PART VI
THE JUDICIARY
[1][CHAPTER I—THE SUPREME COURT

Article 94. (1) **Establishment of Supreme Court**—There shall be a Supreme Court for Bangladesh (to be known as the Supreme Court of Bangladesh) comprising the Appellate Division and the High Court Division.

(2 The Supreme Court shall consist of the Chief Justice, to be known as the Chief Justice of Bangladesh, and such number of other Judges as the President may deem it necessary to appoint to each division.

(3) The Chief Justice, and the Judges appointed to the Appellate Division, shall sit only in that division, and the other Judges shall sit only in the High Court Division.

(4) Subject to the provisions of this Constitution the Chief Justice and the other Judges shall be independent in the exercise of their judicial functions.

Comments on Article 94

This article speaks of establishment of Supreme Court, comprising of the Appellate Division and the High Court Division. This article contemplates which Judges will sit in which Divisions. Clause (4) of this article categorically states that all the Judges of the Supreme Court will exercise their judicial functions independently subject to the provisions of this Constitution.

Article 111 of Section I of the United States Constitution Expresses that "the judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the congress may from time to time ordain and establish". Although in the Constitution of Bangladesh there is no clear vesting of judicial power to the Supreme Court, yet from the scheme of our Constitution it is abundantly clear that all judicial power of Bangladesh vests in Supreme Court, other inferior courts and tribunals, set up under the Constitution and the law.

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[1] Chapter I was substituted for the former Chapters I, IA and IB by the Second Proclamation (Tenth Amendment) Order, 1977 (Second Proclamation Order NO. I of 1977).

Case:

In the case of *Secretary, Ministry of Finance Vs. Masdar Hossain*, 52 DLR(AD) 82, Mustafa Kamal,C.J. while interpreting Articles 94(4) and 116A clearly spelt out that the independence of judiciary is one of the basic pillars of our Constitution and held in paragraph 59 as follows:-

> "The independence of the judiciary, as affirmed and declared by Articles 94(4) and 116A , is one of the basic pillars of the Constitution and cannot be demolished, whettled down, curtailed or diminished in any manner whatsoever, except under the existing provisions of the Constitution. It is true that this independence, as emphasized by the learned Attorney General, is subject to the provisions of the Constitution, but we find no provision in the Constitution which curtails, diminishes or otherwise abridges this independence. Article 115, Article 133 or Article 136 does not give either the Parliament or the President the authority to curtail or diminish the independence of the subordinate judiciary by recourse to subordinate legislation or rules. What cannot be done directly, cannot be done indirectly.

Article 95. (1) **Appointment of Judges**—The Chief Justice and other Judges shall be appointed by the President.

(2) A person shall not be qualified for appointment as a Judge unless he is a citizen of Bangladesh and ---

(a) has, for not less than ten years, been an advocate of the Supreme Court; or

(b) has, for not less than ten years, held judicial office in the territory of Bangladesh; or

(c) has such other qualifications as may be prescribed by law for appointment as a Judge of the Supreme Court.

(3) In this article, "Supreme Court" includes a court which at any time before the commencement of the Second Proclamation (Tenth Amendment) Order, 1977, exercised jurisdiction as a High Court or Supreme Court in the territory now forming part of Bangladesh.

Article 96. (1) **Tenure of office of Judges**—Subject to the other provisions of this article, a Judge shall hold office until he attains the age of [1][sixty-five] years.

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[1] The word "sixty-five" was substituted for the word "sixty-two" by the Constitution (Seventh Amendment) Act, 1986 (Act I of 1986), s.2.

(2) A Judge shall not be removed from office except in accordance with the following provisions of this article.

(3) There shall be a Supreme Judicial Council, in this article referred to as the Council, which shall consist of the Chief Justice of Bangladesh, and the two next senior Judges :

Provided that if, at any time, the Council inquiring into the capacity or conduct of a Judge who is a member of the Council, or a member of the Council is absent or is unable to act due to illness or other cause, the Judge who is next in seniority to those who are members of the Council shall act as such member.

(4) The functions of the Council shall be—

(a) to prescribe a Code of Conduct to be observed by the Judges; and

(b) to inquire into the capacity or conduct of a Judge or of any other functionary who is not removable from office except in like manner as a Judge.

(5) Where, upon any information received from the Council or from any other source, the President has reason to apprehend that a Judge—

(a) may have ceased to be capable of properly performing the functions of his office by reason of physical or mental incapacity; or

(b) may have been guilty of gross misconduct, the President may direct the Council to inquire into the matter and report its finding.

(6) If, after making the inquiry, the Council reports to the President that in its opinion the Judge has ceased to be capable of properly performing the functions of his office or has been guilty of gross misconduct, the President shall, by order, remove the Judge from office.

(7) For the purpose of any inquiry under this article, the Council shall regulate its procedure and shall have, in respect of issue and execution of processes, the same power as the Supreme Court.

(8) A Judge may resign his office by writing under his hand addressed to the President.

Article 97. Temporary appointment of Chief Justice—If the office of the Chief Justice becomes vacant, or if the President is satisfied that the Chief Justice is, on account of absence, illness, or any other cause, unable to perform the functions of his office, those functions shall, until some

other person has entered upon that office, or until the Chief Justice has resumed his duties, as the case may be, be performed by the next most senior Judge of the Appellate Division.

Article 98. Additional Supreme Court Judges—Notwithstanding the provisions of article 94, if the President is satisfied that the number of the Judges of a division of the Supreme Court should be for the time being increased, the President may appoint one or more duly qualified persons to be Additional Judges of the division for such period not exceeding to years as he may specify, or, if he thinks fit, may require a Judge of the High Court Division to sit in the Appellate Division for any temporary period as an *ad hoc* Judge and such Judge while so sitting, shall exercise the same jurisdiction, powers and functions as a Judge of the Appellate Division :

Provided that nothing in this article shall prevent a person appointed as an Additional Judge from being appointed as a Judge under article 95 or as an Additional Judge for a further period under this article.

Article 99. (1) **Disabilities of Judges**—Except as provided in clause (2), a person who has held office as a Judge otherwise than as an Additional Judge shall not, after his retirement or removal therefrom, plead or act before any court or authority or hold any office of profit in the service of the Republic not being a judicial or quasi-judicial office [1][or the office of Chief Adviser or Adviser].

2. A person who has held office as a judge of the High Court Division may, after his retirement or removal therefrom, plead or act before the Appellate Division.

Case :

In the case of *Abdul Bari Sarkar Vs. Bangladesh*, 46 DLR (AD) 37, Shahabuddin Ahmed,C.J. interpreted Article 99 and observed in paragraph 5 as follows:-

> "Existing Article 99 is the result of an amendment made in 1976. Original Article 99 totally prohibited the appointment of a retired Judge "in any office of profit in the service of Republic". The purpose behind this prohibition was that the high position and dignity of a Judge of the Supreme Court should be preserved and respected even after his

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[1] The words "or the office of Chief Adviser or Adviser" were inserted by the Constitution (Thirteenth Amendment) Act, 1996 (Act I of 1996), s. 5.

retirement and, further that if any provision was made for holding of office, after retirement, then a judge, while in service of the Supreme Court might be tempted to be influenced in his decisions in favour of the Authorities keeping his eye upon a future appointment. This Article, after amendment, lifted the embargo partially making a retired Judge eligible for appointment "in a judicial or quasi-judicial office". A Judicial or Quasi-Judicial Office pre-supposes independent dispensation of Justice."

Article [1]100. Seat of Supreme Court—The permanent seat of the Supreme Court, shall be in the capital, but sessions of the High Court Division may be held at such other place or places as the Chief Justice may, with the approval of the President, from time to time appoint.

Case:

In the same case of *Anwar Hossain*, 41 DLR(AD) 165. B.H.Chowdhury,J. has held in paragraph 28 as follows:-

"The amendment has purported to create seven independent High Court Division in the name of permanent Benches. When the question of

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1 Original article 100 has been revived as the impugned amendment of article 100 made by the Constitution (Eighth Amendment) Act, 1988 (Act XXX of 1988) held ultravires and declared invalid by the Appellate Division of the Supreme Court, 41 D.L.R. 1989 (AD), p.165.

Article 100 as amended by the said Act runs thus:-

"100. Seat of Supreme Court— (1) Subject to this article, the permanent seat of the Supreme Court shall be in the capital.

(2) The High Court Division and the Judges thereof shall sit at the permanent seat of the Supreme Court and at the seats of its permanent Benches.

(3) The High Court Division shall have a permanent Bench each at Barisal, Chittagong, Comilla, Jessore, Rangpur and Sylhet, and each permanent Bench shall have such Benches as the Chief Justice may determine from time to time.

(4) A permanent Bench shall consist of such number of Judges of the High Court Division as the Chief Justice may deem it necessary to nominate to that Bench from time to time and on such nomination the Judges shall be deemed to have been transferred to that Bench.

(5) The President shall, in consultation with the Chief Justice, assign the area in relation to which each permanent Bench shall have jurisdictions, powers and functions conferred or that may be conferred on the High Court Division by this Constitution or any other law; and the area not so assigned shall be the area in relation to which the High Court Division sitting at the permanent seat of the Supreme Court shall have such jurisdictions, powers and functions.

(6) The Chief Justice shall make rules to provide for all incidental, supplemental or consequential matters relating to the permanent Benches."

interpretation of the Constitution or on a point of general public importance arises, there, are possibilities of divergent views which will nullify the binding effect as contemplated in Article 111 because the decision by one permanent Bench. Thus, one of the essential constitutional duties of the Supreme Court will be rendered nugatory thereby destroying the one of the basic features of the Constitution. Same will be the case in matter of Superintendence of the subordinate courts because of the absence of any central organ to discharge this "duty".

In the same decision Shahabuddin Ahmed, J. reached his conclusion in paragraph 419 in the following terms:

"(1) The impugned Amendment of Article 100 has broken the "oneness" of the High Court Division and thereby damaged a basic structure of the Constitution; as such it is void;

(2) "The impugned Amendment has resulted in unreconciable repugnancies to other existing provisions of the Constitution related to it rendering the High Court Division virtually unworkable in its original form, and as such, it is void."

Article 101. Jurisdiction of High Court Division—The High Court Division shall have such original, appellate and other jurisdictions, powers and functions as are or may be conferred on it by this Constitution or any other law.

Comments on Article 101

Judiciary with the system of Constitution and laws make legal decisions by protecting the rights of individuals to live, work and enjoy without fear or favour. When political philosopher Hobbes described life in the State of Nature as "Poor, solitary, nasty, brutish and short,"he had in mind the absence of laws and authority to enforce the rule of law. Judicial review of fundamental rights as enumerated in the Constitution is a safe guard of citizens liberty and property.

Article 102. (1) **Powers of High Court Division to issue certain orders and directions etc.** —The High Court Division on the application of any person aggrieved, may give such directions or orders to any person or authority, including any person performing any function in connection with the affairs of the Republic, as may be appropriate for the enforcement of any of the fundamental rights conferred by Part III of this Constitution.

(2) The High Court Division may, if satisfied that no other equally efficacious remedy is provided by law---

(a) on the application of any person aggrieved, make an order—

(i) directing a person performing any functions in connection with the affairs of the Republic or of a local authority to refrain from doing that which he is not permitted by law to do or to do that which he is required by law to do; or

(ii) declaring that any act done or proceeding taken by a person performing functions in connection with the affairs of the Republic or of a local authority has been done or taken without lawful authority and is of no legal effect; or

(b) on the application of any person, make an order—

(i) directing that a person in custody be brought before it so that it may satisfy itself that he is not being held in custody without lawful authority or in an unlawful manner; or

(ii) requiring a person holding or purporting to hold a public office to show under what authority he claims to hold that office.

(3) Notwithstanding anything contained in the forgoing clauses the High Court Division shall have no power under the article to pass any interim or other order in relation to any law to which article 47 applies.

(4) Whereon an application made under clause (1) or sub-clause *(a)* of clause (2), an interim order is prayed for and such interim order is likely to have the effect of—

(a) prejudicing or interfering with any measure designed to implement any development programme, or any development work; or

(b) being otherwise harmful to the public interest, the High Court Division shall not make an interim order unless the Attorney-General has bean given reasonable notice of the application and he (or an advocate authorised by him in that behalf) has been given an opportunity of being heard, and the High Court Division is satisfied that the interim order would not have the effect referred to in sub-clause *(a)* or sub-clause *(b)*.

(5) In this article, unless the context otherwise requires, "person" includes a statutory public authority and any court or tribunal, other than a court or tribunal established under a law relating to the defence services of Bangladesh or any discipline force or a tribunal to which article 117 applies.

Comments on Article 102

Petitions are filed for exercising writ jurisdiction under Article 102 of the Constitution. Under Article 102(1), the High Court Division on an application of any person aggrieved, may pass appropriate order for enforcement of fundamental rights as enumerated in Part III of the Constitution.

Under Clause (2) of Article 102, High Court Division may make an order or directions or writs in the nature of mandamus , prohibition, certiorari, habeas corpus and Quo worranto, which ever may be appropriate, for the enforcement of any of the rights conferred by this part.

It may be stated that variety of rights may come up for enforcement before the High Court Division. The following rights are given by law :

Recognised by law:-

(1) Fundamental rights given by the Constitution;
(2) Constitutional rights not having the status of fundamental rights;
(3) Statutory right;
(4) rights flowing from subordinate legislation;
(5) rights based on case law;
(6) customary rights;
(7) contractual rights;

Any person aggrieved may knock at the door of the High Court Division for enforcement of the fundamental rights conferred by Part III of our Constitution: In our jurisdiction, the concept of 'locus standi' has been gradually expanded from the case of *Mukhlesur Rahman* to the case of *Dr.Mohiuddin Farooque*. These cases will be mentioned herein below in extenso to understand the development of idea of standing in exercise of jurisdiction under Article 102 of the Constitution.

Normally, by the term "locus standi" we mean the right of an individual or a group of individuals to bring grievances before the High Court Division for adjudication of their legal rights. It is palpably clear that individual person aggrieved by any action or inaction on the part of the state or public authority has got right to move the High Court Division. To mention here, the question of 'locus standi' has got new dimensions in various fields of activities of India due to judicial decisions of the Supreme Court of India and various High Courts of the provinces of India.

I may mention here that in India a letter to the Supreme Court of India opened the door of public interest litigation in that country and thereby expanded the meaning of locus standi for the good of the society at large. This is indeed, an innovative method evolved by the Judges of the Supreme Court of India for the purpose of providing easy access to justice to the weaker and disadvantaged communities of India.

In Indian Jurisdiction, Supreme Court under Article 32 and High Courts under Article 226 of the Constitution of India have treated letter as a writ petition and have taken action upon it. It is found that apart from an aggrieved person, a public spirited individual or a social action group have filed writ petitions for enforcement of Constitutional or legal rights of a class of persons who by reason of poverty, disability, economic disabilities could not approach the Supreme Court or High Courts of India for redress of their grievances.

It may be mentioned that the case of *M.C.Mehta Vs. Union of India*, AIR 1987 SC 905, was entertained by the Supreme Court of India as a writ petition of a public interest litigation.

In our jurisdiction, BELA's case is the first case on environment as a public interest litigation.

With regard to the jurisdiction of the High Court Division to issue certain orders, directions and writs, it may be stated that apart from enforcement of any of the fundamental rights conferred by Part III of the Constitution, the High Court Division may, if satisfied that no other equally efficacious remedy is provided by law, then on the application of any person aggrieved, the High Court Division can issue the following directions, namely, (1) Mandamus and prohibition, (2) Certiorari, (3) habeas corpus and (4) Quo Warranto. As a matter of fact, these above English Writs had been incorporated by Article 102(2) of the Constitution.

(1) Mandamus and Prohibition : In the language of Article 102(2)(a)(i) and (ii), it is a direction on a person performing any functions in connection with the affairs of the Republic or of a local authority to do what he is required by law to do or to refrain from doing that which he is not permitted by law to do.

Mandamus is a public law remedy and will not,therefore, be available in respect of duties of private nature. In other words, writ of mandamus, is issued for securing performance of public duties, performance of which has been wrongfully refused. This writ is a most extensive remedial nature. It is to be remembered that condition precedent for issue of this

mandamus is the presence of statutory right. The public officials or public body will be compelled to perform public duty which they failed to perform. Prohibition prevents an order or decision being made. There are instances that when an action has been done in violation of statutory provisions or has no statutory basis writ of prohibition has been issued. Mandamus is an affirmative remedy, a direction or command to do any thing, but writ of prohibition is purely negative as one is directed that something be left undone. Mandamus is normally issued in case of infringement of fundamental rights, statutory order and executive order(non-statutory).

(2) ***Certiorari :*** The main function of the writ of certiorari is to curb excess jurisdiction and to keep inferior courts and tribunals within their bounds. When no other efficacious remedy is provided by way of appeal from the decision of inferior courts or tribunals, the High Court Division can review the decisions of those courts. This scope of certiorari has made it a very suitable method to control administrative tribunals. In case of violation of natural justice or an error of law, the High Court Division can declare the act or proceedings as without lawful authority. Broadly speaking, an essential feature of a writ of certiorari is the exercise of control over judicial, quasi-judicial and other bodies wherein no appeal is provided for. This writ can be issued to correct any error of law. When an administrative tribunal commits an error of law apparent on the face of the record it can be corrected by issuing a writ of certiorari. The writ of certiorari quashes the decision of judicial and quasi-judicial tribunal. When a writ of certiorari is moved, the High Court Division may also call for the records, if necessary. Normally, certiorari is issued in the following circumstances:-

(1) the decision violates fundamental right
(2) the decision violates the law or without jurisdiction
(3) the decision is void
(4) the decision is against natural justice, malafide, perverse or based on non-application of mind. But mere, mis-application of law is not a ground for certiorari .

(3) ***Quo-Warranto :*** This writ of Quo warranto is issued to show by what authority a person is holding or purporting to hold a public office. The High Court Division can enquire into the legality of the claim of a party to an office. A writ of quo-warranto may be applied at the

instance of any person even who has no personal or special interest. A stranger can also file such writ petition. It is a discretionary relief which the Supreme Court may grant or refuse according to the facts and circumstances of each case. Thus, the Supreme Court may refuse it where the application was actuated by ill-will, or malice or ulterior motive. It is a settled practice not to interfere with the discretion of the High Court Division, if the discretion has not been exercised reasonably or perversely.

*(4) **Habeas Corpus** :* The term "Hebeas Corpus" literally means" have the body". Halsbury in Article 40, Page 24 of laws of England, Third Edition, Volume II says as follows:-

> "The writ of habeas corpus and Sub-jiciendum, which is commonly known as the writ of habeas corpus, is a prerogative process for securing the liberty of the subject by affording an effective means of immediate release from unlawful of unjustifiable detention, whether in prison or in private custody".

As regards jurisdiction, it is stated in Article 45 at page 27 of the same volume that:

"The right to the writ is a right which exists at common law independently of any stature, though the right has been confirmed and regulated by statute."

The writ of habeas corpus thus provides a powerful and effective safeguard for personal liberty against unwarranted and arbitrary encroachment therein. Habeas Corpus Act of 1940, 1679 and 1816 were passed in England to regulate, by statute , the procedure relating to the prerogative writ of habeas corpus but the jurisdiction to grant the said writ is independent of statute. The jurisdiction to issue, in England, the writ of habeas corpus, as already stated, rests on common law. In America, which has a written Constitution, there is no mention about the writ of habeas corpus therein except as to its suspension in paragraph 2 of section 9 of Article I which is as follows:-

> "The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it."

(From M.A.Jabir's Judgment in the case of Bangladesh Vs. Ahmed Nazir, 27 DL:R(AD) 41.

Affidavit & Affidavits-in-opposition : It is a general rule that the writ petition is disposed of on Affidavits and Affidavits-in-opposition. If the allegations in the petitioner's affidavit are not adequately met by a proper affidavit-in-opposition on behalf of the respondents, the averments in the petitioner's affidavit shall be taken to have been admitted. In case of specific allegation of fact made in the affidavit of the petitioner, a mere denial thereof in the affidavit-in-opposition will lead to the conclusion that the petitioner's allegation goes unanswered.

Writ petition being in the nature of a summary proceeding, normally evidence is not taken.

Locus Standi : By judicial interpretations of the Supreme Court of Bangladesh, the concept of locus standi i.e. "any person aggrieved" has been gradually extended to other persons as well. For filing an application under Article 102 of the Constitution it is not necessary that the person must be personally aggrieved. Any person or group can issue relief in the interest of the general public or for the well being of the society and not for its own purpose. This idea has changed the traditional doctrine of locus standi and has opened the door of the Supreme Court even when the person concerned has no personal interest in moving the application. Thus in our jurisdiction gradually the door of public interest litigation is expanding which will usher in better days for the common man of our society. The following case of the Supreme Court illustrate the proposition.

Case:

In the case of *Dr.Mohiuddin Farooque Vs. Bangladesh*, 49 DLR(AD)1, Dr.Mohiuddin Farooque, Secretary General of Bangladesh Environmental Lawyer's Association, shortly BELA filed a writ petition in the nature of public interest litigation under Article 102(1)(2) of the Constitution. In that case, the burning question of locus standi was answered by the Appellate Division.

In that decision, Mustafa Kamal,J. held at paragraph 55 as under:

> "We hold therefore that the association-appellant was wrongly held by the High Court Division not to be a "person aggrieved in the facts and circumstances of the case and we hold further that the appellant is "any person aggrieved" within the meaning of both Article 102(1) and Article 102(2)(a) of the Constitution."

In the same decision, Latifur Rahman,J. at paragraphs 62 and 77 held as follows:-

> "From the Language used in Article 102(1) of our Constitution, "any person aggrieved" may move the High Court Division for enforcement of fundamental right conferred by Part III of the Constitution. Under Article 102(2)(a), the High Court Division may make an order on the application of any "person aggrieved" in the nature of mandamus, prohibition, and certiorari except for an application for habeas corpus or quo-warranto".
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> "Thus I hold that a person approaching the court for redress of a public wrong or public injury has sufficient interest (not a personal interest) in the proceedings and is acting bonafide and not for his personal gain or private profits, without any political motivation or other oblique consideration has locus standi to move the High Court Division under Article 102 of the Constitution."

Further, in the same decision,B.B.Roy Chowdhury,J. in paragraph 97 opined as under:-

> "The inescapable conclusion, therefore, is that the expression "person aggrieved" means not only any person who is personally aggrieved but also one whose heart bleeds for his less fortunate fellow beings for a wrong done by the Government or a local authority in not fulfilling its constitutional or statutory obligations. It does not, however, extent to a person who is an interloper and interferes with things which do not concern him. This approach is in keeping with the constitutional principle that are being evolved in the recent times in different countries."

