Dedicated
to the freedom loving people of Bangladesh

PREFACE TO THE SECOND EDITION

The publisher of my book having told me that all the printed copies have been sold out, the necessity of re-print of a Second Edition arose. In the meanwhile, I got an opportunity to include few new and important cases of the Appellate Division upto December, 2004. Those new cases are included in the appendix.

It is gratifying to note that "The Constitution of the People's Republic of Bangladesh with Comments and Case-laws" has been helpful to lawyers, Judges and academics of law.

I am happy to see that my labour has been truly rewarded within such a short time.

Dhaka
1 March, 2005

Justice Latifur Rahman

PREFACE

After relinquishing the office of the last Head of the Non-Party Care-Taker Government of the People's Republic of Bangladesh, I started writing this book on the Constitution of Bangladesh. This writing can in no way be passed as original. Primarily, it is a compilation separately of the provisions of the Constitution of Bangladesh with little comments and the authoritative pronouncements that have been made by the Supreme Court of Bangladesh on those particular provisions of the Constitution. The cases of the Supreme Court which have interpreted various provisions of the Constitution have been elaborately dealt.

After the Second World War many Third world countries achieved independence through negotiations with the colonial power and many of those third world countries had adopted a written Constitution. But if we look to the history of the emergence of Bangladesh, we find that the creation of Bangladesh is not a gift from anybody. It is a result of a war of liberation for about nine months. The framers of the Constitution recognized the war of liberation in the preamble of our constitution.

My endeavour is to remember the Judges of the Supreme Court, lest we forget them, who have interpreted the Constitution of Bangladesh and have enriched Constitutionalism in this country. As a matter of fact, I feel that we should recognise the individual Judges for their little contribution to the growth of the Constitutional law in Bangladesh. The role of Judges in the development of constitutional law is indeed enormous. Although it is the

litigant public and the lawyers who bring various constitutional issues for guidance of the Supreme Court, in reality, the Supreme Court is the guardian of the Constitution. The Judges of the Supreme Court take the solemn oath to protect, preserve and defend the Constitution. I may mention here that in 1907 Charles Even Hughes, Chief Justice of U.S. Supreme Court said, "We are under a Constitution, but a constitution is what the Judges say it is, and judiciary is a safe-guard on our liberty and on our property under the Constitution." So what the Judges of the Supreme Court say ultimately prevails.

On 16 December 1972, the Constitution came into being but unfortunately the Constitution of Bangladesh could not grow and develop unhindered due to imposition of Martial Laws in Bangladesh. Here I may digress a little and say that the Constitution of India was made effective from 26 January 1950 and its growth was continuous and the constitutional journey was never impeded. The First Martial Law was promulgated on 15 August 1975 by Khandakar Mustaque Ahmed and it continued till 27 November 1979. Subsequent thereto, the Second Martial Law was imposed by Hussain Mohammad Ershad on 24 March 1982 and it continued upto 10 November 1986. During those periods, nothing tangible could grow and flourish for the development of the Constitutional law in Bangladesh. As a matter of fact, the rule of law and constitutionalism can only grow in a democratic polity, where the Supreme Court possesses the absolute power of judicial review. But unfortunately in the case of Bangladesh, the development of constitutional law got a set-back for a considerable period of time. If there would have been free play of Constitution since the birth of Bangladesh, probably our Constitutional law would have been greatly enriched by now, and the society would have been benefited.

In this book, I have tried to write a commentary, article by article of our Constitution with particular reference to case laws decided by the Supreme Court of Bangladesh. This is perhaps the first book of this kind and I hope that it will be of help as a reference book to the community of lawyers and Judges, students of law and more particularly academics of law interested in closely observing the growth of constitutional law in Bangladesh through the decisions of the Supreme Court. In writing this book, I have read few books, of which (Constitutional Law of Bangladesh) written by Muhmudul Islam, former Attorney General of Bangladesh and (Shorter Constitution of India) by Durga Das Basu are worth mentioning. My labour will be rewarded if the readers find this book useful to them.

Dhaka

Justice Latifur Rahman

31 January 2004

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INTRODUCTION

Historical Background and Birth of Bangladesh

Indian Independence Act, 1947, as passed by the British Parliament ushered in the creation of two dominions, namely, India and Pakistan from 15 August 1947. The Constitution of India was enacted on 26 January 1950. The Constituent Assembly of Pakistan delayed the framing of the Constitution due to dissensions and hostilities amongst the politicians, bureaucrats and military personnel. Finally, the Constitution of Pakistan saw the light of the day in March, 1956. Soon thereafter, the Constitution of 1956 was abrogated by Ayub Khan by imposing Martial Law in 1958. Again, during Ayub's regime, the Constitution of 1962 was framed on 7 June 1962. In 1965, Ayub Khan got himself re-elected as President for the second term.

The economic disparities between East and West Pakistan prompted Sk. Mujibur Rahamn to start political movement in East Pakistan with 6-point, which runs as follows :-

1. The character of the Government shall be Federal and Parliamentary, in which the election to the federal legislature and to the legislatures of the federating units shall be direct and on the basis of universal adult franchise. The representation in the federal legislature shall be on the basis of population.
2. The Federal Government shall be responsible only for defence, foreign affairs and currency, subject to the conditions provided in (3) below.
3. Two separate but freely convertible currencies for the two wings may be introduced, or (1) one currency for the whole country may be maintained. In this case effective constitutional provisions are to be made to stop flight of capital from East to West Pakistan. Separate Banking Reserve is to be made and separate fiscal and monetary policy to be adopted for East Pakistan.
4. The power of taxation and revenue collection shall vest in the federating units and the Federal Centre will have no such power. The Federation will have a share in the State taxes for meeting their required expenditures. The consolidated federal fund shall come out of a levy of certain percentage of all State taxes.
5. (I) There shall be two separate accounts for foreign exchange earnings of the two wings.
(II) Earnings of East Pakistan shall be under the control of East Pakistan Government and that of West Pakistan under the control of West Pakistan Government.
(III) Foreign exchange requirements of the Federal Government shall be met by the two wings either equally or in a ratio to be fixed.

- (IV) Indigenous products shall move free of duty between the two wings.
 - (V) The Constitution shall empower the unit Governments to establish trade and commercial relations with, set up trade missions in and enter into agreements with, foreign countries.
6. The setting up of a militia or a paramilitary force for East Pakistan.

As the political movement was gaining momentum, the Government of Pakistan started the 'Agartala Conspiracy Case' against Sk. Mujibur Rahman and others to stop the political movement in East Pakistan by putting them behind prison bars. Due to heavy political activities, the Government of Pakistan was compelled to withdraw the case. In the back drop of political agitations, Ayub Khan relinquished his Presidency and handed over power to his Commander-in-Chief Yahaya Khan, who under Martial Law Proclamations abrogated the Constitution of 1962 and promulgated Legal Framework Order (LFO). Under the provisions of LFO, elections were held between 7 December 1970 to 17 January 1971 to the National and Provincial Assemblies on the basis of adult franchise in East Pakistan. In these elections out of 169 seats, Awami League obtained 167 seats. The National Assembly was summoned by Yahaya Khan on 3 March 1971 at Dhaka for framing of the Constitution. Thereafter, Yahaya Khan postponed the sessions at Dhaka indefinitely and an unjust and treacherous war was imposed on the innocent men and women in East Pakistan on the night of 25 March 1971. Sk. Mujibur Rahman was arrested and taken to West Pakistan prison. The war of liberation continued for about nine months and the freedom loving people of East Pakistan got independence on 16 December 1971. The Pakistan occupation forces were compelled to surrender at Dhaka. This war of liberation brought independence and Bangladesh emerged as an independent, sovereign state in the map of the world. The world at large recognised the birth of Bangladesh as a new country.

The members elected in the elections of 1970, proclaimed independence of Bangladesh through the instrument of 'The Proclamation of Independence, 10 April 1971, at Mujibnagar, Bangladesh and formed the Government with Sk. Mujibur Rahman (in custody) as President and Syed Nazrul Islam as Acting President till release of Sk. Mujibur Rahman from the prison of Pakistan. This proclamation of Independence was issued by Professor Yusuf Ali by and under the authority of the Constituent Assembly. This document is in fact the Constitutional basis for the creation of sovereign Bangladesh as a State. The said proclamation is under :-

THE PROCLAMATION OF INDEPENDENCE

Mujibnagar, Bangladesh
Dated 10 day of April, 1971

WHEREAS free elections were held in Bangladesh from 7th December, 1970 to 17th January 1971, to elect representatives for the purpose of framing a Constitution,

AND

WHEREAS at these elections the people of Bangladesh elected 167 out of 169 representatives belonging to the Awami League,

AND

WHEREAS General Yahya Khan summoned the elected representatives of the people to meet on the 3 March 1971, for the purpose of framing a Constitution,

AND

WHEREAS the Assembly so summoned was arbitrarily and illegally postponed for an indefinite period,

AND

WHEREAS instead of fulfilling their promise and while still conferring with the representatives of the people of Bangladesh, Pakistan authorities declared an unjust and treacherous war,

AND

WHEREAS in the facts and circumstances of such treacherous conduct Banga Bandhu Sheikh Mujibur Rahman, the undisputed leader of 75 million of people of Bangladesh in due fulfillment of the legitimate right of self-determination of the people of Bangladesh, duly made a declaration of independence at Dacca on March 26, 1971 and urged the people of Bangladesh to defend the honour and integrity of Bangladesh,

AND

WHEREAS in the conduct of a ruthless and savage war the Pakistani authorities committed and are still continuously committing numerous acts of genocide and unprecedented tortures, amongst others on the civilian and unarmed people of Bangladesh,

AND

WHEREAS the Pakistan Government by levying an unjust war and committing genocide and by other repressive measures made it impossible for the elected representative of the people of Bangladesh to meet and frame a Constitution and give to themselves a Government,

AND

WHEREAS the people of Bangladesh by their heroism, bravery and revolutionary fervour have established effective control over the territories of Bangladesh, we the elected representatives of the people of Bangladesh, as honour bound by the mandate given to us by the people of Bangladesh whose will is supreme duly constituted ourselves into a Constituent Assembly, and

having held mutual consultations, and in order to ensure for the people of Bangladesh - equality, human dignity and social justice, declare and constitute Bangladesh to be a sovereign people's Republic and thereby

confirm the declaration of independence already made by Banga Bandhu Sheikh Mujibur Rahman, and

do hereby affirm and resolve that till such time as a Constitution is framed Banga Bandhu Sheikh Mujibur Rahman shall be the President of the Republic and that Syed Nazrul Islam shall be the Vice-President of the Republic, and

that the President shall be the Supreme Commander of all the armed forces of the Republic,

shall exercise all the executive and legislative powers of the Republic including the power to grant pardon,

shall have the power to appoint a Prime Minister and such other Ministers as he considers necessary,

shall have power to levy taxes and expend monies,

shall have the 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.

We, the elected representatives of the people of Bangladesh do further resolve that in the event of there being no President or the President being unable to enter upon his office or being unable to exercise his powers due to any reason – whatsoever, the Vice-President shall have and exercise all the powers, duties and responsibilities herein conferred on the President.

We further resolve that we undertake to observe and give effect to all duties and obligations that devolve upon us as a member of the family of nations and to abide by the charter of the United Nations.

We further resolve that this proclamation of independence shall be deemed to have come into effect from 26th day of March 1971.

We further resolve that in order to give effect to this instrument we appoint Prof. Yusuf Ali our duly constituted potentiary and to give to the President and the Vice-President oaths of office.

Mujibnagar, Bangladesh
10th April, 1971

PROF. YUSUF ALI
Duly Constituted Potentiary
by and under the authority
of the Constituent Assembly
of Bangladesh.

As the war of liberation was continuing, 'Laws Continuance Enforcement Order, 1971' was promulgated by Syed Nazrul Islam, Acting President on 10 April 1971, so that the existing laws which were in force could continue in Bangladesh from 25 March 1971 (on the day of crack down in East Pakistan).

Laws Continuance Enforcement Order, 1971 is as follows :

Mujibnagar

Dated 10th Day of April, 1972

"I, Syed Nazrul Islam, the Vice-President and Acting President of Bangladesh, in exercise of the powers conferred on me by the proclamation of independence dated tenth day of April, 1971 do hereby order that all laws that were in force in Bangladesh on 25th March, 1971 shall subject to the proclamation aforesaid continue to be so in force with such consequential changes as may be necessary on account of the creation of the sovereign independent state of Bangladesh formed by the will of the people of Bangladesh and that all Government officials, civil, military, judicial and diplomatic who take the oath of allegiance to Bangladesh shall continue in their offices on terms and conditions of service so long enjoyed by them and that all District Judges and District Magistrates, in the territory of Bangladesh and all diplomatic representatives elsewhere shall arrange to administer the oath of allegiance to all government officials within their jurisdiction.

This order shall be deemed to have come into effect from 26th day of March 1971.

Sd/- Syed Nazrul Islam
Acting President

During the war of liberation Sk. Mujibur Rahman was in prison of Pakistan. He was released from the prison of Pakistan on 8 January 1972. He came back to Dhaka on 10 January 1972. On 11 January 1972, 'Provisional Constitution of Bangladesh Order, 1972' was promulgated by Sk. Mujibur Rahman as President of the People's Republic of Bangladesh.

'The Provisional Constitution of Bangladesh Order, 1972' reads as follows :-

WHEREAS by the proclamation of Independence Order, dated the 10th April, 1971 provisional arrangements were made for the governance of the people's Republic of Bangladesh;

AND WHEREAS by the said proclamation the President is invested with all executive and legislative authority and the power to appoint a Prime Minister;

AND WHEREAS the unjust and treacherous war as referred to in the said proclamation has now ended;

AND WHEREAS it is the manifest aspiration of the people of Bangladesh that a parliamentary democracy shall function in Bangladesh,

AND WHEREAS in pursuance of the said objective it is necessary immediately to make certain provisions in that behalf.

NOW, THEREFORE, in pursuance of the proclamation of Independence Order dated the 10th April, 1971 and all other powers enabling him in that behalf the President is pleased to make and promulgate the following order :

- (1) This order may be called the Provisional Constitution of Bangladesh Order, 1972.
- (2) It extends to the whole of Bangladesh.
- (3) It shall come into force at once.
- (4) Definition:
Constituent Assembly referred to in this Order means the body comprising of the elected representative of the people of Bangladesh returned to the N.A. and P.A. seats in the elections held in December, 1970, January, 1971 and March, 1971 not otherwise disqualified by or under any law.
- (5) There shall be a Cabinet of Ministers with the Prime Minister at the head.
- (6) The President shall in exercise of all his functions act in accordance with the advice of the Prime Minister.

- (7) The President shall commission as Prime Minister a member of the Constituent Assembly who commands the confidence of the majority of the members of the Constituent Assembly. All other Ministers, Ministers of State and Deputy Ministers shall be appointed by the President on the advice of the Prime Minister.
- (8) In the event of a vacancy occurring in the office of the President at any time prior to the framing of the Constitution by the Constituent Assembly, the Cabinet shall appoint as President a citizen of Bangladesh who will hold the office of President until another President enters upon the office in accordance with the Constitution as framed by the Constituent Assembly.
- (9) There shall be High Court of Bangladesh consisting of a Chief Justice and so many other Judges as may be appointed from time to time.
- (10) The Chief Justice of the High Court of Bangladesh shall administer an oath of office to the President and the President shall administer an oath of office to the Prime Minister, other Ministers, Ministers of State and Deputy Ministers. The form of the oath shall be as prescribed by the Cabinet.

Dated this eleventh day of January one thousand nine hundred and seventy two, being the twenty-sixth day of Poush, one thousand three hundred and seventy eight.

Dacca
The 11th January, 1972

Sheikh Mujibur Rahman
President of the
People's Republic of Bangladesh.

In this document, the manifest aspiration of the people of Bangladesh was to establish parliamentary democracy in Bangladesh. As a matter of fact, this pre-constitutional document is a declaration, affirmation and resolution for parliamentary democracy in Bangladesh.

These three pre-constitutional documents ultimately gave us the legal basis for creation of Bangladesh and the system of Government in accordance with which the country will be governed.

The Constituent Assembly by a resolution constituted a Constitution Drafting Committee on 11 April 1972 with Dr. Kamal Hossain as Chairman and 33 members of the Constituent Assembly as members of the Commission. The Constitution of Bangladesh was adopted and enacted on 4 November 1972 and it came into effect on 16 December 1972, as the commencing day of the Constitution as per Article 153 of the Constitution of Bangladesh.

It may be noted that under the Chairmanship of Dr. Ambedkar, the Constitution Drafting Committee of India drafted the Constitution of India.

Constitution:

Constitution has been defined in the Universal Standard Encyclopedia, Volume 6 as, "In politics, a system of law established by a sovereign State for its own guidance. It fixes the limits and defines the relations of the legislative, the judicial, and the executive powers of the State, both among themselves and with the citizens of the State, thus setting up the basis for Government."

In the words of Cooley, in his 'Treatise on Constitutional Limitations', Constitution has been defined as "the fundamental law of a State, containing the principles upon which the Government is founded, regulating the division of sovereign powers, and directing to what persons each of these powers is to be confined and the manner in which it is to be exercised."

A Constitution is a bare statements as to the different organs of a State and its functioning within its sphere. Thus the Constitution is different from Constitutional law. The constitutional law of a country grows in the form of legislation, judicial decisions, conventions and practices. A Constitution cannot conceive of all eventualities but leaves them to be provided by legislation. Even our Constitution can not provide all exigencies and leave it to be determined by legislation. American Constitution has developed through various decisions of the United States of Supreme Court. In like manner, our Constitution through judicial interpretations is also getting new colour and dimension.

EMERGENCY DECLARED ON 6.9.65, DURING PAKISTAN TIME, AND THE COMBINED EFFECT OF PROCLAMATION OF INDEPENDENCE, 1971, LAWS CONTINUANCE ENFORCEMENT ORDER, 1971 AND THE CONSTITUTION OF BANGLADESH.

Case cited :

In the case of *Dulichand Omraolal Vs. Bangladesh*, 33 DLR(AD) 30, a substantial question of law of some public importance was raised as to the validity of Ordinance 1 of 1969 which continued by Laws Continuance Enforcement Order, 1971. The fact of the case in short is that on 6.9.65 emergency was proclaimed by the President under Article 30 of Pakistan Constitution of 1962, as war broke out between Pakistan and India. In pursuance of the declaration of Emergency, the Defence of Pakistan Ordinance, 1965 was promulgated. The war was over soon. Thereafter, Defence of Pakistan Ordinance and the Rules made there under continued in operation till 16 February 1969, when came the formal declaration of revocation of the Proclamation of Emergency and on that date Ordinance NO.1 of 1969 Enemy Property (Continuance of Emergency Provision) Ordinance, 1969 was promulgated continuing some provisions of the Defence of Pakistan Rules. While the law was in continuance the country was liberated.

K.Hossain, C.J. held Ordinance No.1 of 1969 as a valid piece of legislation and observed in Paragraph 9 as follows:

“We are to look at the legitimacy of a law from the Proclamation of Independence made on 10 April 1971 and the Laws Continuance Enforcement Order and the Constitution of Bangladesh. As regards argument of constitutional legitimacy of Yaha Khan, all that need to 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. In the present case, however, as we have said, we are to look for the validity of the laws from the source indicated earlier. A combined reading of Proclamation of Independence, Laws Continuance Enforcement Order, the Constitution of Bangladesh, President's Order No.29 of 1972, President's Order No.48 of 1972 and Act XLV of 1974 as amended by Act XCIII of 1976 clearly indicates, that Ordinance 1 of 1969 continued as a valid piece of legislation which has been repealed by Act XLV of 1974. No further argument or speculation is necessary”.

MARTIAL LAW DISPENSATIONS IN BANGLADESH AND THE POSITION OF OUR CONSTITUTION DURING THOSE PERIODS

A.V. Dicey in his book, 'An introduction of the study of the law of the Constitution' has defined "Martial law" in the proper sense of that term, in which it means the suspension of ordinary law and the temporary Government of a country or parts of it by military tribunals, is unknown to the law of England. But the proclamation of martial law in this sense of the term is, as has been pointed out, had visited Bangladesh twice by usurping the authority of a recognised Government. Many Third World Countries had also experienced the imposition of Martial Law from time to time.

On 15 August 1975 President Sheikh Mujibur Rahman was assassinated. Thereafter Khandaker Mostaque Ahmed assumed the Office of the President of Bangladesh and the entire country was placed under Martial Law on 20 August 1975. Khandaker Mostaque Ahmed issued a proclamation of Martial Law and thereby the Constitution of Bangladesh was made subservient to the Martial Law Proclamation and the Martial Law Regulations and Orders (and other orders) made by him.

This Proclamation of 20 August 1975, further takes away the jurisdiction of all courts including the Supreme Court, or Tribunal or Authority to call in question in any manner whatsoever or declare illegal or void this Proclamation or any Martial Law Regulation or Order (or other orders) made by the President himself. This Proclamation also bars the challenge of anything done or any action taken by or under this proclamation, or any Martial Law Regulation or order (or other orders) made by the President in pursuance thereof.

The first Martial Law which was promulgated on 20 August 1975 continued upto 9 April 1979. During this time, A.M. Sayem Chief Justice of Bangladesh assumed the Office of President and Chief Martial Law Administrator and thereafter Ziaur Rahman became the President and Chief Martial Law Administrator.

In the election held under the Martial Law, the new parliament under Ziaur Rahman got the Constitution (Fifth Amendment) Act, 1979 passed, ratifying all the Proclamations and Proclamations Orders and the amendments, modifications and omissions made in the Constitution by such proclamations and proclamation orders. This Fifth Amendment of the Constitution also gave validity to all actions done or taken during this period.

After revocation of the First Martial Law on 9 April 1979, the Constitutional Government was restored and the Supreme Court's

power of judicial review was also restored. Even during Martial Law and thereafter many cases on the Constitutional validity of the First Martial Law Proclamation, Regulations and Orders came up for consideration before the High Court Division of the Supreme Court. Here in below I will deal with some of those cases:

Cases :

- (1) *Halima Khatun –Vs- Bangladesh, 30 DLR(SC) 207*(Judgment on January 4, 1978).

In that case, the petitioner's property was declared as an abandoned property under the Abandoned Property (Control, Management and Disposal) Order (P.O.16 of 1972) and the said notice was challenged in the Writ Petition. The Writ Petition was dismissed as disputed questions of fact were raised in the petition. A preliminary question arose before the Appellate Division whether, in view of the Abandoned Properties (Supplementary Provisions) Regulation, 1977 (Martial Law Regulation No.VII of 1977), the leave petition has been rightly abated or not.

In that decision, F.Munim,J. observed that the Constitution of Bangladesh stands subordinate to the Proclamation, Regulation, or order as may be made by the President by virtue of assumption of powers and as such the Constitution is no longer the Supreme law of the country. Further, it was held in Paragraph 18 of that decision that, inspite of Article 7(2), no Constitutional provisions can claim to be sacrosanct and immutable. The present constitutional provisions may, however, claim superiority to any law other than a Regulation or order made under the Proclamation. Ultimately, total ouster of jurisdiction of the High Court Division was upheld in that decision.

As time passed by, the case of *Halim Khatoon* was reviewed by the same court and total ouster of jurisdiction was modified.

- (2) *State –VS- Haji Joynal Abedin, 32 DLR (AD) 110* (Judgment on December 20, 1978).

In that decision, the High Court Division declared the sentence of death passed on five condemned prisoners by a Special Military Court as passed without lawful authority and is of no legal effect.

The Appellate Division set aside the order of the High Court Division and Ruhul Islam,J. held that-

“The moment the country is put under Martial Law, the aforementioned Constitutional position along with other Civil Laws of the country loses its superior position. Martial Law Courts being creatures either of the

proclamation or Martial Law Regulation, have the authority to try any offence made triable by such courts”.

Further in that case, Ruhul Islam, J. held at Paragraph 18 as under:-

“From a consideration of the features noted above it leaves no room for doubt that the Constitution though not abrogated, was reduced to a position subordinate to the Proclamation, inasmuch as, the unamended and unsuspending Constitutional Provisions were kept in force and allowed to continue subject to the proclamation and Martial Law Regulation or orders and other orders, and the Constitution was amended from time to time by issuing proclamation. In the face of the facts stated above I find it difficult to accept the arguments advanced in support of the view that the Constitution as such is still in force as the Supreme Law of the country, untrammelled by the proclamation and Martial Law Regulation”.

Thus, the power of the Supreme Court to exercise judicial review was not allowed during the existence of Martial Law Proclamation.

- (3) In the case of *Ehtashamuddin Vs. Bangladesh*, 33 DLR(AD) 154, Ruhul Islam, J. held at paragraph 15 as under:-

“In view of the clear provisions in clauses (e) and (h) of the Proclamation of August 20, 1975, which clearly provide, inter alia, that the Constitution shall continue subject to proclamation, etc. and that no courts including the Supreme Court, or Tribunal or authority shall have any power to call in question in any manner whatsoever or declare illegal or void the proclamation or any Martial Law Regulation or Orders or other orders made by the Chief Martial Law Administrator in pursuance thereof, or any declaration made by or under the proclamation”.

In this case, however, the Appellate Division made a little opening and further held that when a Martial Law Court or Tribunal has acted without jurisdiction or such courts or Tribunal is not properly constituted, that is to say, is coram non-judice, or has acted malafide, the power of the Superior Courts under Article 102 of the Constitution in an appropriate case may be exercised.

- (4) *Nasiruddin Vs. Government of Bangladesh*, 32 DLR(AD) 216.

In this case, clarification was given regarding the question of abatement of writ petition in *Halima Khatoon's* case.

Kamaluddin Hosain, C.J. at paragraph 11 of this case observed as follows:

“In *Halima Khatoon's* case the decision is that if any action of taking over or vesting of a property comes within the mischief of Martial Law Regulation No. VII of 1977, any proceedings seeking to

challenge the taking over or vesting of such property shall abate. The further observation that requires to be made is that abatement of the proceedings will follow in such cases, except where the taking over or vesting is without jurisdiction or Coram non-judice or it is malafide and, in such circumstances such action or order is not protected under the said Regulation. With this clarification in *Halima Khatoon's* case and in conformity of the two decisions set out, it to be held that there cannot be any question of abatement of any legal proceedings taken by an aggrieved person to protect his legal right or interest in the property against which action has been taken or vesting order made which is without jurisdiction or Coram non-judice or is malafide. Except within this narrow compass the proceedings coming within the mischief of MLR VII of 1977 shall abate”.

Thus the jurisdiction of the Supreme Court was extended within the narrow compass as indicated above inspite of the mischief of Martial Law Regulation.