In the case of *Kazi Mukhlesur Rahman Vs. Bangladesh* 26 DLR(SC) 44, the appellant challenged the Delhi Treaty, although he was not a resident of the Southern half of South Berubari Union No.12 or of the adjacent enclaves involved in the Delhi Treaty and as such his locus standi was in question. The Supreme Court found that Kazi Mukhlesur Rahman has locus standi to challenge the transfer of the territory.

In the case of *ETV Ltd. Vs. Dr.Chowdhury Mahmood Hasan*, 54 DLR(AD) 130, K.M.Hasan,J. after considering the two decisions of *Dr.Mohiuddin Farooque's case and Kazi Mukhlesur Rahman,* held at paragraph 73 as follows:

> "Such gross violation of fundamental rights should shock the judicial conscience and force it to leave aside additional procedure which shackles the locus standi and gives standing to the petitioners. Unless this court responds to it,Government agencies would be left free to subvert the rule of law to the detriment of the public interest. We must, therefore, reject the preliminary objection raised challenging the locus standi of the petitioners in the writ petition, since important issues relating to public wrong and rule of law involved. It being a litigation affecting public wrong, the petitioners have interest and locus standi to file petition."

In the case of *Professor Nurul Islam and others Vs. Bangladesh*, 52 DLR 413, the question of locus standi to file the writ petition was resolved by Md. Fazlul Karim,J. in paragraph 14 as follows:-

> "It cannot be said that such associations of individuals do not feel aggrieved or feel concerned when any action or inaction on the part of the functionaries of the State or public sector organizations/enterprise, has the effect of endangering human health. Any wrong doing or invasion of public rights, against the aims and objects of such societies does clothe them with the necessary locus standi to move the courts of law."

In the case of *Bangladesh Sangbad Patra Parishad (BSP) Vs. The Government of Bangladesh*, 43 DLR(AD) 126, BSP, an Association of owners of news papers and news organizations, registered under the Societies Registration Act challenged some sections of the Newspaper Employees(conditions of Service) Act, 1974 (Act XXX of 1974) as unconstitutional.

In that decision, the real question was, whether the petitioner has the right to move the writ petition in a representative capacity.

It was argued on behalf of the petitioner that the petitioner was recognised by the Government as part of the award-making process and as such as an association of the Newspapers it had sufficient interest in the subject matter and it not just a busy body.

Mustafa Kamal,J. held in paragraph 11 as under:

> " The fact that the petitioner was all along associated with the award-making process does not make it an aggrieved person and the present case is definitely not a public interest litigation. The petitioner is not espousing the cause of a down trodden and deprived section of the community unable to spend money to establish its fundamental rights and enforce its constitutional remedies. It is not

acting probona publico but in the interest of its members. If the petitioner is refused entry on the threshold point, that will not be the end of the world for newspaper owners and news organisations. Their locus standi as well as means of access to the courts are without doubt assured.

Basic structure theory

In the case of *Anwar Hossain Chowdhury and others Vs. Bangladesh*, 44 DLR(AD) 165, in paragraph 371, Shahabuddin Ahmed, J. held as follows:-

> "Inspite of these vital changes from 1975 by destroying some of the basic structures of the Constitution, no body, challenged them in court after revival of the Constitution; consequently, they were accepted by the people, and by their acquiescence have become part of the Constitution. In the case of Golok Nath, the Indian Supreme Court found three past Amendments of their constitution invalid on the ground of alteration of the basic structures, but refrained from declaring them void in order to prevent chaos in the national life and applied the doctrine of prospective invalidation for the future. In our case also, the past Amendments which were not challenged have become part of the Constitution by General acquiescence. But the fact that basic structures of the Constitution were changed in the past cannot be and is not, accepted as a valid ground to answer the challenge to future Amendment of this nature, that is, the impugned Amendment may be challenged on the ground that it has altered the basic structure of the Constitution."

Local Authority: The Supreme Court can interfere with the action of a 'local authority' set up by a statute. Where the local authority is supposed to act within the limits of the statutory boundary and fail to do so, mandamus may be issued for the performance of that act. Similarly, a local authority having a legal grievance can also file a writ petition. Thus local authority is opposed to private authority having no sanction of law.

Cases:

In the case of *Holy Family Red Cross Hospital Vs. M.M. Yousuf*, BCR (1981) Supreme Court 230, leave was granted to consider whether the Holy Family Red Cross Hospital which is managed by a governing body is an "authority" within the meaning of Article 102 of the Constitution and thus amenable to the writ jurisdiction of the High Court Division? In that

decision it was held that the Holy Family Red Cross Hospital is not an authority and Ruhul Islam, J. held at paragraph 7 as under:-

> " On perusal of the affidavits we are satisfied that Holy Family Red Cross Society continued to function as a private body under the control and management of a governing body. The Constitution of governing board as per terms of the agreement shows that most of the members of the governing Board are representatives of the hospital. Thus effective control over the management and administration of the Holy Family Red Cross Hospital, was to be continued to be exercised by the said hospital."

In the case of *B.S.I. Corporation Vs. Mahbub Hosain*, 29 DLR(SC) 41, Mahmud Husain, C.J. has dealt with the term 'local authority' in paragraph 24 as under:-

> " These principles as have been referred to above, have been by and large, incorporated in the law of judicial review as contained in Article 102(2) of the Constitution. This Constitution power of a superior court can be invoked and the necessary direction or declaration can be given or made only against a person performing functions in connection with the affair of the Republic or of a local authority. The public character of the functionary against whom the necessary relief can be given under the constitutional power is manifest from the terms of the constitutional provision itself, as it requires that such functionary must be acting in the discharge of some public duties relating to the affairs of the State. The term 'local authority' has not been defined in the constitution but according to the definition as given in section 3(31) of the General Clauses Act it is clear that such term implies a public duty authorised by law or by the Government to carry on some administrative function. A public corporation, as we have already noticed, is entrusted with some portion of the sovereign function of the Government which is to be performed by the Corporation for the benefit of the public and such a corporation is undoubtedly a person performing functions in relation to the affairs of the Republic within the meaning of Article 102(2) of the Constitution. Whatever uncertainty there might have been in regard to such an interpretation has now been removed by an amendment of the definition clause to the effect that a local authority includes a statutory body. Once it is accepted that an appropriate order under Article 102(2) of the Constitution may be made against a public corporation the court may make an order restraining it from

doing what is not permitted by law to do or directing it to do what it is required by law to do or declaring that an act done or a proceeding taken by a public corporation has been done or taken without any lawful authority. Dismissal of an employee of such a corporation in violation of statutory rules or regulations is actionable for the purpose of restoration to office according to the constitutional mandate. Dismissal of an employee in violation of the principle of natural justice is also actionable in a similar way as the principle of natural justice must be regarded as a part of the Statute, unless it is excluded therefrom by specific words."

In the case of *A.Z. Rafique Ahmed Vs. Bangladesh Council of Scientific and Industrial Research and others*, 32 DLR(AD) 83, Ruhul Islam,J. observed as to what local authority means and held at paragraph 14 as follows:-

"There is no doubt that the different provisions of the resolution satisfy the requirement to constitute a 'local authority' as defined under General Clauses Act. As per General Clauses Act as amended by P,O.147 of 1972 "local authority" means: A Poura Shabha, Zilla Board, Union Panchayet, Board of Trustees of a port or other authorities, legally entitled to or entrusted by the Government with the control or management of a Municipal or local fund or any corporation or other body or authority constituted or established by the Government under any law."

In the case of *Manjurul Huq –Vs- Bangladesh and others,* 44 DLR 239, the similar proposition has been established that the Bangladesh Diabetic Association is not a local authority.

Natural Justice:

Another judicial rationale for requirement of reasons is that a person affected by an adverse order is entitled to know why the decision has gone against him or her. Our Supreme Court has held that the absence of reasons leads to denial of Justice because the rule requiring reasons to be given in support of an order is, like the principle of *audi alteram partem* which is the basic principle of natural justice.

With regard to penal offences it can be said that no person can be punished retrospectively in respect of an act committed which was not an offence when committed. It is a basic principle of natural justice that no one can be penalized on the ground of conduct which was not penal on the day it was committed.

The question of rules of natural justice will be relevant on the statutory provisions under which action has been taken and the facts and circumstances of each case.

In the case of administrative orders, where civil rights are affected, the question of natural justice is relevant.

Where the statute itself prohibit the application of the principle of natural justice, one cannot ask enforcement of show cause/hearing. In the case of domestic inquiry, reasonable opportunity must be provided to the delinquent employee.

If a statutory provision either specifically or by necessary implication exclude the application of any principles of natural justice, then the court cannot ignore the mandate of the law.

In the case of malafide and fraudulent activities, there is no obligation to offer an opportunity of being heard. Fraud vitiates everything.

In case of disciplinary proceedings against students, a fair hearing ought to be given.

Further, in case of enhancement of sentence, suo moto rule for enhancement is givien before hearing.

Cases:

In the case of *M.A.Hai Vs. TCB, 32 DLR(AD) 46*, Ruhul Islam,J. discussed about the principles of natural justice in an enquiry proceeding and held in paragraph 6 as follows:-

> "If the employer is an 'authority', any order passed in violation of the principles of natural justice can be effectively challenged by a writ petition. In this case the employer is the Bangladesh Trading Corporation which is a statutory body. Therefore, Bangladesh Trading Corporation, being undoubtedly an 'authority', the applicability of the principles of natural justice does not depend upon the fact that the proceedings are held under statutory rules or not. In such a case, irrespective of the authority framing any rules, in an enquiry held against an employee on the charges framed against him for dismissal from service, the principles of natural justice must be complied with."

In that decision, the learned Judge further held that the appointing authority while inflicting a higher punishment is expected to assign some reasons for coming to such decision, and held at paragraph 9 as follows:-

> "The enquiry officer found the appellant guilty of negligence and recommended for administering a warning for future latches but the appointing authority considered that removal of the petitioner was

warranted in the facts and circumstances of the case. While the appointing authority is not bound to accept the recommendation of the enquiry officer, but in inflicting a higher punishment the appointing authority is expected to assign some reasons for coming to such a decision. There are good authorities for the proposition that in such case when no reason has been given by the appointing authority, the impugned order is not immune from attack being violative of the principles of natural justice. Hence, on this ground also the impugned order of dismissal is liable to be declared illegal."

In the case of *Dhaka University Vs. Zakir Ahmed*, 16 DLR(SC) 722, Hamoodur Rahman, J. has enunciated the principles of natural justice in paragraph 29 in the following words:

"Nevertheless, the general consensus of judicial opinion seems to be that, in order to ensure the "elementary and essential principles of fairness" as a matter of necessary implication, the person sought to be affected must at least be made aware of the nature of the allegations against him, he should be given a fair opportunity to make any relevant statement putting forward his own case and "to correct or controvert any relevant statement brought forward to his prejudice". Of course, the person, body or authority concerned must act in good faith, but it would appear that it is not bound to treat the matter as if it was a trial or to administer oath or examine witnesses in the presence of the person accused or give him facility for cross examining the witnesses against him or even to serve a formal charge sheet upon him. Such a person or authority can obtain information in any way it thinks fit, provided it gives a fair opportunity to the person sought to be affected to correct or contradict any relevant statement prejudicial to him. In other words, "in order to act justly and to reach just ends by just means", the Courts insist that the person or authority should have adopted the above "elementary and essential principles" unless the same had been expressly excluded by the enactment empowering him to so act".

The following cases may be considered for the above proposition.

(1) *Chittagong Medical College –VS- Shahrayar Murshed*, 48 DLR (AD) 33 (Paragraph 18 and 26).

(2) *Bangladesh –VS- Tajul Islam*, 49 DLR (AD) 177, (Paragraphs 15, 17 and 21).

(3) *Helaluddin Ahmed –VS- Bangladesh*, 45 DLR (AD) 1 (Paragraph 29)

(4) *Jamuna Oil Company Ltd-VS- S.K. Dey* 44 DLR (AD) 104 (Paragraph 22)

Promissory Estoppel

There can be no estoppel against the constitution and statute. Acting on the assurance or representation is enough for applicability of the doctrine of promissory estoppel. On the basis of the principle of promissory estoppel the court can direct the Government on a writ petition to carry out the promise made.

This doctrine would apply when the promisee would suffer due to non-filment of the promise of the promissor.

This doctrine would not be applicable when the petitioner knew all the fact and there was no question of his being mislead by the authority or the Government. This doctrine must be pleaded in the petition.

Cases:

In the case of *A.B.M.Quabil Vs. Ministry of Health*, 44 DLR 385, B.B.Roy Choudhury,J. had explained the doctrine of Promissory estoppel at paragraph 18 as under:-

> "Had there been any assurance as claimed even then the plea could not be invoked because it is a settled principle that where a statute imposes a duty of a positive kind, not avoidable by the performance of any formality, for doing of the very act which the party suing seek to do, it is not open to the opposite party to set up an estoppel to prevent it (Ref: Maritime Electric Co.Ltd. Vs. General Dairies Ltd., AIR 1973 PC page 115). A promise cannot supersede a statutory duty of a public authority. I thus find no substance in this submission".

In the case of *Collector of Customs, Chittagong Vs. A.Hannan*, 42 DLR (AD) 167, Badrul Haider Chowdhury,J. held at paragraph 20 as under:-

> "The respondent acting upon the Solemn Promise made by the appellant incurred huge expenditure and if the appellant is not held to its promise, the respondent would be put in a very disadvantages position and, therefore, the principle of promissory estoppel can also be invoked in this case. It is not necessary to cite further decisions on the well-settled principle of promissory estoppel."

In the case of *Abdur Rahim Vs. Bangladesh*, 48 DLR 538, Md.Mozammel Hoque,J. explained the principle of promissory estoppel in paragraph 25 in the following terms:

> "The Government Promised to absorb the existing teachers and staff of the College when it will be nationalised and now the Government is not entitled to backout from its own promise which is written down in a registered document executed by the Government and the College authority ---------- once the Government authority makes a promise and in pursuance of such promise something is done, subsequently it cannot back out from its own promise and that is why they are debarred by the promissory estoppel."

Public interest litigation.

Public interest litigation is a proceeding in which an individual or group seeks relief in the interest of the general public and not for its own purpose. Public interest litigation has enlarged and enriched the traditional doctrine of locus standi and had opened new remedies and procedures. In our jurisdiction, the case of *Dr.Mohiuddin Farooque-Vs- Bangladesh*, 49 DLR(AD) 1 is the first and most important case which illustrate the above proposition.

Res judicata:

In writ jurisdiction, where a decision has been delivered on merits, the rule of constructive res judicata will be applicable to bar a second writ application founded on the same cause of action or as regards relief, which were asked for but not granted in the previous proceeding under Article 102, or as regards a ground which ought to have been taken in the previous application.

Legitimate Expectation.

Before the law can protect a legitimate expectation, it must be both legitimate and an expectation. The expectation must also be legitimate to attract the doctrine of legitimate expectation. This expectation must be protected against the whims and capricious of the Government. It is to be protected in two ways. The first one is procedural expectation, that is, to ensure that the promised procedure is followed. It can be reasonably

expected that a promised procedure is to be followed. The second one, is substantive expectation, in which case a favourable decision of one kind or another which is expected or in other words substantive expectation could only be protected by requiring that there should be a decision in accordance with the expectation. The doctrine of legitimate expectation in essence imposes a duty to act fairly. Under the doctrine of legitimate expectation, even non-statutory policy or guide line issued by the state would be enforceable against the state if a person can show that he has been led to take certain actions on the basis of or on the legitimate expectation that the Government would abide by such policy or guide line. In such a case, deviation for the policy would be arbitrary and a violation of Article 27 of our Constitution.

Case:

In the case of *Managing Director WASA Vs. Superior Builders and Engineers Ltd.*, 51 DLR (AD) 56, the question of legitimate expectation came up for consideration and Mustafa Kamal, J. in paragraph 6 observed as follows:-

> "Basically, the principle is that, a writ petition can not be founded merely on a contract, but when a contract is concluded the contractor has a legitimate expectation that he will be dealt with fairly. The petitioner could have asked the respondent to supply the water tanks and generator according to specification and could have given him an opportunity to complete the work according to specification, taking the anomaly during re-examination to be correct; but to cancel the contract unilaterally without regard to subsequent developments is a high feat of arbitrariness which rightly attracts the writ jurisdiction."

In the writ petition of *Rabia Bashri Irene –Vs- Bangladesh Biman*, 52 DLR 308, Kazi A.T. Monowaruddin,J. decided the question of legitimate expectation in the following manner in paragraphs 43 and 45 as under:-

> "In which their Lordships in the House of Lords observed-
>
> "Legitimate, or reasonable, expectation may arise either from an express promise given on behalf of a public authority or from the existence of a regular practice which the Chairman can reasonably expect to continue."
>
> "In the aforesaid case it has been observed that it is not that expectation has got to be based on some contract, it may be based on

past practice or any statement whether that forms part of the contractor not.

In view of the above, we have no hesitation to hold that the petitioners expectations of being absorbed in the service after satisfactory completion of five years service cannot but be said to be their legitimate expectation and in all fairness they should be absorbed in their service."

1. In the case of *chairman, BTMC-Vs. Nasir Ahmed,* 7 Bangladesh law chronicles (AD) 144, illustrate the above proportion.
2. Azaf Khan & Ors-The court of settlement, Dhaka ors, 23 BLD 7, (Para 52).

Case on Master & Servant

In the case of *M.H. Chowdhury –VS- B.M. Titas GAS*, 1981 BLD (AD) 61, a question was raised as to whether Titas Gas Company is a nationalized Enterprise or a Company. In that decision it was held that Titas Gas Company Ltd. is a nationalized Company as such writ petition under Article 102 of the Constitution is maintainable. On behalf of an employee of the enterprise a case was filed. In that decision at paragraph 10, it was held by F.K.Munim, J. as follows:

"As regards the status of the enterprise it was claimed that it became a public enterprise within the meaning of the terms as provided in the Comptroller and Auditor-General (Additional Functions) Amendment Act, 1975 so that its accounts are now audited by the Comptroller and Auditor-General of Bangladesh. It gets allocation of funds from development project and its annual development programme has to be approved by the Planning Commission. Due to these measures, both legislative and executive, the status of an ordinary Limited Company to that of a Public Enterprise which is owned by the Government and controlled by the Corporation".

In that case, it was further observed that an employee enjoys the status of an employee of a statutory body and an employee of such an organization cannot be governed by the law of master and servant.

In the case of *B.S.I. Corporation –VS- Mahbub Hossain*, 29 DLR (AD) 41, two questions were raised before the Appellate Division in granting the Leave Petition. First, whether the relationship between the dismissed employee and the Corporation was one of master and servant. Second, whether the High Court Division had jurisdiction to interfere with the order of dismissal under Article 102 of the Constitution.

In that case, Mahmud Hussain C.J. at paragraph 21, clearly spelt out the relationship of master and servant and its applicability to a office of employment which has got a public character. The paragraph reads as follows:-

> "The law of master and servant, as applicable for determining the right of an employee dismissed from service is based upon the view that such a right is exclusively founded upon a contract of service between an employer and an employee and that inasmuch as such a contract is incapable of being specifically enforced under the provision of the Specific Relief Act, an action for restoration of the dismissed employee to its former office is not maintainable in law. It conceives a private individual serving another private individual or body for mutual private benefits and the relationship does not involve any element other then the contractual one. In such a case, the employee is interested only in his remuneration, which can be measured solely in monetary value. In the same way, the employer employees the particular individual for his own private purpose which is exclusively his own concern and in which nobody else is interested, and if, in case of a breach of any contractual obligation arising out of the contract of employment, the employer is prepared to forego the service of his employee and at the same time pay the dismissed employee adequate monetary compensation, it is nobody else's business to be concerned about it. But if the office of employment has got a public character, the relationship transcends the confines of a contractual character and ceases to be the concern of the individuals, namely, the person who dismisses and the person who is dismissed. In such a case, the person who exercises the power of dismissal does so on behalf of a public corporation in which the general public or a substantial section of the general public is interested and such power is exercised under some authority of law. He cannot rest cynically content by saying that it is the personal affair of an individual or some individuals whose representative he is, and he is prepared to pay the dismissed employee the necessary compensation, if the order of dismissal is ultimately found to be illegal and that it is nobody else's business to be bothered about it. The position of the employee is also different from that of one serving a private concern, at least in principle, as he is serving an institution of public benefit in the development and progress of which he also is supposed to be interested. Those are the considerations which naturally lift the cases of public employment out of the strict category of the master and servant rule. In such a case, the terms and conditions of service may also be regulated by some statutory provisions, and the termination of service may be made in violation of such provisions. In that event as well as the master and servant rule cannot be invoked in

order to deny the relief of reinstatement to the discharged employee. It may be also that the office itself has been created by the statute where the employee will undoubtedly have a kind of legal status the rights whereof may be capable of being enforced."

Contract.

The High Court Division may interfere in Writ Jurisdiction with regard to a contract when the contract is brought within the sphere of public law, that is, because of the exercise by the State of its sovereign power,apart from the contract. In case of contract by the Government as a public utility undertaking, the court can only interfere when the terms of the contract are discriminatory, unreasonable or capricious.

Locus Poententiae.

In the case of *Md.Shoib –Vs- Bangladesh,* 27 DLR 315, D.C. Battacharja,J. held in paragraph 18 as follows:-

"On an examination of the above mentioned authorities, it is clear that the locus poententiae i.e. the power of reseeding before a decisive step has been taken can be exercised so long as there has not been any change in respect of the legal rights of the persons concerned. When some legal rights have arisen in favour of a certain person as a result of a particular order, those rights cannot be undone by a purported exercise of locus Poententiae in respect of the said order. The power of passing an order rescinding or cancelling an earlier one which has given to certain rights shall have to be founded on some statutory provisions."

See the below mentioned case for the above proposition:
Amirul Islam –Vs-The Secretary, 40 DLR(AD) 52.

Cases:

Maintainability of writ petition

In the case of *Bangladesh Telecom(PVT) Ltd. Vs. T&T,* 48 DLR AD 20, the question of maintainability of the writ petition was resisted on the ground of commercial contract. Mustafa Kamal,J. in that decision at paragraph 16 held as under:-

"As the licence was granted to BTL in exercise of a statutory power and as such cancellation thereof was also made in exercise of a statutory power, it is no longer a case of cancellation of a commercial contract. Had there been no licence in favour of BTL then the agreement, standing

alone, would have been a purely commercial contract, the cancellation of which would not have attracted the writ jurisdiction of the High Court Division but as the agreement merged into the licence its terms and conditions no longer remained the terms and conditions of a commercial contract. It became the terms and conditions of the licence itself. Therefore in the facts of the present case the writ petition cannot be resisted on the ground of cancellation of a commercial contract".

In the case of *Bangladesh –VS- Jalil*, 48 DLR (AD) 10,A.T.M. Afzal,C.J. while interpreting the jurisdiction of the High Court under Article 102 of the Constitution held at paragraph 16 as follows:-

"The High Court Division was not a Court of appeal required to make determination of facts on its own. It could interfere with the findings of a tribunal of fact under its extraordinary jurisdiction under Article 102, only if it could be shown that the tribunal had acted without jurisdiction or made any finding upon no evidence or without considering any material evidence/facts causing prejudice to the complaining party or that it acted malafide or in violation of any principle of natural justice. In the absence of any of these conditions the interference by the High Court Division will itself be an act of without jurisdiction. This precisely has happened in the present case and therefore this appeal must succeed".

Gun Licence.

In the case of *Abul Hussain Md. –Vs- Bangladesh,* 44 DLR 521, Fazle Hussain Mohammad Habibur Rahman,J. set aside the order of cancellation of licence of revolver as the same was passed in violation of Article 27. The learned Judge held in paragraph 9 as under:

"Therefore, the impugned order Annexure'E' dated 5.8.90 is liable to be set aside as illegal as it is an arbitrary, indefinite, fanciful, vague and capricious order in violation of Article 27 of the Constitution."

Domestic Inquiry.

In a domestic inquiry, the principles of natural Justice must be observed. Opportunity for cross examination must be provided in a domestic inquiry. Fairness in an important element in case of domestic inquiry.

In the unreported case of *Bangladesh Water Development Board and others –Vs- Mr. A.K.M. Rahimul Islam*, C.P.S.L.A. No.268 of 1977, judgment on 16-11-77, a question was raised as to whether in a

disciplinary proceeding, the High Court Division can enter into the question of malafide in a domestic proceeding.

In the present case, the High Court Division looked into the circumstances in which the officer was transferred, the second order of transfer, the proceedings drawn up, the finding of the enquiry officer, his conclusion, the proposed punishment and from all other attending facts and circumstances found that the proceedings were taken with bad faith by the authority. The High Court Division further found that the Authority was responsible for lapses which amounted to approbation and reprobation.

The Appellate Division held that in writ jurisdiction the High Court Division can enter into the question of malafide of the proceeding taken by the Authority for domestic enquiry.

Malafide

In a writ petition, malafide must be alleged and the same is to established on the basis of facts. There should be some factual basis for alleging the same otherwise the Court will not accept the contention of the petitioner. Malafide vitiates everything and such malafide action will not get immunity in any circumstances.

Case :

In the case of *Mustaque Ahmed –VS- Bangladesh*, 34 DLR (AD) 222, B.H. Chowdhury, J. at paragraph 17 held as under:

> "Malafide or Coram non-judice proceedings are not immune from the scrutiny of the Supreme Court notwithstanding any ouster clause in the Martial Law Proclamation."

In the case of *EVT –VS- Dr.Chowdhury Mahmood Hasan, 55 DLR(AD) 26,* K.M.Hasan,J. observed at paragraph 27 as under:

> "This court had ample proof that the licence to run ETV was obtained by playing foul which can never be approbated. If the licensing act was loathed with all the requisites of law, this court, sitting as a court of law, would have sustained the petitions for leave to appeal by the petitioners. In its judgment the court has recited the undue means practiced and then concluded that the process adopted in granting licence was infected with malafide."

In the case of *Habibullah Khan –VS- S.A. Ahmed,* 35 DLR (AD) 72, Habibullah Khan who was a Minister was directed to pay an amount of TK 10,000\= (Ten Thousand) to S.A. Ahmed by issuing a Suo Moto Rule after delivery of the main judgment. In that case, the question was raised that notice is to be served on the person when allegation is that he was responsible for ordering compulsory retirement of the person retired. In that decision, Ruhul Islam, J. held at paragraph 21 as follows:

> "If at the hearing of the writ petition the Court was of the opinion that the affidavits filed by the parties sufficiently showed that Mr.Habibullah Khan was directly responsible for causing compulsory retirement of Shah Azharuddin Ahmed under the influence of his brother-in-law Mr. Anisuzaman Chowdhury, the Rules of the Court provide that in such a case the Court should adjourn the hearing of the writ petition and direct service of notice on such person. Rule 9 of Chapter A in Appendix IV to the Rules of the High Court of Judicature Vol-1 provides that if at the hearing of the application the Court is of opinion that any person who ought to have been served with notice of the application has not been so served, the Court may order that notice may also be served on such person and adjourn the hearing upon such terms as the Court may consider proper. The leaned Judges instead of following the Rule completed the hearing of the writ petition and delivered judgment. In view of the facts and circumstances the finding imputing malafide on the appellant cannot be sustained. Therefore, the objectionable findings set out above and the observations made in the judgment dated 16-11-80 are quashed".

Perventive Detention Law.

In a democratic society, this law by its very nature has posed challenge before a court of law to secure the liberty of an individual against the allegedly threatened interest of society and security of the State specially in times of peace. Through this punitive detention the liberty of an individual can be deprived. On consideration of a past record of an individual that he might hamper the interest of society and security of the State can be put under preventive detention to prevent the person from committing prejudicial acts in society. The basis of such detention is the subjective satisfaction of the detaining authority. If the executive government can deprive an individual from his liberty without any accountability then the individual liberty become meaningless in a true, democratic society.

Preventive detention is based on this idea that it is the bounded duty of the State to protect the interests of the country and welfare of the citizens from anti-national and anti-social elements-affecting the maintenance of public order, economic welfare of Bangladesh etc. The interests of the nation have always been regarded of Prime importance to personal liberty. It is taken by way of precaution to prevent mischief of the community by curtailing individual liberty. It is putting a person behind the prison bar by taking away his personal liberty from preventing him to act prejudicially against the interest of the State.

As Hebeas Corpus is a writ to assert personal liberty of a person in detention, friends or relations of the detenue can move the writ petition in the Supreme Court.

In order to prevent possible abuse of the law of preventive detention the legislature has taken care to provide certain safeguards in the law itself, such as, (1) Furnishing of grounds within 15 days from the date of order of detention, (2) The right to make representation against the order of detention, (3) Constitution of Advisory Board consisting of Judges of the Supreme Court, (4) Sending the case to the Advisory Board within 120 days, (5) Hearing before the Advisory Board,(6) The revocation of the order after the recommendation of the Advisory Board etc.

In addition to the above safeguards, the detenu or any one on his behalf can file a writ petition in the nature of habeas corpus challenging the detention order before the High Court Division. The High Court Division has interpreted the Special Powers Act and the orders made thereunder in several decisions. The rationale of those decisions will be dealt herein below:-

Detention cases:

In the case of *Abdul Latif Mirza Vs. Bangladesh*, 31 DLR(AD) 1, the detention order of detenu Abdul Latif Mirza was declared as 'without lawful authority' and passed 'in an unlawful manner'. K.Hossain,J. has very elaborately dealt with the question of objective satisfaction of the Court, the availability of valid grounds, the continuation of an invalid detention with a subsequent valid detention order and the scope of judicial review of the Supreme Court in detention matter under Special Powers Act in the light of the Constitutional mandate. K.Hosain,J. in paragraphs 7,12,15,23 and 24 in that case has observed as follows:-

"The Constitution, therefore, has cast a duty upon the High Court to satisfy itself that a person in custody is being detained under an authority of law, or in a lawful manner, the purpose of the Constitution is to confer on the High Court with the power to satisfy itself that a person detained in custody, is under an order which is lawful. Along with it, we are to keep in mind the provision of Section 3 of the Special Powers Act, which gives the detaining authority a discretion to act under the Act, if it is of opinion, that a person's detention is necessary in order to prevent him from doing a prejudicial act. We, therefore, find that the Special Powers Act gives a wide discretion to the detaining authority to act according to its own opinion, but, on the other hand, the Constitution empowers the High Court to satisfy itself that a person is detained in custody under a lawful authority. The Bangladesh Constitution, therefore, provides for a judicial review of an executive action. It is well settled that a judicial review of an executive action does not imply that the court is to sit on the order as on an appeal. But then, the court is concerned to see that the executive authority has acted in accordance with law and it must satisfy the High Court that it has so acted. The Special Powers Act standing by itself emphasizes that the opinion of the detaining authority to act is purely subjective, but the Constitution has given a mandate to the High Court to satisfy itself, a judicial authority, that the detention is a lawful detention. To give a harmonious interpretation we are to observe that under Special Powers Act, the detaining authority satisfaction is to a great extent subjective, but the order of the detaining authority must be based on some materials which will satisfy a reasonable person that a conclusion could be so drawn on such materials. It is a rule that no fixed standard or formula, except that of reasonableness can in this regard be laid down. As to what would constitute reasonableness or the sufficiency of materials must depend on the facts and circumstances of each case. But there can be no denying the fact, that there must be before the detaining authority, some materials before he can form his subjective opinion, and there must be a rational nexus between his satisfaction and the order of detention. Interpreted in this way both the legal requirement of the Act and the constitutional mandate can be harmonised. The High Court, therefore, in or to discharge its constitutional function of judicial review, may call upon the detaining authority to disclose the materials upon which it has so acted, in order to satisfy itself, that the authority has not acted in an unlawful manner."(Para 7).

"We like to observe here that the validity of the order of detention, and the fact of detention on the scope of vagueness of ground stand on a different footing. The order of detention for its validity is to be tested on the basis, whether the detaining authority had before it materials which give a rational probative value to the order and are not extraneous to the purpose of the Act, and beyond which, the order of detention is immune from challenge, except on the ground of malafide. But in judging the grounds served on the detenu to enable him to make a representation so that the fact of detention as distinguished from order of detention, is valid, the court is to consider whether the grounds are vague, or indefinite or irrelevant or are co-extensive with facts on pain of the detention being invalid." (Para-12)

"The principal ground was that the detenu belonged to a political party whose object was to overthrow the Government established by law. This was in 1974 when the composition of the Government was different. The then Government has been overthrown and new government installed. There has been some changes in the Constitution as well judicial notice of these facts can be taken. The detenu, we find, is in continuous detention from 22-4-74 till to-day and this change has taken place during the period of his continued detention. The moot question is, whether the basis of the ground that was existent in 1974, is still existing. Mr. Moudud Ahmed has, with a plausible force, submitted that of the many grounds which were formulated, ground No.1 has lost its cogency with the existing facts. It has become totally irrelevant." (Para 15).

"It is true that initially, the Court is to see whether the detenu is at present detained under a valid order of detention. If, however, the earlier order of detention is illegal and that order is continued by a subsequent order, the subsequent order is illegal." (Para 23).

"From the facts on record it appears that between 22-5-74 and 24-5-74 there is a gap of two days when there was no order of detention. The order passed by the Government on 24.5.74 is no doubt an independent order, but it purported to continue the earlier detention. The detenu was not released on the expiry of thirty days of the order of the Deputy Commissioner. He continued in detention without any order whatsoever, and so his detention become an illegal detention, after the expiry of thirtieth day. The Government continued this illegal detention by its order of 24-5-74. The order is independent but detention is not. There is no correlation between an independent order and the facts of independent detention. The order of detention purporting to continue an illegal detention cannot be sustained." (Para 24).

In the case of *Habiba Mahmud Vs. Bangladesh,* 45 DLR(AD) 89, proviso to Article 33(5) of our Constitution came up for consideration in a preventive detention case wherein Latifur Rahman, J. held at paragraph 49 as follows:-

> "Thus, I hold that the detenu cannot also ask as a matter of right to the detaining authority the facts not disclosed on the plea of public interest. This is the privilege of the State and this privilege the State can always claim against the detenu. Further, when the liberty of a citizen is at stake and when constitutional protection is sought for in the writ jurisdiction for protection of one's liberty and freedom, it is the court alone which can very well look into all the materials including the materials to which privilege is claimed by the detaining authority. If, in fact, a privilege is claimed in respect of any material, it is the High Court Division alone that would finally decide as to whether the document is really a privileged one or not. Under proviso to Article 33(5) of the Constitution, the authority has got a Constitutional protection not to disclose anything in public interest and it is the Constitutional Court alone which can look into the materials pertaining to the detention of the detenu as contemplated in the constitution for its satisfaction alone. The privilege given to the State in the interest of the State, people or community cannot be asked for as a matter of right."

In the case of *Mustafizur Rahman Vs. Bangladesh*, 51 DLR (AD) 1, A.T.M. Afzal, C.J. held at paragraph 41 as under:-

> " It must be made clear that the law which we have declared has never granted absolute power either to the Government or to the President to make an order of detention even in the circumstances mentioned in the judgment nor it is the law that the satisfaction upon which an order of detention is made is immune from challenge. The power of the Supreme Court in making scrutiny of executive acts never recedes in the back ground, as observed by the learned Judge, so long as the Constitution remains operative. The maintenance of law and order, public peace, public safety and security are undisputedly concerns of the State and the Government know best how to preserve them, but the Court's concern in a case of preventive detention is to see whether the person is being detained without lawful authority or in an unlawful manner. The authority can never justify an order of preventive detention by merely saying that the action was taken in the interest of public safety and public order. It has to satisfy the High Court Division which is an obligation cast upon the Court by Constitution, that there were materials on record as would justify a reasonable person to justify the order of detention."

In the case of *Shameem Vs. Government of Bangladesh*, 47 DLR(AD) 109, the detenu was released by the Appellate Division as the respondent did not appear before both the Divisions. M.H.Rahman,C.J. held at paragraph 6 as follows:-

> "It is a distinctive norm in our Court system that application for habeas corpus should get top priority over all other business and be expeditiously disposal of. It is no longer common to direct the body of the prisoner to be produced before the Court but the respondents having the custody of the prisoner must specify the case of detention and discharge the burden of proof in lawful justification of the detention."

In the case of *Sajeda Parvin Vs. Government of Bangladesh*, 40 DLR(AD) 178, B.H.Chowdhury while considering the detention order, held at paragraph 20 as follows:-

> "Malafide vitiates everything and the point is so settled that needs no reiterating by reference to the decided cases. The case of Khondkar Mustaque Ahmed, 34 DLR(AD) 222 has settled the issue. In this proceeding, our attention has been drawn to the statement of the Home Minister who gave out reasons for detention in the Parliament. Putting his statement that detention was necessary so as to prevent this man from escaping from the clutches of law in juxtaposition with the grounds of detention which says in order to prevent him from indulging in prejudicial activities, the conclusion became obvious that the order of detention was passed for collateral purposes for which it has no sanction in law. In this view of the matter, the opinion is that the detention is illegal and the detenu is being held in custody without any lawful authority."

Cases on Preventive Detention

(1) *Government of East Pakistan Vs. Rowshan Bijoya Shaukat Ali Khan, 18 DLR(SC) 214.*

(2) *Md. Humayun Kabir Vs. The State, 25 DLR, 259.*

(3) *Sharfuddin Ahmed Vs. Secretary, Minister of Home Affairs, 27 DLR, 658.*

(4) *M.Mahmood Vs. Bangladesh, 43 DLR, 383*

(5) *Nasima Begum Vs. Bangladesh, 49 DLR (AD) 102*

(6) *Faisal Mahbub-Vs- Bangladesh, 44 DLR, 168.*

(7) *Dr.Habibullah-Vs- Secretary, Ministry of Home, 41 DLR, 160.*

(8) *AlamAra Haq-Vs- Bangladesh, 42 DLR 98.*

(9) *Bangladesh-Vs-Dr.Dhiman Chowdhur, 47 DLR(AD) 52.*
(10) *Mansur Ali-Vs- Secretary, Ministry of Home, 42 DLR,272.*
(11) *Anwar –Vs- Bangladesh, 28 DLR, 428*
(12) *Rama Rani-Vs-Bangladesh, 40 DLR, 364.*
(13) *Tahera Islam-Vs- Secretary, Ministry of Home, 40 DLR,193.*
(14) *Amaresh Chandra-Vs-Bangladesh, 31 DLR(AD) 240.*

Service Matter.

Where the fundamental rights of the petitioner are violated by legislation or rules or by an order of the Government, the petitioner can move the High Court by filing an application under Article 102 of the Constitution. The same principle is application to an employee of a statutory public sector employee. A candidate who has been illegally denied selection in service matter can approach the court for remedy.

Case :

In the case of *Bangladesh –VS- A.Rahman*, 1982 BLD (AD) 176, the respondent was placed in the New National Grade No XIV by a Government Notification. The notification was challenged before the High Court Division on the ground that his placement in the National Grade was discriminatory and violative of Article 29 of the Constitution. High Court Division accepted the contention. The Appellate Division set aside the judgment of the High Court Division and held that the constitution empowers Government to reorganize "Service of the Republic" and further the placement did not adversely affect his terms and conditions of service, on the contrary, his pay was raised considerably. In that case, S. Ahmed, J. held at paragraph 6. as under:

> "Article 136 of the Constitution empowers the government to re-organize the "Services of the Republic" by the creation, amalgamation or unification of Services" and for that purpose Government may, by law, vary a revoke any condition of service of a person employed in the Service of the Republic. In pursuance of this Article, Act XXXII of 1975 was made under Section 4 of this Act Government issued the impugned Notification No. MF (ID)-1-3/77/850 dated 20 December,1977 by which placements of the respondent and other persons in the service of the Republic were made. This Notification and all action taken thereunder got effect notwithstanding anything inconsistent therein contained in any other law in force. The Notification, therefore, cannot be questioned on

the ground that it has varied or revoked the condition of service of a Government servant to his disadvantage".

In the case of *Hasan Imam –Vs- Government of Bangladesh*, 33 DLR (AD) 296, the appellant challenged his order of termination of service in a writ petition. A Division Bench of the High Court Division made the Rule absolute with a direction that the petitioner's service shall be treated as on extra-ordinary leave without any pay from the date of passing of the impugned order till his rejoining in service. Before the Appellate Division it was contended that the termination order having been set aside, the direction was without jurisdiction. The contention was rejected by the Appellate Division wherein, B.H. Choudhury,J. held at paragraph 5 as follows:

> "Since the High Court Division was exercising the constitutional jurisdiction and the constitution has specifically conferred this power upon the Court, no exception can be taken to the order in question. Article 102, however, should not be construed so as to replace the ordinary remedies by way of a suit and application available to the litigant under the General Law of the land. Any declaration or direction or order to be given must be ancillary to the main relief but in doing so, the superior courts had always placed self-imposed limitation for not raising any new issue which requires adjudication on proper facts for which no foundation was laid by the parties in the writ proceeding. Keeping in mind these well-settled principles of law the opinion is in the facts and circumstances of the case it can not be said that the direction is pregnant with any new issue which requires adjudication in separate proceedings."

In the case of *Bangladesh Vs. A.K.M.Zahangir Hossain*, 34 DLR(AD) 173. A common question was raised in all the appeals is whether a member of the subordinate police service by virtue of some provisions contained in the Bangladesh Constitution can maintain a writ petition on the ground of violation of

any statutory rules governing the service condition. In that decision at paragraphs 77 and 78, the order of the court is as follows:-

> "It is decided by the Court that a member of any disciplined force, if aggrieved by an order of a Court or tribunal established under law relating to the disciplined force, he is debarred from invoking the writ jurisdiction subject to the rule laid down by the Division in the case of Khandker Eteshamuddin @ Iqbal in that the order is Coram non-judice or malafide.

By the majority opinion, it is decided that the authorities mentioned in schedule to the Public Officers (Special Provisions) Ordinance, 1976, are not 'tribunals' as contemplated in sub-article (5) of Article 102 of the Constitution, so as to deny the said right to an aggrieved member of the police force, coming within the purview with said Ordinance. The remedy provided under Article 102 of the Constitution in an appropriate case, may be invoked by a member of the said 'disciplined force' if he has been illegally dismissed, removed, discharged, reduced in rank or compulsorily retired".

Election cases.

In the case of *Mahmudul Hoque Vs. Hedayatullah*, 48 DLR(AD) 128, Md. Abdur Rouf,J. spelt out the jurisdiction of the High Court Division in entertaining writ petition under Article 102 of the Constitution in Election matter and held at paragraph 10 as under:

"It is well settled, vide the case of *A.F.M.Shah Alam Vs. Mujibul Huq and others*, 41 DLR(AD) 68, that in election matters the jurisdiction of the High Court Division cannot be invoked under Article 102 of the Constitution except on a very limited ground of total absence of jurisdiction (Coram non-judice) or malice in law for the purpose of interferring with any step taken in the election process, like in the present case, acceptance of nomination paper."

In the case of *Noor Hossain –Vs-Md.Nazrul Islam,* 20BLD(AD) 174, it was held at paragraph 18 by Kazi Ebadul Hoque,J. that Post-election allegations are to be decided by the Election Tribunal, but the Election Commission would not be justified to cancel the result of election held peacefully on the basis of Post-election allegations.

Domestic Tribunal.

In the case of *Bashir Ahmed Vs. BJMC*, 44 DLR(AD) 267, Shahabuddin Ahmed,C.J. clearly determined the scope of domestic tribunal and held in paragraph 8 as follows:-

"Mr.Khalilur Rahman has referred to a decision of this court in the case of Bikash Ranjan Das Vs. The Chairman, Labour Court, 29 DLR(SC) 280. In that case the scope and extent of the court's jurisdiction to examine and scrutinise the findings of a domestic tribunal has been indicated. It has been stated therein that when an order of a domestic tribunal is challenged all that the court is to see is whether the charge framed against the delinquent constitutes any offence calling for penal

action, that the delinquent was given opportunity to defend himself, that the tribunal was constituted with impartial persons and that there was no malafide intention on the part of the tribunal. It has been further held that a domestic tribunal is not bound by the Evidence Act and that the tribunal is to see whether from the materials available before it any conclusion can be drawn. It has been further observed that a difference conclusion is possible is no ground for the court's interference."

Passport.

A citizen's passport cannot be impounded without any valid ground and cause. Hence the requirement of natural justice is implicit in case of denial and impounding of a passport of a citizen.

Case :

In the case of *Rafique-Ul-Huq Vs. Bangladesh*, 44 DLR 398, the petitioner was served with an order to hand over his passport. The petitioner challenged the impugned order as arbitrary, malafide and violative of Articles 31, 36 and 40 of the Constitution. In that decision, Md.Abdul Jalil,J. at paragraph 17 held as under:-

> "In the facts and circumstances as discussed above, we are of the opinion that the impugned order impounding the passport of the petitioner was passed without due compliance with the requirements of Article 10 of the Bangladesh Passport Order, 1973 and it has no legal effect."