(5) *Jamil Huq Vs. Bangladesh*, 34 DLR(AD) 125.

President Ziaur Rahman was killed on 30 May, 1981. As a consequence of that several Army Officers were tried and convicted by a court martial, out of those convicted persons, twelve persons who were sentenced to death filed writ petition before the High Court Division. The writ petitions were dismissed in limine by a Division Bench of the High Court Division holding that under Sub-clause(5) of Article 102 of the Constitution, the High Court Division has no jurisdiction to entertain the writ petition. On leave to appeal, the Appellate Division held that the view taken by the High Court Division that the jurisdiction is barred in absolute terms is not correct. Kamaluddin Hossain, C.J. held at paragraph 45 as under:-

“It has been now well settled that the court can interfere when a case is made out of coram non-judice or malafide notwithstanding a finality clause. In the present cases, such case has not been made out. Since this is the position the conclusion is that the High Court Division has not been conferred with the jurisdiction under Article 102 of the Constitution to interfere with a decision given by a Court Martial Law convened under the Army Act, unless it can be shown that the proceedings was in coram non-judice or malafide. If the court is constituted properly and the offence is cognizable then the proceedings of such court cannot be interfered with on the ground of procedural irregularities.”

(6) *Bangladesh Vs. Mahbubur Rashid*, 1981 BLD(AD) 300.

Respondent and others were convicted by the Special Martial Law Court. The proceedings of that case were submitted to the Government for review. The Government found no ground of review. The respondent, however, challenged the order of review in a writ petition before the High Court Division. The High Court Division allowed the review on the ground that in the absence of any judgment the purported review was illegal. Appellate Division dismissed the writ petition. In that decision, Sahabuddin Ahmed, J. rejected the contention of the respondent's Advocate that there is no Constitutional backing of clause (e) of the proclamation from 7 April 1979 and held at paragraph 6 as follows:-

"In clause(e) this proclamation has only provided for disposal of certain pending matters and this provision has been ratified by the Constitution(Fifth Amendment) Act which was enacted simultaneously with the last proclamation."

(7) *Khondker Moshtaque Ahmed-Vs-Bangladesh*, 34 DLR(AD) 222.

Khondker Moshtaque Ahmed was convicted in two cases before the Martial Law Court. In both the cases the proceedings were submitted to the Chief Martial Law Administrator for review. In the above decision it was held that malafide or coram non judge proceedings are not immune from scrutiny of the Supreme Court notwithstanding any ouster clause in the Martial Law Proclamation. In that case, B.H.Chowdhury, J. held at Paragraph 23 as follows:-

"Power has not been given to exercise it illegally or with malafide intention. Malafide action do not get any protection from a court of law. The learned Judges of the High Court Division having come to this point fell short of giving the remedy which inferentially leads to irresistible conclusion, namely, the quashment of the conviction. Since the conviction is to be quashed it is needless to go into the second point whether the review was done in accordance with law. Suffice it to say that the review was not done by the Chief Martial Law Administrator who was the reviewing authority till 6.6.1977. The only inference that can be drawn by such belated review by an authority e.g, the Government when the Chief Martial Law Administrator was the designated authority is that the apprehension of the accused that the proceedings have been initiated malafide cannot be repudiated."

SECOND MARTIAL LAW: 24 MARCH, 1982-10 NOVEMBER, 1986.

Bangladesh was placed under Second Martial Law on 24 March, 1982 by Hussain Muhammad Ershad. By the Proclamation of 24 March 1982, he suspended the Constitution of Bangladesh and the Supreme Court of Bangladesh ceased to derive any power from the Constitution. Subsequent thereto, Ershad revived the power of judicial review in respect of some of the fundamental rights and the Constitution was partially restored. Final revival of the Constitution took place after withdrawal of the Martial Law on 10 November 1986. As the Constitution (Fifth Amendment) Act gave validity to the First Martial Law, in the like manner, the Constitution (Seventh Amendment) Act, 1986, ratified and confirmed all Martial Law Proclamations, Regulations and orders. By inserting paragraph 19 to the Fourth Schedule to the Constitution all Martial Law orders, actions made or taken during this period was validated.

Cases:

(1) *Nasrin Kader Siddique Vs. Bangladesh*, 44 DLR(AD)16.

Detenu, Abdul Kader Siddique's wife filed a writ petition challenging her husband's detention under Section 3(1)(a) of the Special Powers Act, 1974. The facts are like this, that after the assassination of Sheikh Mujibur Rahman on 15 August 1975, the detenu left for India. He returned to Bangladesh on 16 December, 1990. Subsequently, he was arrested on the ground that there is a conviction order against him by a Martial Law Court. The detenu wanted to see the warrant of arrest and the police failed to produce the same. Thereafter, this detention order was passed. The alleged conviction and sentence remained unexecuted for 14 years. On 7 April 1979, a proclamation was issued which was both a repealing and saving legislation. Now, the main question raised is, unexecuted sentences of Special Martial Law Court can be executed only in the manner and by the authority prescribed in the saving clauses.

The said proclamation of withdrawal in Sub-paragraph 'K' reads as follows:-

"K": Every sentence of imprisonment or whipping passed in any case at any time before the commencing day by a Special Martial Law Court or Special Martial Law Tribunal shall, after the commencing day, be put into execution under the warrant of the Sessions Judge of the area in which such person under sentence may be found, as if the sentence were passed by him."

But in the instant case the warrant of commitment of sentence was issued by the Additional District Magistrate, Tangail, whereas the warrant of commitment of sentence was not passed by the Sessions Judge within whose area the detinue was found as contemplated under the proclamation of 7 April 1979. It is the Sessions Judge who alone is lawfully competent to issue the Warrant of Commitment in this case. Hence, it was held that the order of detention was wholly without any lawful authority.

- (2) In the case of *Principal Secretary Vs. Mahtabuddin Ahmed*, 42 DLR(AD) 214, the respondent, Additional Chief Engineer of the Roads and High Ways Department was dismissed from service by Chief Martial Law Administrator under Martial Law Order No. 9 of 1982. A criminal case filed against the respondent was disposed of by submitting FRT. Though the Criminal case was withdrawn but the review application and the dismissal order were not set aside. Martial Law was withdrawn with effect from 10.11.86 by a proclamation. All Martial Law Orders including Martial Law Order No.9, stood repealed and thus there was no competent authority to pass any order on review for respondent's re-instatement under Para 1A of MLO No.9 of 1982.

In that decision A.T.M. Afzal, J. held at para 6 as under:

"The relevant provision shows that an aggrieved person may make an application praying for review of an order made under MLO 9. It is true that the word 'may' has been used in conferring authority to the Chief Martial Law Administrator for review but upon a true construction of the Provision in the context of an order made under MLO 9 it will be reasonable and right to hold, as the High Court Division has done, that the word 'may' ought to be read as 'shall' and the CMLA is bound to consider and dispose of an application for review which has been filed to him."

The learned Judge further held in paragraph 7 as follows:

"The General Clauses Act, 1897 has been made applicable to Martial Law Orders by reason of Sub-Paragraph(a) of Paragraph 19 of the 4th Schedule of the Constitution (7th Amendment) Act, 1986. Under the Proclamation of withdrawal of Martial Law, MLO 9 was repealed but the remedy of review provided under the said MLO survived the repeal. It is obvious that unless some provision was made for disposal of cases awaiting review the effect to the proclamation could not be fully given. In order to harmonize the effect of repeal of the MLO with the operation of proclamation of withdrawal of Martial Law in the circumstances as in the present case, provision has been rightly made in

paragraph 5 of the said proclamation enabling the President to make an order whenever necessary to which the High Court Division has referred.”

- (3) In the case of *Dewan Abdul Karim-Vs- Bangladesh*, 54 DLR, 33, Syed J.R.Mudassir Husain, J. relying on the decision of 42 DLR(AD) 214 held in paragraph 14 as under:

“ In view of the aforesaid decision of the Appellate Division reported in 42 DLR(AD) 214 as well as of the decision of the Writ Petition No.4897 of 1997 we find substance in the Rule and accordingly, we direct the respondents to communicate the result of the review application of the petitioner which was heard on 16.6.92 pursuant to notice 3.6.92 (Annexure F). If the petitioner’s application is still undisposed of, the Government may take step to dispose of the said application for review by creating an appropriate review forum within three months from the date of receipt of this order.”

- (4) In the case of *Manoranjan Mukherjee Vs. Election Commission and others*, 41 DLR 484, a question was raised as to what will be the effect of a conviction and sentence by a summary Martial Law Court after the withdrawal of Martial Law and could such a conviction be termed as a disqualification under Section 7(2)(d) of Local Government (Union Parishad) Ordinance, 1983. In that decision at Paragraphs 9 and 10 Mustafa Kamal, J. observed as follows:

“But while leaving, the Martial Law does not leave a trail of disqualification. It is good as it lasts, but with its departure it no longer casts a shadow upon the ordinary laws of the land. In that view of the matter we are clearly of the opinion that Section 7(2)(d) of the Ordinance does not refer to a conviction of a Military Court and it also does not refer to an offence under the Martial Law Regulations or orders. It simply refers to Criminal offences as provided by the ordinary laws of the land and conviction on trial by an ordinary court of the country as provided in the judicial hierarchy or by Special Tribunals.”

- (5) In the case of *Mullick Brothers Vs. Income Tax Officer and another*, 31 DLR(AD) 165, a question was raised that the Martial Law Regulation came to an end after the revocation of Martial Law and it cannot be included as a valid piece of legislation in the definition of law or existing law or Regulation as provided in the Constitution of Bangladesh. In that decision, Article 83 of the Constitution, Income Tax Regulation, 1969 promulgated by Martial Law authority of Pakistan, proclamation of Independence

were considered and K.M.Sobhan,J. held at Paragraph 12 as follows:-

“The learned Judges of the High Court Division again wrongly concluded that the tax demanded from the appellant is debt due to the Government of the then Pakistan and became a debt, to the Government of Bangladesh. President’s Order No.147 of 1972 has amended the definition of the Government which is effective from the 26 day of March, 1971 and it reads as follows:-

“Clause 21 “Government or the Government” shall mean

(a) in relation to anything done before the 26 day of March, 1971, comprised in Bangladesh;

(b) in relation to anything done or to be done after the 25 day of March, 1971, the Government of the People’s Republic of Bangladesh. This definition of the Government is contrary to what have been taken as meaning of Government by the High Court.

“Government debt” has also been defined in clause (216) of the General Clauses Act as amended by President’s Order No.147 of 1972 and is as follows:-

“(216) Government debts” and equivalent expressions shall include debts due to the Government of the People’s Republic of Bangladesh and any debt due to any Government that functioned within the territories now comprised in Bangladesh.”

The imposition of the impugned tax was totally unauthorised and lacked legal foundation. It created no liability and so the question of debt does not arise”.

- (6) In the case of *A.K.M.Fazlul Hoque and others Vs. State*, 26 DLR SC 11, a question was raised as to whether the President’s Order No.8 of 1972, the Bangladesh Collaborators (Special Tribunal) Order, 1972 was promulgated by an authority competent to do so. Sayem,C.J. on consideration of Clause (5) to (8) of the Provisional Constitution of Bangladesh Order, 1972, held at paragraph 11 as under:

“It will,however, be seen that in addition to conferring on the President all other powers including the executive powers, the proclamation after having notice the prevailing circumstances invested him with all the “legislative powers of the Republic”. Obviously, the expression “Legislative Power of the Republic” is of the widest amplitude and admits of no limitation. The

proclamation, in our view, empowered the President designated by it to make any law or legal provision, even of a Constitutional nature. We looked for but found no indication in the proclamation to the contrary. On the other hand, assurance is lent to this view by the further provision in the proclamation which empowered the President to do everything necessary to give the people of Bangladesh an orderly and just Government, including the power to appoint a Prime Minister and other Ministers. The impugned clauses (5) to (8) of the Provisional Constitution order were thus authorised by the terms of proclamation.”

Thus, the Appellate Division found that the Bangladesh Collaborators order was promulgated by a competent legislative authority of the Republic.

AMENDMENTS OF THE CONSTITUTION

There has been 13 amendments of the Constitution :

1. Constitution (Ist Amendment) Act, 1973 was passed on 15 July 1973. Sub-Article (3) of Article 47 was inserted whereby any law providing for the detention and trial of war criminals was kept out of the purview of fundamental rights as enumerated in Part III of our Constitution. New Article 47A debars any person to whom a law specified in Clause (3) of Article 47 applies to move the Supreme Court for any of the remedies under the Constitution.
2. Constitution (Second Amendment) Act, 1973 was passed on 22 September, 1973. In our constitution, there was no provision of proclamation of emergency and suspension of fundamental rights. Part IXA was introduced providing for proclamation of Emergency, suspension of provisions of certain articles during emergencies and suspension of enforcement of fundamental rights during emergencies. Further, Article 33 was substituted providing for preventive detention.
3. Constitution (Third Amendment) Act, 1974 was passed on 28 November 1974. In the case of *Mukhlesur Rahman Vs. Bangladesh*, 26 DLR(SC) 44, the agreement between India and Bangladesh signed by Sheikh Mujibur Rahman, Prime Minister of Bangladesh and Indira Gandhi, Prime Minister of India in respect of retaining Dahagram and Angarpota and giving up Berobari was challenged. In view of the decision of the Appellate Division to give effect to the said agreement, this Amendment was brought in Article 2.

4. Constitution (Fourth Amendment) Act, 1975 was passed on 25 January 1975. This Amendment brought in changes in the basic structures of the Constitution. Part VIA was added bringing the following basic changes:
- (1) Parliamentary form of government was abolished introducing Presidential form.
 - (2) One political party was introduced in place of many political parties in the country.
 - (3) Power of judiciary was curtailed. Article 44 was amended.
 - (4) President can appoint and remove Judges.
 - (5) President will appoint Vice-President and Ministers.
 - (6) Subordinate Court's control was taken away from the Supreme Court to the President.
 - (7) No provision was kept for consultation with the Chief Justice in case of appointment of the Supreme Court Judges.

By this amendment all authority was vested in the President.

5. Constitution (Fifth Amendment), 1979. The First Martial Law of Khandoker Mostaque Ahmed continued upto 9 April 1979. Constitution (Fifth Amendment) Act, 1979 was passed in the new Parliament of President Ziaur Rahman ratifying and conforming of all martial law proclamations/orders between 15 August 1975 to 9 April 1979.
6. Constitution (Sixth Amendment) Act, 1981. On the death of President Ziaur Rahman on 30 May 1981, Vice President Abdur Sattar became the Acting President. To remove doubt as to whether Acting President can contest as President without resigning from the post of Vice President in 1981, this amendment was brought in that on being elected as President he shall be deemed to have vacated the post of the vice President.
7. Constitution (Seventh Amendment) Act 1986:
2nd Martial Law of Hussain Muhammad Ershad continued from 24 March 1982 to 10 November 1986. By this amendment all Martial Law proclamations/Orders of this period were ratified and confirmed. Further the age of the Supreme Court Judges was raised from 62 to 65 years.
8. Constitution (Eight Amendment) Act 1988:
By this amendment, Article 100 of the Constitution was amended by setting up six permanent benches out side Dhaka. By the same Amendment Act, Islam was introduced as the State religion of Bangladesh in Article 2A. In the case of Constitution (8th Amendment) case, Anwar Hossain Chowdhury-Vs- Bangladesh,

- 41 DLR(AD) 165, the Constitution (Eight Amendment) Act, 1988 was declared as unconstitutional and void.
9. Constitution (Ninth Amendment) Act, 1989 was passed providing for election of the Vice-President and making amendments in respect of the terms of office of the President and Vice-President. Before this amendment, the movement for formation of Non-Party Care-Taker Government for holding a free and fair election was going on for appointing a neutral person. To facilitate this formula, Article 55A was inserted for appointment of a new Vice-President, and to make it effective, would require the confirmation by the majority of the total number of members of Parliament.
 10. Constitution (Tenth Amendment) Act, 1990. By amendment of Article 65(3), reserved seats for 30 women were further extended for ten years.
 11. Constitution (Eleventh Amendment) Act, 1991. President Ershad handed over power to Shahabuddin Ahmed, Chief Justice after appointing him as Vice-President. By this amendment all actions of the Care-Taker Government was ratified along with the appointment of Justice Shahabuddin Ahmed and his return to the Supreme Court as Chief Justice.
 12. Constitution (Twelfth Amendment) Act, 1991 restored Parliamentary form of Government. This amendment is very important as original Constitution was substantially restored.
 13. Constitution (Thirteenth Amendment) Act, 1996 introduced Non-Party Care Taker Government by introducing Chapter 11 A-in the Constitution. This was passed in the Sixth Parliament.

**THE CONSTITUTION OF THE
PEOPLE'S REPUBLIC OF BANGLADESH**

¹Bismillah-ar-Rahman-ar-Rahim
(In the name of Allah, The Beneficent, The Merciful)

PREAMBLE

We, the people of Bangladesh, having proclaimed our independence on the 26th day of March, 1971 and through ²[a historic war for national independence], established the independent sovereign People's Republic of Bangladesh;

³[Pledging that the high ideals of absolute trust and faith in the Almighty Allah, nationalism, democracy and socialism meaning economic and social justice, which inspired our heroic people to dedicate themselves to, and our brave martyrs to sacrifice their lives in the war for national independence, shall be the fundamental principles of the Constitution;]

Further pledging that it shall be a fundamental aim of the State to realise 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;

Affirming that it is our sacred duty to safeguard, protect and defend this Constitution and to maintain its supremacy as the embodiment of the will of the people of Bangladesh so that we may prosper in freedom and may make our full contribution towards international peace and co-operation in keeping with the progressive aspirations of mankind;

In our Constituent Assembly, this eighteenth day of Kartick, 1379 B.S. corresponding to the fourth day of November, 19~~71~~ A.D., do hereby adopt, enact and give to ourselves this Constitution.

Comments on Preamble

Basic Structure

High Ideals specified in the preamble contain the basic structure of our Constitution which cannot be amended in exercise of the power under Article 142 of the Constitution. The land mark judgment of the Appellate

¹The words, commas and brackets "Bismillah-ar-Rahman-ar-Rahim (in the name of Allah, the Beneficent, the Merciful)" were inserted by the proclamations (Amendment) order, 1977 (Proclamations Order No.1 of 1977).

²The words "a historic war for national independence" were substituted for the words "a historic struggle for national liberation", (*ibid*).

³The second paragraph was substituted for the former second paragraph, *ibid*.

Division in the Constitution (Eighth Amendment) case of *Anwar Hossain Chowdhury Vs. Bangladesh*, 41 DLR (AD) 165 may be read for consideration of the theory of "basic structure", wherein it has been held that preamble now is an entrenched provision of the Constitution which cannot be amended by the Parliament alone without a referendum as contemplated in Article 142(1A) of the Constitution. In our jurisdiction, the Constitution (Eight Amendment) case is the only case which has given a clear interpretation of the preamble but in Indian jurisdiction, the importance and utility of the preamble has been pointed out in several decisions of the Supreme Court of India. Ref. *Keshvananda Bharati V. State of Keral*, AIR 1973 SC 1461. The basic structure doctrine is now firmly established in the constitutional law of India. The Janata Government's efforts to enshrine the 'basic feature theory' in the Constitution of India, by requiring a referendum to amend four basic feature failed owing to congress opposition to the relevant amendments of Article 368 of the Constitution of India, as proposed by the 45th Amendment Bill, 1978. The four basic features mentioned in that Bill were – (i) Secular and democratic character of the Constitution; (ii) Fundamental rights under Part III; (iii) Free and fair elections to the legislatures; (iv) Independence of Judiciary.

The framers of our Constitution recognized the proclamation of Independence on the 26th day of March, 1971 and emergence of Bangladesh as an independent, sovereign nation through a historic war of national independence. The objectives specified as high ideals are, absolute trust and faith in the Almighty Allah, nationalism, democracy and socialism meaning economic and social justice which inspired our heroic people for the war of national independence.

One of the fundamental aims of our Constitution is to secure the rule of law for all citizens. Part VI (Judiciary), and other provisions have been incorporated in the Constitution in furtherance of that aim. The realization of all these objectives will increase manifold activities of the State for overall welfare of the citizens by establishing a welfare and socialistic State in Bangladesh.

Interpretation by Preamble

Looking at the preamble of our Constitution it can safely be said that it does not stand in the same footing with the preamble of a Statute. The preamble of a Statute cannot govern the substantive provisions of the statute. Normally, preamble is not recognised as a part of the Statue. And

if the provisions of a statute are clearly unambiguous then the substantive part of a statute will prevail over the preamble. In the case of *Anwar Hossain Chowdhury Vs. Bangladesh*, 41 DLR (AD) 165, the Appellate Division has taken note of aspirations of the people of Bangladesh and has given interpretation and meaning to the preamble in conformity with other constitutional provisions of the Constitution.

Preamble speaks of ideals of trust and faith in Almighty Allah, nationalism, democracy, socialism, rule of law, fundamental human rights, political, social and economic rights. As a matter of fact the preamble may be invoked to determine the ambit of (a) fundamental rights and (b) fundamental principles of State Policy, which are supposed to secure civil, economic, social and political rights of the citizens of Bangladesh. As a matter of fact the preamble spells out the aspirations of the people of Bangladesh.

In interpreting a constitutional provision not only the grammatical construction but also the intention of the framers of the Constitution are also to be looked into to avoid ambiguity.

Democracy

Democracy guarantees its citizens a number of fundamental rights that non-democratic systems do not, and cannot, grant. It ensures its citizens a broader range of personal freedom. It provides a maximum opportunity for persons to exercise the freedom or self determination - that is to live under laws of their own choosing. Only a democratic Government can foster a relatively high degree of political equality. It is seen that countries with democratic Governments tend to be more prosperous than countries with non-democratic Governments. Democracy is, for most of us, a better system than any attainable alternative system. It is the best possible form of Government, though it may not be all perfect. Democracy in theory, is based on a notion of equality of all citizens irrespective of race, colour, sex etc.

Economic and Social Justice

In all modern Constitutions social and economic rights are incorporated for the well being of common man. In keeping with the aspirations of the preamble, the Court should uphold legislation which enables for establishment of social justice. Economic and social justice means, to remove economic inequalities to provide a decent standard of living to the working people and to protect the interests of weaker sections

of the people in the society. It is now a standard practice to have explicit constitutional bill of rights in the Constitution.

Written Constitution

Ours is a written Constitution. The adoption of written Constitution has, however, become the practice of the day. In U.K., Israel and New Zealand, we find unwritten Constitutions.

An organic Law

Constitution is not to be construed as a mere law, but as the machinery by which laws are made. A Constitution is a living and organic thing which, of all instruments has the great claim to be construed broadly and liberally.

Secularism

It was one of the ideals in the original Constitution and the same was substituted by 'absolute trust and faith in Almighty Allah' by the Proclamation (Amendment) Order, 1977 (Proclamations Order No. I of 1977). The meaning of secularism in English-Bengali dictionary published by Sahitya Samsad is as follows : "রাজনীতি শিক্ষা প্রভৃতি ধর্মীয় শাসন হইতে মুক্ত থাকা উচিত এই মতবাদ" Secularism ensures freedom of religion. It not only guarantees a person's freedom of religion and conscience, but also ensures freedom for one who has no religion. The State cannot make any discrimination on grounds of religion. It treats all alike. As opposed to Bangladesh, India is a secular democratic Republic. Bangladesh has now a official religion.

Rule of Law

According to A.V. Dicey, Rule of Law means supremacy of law as opposed to the arbitrary authority of the Government. This supremacy guarantee three concepts:

- (1) Absence of arbitrary power;
- (2) equality before law; and
- (3) rights of citizen.

Fundamental Law

The Constitution of Bangladesh operates as a fundamental law of the land. All organs of the Government owe their origin and derive their authority from the Constitution. All organs of the Government are to discharge their responsibilities within the frame-work of the Constitution. The judiciary

has power to declare a law unconstitutional, if the law is found to have contravened any provision of the Constitution.

Sources of constitutional Law

The Constitution is a bare statement of facts of the different organs of the State, but the Constitutional law is supplemented by Act of Parliament, Judge made laws, conventions and practices. Article 152(2) of the Constitution of Bangladesh provides that the provisions of the General Clauses Act 1897 shall apply to the interpretation of the Constitution. Article 6 of our Constitution speaks that citizenship shall be regulated by law, Further an Act of parliament shall govern the method of election of the President by the members of the Parliament. Hence, legislation is a main source of constitutional law. Judicial decisions also form part of the constitutional law of Bangladesh. Conventions are not enforceable in a Court of law but those can attain the status of law by judicial interpretations. The authoritative books on constitutional law can be treated as a source of constitutional law but those have persuasive force only.

In the case *Anwar Hossain Vs. Bangladesh* reported in 41 DLR (AD) 165, at paragraph 53, B.H. Chowdhury, J. held as follows:

"We are relieved of the anxiety as to whether the preamble is a part of the Constitution or not as it has been the case in some other Country. Article 142(1A) stipulates that a Bill for amendment for the preamble and provisions of Article 8, 48, 56, 80, 92A and Article 142 when passed in the Parliament and presented to the President for assent "the President shall within the period of seven day after the Bill is presented to him, cause to be referred to a referendum the question whether the Bill should or should not be assented to." Hence, the preamble can only be amended by referendum and therefore is a part of the Constitution."

In the same decision at paragraph 496, M.H. Rahman, J has opined as under:

"This preamble is not only a part of the Constitution, it now stands as an entrenched provision that cannot be amended by the Parliament alone. It has not been spun out or gossamer matters nor it is a little star twinkling in the sky above. If any provision can be called the pole star of the Constitution then it is the preamble."

In the case of *Dr. Mohiuddin Farooque Vs. Bangladesh* reported in 49 DLR (AD) 1, Mustafa Kamal, J. held in paragraph 42 as follows:

"As for (ii) the Preamble and Article 7, the Preamble of our Constitution stands on a different footing from that of other Constitutions by the very fact of the essence of its birth which is different from others. It is in our

Constitution a real and positive declaration of pledges, adopted, enacted and given to themselves by the people not by way of a presentation from skilful draftsmen, but as reflecting the ethos of their historic war of independence. Among other pledges the high ideals of absolute trust and faith in the Almighty Allah, a pledge to secure for all citizens a society in which the rule of law, fundamental human rights and freedom, equality and justice, political, economic and social and the affirmation of the sacred duty of safeguard, protect and defend the Constitution and to maintain its supremacy as the embodiment of the will of the people of Bangladesh are salutary in indicating the course or path that the people wish to tread in the days to come. Article 7 of the Constitution bestows the powers of the Republic with the people and the exercise of the people's power on behalf of the people shall be effected only under and by the authority of the Constitution.