In the case of *Syed Mokbul Hosain Vs. Bangladesh*, 44 DLR, 39, Similar proposition has been enunciated as the revocation of the passport has been made without any show cause.

The below mentioned cases illustrate the above proposition:-

1. *Ekram Ibrahim-Vs-Bangladesh,* 47 DLR 256 (Revocation of Passport).
2. *Bangladesh-Vs-Ghulam Azam,* 2001 BLD(AD) 162 (Renewal of Passport).
3. *H.M.Ershad -Vs-Bangladesh,* 2001 BLD(AD)69(Impounding of Passport).
4. *Syed Makbool Hosain-Vs-Bangladesh,*44 DLR 39 (Refusal of Passport).
5. *Ziauddin-Vs-Bangladesh,* 47 DLR 29.
6. *Bangladesh-Vs-Zeanat Hossain,*1 BLC(AD) 89.

Quid Proquo.

When the levy of the fee is for the benefit of the entire industry, there is sufficient quid proquo between the levy recovered and the services rendered to the whole industry. All that is necessary is that there should be a reasonable relationship between levy of the fee and service rendered.

Case:

In the case of *Zaminur Rahman Vs. Bangladesh*, 31 DLR (AD) 171, at paragraph 14, the concept of quid proquo was discussed by K.M.Subhan,J. wherein it is observed as follows:-

> "There cannot be any dispute that a tax does not aid at conferring any direct benefit upon any particular individual and there is an element of quid proquo between the tax payer and the public authority while on the other hand fee or a toll is a charge for a special service rendered to some individuals by the agency authorised to charge a toll or fee.

Reasonableness.

The duty to act fairly and reasonably has been developed in the administrative law field to ensure the rule of law and to prevent failure of justice where the action is administrative in nature. Just as principles of natural justice ensure fair decision in a quasi-judicial proceeding.

Estoppel.

There can be no estoppel against constitution. A concession made by the petitioner whether under mistake of law or otherwise that he does not possess or would not enforce any particular fundamental right, cannot create estoppel against him, in that or in any subsequent proceeding. Such a concession, if enforced, would defeat the purpose of the Constitution.

Unjust Enrichment.

The doctrine of unjust enrichment is a just and salutary doctrine. Under this doctrine, no person can seek to collect the duty from both sides. In other words, he cannot get the duty for the purchaser at one end, and also collect the same duty from the State on the ground that it has been collected from him contrary to law. The power of the Court is not meant to be exercised for unjustly enriching a person. If an assessee has passed on the tax for the consumer or a third party and sustained no loss or injury, grant of refund to him will result in a windfall to him. Such a person will be unjustly enriched. This will result in the assessee or the claimant obtaining a benefit, which is neither legally or equitably due to him.

Corporate Veil.

Where the corporate character is employed for the purpose of committing illegality or for defrauding others the court could ignore the corporate character and will look at the reality behind the corporate veil, so as to enable it to pass appropriate orders to do justice between the parties concerned.

Lifting the viel.

The Court, in appropriate case lift the veil to understand the real intention behind the veil.

Ultra Vires.

This doctrine simply means that an authority has no power to do act complained of. An authority can only do things permitted by the statute to be done and things which are not expressly conferred by the Statute are forbidden to be done. This doctrine permits the court to strike down the decision made by the bodies exercising public functions which they have no power to make.

Doctrine of severability

It contemplates that if the provisions of a Statute become unconstitutional and on account of inconsistency or contravention with fundamental rights, only the repugnant provisions of the law in question shall be treated by the courts as void, and not the whole statute. This means some particular provision of a statute can be separated and severed from the rest of the statute. The offending provision will be declared void by the court by the doctrine of severability and the repugnant provision of the Statute can be severable from the rest of the Statute. This doctrine is applicable to legislation which is partly ultra vires.

If good provisions are so joined together and by severing the bad provision, the remaining portion of the statute cannot independently survive, then the entire statute is declared ultra vires.

Doctrine of eclipse.

This means an obstruction has come in the way of a law which has validity been enacted. Such a law was valid when originally made, but it became invalid with the coming into effect of the constitution. This

doctrine applies to pre-constitution laws. When this obstruction is removed the law becomes valid.

Administrative Law.

The Administrative law relates to Public Administration. It controls the power of the Government. The public authority has been vested with the powers and duty and to follow the procedure in exercising these powers. The primary purpose of administrative law, therefore, is to keep the powers of the Government within their legal limits, so as to protect citizens against any abuse or misuse of power by governmental authorities.

Tribunal.

A Tribunal is not a Court in the strict sense of the term. It refers to quasi-judicial tribunal. All Courts are tribunals but all tribunals are not courts. There are various administrative tribunals set up under various statutes and those discharge quasi-judicial functions. The decisions of such tribunals are amenable to the jurisdiction of the High Court in the nature of certiorari and prohibition. In case of judicial decision, the duty to act judicially must be laid down in the law itself, whereas in a quasi-judicial decision, the administrative authority must act according to the relevant statute and the rules framed thereunder.

Public law and private law.

Judicial review by the Supreme Court in writ jurisdiction is available only in respect of public law remedy and not of the private law. Where the power is statutory, it falls within public law domain, but where the powers are confined solely by a contract between private individuals or duties of private nature are subject matter of private law.

Obterdicta.

A decision which is not express and is not founded on reasons nor where issues in the case were not considered are obiter dicta and those cannot be deemed to have a binding effect.

Ratio Decidendi.

When the law is declared in clear terms with reasons is called ratio decidendi and the same is binding as the judgment of the Appellate Division of the Supreme Court is binding on all courts of the country.

Doctrine of stare decision.

It means to stand by the decisions. The decisions are authorative and binding which must be followed. This doctrine pre-supposes following of a long-standing decision of a court in future cases.

Prospective overruling.

According to this doctrine the decision of a court of law operates prospectively not retrospectively. The decision operates from the date of the judgment. Future transactions are covered and all past and closed transactions are not affected to avoid administrative inconveniences and hardships to the people. As a matter of fact the judgment, order and decrees operate prospectively.

Case: *Anwar Hossain Chowdhury-Vs-Bangladesh,* 41 DLR(AD) 165.

Malice in fact and malice in law.

Case :

In the case of *Dr.Nurul Islam Vs. Bangladesh*, 33 DLR(AD) 201, Ruhul Islam,J. has interpreted the idea of malice in fact and malice in law at paragraph 107 as follows:-

> "Before this court malafide in a particular person has neither been alleged nor argued. The allegations made by the appellant clearly constitute malice in law.'Malice in law' means a doing of a wrongful act intentionally without just cause or excuse. The word 'intentional' refers to the doing of the act, but it does not mean that the person concerned means to be spiteful. So, to satisfy the term maliciously it is not necessary that there should have been any spite or revenge in the respondents towards the appellant. If from any indirect motive the action was taken to total disregard of the judgment in Writ Petition No.571 of 1979, the respondent must be deemed to have acted maliciously.
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> Viscount Haldane L.C. observed as follows: Between malice in fact and malice in law there is a broad distinction which is not peculiar to any particular system of jurisprudence. A person who inflicts an injury upon another person in contravention of law is not allowed to say that he did so with an innocent mind, he is taken to know the law, and he must act within the law. He may, therefore,be guilty or malice in law, although so

far as the state of his mind is concerned, he acts ignorantly, and, in that sense, innocently. Malice in fact is quite a different thing, it means an actual malicious intention on the part of the person who has done the wrongful act, and it may be, in proceedings based on wrongs independent of contract, a very material ingredient in the question of whether a valid cause of action can be stated."

In Exercise of writ Jurisdiction High Court Division is not an Appellate Court.

The High Court Division does not, and should not, act as a court of appeal under Article 102 of the Constitution. The power of the High Court Division is purely discretionary. It will not allow itself to be turned into a court of appeal and revision.

Case :

The facts of the case of *Enamul Huq & others-Vs-Dhaka University*, 40 DLR 507, are that, the students deposited their respective answer scripts in respect of the papers mentioned therein by smuggling then into the examination hall. The Discipline Board and the Syndicate found them guilty. In that decision Mohammad Abdur Rouf,J. held at paragraph 7 as under:

"One of the cardinal principles regarding the relationship of the student and the University is that the relationship being fiduciary, the evaluation of academic attainment of a student being the sole function of the University., and any action taken, primafacie in accordance with the rules and regulations, has little to be interfered by the dictum of the court, specially under the writ jurisdiction. What materials the Discipline Board could find against the petitioners during inquiry cannot be a subject matter of review by this court in writ jurisdiction as the High Court Division cannot assume the function of any appellate authority."

Cases on the above proposition.

1. *Mustafa Kamal(Md)-Vs-First Court of Settlement and others,* 48 DLR(AD) 61.
2. *Bangladesh-Vs-Md.Tajul Islam,* 49 DLR(AD) 177 (Writ Court is not an appellate court).
3. *Bangladesh-Vs-Ashraf Ali,* 49 DLR(AD) 161.

Rule of pith and Substance.

In a federal structure, the legislative power between the center and the provinces are limited by the Constitution. When a controversy arises whether a particular legislature is not exceeding its jurisdiction and encroaching on others constitutional power; the court has to consider the real nature of legislation impugned, its pith and substance, to see whether the subject dealt with is in the one legislative list or in the other.

Cases on Quo Warranto:

In the case of *Md. Mostafa Hossain –VS- Sikder Md. Faruque an another*, 40 DLR (AD) 10, a question was raised as to whether a writ petition in the nature of quo warranto can be compromised and S.Ahmed. J. held at paragraph 8 as follows:

> "It may be mentioned here that before the hearing of this appeal was taken up, an application was filed jointly by the appellant and the respondent No. 1 to the effect that they have settled their disputes amicably on the advice of their common well-wishers and that for the sake of peaceful relationship they pray for allowing the appeal on compromise by setting aside the impugned order of the High Court Division in the writ petition. The learned Additional Attorney General appearing for the Government, respondent No 2, opposed the petition for compromise on the ground of public interest contending that the writ petition being a proceeding in the nature of quo warranto does not relate to any private grievance between the appellant and respondent No. 1 but is a matter of public interest and that when any person may question the holder of a public office about his title thereto the question cannot be left to be decided by compromise between the private parties particularly when the High Court Division in exercise of its constitutional jurisdiction held that the purported holder of the public office got no lawful authority to hold the office."

Cases on Certiorari.

1. *Bangladesh-Vs-Dr.Nilima Ibrahim*, 1981 BLD(AD) 175 (Want of Jurisdiction).
2. *Abdur Rahman-Vs-Bangladesh*,49 DLR 344 (Excess of Jurisdiction).

Declaratory Order.

In the case of *Bangladesh –VS- Mahbubuddin Ahmed*, 50 DLR (AD) 154, A.T.M. Afzal.C.J. while considering the power of the High Court Division under Article 102(2)(a)(ii) held that the High Court Division can only make a declaratory order and nothing more and unless it is required by law to do it cannot direct any authority to do a particular thing. Consequently, it was held that the order for salary, increment, promotion etc. are all gratuitous order not covered by any law.

What is Public Interest.

In the case of *Habibullah Khan –VS- S.A. Ahmed,* 35 DLR (AD) 72, a question was raised as to who will decide as to what is "Public interest" and who will decide the validity of the retirement order of a Government servant. In paragraph 39 of that decision S. Ahmed, J. held as follows:

> "It may he mentioned here that when the order of retirement in this case was made on October 4, 1978, the provision as to "Public interest" was not there in section 9(2) of the Act XII of 1974. In the case of Dr. Nurul Islam –VS- Government of Bangladesh, 33 DLR (AD)201, this Court declared section 9(2) invalid being violative of Article 27 of the Constitution since in the absence of any guide line for selecting a Government servant for the retirement this section was discriminatory. The President thereafter, on 24 July 1981, promulgated the Government Savants (Retirement) (Amendment) Ordinance, 1981, Ordinance VI of 1981 which amended Section 9(2) of Act XII of 1974 with retrospective effect from 1974. The amendment brought in the provision "if it considers necessary in public interest so to do". The ordinance further included a validation clause which validated all orders of retirement under section 9(2) made before the promulgation of the Ordinance. This clause provides, among other things, that notwithstanding anything to the contrary contained in any other law in force or in any judgment of a Court "all orders of retirement made before the commencement of this Ordinance shall be deemed to be, and to have always been, made validly, lawfully and in public interest". By virtue of this amendment of Section 9(2) along with the validation clause, the order of the respondent's retirement is deemed to have been made in the public interest validity of this validation clause, namely, Section 5 of the Ordinance was challenged by a writ-Petition which gave rise to Civil Appeal Nos. 73, 74, and 124 of 1981 of this Court, and by a judgment delivered on 10 March 1982, this Court upheld the validity of the Ordinance. This Court,

however, observed that inspite of the validity law a person feeling aggrieved by retirement may contend that his retirement was not ordered in the public interest, in which case the Government should place some materials before the court to show that the order of retirement was in fact made in the public interest. In the instant case the Government produced relevant file showing certain facts on the basic of which the authorities formed the opinion that the respondent should be retired from service in the public interest. Now the question is who will decide as to what is "public interest". The answer is clearly that the Government is the better judge to decide whether a Government servant should be retired in public interest under Section 9(2). There may be various reasons for which the Government may retire a Government servant after he has completed the requisite period of service qualifying for pension. The Government is in a better position to decide to whom to retire. It is not possible for a court to sit on judgment over Government's action if from the facts disclosed it does not appear that the Government's action was malafide or colourable exercise of power. Subject to these limitations, the discretion of the Government in such a matter is absolute".

Abatement of a Writ Petition.

In the case of *Anwaruddin Bepari –VS-. Assistant Commissioner and other*, 49DLR (AD)48, a question was raised as to what will happen after abatement of a writ petition during Martial Law of 1982 and A.T.M. Afzal.C.J. at paragraph 10 held as follows:

> "With the promulgation of Martial Law all proceedings arising out of and in connection with petitions under Article 102 of the suspended Constitution abated. The Martial Law Proclamation, however, did not put any embargo upon going to the Civil Court for the redress of the causes for which the abated writ petitions were filed. The cause of action for the writ petitions survived their abatement".

Contract of Service.

In the case of *Abdul Bari Sarker –VS- Bangladesh*, 46 DLR (AD) 37, a retired Judge of the High Court Division, Supreme Court of Bangladesh was appointed on contract basis for one year as Chairman of the Settlement Court; but within three months his contract was cancelled. The Judge challenged this cancellation order under writ jurisdiction of the

High Court Division, Shahabuddin Ahemd,C.J. held in that decision at paragraph 6 as under:

> "The petitioner's contract service has been terminated in terms of the contract to which he was a party and since his appointment has been cancelled in terms of the contract we do not think that writ jurisdiction under Article 102 of the Constitution is attracted to his case".

Trading Contract:

In the case of *Sumikin Bussan Corporation –VS- CTG Port Authority*, 53 DLR 599, Kazi A.T. Monowaruddin,J. relying on the case of *Sharping Matshajibi Samabaya Somiti Ltd. –VS- Bangladesh and others*, held at paragraph 37 as under:

> "On consideration of the facts and circumstances of the case we find that the Chittagong Port Authority has in exercise of its statutory power floated tender for the purchases of machineries e.g. Gantry Cranes, for capital investment, as such, it cannot be said that the transaction is an ordinary trading transaction".

Ordinary Contract.

In the case of *Ali Sikder (MD) –VS-Bangladesh*, 54 DLR 543, Kazi A.T. Monowaruddin,J. in paragraph 11 while considering the maintainability of a writ petition out of a contract, held as follows:

> "We have perused the Sharping Matshajibi case and find that the contract/Government grant of lease as referred to in Sharping Metshajibi's case had its root under the statute but in the instant case we find this contract of one year lease was made in the discharge of on ordinary function it has not been rooted through statute, nor in the discharge of any statutory function".

Contract by Sovereign.

In the case of *Sharping Matshajibi Samabaya Samity Ltd. –VS-Bangladesh and others*, 39 DLR (AD) 85, the lease of the Fishery was cancelled and as such a writ petition was filed. The High Court Division held that a contractual right could not be enforced by invoking the writ jurisdiction under Article 102 of the Constitution. The Appellate Division negatived the contention of the High Court Division by holding that in this case the Government functions not in the capacity as a trader e.g. buyer but here the Government acts in exercise of the sovereign powers. B.H. Chowdhury, J. in paragraph 29 held as under:

"On the other hand, when the Government grants lease, privilege, settlement, etc., the Government acts and discharges sovereign function "Performing function in connection with affairs of the Republic or the local authority". Such function can best be appreciated if matters of settlement of hat, bazar, fisheries, Khas land, etc. are kept in view. The Government acts in these affairs in pursuance of some statutory power and any such contract when rooted in statute the Government discharges its sovereign function. While doing so, if there is a breach of any statute or Rule the same can be remedied by invoking writ jurisdiction. Even if any discretion is left in the Statute such discretion must be exercised in accordance with settled principles and not arbitrarily".

Policy Matter.

In the case of *Al-jah Abul Basher being dead his heirs Hosne Ara Begum and others Vs. Bangladesh and others*, 50 DLR (AD) 11, a question was raised that the requisitioned land remained unused for the last 28 years and the Government in the meanwhile having taken a policy decision, the petitioner is entitled to legally get back the land. In that decision at paragraph 5, Latifur Rahman,J. held as under:-

"From the Inter-Ministerial Communications it appears that the Ministry of Land Administration directed the Secretaries of various departments of Bangladesh that unutilized requisitioned land may be returned to the original owners, if not required. These Inter-Ministerial Communications only lay down the policy of the Government which the various Government Departments shall follow in the case of unutilized requisitioned land. These Inter-Ministerial Communications are merely policy guide lines as to how the excess and unutilized lands are to be treated but these instructions do not create any legal right in favour of the petitioner to ask for return of the land from the government after the same has been validly acquired under the law."

Cases on Article 102 (5) And Article 152.

In the case of *Bangladesh –VS- Abdur Rab*, 33 DLR (AD) 143, the appellant who was a police officer and was posted as Officer–In-Charge of Mohammadpur Police-Station, Dhaka challenged the order of show cause notice under President's Order No. 67 of 1972, Government of Bangladesh (Service Screening) Ordinance 1972. In that decision Fazle Munim, J. on an interpretation of Article 152, found the appellant to be member of 'Disciplined Force' and consequently held in paragraph 14 as under:

> "An the law which has set up the Screening Board permits it to exercise jurisdiction in relation to a member of any disciplined force, it must be considered a Court or Tribunal under a law in relation to disciplined force, though such law is not meant exclusively for it."

Thus it was held that a police officer cannot maintain an application under Article 102 because his locus standi is gone due to the ouster clause on Clause (5) of Article 102, even though he may be an "aggrieved person".

In that decision, Fazle Munim, J. interpreted Article 102 of the Constitution in paragraph 22 as under:

> "The bar created under Sub-Article (5) is of that 'person' and the makers of the Constitution have sought to give a comprehensive meaning to the word by including "a statutory public authority and any court or tribunal other than a court or tribunal established under a law relating to the Defence Services or a tribunal to which Article "117 applies".

From the plain language the exclusion applies to a Court or tribunal established under a law relating to any disciplined force. I have taken the view that the exclusion is applicable to a Court or tribunal as the language indicates: The Governing inclusion clause in any " Court or tribunal" and the legislature while including "Court or tribunal" established under a law relating to the Defence Service of Bangladesh or "a tribunal to which Article 117 applies". A reading of Article 117 would show that it is in the contemplation of the Constitution-makers that " Administrative Tribunal would be set up which would exercise jurisdiction in respect of matters referred to in Clauses (a) and (b) of that Article 117. Sub-Article (2) seeks to oust the jurisdiction of the Courts from entertaining any proceeding or making any order in respect of matters within the jurisdiction of the Administrative Tribunal".

In the case of *Jamil Huq –VS- Bangladesh*, 34 DLR (AD) 125, K. Hossain,C.J. after considering the case of *Bangladesh –VS- Md. Abdur Rab*, 33 DLR (AD) 143 and the case of *Bangladesh –VS- Jahangir Hosain*, Civil Appeal No. 134 or 1978 had held on the scope of writ jurisdiction of High Court Division under Article 102 (5) of the Constitution. In this case, K. Hossain, C.J. at paragraph 45 has clearly stated that,

> "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 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. at paragraph 16 while interpreting Clause (5) of Article 102 of the Constitution held as under:

> "A member of the disciplined force can be an aggrieved person and can also move, subject to the provision of Article 45 of the Constitution, High Court Division for enforcement of a fundamental right. There are, however, certain Constitutional limitation's of the judicial review of an order passed or action taken against a member of a disciplined force in this country. Reading Clause (5) of Article 102, Article 134 and Article 45 of the Constitution together 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 disciplinary law for the purpose of ensuring the proper discharge of his duties or maintenance of discipline in the disciplined force".

Limits of writ jurisdiction.

It is to be remembered that the jurisdiction exercised under Article 102 of the Constitution is a discretionary relief. In that view of the matter, the Judges have imposed certain limitations on exercise of jurisdiction under Article 102 of the Constitution. In the following circumstances, the Supreme Court is reluctant to give relief.

1. Latches or unreasonable delay:- There is a maxim based on equitable principle that, 'delay defeats equity'. Inordinate and unreasonable delay in filing a writ petition may bar the remedy under Article 102 of the Constitution. However, if the delay is unintentional and properly explained, then at times the writ jurisdiction may be exercised on the facts and circumstances of each case.

Case :

In the case of *Sarwarjan Bhuiyan and others Vs. Bangladesh*, 44 DLR 144, Kazi Ebadul Hoque,J. in paragraph 19 observed as under:

> "Extraordinary remedy provided by writ petitions under Article 102 of the Constitution is for speedy relief and is for the vigilant and not for the

indolent one like the petitioner and is to be sought immediately after the grievance is caused. It is well settled law that latches and delay disentitle one to such remedy. The petitioners having not sought the relief immediately after their grievance arose rather having acquiesced in the matter as far back as in the year 1969 they cannot now be allowed to claim the disputed land."

The following cases support the above proposition.

(1) *Delwar Hossain(Md) –Vs- Bangladesh*, 54 DLR 494.

(2) *Fazlur Rahman Akhand and 5 others –Vs- Bangladesh*, 52 DLR(AD) 116.

(3) *Younus Mia(Md) and others -Vs- The Secretary, Ministry of Works*, 45 DLR 498.

(4) *Shafiquer Rahman –Vs- Certificate Officer, Dhaka and others*, 29 D:LR(SC) 232.

(5) *Mohammad Jan Vs. Bangladesh and others*, BCR 1982(AD) 315.