Article 7 does not contain empty phrases. It means that all the legislative, executive and judicial powers conferred on the Parliament, the Executive and the Judiciary respectively are constitutionally the powers of the people themselves and the various functionaries and institutions created by the Constitution exercise not their own indigenous and native powers but the powers of the people on terms expressed by the Constitution. The people, again, is the repository of all power under Article 7."

In the same decision, Latifur Rahman, J. in paragraph 71 held as follows:

"The Preamble of our Constitution really contemplates a society where there will be unflinching respect for the Rule of Law and the welfare of the citizens. Article 7 speaks of the supremacy of the Constitution. This supremacy of the Constitution is a special and unique feature in our Constitution. Neither in the Constitution of India nor in the Constitution of Pakistan there is reassertion of the supremacy of the Constitution. This is a substantive provision which contemplates exercise of all powers in the Republic through the authority of the Constitution."

PART I THE REPUBLIC

Article 1. The Republic.—Bangladesh is a unitary, independent, sovereign Republic to be known as the People's Republic of Bangladesh.

Comments on Article 1

Unitary Structure

The Constitution of Bangladesh is unitary in form and is marked by the traditional characteristic of a unitary system, namely, supremacy of the Constitution, division of power between the different organs of the State, existence of an independent judiciary and a rigid procedure for the amendment of the Constitution. There is an independent judiciary to determine issues between State and its citizens and between citizens and citizens. An amendment in respect of preamble, or any provisions of Article 8, 48 or 56 or 142 may be caused by referendum alone. Unitary system of government, is opposed to Federal system of Government, as in the case of American Federation and Indian Federal system. In our system of Government there is one central command i.e. one central government, whereas in a federal system there is a central government as well as State Governments with separate executive, legislative and judicial branches. In our unitary system, all administrative units and local government organizations derive their powers and jurisdictions from the single central authority. In the Constitution of America it has been clearly said that all Judicial power vests in the Supreme Court of the United States. Although there is no such vesting of judicial power by express words in our Constitution. Yet all judicial powers of the Republic are vested centrally in the Supreme Court of Bangladesh. In a unitary State, there will be one central constitutional Court with full plenary power. Our founding fathers have devised a composite Supreme Court to emphasis the oneness of the Supreme Court. Thus bifurcation and creation of Seven Permanent Benches outside capital with assigning separate territorial jurisdictions is contrary to the concept of unitary character of Bangladesh.

Sovereign

Sovereignty is the independent authority of the State. The external sovereignty of Bangladesh means that it is not under control of any outside State or external power, Bangladesh as an independent sovereign State can acquire foreign territory and also cede any part of Bangladesh territory.

The case of Mukhlesur Rahman reported in 26 DLR (SC) 44 illustrate the proposition.

From internal stand point it means the power to legislate on any matter in accordance with the Constitution and the fundamental rights enshrined in the Constitution. The doctrine of sovereignty also obliges the sovereign to protect the rights and privileges of the citizens of Bangladesh from external aggression.

Republic

It is opposed to aristocracy, monarchy, oligarchy or dictatorship. The Republican character is demonstrated in the idea that people are the repository of all powers in the Republic. The head of the State must be an elected functionary. The Constitution declares that the sovereignty lies with the people of Bangladesh.

Article 2. The Territory of The Republic—The territory of the Republic shall comprise—

- (a) The territories which immediately before the Proclamation of Independence on the 26th day of March, 1971 constituted East Pakistan¹ [and the territories referred to as included territories in the Constitution (Third Amendment) Act, 1974, but excluding the territories referred to as excluded territories in that Act; and]
- (b) Such other territories as may become included in Bangladesh.

Comments on Article 2

An agreement was entered into between India and Bangladesh on 16 May 1974 in Delhi between Sheikh Mujibur Rahman, Prime Minister of Bangladesh and Indira Gandhi, Prime Minister of India in respect of retaining Dahagram and Angorpota enclaves and giving up South Beribari to India. One Kazi Mukhlesur Rahman³⁶ challenged the legality of this Delhi agreement of 1974. In the case of *Kazi Muklesur Rahman Vs. Bangladesh*, 26 DLR (SC) 44, it was held that cession of territory cannot be done without constitutional amendment. Hence, the Constitution (Third Amendment) Act, 1974 was incorporated in the Constitution. Being a sovereign State, Bangladesh is free from any type of external control. It

¹ The words, brackets, commas, figure and semi-colon "and the territories referred to as included territories in the Constitution (Third Amendment) Act, 1974, but excluding the territories referred to as excluded territories in that Act; and" were substituted for the semi-Colon and word "; and" by the Constitution (Third Amendment) Act, 1974 (Act I XXIV of 1974) s. 3.

can acquire foreign territory and, if necessary, cede a Part of the territory in favour of another country, subject to certain constitutional requirements.

Thus it is elementary that a definite territory, Population, a Government and sovereignty constitute a State.

¹[**Article 2A. The state religion**— The state religion of the Republic is Islam, but other religions may be practised in peace and harmony in the Republic.]

Comments on Article 2A

Islam was recognised as the official religion of Bangladesh. The Constitution of India stands for a secular State. India has no official religion as opposed to Bangladesh.

It may be mentioned here that many countries viz. Ireland, Sweden, Norway, Denmark, Switzerland and Brazil have recognized Christianity and Jesus as religion.

Article 3. The state language—The state language of the Republic is ²[Bangla].

Article 4. (1) National anthem, flag and emblem—The national anthem of Republic is the first ten lines of "Amar Sonar Bangla".

- (2) The national flag of the Republic shall consist of a circle, coloured red throughout its area, resting on a green background.
- (3) The national emblem of the Republic is the national flower Shapla (*Nymphaea nouchali*) resting on water, having on each side an ear of paddy and being surmounted by three connected leaves of jute with two stars on each side of the leaves.
- (4) Subject to the foregoing clauses, provisions relating to the national anthem, flag and emblem shall be made by law.

Article 5. (1) The capital—The capital of the Republic is ³[Dhaka].

- (2) The boundaries of the capital shall be determined by law.

¹Article 2A. was inserted by the Constitution (Eighth Amendment) Act, 1988 (Act XXX of 1988), s.2.

²The word "Bangla" was substituted for the word "Bengali" *ibid*, s.3.

³The word "Dhaka" was substituted for the word "Dacca" *ibid*, s.4.

Article 1[6. (1) **Citizenship**— The citizenship of Bangladesh shall be determined and regulated by law.

(2) The citizens of Bangladesh shall be known as Bangladeshis].

Comments on Article 6

Two sets of law determine and regulate the citizenship of Bangladesh.

- (1) Bangladesh citizenship (Temporary Provisions) Order, 1972 (P.O.149 of 1972).
- (2) Citizenship Act, 1951.

Cases:

In the case of *Bangladesh -Vs- Professor Golam Azam*, 46 DLR(AD) 192, the question of respondent's citizenship came into question and on consideration of the relevant existing laws on Bangladesh Citizenship, M.H.Rahman,J. held at paragraph 9 as under:

“Citizenship may be acquired by birth or by naturalisation. A person who is deemed to be a citizen of Bangladesh under Article 2 is not required to take any oath of allegiance unless he is elected or appointed to any office mentioned in the Third Schedule of the Constitution. A naturalised citizen is, however, required to take oath of allegiance to the constitution of the People's Republic of Bangladesh.

To meet the requirements of the new situation that emerged out of the independence of Bangladesh President Over No.149 of 1972 was brought into existence on 15 December 1972, one day before the commencement of the Constitution so that it might get the constitutional protection of an existing law. The legislation bears marks of hurried drafting. It has undergone several amendments. At present law of citizenship is governed by two legislations the Citizenship Act, 1951, continued as an existing law by President's Order No.48 of 1972, but not yet revised for printing in the statute book, and the Bangladesh Citizenship (Temporary Provisions) Order 1972(President's Order No.149 of 1972). The instant case is governed by President's Order No.149 of 1972.”

In the same decision, Latifur Rahman,J. held at paragraph 191 as follows:-

¹ Article 6 was substituted for the former article 6 by the proclamation (Amendment) Order, 1977 (Proclamations Order No. I of 1977).

“Hence, legally speaking the commencement day of this order is the 15th December, 1972 and we are to see whether upto this date a person qualifies the tests as contained in Clause (1) of Article 2 of the Order. Clause (1) of Article 2 of the order only speaks of permanent residence on 25th day of March, 1971 and nowhere it has been mentioned that one is to be physically present at any point of time after 25th day of March, 1971. From the 26th day of March, 1971 upto 15.12.72 the investigation will be whether a person continues to be so permanently resident in Bangladesh upto the date of the commencement of the order. On other words, Article 2 of the order does not provide any mode for acquisition of citizenship of Bangladesh, subsequent to the commencement of the order.”

In the case of *Govt. of Bangladesh-Vs- M.S.Ispahani*, 40 DLR(AD) 116, the main contention of the Government was that the respondent cannot be deemed to be a citizen of Bangladesh within the meaning of the provisions of Articles 2 and 2A of the President's Order No.149 of 1972. This contention was rejected by the majority judgment. In that case, Shahabuddin Ahmed, J. held at paragraph 40 as under:

“Respondent does not come under clause (1) of Article 2, but his case is that he comes under clause (ii) in view of the fact that he was a permanent resident “of the territories now comprised in Bangladesh on the 25th March, 1971 and continued to be so. From before 25th March, 1971 he had been residing in U.K., first for study, then for the purpose of professional work. He did not physically continue to reside in Bangladesh but on the strength of Article 2A of President's Order No.149 of 1972, in spite of his residence in U.K. “he shall be deemed to continue to be permanent resident of Bangladesh.”

In the case of *Mukhtar Ahmed-Vs-Govt. of Bangladesh*, 34 DLR 29, the facts are like this that the petitioner migrated from India in 1951 and his domicile certificate was issued from Dhaka and he remained in Bangladesh. After liberation of the country he swore an affidavit of allegiance to Bangladesh in 1972 and he was a voter in the voters list prepared after liberation. He filed an application to the International Committee of Red Cross with a view to go over to Pakistan. The issue was whether in such circumstances he lost his citizenship. Rafiqur Rahman, J. held at paragraph 6 as under:

“The mere fact that he filed an application for going over to Pakistan cannot take away his citizenship. The Bangladesh Citizenship Order, P.O.149 of 1972, has enumerated different situations in which a person shall be deemed to be a citizen of Bangladesh, but it has not discriminated among its citizens no matter in which way they have become citizen of this country. So, the petitioner is on the same footing as any other citizen. His citizenship, therefore, clings to him.”

Article 7. (1) Supremacy of the Constitution—All powers in the Republic belong to the people, and their exercise on behalf of the people shall be affected only under, and by the authority of, this Constitution.

(2) This Constitution is, as the solemn expression of the will of the people, the supreme law of the Republic, and if any other law is inconsistent with this Constitution that other law shall, to the extent of the inconsistency, be void.

Comments on Article 7

The importance of Article 7 was discussed at great length in the Constitution (Eight Amendment) Case, 41 DLR (AD) 165. In this decision, Article 7 has been held as a Pole Star of our Constitution. Parliament is the creation of this Constitution and all powers flow from this Article 7 and as such no Parliament can amend it. Further, it was held in that decision that an amendment of the Constitution is not included in law within the meaning of Article 7 in the same way as it is not law in Article 26 of the Constitution. The fabric of the Constitution cannot be dismantled by Parliament as the amendment is to be tested with the touch stone of Article 7.

This article is of an unique nature and we do not find any corresponding article like this in the Constitution of India. Such reaffirmation of the Supremacy of Constitution and vesting of all powers to the people are seldom find in any Constitution of the world. There is clear assertion that this Constitution has been given to ourselves by the people of Bangladesh. The preamble and Article 7 envisage supremacy of the Constitution.

The Constitution operates as a fundamental law. The judiciary has power to declare a law void to the extent of its inconsistency, if the law is found to have contravened any provision of the Constitution.

PART II

FUNDAMENTAL PRINCIPLES OF STATE POLICY

Article 1 [8. (1) **Fundamental Principles**—The principles of absolute trust and faith in the Almighty Allah, nationalism, democracy and socialism meaning economic and social justice, together with the principles derived from them as set out in this Part, shall constitute the fundamental principles of state policy.

(1A) Absolute trust and faith in the Almighty Allah shall be the basis of all actions.]

(2) The Principles set out in this Part shall be fundamental to the governance of Bangladesh, shall be applied by the State in the making of laws, shall be a guide to the interpretation of the Constitution and of the other laws of Bangladesh, and shall form the basis of the work of the State and of its citizens, but shall not be judicially enforceable.

Comments on Article 8

The provisions in this Article are indeed in the nature of socio-economic policies which a good Government must aspire to implement for the good of the citizens. These fundamental principles when truly achieved will be a manifestation of a Welfare State. As a matter of fact, these fundamental principles of state policy have been interpreted as an embodiment of concept of Welfare State. These principles oblige the Government to create conditions in which the welfare of the common man could be achieved by the State. These fundamental principles do not confer any enforceable rights and their violation by the State dose not entitle a citizen to seek relief in a court of law. These principles shall be fundamental to the governance of the State and shall be applied by the State in the making of laws. If a law is made by the Parliament for implementation of the fundamental principles of State policy should be upheld, as far as possible As a matter of fact, the Supreme Court of India in various decisions when necessary, even constitutional provisions as to fundamental rights have been adjusted so as to give effect to the directive principles. Constitutional provisions (apart from fundamental rights) have been construed in the light of Directive Principles. In some of the decisions of Indian jurisdiction, harmonious construction has been given of Directive Principles and Fundamental Rights.

¹ Clauses (1) and (1A) were substituted for the former clauses (1) by the Proclamations (Amendment) Order, 1977 (Proclamations Order No. I of 1977).

Through judicial decisions various constitutional provisions are interpreted and the constitution gets a new dimension. If we look to some of the earlier cases of Indian jurisdiction then we find that the Supreme Court of India in the beginning upheld that the provisions of fundamental rights will prevail in case of conflict with the Directive Principles of State Policy. But in the later decisions, the same court did not find any conflict between Part II and Part III and on the contrary, both Fundamental Rights and the Directive Principles of State Policy were found to be supplementary and complementary to each other. This is how constitution develops gradually with the need of the time, through judicial pronouncement of the constitutional Court for the good of the people and society.

Cases :

In the case of *Kudrat-e-Elahi Panir-Vs- Bangladesh*, 44 DLR (AD) 319, Shahbuddin Ahmed, C.J. held about the importance of fundamental Principles of State Policy at paragraph 22 as under:

“They are in the nature of people’s programme for socio-economic development of the country in peaceful manner, not overnight, but gradually. Implementation of these programme require resources, technical know-how and many other things including mass-education. Whether all these pre-requisites for a peaceful, socio-economic revolution exit is for the state to decide.” //

In the case of *Dr. Mohiuddin Farooque-VS.-Bangladesh*, 49 DLR (AD) 1, Mustafa Kamal, J. held in paragraph 25 as under while interpreting Article 8 of our Constitution:

“The preamble and Article 8 also proclaim principles of absolute trust and faith in the Almighty Allah as a fundamental principles of State Policy. Absolute trust and faith in the Almighty Allah necessarily mean the duty to protect his creation, and environment. The appellants are aggrieved, because Allah’s creations and environment are in mortal danger of extinction and degradation.”

In the case of *Sheikh Abdus Sabur Vs. Returning Officer*, 41, DLR(AD) 30, it was held that it is judiciary that has to say the last word even in matters of propriety of legislation. The concept of legislative supremacy imported from the soil of a developed country cannot be transplanted into the soil of a developing nation which has a nascent democracy. In the same decision, the Appellate Division did not accept the theory of judicial enforceability of fundamental principles of State Policy.

In the case of *Saleemullah Vs. Justice Mohammed Abdul Quddus Chowdhury and other*. 41 DLR 691, the appointment of Justice Mohammed Abdul Quddus Chowdhury as Secretary, Ministry of Law was challenged on the ground that as a Judge he cannot be appointed as a Secretary to the Ministry of Law and further his appointment has violated Article 22 and other Articles of the Constitution. Abdul Matin Khan Chowdhury, J. repelled this argument by interpreting Article 8(2) of the Constitution and held at Paragraph 3 as follows:-

“In view of the above provision it is clear that although the separation of judiciary was one of the fundamental principles of the State Policy of the Government that cannot be enforceable in a court of law.”

In the case of *Aftabuddin (Md)-Vs- Bangladesh and others*, 48 DLR 3, Naimuddin Ahmed, J. while interpreting Article 8(2) of the Constitution observed in Paragraphs 45 and 46 that fundamental principles of State Policy act as guide to the interpretation of the Constitution and other laws of Bangladesh in view of Clause (2) of Article 8, but the fundamental principles of State Policies are not enforceable in a Court of law.

Article 9. **Promotion of local Government institutions**—The State shall encourage local government institutions composed of representatives of the areas concerned and in such institutions special representation shall be given, as far as possible, to peasants, workers and women.

Comments on Article 9

Local Government Institutions must be composed of representatives of the areas concerned, wherein as far as possible arrangement for special representatives of peasants, workers and women should be provided.

Cases :

In the case of *Sheikh Abdus Sabur Vs. Returning Officer, District Election Officer-In-Charge, Gopalganj and others*, 41 DLR(AD) 30, at paragraph 12 it has been held by the Appellate Division that fundamental principles as enunciated in Part II, are not judicially enforceable.

“While our Constitution recognizes the supremacy of the Constitution, it lays fundamental principles of the State Policy in Part II although the principles cannot be judicially enforced.”

In the case of *Ahsanullah Vs. Bangladesh*, 44 DLR-179, Md. Abdul Jalil, J. at paragraph 21 held that;

¹ Articles 9 and 10 were substituted for the former Articles 9 and 10, *ibid*.

"However Article 9 of the Constitution as quoted above is not mandatory provision but is an enabling one as it is a direction on the State to encourage Local Government Institution composed of representatives of the area concerned with special representation of pleasant, workers and women, as far as possible. There is no mandate that no Local Government Institution can be abolished if necessary. Hence the impugned ordinance cannot be said to be inconsistent with Article 9."

Article 10. Participation of women in national life—Steps shall be taken to ensure participation of women in all spheres of a national life.]

Article 11. Democracy and human rights—The Republic shall be a democracy in which fundamental human rights and freedoms and respect for the dignity and worth of the human person shall be guaranteed¹* * *²[, and in which effective participation by the people through their elected representatives in administration at all levels shall be ensured].

3 * * * * *

Cases on Article 11

In the case of Kudrad-E-Elahi Panir, 44 DLR(AD) 319, the Appellate Division took note of Articles 9 and 11 while construing provision of Article 59 and held that there is no scope for forming a local government body outside the provision of Article 59 or composed of non-elected persons. It is the duty of the State to organise local government institutions at Village, Union, Upazila and District levels. This Article also contemplates the participation of workers, peasants and women in local self governments.

Article 13. Principles of ownership—The people shall own or control the instruments and means of production and distribution, and with this end in view ownership shall assume the following terms—

¹ The comma and words “, and in which effective participation by the people through their elected representatives in administration at all levels shall be ensured” were omitted by the Constitution (Fourth Amendment) Act, 1975 (Act II of 1975), s.2.

² The comma and words “, and in which effective participation by the people through their elected representatives in administration at all levels shall ensured” were inserted by the Constitution (Twelfth Amendment) Act, 1991 (Act XXVIII of 1991), s. 2.

³ Article “12. Secularism and freedom of religion.” was omitted by the Proclamations (Amendment) Order, 1977 (Proclamations Order No.1 of 1977).

- (a) state ownership, that is ownership by the State on behalf of the people through the creation of an efficient and dynamic nationalised public sector embracing the key sectors of the economy;
- (b) co-operative ownership, that is ownership by co-operatives on behalf of their members within such limits as may be prescribed by law; and
- (c) private ownership, that is ownership by individuals within such limits as may be prescribed by law.

Comments on Article 11

In Bangladesh, we find the instruments and means of production and distribution are owned by State, co-operative management and Private Sector ownership.

Article 14. Emancipation of peasants and workers—It shall be a fundamental responsibility of the State to emancipate the toiling masses—the peasants and workers—and backward sections of the people from all forms of exploitation.

Article 15. Provision of basic necessities—It shall be a fundamental responsibility of the State to attain, through planned economic growth, a constant increase of productive forces and a steady improvement in the material and cultural standard of living of the people, with a view to securing to its citizens—

- (a) the provision of the basic necessities of life, including food, clothing, shelter, education and medical care;
- (b) the right to work, that is the right to guaranteed employment at a reasonable wage having regard to the quantity and quality of work;
- (c) the right to reasonable rest, recreation and leisure; and
- (d) the right to social security, that is to say, to public assistance in cases of undeserved want arising from unemployment, illness or disablement, or suffered by widows or orphans or in old age, or in other such cases.

Article 16. Rural development and agricultural revolution—The State shall adopt effective measures to bring about a radical transformation in the rural areas through the promotion of an agricultural revolution, the provision of rural electrification, the development of cottage and other

industries, and the improvement of education, communications and public health, in those areas, so as progressively to remove the disparity in the standards of living between the urban and the rural areas.

Article 17. Free and compulsory education—The State shall adopt effective measures for the purpose of—

- (a) establishing a uniform, mass-oriented and universal system of education and extending free and compulsory education to all children to such stage as may be determined by law;
- (b) relating education to the needs of society and producing properly trained and motivated citizens to serve these needs;
- (c) removing illiteracy within such time as may be determine by law.

Article 18. (1) Public health and morality—The State shall regard the raising of the level of nutrition and the improvement of public health as among its primary duties, and in particular shall adopt effective measures to prevent the consumption, except for medical purposes or for such other purposes as may be prescribed by law, of alcoholic and intoxicating drinks and of drugs which are injurious to health.

(2) The State shall adopt effective measures to prevent prostitution and gambling.

Article 19. (1) Equality of opportunity—The State shall endeavour to ensure equality of opportunity of all citizens.

(2) The State shall adopt effective measures to remove social and economic inequality between man and man and to ensure the equitable distribution of wealth among citizens, and of opportunities in order to attain a uniform level of economic development throughout the Republic.

Article 20. (1) Work as a right and duty—Work is a right, a duty and a matter of honour for every citizen who is capable of working, and everyone shall be paid for this work on the basis of the principle “from each according to his abilities to each according to his work”.

(2) The State shall endeavour to create conditions in which, as a general principles, persons shall not be able to enjoy unearned incomes, and in which human labour in every form intellectual and physical, shall become a further expression of creative endeavour and of the human personality.

General Comments

It is no doubt, the duty of the State to provide for basic necessities of life for its citizens, provide for employment opportunities, bring equal development of rural and urban life, provide for free and compulsory education and improve public health and morality, but all these developments depend on the economic resources of the State.

Article 21. (1) Duties of citizens and public servants—It is the duty of every citizen to observe the Constitution and the laws, to maintain discipline, to perform public duties and to protect property.

(2) Every person in the service of the Republic has a duty to strive at all times to serve the people.

Comments on Article 21

It is incumbent on every citizen in our country to understand and observe the Constitution. It is unfortunate that the people of our country are apathetic towards the Constitution and are not at all conscious to perform public duties and to protect public property. Observance of the Constitution will in reality, enable a person to be a good citizen in our country. A duty is also cast on a public servant of the Republic to serve the people with honesty and dedication.

Article 22. Separation of Judiciary from the executive—The State shall ensure the separation of the judiciary from the executive organs of the State.

Comments on Article 22

This Article is incorporated in the Constitution of Bangladesh since its inception, but no government till today has implemented the separation of the Judiciary from other executive organs of the State. The Appellate Division of the Supreme Court in the case of *Secretary, Finance, Government of Bangladesh Vs. Masdar Hossain, 2000 BLD(AD) 104*, judgment delivered on 19.12.1999, gave clear direction to the Government to implement twelve directions within six months and thereby to separate the judiciary.

It may be mentioned here that during the Care-Taker Government of 2001, necessary Rules and ordinances were framed by the Ministry of Law, Justice and Parliamentary Affairs, but those could not be implemented at that time. The directives of the highest court is still not implemented by the Government and on the contrary, Government is taking time from the Appellate Division on various grounds. It may be

mentioned here that in India, Judiciary has been separated from the executive in accordance with the directive principles of the State Policy as per Article 50 of the Constitution of India. At the present time, there are two classes of Magistrates-Executive Magistrates and judicial magistrates. The judicial magistrates discharge all judicial functions, subject to the judicial control of respective High Courts of India (Vide Durga Das Basu's Constitution of India, Twelfth edition).

Case :

In the case of *Secretary, Ministry of Finance Vs. Md. Masdar Hossain*, 20 BLD(AD) 104, Latifur Rahman, J. observed at paragraph 75 as under:-

“Article 22 of the Constitution provides that the State shall ensure the separation of judiciary from the executive organs of the State. Though more than 29 years have elapsed since making of the Constitution and its coming into force no effective steps have been taken to separate the judiciary from the executive organs of the State.”

The twelve directions of the case of Masdar Hossain as given by Mustafa Kamal, C.J. are 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.
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, 1975 have no application to the above matters in respect of judicial service and magistrate 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 for 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 and 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, allowance 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. 116 A, elaborated in the judgement, 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 limits 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 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 Judiciary 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.”

Article 23. National culture—The State shall adopt measures to conserve the cultural traditions and heritage of the people, and so to foster and improve the national language, literature and the arts that all sections of the people are afforded the opportunity to contribute towards and to participate in the enrichment of the national culture.

Article 24. National monuments, etc.—The State shall adopt measures for the protection against disfigurement, damage or removal of all monuments, objects or places of special artistic or historic importance or interest.

Article 25.¹(1) **Promotion of international peace, security and solidarity**—The State shall base its international relations on the principles of respect for national sovereignty and equality, non-interference in the internal affairs of other countries, peaceful settlement of international disputes, and respect for international law and the principles enunciated in the United Nations Charter, and on the basis of those principles shall—

- (a) strive for the renunciation of the use of force in international relations and for general and complete disarmament;
- (b) uphold the right of every people freely to determine and build up its own social, economic and political system by ways and means of its own free choice; and
- (c) support oppressed peoples throughout the world waging a just struggle against imperialism, colonialism or racialism.

²[(2) The State shall endeavour to consolidate, preserve and strengthen fraternal relations among Muslim countries based on Islamic solidarity].

Comments on Article 25

Under this Article, promotion of international peace, security and solidarity of the Government of Bangladesh with other countries particularly with muslim countries are to be maintained and strengthened.