Delay in moving an application is also a relevant fact for which the Supreme Court may refuse to entertain the writ petition for granting relief.

In the case of *Sadeque Uddin Ahmed and others -Vs- Rajdhani Unnayan Karti Pakhya* at paragraph 15, Habibur Rahman Khan,J. held as follows:-

> "Furthermore, the petitioners are themselves guilty of undue delay and latches in seeking relief though they were aware that the land was kept under requisition for a long time. Though no period of limitation has been prescribed by law for seeking relief under Article 102 of the Constitution it has been consistently held that the aggrieved party seeking such relief must show due diligence. Relying on the principle laid down in the case of Standard Vacum Oil Co. Vs. Trustees of the Port of Chittagong reported in 13 DLR 804 and the case of Aktaruddin Khan Vs. Province of East Pakistan reported in 15 DLR 1, we hold that neither the owners nor the petitioners, who claim to be their successors-in-interest, ever challenged the requisition for the last 3 decades and for the first time the petitioners have awakened from slumber only to challenge the notification for proposed allotment. Under such circumstances, we are of the view that the petitioners are themselves guilty of latches and hence are not entitled to the relief claimed."

In the case of *Professor Golam Azam –Vs- Bangladesh*, 45 DLR 423, Anwarul Hoque Chowdhury,J. in paragraph 145 held as follows:-

> "There remains the question of delay in filing of this application as pleaded by the respondent-Government. Under the law for an aggrieved person to come before this court under Article 102 of the Constitution, no statutory limitation is provided for as in a suit. The jurisdiction under Article 102 of the Constitution is a jurisdiction in law and also in equity. A Court thus, entertains a petition if the delay is explained to the satisfaction of the Court and it would be explained and examined in the light of the attending facts and circumstances."

Illustrate the above proposition-*K.M.Mahmudur Rahman-Vs-State*, 48 DLR 92.

2. Alternative efficacious remedy:

In the case of *Mahmudul Alam-Vs-Sarwar Hossain Talukdar,* 42 DLR(AD) 211, the question of maintainability of the writ was raised as from the decision of the Election Tribunal there is no other forum of appeal and there being no other efficacious remedy, the writ petition was maintainable. A.T.M.Afzal,J. held that the writ petition is maintainable and remitted the case to the High Court Division for disposal on merit. In that decision, A.T.M.Afzal,J. held at paragraph 12 as follows:

> "All this exercise, however, appears to be academic in the present case because it has already been noticed that there is no word of finality attached to the decision of the Election Tribunal in the Rules. Even if there was any, the jurisdiction of the High Court under Article 102 of the Constitution could not be limited by such word of finality."

In the case of *Collector of Customs,CTG-Vs-A.Hannan*, 42 DLR(AD)167, B.H.Chowdhury,J. held at paragraph 16, that the alternative remedy is not an equally efficacious remedy because it stipulated deposit of 50% of the amount of penalty of the duty demanded. According to the learned Judge it cannot be efficacious alternative remedy.

In the case of *Dhaka University-Vs- Mahinuddin*, 44 DLR(AD) 30, Shahabuddin Ahmed,C.J. at paragraph 8 observed as follows:-

> "Remedy by appeal is quite simple and speedy, particularly when a time limit has been given for the opinion of the syndicate on the report of the Enquiry Commission. An application under Article 102 of the Constitution is maintainable if the High Court Division is satisfied that no other equally efficacious remedy is provided by law. Hence, the

remedy available by appeal to the cancellation is efficacious and speedy."

The following cases may be seen for the above proposition:

(1) *Trade Channel Vs. Collector of Customs*, 44 DLR 127.
(2) *Md.Shahidulah Vs. Collector of Customs*, 48 DLR(AD) 58.
(3) *Dhaka Ware House Ltd. Vs. Assistant Collector of Customs*, 11 BLD(AD) 327.
(4) 40 DLR (AD) 206.
(5) *Tasmina Chowdhury Vs. Deputy Commissioner*, 49 DLR 29.
(6) *Abdul Hakim Vs. Bangladesh*, 49 DLR, 438.
(7) *Nesar Ahmed Vs. Bangladesh*,49 DLR(AD)111.
(8) *Bangladesh Telecom (Pvt.) Ltd. Vs. T&T*, 48 DLR (AD) 10.
(9) *Delicia Dairy Food Ltd. Vs. Collector of Customs*, 51 DLR 381.
(10) *Abdul Hannan Khan-Vs-Ministry of Home Affairs*, 43 DLR 131.
(11) *Mansur Ali-Vs-Janata Bank*, 43 DLR 394.
(12) *Begum Lutfunnessa-Vs-Bangladesh*, 41 DLR 193.
(13) *University of Dhaka-Vs-A.K.Monoruddin*, 52 DLR(AD) 17.

3. Disputed question of facts:-

In general, a disputed question of fact is not investigated in a writ petition where an alternative remedy is available. Rival claims of property and disputed question of title cannot be the subject matter of writ.

In the case of *Shamsunnahar Salam Vs. Md. Wahidur Rahman*, 51 DLR (AD)232, A.T.M.Afzal, C.J. held at paragraph 15 as follows:-

> "However, extraordinary its powers, a writ court cannot and should not decide any disputed question of fact which requires evidence to be taken for settlement. The principle is well-settled and we have no hesitation therefore in observing that all the findings, orders and observations made by the High Court Division on the question of title and possession of the disputed lands are wholly untenable and uncalled for and the dispute can only be decided one way or the other by a competent civil court upon taking evidence."

In the case of *Tasmina Chowdhury Vs. Deputy Commissioner*, 49 DLR 29, Habibur Rahman Khan,J. relying on the decision in PLD 1964(SC) 636, held at paragraph 28 as under:-

> "Relying on the above view we find that disputed question of facts are involved in the instant case. Writ jurisdiction is not the proper forum for seeking remedy."

In the case of *Sultana Nahar, Advocate Vs. Bangladesh and others*, 7 B.L.C (AD) 89, the petitioner, a human right activist filed a writ petition in the nature of mandamus against Government Agencies for illegally evicting several hundred sex-workers from the city of Dhaka. By a majority judgment, the writ petition was dismissed as the facts were disputed. The Appellate Division upheld the judgment of the High Court Division, wherein, Md.Ruhul Amin,J. found that the writ petition contains disputed question of fact and further held as under:-

> "The facts stated in the writ petition were vague and unspecified particularly relating to the number of sex workers, house and holding numbers wherein the sex workers' said to have been staying and following their profession."

Findings of fact made by the Labour Court could not be upset in writ jurisdiction. For this above proposition the below mentioned case may be considered.

1. *Managing Director, Bangladesh Machine Tools Factory Ltd. Vs. Chairman*, 2nd Labour Court and another, 44 DLR AD 272.

For disputed question of facts the following cases may be seen:-

1. *Sheikh Md.Shahidun Nabi Vs. University of Dhaka and others*, 45 DLR 2013..
2. *Farid Mia Vs. Amjid Ali*, 42 DLR (AD) 13..
3. *Abdul Hamid Khan Vs. Miah Nurul Islam and others*, 42 DLR 49.
4. *Karamat Ali and others Vs. Bangladesh*, 50 DLR 372.
5. Unreported case of *Serajuddin-Vs- Government of Bangladesh*, Civil Petition For Leave To Appeal No.113 of 1976.
6. *New India Tea Company Ltd.- Vs- Bangladesh and others*, 31 DLR(AD) 303.
7. *Md.Nawab Ali Khandker-Vs-Md.Aminuddin*, 41 DLR 254.

4. Academic and Theoretical Question:-

In the case of *Kudrat-E-Elahi Panir Vs. Bangladesh*, 44 DLR AD-319, Latifur Rahman,J. held at paragraph 114 as under:

> "I must say that in dealing with Constitutional provisions the Court is not allowed to take hypothetical questions as has been posed by the learned Judge and has answered them like an academician. The learned Judge has made some questions from Text Books on various constitutional law of some renowned scholars. Abstract theoretical questions are not to be decided by any Court as those are of only academic importance."

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

> "The Court does not answer merely academic question but confines itself only to the point/points which are strictly necessary to be decided for the disposal of the matter before it. This should be more so when constitutional questions are involved and the court should be ever discreet in such matters."

The case of *Ghyas Siddiqui-Vs-Bangladesh,* 43 DLR 179 – illustrate the above proposition.

5. No writ after repaing the benefit:-

A person cannot be allowed to blow hot and cold at the same breadth. If a person has acquired some benefit under a statute or of an official act he cannot be allowed to challenge the constitutionality of the law or the official action as he has already taken benefit out of that legislation under challenge. Such writ petitioner is stopped to file writ petition after repaing the benefit.

In the case of *Nurul Hoque (Md) and another Vs. Bangladesh*, 51 DLR(AD) 140, Latifur Rahman,J. observed at paragraph 6 as under:-

> "The petitioners having accepted the benefit cannot now term the same as illegal. The learned Judges of the High Court Division in exercising their writ jurisdiction which is a discretionary relief rightly refused to exercise their discretion in favour of the petitioners as it is unconscionable to blow hot and cold in the same breadth."

6. Economic and Political policies of the Government:-

Judicial review is not concerned with economic and political policies of the State. In all such cases, judicial inquiry is confined with whether such findings are consistent with the laws of the land and whether such

findings are reasonably based on evidence. The Court will act according to Constitution and the law of the land.

In the case of *Kazi Aftabuddin –Vs- Bangladesh*, 49 DLR 422, A.M.Mahmudur Rahman,J. held at paragraph 9 as under:

> "The aforesaid letter is not a legal instrument creating legal rights for the petitioners over the unutilised portion of the land. It only lays down the policy of the Government without any force of law and without creating any legal right. Therefore, we do not see infringement of any right invoking protection under Article 102 of our Constitution."

(1) *Younus Mia –Vs- Ministry of Public Works*, 44 DLR 488, it was held that the Court cannot issue prerogative writ directing the Government to implement its policies.

(2) *Dr.Md.Monirul Huq Vs. Bangladesh*, 45 DLR (AD) 39, Guidelines and Policies are directory it cannot be enforced through Court.

7. In case of two interpretations, the court should save the Act:-

The presumption is always in favour of the constitutionality of an enactment. The person who challenges the validity of an enactment must show that there has been clear violation of the Constitutional principles in respect of pre-constitution and post constitution law. The court would make such progressive or narrow construction of the legislation under challenge as would sustain its constitutional validity.

It is the cardinal principles of interpretation that the court will lean in favour of upholding the constitutionality of law if it is possible to dispose of the case and to determine the rights of the parties before it, on other grounds.

In the case of *Mujibur Rahman –Vs- Bangladesh*, 44 DLR (AD)111, Mustafa Kamal,J. observed at paragraph 66 as under:

> "With regard to his challenge of the vires of sections 3(3) and (5) of the Act as at- (a) above, it is a settled rule of construction of Statutes that there is a presumption of validity of legislative statutes. The maxim *utres magis valeat quam pareat* it is better for a thing to have effect than to be made void applies even more liberally in the case of a Constitution regard being had to the nature of the instrument. As Gwyer,C.J. said re CP Motor Spirit Taxation Act, AIR 1939 (F.C) 1.

"A Constitution of Government is a living and organic thing, which of all instruments has the greatest claim to be construed *utres magis valeat quam pareat.*"

When two constructions are possible, one invalidating a statute and the other upholding it, the court is inclined to adopt that which will remove the statute furthest from Constitutional infirmity."

The following case will illustrate the above proposition.

(1) *NCTB –Vs- A.M.Shamsuddin*, 48 DLR(AD) 184.

(2) *Province of East and others-Vs-Serajul Hoque Patwary*,19 DLR(SC) 282.

(3) *Dr.Nurul Islam-Vs-Bangladesh*,33 DLR 201.

(4) *Kudrat-e-Elahi Ponir-Vs-Bangladesh*, 44 DLR(AD) 310.

8. No legal right:-

In the case of *Shafiq Ahmed Vs. Chairman, BCIC*, 45 DLR 99, Anwarul Hoque Choudhury,J. held at paragraph 15 as under:-

"We are examining this petition in exercise of the power of judicial review of this Court under Article 102 of the Constitution of the People's Republic of Bangladesh, in which an aggrieved person must show that he has a legal right, accrued to him under a law which right had been taken away by an order of an executive authority performing function in the affairs of the State, illegally or without lawful authority for a mandamus to be sustained. Personal right arising out of a contract would not be subject matter of mandamus unless the authority, acting on a contract, acted malafide in refusing a right arising out of a contract."

The following cases may be looked for the above proposition:

(1) *National Engineers Vs. Ministry of Defence*, 44 DLR (AD) 179

(2) *Bangladesh-Vs-Dhaka Steel Works Ltd*, 45 DLR(AD) 69 (para 83).

9. In both Forums writ petition cannot be agitated simultaneously:

When the petitioner has obtained relief by way of stay order granted to him in another proceedings, a petition under Article 102 of the Constitution has held to be infructuous and consequently not maintainable. One will not be allowed to move forums for the same relief.

In the case of *Abu Yousuf –Vs- Bangladesh and others*, 45 DLR(AD) 162, at paragraph 3 M.H.Rahman,J. held as under:-

> "The liquidation of respondent No.5 a company, registered under the Companies Act cannot be challenged in writ jurisdiction of the High Court Division when in its company court the liquidation proceeding itself is pending for disposal."

Case on the above proposition.

(1) *Awlad Hossain-Vs-Haji Moniruddin*, 40 DLR 427.

(Obtain a stay order from the High Court while the suit was earlier pending).

10. Internal Communication not enforceable:

In the case of *National Board of Revenue*, 48 DLR(AD)171 at paragraph 17, Mustafa Kamal J. held as follows:-

> "The various Ministries/Divisions were thinking aloud, within themselves as to what to do with the erstwhile employees of the Tribunals. None of these annexures where communicated to the Writ petitioners. No specific decision was taken by the appellant Ministry in favour of the respondents after these correspondences ended. No legal right can be founded on these interministerial/ divisional communications."

Cases on the above proposition:

(1) *Bangladesh Vs. Dhaka Steel Works Ltd.*, 45 DLR(AD) 70 (Paragraph 83) .

(2) *Abdul Bashar-Vs-Bangladesh*,50 DLR(AD) 11.

11. Petitioner must approach the Court with clean hand:

> "A writ petition is liable to be dismissed on the ground that the petitioner has not approached the court with clean hands. Suppression of material facts while making the writ petition, when the petitioner had knowledge of the same will disentitle one to the relief under writ jurisdiction."

12. Misrepresentation :

Where the petitioner makes a clear misrepresentation as to material facts, the Supreme Court may dismiss the petition at any stage on that ground, even revoking a Rule Nisi which may have been issued earlier.

13. The principle of resjudicata.

The petitioner has no right to move the Supreme Court under 102 of the Constitution more than once on the same facts. In the absence of new

circumstances, after dismissal of a writ petition, the same matter cannot be reagitated by a fresh petition.

Article 103. (1) **Jurisdiction of Appellate Division**—The Appellate Division shall have jurisdiction to hear and determine appeals from judgments, decrees, orders or sentences of the High Court Division.

(2) An appeal to the Appellate Division from a judgment, decree, order or sentence of the High Court Division shall lie as of right where the High Court Division—

(a) certifies that the case involves a substantial question of law as to the interpretation of this Constitution; or

(b) has sentenced a person to death or to [1][imprisonment] for life; or

(c) has imposed punishment on a person for contempt of that division;

and in such other cases as may be provided for by Act of Parliament.

(3) An appeal to the Appellate Division from a judgment, decree, order or sentence of the High Court Division in a case to which clause (2) does not apply shall lie only if the Appellate Division grants leave to appeal.

(4) Parliament may by law declare that the provisions of this article shall apply in relation to any other court or tribunal as they apply in relation to the High Court Division.

Comments on Article 103

Substantial Question of Law.

A certificate may be issued by the High Court Division only on a substantial question of law. In order to be 'substantial' it must be such that there may be some doubts or difference of opinion, or there is room for difference of opinion. If the law is well settled by the higher courts or there are consensus of judicial opinion, a certificate cannot be granted on the plea of substantial question of law. A mere question of law is thus different from a substantial question of law.

The Appellate Division does not grant leave on a question of fact, more particularly when a matter is concluded by findings of fact. In case of perverse or arbitrary decision, the court may grant leave to consider the

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[1] The word "imprisonment" was substituted for the word "transportation" by the Constitution (Eighth Amendment) Act, 1988 (Act XXX of 1988), s. 8.

matter. In case of an error of law or substantial miscarriage of justice, the court grants leave for consideration.

Cases on Article 103.

(1) *Erfan Ali-Vs-Joynal Abedin,* 35 DLR(AD) 216.

(2) *Joynal Abedin-Vs-Mofizur Rahman,* 44 DLR(AD) 162.

Comments on Article 103(2)(C)

Any thing which tends to bring the administration of justice into disrespect or interference with the administration of justice constitutes contempt of court. Broadly, for instances, (1) scandalizing the Judge himself by imputing corruption or dishonesty, (2) destruction or interference with due course of justice and (3) disobedience to the order of court. The Court may proceed suo moto or can take cognizance of such fact on the application of such fact on the application of an advocate of the Court. A notice is issued to the contemner at the first instant for giving opportunity to answer the charge.

The following cases illustrate the above proposition:

(1) *Habibul Islam Bhuiyan,* 51 DLR(AD) 57.

(2) *Moinul Hosein-Vs-Sheikh Hasina Wazed,* 53 DLR(AD) 138.

(3) *Mahbubur Rahman-Vs-Mujibur Rahman*, 53 DLR(AD) 203.

(4) *Kushtia Co-Operative –Vs- Mujibur Rahman,* 44 DLR(AD) 219.

Cases on Article 103(1)

In the case of *Moqbul Ahmed and another Vs. Ahmed Impex(Pvt.) Lt. and others*, 48 DLR (AD)82, a question was raised as to whether the appeal from a Single Company Judge is competent before a Division Bench and on what grounds. Mustafa Kamal,J. in paragraph 25 held as follows:-

> "But when a Single Company Judge of the High Court Division is exercising the power under Section 38 of the Companies Act and appeal from its decision has to be taken by way of leave to the Appellate Division under Article 103(1) of the Constitution. The grounds of appeal mentioned in the proviso to Section 38(3) of the Companies Act are not binding on the Appellate Division exercising its Constitutional jurisdiction under Article 103(1) of the Constitution, because a subordinate legislation like companies Act cannot prevail over the Constitutional provisions. The Appellate Division may or may not grant leave on any ground or grounds whatsoever."

In the case of *Qazi Kamal Vs. Rajdhani Unnayan Kartripakha and another*, 44 DLR(AD) 29, a question was raised as to grant of certificate for Appeal by the High Court Division under Article 103(2)(a), wherein Mustafa Kamal,J. observed in paragraph 8 as under:

> "This Division has been persistently holding that there must be an indication in the certificate as to the nature of the substantial question of law as to the interpretation of the Constitution. In the present case no constitutional point was advanced in the High Court Division, no constitutional point was discussed in the judgment and no question of law was referred for the decision of this Division. The grant of a certificate of fitness for appeal is a judicial function requiring care, and cautiousness of a judicial mind. It is not a mere mechanical act. The High Court Division fell into an oft-repeated avoidable error in granting a certificate in this case."

In the case of *Bangladesh Bank and another Vs. The Administrative Tribunal*, 44 DLR(AD) 239, a question arose whether the leave petition directed against the judgment passed before the coming into effect of the new Section 6A of the Act of 1981 is maintainable. By inserting 6A, Article 103 of the Constitution was made applicable in relation to a judgment of the Administrative Appellate Tribunal. The High Court's power of judicial review was taken away and the Appellate Division was granted the power to grant leave under Article 103(3) of the Constitution. In that case, it was also argued that in the absence of any express words of necessary implication in new Section 6A, it is to be construed as prospective in nature. Incidentally, it may be mentioned that the petitions were barred by 822 days. In that decision at paragraph 4, M.H.Rahman,J. held as under:-

> "Under the new dispensation the petitioner have only the right to seek leave for appeal. This Court's power under clause (3) of Article 103 to interfere in suitable cases where miscarriage of justice has occurred is very wide. It is neither possible nor would be expedient to lay down any general rule, but where there is some substantial question of law of public importance which deserves to be decided by this Court, where grave miscarriage of justice has resulted from illegality or from misreading of evidence or from excluding or illegally admitting material evidence or when a person has been dealt with arbitrarily or that a court or tribunal has not given a fair deal to a litigant this court will not be deterred by any technical hurdles, even by its own rule of limitation as under Order XIII rule 1, because it is the duty of this court to see that an

injustice is not perpetrated. And in view of that the requisition of retrospectivity or prospectivity of Section 6A of the Act of 1981 has got no relevance. Each petition whether it is directed against a judgment passed before or after the coming into effect of Section 6A is to be considered on its merit. The court will neither refuse leave in a case of grave injustice nor grant leave on technical or insubstantial ground to upset the decision of the Appellate Tribunal otherwise validly made for the benefit of the respondents and the petitioner accepted or acted on it for some considerable time."

In an unreported case of *Abdul Mannan Chowdhury Vs. Lal Mohan and others*, Civil Appeal No.19 of 1978, dismissed on 4.12.78, a question was raised as to whether a witness in a criminal case can ask for Special Leave to Appeal under Clause (3) of Article 103 of our Constitution.

The Appellate Division held that Article 103 does not put any limitation on the court. It is not restricted in the matter of granting special leave to appeal only to a party to the proceedings. A person who is not a party to the proceedings may, in a proper case, ask for special leave. It is for the court to examine the nature of the petitioner's interest in the proceedings and whether he is adversely affected by the judgment, decree or order complained of.

Article 104. Issue and execution of processes of Appellate Division— The Appellate Division shall have power to issue such directions, orders, decrees or writs as may be necessary for doing complete justice in any cause or matter pending before it, including orders for the purpose of securing the attendance of any person or the discovery or production of any document.

Comments on Article 104

Under this article the power of doing complete justice in any cause or matter pending before the Appellate Division lies to this Division alone. The High Court Division has no power to do complete justice in any case pending before it.

Cases on Article 104

The facts of the case of *A.F.M.Naziruddin Vs. Hameeda Banu,* 45 DLR(AD) 38, are like this, that on the wife's land the appellant-husband constructed a house by taking loan from Shilpa Bank, where he was an

officer. Subsequently, the marriage tie was dissolved. The trial court held that the husband had constructed the house and decreed the suit. The appellate court, namely,the High Court Division held that the building was, however, constructed by the husband, but he did not acquire any title in the building or in the land. In such circumstances, the question of doing complete justice under Article 104 of the Constitution came up for consideration in that case.

M.H.Rahman,J. held in that case at paragraph 37 as under:-

> "Considering the vagaries of legal proceedings and the technicalities involved in adjudication, Article 104 of the Constitution has invested as a measure of abundant caution, the last court of the country with wide power, so it may forestall a failure of justice and do complete justice in an appropriate case. It is an extraordinary procedure for doing justice for completion of or putting an end to a cause or matter pending before this Court. If a substantial justice under law and an undisputed facts can be made so that parties may not be pushed to further litigation then a recourse to the provision of Article 104 may be justified. Complete justice may not be perfect justice, and any endeavour to attain the latter will be an act of variety. In the name of complete justice if a frequent recourse is made to Article 104 then this court will be exposed to the opprobrium of purveyor of "Palm tree Justice."

Ultimately an equitable remedy was granted on the concept of complete justice by M.H.Rahman,J. at the concluding paragraph as follows:

> "Accordingly it is ordered that the appellant will retain his possession of that floor of the suit building where he is now residing, with no right to transfer his possession. The respondent may recover possession there any time within one year from date on payment of taka Six lacs in default of which the appellant will have only the right to live in that floor of the suit building where he is new residing during his life time."

In the case of *National Board of Revenue Vs. Nasrin Banu and 5 others*, 48 DLR 171, Mustafa Kamal,J. has spelt out the idea of complete justice under Article 104 of our Constitution in paragraphs 21 and 26, in the following manner:

> "The High Court Division will do well to remember that is only the Appellate Division which has been bestowed with the jurisdiction of "doing complete justice in any cause or matter pending before it "under Article 104 of the Constitution and that this jurisdiction is not available either to the High Court Division or the Subordinate

Courts .....We have done this exercise "for doing complete justice"Under Article 104 of the Constitution. But what is "complete justice"? The words do not yield to a precise definition. Cases vary, situations vary and the scale and parameter of complete justice also vary. Sometimes it may be justice according to law, sometimes it may be justice according to fairness, equity and good conscience, sometimes it may be in the nature of arbitration, sometimes it may be justice tempered with mercy, sometimes it may be pure common senses, sometimes it may be the inference of an ordinary reasonable man and so on. This court has done this exercise in varying circumstances applying varying principles in various cases."

In the case of *Raziul Hasan Vs. Badiuzzaman Khan and others*, 48 DLR(AD) 71, Latifur Rahman,J. held in paragraphs 13 and 14 as follows:-

"We now find that no remedy is available to the appellant, though a gross injustice has been done to him for no fault or latches of his own. A valuable right accrued to the appellant in law and fact should not be lost. In that view of the matter, we thought it to be a most appropriate case to exercise our jurisdiction under Article 104 of the Constitution. It will not be out of place to say that Article 32(2) of the Constitution of India vests the Supreme Court of India not only with the writ jurisdiction but also with the power to issue directions, orders or writs in any matter. Thus the Indian Supreme Court possesses original jurisdiction. But in the scheme of our Constitution we can only do complete justice under Article 104 of the Constitution in a matter or cause which is pending in appeal under Article 103 of the Constitution. A substantial injustice having been done to the appellant we feel that the jurisdiction under Article 104 of the Constitution should be exercised in the facts and circumstances of this case".

"Before parting with the case, it may be mentioned that in Government Service the question of due promotion and seniority are very important matter and a person who enters government service always thinks that if he performs his duty with honesty, sincerity, and dedication his promotion and seniority is secured. In doing complete justice in this case we are not unmindful of this important consideration."

In the case of *ETV-Vs-Dr.Chowdhury Mahmood Hasan,* 55 DLR(AD) 27, K.M.Hasan,J. held at paragraph 30 as under:

"If this court finds it necessary within the meaning of the expression of 'complete justice' it may, in view of the power conferred upon it under

Article 104 of the Constitution, consider an affidavit and refer to the facts contained therein even though the High Court Division refrained from doing so under the law."

In the case of *Bangladesh Vs. Chairman, Court of Settlement*, Kazi Ebadul Hoque, considered the question of doing complete justice under Article 104 of our Constitution and held at para 5 as follows:-

"It appears that on Government's own admission the property in question was not an abandoned property and was wrongly included in the 'Ka' list of abandoned buildings. In that view of the matter question of limitation does not arise. By the impugned judgment justice having been done we are not inclined to interfere with the same on technical ground of limitation."

The under mentioned cases illustrate the scope of Article 104:

(1) *A.K.M.Abdul Mannan-Vs-Raj Textile Ltd,* 42 DLR(AD) 11.
(2) *Mahbubur Rahman Sikdar-Vs-Mujibur Rahman Sikdar,*37 DLR(AD) 145.
(3) *Shara Hossin-Vs-A.K.M.Asaduzzaman,*47 DLR(AD) 155.(High Court Division ha no power to do complete justice).
(4) *Bangladesh-Vs-Mashiur Rahman & others,* 50 DLR(AD) 205.
(5) *Monir Ahmed & others-Vs-Forest Research Institute, Chittagong,* 53 DLR(AD) 68.

Article 105. Review of judgments or order by Appellate Division—The Appellate Division shall have power, subject to the provisions of any Act of Parliament and of any rules made by the division to review any judgment pronounced or order made by it.

Comments on Article 105

Rule 1 of Order 47 of the Code of Civil Procedure authorises review of judgment on the below mentioned grounds:

(1) Discovery of new and important matter or evidence which, after due exercise of diligence, could not be produced before the Court at the time of hearing.
(2) Error apparent on the face of the record.
(3) Any other sufficient reason which is analogous to discovery of new facts and error apparent of the face of the record.

Apart from the above grounds, the court may review its judgment to rectify mistakes or errors crept in the judgment through inadvertence, clerical or accidental mistake.

Case on Article 105

In the case of *Idris Ali Bhuiyan Vs. Enamul Haque and others*, 43 DLR(AD) 12, Latifur Rahman,J. interpreted the scope of review under Article 105 of our Constitution in paragraph 13 as under:

> "It may be pointed out that the scope of review of our judgment is very limited. Review of a judgment can be made where there is an error apparent on the face of the record or that the attention of this Court was not drawn to any particular statutory provision of law for which an error has crept in the judgment."

Cases on the above proposition:- *Mahbubur Rahman Sikdar-Vs-Mujibur Rahman Sikdar,* 37 DLR(AD) 145 (Appellate Division has power to review its own judgment acting on its own). *Hefazetur Rahman-Vs-Kazi Anwar Hossain,* 53 DLR (AD) 89.

Article 106. Advisory jurisdiction of Supreme Court—If at any time it appears to the President that question of law has arisen, or is likely to arise, which is of such a nature and of such public importance that it is expedient to obtain the opinion of the Supreme Court upon it, he may refer the question to the Appellate Division for consideration and the division may, after such hearing as it thinks fit, report its opinion thereon to the President.

Case on Article 106

In Special Reference No 1 of 1995, the President of the Republic sought the opinion of the Supreme Court on its advisory jurisdiction under Article 106 of the Constitution. In that Special Reference case. A.T.M Afzal, C.J. at paragraph 23 held of follows:

> " The discretion is entirely his which cannot be doubted or questioned. The expediency or the motive. Political or otherwise, or bonafide, of making the reference cannot be gone into by Court. The Presidents satisfaction that a question of law has arisen, or in likely to arise, and that it is of public importance and that it is expedient to obtain the opinion of the Supreme Court justifies a reference at all times under the Article. The Appellate Division may, after such hearing as it think fit, refer its opinion thereon to the President."

Article 107. (1) **Rule-making power of the Supreme Court**—Subject to any law made by Parliament the Supreme Court may, with the approval of the President, make rules for regulating the practice and procedure of each division of the Supreme Court and of any court subordinate to it.

(2) The Supreme Court may delegate any of its functions under clause (1) and article 113 to a division of that Court or to one or more Judges.

(3) Subject to any rules made under this article the Chief Justice shall determine which Judges are to constitute any Bench of a division of the Supreme Court [1*****] and which Judges are to sit for any purpose.

(4) The Chief Justice may authorise the next most senior judge of either division of the Supreme Court to exercise in that division any of the powers conferred by clause (3) or by rules made under this article.

Case on Article 107(3)

In the case of *Mazzem Hossain-VS-State*, 35 DLR (AD) 29; Shabuddin Ahmed, J. considered Article 107 (3) of the Constitution and held at paragraph 28 as follows

> "There is no dispute that under the Chief Justice's order of reconstitution, this bench ceased to exist and as such it got no jurisdiction to take up this matter on 12 or 13 April. For disposal of a part-heard matter, it is brought to the notice of the Chief Justice who thereupon makes specific orders authorising the previous Bench to dispose of the matter either on the date fixed or on any other date, by notice to the parties, and unless such written order for disposal is given by the Chief Justice the previous Bench got no jurisdiction whatsoever to take up a part-heard matter. In this case, this matter was not brought to the notice of the Chief Justice seeking a fresh Constitution for disposal of this matter. The matter is found to have been heard and disposed of by this Bench when it got no jurisdiction."

Article 108. Supreme Court as court of record—The Supreme Court shall be a court of record and shall have all the powers of such a court including the power subject to law to make an order for the investigation of or punishment for any contempt of itself.

Article 109. Superintendence and control over courts—The High Court Division shall have superintendence and control over all courts [2][and tribunals] subordinate to it.

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[1] The words, brackets and figures "or any Bench of a permanent Bench of the High Court Division referred to in clause (3) of article 100" inserted by the Constitution (Eighth Amendment) Act, 1988 (Act XXX of 1988), omitted in consequence of the amendment of article 100 by the said Act being declared invalid and held *ultravires* by the Appellate Division of the Supreme Court (41 D.L.R. 1989 (AD), p.165.

[2] The words "and tribunals" were inserted by the Constitution (Twelfth Amendment) Act, 1991 (Ac XXVIII of 1991), s. 11.

Comments on Article 109

This jurisdiction of the High Court Division under this article is a supervisory jurisdiction, a jurisdiction which apart from sitting over judgment of the inferior courts meant to supervise the over all works of lower courts.

Cases on Article 109

In the case of *Hosne Ara Begum another Vs. Islami Bank Bangladesh Ltd.*, 53 DLR(AD) 9, Justice Latifur Rahman after considering Article 109, supervisory jurisdiction, held at paragraph 7 as follows:-

> "It may be mentioned here that in exercise of supervisory jurisdiction under Article 109 of the Constitution the High Court Division has got power to call for any records pending before the Subordinate Court but then in a case where provision of filing a revision is barred under Special Statute I am afraid the argument of Mahmudul Islam that revision lies is not entertainable. There are various decisions from Indian Jurisdiction where it has been held that for fundamental basic principle of justice and fair play or where a patent or flagrant error in the procedure of law has crept in or where the order was passed resulting in manifest injustice the High Court Division in exercise of its supervisory jurisdiction can interfere, even no appeal or revision has been filed. But in a case where a statute bars entertainment of a revision the exercise of supervisory power under Article 109 of the Constitution is not available."

In the case of *Solicitor, Government of Bangladesh Vs. A.T.Mridha*, 26 DLR(SC) 17, the Appellate Division held that the order of the High Court Division in quashing of the proceedings before filing of the charge-sheet is premature and unwarranted. Further, taking recourse to Article 109 of the Constitution is not proper.

M.A.Jabir,J. at paragraph 31 of the case held as follows:-

> "Article 109 of the Constitution says that the High Court Division shall have superintendence and control over all courts and tribunals subordinate to it. The invocation of the article, in the facts and circumstances of the present case, does not appear to be proper as we have already held that the actions which were sought to be challenged in the two revision applications, namely, the orders passed by the Sub-Divisional Magistrate under Clause (3) of Article 13 of P.O. 50 and the investigation by police in Daulatpur P.S. Case No.27, were not orders or actions of any "Court" or "Tribunal" subordinate to the High Court."

Article 110. Transfer of cases from subordinate courts to High Court Division—If the High Court Division is satisfied that a case pending in a court subordinate to it involves a substantial question of law as to the interpretation of this Constitution, or on a point of general public importance, the determination of which is necessary for the disposal of the case, it shall withdraw the case from that court and may---

(a) either dispose of the case itself; or

(b) determine the question of law and return the case to the court from which it has been so withdrawn (or transfer it to another subordinate court) together with a copy of the judgment of the division on such question, and the court to which the case is so returned or transferred shall, on receipt thereof, proceed to dispose of the case in conformity with such judgment.

Case on Article 110

In the case of *Mazar Market Society-Vs-Bangladesh,* 1 BLC(1996) 79, Md.Ismailuddin Sarker,J. ordered for transfer of the case in the High Court Division as general public importance was involved in the matter. The learned Judge held at paragraph 12 as under:

> "Naturally question of interpretation of the relevant provisions of the Constitution and law will arise in finding out the extent of such authority of the respondent Nos.1-6. Moreover, question involved in a suit is also of general public interest in that members of the public are going to be adversely affected by the alleged action of the respondent Nos.1-6. We,therefore, find substance in the submission of the learned Advocate of the petitioner in this respect."

Article 111. Binding effect of Supreme Court judgments—The law declared by the Appellate Division shall be binding on the High Court Division and the law declared by either division of the Supreme Court shall be binding on all courts subordinate to it.

Case on Article 111

In the case of *Sher Ali(Md) and others Vs. State*, 46 DLR(AD) 67, leave was granted to put an end to the chaos, confusion and anarchy in the administration of criminal justice, by the judgment of the High Court Division. The question raised is whether the High Court Division has got power under section 561A of the Code of Criminal Procedure to interfere with a decision of a Sessions Judge in revision under Section 439A of the

Code of Criminal Procedure. The Appellate Division by a series of judgment held , "yes", but the High Court Division in the instant case, has said "no". In that decision it was held that the judgment of the Appellate Division as per the mandate of Article 111 of the Constitution is binding on the High Court Division. Thus in the instant case the learned Judges clearly violated the Constitutional mandate of Article 111 of the Constitution. The learned Judges have placed themselves well inside the perimeter of contempt of this court and openly and consciously flouted Article 111 of the Constitution.

In the case of *Bangladesh Agricultural Development Corporation (BADC) Vs. Abdul Barek Dewan*, 19 BLD(AD) 106, Bimelandu Bikash Roy Choudhury,J. clearly spelt out what is meant by "Perincuriam " and the binding effect of the judgment of the Supreme Court, Appellate Division in paragraph 18 as follows:-

> "The word "Perincuriam" is a latin expression. It means through inadvertance. A decision can be said generally to be given Per incuriam when the court had acted in ignorance of a previous decision of its own or when the High Court Division had acted in ignorance of a decision of the Appellate Division.[See *Punjab Land Development and Reclamation Corporation Ltd.–Vs-Presiding Officer, Labour Court*, 1990(3) Scc. 685 (705)]. Nothing could be shown that the Appellate Division in deciding the said case had over looked any of its earlier decision on the point so it was not open to the High Court Division to describe it as one given "Per incuriam". Even if it were so, it could not have been ignored by the High Court Division in view of Article 111 of the Constitution which embodies, a rule of law, the doctrine of precedent."

Article 112. Action in aid of Supreme Court—All authorities, executive and judicial, in the Republic shall act in aid of the Supreme Court.

Case on Article 112

The case of *Ain-O-Salish Kendra (ASK) and others-Vs- Government of Bangladesh*, 1999 BLD 488, is a case of public interest litigation relating to eviction of slum dwellers from the City of Dhaka. In that case, the Judges of the High Court Division took note of the Indian decision in the case of *Olga Tabis Vs. Bombay Municipal Corporation,(1985) 3 Scc.* 454, wherein Article 21 of the Indian Constitution speaks of Protection of life and personal liberty. In this decision Mohammad Fazlul Karim,J. while

referring to the administrative order of the Registrar of the Supreme Court, held at paragraph 20 as follows:-

> "Thus Supreme Court being the guardian of the Constitution and the protector of the good social norms and civil society in a democratic country, all authorities, executive and judicial in the Republic shall act in aid of the Supreme Court as also enshrined in Article 112 of the Constitution."

Article 113. (1) **Staff of Supreme Court**—Appointments to the staff of the Supreme Court shall be made by the Chief Justice or such other judge or officer of that court as he may direct, and shall be made in accordance with rules made with the previous approval of the President by the Supreme Court.

(2) Subject to the provisions of any Act of Parliament the conditions of service of members of the staff of the Supreme Court shall be such as may be prescribed by rules made by that court.

CHAPTER II : SUBORDINATE COURTS

Article 114. Establishment of subordinate courts—There shall be in addition to the Supreme Court [1]* * such courts subordinate thereto as may be established by law.

Article [2]**[115. Appointments to subordinate courts**—Appointments of persons to offices in the judicial service or as magistrates exercising judicial functions shall be made by the President in accordance with rules made by him in that behalf.]

Article 116. Control and discipline of subordinate courts-The control (including the power of posting, promotion and grant of leave) and discipline of persons employed in the judicial service and magistrates

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

[2] Article 115 was substituted for the former article 115 by the Constitution (Fourth Amendment) Act, 1975 (Act II of 1975), s.19.

exercising judicial functions shall vest in the [1][President] [2][and shall be exercised by him in consultation with the Supreme Court.]

Article [3][116A. **Judicial officers to be independent in exercise of their functions**—Subject to provisions of the Constitution, all persons employed in the judicial service and all magistrates shall be independent in the exercise of their judicial functions.]

Cases on Article 116

In the case of *Bangladesh –Vs- Idrisur Rahman, Advocate and others*, 51 DLR(AD) 163, Mustafa Kamal,C.J. while interpreting Article 116 of the Constitution affirmed the judgment of the High Court Division which held that consultation with the Supreme Court for posting, promotion and grant of leave and discipline of persons employed in the judicial service and magistrates exercising judicial functions is necessary. The learned Judge further held at paragraph 10 of the decision as follows:-

> "When a declaratory judgment is passed by a court it is usually retrospective in nature, unless otherwise indicated. Therefore, the interpretation of Article 116 of the Constitution given by the High Court Division will be operative ever since the amended Article 116 is in operation."

In the case of *Aftabuddin-Vs- Bangladesh*, 48 DLR 1, a question was raised as to whether consultation with the Supreme Court was necessary under Article 116 of the Constitution in case of promotion of District Judges to the posts of Joint Secretary in the Ministry of Law, Justice and Parliamentary Affairs. In that decision Naimuddin Ahmed,J. held at paragraph 51 as follows:

> "So, in our view, Article 116 applies in case of posting and promotion of persons in the judicial service to any post or position outside the judicial service in the same manner as their posting and promotion to any post in the judicial service."

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[1] The word "President" was substituted for the words "Supreme Court", *ibid.*,s.20.

[2] The words "and shall be exercised by him in consultation with the Supreme Court" were inserted by the Second Proclamation (Fifteenth Amendment) Order, 1978 (Second Proclamation Order No. IV of 1978).

[3]Article 116A was inserted by the Constitution (Fourth Amendment) Act, 1975 (Act II of 1975), s.21.

CHAPTER III : ADMINISTRATIVE TRIBUNALS

Article 117. (1) **Administrative tribunals**—Notwithstanding anything hereinbefore contained, Parliament may by law establish one or more administrative tribunals to exercise jurisdiction in respect of matters relating to or arising out of—

(a) the terms and conditions of persons in the service of the Republic, including the matters provided for in Part IX and the award of penalties or punishments;

(b) the acquisition, administration, management and disposal of any property vested in or managed by the Government by or under any law, including the operation and management of, and service in any nationalised enterprise or statutory public authority;

[1][*(c)* any law to which clause (3) of article 102 applies.]

(2) Where any administrative tribunal is established under this article, no court shall entertain any proceedings or make any order in respect of any matter falling within the jurisdiction of such tribunal :

Provided that parliament may, by law, provide for appeals from, or the review of, decisions of any such tribunal.

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Comments on Article 117

In pursuance of the Provisions of Article 117 of our Constitution, the Administrative Tribunals Act, 1980 was passed by the parliament with a view to exercise jurisdiction in respect of matters to or arising out of the terms and conditions of persons in the service of the Republic or any statutory public authority.

The scheme of the Act is to deal separately service matters of the persons in the service of the Republic or other statutory public authority. It

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1 Sub-clause (c) was substituted for the former sub-clause (c) by the Second Proclamation (Tenth Amendment) Order, 1977 (Second Proclamation Order No. I of 1977).

2 "PART VIA-THE NATIONAL PARTY" omitted by the Proclamation, dated the 8th November, 1975.

is like French system of separate and independent administrative jurisdiction, known as 'Droit Administratif'. Due to large number of cases in the administrative side it is thought advisable to deal separately the administrative cases by setting up Administrative Tribunals, Administrative Appellate Tribunals and the Appellate Division of the Supreme Court at the apex of the hierachery of such courts. Thus a separate branch of service laws have developed in Bangladesh.

Those Tribunals will decide all service disputes. The ordinary jurisdiction of the High Court Division with regard to service matters is intended to be taken away and is intended to be vested in the tribunal. The case of *Mujibur Rahman*, 44 DLR(AD) 111, has very clearly spelt out the jurisdiction of the Administrative Tribunal visa-vis the High Court Division.

Cases on Article 117

The case of *Mujibur Rahman (Md) –VS- Government of Bangladesh and others*, 44 DLR (AD) 111, is a very important Judgment as in this case, the constitution of Administrative Tribunal, it's jurisdiction and power, and whether it is Court in the strict sence of the term have been elaborately dealt with.

In that decision, M.H.Rahman,J. has held in paragraph 93 as follows:

> " The constitution made provisions in Article 117 for conferring States judicial powers on some tribunals and integrating them in the judiciary, and enabled the Parliament to make necessary legislation for evolving a system that may in future cumulate some of the attributions which are divided between the formal Court system and the growing practice of adjudication of disputes by tribunals".

In the same decision, with regard to the jurisdiction of tribunal, M.H. Rahman J. held as under in paragraph 48:

> "Within its jurisdiction the tribunal can strike down an order for violation of Principles of natural Justice as well as for infringement of fundamental rights, guaranteed by the Constitution, or any other law, in respect of matters relating to or arising of sub-clause (a), but such tribunal cannot, like the Indian Administrative Tribunal in exercise of a more comprehensive Jurisdiction under Article 323A (SASP Sampath Kumer –Vs- Union of India, A.I.R. 1937 SC 386 (Para 16) and J.B. Chopra –VS- Union of India AIR 1987 SC 357 (Para 2), strike down any law or rule on the ground of its constitutionality. A person in the service

of Republic who intends to invoke fundamental right to challenge the Vires of a law will seek his remedy Under Article 102(1), but in all other case he will be required to reek remedy under Article 117 (2)."