Case :

In the case of *M. Saleemullah, Advocate, Supreme Court of Bangladesh, High Court Division, Dhaka Vs. Bangladesh*, 47 DLR-218, A.M.Mahmudur Rahman, J. while interpreting Article 25 of the Constitution held in paragraph 7 as follows:

“For the purpose of disposal of this petition Articles 25(I)(b) is relevant. Our reading of this Sub-Article vis-a-vis Chapter VII of the U.N. Charter and the Resolution No.940 does not impress us to hold that there is any infringement of Sub-Article (1)(b) of Article 25 in taking decision to participate in U.N. Sponsored multinational force in Haiti and to send troops. Sub-Articles (1)(e) and (2) have no relevancy for our purpose. Rather the decision in our view, has been taken on the principles enunciated in the United Nations Charter which is in no way against the

¹ Article 25 was renumbered as clause (1) of that Article by the Proclamations (Amendment) Order, 1977 (Proclamations Order No.I of 1977).

² Clause (2) was added, *ibid*.

fundamental principles of State Policy. The decision of the Government of the People's Republic of Bangladesh is in consonance with the spirit of the fundamental principles of State Policy and in accordance with Chapter VII of the Charter of the U.N."

The contention of the learned Advocate of the petitioner that the decision of the Government of Bangladesh was against Article 25 of the Constitution was negated by the learned Judges in the above terms in the said judgment.

In the case of *Saiful Islam Dilder Vs. Bangladesh*, 50 DLR-318, A.M.Mahmudur Rahman,J. interpreted Article 25 of the Constitution and opined that fundamental principle of State Policy cannot be enforced by court, nevertheless the fundamental principles of State Policy is fundamental to the governance of Bangladesh, and serve as a tool in interpreting the Constitution on the strength of Article 8(2) of the Constitution. Paragraph 6 of the decision reads as follows:

"The learned Advocate relying upon Article 25 of our Constitution contended that Anup Chatia, if extradited to India the government would violate the mandate of Article 25. The contention on the facts of this case is totally misconceived. Rather the Government can take help of Article 25 for the purpose to extradite Anup Chatia to Indian Authority in order to base its international relations on the principle of 'respect for national sovereignty and equality, non-interference in the internal affairs of other countries."

PART III FUNDAMENTAL RIGHTS

Article 26. (1) Laws inconsistent with fundamental rights to be Void- All existing law inconsistent with the provisions of this part shall, to the extent of such inconsistency, become void on the commencement of this constitution.

(2) The state shall not make any law inconsistent with any provisions of this Part, any law so made shall, to the extent of such inconsistency, be void.

¹[(3) Nothing in this Article shall apply to any amendment of this constitution made under Article 142]. ↵

Comment on Article 26

Many third world countries which achieved independence after the second World war adopted fundamental rights in their written constitutions. These rights are in the nature of bill of rights. The framers of the constitutions of those third world countries had before them the Universal Declaration of Human Rights as adopted by the United Nations General Assembly in 1948. 30 Paragraphs of Universal Declaration of Human rights charter mentioned all conceivable rights for mankind. As a matter of fact, Part II & III of our constitution are akin to two covenants, namely, (1) Covenants on Civil and Political rights and, (2) Covenants on economic, social and cultural rights which were adopted by the United Nations General Assembly in 1966.

A.V. Dicey in his book, 'An Introduction of the study of the law of the constitution' has elaborated as a proposition of Law of the United Kingdom that parliament has the right to make or unmake any law whatever. Nor can any Court within the United Kingdom set aside the Provisions of an Act of parliament. All that a court of law can do with such an Act is to apply it i.e. to interpret the meaning of the enactment. This is enough to satisfy the lawyer, but it must be admitted that the concept is purely a legal one. As a matter of fact, no person or body is recognised by the law of England as having a right to override or set aside the legislation of parliament. The United Kingdom has no fundamental rights at all in the constitution as, we have, because it has no written Constitution.

¹ Clause (3) was added by the constitution (Second Amendment) Act, 1973 (Act XXIV of 1973), s. 2.

Thus in United Kingdom the sovereignty of Parliament is recognised as supreme in making laws and those cannot be set aside by a Court of law. Whereas in the case of a country, that is India, Bangladesh and the United States which is governed by a written constitution, the legislative power of the Parliament is subject to Judicial review in the light of constitution of these countries. There is no idea of unlimited authority of the Parliament of Bangladesh as evident from Article 26 of our Constitution. This constitutional provision defines the parameters within which Parliament can function. If Parliament transgresses those functions, then the legislation is declared as invalid and unconstitutional.

Further, fundamental rights as enumerated in this part are also qualified by reasonable restrictions otherwise rights of others will not be secured in a society. Absolute right will create chaos in the society and the equilibrium of society and governmental actions will suffer.

The main object of Article 26 is to secure the supremacy of the constitution in regards to fundamental rights. The clauses (1)&(2) refer to pre-constitution and post constitution laws. The first clause relates to existing laws in force and declares that those laws will become void to the extent to which they are inconsistent with the fundamental rights. The second clause prohibits the State from making a law which either takes away totally or abrogates in part a fundamental right. All pre-constitutional laws shall be void on the date of commencement of the constitution, whereas in case of post constitutional laws, shall be void on the date of the enactment of the law. The third clause clearly says that this Article shall not apply to any amendment of the constitution made under Article 142. Thus the constitutional amendment does not fall within definition of law as per Article 26. The constitution (Eight Amendment) case reiterates this view.

In Indian Jurisdiction, (1) the case of *Keshavananda -VS- State of Punjab*, AIR 1973 SC 1461 and (2) *Minerva Mills -VS- Union of India*, ALR 1980 SC 1789, which, while upholding the validity of amendment held that certain basic features which could not be amended under the amending power. As a matter of fact these above decisions while declaring that there shall be no limitation whatsoever on the constituent power of parliament to amend, by way of addition, variation or repeal, the provisions of the constitution under Article 368 of the Indian Constitution cannot touch the basic feature of the constitution. Judicial review is excluded in relation to the concept of basic feature and such amendment will be void. In our jurisdiction, the case of *Anwar Hossain -VS-*

Bangladesh, 41 DLR (AD) 165, popularly known as the Constitution (Eight Amendment) case has also expressed the same view. In that decision, Shahabuddin Ahmed, J. held at paragraph 381, as under:

“As to the constituent power, that is power to make a constitution, it belongs to the people alone. It is the original power. It is doubtful whether it can be vested in the Parliament, though opinion differ, people after making a constitution give the Parliament power to amend it in exercising its legislative power strictly following certain special procedures. Constitutions of some countries may be amended like any other statues following the ordinary legislative procedure. Even if the ‘constituent power’ is vested in the Parliament the power is a derivative one and the mere fact that an amendment has been made in exercise of the derivative constituent power will not automatically make the amendment immune from challenge. In that sense there is hardly any difference whether the amendment is a law, for it has to pass through the ordeal in validity test. My considered opinion therefore is that an amendment of the Constitution is not included in ‘law’ within the meaning of Article 7 in the same way as it is not law in Article 26.”

Article 27. Equality before law—All citizens are equal before law and are entitled to equal protection of law.

Comment on Article 27

This Article refers to ‘equality before law’ and ‘equal protection of law’. The idea as contained in this Article is a combination of the English concept of ‘equality before law’ and the American concept of ‘equal protection of laws’. The first and foremost right which has been made justiciable under Part III of our constitution is the right to equality before the law and the equal protection of laws. The doctrine of equality is one of the most difficult doctrines to apply to real life situations. The Courts have therefore evolved some principles on the basic of equality and non-discrimination can be tested. These principles are as follows:-

1. Discrimination, whether under substantive or procedural law, would be unconstitutional.
2. It is permissible to classify individuals into different groups on the basic of certain criteria which are relevant to the set of facts requiring differentiation. Members who are similarly situated in the given set of facts must be treated similarly. However, one can have legislation which makes a distinction between members belonging to

different i.e. non-homogenous, classes, permissible classification for this purpose must be based on two criteria.”

Several decisions of the Supreme Court of Bangladesh have judicially enunciated two conditions, namely,

- (a) The classification must be founded on an intelligible differential which distinguishes those that are grouped together from others.
- (b) The differential must have a rational relation to the object sought to be achieved by the law under challenge.

Case :

In the case of *Sheikh Abdus Sabur –Vs- Returning Officer, District Education Office-in-charge, Gopalgong others*, 41 DLR (AD) 30, Shahabuddin Ahmed, J. at paragraph 29 has spelt out the above two criteria, which runs as follows:

“Equality before law’ is not to be interpreted in its absolute sense to hold that all persons are equal in all respects disregarding different conditions and circumstances in which they are placed or special qualities and characteristics which some of them may possess but which are lacking in others. The term ‘Protection of equal law’ is used to mean that all persons or things are not equal in all cases and that persons similarly situated should be treated alike. Equal protection is the guarantee that similar people will be dealt with in a similar way and that people of different circumstances will not be treated as if they were the same. A single law therefore cannot be applied uniformly to all persons disregarding their basic differences with others; and if these differences are identified, then the persons or things may be classified into different categories according to these distinctions; this is what is called ‘permissible criteria’ or ‘intelligible differentia’. The legislature while proceeding to make law with certain object in view, which is either to remove some evil or to confer some benefit, has power to make classification on reasonable basis, classification of persons for the purpose of legislation is different from class legislation, which is forbidden. To stand the test of ‘equality’ a classification besides being based on intelligent differentia, must have reasonable nexus with the object the legislature intends to achieve by making the classification”.

Reasonableness:-

Classification which is unreasonable can be challenged in Court and to this extent the policy of legislation is open to scrutiny by Court. The element of reasonableness is an important criteria in determining rights to equality.

This aspect is decided in the following decisions of both the Divisions of the Supreme Court.

- (i) *Nurul Islam –VS- Secretary, Ministry of Law*, 46 DLR (AD) 188
- (ii) *Retired Govt. Employees –VS- Bangladesh*, 46 DLR 427.
- (iii) *Abdul Mannan Khan –VS- Bangladesh*, 42 DLR 316.

Discrimination:

In the case of *A.B Mohiuddin Ahmed, Executive Engineer –VS- Bangladesh at others*, 49 DLR-353, it was held as such; classification of those who failed in the examination for the first time like the petitioner and those who did not appear at all in such examination or failed to appear in such examination into two categories has a reasonable basis is and an intelligible differentia. Subsequently passing of one who failed earlier in such examination though securing highest position like the petitioner is immaterial as the stigma of failure sticks to him. The classification of the two categories of officers is not discriminatory.

Equal and unequals:

Unequals are not only permitted to be treated unequally but also they are to be so treated. Under mentioned cases illustrate the above propositions:

- (i) *Bangladesh –VS- Md. Azizur Ahmed*, 46 DLR (AD) 19.
- (ii) *Secretary of Aircraft Engineers of Bangladesh & another –VS- Registrar of Trade Unions others*, 45 DLR (AD) 122.
- (iii) *Nurul Islam another –VS- The Secretary, Ministry of Law, Justice & others*, 46 DLR (AD)-189

Equal Protection of Law.

An accused person who is poor and cannot engage a lawyer where the charge is of an offence punishable with imprisonment for life, he is entitled to be offered legal aid. In our parliament, the Legal Aid Ain, 1999 has been passed and the workings of the legal aid in various districts have been adopted in that act. Legal aid in reality will help fair trial of a weaker

and disadvantaged person in our society. Through the help of legal aid a citizen is entitled to equal protection of law.

In the case of *Sheikh Abdus Sabur -VS- Returning Officer & ors*, 41 DLR AD 30, A. T. M. Afzal J. has interpreted Article 27 of our Constitution, while considering the disqualification clause in section 7(2)(g) of U.P. Ordinance, 1983, whereas there is no corresponding disqualification for a person seeking election to Parliament, though he has alike defaulted in repaying the same kind of loan.

“On consideration of the views expressed by these distinguished Judges and authors as to the meaning of the equality before law and equal protection of the law”, I do not think that I will be able to define this term in a better way. “Equality before law” is not to be interpreted in its absolute sense to hold that all persons are equal in all respects disregarding different conditions and circumstances in which they are placed or special qualities and characteristic which some of them may possess but which are lacking in others. The term ‘Protection of equal law’ is used to mean that all persons or things are not equal in all cases and that persons similarly situated should be treated alike. Equal protection is the guarantee that similar people will be dealt with in a similar way and that people of different circumstances will not be treated as if they were the same. A single law therefore cannot be applied uniformly to all persons disregarding their basic differences with others; and if these differences are identified, then the persons or things may be classified into different categories according to those distinctions; this what is called ‘permissible criteria’ or intelligible differentia. The legislature while proceeding to make law with certain object in view, which is either to remove some evil or to confer some benefit, has power to make classification on reasonable basis. Classification of persons for the purpose of legislation is different from class legislation, which is forbidden. To stand the test of ‘equality’ a classification, besides being based on intelligent differentia, must have reasonable nexus with the object the legislature intends to achieve by making the classification. A classification is reasonable if it aims of giving special treatment to a backward section of the population; it is also permissible to deal out distributive justice by taxing the privileged class and subsidizing the poor section of the people. What is of fundamental importance in law-making is that while making a classification the legislature shall not act arbitrarily but make selection on rational basis.”

In the light of the above discussion, the learned Judge ultimately held that Section 7(2)(g) of the Union Parishad Ordinance, 1983, is not discriminatory but is constitutionally valid.

In the case of *Abdus Sattar (Md.) Vs. Bangladesh*, 45 DLR (AD) 65, a question was raised as to whether barring a thrice-elected member of the Managing Committee of a Co-operative Association to stand for election again till lapse of two years since his last term expired as provided in section 19(2) of the Co-operative Societies Ordinance is an unreasonable restriction under Article 27 of our Constitution.

Mustafa Kamal, J. in that case at paragraph 5, answered the point in the following words:

"While the proverb "old is gold" has a fatal attraction, another proverb "the old order changeth yielding place to new" is equally honoured, which proverb to follow in what given situation is a legislative exercise and it cannot be said that barring a thrice-elected member of the Managing Committee to stand for election again till lapse of 2 years since his last term expired, is an unreasonable restriction. The petitioner has not been unequally treated at all because on being elected for 3 consecutive terms he has himself achieved inequality with and superiority to others who did not have the opportunity of being elected for three consecutive terms."

In the case of *Mafizur Rahman Vs. Government of Bangladesh*, 34 DLR (AD) 321.

The appellant was retired from his service on completion of 25 years of service under section 9(2) of the Public Servants (Retirement) Act, 1974. It was argued before the Court, inter alia, that the order was malafide, that the punishment was imposed without hearing him, and that section 9(2) of the Act was violative of Articles 27 and 29 of the Constitution. In that case it was held that parliament is the supreme legislative body subject to the constitutional limitations. It can equally validate, subject to the Constitution, any law earlier found invalid either prospectively or retrospectively by a Court of law by removing the cause of illegality or infirmity.

K. Hossain, C.J. held at paragraph 5 as under:

"The validity of a validating law is to be judged by three tests. The first, is to see whether parliament is clothed with the legislative power on the subject. The second is whether by validation, Parliament has removed the defect which the Court found in the earlier law. And thirdly, whether the validating law is consistent with the provision of the Constitution. When all the three tests have been fulfilled, the validation law may operate retrospectively, if Parliament so expresses it in the validating enactment. The invalidity of a law may be owing to some legislative incompetence

or to its repugnancy to any of the fundamental rights and they can be cured in the manner set out above."

In that decision, the earlier case of *Dr. Nurul Islam Vs. Government of Bangladesh*, 33 DLR (AD) 201 was referred to wherein section 9(2) of Act No.XII of 1974 was found violative of Articles 27 and 29 of the Constitution in the absence of any principle or guide-line provided therein for exercising the discretion as to which of the Government servants who have completed 25 years of service should be retired. Eight months after the judgment the amendment was brought in by promulgating Ordinance No.VI of 1981 to this effect in section 9(2) which reads as follows :

"The Government may, if it considers necessary in the public interest so to do, retire from service a public servant at any time after he has completed twenty five years of service, without assigning any reason."

Having tested the validity of the validation provision, the above-amended section was found to be constitutionally valid.

In an unreported case of *Md. Shamsuddin Ahmed Vs. Janata Bank and others*, C.P.S.L.A. No.18 of 1972, judgment delivered on 28.5.1974, a question was raised as to whether the direction given by the Assistant General Manager (Personnel) to an employee of Janata Bank to undergo practical training in general Banking for two years is violative of Article 27 of our Constitution. No other officer of the petitioner's status and experience in the employment of the Bank was formally asked to undergo such training. In the leave petition it was contended that the impugned order was discriminatory. The contention of the petitioner was rejected and the leave petition was dismissed on the finding that order of the Bank was not discriminatory. Further, the petitioner could not produce any material to show that the intention of the Bank authority in passing such order is malafide. Consequently the Appellate Division found the impugned order not violative of Article 27 of our Constitution.

The brief facts of the case, *Dr. Nurul Islam Vs. Bangladesh*, 33 DLR (AD) 201 are that the appellant who was a Director and Professor of medicine of the Institute of Post-Graduate and Research was retired of his duties as Professor of medicine and was to continue to as Director of the Institute which was non-practicing post. The appellant challenged this notice in Writ Petition No.571 of 1971 and the same was made absolute by the High Court Division. Thereafter Government retired the appellant from service under sub-section (2) of section 9 of Public Servants

(Retirement) Act, 1974 as the appellant completed 25 years of service. This order was again challenged in the High Court Division but with no success.

In the Appellate Division, the order of retirement was challenged on the ground that it is ultra vires of the provisions of Articles 27 and 29 of the Constitution and the same is also violative of Article 135 of the Constitution.

In that case, the main judgment was written by F. Munim, J. wherein his Lordship held at paragraph 76 as under :

"As already observed, the impugned action was taken to circumvent the judgment of the High Court Division passed in Writ Petition No.571 of 1971, and also liable to be struck down on the ground of malice in law which form the basis of action. I declare that section 9(2) of the impugned Act in so far as it empowers to retire a Government servant is unconstitutional and the impugned notification issued thereunder is violative of Articles 27 and 29 of the Constitution and, therefore, void."

In that decision, the majority judgment declared section 9(2) of the Public Servants (Retirement) Act, 1974 as ultra vires of the Constitution. Most of the Judges held that there is scope of arbitrary action by the Government as absence of principle of guide-line in section 9(2) of the Act. Further, the action is a clear proof of malice in law, used for a collateral purpose to defeat the earlier judgment and there is nothing to indicate that the action was taken on the ground of "public interest".

In the case of *Dr. Nurul Islam Vs. Bangladesh*, 33 DLR 201, Article 27 of the Constitution which speaks of "entitled to equal protection of law" was interpreted by R. Islam, J. at paragraph 87 as under:

"The principle on which the doctrine of equal protection of laws is founded is that persons in similar circumstances must be governed by the same laws. The legislative classification by itself does not offend against the principle of equal protection of the laws provided the law operates equally in all members of the said class or group. For valid legislation, classification must be reasonable for the purpose of legislation, should be based on proper and justifiable distinction, should not be clearly arbitrary and should have all reasonable relation to the objects and to the public purpose sought to be achieved by the legislation."

In the case of *Bangladesh Vs. Azizur Rahman*, 46 DLR (AD) 19, Shahabuddin Ahmed C.J. while interpreting Article 27 of the Constitution observed in paragraph 22 as follows :

"Classification of persons for making a law is permissible. This classification is not class legislation. The term "equality before law" should not be interpreted in its absolute sense to hold that all persons are equal in all respects disregarding different conditions and circumstances in which they are placed or special quality and characteristics which some of them may possess but which are lacking in others. In fact, this term means that all persons are not equal in all respects and that persons similarly situated should be treated alike. Equal protection of law is a guarantee that similar people should be dealt with in a similar way and that people of different circumstances will not be treated as if they were the same. A single law therefore cannot be applied uniformly to all persons disregarding the basic differences among them, and if these differences are identified, then the persons may be classified into different groups or categories according to those distinctions. Therefore a classification is reasonable if it is made to give special treatment to a backward section of the people. It is also permissible to dole out distributive justice by taking the privileged class and subsidizing the poor section of the people. A classification based on distinct characteristics cannot be assailed as arbitrary. Secondly, a classification to be reasonable it must have direct nexus to the object which the classification seeks to achieve."

In Public Demands Recovery Act (No.III of 1913) section 10A was added for quick recovery of loan from the defaulting borrowers. Section 10A was challenged by a writ petition, inter alia, that it is harsh, against principle of natural justice and violative of Articles 27 and 31 of our Constitution. In the case of *Bangladesh Krishi Bank Vs. Meghna Enterprises and another*, 50 DLR (AD) 194, Latifur Rahman, J. held at paragraph 9 as follows :

"It is the policy of the legislature to make an enactment to that effect. Can we say that the law is bad because it is not in consonance with the principle of natural justice and it is harsh and arbitrary? Certainly not.

.....

As a matter of fact, the learned Judges of the High Court Division in their judgment did not elaborate as to how section 10A of the Act is violative of Articles 27 and 31 of the Constitution, other than mentioning that it is arbitrary and violates the principles of natural justice. It appears that the learned Judges failed to appreciate the true import of Article 27 which speaks of equality before law and Article 31 which speaks of protection of the law and to be treated in accordance with law."

As a matter of fact defaulting borrowers are situated differently from non-defaulting borrowers.

In the case of *City Bank Ltd Vs. Bangladesh*, 51 DLR (AD) 262, Mustafa Kamal CJ interpreted Article 27 of our Constitution and held in paragraph 15 as under:

"We are of the opinion that the embargo on banks, insurance companies and other financial institutions to nominate its directors on the Board of a financial institution is based on a reasonable classification. It appears to us to be obvious that the legislative policy is to exclude the same set of persons to manage, control, regulate and monopolize the policy-making functions of capital-generating financial institutions. A textile manufacturing company is generating goods and it may not be immoral from the point of view of financial policy to allow the directors of such a company to be represented on the Board of a financial institution in which the textile manufacturing company may have share holding interest. But it appears to be the policy of the legislature that directors of capital-generating institutions should not be allowed to flock together in a financial institution to control and monopolize the capital market."

In the case of *ETV Ltd. Vs. Dr. Chowdhury Mahmood Hasan*, 54 DLR (AD) 130, K.M. Hasan, J. while interpreting Article 27 of our Constitution observed at paragraph 59 as follows:

"Law requires that subsequent change of terms and conditions of tender must be relayed to each and every participants so that all the participants can avail of the equal opportunity while participating in the tender. But in this case subsequent change of conditions were kept secret to other participants. As a result of which requirement of law are not met with and other participants were discriminated and deprived of participation in the tender on equal terms."

In the case of *Bangladesh Biman Corporation -Vs. Md. Yousuf Horoon Ors*, 23 BLD (AD) 110, Bangladesh corporation Employees (Service) regulations, 1979 was found valid as it was not devoid of any guideline and was not violative of Articles 26 and 27 of the constitution. (Para 27)

Article 28. (1) **Discrimination on grounds of religion, etc.**—The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex or place of birth.

(2) Women shall have equal rights with men in all spheres of the State and of public life.

- (3) No citizen shall, on grounds only of religion, race, caste, sex or place of birth be subjected to any disability, liability, restriction or condition with regard to access to any place of public entertainment or resort, or admission to any educational institution.
- (4) Nothing in this Article shall prevent the State from making special provision in favour of women or children or for the advancement of any backward section of citizens.

Comments on Article 28

The principle of equality laid down in Article 27 is spelt out for certain situations in greater detail in Article 28. Article 28, clauses (1) and (2) are both limited to discrimination on the ground of religion, race, caste, sex or place of birth or any of them. Clause (3) speaks of non-restriction of access in any public entertainment or resort, or admission to any educational institution on grounds of religion, race, caste, sex or place of birth. Clause (4) of this article permits the State to make special provision for women, children and for the advancement of any backward section of citizens. As a matter of fact, this article projects the citizen against discrimination. The State cannot discriminate only on the grounds as mentioned in Article 28, but with some other rational factor, the discrimination would be valid. The crucial word in this Article is discrimination which means making an adverse distinction with regard to or distinguishing unfavorably from others.

In the case of *Dr. Ahmed Hossain Vs. Bangladesh and others*, 44 DLR (AD) 109, a question was raised as to whether after the period of reservation of thirty women seats having expired, the Constitution (Tenth Amendment) Act, 1990 could extend the time for further ten years. M.H. Rahman, J. held in paragraph 6 as follows:

"A system of indirect election cannot be called undemocratic. It is provided in the Constitution itself. The amendment is not also violative of Article 28. Clause (4) in Article 28 provides that nothing in that Article shall prevent the State, which expression includes Parliament, from making special provision in favour of women."

Article 29. (1) Equality of opportunity in public employment—There shall be equality of opportunity for all citizens in respect of employment or office in the service of the Republic.

- (2) No citizen shall, on grounds only of religion, race, caste, sex or place of birth, be ineligible for, or discriminated against in respect of, any employment or office in the service of the Republic.
- (3) Nothing in this Article shall prevent the State from —

- (a) making special provision in favour of any backward section of citizens for the purpose of securing their adequate representation in the service of the Republic;
- (b) giving effect to any law which makes provision for reserving appointments relating to any religious or denominational institution to persons of that religion or denomination;
- (c) reserving for members of one sex any class of employment or office on the ground that it is considered by its nature to be unsuited to members of the opposite sex.

Comments on Article 29

The main object of this article is to create a Constitutional right to equality of opportunity and employment in public offices. It is confined to employment or appointment to an office under the Republic. Clauses (1) & (2) of this Article speak of certain positive rights and clauses 3(a)(b) and (c) are certain exceptions in respect of which the State can make laws for reservation of any backward sections of citizens, if not adequately represented in the Service of the Republic, and prescription of professing a particular religion or belonging to a particular denomination, if the office is in connection with the affairs of any religious or denominational institution. Law can be made reserving any class or employment or office for one sex on the ground that the nature of employment is unsuited to the members of the opposite sex. In reality, clause (3) of Article 29 gives a permissible basis. Broadly, equality of opportunity in public employment is provided in general terms, but Article 29(2) prohibits discrimination against a citizen on the ground of religion, race, caste, sex or place of birth.

In the case of Bangladesh Vs. Azizur Rahman, 46 DLR (AD) 19, Latifur Rahman, J. will interpreting Article 29 of the Constitution, "Equal opportunity" held at paragraph 44 as under :

"The guarantee of "equal opportunity" in respect of employment is available at the stage of initial appointment and of promotion. Merely because chances of promotion of the writ petitioners may be said to have been affected by the impugned Rules of 1990 would not amount to denial of equality of opportunity in respect of the employment, as chances of promotion are not condition of service. As a matter of fact, no writ petitioners have been deprived of the right to be considered for promotion and, as such, the submission that they have been denied the right of equal opportunity in respect of future employment is untenable and there is in fact no violation of Article 29(1) of the Constitution."

Article 1[30. Prohibition of foreign titles, etc.]—No citizen shall, without the prior approval of the President, accept any title, honour, award or decoration from any foreign state.]

Article 31. Right to protection of law—To enjoy the protection of the law, and to be treated in accordance with law, and only in accordance with law, is the inalienable right of every citizen, wherever he may be, and of every other person for the time being within Bangladesh, and in particular no action detrimental to the life, liberty, body, reputation or property of any person shall be taken except in accordance with law.

Comments on Article 31

This article clearly speaks that every citizen and every person in Bangladesh have an inalienable right to be treated in accordance with law. Further, no action detrimental to the life, liberty, body, reputation or property of any citizen or inhabitant of Bangladesh shall be taken except in accordance with law. The term in accordance with law is akin to American concept of 'due process'. No person's life, liberty, reputation or property shall be taken except in accordance with law means maintaining fairness and avoiding arbitrariness. This is in essence the concept of rule of law.

Case :

In the case of *ETV Ltd. Vs. Dr. Chowdhury Mahmood Hasan*, 54 DLR (AD) 130, K.M. Hasan, J. while interpreting Articles 31 and 32 of the Constitution held in paragraph 80 as under :

"It is a simple case of investment, and like every investment the investment in ETV has its own risk. The third party rights exist and fall with the Ekushey Television, since their interests are merged with that of ETV. The substantive legal principle in this regard is that every person is subject to the ordinary law within the jurisdiction. Therefore, all persons within the jurisdiction of Bangladesh are within Bangladesh rule of law. The foreign investors in ETV are no exception to this principle."

In the case *Shahadat Hossain Vs. Executive Engineer*, 44 DLR 420, a question of contractual obligation on the part of the Government was raised. AKM Sadeque, J. after considering Article 31 and 40 of the Constitution held at paragraph 19 as under:

¹Article 30 was substituted for the former Article 30 by the Constitution (Eighth Amendment) Act, 1988 (Act XXX of 1988), s.5.

"In the instant case also we find that the Ramna Cafeteria is a property of the Government under the PWD. We cannot distinguish between the property of Government like fisheries or hat or khas land which they lease out and the property in the instant case namely, the Ramna Cafeteria. The Government is equally owners of all of them and all of them are leased out to the successful bidders according to well defined rules framed in exercise of powers rooted in statute. In this regard we may conveniently refer to endorsement of the Ministry of Works upon Annexure-'B' which is, "the highest bidder should be offered as per Government rules." This endorsement itself shows that there was leasing out of Ramna Cafeteria like other properties of the Government of like nature in accordance with Government rules. In this case we find that the contract between the respondents and the petitioner in pursuance of the action was not an ordinary contract between ordinary tenderer and buyer. We are of the view that in this case the Government acted in course of administration of the affairs of the Republic. The action of the respondents in the instant case was of like nature as in respect of hat, bazaar, fisheries and khas lands, etc. not any different. Again even if the impugned action of the respondent be considered as purely an administrative action and mere contract without any statutory obligation then also a writ petition will lie as malafide in the act is established."

Article 32. Protection of right to life and personal liberty—No person shall be deprived of life or personal liberty save in accordance with law.

Comments on Article 32

In this Article the expression, 'in accordance with law' clearly indicates that deprivation of life or personal liberty is permissible on the ground of reasonableness. A strict scrutiny of reasonableness can be investigated by the court to see the objective reasonable ground on the basis of which a man's life or personal liberty can be deprived.

Case :

In the case of *Anisul Islam Mahmood Vs. Bangladesh*, 44 DLR 1, H.M.Habibur Rahman, J. held that the detaining authority must have some jurisdictional facts for detaining an individual, since the detaining authority is curtailing the liberty of a citizen by detaining him on preventive detention, it is exercising a non-judicial authority. To curtail fundamental rights of personal liberty enshrined in the Constitution it is essential that the detaining authority must have reports and materials, that is

jurisdictional facts' for exercising power to detain the detenu under the Special Powers Act.

Article ¹[33. (1) Safeguards as to arrest and detention—No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest, nor shall he be denied the right to consult and be defended by a legal practitioner of his choice.

- (2) Every person who is arrested and detained in custody shall be produced before the nearest Magistrate within a period of twenty-four hours of such arrest, excluding the time necessary for the journey from the place of arrest to the court of the Magistrate, and no such person shall be detained in custody beyond the said period without the authority of a Magistrate.
- (3) Nothing in clauses (1) and (2) shall apply to any person—
(a) who for the time being is an enemy alien; or
(b) who is arrested or detained under any law providing for preventive detention.
- (4) No law providing for preventive detention shall authorise the detention of a person for a period exceeding six months unless an Advisory Board consisting of three persons, of whom two shall be persons who are, or have been, or are qualified to be appointed as, Judges of the Supreme Court and the other shall be a person who is a senior officer in the service of the Republic, has, after affording him an opportunity of being heard in person, reported before the expiration of the said period of six months that there is, in its opinion, sufficient causes for such detention.
- (5) When any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, as soon as may be, communicate to such person the grounds on which the order has been made, and shall afford him the earliest opportunity of making a representation against the order;
Provided that the authority making any such order may refuse to disclose facts which such authority considers be against the public interest to disclose.
- (6) Parliament may by law prescribe the procedure to be followed by an Advisory Board in an inquiry under clause (4).]

¹ Article 33 was substituted for the former Article 33 by the Constitution (Second Amendment) Act, 1973 (Act XXIV of 1973) s.3.

Comments on Article 33

This Article consists of two parts. Clauses (1) and (2) relate to persons arrested or detained under a law otherwise than a preventive detention law. Clauses 3 to 6 apply to persons arrested or detained under preventive detention. This Article provides for protection against unreasonable arrest and detention. This Article provides for some specific procedural safeguard as in clause(1) of 33, a person in detention is entitled to know the grounds of his arrest and he cannot be denied the right to consult or be defended by a lawyer of his/her choice. In Clause(2) a person arrested must be produced before the nearest Magistrate within twenty-four hours, excluding the time for such journey. This Article provides for certain substantive and procedural safeguard in respect of deprivation of life and personal liberty. As a matter of fact, disclosure of grounds of arrest and detention before a magistrate even mandatory, Under Clause (1) of Article 33. There are numerous judicial decisions of the Supreme Court of Bangladesh on the question of preventive detention and the safeguards to be observed in preventive detention have become a highly specialised subject. Clause (4) provides that no person can be detained at the first place exceeding six months and during this time he must be given an opportunity to be heard by an Advisory Board. This clause also speaks of the Constitution of the Board. Clause (5) of this Article provides for early communication of grounds of detention of such person. The proviso of this clause also authorises the detaining authority for not disclosure of facts in public interest.

Case :

In the case of *Professor Ghulam Azam Vs. Bangladesh*, 46 DLR 29, Md.Abdul Jalil,J. held at paragraph 25 as under:

“From the facts and circumstances as discussed above we are of the opinion that the petitioner having been living in Bangladesh is entitled to the protection under Article 33(5) of the Constitution and as such the detaining authority was under constitutional obligation to communicate grounds of detention as soon as may be, but no grounds were communicated within such long period of more than 1 year and 3 months.”

In the case of *Habiba Mahmud Vs. Bangladesh*, 45 DLR(AD) 89, M. H. Rahman, J. Held at Paragraph 27 as follows while interpreting Article 33 (5)

“It is needless to add, that in case of mollified the matter of non-disclosure will be justiciable one. But for the clear constitutional sanction provided in Article 33(5) a non-disclosure of fact that was considered to the prejudice of the detune ought to be regarded as violation of basic principle of national justice.”

It may be mentioned here that there are several decisions of the Supreme Court of Bangladesh that Quasi-judicial orders must contain reasons to enable an objective inquiry as to whether there has been an application of mind and a consideration of relevant facts by the detaining authority.

Article 34. (1) Prohibition of forced labour—All forms of forced labour are prohibited and any contravention of this provision shall be an offence punishable in accordance with law.

- (2) Nothing in this Article shall apply to compulsory labour-
- (a) by persons undergoing lawful punishment for a criminal offence; or
 - (b) required by any law for public purposes.

Comments on Article 34

Clause(1) of this Article speaks about prohibition against forced labour and any contravention will be punishable under the law. But Article 34(2) is an exception which provides for compulsory labour in certain conditions and circumstances, namely, undergoing punishment in criminal offence and required by any law for public purposes.

Article 35 (1) Protection in respect of trial and punishment—No person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than, or different from, that which might have been inflicted under the law in force at the time of the commission of the offence.

- (2) No person shall be prosecuted and punished for the same offence more than one.
- (3) Every person accused of a criminal offence shall have the right to a speedy and public trial by an independent and impartial court or tribunal established by law.
- (4) No person accused of any offence shall be compelled to be a witness against himself.

- (5) No person shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment.
- (6) Nothing in clause (3) or clause (5) shall affect the operation of any existing law which prescribes any punishment or procedure for trial.

Comments on Article 35

This Article provides for certain rights in respect of trial and punishment. These rights are protection against ex-post facto laws, double jeopardy, holding of speedy and fair trial, granting of privilege against incrimination, prohibits torture and cruel, inhuman or degrading punishment. Clause (6) provides that nothing in clause(3) or clause (5) shall affect the operation of any existing law which prescribes any punishment or procedure for trial.

Ex-Post facto law: This law has been enacted to prohibit convictions and sentences under ex-post facto laws. The protection given by this provision creates against those offences which are offences at the time when they are sought to be punished, though they were not offences at the time when they were committed. Where there is an amendment of law after the commission of the offence, accused cannot be adversely affected by retrospective application of the changed law, generally, majority of laws are prospective in their operation. But at times, the legislature may give retrospective effect to a law, that is to bring acts or commissions, committed even prior to the enactment of the law in question. But according to this Article, a criminal law cannot be retrospective so as to provide for conviction of a person for an offence which was not an offence at the time of commission of that act or to impose a penalty greater than that which might have been inflicted under the law in force at the time of commission of the offence. As a matter of fact, when the legislature declares an act to be an offence or provide a penalty for an offence, it cannot make the law retrospective so as to prejudicially affect the persons who have committed such acts prior to the enactment of the law. These principles in Article 35 (1) have got explicit recognition in international law.

Double Jeopardy : This Article provides immunity from proceedings before a Court of law or a judicial Tribunal. A government servant who has been punished by a Court of law for a criminal offence may be subjected to departmental proceedings for the same offence or vice versa. For the same offence a person cannot be punished twice by a court of law. If any law provides for such double punishment, such law would be void.

Case :

In the case of *Serajul Islam Vs. The Director General of Food*, 42 DLR(AD) 199, the petitioner who was Inspector of Food and Incharge of Sylhet LSD at the relevant time challenged the drawing up of a departmental proceeding against him on the principle of 'double-jeopardy' under Article 35 of the Constitution as already a charge-sheet was submitted against him in a criminal proceeding for a shortage amounting to Tk.47.9 lacs.

Shahabuddin Ahmed, C.J. while interpreting Article 35 of the Constitution held in paragraph 4 of the above decision as under:-

"We are not impressed by the arguments advanced by the learned Advocate. Protection in respect of trial and punishment, that is, bar to conviction and punishment more than once for the same offence as referred to in Article 35 relates to Criminal Prosecutions. 'Double Jeopardy', which has been defined in black's law Dictionary, means danger of being convicted and punishment more than once on same facts constituting offence in a criminal proceeding only."

Thus, it was held that the principle of double jeopardy cannot be extended in a departmental proceeding of a public servant.

In the case of *Shaikh (Md) Harun-Or-Rashid Vs. Secretary, Ministry of Jute, Government of the People's Republic of Bangladesh*, 49 DLR 596, K.M.Hasan, J. in paragraph 8 held as follows:

"Protection in respect of trial and punishment as a bar to conviction and punishment more than once for the same offence as referred to in this Article (Article 35 of the Constitution) relates to criminal prosecution only and not a departmental proceeding."

Hence, proceeding before a Departmental Inquiry Committee is not a Criminal proceeding to protect a person's right guaranteed under Article 35(2) of the Constitution against double jeopardy.

Undermentioned cases may be consulted for the above prepositions:-

- (1) *Mustafizur Rahman and 3 others Vs. D.G. Anticorruption and others*, 49 DLR 599.
- (2) *Muhammadullah -Vs-Sessions Judge and others*, 52 DLR 374.
- (3) In the case of *Habiba Mahmud Vs. Bangladesh*, 45 DLR(AD) 89, M.H.Rahman, J. at paragraph 27 held as follows while interpreting Article 35(5).

"It is needless to add, that in case of malafide the matter of non-disclosure will be justiciable one. But for the clear constitutional sanction provided in Article 33(5) a non-disclosure of fact that was

considered to the prejudice of the detenu ought to be regarded as violation of basic principle of natural justice.”

In the case of *Abu Siddiqui Vs. Bangladesh*, 54 DLR(AD) 154, Md. Ruhul Amin, J. interpreted Article 35(4) of the Constitution and held at paragraph 8 as under:

“The other contention that action of respondent No.3 was violative of Article 35(4) of the Constitution is also of no substance since the notices impugned were issued in connection with an enquiry as regard the information received against the petitioners. The petitioners are not accused of any offence and, as such, protection under Article 35(4) is not available to them.”

In the case of *University of Dhaka-Vs- Dr. S.Hussain and another*, 34 DLR(AD) 1, the principle of protection as provided in Article 35 of the Constitution was invoked inasmuch as President's Order No.67 of 1972 does not contain any express words giving retrospective effect, but the statute is prospective in nature only. The facts of the case are that, Dr. Syed Sajjad Hossain who was the Vice-Chancellor of the Dhaka University during the War of Liberation in 1971, was charged with having collaborated with Pakistan occupation Army during the war of liberation. His case was referred to the First Screening Board constituted under the President's Order No.67 of 1972. The Screening Board found him guilty. Accordingly, the respondent was dismissed from his service. The dismissal order was challenged before the High Court Division. The High Court Division upheld the order of dismissal. By a majority judgment, the decision of the High Court Division was set aside and B.H.Chowdhury, J. in paragraph 45 held as follows:

“In view of the matter the opinion is all the activities attributed to the respondent Dr.Sajjad Hossain and Dr.Mohar Ali allegedly were performed in 1971 do not come within the mischief of the President's Order No.67 of 1972. Such activities are punishable under President's Order No.8 of 1972. As a matter of fact, both of them were prosecuted under President's Order No.8 of 1972 which was given retrospective effect. Both the respondents were given clemency and in the writ petition they quoted the statement of the Prime Minister as mentioned in the press note. After assurance of such clemency, it was not permissible for initiation of any proceedings. President's Order No.67 of 1972, however, has no manner of application because it was not given retrospective effect.”

Speedy trial is a component of personal liberty and it is an obligation on the state by the mandate of Article 35(3) to arrange for speedy and public trial. It is also a fundamental principle of criminal justice that the prosecution must prove its case and accused cannot be a witness to make any statement against his will.

Article 36. Freedom of movement—Subject to any reasonable restrictions imposed by law in the public interest, every citizen shall have the right to move freely throughout Bangladesh, to reside and settle in any place therein and to leave and re-enter Bangladesh.

Comments on Article 36

A person's physical movement within Bangladesh can only be restricted by any reasonable restriction imposed by law in the Public interest otherwise not. Freedom of movement is an important element of human liberty.

Case :

In the case of *Kazi Mukhlesur Rahman –Vs- Bangladesh*, 26 DLR(SC) 44, Sayem,C.J. held at paragraph 18 as follows:-

“The fact that the appellant is not a resident of the southern half of South Berubari Union No.12 or 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 through out the territory of Bangladesh, to reside and settle in any place therein as well as his right of franchise. Evidently, these pervade and extend to every inch of the territory of Bangladesh stretching upto the continental shelf.”

In the case of *Dr. Mohiuddin Farooque –Vs- Bangladesh and others*, 49 DLR 1, Mustafa Kamal, J. held at paragraph 31 as under:

“These rights, attached to a citizen are not local. They pervade and extend to every inch of the territory of Bangladesh stretching upto continental shelf.”

Article 37. Freedom of assembly—Every citizen shall have the right to assemble and to participate in public meetings and processions peacefully and without arms, subject to any reasonable restrictions imposed by law in the interests of public order or public health.

Comments on Article 37

The freedom of assembly to hold meetings and processions peacefully can only be restricted by imposing law in the interest of public order or public health. The reasonableness of any restrictive order is subject to judicial scrutiny. Judicial decision confines the freedom of Assembly within permissible restrictions. Moreover, the freedom of assembly can be exercised only on public land. But the restrictions cannot attain the status of absolute prohibition at least in normal times.

Article 38. Freedom of association—Every citizen shall have the right to form associations or unions, subject to any reasonable restrictions imposed by law in the interests of morality or public order :

1* * * * * * * *

Comments on Article 38

The right to freedom of Association is for a lawful purpose. The right includes the right to start or continue an association subject to reasonable restricts in the interest of morality and public order. This right to freedom of association helps people to start political party on identical views which is essential in a democracy. Judicial Review of executive order is allowable to see the reason behind of the restrictive order.

Case :

The facts in the case of *Asaduzzaman Vs. Bangladesh*, 42 DLR(AD)144, are this, that the appellant Asaduzzaman challenged the validity of certain Amendment made in the Bangladesh Red Crescent Society order, 1973 (P.O.NO.26 of 1973) on the ground that those amendments are void being inconsistent with Article 38 of the Constitution.

M.H. Rahman, J. held in that decision at paragraphs 37,38 and 39 held as under:

¹ Proviso to Article 38 was omitted by the Second Proclamation (Sixth Amendment) Order, 1976 (Second Proclamation Order No.III of 1976).

“The right under Article 38 implies that several individuals having a community of interests can join together to form a voluntary association for furtherance of a common lawful object. This right along with other rights, described as fundamental rights under Part III of the Constitution, have been guaranteed in this sense that the state shall not make any law inconsistent with any provision of that Part III of the constitution, and any law so made shall, to the extent of such inconsistency, be void. The rights are fundamental for civil life so that citizens may borrow three very significant words from the preamble, “Prosper in freedom”. Under Article 102(1) of the constitution the High Court Division has been made the guardian for enforcement of fundamental rights not only against the executive but also against the legislature. The judicial review with regard to the vires of a law passed by the legislature from the court’s constitutional duty to enforce a fundamental right.

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

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

In the case of *Aircraft Enginners Vs. Registrar, Trade Union*, 45 DLR(AD) 122, an argument was raised on behalf of the appellant unions that they will lose their international affiliations if they lose registration.

Mustafa Kamal, J. answered this at paragraph 20 as under:—

“The short answer will be that the consequences if any, will no doubt be unfortunate but the right to constitute a separate trade union for workers with international affiliations is simply not provided for, either in the unamended Ordinance, 1969 or in the Amendment Act, 1990. The amended legislation cannot be said to be violative of the fundamental right guaranteed under Article 38 of the Constitution on the ground of loss of international affiliation.”

In the case of *Nasreen Fatema and 20 others Vs. Bangladesh*, 49 DLR-542, validity of the impugned provisions were challenged on the ground of violation of Article 38 of the Constitution. In that case, Kazi Ebadul Hoque, J. held at paragraph 32 as under:

“In our view, imposing reasonable restrictions on certain persons becoming directors in Public interest has not violated their right to form association as share holders in any manner. In the case of *Asaduzzaman Vs. Bangladesh* reported in 42 DLR(AD) 144 it has been held:”Article

38 cannot, however, be invoked for support, sustenance or fulfillment of every object of an association.”

Article 39. (1) Freedom of thought and conscience, and of speech—Freedom of thought and conscience is guaranteed.

(2) Subject to any reasonable restrictions imposed by law in the interests of the security of the State, friendly relations with foreign states, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence—

- (a) the right of every citizen to freedom of speech and expression; and
 - (b) freedom of the press,
- are guaranteed.

Comments on Article 39

Clause (1) of this Article guarantees the freedom of thought and conscience in absolute form as it is a subjective condition of mind which cannot be curbed by imposing law. But the freedom of speech and expression and freedom of the press are guaranteed subject to reasonable restrictions mentioned in this Article. As a matter of fact, permissible restrictions can be imposed by law on specified grounds. By applying the test of reasonableness, freedom of speech and expression and freedom of press can be judicially investigated.

Clause (2) of Article 39 enables the legislature to impose restrictions upon freedom of thought and conscience, and of speech, on the following grounds:—(1) Security of the State, (2) Friendly relations with foreign States, (3) Public order, (4) Decency or morality, (5) Contempt of Court, (6) Defamation, and (7) Incitement to an offence.

Case :

In the case of *Bangladesh National Curriculum and Text Board Vs. A.M. Samsuddin and others*, 48 DLR(AD) 184, A.T.M.Afzal, C.J. held at paragraph 32 while interpreting Article 39(2) as under:-

“The right to freedom of speech and expression as claimed by the writ petitioners does not extend to the right of printing and publishing of ‘note books’ or ‘text-book’ prepared and published by the Text Book Board under statutory authority. The court was not justified in declaring the impugned Act to be ultra vires of Article 39(2) of the Constitution.”

In the same decision, A.T.M.Afzal,C.J. while interpreting Article 39(2) of the Constitution held in paragraph 20 as under:

“It is true that under Article 39(2) it has been specifically mentioned as regards the grounds upon which reasonable restriction may be imposed by law on the right of citizens to freedom of speech and expression, but the basic assumption for the exercise of the said right is and must be that it may not offend any law or any right of other person under law. To give a free hand to the publishers to publish any kind of ‘note book’ or ‘text book’ without any control from the Board is to defeat the very purpose for which the Text Book Board was vested with the authority to prepare and publish or approve text books for such.”

Article 40. Freedom of Profession or occupation—Subject to any restrictions imposed by law, every citizen possessing such qualifications, if any, as may be prescribed by law in relation to his profession, occupation, trade or business shall have the right to enter upon any lawful profession or occupation, and to conduct any lawful trade or business.

Comments on Article 40

A citizen cannot be compelled to do a certain kind of business. The right to freedom of profession or occupation is subject to reasonable restrictions imposed by law in the interest of General Public, of course, there is no right where the business is dangerous or immoral; such a business may be absolutely prohibited or may be required to be licensed. Moreover, there is no right to carry on a business at any place or at any time, restrictions may be imposed in this regard. This article empowers the parliament to prescribe qualifications for particular professions and occupations. This article also contemplates that the State in public interest, can lay down reasonable conditions subject to which any trade or business can be pursued.

In the case of *Abdul Jalil Vs. Chairman, REB*, 45 DLR 24, Abdul Jalil,J. interpreted Article 40 of the Constitution and held that the decision of the Board when infringes any fundamental right that restriction cannot be made unless it is authorised by law and observed at paragraph 8 as follows:

Case :

“In the facts and circumstances as discussed before we are of the opinion that the petitioner’s fundamental right as enjoined in Article 40 of the

Constitution has been violated and he has been prejudiced thereby, the action of the Board which is a statutory body is, therefore, unauthorised.”

In the case of *Nasreen Fatema Vs. Bangladesh*, 49 DLR 542, Kazi Ebadul Hoque, J. while interpreting Article 40 of the Constitution held at paragraph 34 as under:-

“Under Article 40 of our Constitution reasonable, restriction can be imposed on a person's entering upon any lawful profession or occupation and to conduct any lawful trade or business. We have already seen that reasonable restriction have been imposed on certain persons under the impugned provisions in public interest. So, we find no violation of Article 40 of the Constitution also in the impugned provisions.”

Article 41. (1) Freedom of religion—Subject to law, public order and morality.

- (a) Every citizen has the right to profess, practise or propagate any religion;
 - (b) Every religious community or denomination has the right to establish, maintain and manage its religious institutions.
- (2) No person attending any educational institution shall be required to receive religious instruction, or to take part in or to attend any religious ceremony or worship, if that instruction, ceremony or worship relates to a religion other than his own.

Comments on Article 41

This Article ensures that every citizen has the right to profess, practise or propagate any religion and every religious community or group can establish, maintain and manage its religious institutions subject to reasonable restrictions imposed by law on the ground of public order and morality. The main emphasis in this article is on the practice of religious freedom by individuals and on the establishment of religious institutions, citizens right to profess, practise and propagate religion is guaranteed. This article pre-supposes observance of religious worship a ritual. Even according to this article, a person attending any educational institution can receive religious instruction, or can take part or attend religion ceremonies but it cannot be other than those his own religion. This guarantee under clause (2) of Article 41 is an absolute guarantee.

Case :

In the case of *Bangladesh Anjuman-e-Ahmadiya Vs. Bangladesh*, 45 DLR 185, Sultan Hossain Khan, J. while interpreting right to profess religion held at paragraph 11 as under:

“The right of the Ahmadiya Community to preach their religious belief is, however, subject to law, public order and morality. By the aforesaid passages in our view the author and the publisher are deliberately and maliciously propagating a matter which is outrageous to the religious feeling of the bulk of the Muslims of this country. The petitioner has submitted that Ahmadiyas also being Muslim the order stating that the book has outraged the feelings of the Muslims of Bangladesh is not correct.”

In the case of *Islamic Law research center and legal Aid Bangladesh vs- Eva Suananda Chowdhury & Mrs*, 23 BLD (AD) 21, the Appellate division expunged the controversial part of the Judgement of the High court Division in view of Article 41 of the constitution.

Article 42. (1) Rights to property—Subject to any restrictions imposed by law, every citizen shall have the right to acquire, hold, transfer or otherwise dispose of property, and no property shall be compulsorily acquired, nationalised or requisitioned save by authority of law.

¹[(2) A law made under clause (1) shall provide for the acquisition, nationalisation, or requisition with compensation and shall either fix the amount of compensation or specify the principles on which, and the manner in which, the compensation is to be assessed and paid; but no such law shall be called in question in any court on the ground that any provision in respect of such compensation is not adequate.]

(3) Nothing in this Article shall affect the operation of any law made before the commencement of the Proclamations (Amendment) Order, 1977 (Proclamations Order No. I of 1977), in so far as it relates to the acquisition, nationalisation or acquisition of any property without compensation.]

Comments on Article 42

This Article guarantees, citizens right to acquire, hold, transfer or otherwise dispose of property, subject to restrictions imposed by law.

¹Clauses (2) and (3) were substituted for the former clause (2) by the Proclamations (Amendment) Order, 1977 (Proclamations Order No.I of 1977).

Compulsory acquisition, nationalisation and requisition of property is not permissible without the authority of law. This Article also provides for compensation in case of acquisition, nationalisation or requisition of property. A law made under clause (1) shall also provide for principles on which the compensation is to be assessed and paid.