In the same decision, M.H. Rahman J. held at paragraph 29 that the tribunals have many of the trappings of the court, but "An administrative tribunal may act judicially, but still remain an administrative tribunal as distinguished from a Court, strictly so called."

In the same Judgment, M.H. Rahman,J. held at paragraph 36 as follows:-

" The tribunals are not meant to be like the High Court Division or the Subordinate Court over which the High Court Division of the Supreme Court exercises both judicial review and superintendence. The tribunals are not in addition to the Courts described in Chapters I and III. They are set a part, as sui generics, in a separate chapter".

In the case of *Bangladesh –VS- Md. Abdus Sabur & others*, 46 DLR (AD) 19, the question of maintainability of the writ petition under Article 102 (2) of the constitution was challenged on the ground that in view Article 117 of the Constitution the case is to be filed before the Administrative Tribunal.

Shahabuddin Ahmed,C.J. at paragraph 21 of the Judgment repelled the argument and held as follows:-

"This question was given due consideration by the High Court Division which found that though the Administrative Tribunal was there, it got no jurisdiction to declare invalid any legislation on the ground of its inconsistency with any provision of the Constitution, in particular Articles 27 and 29 relating to fundamental rights; which the writ petitioners allege to have violated."

Shahabuddin Ahmed,C.J. further took note of the case of *Mujibur Rahman –VS- Bangladesh*, 44 DLR (AD) 111 and held from the facts of this case that the question of fundamental right invoked therein has been so mixed up with the facts and statutory rules that the question of fundamental right cannot be extricated for exclusive consideration.

In the case of *Abdul Latif –Vs-Bangladesh,* 43 DLR 446, a question was raised as to whether civilian employees in the Defence Services can file a case before the Administrative Tribunal. The Administrative Tribunal held that it had no jurisdiction to entertain the case. This contention was rejected, wherein Mustafa Kamal,J. held in paragraph 8 as follows:-

"They are civilian employees in the defence services. The Administrative Tribunal was obviously not correct in holding in the cases filed by the

petitioners that they belonged to defence services. Against the said mistaken orders of the Administrative Tribunal the petitioners were at liberty to prefer appeals before the Administrative Appellate Tribunal within two months from the date of making of the orders."

In the case of *Bangladesh –VS- S.M. Fariduddin*, 54 DLR (AD) 95, M. Amin Choudhury,C.J. after considering the decision of Government of Bangladesh and others–VS- Mohammad Faruque, 51 DLR (AD) 112, held at paragraph 6 as under:

" The fact and law involved in these two appeals are same and similar. The High Court Division in passing the impugned orders have over looked this latest decision of this Division on transfer matters. It may be argued that the Administrative Tribunal has no authority to pass any order of stay or injunction but when a person is transferred from one place to another he is to follow or abide by that order. If by the order of transfer any terms and conditions of Service is violated his remedy lies before the Administrative Tribunal. But it cannot be a ground to issue an order of stay by the High Court Division only on the ground that the Administrative Tribunal has no authority to pass any such order. This has been well settled by this Division in the aforesaid decision. In view of the clear decision by this Division we hold that the High Court Division committed gross illegality in passing the aforesaid orders".

In the case of *Kamrul Hasan –VS- Bangladesh*, 49 DLR (AD) 44, Md. Abdur Rouf, J. considered the question of granting interim relief and held at paragraph 5 as follows:

" Mr. Awlad Ali's next submission regarding the implications of the provisions of Sections 4 and 6 of the Act is also not acceptable in view of the fact that the jurisdiction provided in Section 4 of the Administrative Tribunal and that of the Appellate Tribunal in Section 6 do not contain in express terms that those Tribunals may grant any interim relief in respect of a lis pending before it for final adjudication".

In the case of *Abdul Naim(Md)-Vs-Sonali Bank,* 1 BLC(AD) 80, Mustafa Kamal,J. on an interpretation of Section 4(2) of the Administrative Tribunal Acts held in paragraph 6 as follows:-

"Any application under section 4(2) of the said Act has to be filed within 6 months from the passing of the order in the departmental appeal and after expiry of 6 months no amendment of the application can be made, the said Act being a special law."

In the case of *Bangladesh –VS- Mohammed Faruque,* 51 DLR (AD) 112, Mustafa Kamal, J. interpreted Article 117 of the Constitution and observed in paragraph 11 as follows:

> " But all violations of all kinds of law are not violations of fundamental right. The protection from transfer from one place to another which the respondent allegedly enjoys is protection in connection with his terms and conditions of service. He has no fundamental right of non-transferability in his service. If there is a violation of any instruction having the force of law touching upon his terms and conditions of service, the Constitution requires him to take recourse to the specific remedy provided in Article 117 of the Constitution."

In the case of *Junnur Rahman –VS- BSRS*,51 DLR AD 180, it was held that the writ petition was not maintainable and the proper forum was Administrative Tribunal as there was in fact no violation of fundamental right. In that decision, A.T.M. Afzal,C.J. held in paragraph 6 as under:

> " The High Court Division found no violation of the fundamental right of the petitioner under Articles 27 and 29 of the Constitution because of the impugned circular and office order as alleged. The High Court Division further found that since there was no question of violation of any fundamental right of the petitioner, the writ petition was not maintainable in as much as the relief sought for by the petitioner was within the exclusive Jurisdiction of the Administrative Tribunal".

In the case of *Abu Taleb-Vs-Bangladesh,* 45 DLR(AD) 45, M.H.Rahman,J. explained the word 'rehearing' and held at paragraph 10 as under:

> "As the decision pronounced on June 12, 1989 was not made as per sub-rule(9) of rule 6 of the Rules it did not reach any finality. The Appellate Tribunal did not became functus officio on that date and it had the jurisdiction as an adjudicating body to recall that decision subsequently and order for rehearing."

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PART VII
ELECTIONS

Article 118. (1) **Establishment of Election Commission-**There shall be an Election Commission for Bangladesh consisting of a Chief Election Commissioner and such number of other Election Commissioners, if any, as the President may from time to time direct, and the appointment of the Chief Election Commissioner and other Election Commissioners (if any) shall, subject to the provisions of any law made in that behalf, be made by the President.

(2) When the Election Commission consists of more than one person, the Chief Election Commissioner shall act as the chairman thereof.

(3) Subject to the provisions of this Constitution the term of office of an Election Commissioner shall be five years from the date on which he enters upon his office, and–

(a) a person who has held office as Chief Election Commissioner shall not be eligible for appointment in the service of the Republic;

(b) any other Election Commissioner shall, on ceasing to hold office as such, be eligible for appointment as Chief Election Commissioner but shall not be otherwise eligible for appointment in the service of the Republic.

(4) The Election Commission shall be independent in the exercise of its functions and subject only to this Constitution and any other law.

(5) Subject to the provisions of any law made by Parliament, the conditions of service of Election Commissioners shall be such as the President may, by order, determine :

Provided that an Election Commissioner shall not be removed from his office except in like manner and on the like grounds as a judge of the [1][Supreme Court].

(6) An Election Commissioner may resign his office by writing under his hand addressed to the President.

Article 119. [2](1) **Functions of Election Commission—**The superintendence, direction and control of the preparation of the electoral rolls for elections to the office of President and to Parliament and the

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1 The words "Supreme Court" were substituted for the words "High Court" by the Second Proclamation (Tenth Amendment) Order, 1977 (Second Proclamation Order No. I of 1977).

2 Clause (1) was substituted for the former clause (1) by the Constitution (Twelfth Amendment) Act, 1991 (Act XXVIII of 1991), s. 12.

conduct of such elections shall vest in the Election Commission which shall, in accordance with this Constitution and any other law–

(a) hold elections to the office of President;

(b) hold elections of members of Parliament;

(c) delimit the constituencies for the purpose of elections to Parliament; and

(d) prepare electoral rolls for the purpose of elections to the office of President and to Parliament.]

(2) The Election Commission shall perform such functions, in addition to those specified in the foregoing clauses, as may be prescribed by this constitution or by any other law.

Article 120. Staff of election commission—The President shall, when so requested by the Election Commission, make available to it such staff as may be necessary for the discharge of its functions under this Part.

Article 121. Single electoral roll for each constituency—There shall be one electoral roll for each constituency for the purposes of elections to Parliament, and no special electoral roll shall be prepared so as to classify electors according to religion, race, caste or sex.

Article 122. (1) **Qualifications for registration as voter**—The elections [1]* * * * to Parliament shall be on the basis of adult franchise.

(2) A person shall be entitled to be enrolled on the electoral roll for a constituency delimited for the purpose of election to the Parliament, if he–

(a) is a citizen of Bangladesh;

(b) is not less than eighteen years of age;

(c) does not stand declared by a competent court to be of unsound mind; [2][and]

(d) is or is deemed by law to be a resident of that constituency [3][.]

[4] * * * * * * * * * * * *

[5] * * * * * * * * * * * *

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1 The words "to the offices of President and Vice-President and" were omitted by the Constituion (Twelfth Amendment) Act, 1991 (Act XXVIII of 1991), s. 13(a).

2 The word "and" was added by the Second Proclamation (Third Amendment) Order, 1975 (Second Prclamation Order No. III of 1975).

3 The full-stop was substituted for the semi-colon and word "; and", *ibid.*

4 Sub-clause (e) was omitted, *ibid.*

5 Clause (3) was omitted by the Constitution (Twelfth Amendment) Act, 1991 (Act XXVIII of 1991), s. 13(b).

Article 123. [1][(1) **Time for holding elections—**In the case of a vacancy in the office of President occurring by reason of the expiration of his term of office an election to fill the vacancy shall be held within the period of ninety to sixty days prior to the date of expiration of the term :

Provided that if the term expires before the dissolution of the Parliament by members of which he was elected the election to fill the vacancy shall not be held until after the next general election of members of Parliament, but shall be held within thirty days after the first sitting of Parliament following such general election.

(2) In the case of a vacancy in the official of President occurring by reason of the death, resignation or removal of the President, an election to fill the vacancy shall be held within the period of ninety days after the occurrence of the vacancy.]

[2][(3) A general election of members of Parliament shall be held within ninety days after Parliament is dissolved, whether by reason of the expiration of its term or otherwise than by reason of such expiration.]

(4) An election to fill the seat of a member of Parliament which falls vacant otherwise than by reason of the dissoution of Parliament shall be held within ninety days of the occurrence of the vacancy [:][3]

[3][Provided that in a case where, in the opinion of the Chief Election Commissioner, it is not possible, for reasons of an act of God, to hold such election within the period specified in this clause, such election shall be held within ninety days following next after the last day of such period.]

Article [4][**124. Parliament may make provision as to elections—**Subject to the provisions of this Constitution, Parliament may by law make provision with respect to all matters relating to or in connection with elections to Parliament, including the delimitation of constituencies, the preparation of electoral rolls, the holding of

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[1] Clauses (1) and (2) were substituted for clauses (1), (2), (2A) and (2B) by the Constitution (Twelfth Amendment) Act, 1991 (Act XXVIII of 1991), s. 14(a).

[2] Clause (3) was substituted for the former clause (3) by the Constitution (Thirteenth Amendment) Act, 1996 (Act I of 1996), s. 6.

[3] The colon was substituted for the full-stop at the end of clause (4) and thereafter the proviso was added by the Constitution (Twelfth Amendment) Act, 1991 (Act XXVIII of 1991), s. 14(b).

[4] Article 124 was substituted for the former article 124. *ibid*, s. 15.

elections, and all other matters necessary for securing the due Constitution of Parliament.]

Article 125. Validity of election law and elections—Notwithstanding anything in this Constitution–

(a) the validity of any law relating to the delimitation of constituencies, or the allotment of seats to scuh constituencies, made or purporting to be made under article 124, shall not be called in question in any court;

(b) no election to the [1][offices of President [2] **] or to Parliament shall be called in question except by an election petition presented to such authority and in such manner as may be provided for by or under any law made by Parliament.

Article 126. Executive authorities to assist Election Commission—It shall be the duty of all executive authorities to assist the Election Commission in the discharge of its functions.

Case :

In the case of *Jatiya Party –VS- Election Commission*, 53 DLR (AD) 38, Latifur Rahman,C.J. while interpreting Article 118 of the Constitution held at paragraph 9 as follows:

> " In the present case the order was passed by the Acting Chief Election Commissioner alone and not by the Election Commission. The moot question is whether a member who was acting as Chief Election Commissioner can perform all or any of its powers and functions under the representation of the People Order, 1972, briefly the order, without there being any authorization by the commission itself. It has been referred earlier that the Election Commission is constituted under Article 118 (1) of the Constitution and it consists of the Chief Election Commission and such other Election Commissioners as may be appointed by the President and they, in fact, constitute the Election Commission of Bangladesh. In that sense, Election Commission is a composite body, and individual member can only act under Section 4 of the order when he is authorized by the Commission itself."

In the case of *A.F.M. Shah Alam-Vs-Mujibul Haque and others,* 41 DLR(AD) 68, considering the importance of holding free and fair election

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[1] The words "offices of President and Vice-President" were substituted for the words "office of President" by the Constitution (Ninth Amendment) Act, 1989 (Act XXXVIII of 1989), s. 14.

[2] The words "and Vice-President" were omitted by the Constitution (Twelfth Amendment) Act, 1991 (Act XXVII of 1991), s. 16.

with promptitude, Badrul Haider Chowdhury,J. in paragraph 49 held as under:

"On consideration of all aspects of the matter, our conclusions are as follows:-

(1) Under rule 70 read with Section 24 of the Ordinance the Election Commission has been vested with plenary, supervisory and discretionary jurisdiction to oversee that an election is conducted honestly, justly and fairly and in accordance with the provisions of the Ordinance and the Rules.

(2) In so doing it may pass any order, unless specifically barred, including an order for repoll, acceptance/ consideration of result, review etc. on the basis of materials before it. The observance of the rule of and alteram partem though desirable in some circumstances is not an invariable pre-condition for the validity of such order.

(3) The jurisdiction of the High Court Division under Article 102 of the Constitution cannot be invoked except on the very limited ground of total absence of jurisdiction (coram non-judice) or malice in law to challenge any step in the process of election including an order passed by the Election Commission under Rule 70 because

(a) the real and larger issue of completion of free and fair election with rigorous promptitude for timely emergence and functioning of elective bodies must take precedence over settlement of private disputes.

(b) all election disputes must wait pending completion of the election and be taken to the special forum created under the Election Law itself for their resolution.

(c) almost invariably there will rise dispute over facts which cannot and should not be decided in an extraordinary and summary jurisdiction of writ."

Case :

In the case of *Altaf Hossain –VS- Abul Kashem*, 45 DLR (AD) 53, the Election Commission's inherent power of superintendence, control and direction under Article 119 of the Constitution came up for consideration. Shahabuddin Ahmed,C.J. clearly spelt out the Election Commission's power in paragraph 9 of the above decision as under:

" In our legal system relating to elections also the Election Commission's inherent power under the provision of 'superintendence, control and direction' should be construed to

mean the power to supplement the statutory rules with the sole purpose of ensuring free and fair elections. This power is to be exercised with utmost restraint for frequent use of it is likely to render the other statutory functionaries ineffective. It is rather difficult to draw a line of demarcation of the field where this power should be exercised and where should not. But from the experience it is found that sometime statutory functionaries on the spot do not make timely report as to any disturbance during poll or large scale rigging at the time of counting of ballot papers either through coercion or from dishonest motives. So, the general rule that when election has been held peacefully and no report has been made about any disturbances or rigging by the Presiding Officer or the Returning Officer, then the Election Commission has no power to interfere, cannot be taken for universal application. If, for instance, the total number or votes cast in a centre exceed either total number of ballot papers issued to the centre by the Election Commission or the total number of voters enrolled for that centre, then the latter may interfere even if everything is reported to have been done peacefully. Similarly, if during the counting of ballot papers a ballot box is found missing glaringly contradictory reports as to the result of the counting of votes, without reasonable explanation, then the Election Commission need not wait for determination of the dispute by the Election Tribunal. But when no such thing has happened but allegation is brought after the declaration of the result then it is always desirable that dispute, if any, should go to the Tribunal for determination."

PART VIII
THE COMPTROLLER AND AUDITOR-GENERAL

Article 127. (1) **Establishment of office of Auditor-General**—There shall be a Comptroller and Auditor-General of Bangladesh (hereinafter referred to as the Auditor-General) who shall be appointed by the President.

(2) Subject to the provisions of this Constitution and of any law made by Parliament, the conditions of service of the Auditor-General shall be such as the President may, by order, determine.

Article 128. (1) **Functions of Auditor-General**—The public accounts of the Republic and of all courts of law and all authorities and officers of the Government shall be audited and reported on by the Auditor-General and for that purpose he or any person authoirsed by him in that behalf shall have access to all records, books, vouchers, documents, cash, stamps, securities, stores or other government property in the possession of any person in the service of the Republic.

(2) Without prejudice to the provisions of clause (1), if it is prescribed by law in the case of any body corporate directly established by law, the accounts of that body corporate shall be audited and reported on by such person as may be so prescribed.

(3) Parliament may by law require the Auditor-General to exercise such functions, in addition to those specified in clause (1), as such law may prescribe, and until provision is made by law under this clause the President may, by order, make such provision.

(4) The Auditor-General, in the exercise of his functions under clause (1), shall not be subject to the direction or control of any other person or authority.

Article 129. (1) **Term of office of Auditor-General**—The Auditor-General shall, subject to this article, hold office until he attains the age of sixty years.

(2) The Auditor-General shall not be removed from his office except in like manner and on the like ground as a judge of the [1][Supreme Court].

(3) The Auditor-General may resign his office by writing under his hand addressed to the President.

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[1]The words "Supreme Court" were substituted for the words "High Court" by the Second Proclamation (Tenth Amendment) Order, 1977 (Second Proclamation Order No. I of 1977).

(4) On ceasing to hold office the Auditor-General shall not be eligible for further office in the service of the Republic.

Article 130. (1) **Acting Auditor-General**—At any time when the office of Auditor-General is vacant, or the President is satisfied that the Auditor-General is unable to perform his functions on account of absence, illness or any other cause, the President may appoint a person to act as Auditor-General and to perform the functions of that office until an appointment is made under article 127 or, as the case may be, until the Auditor-General resumes the functions of his office.

Article 131. Form and manner of keeping public accounts—The public accounts of the Republic shall be kept in such form and in such manner as the Auditor-General may, with the approval of the President, prescribe.

Article 132. Reports of Auditor-General to be laid before Parliament— The reports of the Auditor-General relating to the public accounts of the Republic shall be submitted to the President, who shall cause them to be laid before Parliament.

General Comments on this part

The Comptroller and Auditor General mainly performs two functions, i.e. the control of moneys from the Consolidated Fund and the audit of accounts. This power prevents misuse of Public money. His report is of utmost importance because misuse of public fund by various ministries of the Government are detected and wasteful expenditures are objected to. Independence of the Auditor General has been ensured by the various provisions of this part.

In U.K. the Comptroller and Auditor General is the agent of the Parliament and he submits his report to the Parliament.

PART IX
THE SERVICES OF BANGLADESH
CHAPTER I : SERVICES

Article 133. Appointment and conditions of service—Subject to the provisions of this Constitution Parliament may by law regulate the appointment and conditions of service of persons in the service of the Republic :

Provided that it shall be competent for the President to make rules regulating the appointment and the conditions of service of such persons until provision in that behalf is made by or under any law, and rules so made shall have effect subject to the provisions of any such law.

Comments on Article 133

In our Constitution Chapter 1 of Part IX deals with the services of Bangladesh. Parliament by law can regulate the appointment and conditions of service of persons in the service of the Republic. But the President can make rules on matters upon which the statutory rules are not in existence.

Cases on Article 133

In the case of *Bangladesh-Vs- Shafiuddin*, 50 DLR(AD) 27, Mustafa Kamal,J. interpreted Article 133 of the Constitution and held at paragraph 37 as follows:-

> "Article 133 of our Constitution is clearly an enabling provision which confers certain powers but does not impose any duty to legislate. It is not obligatory for the parliament to make laws. No court can direct the Parliament to make laws. Nor is it obligatory for the President to make rules. No court can similarly direct the President to make rules, because the rule-making power of the President is identical with that of the Parliament."

In that decision, the learned Judge further held that in the absence of law and rules under Article 133 of the Constitution, power under article 55(2) expressed to be taken in the name of the President (Article 55(4). Such exercise of power is not unknown or without precedent in our jurisdiction.

Article 134. Tenure of office—Except as otherwise provided by this Constitution every person in the service of the Republic shall hold office during the pleasure of the President.

Comments on Article 134

The doctrine of pleasure theory as incorporated in our Constitution is a legacy of the English doctrine that a servant of the crown holds office during the pleasure of the sovereign.

Cases on Article 134

In the case of *Bangladesh Vs. Zahangir Hossain,* 34 DLR(AD) 173, K.Hossain,C.J. while interpreting Article 134 of the Constitution held at paragraph 14 as under:

> "The position,therefore, is that a person who holds office during the pleasure of the President and does not get protection of Article 135, as he does not hold a civil post in the service of the Republic, his entire terms and conditions of service, though governed by statutory rules, are at the pleasure of the President, and so these statutory rules are but the expression of the pleasure of the President, and not a Constitutional or Statutory guarantee. His remedy for the breach of any of these rules will be through official or departmental channel and not in a court of law."

In the case of *Major(Rtd) A.F.M.Hafizur Rahman –Vs- Bangladesh,* 29 DLR 34, the question that initially came up for consideration is as to the maintainability of the petition under Article 102 of the Constitution. Shahabuddin Ahmed,J. on interpretation of Articles 134 and 135 of the Constitution of Bangladesh held that Military Servant's employment being dependent on President's pleasure, their rights cannot be enforced by a Court. In that decision, it was further held that the nature of application and the relief prayed for clearly show that it relates to terms and conditions of the petitioner's service as a member of the Bangladesh Army and hence writ petition is not maintainable.

In the case of *Serajul Islam Thakur Vs. Government of Bangladesh,* the Senior Judge of the Special Bench. Mahammad Habibur Rahman,J. while interpreting Articles 134 and 135 of our Constitution held as under in paragraph 12.

> "We will presently show that the members of defence services as well as persons holding any civil post in the service of the Republic in view of the provision of Article 134 of the Constitution of Bangladesh hold office during the pleasure of the President but due to the protections

given to the persons holding any civil post in the service of the Republic under Article 135 of the Constitution they are excluded from the mischief of the absolute doctrine of pleasure(Vide AIR 1964 (SC) 600), but as the members of the service of defence have not been given any protection under the said Article 135 or any other Article of the Constitution, they can be retired, dismissed, removed and terminated at any time and against such orders passed against the members of the defence services they cannot come to the ordinary courts(that is civil and constitutional courts) for any relief or redress against such order."