Case :

In the case of *Alhaj Mohammad Rahimuddin Bhorasha Vs. Bangladesh*, 46 DLR-130, Kazi Ebadul Hoque, J. held at paragraph 8 while interpreting Article 42 of the Constitution as follows:-

“Article 42 of the Constitution of Bangladesh provides that ‘subject to any restrictions imposed by law, every citizen shall have the right to acquire, hold, transfer or otherwise dispose of property, and no property shall be compulsorily acquired, nationalised or requisitioned save by authority of law’. So petitioner as a citizen of Bangladesh has right to hold the disputed property owned by him unless such right is restricted by any law or acquired or nationalised by the authority of law. We have already found that the property owned by the petitioner does not answer the description of abandoned property and inclusion of the same in the list of abandoned properties is without jurisdiction.”

In the unreported case of *M/S.Nasirabad Properties Vs. The Chittagong Development Authority and others*, Civil Appeal No.48 of 1965, dismissed on 7.8.1974, the question of deprivation of right to property was argued as there was delay in execution and implementation of Master Plan. It was held that there was no time limit for execution of the work and that by itself cannot tantamount to deprivation of property of the owner whose land has been validly acquired by the Chittagong Development Authority.

In the case of *Syeda Chand Guttara and others Vs. Bangladesh*, 48 DLR 547, K.M.Hasan, J. released the property wrongly listed as abandoned property as it was done in violation of Article 42 of the Constitution, rights to property. In that decision the learned Judge held at paragraph 17 as under:-

“The very fact that the inclusion of the disputed property in the ‘Kha’ list had been found by us to be ex-facie void for want of jurisdiction and in violation of Article 42 of the Constitution it is our view that the petitioners can come directly to this court for protection of their fundamental rights even though an alternative remedy is available.”

Article 43. Protection of home and correspondence—Every citizen shall have the right, subject to any reasonable restrictions imposed by law in the interests of the security of the State, public order, public morality or public health—

- (a) to be secured in his home against entry, search and seizure; and
- (b) to the privacy of his correspondence and other means of communication.

Comments on Article 43

This article ensures the citizens right to be secured in his home against entry, search and seizure and also to the privacy of his correspondence and other means of communication. Restrictions can be imposed on such rights on the ground of security of the state, public order, public morality and public health. This article guarantees the privacy of home and correspondence and communications.

Article 1[44. (1) Enforcement of fundamental rights—The right to move the ²[High Court Division in accordance with ³[clause (1)] of article 102, for enforcement of the rights conferred by this Part is guaranteed.

- (2) Without prejudice to the powers of the ²[High Court Division] under article 102, Parliament may be law empower any other court, within the local limits of its jurisdiction, to exercise all or any of those powers].

Comments on Article 44

Enforcement of fundamental rights through Article 102 of the constitution in the High Court division is guaranteed by this part. This Article provides that the power to move the High Court Division is itself a fundamental right. Clause (2) of this Article provides that enforcement of fundamental rights may be given to any other Court of concurrent

¹Article 44 was substituted for the former article 44 by the Second Proclamation (Seventh Amendment) Order, 1976 (Second Proclamation Order No.IV of 1976) (w.e.f. 13.8.76).

² The words "High Court Division" were substituted for the words "High Court" by the Second Proclamation (Tenth Amnendmment) Order, 1977) (Second Proclamation Order No. I of 1977) (w.e.f. 1.12.1977).

³ The word, brackets and figure "Clause (I)" were substituted for the word, brackets and figure "Clause (2)", *ibid.*

Jurisdiction, but the High Court Division's power of enforcement of fundamental rights can never be taken away. Thus, any other Court empowered by law cannot have exclusive jurisdiction. The High Court Division's power of enforcement of fundamental rights will always remain therein.

Case :

In the case of *Anwar Hossain Chowdhury VS Bangladesh*, 41 DLR (AD)165, B.H. Chowdhury, j, held that by the Amendment Act original Article 100 had been displaced and complete new dispensation started by enacting permanent Benches at six designated places and sub Article (5) is inconsistent with Articles 44 and 114. It has enacted permanent Benches with Jurisdictions, powers and functions of the High Court Division contrary to the express mandate in Articles 44 and 114. The learned Judge further held in paragraph 160 as follows:

“The mandate is clear and express if Articles 44 and 114 are read together. It is well settled principle in interpreting the Constitution that the entire Constitution is to be looked into and if any amendment to the Constitution does not fit in with the constitution itself then the amendment is to be declared ultra vires because constitution is a logical whole.”

In the case of *Serajul Islam Vs. D.G. Food*, 43 DLR 237, F.H.M.H.Rahman,J. held while interpreting Article 44 of the Constitution at paragraph 7 as under:

“As already stated, without exhausting all available remedies before the administrative authorities including Administrative Appellate authority, the Administrative Tribunal and the Administrative Appellate Tribunal generally speaking the petitioner is not entitled to any relief before this court for the enforcement of any fundamental right under Article 44 read with Article 102(1) of the Constitution. In the case of *State of UP-Vs-Nooh*, AIR 1958(SC) 86 and *Abrahan-Vs- ITO*, AIR 1961(SC) 609 it was held that the principle of exhaustion of statutory remedy is applied as a general rule, in the matter of issuing certiorari and the superior court will ordinarily decline to interfere until the aggrieved party has exhausted his statutory remedies.”

Article 45. Modification of rights in respect of disciplinary Law- Nothing in this Part shall apply to any provision of a disciplinary law relating to members of disciplined force, being a provision limited to the

purpose of ensuring the proper discharge of their duties or the maintenance of discipline in that force.

Comments on Article 45

This Article is a modification of rights in respect of disciplinary law. The provisions of Part III will not be applicable to the members of disciplined forces for ensuring proper discharge of their duties or maintenance of discipline in that force. Disciplinary law is kept out of the ambit of enforcement of fundamental rights.

Case :

In the case of *Bangladesh Vs. Matiur Rahman*, 34 DLR(AD) 287, while interpreting Rule 3 clauses (a)(b) of Government Servant's (Discipline and Appeal) Rules, 1976, S.Ahmed,J. held in paragraph 9 as follows:-

"We find that there is no provision in the Rules requiring the enquiry officer to give any recommendation as to the punishment to be imposed while submitting his report of enquiry held by him under these Rules. What he is required to do is to submit a "report of his findings" to the "authority" by whom he was appointed; and the latter is required by these Rules to consider the report and record its findings of the "charge". These provisions of the Rules show that the 'authority' which may be governed itself, is not bound to accept the findings of the enquiry officer not to speak of his recommendation, but may come to a different finding on the basis of the materials on record."

In the case of *Col.Md.Hashmat Ali(Retired) of Bangladesh Army Medical Corps. Vs. Government of Bangladesh and another*, 47 DLR(AD)1, M.H.Rahman,J. held at paragraph 16 as under:

"I am of the view that a member of any disciplined force of Bangladesh will not be entitled to any remedy under Article 102 if he is aggrieved by (i) by any decision of a Court or Tribunal established under a law relating to the defence services unless that decision is coram non-judice or malafide; or (ii) by an order affecting his terms and conditions of service, passed by or by order of the President; or (iii) by any violation of fundamental right resulting from application of a disciplinary law for the purpose of ensuring the proper discharge of his duties or the maintenance of discipline in the disciplined force."

In the said decision it was further held that a member of the disciplined force can move the High Court Division for enforcement of fundamental rights subject to the provisions of Article 45.

Article 46. Power to provide indemnity—Notwithstanding anything in the foregoing provisions of this Part, Parliament may by law make provision for indemnifying any person in the service of the Republic or any other person in respect of any act done by him in connection with the national liberation struggle or the maintenance or restoration or order in any area in Bangladesh or validate any sentence passed, punishment inflicted, forfeiture ordered, or other act done in any such area.

Comments on Article 46

This Article grants indemnity by law in respect of acts done during the national liberation struggle or the maintenance or restoration or order in any area in Bangladesh.

Article 47. (1) Saving for certain laws—No law providing for any of the following matters shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges, any of the rights guaranteed by this Part—

- (a) the compulsory acquisition, nationalisation or requisition of any property, or the control of management thereof whether temporarily or permanently;
- (b) the compulsory amalgamation of bodies carrying on commercial other undertakings;
- (c) the extinction, modification, restriction or regulation of rights of directors, or managers, agents and officers of any such bodies, or of the voting rights of persons owning shares or stock (in whatever form) therein;
- (d) the extinction, modification, restriction or regulation of rights to search for or win minerals or mineral oil;
- (e) the carrying on by the Government or by a corporation owned, controlled or managed by the Government, of any trade, business industry or service to the exclusion, complete or partial, of other persons; or
- (f) the extinction, modification, restriction or regulation of any right to property, any right in respect of profession, occupation, trade or business or the rights of employers or employees in any statutory public authority or in any commercial or industrial undertakings;

if Parliament in such law (including, in the case of existing law, by amendment) expressly declares that such provision is made to give effect to any of the fundamental principles of state policy set out in Part II of this Constitution.

(2) Notwithstanding anything contained in this Constitution the laws specified in the First Schedule (including any amendment of any such law) shall continue to have full force and effect; and no provision of any such law, nor anything done or omitted to be done under the authority of such law, shall be deemed void or unlawful on the ground of inconsistency with, or repugnance to, any provision of this Constitution;

¹[Provided that nothing in this article shall prevent amendment, modification or repeal or any such law].

²[(3) Notwithstanding anything contained in this Constitution, no law nor any provision thereof providing for detention, prosecution or punishment of any person, who is a member of any armed or defence or auxiliary forces or who is a prisoner of war, for genocide, crimes against humanity or war crimes and other crimes under international law shall be deemed void or unlawful, or ever to have become void or unlawful, on the ground that such law or provision of any such law is inconsistent with, or repugnant to, any of the provisions of this Constitution.]

Comments on Article 47

Certain laws have been saved and Clause(1) of this Article grants immunity from challenge on the ground of violation of fundamental rights. Clause(2) gives protection of certain laws in First Schedule inspite of the inconsistency with any provision of the Constitution. Clause(3) of this Article provides for detention, prosecution and punishment for genocide, war crimes against humanity under International law and in case of conflict with any provision of this constitution, the law made for such detention, prosecution or punishment of any person under international law shall not be void.

In the case of *Bangladesh Bank and others Vs. Mohammad Abdul Mannan*, 46 DLR(AD) 1, Shahabuddin Ahmed, C.J. held while interpreting Article 47(2) that Bangladesh Bank Staff Regulations are protected legislation like its parent law, the Bangladesh Bank Order. The Constitutionality of these Regulations stand beyond any question and cannot be declared void being inconsistent with the equality clause of the Constitution.

¹ The proviso was substituted for the original proviso the proclamations (Amendment) Order, 1977 (Proclamations Order No.1 of 1977).

² Clause (3) was added by Constitution (First Amendment) Act, 1973 (Act XV of 1973), s.2.

The facts of the case, *New Ideal Engineering Works Vs. Bangladesh Shilpa Bank and others*, 42 DLR(AD) 221, are that the petitioner challenged the decision of the Bangladesh Shilpa Bank for Sale of his industrial concern under Article 34 of the Bangladesh Shilpa Bank Order, 1972. Bangladesh Shilpa Bank Order(P.O. 129 of 1972). A.T.M. Afzal,J. held at paragraph 8 as follows:-

“To answer his submissions, briefly, it may be observed that the order is a protected legislation under Article 47(2) of the Constitution and no provision thereof shall be deemed to be void or unlawful on the ground of inconsistency or repugnance to any provision of the Constitution. Secondly, it is to be observed that a non-obstinate clause is unusually used in a provision to indicate that, that provision should prevail despite anything to the contrary in the provision mentioned in such non-obstinate clause.”

In the case of *K.M.Hossain Vs. Government of Bangladesh*, 31 DLR(AD) 64, the validity of Government of Bangladesh (Services screening) Order(P.O.67 of 1972) was challenged, wherein, K.Hossain, C.J. held at paragraph 7 as under:-

“To appreciate the point we are to refer to sub-Article(2) of Article 47 of the Constitution. This Sub-Article says that notwithstanding anything contained in the Constitution the laws specified in the first schedule , wherein this Presidential Order No.67 of 1972 has been included, shall continue to have full force and effect, and no provision of any such law or anything done or omitted to be done under the authority or such law shall be deemed to be void or unlawful on the ground of inconsistency with or repugnance to any provision of the Constitution.”

Thus, it appears that the laws specified in the first schedule of Article 47 are protected laws and those are immune from challenge and this is the mandate of the Constitution.

In the case of *Bangladesh Vs. Haji Abdul Ghani*, 33 DLR(AD) 233, President's Order No.88 of 1972 and 136 of 1972 were challenged, wherein B.H.Chowdhury, J. held at paragraph 7 of that decision as follows:-

“Article 47 read with the First Schedule of the Constitution has protected by law and clear indication has been given in the Constitution itself and when the parent legislation is immune from attack the consequential amendments are to be viewed in that light, namely, for giving effect to the parent legislation unless it would be shown that the amendment minus the protection, is otherwise unconstitutional.”

The facts of the case of *Kazi Mokarram Hossain Vs. Bangladesh*, 31 DLR(AD) 64, are that the petitioner was dismissed on the recommendation of the First Screening Board, Government of Bangladesh (Services Screening Order P.O.67 of 1972) without compliance of Sub-Article (2) of Article 135 of the Constitution. The High Court Division dismissed the writ petition and the same was upheld by the Appellate Division.

K.Hossain, C.J. held at paragraph 10 of the decision as follows:

“Reading Presidential Order No.67 of 1972 as a whole it is quite clear that as self-contained enactment it has left no scope for any application of a second show cause notice as contemplated in Sub-Article(2) of Article 135. If any attempt to so do it will be to introduce and artificial inconsistency or repugnancy which the Presidential order itself does not contain. Article 47(2) has in clear language excluded any such attempt to introduce repugnancy or in the name of any inconsistency, to import some other provision of the Constitution into Presidential Order No.67 of 1972.”

As a matter of fact, in that decision it was held that Sub-Article(2) of Article 47 of the constitution gives two kinds of protections; first is the legislative protection to the laws specified in the First Schedule, and the second is the action taken under those protected laws.

Article 1[47A. (1) Inapplicability of certain articles—The rights guaranteed under Article 31, clause (1) and (3) of Article 35 and Article 44 shall not apply to any person to whom a law specified in clause (3) of Article 47 applies.

(2) Notwithstanding anything contained in this constitution, no person to whom a law specified in clause (3) of Article 47 applies shall have the right to move the Supreme Court for any of the remedies under this Constitution].

Comments on Article 47A

The persons in respect of whom Clause(3) of Article 47 apply shall be precluded from moving the Supreme Court for any remedy under the Constitution. It provides for inapplicability of certain Articles of this part mentioned in Article 47A of the Constitution.

¹ Article 47A was inserted, *ibid*, s. 3.

PART IV
THE EXECUTIVE

¹[CHAPTER I – THE PRESIDENT

Article 48. (1) **The President**—There shall be a President of Bangladesh who shall be elected by members of Parliament in accordance with law.

- (2) The President shall, as Head of State, take precedence over all other persons in the State, and shall exercise the powers and perform the duties conferred and imposed on him by this Constitution and by any other law.
- (3) In the exercise of all functions, save only that of appointing the Prime Minister pursuant to clause (3) of Article 56 and the Chief Justice pursuant to clause (1) of Article 95, the President shall act in accordance with the advice of the Prime Minister :

Provided that the question whether any, and if so what, advice has been tendered by the Prime Minister to the President shall not be enquired into in any court.

- (4) A person shall not be qualified for election as President if he –
- (a) is less than thirty-five years of age; or
 - (b) is not qualified for election as a member of parliament; or
 - (c) has been removed from the office of President by impeachment under this constitution.
- (5) The Prime Minister shall keep the President informed on matters of domestic and foreign policy, and submit for the consideration of the Cabinet any matter which the President may request him to refer to it.

Case on Article 48

In the case of *Abdus Samad Azad –VS- Bangladesh*, 44 DLR- 354, the provisions of Act XXVII of 1991 was challenged on the ground that open ballot system of vote by the members of Parliament to elect the President was violative of Article 39 and contrary to the principles of State Policy as envisaged under Article 11 of the Constitution of Bangladesh. The contention of the petitioner was rejected by the High Court Division, wherein Anwarul Haque

¹ Chapters I, II and III were substituted for Chapters I and II by the Constitution (Twelfth Amendment) Act, 1991 (Act XXVIII of 1991) s.3.

Chowdhury, J. held at paragraph 20 as follows:—

“In fact from the different provisions of the Constitution we do not find that the democratic institution as spelt out in the Constitution to be the aim, did not narrow it down to a choice of representative either by direct or by secret ballot, leaving it to be decided by law on the basis of the political expediency and necessity of the time at a given period. Voting by secret ballot or by open ballot or by a division are all accepted modes of voting and different ways of choosing and those modes are also not foreign to our Constitution and only because an election is ordered to be held by open vote would not make the said election illegal and the right to choose according to one's own conscience would be existing in both the procedures whether it is by open vote or by secret vote. The system of open ballot procedures could not be said to have taken away the right to vote freely and fearlessly.”

Article 49. Prerogative of mercy—The President shall have power to grant pardons, reprieves and respites and to remit, suspend or commute any sentence passed by any court, tribunal or other authority.

Article 50. (1) Term of office of President— Subject to the provisions of this Constitution, the President shall hold office for a term of five years from the date on which he enters upon his office :

Provided that notwithstanding the expiration of his term the President shall continue to hold office until his successor enters upon office.

- (2) No person shall hold office as President for more than two terms, whether or not the terms are consecutive.
- (3) The President may resign his office by writing under his hand addressed to the speaker.
- (4) The President during his term of office 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 on which he enters upon his office as President.

Article 51. (1) President's immunity Without prejudice to the Provisions of article 52, the President shall not be answerable in any court for anything done or omitted by him in the exercise or purported exercise of the functions of his office, but this clause shall not prejudice the right of any person to take proceedings against the Government.

- (2) During his term of office no criminal proceedings whatsoever shall be instituted or continued against the President in, and no process for his arrest or imprisonment shall issue from, any court.

Comments of Article 51

The President shall not be answerable to any Court while in office for exercise or purported exercise of the functions of his office. But an aggrieved person can take a proceeding against the Government. The immunity against a criminal proceeding is available while the President is in office.

Case :

In the case of *Hussain Mohammed Ershad -VS- The state*, (1991)11 BLD(AD)55, the question of immunity of the petitioner from criminal prosecution under Article 51(1) of the Constitution came up for consideration, wherein at paragraph 6, M.H. Rahman, J. held as under:

“It is contended that the arms seized were in the possession and control of the petitioner in his capacity as President and hence in view of Article 51(1) of the Constitution there is a Complete bar against any criminal Prosecution against the petitioner. We find no substance in this contention. The immunity is available to the President while he is in office”.

Article 52(1) Impeachment of the President— The President may be impeached on a charge of violating this constitution or of grave misconduct, preferred by a notice of motion signed by a majority of the total number of members of Parliament and delivered to the Speaker, setting out the particulars of the charge, and the motion shall not be debated earlier than fourteen nor later than thirty days after the notice is so delivered; and the Speaker shall forthwith summon Parliament if it is not in session.

- (2) The conduct of the President may be referred by Parliament to any court, tribunal or body appointed or designated by Parliament for the investigation of charge under this article.
- (3) The President shall have the right to appear and to be represented during the consideration of the charge.
- (4) If after the consideration of the charge a resolution is passed by Parliament by the votes of not less than two-thirds of the total number

of members declaring that the charge has been substantiated, the President shall vacate his office on the date on which the resolution is passed.

- (5) Where the Speaker is exercising the functions of the President under article 54 the provisions of this article shall apply subject to the modifications that the reference to the Speaker in clause (1) shall be construed as a reference to the Deputy Speaker, and that the reference in clause (4) to the vacation by the President of this office shall be construed as a reference to the vacation by the Speaker of his office as Speaker; and on the passing of a resolution such as is referred to in clause (4) the Speaker shall cease to exercise the functions of President.

Article 53. (1) Removal of President on ground of incapacity – The President may be removed from office on the ground of physical or mental incapacity on a motion of which notice, signed by a majority of the total number of members of Parliament, is delivered to the Speaker, setting out particulars of the alleged incapacity.

- (2) On receipt of the notice the Speaker shall forthwith summon Parliament if it is not in session and shall call for a resolution constituting a medical board (hereinafter in this article called the “Board”) and upon the necessary motion being made and carried shall forthwith cause a copy of the notice to be transmitted to the President together with a request signed by the Speaker that the President submit himself within a period of ten days from the date of the request to an examination by the Board.
- (3) The motion for removal shall not be put to the vote earlier than fourteen nor later than thirty days after notice of the motion is delivered to the Speaker, and if it is again necessary to summon Parliament in order to enable the motion to be made within that period, the Speaker shall summon Parliament.
- (4) The President shall have the right to appear and to be represented during the consideration of the motion.
- (5) If the President has not submitted himself to an examination by the Board before the motion is made in Parliament, the motion may be put to the vote, and if it is passed by the votes of not less than two-thirds of the total number of members of Parliament, the President shall vacate his office on the date on which the motion is passed.

- (6) If before the motion for removal is made in Parliament, the President has submitted himself to an examination by the Board, the motion shall not be put to the vote until the Board has been given an opportunity of reporting its opinion to Parliament.
- (7) If after consideration by Parliament of the motion and of the report of the Board (which shall be submitted within seven days of the examination held pursuant to clause (2) and if not so submitted shall be dispensed with) the motion is passed by the votes of not less than two-thirds of the total number of members of Parliament, the President shall vacate his office on the date on which the resolution is passed.

Article 54. Speaker to act as President during absence, etc.—If a vacancy occurs in the office of President or if the President is unable to discharge the functions of his office 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, as the case may be.

General Comments

The President of Bangladesh is the Constitutional head of the State and of the executive Government. The office of the President is a ceremonial one like the British Monarch. In our Constitutional dispensations, the President is required to act on the advice of the Prime Minister except in two cases, namely, the President can independently appoint the Prime Minister and the Chief Justice of Bangladesh. In exercise of all other functions the President must act on the advice of the Prime Minister.

Article 52 lays down the Procedure for impeachment of the President wherein the President shall have the right to appear and to be represented during the consideration of the charge. For substantiating the charge against the President the Parliament by not less than two-thirds of the total number of members of the Parliament can pass the resolution of impeachment.

Article 53 also authorises the removal of the President on the ground of physical or mental incapacity. An elaborate procedure has been laid down in the Article itself. Further in the absence of the President, the Speaker shall discharge those functions of the President.

In Bangladesh, there has been no case of impeachment of the President.

CHAPTER II : THE PRIME MINISTER AND THE CABINET

- Article 55 (1) The Cabinet**—There shall be a Cabinet for Bangladesh having the Prime Minister at its head and comprising also such other Ministers as the Prime Minister may from time to time designate.
- (2) The executive power of the Republic shall, in accordance with this Constitution, be exercised by or on the authority of the Prime Minister.
 - (3) The Cabinet shall be collectively responsible to Parliament.
 - (4) All executive actions of the Government shall be expressed to be taken in the name of the President.
 - (5) The President shall by rules specify the manner in which 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 questioned in any court on the ground that it was not duly made or executed.
 - (6) The President shall make rules for the allocation and transaction of the business of the Government.

Rules of Business : Under Article 55(6) the president is to make rules for the allocation of transaction of the business of the government and those are called the rules of business. The rules of business enable which authority is to perform what function of the government.

The below mentioned Cases will illustrate proposition enunciated as per Article 55(6) of the Constitution.

- (1) *Bangladesh -Vs- Shafiuddin Ahmed and 2 others*, 50 DLR(AD) 27 (Cabinet decision without publication in the official gazette cannot be treated as an executive action in terms of Article 55(4).
- (2) *Bangladesh -Vs- Dr.Dhiman Chowdhury and others*, 47 DLR(AD) 52 (In detention case, Government is bound to disclose that the order was passed by proper person in accordance to Rules of Business). //

Article 56. (1) Ministers—There shall be a Prime Minister, and such other Ministers, Ministers of State and Deputy Ministers as may be determined by the Prime Minister.

- (2) The appointments of the Prime Minister and other Ministers and of the Ministers of State and Deputy Ministers, shall be made by the President :
- Provided that not less than nine-tenths of their number shall be appointed from among members of Parliament and not more than one-tenth of their number may be chosen from among persons qualified for election as members of Parliament.
- (3) The President shall appoint as Prime Minister the member of Parliament who appears to him to command the support of the majority of the members of Parliament.
- (4) If occasion arises for making any appointment under clause (2) or clause (3) between a dissolution of Parliament and the next following general election of members of Parliament, the persons who were such members immediately before the dissolution shall be regarded for the purpose of this clause as continuing to be such members.

Article 57. (1) Tenure of office of Prime Minister—The office of the Prime Minister shall become vacant-

- (a) if he resigns from office at any time by placing his resignation in the hands of the President; or
- (b) if he ceases to be a member of Parliament.
- (2) If the Prime Minister ceases to retain the support of a majority of the members of Parliament, he shall either resign his office or advise the President in writing to dissolve Parliament, and if he so advises 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 accordingly.
- (3) Nothing in this article shall disqualify Prime Minister for holding office until his successor has entered upon office.

Article 58. (1) Tenure of office of other Ministers—The office of a Minister other than the Prime Minister shall become vacant-

- (a) if he resigns from office by placing his resignation in the hands of the Prime Minister for submission to the President;
- (b) if he ceases to be a member of Parliament, but this shall not be applicable to Minister chosen under the Proviso to Article 56(2);
- (c) if the President pursuant to the provisions of clause (2) so directs; or
- (d) as provided in clause (4).

- (2) The Prime Minister may at any time request a Minister to resign, and if such Minister fails to comply with the request, may advise the President to terminate the appointment of such Minister.
- (3) Nothing in sub-clauses (a), (b) and (d) of clause (1) shall disqualify a Minister for holding office during any period in which Parliament stands dissolved.
- (4) If the Prime Minister resigns from or ceases to hold office each of the other Ministers shall be deemed also to have resigned from office but shall, subject to the provisions of this Chapter, continue to hold office until his successor has entered upon office.
- (5) In this article "Minister" includes Minister of State and Deputy Minister.

Article 1[58A. Application of Chapter]—Nothing in this Chapter, except the provisions of Article 55(4), (5) and (6) shall apply during the period in which Parliament is dissolved or stands dissolved :

Provided that, notwithstanding anything contained in Chapter IIA, where the President summons Parliament that has been dissolved to meet under Article 72(4), this Chapter shall apply].

Comments on Article 55 and General Comments—

In our Parliamentary form of Government, as per the Constitution, the Prime Minister occupies the most important position. The Prime Minister is the leader of the majority party in Parliament, the leader of the Cabinet and the council of Ministers. As a matter of fact, the Prime Minister is the Chief Executive of the Government. All executive powers of the Republic shall be exercised by and under the authority of the Prime Minister. The Cabinet shall be collectively responsible to Parliament. In case, the Parliament passes a vote of non-confidence, the entire council of Ministers along with the Prime Minister goes out of office.

Cabinet, the name applied to the collective body of advisers to the executive head of a Parliamentary Government. The composition and functions of the Cabinet vary in different countries. In modern British Cabinet system, the Prime Minister at its head, is collectively responsible to Parliament. The Cabinet is the effective policy making organ of the Executive Government. In Bangladesh, we are following the British Parliamentary system of West-Minister. Individual and collective

¹ Article 58A was inserted by the Constitution (Thirteenth Amendment) Act, 1996 (Act I of 1996) s. 2.

responsibilities and tenure of the Ministers are also spelt out in the Constitution itself.

Case on Article 55.

In the case of *Bangladesh Vs. Shafiuddin Ahmed*, 50 DLR(AD) 27, Mustafa Kamal, J. after considering the case of Mujibur Rahman found that the tribunals have no power of judicial review under Article 102(2) of the Constitution and the writ petitioners rightly invoked the jurisdiction of the High Court Division. In that decision at paragraphs 53 and 54, the learned Judge further held as under:-

“We, therefore, agree with the majority judgment of the Special Bench that the Cabinet decision dated 3.11.91 without publication in the official Gazette cannot be treated as a guide line and add thereto that it was not an executive action in terms of Article 55(4) of the Constitution. That in the absence of any guide line the authorities are vested with arbitrary powers, offending equality clauses contained in Articles 27 and 29(1) of the Constitution have been amply dealt with in the decision of this court in *Dr. Nurul Islam Vs. Government of Bangladesh*, 33 DLR(AD) 201”.

† CHAPTER IIA : NON-PARTY CARE-TAKER GOVERNMENT

Article 58B. (1) **The Non-Party Care-taker Government**—There shall be a Non-Party Care-taker Government during the period from the date on which the Chief Adviser of such Government enters upon office after Parliament is dissolved or stands dissolved by reason of expiration of its term till the date on which a new Prime Minister enters upon his office after the Constitution of Parliament.

- (2) The Non-Party Care-taker Government shall be collectively responsible to the President.
- (3) The executive power of the Republic shall, during the period mentioned in clause (1), be exercised, subject to the provisions of article 58D(1), in accordance with this Constitution, by or on the authority of the Chief Adviser and shall be exercised by him in accordance with the advice of the Non-Party Care-taker Government.
- (4) The provisions of article 55(4), (5) and (6) shall (with the necessary adaptations) apply to similar matters during the period mentioned in clause (1).

¹ New Chapter IIA was inserted, *ibid*; s. 3.

Article 58C. (1) Composition of the Non-Party Care-taker Government, appointment of Advisers, etc.—The Non-Party Care-taker Government shall consist of the Chief Adviser at its head and not more than ten other Advisers, all of whom shall be appointed by the President.

- (2) The Chief Adviser and other Advisers shall be appointed within fifteen days after Parliament is dissolved or stands dissolved, and during the period between the date on which 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 therefore Parliament was dissolved or stood dissolved shall continue to hold office as such.
- (3) The President shall appoint as Chief Adviser the person who among the retired Chief Justices of Bangladesh retired last and who is qualified to be appointed as an Adviser under this Article :
Provided that if such retired Chief Justice is not available or is not willing to hold the office of Chief Adviser, the President shall appoint as Chief Adviser the person who among the retired Chief Justices of Bangladesh retired next before the last retired Chief Justice.
- (4) If no retired Chief Justice is available or willing to hold the office of Chief Adviser, the President shall appoint as Chief Adviser the person who among the retired Judges of the Appellate Division retired last and who is qualified to be appointed as an Adviser under this Article :
Provided that if such retired Judge is not available or is not willing to hold the office of Chief Adviser, the President shall appoint as Chief Adviser the person who among the retired Judges of the Appellate Division retired next before the last such retired Judge.
- (5) If no retired Judge of the Appellate Division is available or willing to hold the office of Chief Adviser, the President shall, after consultation, as far as practicable, with the major political parties, appoint the Chief Adviser from among citizens of Bangladesh who are qualified to be appointed as Advisers under this Article.
- (6) Notwithstanding anything contained in this Chapter, if the provisions of clauses (3), (4) and (5) cannot be given effect to, the President shall assume the functions of the Chief Adviser of the Non-Party Care-taker Government in addition to his own functions under this Constitution.

- (7) 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 organization 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;
 - (d) not over seventy-two years of age.
- (8) The Advisers shall be appointed by the President on the advice of the Chief Adviser.
- (9) The Chief Adviser or an Adviser may resign his office by writing under his hand addressed to the President.
- (10) The Chief Adviser or an Adviser shall cease to be Chief Adviser or Adviser if he is disqualified to be appointed as such under this Article.
- (11) The Chief Adviser shall have the status, and shall be entitled to the remuneration and privileges, of a Prime Minister, and an Adviser shall have the status, and shall be entitled to the remuneration and privileges of a Minister.
- (12) The Non-Party Care-taker Government shall stand dissolved on the date on which the Prime Minister enters upon his office after the constitution of new Parliament.

Article 58D. (1) Functions of Non-Party Care-taker Government—The Non-Party Care-taker Government shall discharge its functions as an interim government and shall carry on the routine functions of such government with the aid and assistance of persons in the services of the Republic; and, except in the case of necessity for the discharge of such functions it shall not make any policy decision.

- (2) The Non-Party Care-taker Government shall give to the Election Commission all possible aid and assistance that may be required for holding the general election of members of Parliament peacefully, fairly and impartially.

Article 58E. Certain provisions of the Constitution to remain ineffective— Notwithstanding anything contained in articles 48(3), 141A(1) and 141C(1) of the Constitutions, during the period the Non-Party Care-taker Government is functioning, provisions in the Constitution requiring the President to act on the advice of the Prime Minister or upon his prior counter-signature be ineffective.]

General Comments on Articles 58B-58E

The concept of Non-party Care-taker Government was passed in the sixth Parliament by the Constitution (Thirteenth Amendment) Act. The main object of bringing this concept is to avoid rigging and unfairness in the Parliamentary Elections of Bangladesh. The main function of the Non-party Care-Taker Government is to give all possible aid and assistance to the Election Commission of Bangladesh for holding free, fair and neutral election. Apart from running the country, during the span of 90 days, the Care-Taker Government cannot take any policy decision. The Care-Taker Government will consist of one Chief Adviser and ten other advisers to assist the Chief-Adviser of the Care-Taker Government. The Non-party Care-Taker Government shall be collectively responsible to the President.

Three General Parliamentary Elections were held in Bangladesh under the Care-Taker Government and on the Constitutional procedure of Non-party Care-Taker Government. The election of fifth parliament was held under former Chief Justice Shahabuddin Ahmed. The General Election of the Seventh Parliament was held under former Chief Justice Md.Habibur Rahman and the election of the eighth Parliament was held under former Chief Justice Latifur Rahman.

CHAPTER III : LOCAL GOVERNMENT

Article 59 (1) **Local government**—Local Government in every administrative unit of the Republic shall be entrusted to bodies, composed of persons elected in accordance with law.

(2) Everybody such as is referred to in clause (1) shall, subject to this Constitution and any other law, perform within the appropriate administrative unit such functions as shall be prescribed by Act of Parliament, which may include functions relating to—

- (a) administration and the work of public officers;
- (b) the maintenance of public order;
- (c) the preparation and implementation of plans relating to public services and economic development.

Article 60 **Powers of local government bodies**— For the purpose of giving full effect to the provisions of article 59 Parliament shall, by law, confer powers on the local government bodies referred to in that article, including power to impose taxes for local purposes, to prepare their budgets and to maintain funds.]

Comments on Articles 59 and 60

Article 59 provides for local government in every administrative unit of the Republic which shall be entrusted to bodies composed of persons elected in accordance with law. In Clause(2) of Article 59, it has been said that by an Act of Parliament the functions of the Local Government may be determined 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. Article 60 provides that for giving meaningful effect of Article 59, Parliament shall by law, confer on the local government bodies the power to impose taxes, prepare budget and to maintain funds within the local area. In a democratic polity, for effective involvement of the people at grass-root level, the idea of local government bodies were conceived by the framers of the Constitution. As a matter of fact, these Articles are the reflections of Articles 9 and 11 of the constitution which are truly two important fundamental principles of State policy, namely, local government bodies elected by the people of the locality and effective participation by the people through their elected representatives in local administration.

Local Government is the subordinate administrative system by means of which the affairs of particular Divisions and Sub-Divisions of a country are managed. As for example in the United States of America there exists three types of local government: town Government, county Government and the Compromise System. Each of these types is typical of a particular section of the country in which it predominates; hence it can be said that there are three different types of Local Government.

In Bangladesh, the system of Government is unitary and the local Government system is directly linked up with the central government. Thus the local government system is a political institution. This local government is the core of functional democracy and structural democracy.

These institutions at village, union, upazila etc. perform similar functions of a State in local level viz, agriculture, health, education and road development. These institutions being nearer to local people can do better works by participation of local government bodies. These should be decentralized and devolution of power is essential. Strengthening of local government institutions can, therefore, be seen as a positive trend towards good governance.

Cases :

In the case of *Kudrat-E- Elahi Ponir*, 44 DLR(AD)-319, Shahabuddin Ahmed, C.J. in paragraph 11 held that for local government these are old institutions which cannot be abolished without damaging the democratic fabric of the country. But since independence from British rule, these

institutions fell victim to party politics or evil designs of autocratic regimes, passed through the ordeal of suppression, dissolution or management of their affairs by official bureaucrats or henchman nominated by Government of the day.

In paragraph 41(vi) the learned Chief Justice held as follows:-

“The other constitutional requirement for these local bodies is that they shall be entrusted to bodies” composed of persons elected in accordance with law.”The existing local bodies are, therefore, required to be brought in line with Article 59 by replacing the non-elected persons by election keeping in view the provision for special representation under Article 9. Necessary action in his respect should be taken as soon as possible in any case within a period not exceeding six months from date.”

In the said decision, Mustafa Kamal, J. held at paragraph 69 as follows:-

“I cannot conceive of a local government existing in terms of Articles 59 and 60 and another outside of it. That will make a mockery of Articles 59 and 60 and will be in direct conflict with Article 7(1) of the Constitution.”

In the same judgment A.T.M. Afzal, J. held at paragraph 52 as under:-

“The contention of the learned Attorney General that the legislature may without designating an area as an administrative unit for the purpose of Article 59 in exercise of its plenary legislative power (Article 65) establish local government is mischievous as it would amount to defying the mandate of Article 59 and 60 which cannot be permitted. The argument, therefore, must be rejected.”

Thus it now stands that a local body must consist of elected persons and the local government be constituted in an administrative unit. As in Article 152(1) districts have been designated as administrative units and as such no designation by law is necessary in case of district area. But designation by law is necessary in case of areas other than district within Article 59 of the Constitution.

CHAPTER IV : THE DEFENCE SERVICES

Article 61 : Supreme command—The supreme command of the defence services of Bangladesh shall vest in the President and the exercise thereof shall be regulated by law ¹[and such law shall, during the period in which there is a Non-Party Care-taker Government under article 58B, be administered by the President].

¹The words, commas and figure “and such law shall, during the period in which there is a Non-Party Care-taker Government under article 58B, be administered by President” were inserted by the Constitution (Thirteenth Amendment) Act, 1996 (Act I of 1996), s.4.

Article 62. (1) Recruitment etc., of defense Services—The Parliament shall by law provide for regulating-

- (a) the raising and maintaining of the defence services of Bangladesh and of their reserves;
- (b) the grant of commissions therein;
- (c) the appointment of chief of staff of the defence services, and their salaries and allowances; and
- (d) the discipline and other matters relating to those services and reserves.

(2) Until Parliament by law provides for the matters specified in clause (1) the President may, by order, Provide for such of them as are not already subject to existing law.

Article 63. (1) War— War shall not be declared and the Republic shall not participate in any war except with the assent of Parliament.

¹* * * * *

Comments on Articles 61– 63

In our Constitutional dispensation the Ministry of Defence is under the Prime Minister who is the executive head of the Republic. During the period of Non-Party Care-Taker Government, under Article 58B, the President remains in charge of the Ministry of Defence. Recruitment, discipline and all other matters relating to Defence Services are regulated by a separate law, namely, Military Law.

CHAPTER V : THE ATTORNEY GENERAL

Article 64. (1) The Attorney-General— The President shall appoint a person who is qualified to be appointed as a Judge of the Supreme Court to be Attorney-General for Bangladesh.

- (2) The Attorney-General shall perform such duties as may be assigned to him by the President.
- (3) In the performance of his duties, the Attorney-General shall have the right of audience in all courts in Bangladesh.
- (4) The Attorney-General shall hold office during the pleasure of the President, and shall receive such remuneration as the President may determine.

¹ Clauses (2) and (3) were omitted by the Constitution (Second Amendment) Act, 1973 (Act XXIV of 1973), S.4.

* * * * *

Comments on Article 64

Attorney General of Bangladesh is not a political person. In the United States, Attorney-General is a member of the Cabinet and performs the functions of those of a law Minister in Bangladesh. In Bangladesh, normally, an advocate of high standing is appointed as Attorney-General. He has a right of audience before all courts in Bangladesh. He is the highest law officer of the Republic. He is the ex-offio Chairman of the Bangladesh Bar Council and also the leader of the entire Bar of Bangladesh. A custom has developed that with the change of Government, the Attorney General tenders his resignation.

¹ Chapter VI-“ADVOCATE GENERAL” was omitted the second proclamations (Amendment) Order, 1977 (Second Proclamations Order I of 1977), which was added by the second Proclamation (Seventh Amendment) Order, 1976 (Second Proclamation Order No.IV of 1976).

PART V
THE LEGISLATURE
CHAPTER I : PARLIAMENT

Article 65. (1) Establishment of Parliament—There shall be a Parliament for Bangladesh (to be known as the House of the Nation) in which subject to the provisions of this Constitution, shall be vested the legislative powers of the Republic :

Provided that nothing in this clause shall prevent Parliament from delegating to any person or authority, by Act of Parliament, power to make orders, rules, regulations, bye-laws or other instruments having legislative effect.

(2) Parliament shall consist of three hundred members to be elected in accordance with law from single territorial constituencies by direct election and, for so long as clause (3) is effective, the members provided for in that clause; the members shall be designated as **Members of Parliament**.

¹[(3) Until the dissolution of Parliament occurring next after the expiration of the period of ten years beginning from the date of the first meeting of the Parliament next after the Parliament in existence at the time of commencement of the Constitution (Tenth Amendment) Act, 1990, there shall be reserved thirty seats exclusively for women members, who shall be elected according to law by the members aforesaid :

Provided that nothing in this clause shall prevent a woman from being elected to any of the seats provided for in clause (2).]

(4) The seat of Parliament shall be in the capital.

Comments on Article 65

Article 65 provides for Parliament known as Jatiya Sangshad in Bangladesh. The legislative power of the Republic is vested in the Parliament. Under clause (3) of Article 65, thirty ⁵~~(30)~~ seats were exclusively reserved for women Members. At the moment there is no women Member in the reserved seats as the period for which the reservation of seats was fixed had expired on the dissolution of the Seventh Parliament.

¹ Clause (3) was substituted for the former clause (3) by the Constitution (Tenth Amendment) Act, 1990 (Act XXXVIII of 1990); s.2.

Case :

In the case of *Fazle Rabbi -Vs- Election Commissioner*, 44 DLR 14, the question raised was whether the election to reserved seats for women members in the Parliament ought to wait till Completion of oath of all 300 members of Parliament. F.H.M.H. Rahman, J. on consideration of Articles 65(2)(3) and 67(1)(a) (vacation of seats of members) held at Paragraph 8 as follows :

“When clauses (2) and (3) of Article 65 are read together, it clearly means that the election to the thirty reserved seats for women Members of Parliament cannot take place before the general election to all the three hundred territorial constituencies are held and that results are published by the Election Commission of the General Election of all the said three hundred territorial constituencies. It is nowhere provided either in Article 67(1)(a) or in any other article of the Constitution that if one or some of the said three hundred representatives declared by direct election do not make and subscribe the oath or affirmation for a member of the Parliament as prescribed in the Third Schedule to the Constitution, the election to the thirty seats exclusively reserved for women Members under Article 65(3) of the Constitution cannot held.”

In the case of *Bangladesh & ors-15, M/S Eastern Beverage Industries Ltd.*, 23 BLD (AD) 68, Article 65 (1) of Parliament's delegated authority was considered, (Paragraphs 14, 22 & 26).

Article 66. (1) Qualifications and disqualifications for election to Parliament—A person shall subject to the provisions of clause (2), be qualified to be elected as, and to be, a member of Parliament if he is a citizen of Bangladesh and has attained the age of twenty-five years.

(2) A person shall be disqualified for election as, or for being, a member of Parliament who-

- (a) is declared by a competent court to be of unsound mind;
- (b) is an undercharged insolvent;
- (c) acquires the citizenship of, or affirms or acknowledges allegiance to, a foreign state;
- (d) has been, on conviction for a criminal offence involving moral turpitude, sentenced to imprisonment for a term of not less than two years, unless a period of five years has elapsed since his release;^{1*}

¹ The word “or” was omitted by the Second Proclamation (Fifteenth Amendment) Order, 1978 (Second Proclamation Order No.IV of 1978).

¹(dd) holds any office of profit in the service of the Republic other than an office which is declared by law not to disqualify its holders; or]

2 * * * * *

3 * * * * *

(g) is disqualified for such election by or under any law.

⁴[(2A) For the purposes of this article a person shall not be deemed to hold an office of profit in the service of the Republic by reason only that ⁵[he is a President, ⁶* Prime Minister], ⁷* * * * * Minister, Minister of State or Deputy Minister.]

8 * * * * *

(4) If any dispute arises as to whether a member of Parliament has, after his election, become subject to any of the disqualifications mentioned in clause (2) or as to whether a member of Parliament should vacate his seat pursuant to article 70, the dispute shall be referred to the Election Commission to hear and determine it and the decision of the Commission on such reference shall be final.

(5) Parliament may, by law, make such provision as it deems necessary for empowering the Election Commission to give full effect to the provisions of clause (4).

¹ Sub-clause (dd) was inserted by the Second Proclamation (Fifteenth Amendment) Order, 1978 (Second Proclamation Order No. IV of 1978).

² Sub-clause (e) was omitted by the Second Proclamation (Third Amendment) Order, 1975 (Second Proclamation Order No. III of 1975).

³ Sub-clause (f) was omitted by the Constitution (fourth Amendment) Act, 1975 (Act II of 1975), s.5.

⁴ Clause (2A) was inserted by the second Proclamation (Fifteenth Amendment) Order, 1978 (Second) Proclamation Order No. IV of 1978).

⁵ The words and commas "he is a President, Vice-President, Prime Minister" were substituted for the words "he is a Prime Minister" by the Constitution (Sixth Amendment) Act, 1981 (Act XIV of 1981), s.3.

⁶ The word and comma "Vice-President" were omitted by the Constitution (Twelfth Amendment) Act, 1991 (Act XXVIII of 1991), s.4.

⁷ The words and comma "Deputy Prime Minister," were omitted, *ibid*;

⁸ Clause (3) was omitted by the Constitution (Fourth Amendment) Act, 1975 (Act II of 1975), s. 5.

Case :

In the case of *Hussain Muhammad Ershad Vs. Zahedul Islam Khan* and others, 54 DLR(AD) 1, Mahmudul Amin Chowdhury, C.J. while interpreting Articles 66 and 67 of the Constitution, held in paragraph 13 as under:

“The petitioner cannot hold that office after he has been sentenced to suffer imprisonment for over two years which has been upheld by the Appellate Division. The petitioner lost his seat in the Parliament as he has incurred disqualification as provided under Article 66 of the Constitution. Embezzlement of State money by a person who was the President of the country and using the same for his personal benefit or living or having properties disproportionate to his known source of income which definitely come within the ambit of moral turpitude”.

In the case of *Abu Bakkar Siddique -Vs- Shahabuddin Ahmed*, 49 DLR-1, a question was raised as to whether Mr. Justice Shahabuddin Ahmed, former Chief Justice can be elected as a President of Bangladesh in view of Article 99(1) of the Constitution. Md. Mozammel Hoque, J. in that decision held at paragraph 47 after interpreting Article 66(2A) and 99(1) as follows:-

“We further find that under this provision clause (2A) the President, Prime Minister others are excluded from this Article 66 which does not mean that the office-holders like the President, Prime Minister and others will be included as holders of office of profit in the service of the Republic considering the provisions of Article 99(1) along with the provision of Article 66(2A) of the Constitution. We are of the view that this clause(2A) shall not include the office of President, the Prime Minister and other constitutional office-holders in the category of office of profit in the service of the Republic by implication.”

Article 67. (1) Vacation of seats of members—A member of Parliament shall vacate his seat-

- (a) if fails, within the period of ninety days from the date of the first meeting of Parliament after his election, to make and subscribe ^{1**} the oath or affirmation prescribed for a member of Parliament in the Third Schedule :

¹ The words “before Parliament” were omitted, *ibid*.

Provided that the Speaker may, before the expiration of that period, for good cause extend it;

(b) if he is absent from Parliament, without the leave of Parliament, for ninety consecutive sitting days;

(c) upon a dissolution of Parliament;

(d) if he has incurred a disqualification under clause (2) of article 66;
or

(e) in the circumstances specified in article 70.

(2) 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 Speaker is vacant or the Speaker is for any reason unable to perform his functions, by the Deputy Speaker.

Case :

In Special Reference No 1 of 1995, the President referred the matter under Article 106 of the Constitution to decide the question as to whether the walkout of all the opposition parties from the Parliament can be construed as 'absent' from Parliament without leave of Parliament occurring in Article 67(1) (b) of the Constitution resulting in vacation of their seat in Parliament?

In that decision, Latifur Rahman, J. held at paragraph 113 as under:

“In Article 67 (1) (b) we find the word absent which means simply not present whatever may be the meaning of walkout and boycott, the net result is that all the members of the opposition parties in the Parliament are absent”.

In the same decision, while computing 90 consecutive sitting day, A.T.M.Afzal, C.J, held in paragraph 76 as follows:-

“ We have, therefore, no doubt in our mind that in computing the period of ninety sitting days the period between two Sessions as above and even adjournments in a particular Session between sitting day should be excluded”.

Article 68. ¹[Remuneration], etc., of members of Parliament—
Members of Parliament shall be entitled to such ¹[remuneration],

¹ The word “remuneration” was substituted for the word “salaries” by the Constitution (Eighth Amendment) Act, 1988 (Act XXX of 1988), s. 6.

allowances and privileges as may be determined by Act of Parliament or, until so determined, by order made by the President.

Case :

In the case of *Dr. Ahmed Husain –VS- Bangladesh, 51 DLR(AD) 75*, a question was raised as whether insertion of Article 3c is beyond the scope of President's Order No. 28 of 1973. It was held by the Appellate Division that when the power is there in Article 68 of the Constitution, non-invocation of the specific power of the concerned President's order is constitutionally valid.

In this case it was held that the import of Car or Jeep from duty etc, may offend the sense of decency and dignity of a section of the people outside the Parliament but on that ground it can not be unconstitutional.

In that decision, Mustafa Kamal, J. held at paragraph 5 as under:

“ It is clear from the language of Article 68 of the Constitution that Parliament has been given as enabling power to enact a legislation providing for payment of remuneration and allowances and granting of privileges to the members of the Parliament. The enabling power is there, but while enacting President's Order No 28 of 1973 the word “Privileges” was not used.”

Even without using this word in the Preamble of the President's Order and in the nomenclature of the President's Order, the Parliament retains the power to grant privileges to members of Parliament under Article 68 of the Constitution. When the power is there in the Constitution, non-invocation of the specific power in the concerned legislation will not make the privilege granted outside the scope of the concerned President's Order. In President's Order No 28 of 1973 itself preamble further says as follows:

“ Now, therefore, in power once of Article 68 of the Constitution of the People's Republic of Bangladesh and in exercise of all Powers enabling him in that behalf, the President is pleased to make the following order”. As such Presidents Order No 28 of 1973 was specifically enacted in pursuance of the powers of Parliament granted by Article 68 of the Constitution”.

Article 69. Penalty for member sitting or voting before taking oath—If a person sits or votes as a member of Parliament before he makes or subscribes the oath or affirmation in accordance with this Constitution, or when he knows that he is not qualified or is disqualified for membership thereof, he shall be liable in respect of each day on which he so sits or

votes to a penalty of one thousand take to be recovered as a debt due to the Republic.

Article 1[70. (1) Vacation of seat on resignation, etc.—A person elected as a member of Parliament at an election at which he was nominated as a candidate by a political party shall vacate his seat if he resigns from that party or votes in Parliament against that party.

Explanation.— If a member of Parliament—

(a) g present in Parliament abstains from voting, or

(b) nts himself from any sitting of Parliament,

ignoring the direction of the party which nominated him at the election as a candidate not to do so, he shall be deemed to have voted against that party.

(2) If, at any time, any question as to the leadership of the Parliamentary party of a political party arises, the Speaker shall, within seven days of being informed of it in writing by a person claiming the leadership of the majority of the members of that party in Parliament, convene a meeting of all members of Parliament of that party in accordance with the rules of procedure of Parliament and determine its Prliamentary leadership by the votes of the majority through division and if, in the matter of voting in Parliament, any member does not comply with the direction of the leadership so determined, he shall be deemed to have voted against that party under clause (1) and shall vacate his seat in the Parliament.

(3) If a person, after being elected a member of Parliament as an independent candidate, joins any political party, he shall, for the purpose of this article, be deemed to have been elected as a nominee of that Party.]

Comments on Article 70

Article 70 was substituted by the Constitution (Twelfth Amendment) Act, 1991. One may argue both in favour or against the substitution of Article 70. If the floor-crossing is for horse trading, evil power grabbing and self-aggrandizement, then it affects on good democratic polities. But the withdrawal of political support on grounds of principle, is a vital safeguard of the democratic process which keeps a leadership in cheek and prevents it from riding rough that over diverse interest, one may argue that threat of withdrawal to support is an effort to keep a government in its toes.

¹Article 70 was substituted for the former article 70 by the Constitution (Twelfth Amendment) Act, 1991 (Act XXVIII of 1991), s. 5.

Case :

In the case of *the Secretary, Parliament Secretariat -VS- Mr. Khandker Delwar Hossain*, 19 BLD (AD) 276, a question was raised of floor crossing by two members of the Parliament by changing their allegiance to the Party from which ticket they were elected in the Parliament. Mustafa Kamal, J. while interpreting Article 70 along with Article 66 (4) (5) of the Constitution held at paragraph 25 as follows:

“The subject matter of Article 70 is within the executive domain of the Election Commission and the Speaker has neither any Constitutional authority to thwart a decision by the Election Commission by including the subject matter in a parliamentary proceeding and by pre-empting any decision under the cover of a ruling which will be a usurpation of the Constitutional power of the Election Commission. We, therefore, do not attach any importance to an unedited copy of the proceedings of the Jatiya Sangshad held on 21.4.98 produced for our perusal by the learned Attorney General.”

71. (1) Bar against double membership—No person shall at the same time be a member of Parliament in respect of two or more constituencies.

(2) Nothing in clause (1) shall prevent a person from being at the same time a candidate for two or more constituencies, but in the even of his being elected for more than one—

(a) within thirty days after his last election the person elected shall deliver to the Chief Election Commissioner a signed declaration specifying the constituency which he wishes to represent, and the seats of the other constituencies for which he was elected shall thereupon fall vacant;

(b) if the person elected fails to comply with sub-clause (a) all the seats for which he was elected shall all vacant; and

(c) the person elected shall not make or subscribe the oath or affirmation of a member of Parliament until the foregoing provisions of the clause, so far as applicable, have been complied with.

Article. 72. (1) Sessions of Parliament—Parliament shall be summoned, prorogued and dissolved by the President by public notification, and when summoning Parliament the President shall specify the time and place of the first meeting;

¹[(Provided that a period exceeding sixty days shall not intervene between the end of one session and the first sitting of Parliament in the next session:

Provided further that in the exercise of his functions under this clause, the President shall act in accordance with the advice of the Prime Minister tendered to him in writing.]

(2) Notwithstanding the provisions of clause (1) Parliament shall be summoned to meet within thirty days after the declaration of the results of polling at any general election of members of Parliament.

(3) Unless sooner dissolved by the President, Parliament shall stand dissolved on the expiration of the period of five years from the date of its first meeting :

Provided that at any time when the Republic is engaged in war the period may be extended by Act of Parliament by not more than one year at a time but shall not be so extended beyond six months after the termination of the war.

(4) If after a dissolution and before the 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 to meet.

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(5) Subject to the provisions of clause (1) the sittings of Parliament shall be held at such times and places as Parliament may, by its rules of procedure or otherwise determine.

Article : 73. (1) President's address and messages to Parliament—The President may address Parliament and may send message thereto.

(2) At the commencement to the first session after a general election of members of Parliament and at the commencement of the first session of each year the President shall address Parliament.

¹ The provisos were substituted for the former proviso by the Constitution (Twelfth Amendment) Act, 1991 (Act XXVIII of 1991), s.6(a).

² Clause (4A) was omitted by the Constitution (Twelfth Amendment) Act, 1991 (Act XXVIII of 1991), s. 6(b).

- (3) Parliament shall, after the presentation of an address by the President, or the receipt of a message from him, discuss the matter referred to in such address or message.

1[73A. (1) Rights of Ministers as respects Parliament- Every Minister shall have the right to speak in, and otherwise to take part in the proceeding of, Parliament, but shall not be entitled to vote ²[or to speak on any matter not related to his Ministry] unless he is a member of Parliament also.

(2) In this article, "Minister" includes a Prime Minister, ^{3**}, Minister of State and Deputy Minister.]

Article. 74. (1) Speaker and Deputy Speaker—Parliament shall at the first sitting after any general election elect from among its members a Speaker and a Deputy Speaker, and if either office becomes vacant shall within seven days or, if Parliament is not then sitting, at its first meeting thereafter, elect one of its members to fill the vacancy.)

(2) The Speaker or Deputy Speaker shall vacate his office—

- (a) if he ceases to be a member of Parliament;
- (b) if he becomes a Minister;
- (c) if Parliament passes a resolution (after not less than fourteen days' notice has been given of the intention to move the resolution) supported by the votes of a majority of all the members thereof, requiring his removal from office;
- (d) if he resigns his office by writing under his hand delivered to the President;
- (e) if after a general election another member enters upon that office; or
- (f) in the case of the Deputy Speaker, if he enters upon the office of Speaker.

¹ Article 73A was inserted by the Constitution (Fourth Amendment) Act, 1975 (Act II of 1975), s.9.

² The words "or to speak on any matter not related to his Ministry" were inserted by the Constitution (Twelfth Amendment) Act, 1991 (Act XXVIII of 1991), s. 7(a).

³ The words "Deputy Prime Minister" were omitted by the Constitution (Twelfth Amendment) Act, 1991 (Act XXVIII of 1991), s. 7(b).

- (3) While the office of the Speaker is vacant or the Speaker is ¹[acting as] President, or if it is determined by Parliament that the Speaker is otherwise unable to perform the functions of his office, those functions shall be performed by the Deputy Speaker or, if the office of the Deputy Speaker is vacant, by **such member of Parliament as may be** determined by or under the rules of procedure of Parliament; and during the absence of the Speaker from any sitting of Parliament the Deputy Speaker or, if he also is absent, such person as may be determined by or under the rules of procedure, shall act as Speaker.
- (4) At any sitting of Parliament, while a resolution for the removal of the Speaker from his office is under consideration the Speaker (or while any resolution for the removal of the Deputy Speaker from his office is under consideration, the Deputy Speaker) shall not preside, and the provisions of clause (3) shall apply in relation to every such sitting as they apply in relation to a sitting from which the Speaker or, as the case may be, the Deputy Speaker is absent.
- (5) The Speaker or the Deputy Speaker, as the case may be, shall have the right to speak in, and otherwise to take part in, the proceedings of Parliament while any resolution for his removal from office is under consideration in Parliament, and shall be entitled to vote but only as a member.
- (6) Notwithstanding the provisions of clause (2) the Speaker or, as the case may be, the Deputy Speaker, shall be deemed to continue to hold office until his successor has entered upon office.

Comments on Article 74 of the Constitution

The office of the Speaker is of great importance. He presides over the sittings of the Parliament and regulates proceedings of the House and control its workings. He is expected to maintain strict neutrality, that is why in Britain there is a convention that the Speaker resigns after being elected as a Speaker. The Speaker upholds the dignity and privileges of the House.

75. (1) Rules of procedure, quorum, etc.—Subject to this Constitution—

- (a) the procedure of Parliament shall be regulated by rules of procedure made by it, and until such rules are made shall be regulated by rules of procedure made by the President;

¹ The words "acting as" were substituted for the words "exercising the functions of the" by the Constitution (Fourth Amendment) Act, 1975 (Act II of 1975), s. 10.

- (b) a decision in Parliament shall be taken by a majority of the votes of the members present and voting, but the person presiding shall not vote except when there is an equality of votes, in which case he shall exercise a casting vote;
 - (c) no proceeding in Parliament shall be invalid by reason only that there is a vacancy in the membership thereof or that a person who was not entitled to do so was present at, or voted or otherwise participated in, the proceeding.
- (2) If at any time during which Parliament is in session the attention of the person presiding is drawn to the fact that the number of members present is less than sixty, he shall either suspend the meeting until at least sixty members are present, or adjourn it.

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76. (1) Standing committees of Parliament—¹* * * Parliament shall appoint from among its members the following standing committees, that is to say—

- (a) a public accounts committee;
 - (b) committee of privileges; and
 - (c) such other standing committees as the rules of procedure of Parliament require.
- (2) In addition to the committees referred to in clause (1), Parliament shall appoint other standing committees, and a committee so appointed may, subject to this Constitution and to 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 of administration of a Ministry and may require it to furnish, through an authorised representative, relevant information and to answer questions, orally or in writing ;
 - (d) perform any other function assigned to it by Parliament.
- (3) Parliament may by law confer on committees appointed under this article powers for—
- (a) enforcing the attendance of witnesses and examining them on oath, affirmation or otherwise;
 - (b) compelling the production of documents.

¹ The words "At its first meeting in each session" were omitted by the Constitution (Fourth Amendment) Act, 1975 (Act II of 1975), s. 11.

Comments on Article 76

The principal task of legislature is of course, law-making. People elect their representatives not only to make-laws but also to oversee their enforcement and administration. Government is required not only for ensuring enforcement of laws but also to check and control excesses committed or transgressions made by the public servants. This power is exercised by legislature through general discussions in the sessions and in various parliamentary committees. If the parliamentary committees are active, vigorous and regular for overseeing and controlling the executive branch, the greater is the promotion of the cause of good governance.

Further, promulgation of new laws can be discussed in detail and on a multi-party basis as much within the parliament and in public.

The Public Accounts Committee (PAC) is the top vigilance body of parliament to scrutinise whether the budget allocations are spent properly.

Article 77. (1) Ombudsman—Parliament may, by law, provide for the establishment of the office of Ombudsman.

- (2) The Ombudsman shall exercise such powers and perform such functions as Parliament may, by law, determine, including the power to investigate any action taken by a Ministry, a public officer or a statutory public authority.
- (3) The Ombudsman shall prepare an annual report concerning the discharge of his functions, and such report shall be laid before Parliament.

Comments on Article 77

The word comes from old Swedish Embed, meaning proxy or Power to act for another. Swedish call "Parliamentary Commissioner of Justice". It started in Sweden in 1809. It is practised in Scandinavian countries, New Zealand and the Philippines. The crucial point in Ombudsman's power in the right to look into 'unreasonable, unfair, oppressive or unnecessarily discriminatory' acts by government officials. Any one can file any complaint for deprivation of their freedom in jail, hospital etc. The ombudsman should be a person of distinguished accomplishment in the field of law or administration who will ameliorate the sufferings of Urban people.

The provision is in our Constitution since the day of coming into force of the Constitution. In 1980, Ombudsman Act has been passed in the

Parliament, but the Office of the Ombudsman has not yet been established in Bangladesh till today.

Article 78. (1) Privileges and immunities of Parliament and members—The validity of the proceedings in Parliament shall not be questioned in any court.

- (2) A member or officer of Parliament in whom powers are vested for the regulation of procedure, the conduct of business or the maintenance of order in Parliament, shall not in relation to the exercise by him of any such powers be subject to the jurisdiction of any court.
- (3) A member of Parliament shall not be liable to proceedings in any court in respect of anything said, or any vote given, by him in Parliament or in any committee thereof.
- (4) A person shall not be liable to proceedings in any court in respect of the publication by or under the authority of Parliament of any report, paper, vote or proceeding.
- (5) Subject to this article, the privileges of Parliament and of its committees and member may be determined by Act of Parliament.

Comments on Article 78

This article speaks of the parliamentary privilege and immunities of the members of the Parliament. The underlying principle has been stated to be that the people's representatives should be free to express themselves without fear of legal consequences. This immunity is confined within the Parliament only. Clause (4) also extend immunity in respect of any publication, report, paper, vote or proceeding in the Parliament. Thus a member of Parliament enjoys freedom of speech and publication of proceedings within the Parliament.

In the case of *Ataur Rahman Vs. Md. Nasim*, 52 DLR-16, a question was raised as to whether the statement of the Home Minister in the Parliament that the High Court is patronizing terrorist by granting them bail indiscriminately, has immunity under Article 78(3) of the Constitution. In that decision Md. Mozammel Hoque, J. held at paragraph of that decision as under:-

“Though prima facie the alleged statements appear to be objectionable and contemptuous, yet we hold that the immunity under Article 78(3) of the Constitution is wide, absolute and unqualified and such immunity enjoyed by a member of Parliament cannot be curtailed in any manner and no court including the Supreme Court can take any legal proceeding

against a member of Parliament for anything he says in the Parliament during the course of business of the Parliament”.

Article 79. (1) Secretariat of Parliament—Parliament shall have its own secretariat.

- (2) Parliament may, by law, regulate the recruitment and conditions of service of persons appointed to the secretariat of Parliament.
- (3) Until provision is made by Parliament the President may, after consultation with the Speaker, make rules regulating the recruitment and condition of service of persons appointed to the secretariat of Parliament, and rules so made shall have effect subject to the provisions of any law.

CHAPTER II : LEGISLATIVE AND FINANCIAL PROCEDURES

Article 80. (1) Legislative Procedure—Every proposal in Parliament for making a law shall be made in the form of a Bill.

- (2) When a Bill is passed by Parliament it shall be presented to the President for assent.
- (3) The President, within fifteen days after a Bill is presented to him, shall assent to the Bill¹ *** or, in the case of a Bill other than a Money Bill may return it to Parliament with a message requesting that the Bill or any particular provisions thereof be reconsidered and that any amendments specified by him in the message be considered : and if he fails so to do he shall be deemed to have assented to the Bill at the expiration of that period.
- (4) If the President so returns the Bill Parliament shall consider it together with the President's message, and if the Bill is again passed by Parliament with or without amendments²[by the votes of a majority of the total number of members of Parliament], it shall be presented to the President for his assent, whereupon the President shall assent to the Bill within the period of seven days after it has been presented to him, and if he fails to do so he shall be deemed to have assented to the Bill on the expiration of that period.

¹ The words “or declare that he withholds assent therefrom” were omitted by the Second Proclamation (Fifteenth Amendment) Order, 1978 (Second Proclamation Order No. IV of 1978).

² The words “by the votes of a majority of the total number of members of Parliament” were inserted, *ibid.*

(5) When the President has assented or is deemed to have assented to a Bill passed by Parliament it shall become law and shall be called an Act of Parliament.

Article 81. (1) Money Bills— In this Part “Money Bill” means a Bill containing only provisions dealing with all or any of the following matters—

- (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 Consolidate 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 or issue of such moneys, or the audit of the accounts of the Government;
- (f) any subordinate matter incidental to any of the matter specified in the foregoing sub-clauses.

(2) A Bill 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.

(3) Every Money Bill shall, when it is presented to the President for his assent, bear a certificate under the hand of the Speaker that it is a Money Bill, and such certificate shall be conclusive for all purposes and shall not be questioned in any court.

Article 82. Recommendation for financial measures— No Money Bill, or any Bill which involves expenditure from public moneys, shall be introduced into Parliament except on the recommendation of the President:

Provided that no recommendation shall be required under this article for the moving of an amendment making provision for the reduction or abolition of any tax.

Article 83. No taxation except by or under Act of Parliament—No tax shall be levied or collected except by or under the authority of an Act of Parliament.

Article 84. (1) Consolidated Fund and the Public Account of the Republic—All revenues received by the Government, all loans raised by the Government, and all moneys received by it in repayment of any loan, shall form part of one fund to be known as the consolidated Fund.

(2) All other public moneys received by or on behalf of the Government shall be credited to the Public Account of the Republic.

Article 85. Regulation of public moneys—The custody of public moneys, their payment into and the withdrawal from the Consolidated Fund or, as the case may be, the Public Account of the Republic, and matters connected with or ancillary to the matters aforesaid, shall be regulated by Act of Parliament, and until provision in that behalf is so made, by rules made by the President.

Article 86. Moneys Payable to Public account of Republic—All moneys received by or deposited with—

(a) any person employed in the service of the Republic or in connection with the affairs of the Republic other than revenues or moneys which by virtue of clause (1) of article 84 shall form part of the Consolidated Fund; or

(b) any court to the credit of any cause, matter, account or persons,

shall be paid into the Public Account of the Republic.

Article 87. (1) Annual financial statement— There shall be laid before Parliament, in respect of each financial year, a statement of the estimated receipts and expenditure of the Government for that year, in this Part referred to as the annual financial statement.

(2) The annual financial statement shall show separately—

(a) the sums required to meet expenditure charged by or under this Constitution upon the Consolidated Fund; and

(b) the sums required to meet other expenditure proposed to be made from the Consolidated Fund;

and shall distinguish expenditure on revenue account from other expenditure.

Article 88. Charges on Consolidated Fund— The following expenditure shall be charged upon the Consolidated Fund—

(a) the remuneration payable to the President and other expenditure relating to his office;

1 * * * * *

(b) the remuneration payable to—

(i) the Speaker and Deputy Speaker;

(ii) the Judges of the ²[Supreme Court ^{3***}];

(iii) the Comptroller and Auditor-General;

(iv) the Election Commissioners;

(v) the members of the Public Service Commissions;

(c) the administrative expenses of, including remuneration payable to, officers and servants of Parliament, the Supreme Court ^{4**}, 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 expenditure charged upon the Consolidated Fund by this Constitution or by Act of Parliament.

Article 89. (1) Procedure relating to annual financial statement—So much of the annual financial statement as relates to other expenditure charged upon the Consolidated Fund may be discussed in, but shall not be submitted to the vote of Parliament.

1 Clause (aa) was omitted by the Constitution (Twelfth Amendment) Act, 1991 (Act XXVIII of 1991), s. 8.

2 The words "Supreme Court and High Court" were submitted for the words "Supreme Court" by the Second Proclamation (Seventh Amendment) Order, 1976 (Second Proclamation Order No. IV of 1976).

3 The words "and High Court" were omitted by the Second Proclamation (Tenth Amendment) Order, 1977 (Second Proclamation Order No. I of 1977).

4 The comma and words "the High Court" were omitted, *ibid.*

- (2) So much of the annual financial statement as relates to other expenditure shall be submitted to Parliament in the form of demands for grants, and Parliament shall have power to assent to or to refuse to assent to any demand, or to assent to it subject to a reduction of the amount specified therein.
- (3) No demand for a grant shall be made except on the recommendation of the President.

Article 90. (1) **Appropriation Act**—As soon as may be after the grants under article 89 have been made by Parliament there shall be introduced in Parliament a Bill to provide for appropriation out of the Consolidated Fund of all moneys required to meet—

- (a) the grants so made by Parliament; and
 - (b) the expenditure charged on the Consolidated Fund but not exceeding in any case the amount shown in the annual financial statement laid before Parliament.
- (2) No amendment shall be proposed in Parliament to any such Bill which has the effect of varying the amount of any grant so made or altering the purpose to which it is to be applied, or of varying the amount of any expenditure charged on the Consolidated Fund.
 - (3) Subject to the provisions of this Constitution no money shall be withdrawn from the Consolidated Fund except under appropriation made by law passed in accordance with the provisions of this article.

Article 91. Supplementary and excess grants—If in respect of any financial year it is found—

- (a) that the amount authorised to be expended for a particular service for the current financial year is insufficient or that a need has arisen for expenditure upon some new service not included in the annual financial statement for that year; or
- (b) that any money has been spent on a service during a financial year in excess of the amount granted for that service for that year;

the President shall have power to authorise expenditure from the Consolidated Fund whether or not it is charged by or under the Constitution upon that Fund and shall cause to be laid before Parliament a

supplementary financial statement setting out the estimated amount of the expenditure or, as the case may be, an excess financial statement setting out the amount of the excess, and the provisions of articles 87 to 90 shall (with the necessary adaptations) apply in relation to those statements as they apply in relation to the annual financial statement.

Article 92. (1) Votes of account, votes of credit, etc.—Notwithstanding anything in the foregoing provisions of this Chapter, Parliament shall have power—

- (a) to make any grant in advance in respect of the estimated expenditure for a part of any financial year pending the completion of the procedure prescribed in article 89 for the voting of such grant and the passing of a law in accordance with the provisions of article 90 in relation to that expenditure;
- (b) to make a grant for meeting an unexpected demand upon the resources of the Republic when on account of the magnitude or the indefinite character of the service the demand cannot be specified with the details ordinarily given in an annual financial statement;
- (c) to make an exceptional grant which forms no part of the current service of any financial year;

and Parliament shall have power to authorise by law the withdrawal of moneys from the Consolidated Fund for the purposes for which such grants are made.

(2) The provisions of articles 89 and 90 shall have effect in relation to the making of any grant under clause (1), and to any law to be made under that clause, as they have effect in relation to the making of a grant with regard to any expenditure mentioned in the annual financial statement and to the law to be made for the authorisation of appropriation of moneys out of the Consolidated Fund to meet such expenditure.

¹(3) Notwithstanding anything contained in the foregoing provisions of this Chapter, if, in respect of a financial year, Parliament—

- (a) has failed to make the grants under article 89 and pass the law under article 90 before the beginning of that year and has not also made any grant in advance under this article; or

¹ Clause (3) was added by the Constitution (Twelfth Amendment) Act, 1991 (Act XXVIII of 1991), s. 9.

(b) has failed to make the grants under article 89 and pass the law under article 90 before the expiration of the period for which the grants in advance, if any, were made under this article, the President may, upon the advice of the Prime Minister, by order, authorise the withdrawal from the Consolidated Fund moneys necessary to meet expenditure mentioned in the financial statement for that year for a period not exceeding sixty days in that year, pending the making of the grants and passing of the law.]

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Comments on Articles 80-92

(Legislative and Financial Procedure of Parliament)

The Primary function of the Parliament is to make laws. The legislative Procedure is introduced in the form of bill. There are two types of Bills, namely, public and private Bills. Public Bill concerns the general interest of the entire people. Private Bills relates to the interest of some locality or Corporation, or Particular person or body of persons.

A public bill may be introduced in the House by the Government and is generally known as a government Bill. Government Bill are of two kinds, (a) ordinary Public bills and (b) money bills. When a private member of Parliament introduces a public Bill it is called a private member public Bill.

In the Constitutional provisions mentioned in this chapter, the procedure and considerations at different stages including the procedure and report of select/standing committee and amendments are elaborately dealt with.

In other Constitutional provisions the Procedure of withdrawal of Bills and authentication of Bill by the President for assent are mentioned.

It may be mentioned that a money Bill is a bill which contains matter mentioned in Article 81 of the Constitution. Certain principles are followed regarding money Bills as mentioned in the Constitutional provisions.

The expenditures as mentioned in Article 88 of our Constitution are charged on the consolidated fund such expenditures are not subject to vote in Parliament.

¹ Article "92A. Authorisation of expenditure in certain cases" was omitted, *ibid.*, s. 10.

Case on Article 85:

In the case of *Bangladesh -Vs- Prize Court*, 34 DLR(AD) 212, the Government of Bangladesh filed an application before the Prize Court for a direction for allocating and transfer of the Prize Fund of the proceedings in a Prize suit to the Public Account of the Republic of Bangladesh. The said application was rejected by the Prize Court and subsequently the Appellate Division affirmed the same. Fazle Munim, J. on a reference to Article 85 of the Constitution held in paragraph 10 as under:

“There is neither an Act of Parliament nor any rules made by the President which govern the mode of payment of money constituting the Prize Count Fund into the Public Account of Republic. In the absence of any enactment or rules which the Constitution has empowered the President to make for the regulation of payment of money belonging to the Prize Count Fund into the Public Account of the Republic, the only alternative left to the Government is to get an Act passed by Parliament or have Rules framed by the President pending such enactment.”

In the case of *Zaminur Rahman -VS- Bangladesh*, 31 DLR (AD) 172, Octroi Muhrir's of Dhaka Pourashava who were entrusted with the duty of assessing and collecting Octroi on goods and animals imported in the Municipal area, challenged the validity of notification. In that case K.M. Subhan, J. on an interpretation of Articles 83 and 84 held in Paragraph 17 as under:

“Now reverting to Article 83 of the constitution it is found that it Provides thus: “No tax shall be levied or collected except by or under the authority of an Act of Parliament”. If octroi, as is leviable by the Paurashava, and mentioned in the 4th Schedule of the Ordinance is a tax as authorized to be levied or collected as mentioned in Article 83 of the Constitution, then it is to be credited to the consolidated fund mentioned in Article 84 of the constitution, which is the ultimate source for utilization for all public purposes. A toll or fee is never intended to be or becomes a part of the consolidated fund.”

Further, it was observed in that case from the provisions of Municipal Administration Ordinance, 1960 that the cost of service rendered by the Municipality is derived from the Municipal Fund in which the Proceeds, all taxes, tolls, rates and fees and other charges, levied by the Pouravashava are credited.

CHAPTER III : ORDINANCE MAKING POWER

Article 93. (1) **Ordinance making power**—At any time when ¹[Parliament stands dissolved or is not in session], if the President is satisfied that circumstances exist which render immediate action necessary, he may make and promulgate such Ordinances (as the circumstances) appear to him to require, and any Ordinance so made shall, as from its promulgation have the like force of law as an Act of Parliament;

Provided that no Ordinance under this clause shall make any provision--

- (i) which could not lawfully be made under this Constitution by Act of Parliament;
 - (ii) for altering or repealing any provision of this Constitution; or
 - (iii) continuing in force any provision of an Ordinance previously made.
- (2) An Ordinance made under clause (1) shall be laid before Parliament at its first meeting following the promulgation of the Ordinance and shall, unless it is earlier repealed, cease to have effect at the expiration of thirty days after it is so laid or, if a resolution disapproving of the Ordinance is passed by Parliament before such expiration, upon the passing of the resolution.
- (3) At any time when Parliament stands dissolved the President may, if he is satisfied that circumstances exist which render such action necessary, make and promulgate an Ordinance authorising expenditure from the Consolidated Fund, whether the expenditure is charged by the Constitution upon that fund or not, and any Ordinance so made shall, as from its promulgation, have the like force of law as an Act of Parliament.
- (4) Every Ordinance promulgated under clause (3) shall be laid before Parliament as soon as may be, and the provisions of articles 87 and 90 shall, with necessary adaptations, be complied with in respect thereof within thirty days of the reconstitution of Parliament.

¹ The words within square brackets were substituted for the words "Parliament is not in session" by the Proclamation (Amendment) Order, 1977 (Proclamations Order No.I of 1977).

Comments on Article 93

This is the legislative power of the President when the Parliament is not in session. The President must be satisfied that immediate action is necessary for Promulgation of the Ordinance. The President is to act on the advice of the Prime Minister, who is the head of the Cabinet.

Case:

In the case of *Kudrat-E-Elahi Panir*, 44 DLR (AD) 319, the President's Ordinance making power was questioned on the plea of malafide and colourable exercise of power, Shahbuddin Ahamed C.J. repelled the argument by holding at paragraph 36 as under:-

"The question of colourable legislation arises when a thing which cannot be done directly is sought to be done indirectly. A thing is colourable which exists in appearance and not in reality. It is "what it purports" to be, colourability is linked up with incompetency, that is, an authority doing a thing which he got no power to do. "Colourable" is not tainted with faith, it is just lack of jurisdiction. In other words, in the case of law-making, the doctrine of colourable legislation does not involve any question of bonafide on the part of the legislature. If the legislature is competent to pass a particular law, the motives which impelled it to act are really irrelevant".