In the case of Abu Saleh Md.Nasim Vs. Bangladesh, 51 DLR(AD) 101, while interpreting Article 134 of our Constitution Mustafa Kamal,J. explained the pleasure theory at paragraph 6 of the decision as under:-

"The answer to this submission is, that all military personnel, especially the post of Chief of Army Staffs which is a position of trust, hold their posts during the pleasure of the President. In the case of the civilian employees the pleasure is curtailed by Constitutional provisions but in the case of military personnel there is absolutely no exception to the theory of pleasure of the President in the Constitution."

In the case of *Rear Admiral A.A.Mustafa-Vs- Bangladesh,* 51 DLR(AD) 146, the question of pleasure theory was further considered by the Appellate Division and Mustafa Kamal, C.J. at paragraph 7 held as under:

"As malafide vitiates every exercise of power, a malafide exercise of pleasure by the President under Article 134 of the Constitution can be brought within the purview of judicial review, if other provisions of the Constitution are not a bar. But in the instant case we are not satisfied that the President has exercised the power malafide. The two reports of a court of Inquiry and a Commission of inquiry were confidential documents. The Court of inquiry and the commission of inquiry were constituted by the Government in exercise of the investigative power of the State to inform itself as to the state of affairs when cyclonic storm and tidal bore hit the country in the night between 29 and 30 April, 1991. It was not for public information and consumption, but for fact-gathering purpose of the Government."

In the case of *Secretary, Ministry of Finance Vs. Masdar Hossain,* 52 DLR(AD) 82,Mustafa Kamal,C.J. interpreted Article 134 of our Constitution and held in paragraph 27 of that decision as under:-

" In the definition of "the service of the Republic", a broad distinction has been drawn between civil service and military service. All those who are civilian public officers are entitled to the protection of Article 134. The Constitution in Article 152(1) defines "public officer" as meaning "a person holding or acting in any office of emolument in the Service of the Republic". Persons appointed to the Secretariat of Parliament and the Staff of the Supreme Court, although governed by separate terms and conditions of service, are entitled to the protection of Article 134, because they are public officers holding or acting in an office of emolument in the service of the Republic. They are not in the executive administrative service of the executive government of Bangladesh, but broadly, and in a generic sense, in a service in respect of the Government of Bangladesh. The definition of the "Service of the Republic" uses the word "Government" in a generic sense. Hence on that ground the members of the Judicial Service cannot be excluded from the ambit of "the Service of the Republic".

Case on pleasure theory

1. *Major General Moinul Hossain Chowdhury(Retd.)-Vs-Bangladesh,* 50 DLR(AD) 370.

Article 135. (1) **Dismissal etc. of civilian public officers**—No person who holds any civil post in the service of the Republic shall be dismissed or removed or reduced in rank by an authority subordinate to that by which he was appointed.

(2) No such person shall be dismissed or removed or reduced in rank until he has been given a reasonable opportunity of showing cause why that action should not be taken :

Provided that this clause shall not apply—

(i) where a person is dismissed or removed or reduced in rank on the ground of conduct which has led to his conviction of a criminal offence; or

(ii) where the authority empowered to dismiss or remove a person or to reduce him in rank is satisfied that, for a reason recorded by that authority in writing, it is not reasonably practicable to give that person an opportunity of showing cause; or

(iii) where the President is satisfied that in the interests of the security of the State it is not expedient to give that person such an opportunity.

(3) If in respect of such a person the question arises whether it is reasonably practicable to give him an opportunity to show cause in accordance with clause (2), the decision thereon of the authority empowered to dismiss or remove such person or to reduce him in rank shall be final.

(4) Where a person is employed in the service of the Republic under a written contact and that contract is terminated by due notice in accordance with its terms, he shall not, by reason thereof, be regarded as removed from office for the purposes of this article.

Comments on Article 135

This article protects civil servants from dismissal, removal and reduction in rank by providing certain safeguards in the nature of reasonable opportunity of showing causes against any of those proposed actions against a person holding civil post.

Compulsory retirement: In Bangladesh, a Government servant retires at the age of 57 years by law. But the law has also provided for compulsory retirement of a Government servant after an employee has completed 25 years of service.

Reference:-*Dr.Nurul Islam-Vs-Bangladesh,* 33 DLR(AD) 201.

Reduction in rank: It means reversion of a employee from a higher to lower rank. When an employee is temporarily holding a higher rank on probation or on an ad hoc or officiating basis, his reversion from the higher rank to his substantive rank is not reduction in rank. When a person is appointed to a post, substantively or temporarily, his reversion to a lower post which he never held at any point of time will amount to reduction of rank and such employee is entitled to the protection of Article 135(2).

In the case of *Bangladesh-Vs-Md.Ismail Hossain,* 31 DLR(AD) 127, the question of reduction in rank come up for consideration. The respondent while holding substantively the post of District Kanongo was appointed temporary to EPCS(Class II) Cadre which is temporary dependent on yearly sanction. After 7 years of service respondent was reverted to the post of District Kanongo without notice. In that case, Mahmud Husain,C.J. held at paragraph 6 as under:

> "In our view the respondent held his office substantively in the temporary cadre and he cannot be removed during the period the cadre remains in existence except for misconduct or some such reason and by following the service rules."

Thus Article 135(2) is attracted in the present case as it is case of reduction in rank.

Case:

Saleh Ahmed Joarder-Vs-Bangladesh, 36 DLR(AD) 26,(This case falling within the four corners of the above case of *Ismail Hossain).*

Cases on Article 135

In the case of *Bangladesh-Vs- Abdul Motaleb Dewan and others*, 45 DLR(AD) 108, M.H.Rahman,J. while interpreting Article 135 of our Constitution held in paragraph 4 as follows:-

> "Furthermore, as an order for compulsory retirement by way of penalty amounts to removal from service the respondents are also entitled to protection under Article 135 of our Constitution."

Further, in that decision, at paragraph 6 it has further been observed as follows:-

> "In these matters the respondents are entitled to the protection under Article 135(1) of the Constitution and such protection cannot be taken away either by the Parliament in its statute making power or by the President in his rule making power. The Constitutional guarantee given under Article 135 of the Constitution cannot be whittled down by designating an officer lower in rank than the one who was the appointing authority at the time of the appointment of the respondents."

In the case of *Bangladesh-Vs-Md.Fazlul Huq, 43 DLR(AD) 144,* a question was raised as to whether a postal clerk who was asked to act as an Inspector on purely temporary basis, on being reverted to his substantive post after about five years of service can be termed as reversion in service and entitled to the protection of Article 135 of the Constitution.

In that decision, M.H.Rahman,J. held at paragraph 32 as under:

> "The uninterrupted service rendered by the respondent for about five years, if considered as "one non-temporary or quasi-permanent", as suggested by the learned counsel for the respondent, even then the impugned order of reversion cannot be termed as an instance of reduction in rank for attracting the protection under Article 135 of the Constitution. The language of the impugned order indicates in unmistaken manner that it has never meant to be order of promotion. In

the facts of the case the respondent was not entitled to any show cause notice nor there was any violation of any principles of natural justice."

In the case of *Jamuna Oil Company Vs. Sk. Dey and others,* 44 DLR 104, Mustafa Kamal,J. considered the question of a reasonable opportunity of showing cause as contemplated in Article 135 of our Constitution and held in clear terms in paragraph 24 as follows:-

"In Article 135 of our Constitution a person holding any civil post in the service of the Republic is entitled to a second show cause notice in the event of dismissal, removal or reduction in rank, but that is a Constitutional protection given to them. We are unable to extend the application of this protection to the employees of a statutory corporation on the ground of natural justice. This protection can only be extended by statutory Rules and it is apparent that at the time of dismissal of the plaintiff from his service in 1979 no statutory Rules afforded this protection to the plaintiff."

In the case of *Dr.Nurul Islam Vs. Bangladesh,* 33 DLR(AD) 201, Article 135, the reasonable opportunity of show to a Government servant was considered, wherein R. Islam,J. in paragraph 103 observed as under:-

"Article 135 provides the Constitutional protection to the Government servants, who have title to the office, against arbitrary and summary dismissal or removal. From this it can be safely held that the Government or the legislature cannot by framing a Rule or by enacting a law evade the guarantees provided under the fundamental rights and the protection provided under Article 135 of the constitution. In my opinion the impugned law, that is, Sub-section (2) of section 9 or Act XII of 1974 giving the discretion to the Government without any guideline, to retire a Government servant without assigning any reason, on his completing 25 years of service, is unconstitutional, and as such it is void on this ground also."

In the case of *Bangladesh –Vs- A.K.M. Zahangir Hossain,* 34 DLR(AD) 173, K, Hossain C. J. interpreted Article 135 of the Constitution and held at paragraph 13 as under:

" The constitution guarantee to the person holding a civil post is that he shall not be (1) dismissed, (2) removed or (3) reduced in rank by any authority subordinate to one by whom he was appointed and secondly, no such action could be taken against him, unless he has been given a reasonable opportunity of showing cause why that action should not be taken."

The following case illustrate above proposition of law:-
(1) *D.G.Prisoners & ors. –Vs- Md.Nasimuddin,* 53 DLR(AD) 30.

Article 136. Reorganisation of service—Provision may be made by law for the reorganisation of the service of the Republic by the creation, amalgamation or unification of services and such law may vary or revoke any condition of service of a person employed in the service of the Republic.

Cases on Article 136

In the case of *Secretary, Ministry of Finance-Vs- Masder Hossain,* 52 DLR(AD) 82, Latifur Rahman,J. while interpreting Article 136 of the Constitution dealing with re-organisation of Service held that the conditions of service is to be separately framed for persons employed in the 'Judicial Service'. In that decision at paragraph 86 it was observed as follows:-

"Article 136 of Part IX speaks of reorganization of service of the Republic by creation, amalgamation or unification of services and such law may vary or revoke any condition of service of a person employed in the service of the Republic. This concept of reorganization of service is available to all other civil post including executive service of Republic other than members of judicial service and magistrates exercising judicial functions as they have been treated separately under articles 115, 116 and 116A of the constitution. Article 136 refers to all general services of civil post. Judicial service has been separately treated in the relevant constitutional provisions and as such conditions of service is to be separately framed under Article 133 and it cannot be tagged as Bangladesh Civil Service (Judicial) under paragraph 2 (X) of Act XXII of 1975.

In the case of *Bangladesh, the Secretary, Ministry of Finance –Vs- A.Rahman*, 1982 BLD(AD) 176, respondent, a selection grade, Auditor challenged his placement in National Grade No.XIV from Grade XII as discriminatory and violative of Article 29 of the Constitution. The High Court Division accepted his contention, but the Appellate Division set aside the judgment of the High Court Division. Shahabuddin Ahmed,J. held at paragraph 6 as under:

"Article 136 of the Constitution empowers the Government to re-organise the "Services of the Republic" by the "creation,

amalgamation or unification of services" and for that purpose Government may, by law vary or revoke any condition of service of a person employed in the Service of the Republic. In pursuance of this Article, Act XXXII of 1975 was made. Under section 4 of this Act Government issued the impugned Notification No.MP(11)-01-3/77/850 dated 20 December, 1977 by which placements of the respondent and other persons in the service of the Republic were made. This Notification and all action taken thereunder got effect notwithstanding anything inconsistent therein contained in any other law in force. The Notification, therefore, cannot be questioned on the ground that it has varied or revoked the condition of service of a Government servant to his disadvantage."

CHAPTER II : PUBLIC SERVICE COMMISSIONS

Article 137. Establishment of Commissions—Provision shall be made by law for establishing one or more public service commissions for Bangladesh, each of which shall consist of a chairman and such other members as shall be prescribed by law.

Comments on Article 137

Chapter II of part IX deals with Public Service Commission. Public Service Commission was established under Article 137 of our constitution for conducting recruitment tests, examinations and selecting suitable candidates for appointment in various cadre services of Bangladesh and for providing uniform recruitment policies.

Article 138. (1) **Appoinment of members**—The chairman and other members of each public service commission shall be appointed by the President :

Provided that not less than one-half of the members of a commission shall be persons who have held office for twenty years or more in the service of any government which has at any time functioned within the territory of Bangladesh.

(2) Subject to any law made by Parliament the conditions of service of the chairman and other members of a public service commission shall be such as the President may, by order, determine.

Article 139. (1) **Term of office**—The term of office of the chairman and other members of a public service commission shall, subject to the provisions of this article, expire five years after the date on which he entered upon his office, or when he attains the age of sixty-two years, whichever is earlier.

(2) The chairman and other members of such a commission shall not be removed from office except in like manner and on the like grounds as a judge of the [1][Supreme Court].

(3) A chairman or other member of a public service commission may resign his office by writing under his hand addressed to the President.

(4) On ceasing to hold office a member of a public service commission shall not be eligible for further employment in the service of the Republic, but, subject to the provisions of clause (1) —

(a) a chairman so ceasing shall be eligible for re-appointment for one further term; and

(b) a member (other than the chairman) so ceasing shall be eligible for re-appointment for one further term or for appointment as chairman of a public service commission.

Article 140. (1) **Functions of Commission**—The functions of a public service commission shall be----

(a) to conduct tests and examinations for the selection of suitable persons for appointment to the service of the Republic;

(b) to advise the President on any matter on which the commission is consulted under clause (2) or on any matter connected with its functions which is referred to the commission by the president; and

(c) such other functions as may be prescribed by law.

(2) Subject to the provisions of any law made by Parliament, and any regulation (not inconsistent with such law) which may be made by the President after consultation with a commission, the President shall consult commission with respect to—

(a) matters relating to qualifications for, and methods of recruitment to , the service of the Republic;

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[1]The words "Supreme Court" were substituted for the words "High Court" by the Second Proclamation (Tenth Amendment) Order, 1977 (Second Proclamation Order No. I of 1977).

(b) the principles to be followed in making appointments to that service and promotions and transfers from one branch of the service to another, and the suitability of candidates for such appointment, promotions and transfers;

(c) matters affecting the terms and conditions (including pension rights) of that service; and

(d) the discipline of the service.

Case on Article 140 (2)

In the case of *Bangladesh–Vs-Shafiuddin Ahmed,* 50 DLR (AD) 27, Mostafa Kamal,J. interpreted Article 140(2) of the constitution and held at paragraphs 23 and 24 as follows:

> "To us, it appears, the words " The President shall consult a commission" is not mandatory. When, however, a law or regulation is framed requiring consultation but no consultation is made, the Court may interfere in public interest .....But we should not be understood to have given a carte blanche for the Parliament and the president to make sub-clauses (a) to (d) of clauses (2) a dead, and moribund provision. The sub-clauses must be kept alive at all times and the exclusion must be an exception, not a rule, based on sound principles of public Administration and good government. The exclusion will not be so random and indiscriminate as to render sub-clauses (a) to (d) of clause (2) of Article 140 nugatory."

Article 141. (1) **Annual report**—Each commission shall, not later than the first day of March each year, prepare and submit to the President a report on the performance of its functions during the period ended on the previous 31st day of December.

(2) The report shall be accompanied by a memorandum setting out, so far as is known to the commission—

(a) the cases, if any, in which its advise was not accepted and the reasons why it was not accepted;

(b) the cases where the commission ought to have been consulted and was not consulted, and the reasons why it was not consulted.

(3) The President shall cause the report and memorandum to be laid before Parliament at its first meeting held after 31st March in the year in which the report was submitted.

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[1][PART IXA
EMERGENCY PROVISIONS

Article 141A. (1) **Proclamation of emergency**—If the President is satisfied that a grave emergency exists in which the security or economic life of Bangladesh, or any part thereof, is threatened by war or external aggression or internal disturbance, he may issue a Proclamation of Emergency :

[2] * * * * * * * * * *

[3][Provided that such Proclamation shall require for its validity the prior counter signature of the Prime Minister.]

(2) A Proclamation of Emergency—

(a) may be revoked by a subsequent Proclamation;

(b) shall be laid before Parliament;

(c) shall cease to operate at the expiration of one hundred and twenty days, unless before the expiration of that period it has been approved by a resolution of Parliament :

Provided that if any such Proclamation is issued at a time when Parliament stands dissolved or the dissolution of Parliament takes place during the period of one hundred and twenty days referred to in sub-clause (c), the Proclamation shall cease to operate at the expiration of thirty days from the date on which Parliament first meets after its re-constitution, unless before that expiration of the said period of thirty days a resolution approving the Proclamation has been passed by Parliament.

(3) A Proclamation of Emergency declaring that the security of Bangladesh, or any part thereof, is threatened by war or external aggression or by internal disturbance may be made before the actual occurrence of war or any such aggression or disturbance if the President is satisfied that there is imminent danger thereof.

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1 Part IXA was inserted by the Constitution (Second Amendment) Act, 1973 (Act XXIV of 1973), s. 6.

2 The proviso was omitted by the Constitution (Fourth Amendment) Act, 1975 (Act II of 1975), s. 28.

3 The Proviso was added by the Constitution (Twelfth Amendment) Act, 1991 (Act XXVIII of 1991), s. 17.

Article 141B. Suspension of provisions of certain articles during emergencies—While a Proclamation of Emergency is in operation, nothing in articles 36, 37, 38, 39, 40 and 42 shall restrict the power of the State to make any law or to take any executive action which the State would, but for the provisions contained in Part III of this Constitution, be competent to make or to take, but any law so made shall, to the extent of the incompetency, cease to have effect as soon as the Proclamation ceases to operate, except as respects things done or omitted to be done before the law so ceases to have effect.

Article 141C. (1) **Suspension of enforcement of fundamental rights during emergencies**—While a Proclamation of Emergency is in operation, the President may, [1][on the written advice of the Prime Minister, by order], declare that the right to move any court for the enforcement of such of the rights conferred by Part III of this Constitution as may be specified in the order, and all proceedings pending in any court for the enforcement of the right so specified, shall remain suspended for the period during which the Proclamation is in force or for such shorter period as may be specified in the order.

(2) An order made under this article may extend to the whole of Bangladesh or any part thereof.

(3) Every order made under this article shall, as soon as may be, be laid before Parliament.]

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1 The words and comma "on the written advice of the Prime Minister, by order" were substituted for the words "by order" by the Constitution (Twelfth Amendment) Act, 1991 (Act XXVIII of 1991), s. 18.

PART X
AMENDMENT OF THE CONSTITUTION

Article 142.[1](1) **Power to amend** [2]*** **any provision of the Constitution**—Notwithstanding anything contained in this Constitution—

(a) any provision thereof may be [3][amended by way of addition, alteration, substitution or repeal] by Act of Parliament :

Provided that—

(i) no Bill for such amendment [2]*** shall be allowed to proceed unless the long title thereof expressly states that it will amend [2]*** a provision of the Constitution;

(ii) no such Bill shall be presented to the President for assent unless it is passed by the votes of not less than two-thirds of the total number of members of Parliament;

(b) when a Bill passed as aforesaid is presented to the President for his assent he shall, within the period of seven days after the Bill is presented to him assent to the Bill, and if he fails so to do he shall be deemed to have assented to it on the expiration of that period.

[4][(1A) Notwithstanding anything contained in clause (1), when a Bill, passed as aforesaid, which provides for the amendment of the Preamble or any provisions of articles 8, 48 [5][or] 56 [6]*** or this article, is presented to the President for assent, the President, shall, within the period of seven days 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.

(1B) A referendum under this article shall be conducted by the Election Commission, within such period and in such manner as may be provided by law, amongst the persons enrolled on the electoral roll prepared for the purpose of election to [7][Parliament].

(1C) On the day on which the result of the referendum conducted in relation to a Bill under this article is declared, the President shall be deemed to have—

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1 Article 142 was re-numbered as clause (1) of that article by the Constitution (Second Amendment) Act, 1973 (Act XXIV of 1973), s. 7.

2 The words "or repeal" were omitted, *ibid.*

3 The words and commas "amended by way of addition, alteration, substitution or repeal" were substituted for the words "amended or repealed," *ibid.*

4 Clauses (1A), (1B) and (1C) were inserted by the Second Proclamation (Fifteenth Amendment) Order, 1978 (Second Proclamation Order No. IV of 1978).

5 The word "or" was substituted for the comma "," by the Constitution (Twelfth Amendment) Act, 1991 (Act XXVIII of 1991) s. 19 (a).

6 The commas and figures ", 58, 80, 92A" were omitted, *ibid.*

7 The word "Parliament" was substituted for the words "the office of President" by the Constitution (Twelfth Amendment) Act, 1991 (Act XXVIII of 1991), s. 19(b).

(a) assented to the Bill, if the majority of the total votes cast are in favour of the Bill being assented to; or

(b) withheld assent thereform, if the majority of the total votes cast are not in favour of the Bill being assented to.]

[1][(1D) Nothing in clause (1C) shall be deemed to be an expression of confidence or no-confidence in the Cabinet or Parliament.]

[2][(2) Nothing in article 26 shall apply to any amendment made under this article.]

Case on Article 142

In the case of *Anwar Hossain Chowdhury-Vs-Bangladesh,* 41 DLR(AD) 165, S.Ahmed,J. held at paragraph 385 as under:

> "The Constitution of Bangladesh is a controlled one because a special procedure and a special majority-two thirds of the total strength of the parliament are required for its amendment. Besides, further limitation has been imposed by amending Article 142 which requires a referendum in certain matters. Learned Attorney General quoting from a dissenting view in Kasavandar's case argued that the rigidity in the amendment process as it is to-day if made more rigid by implied limitation, will leave no scope for peaceful change and this may lead to change by violent and unconstitutional means, such as revolution. I would not very much appreciate this argument for, nowadays, there is hardly any revolution in the sense of French or Russian revolution for radical change of socio-economic structure. What is spoken of as revolution in the third world countries is the mere seizure of state power by any means, fair or foul. If a real revolution comes, it cannot be prevented by a constitution, however, flexible it might be."

Further, in the above decision, B.H.Chowdhury,J. at paragraph 215 held as under:

> "A Constitution is a mechanism under which laws are to be made and not a mere Act which declares what laws are to be (See AIR 1939 FC at page 4). The power to amend the Constitution is there within the Constitution itself, namely, Article 142. Constitution is the original and Supreme will. The powers of legislatures are defined and limited and these limits may not be mistaken or forgotten when the constitution is written."

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1 Clause (1D) was inserted *ibid.*, s. 19(c).

2 Clause (2) was added by the Constitution (Second Amendment) Act, 1973 (Act XXIV of 1973), s. 7.

PART XI
MISCELLANEOUS

Article 143. (1) **Property of the Republic**—There shall vest in the Republic, in addition to any other land or property lawfully vested—

(a) all minerals and other things of value underlying any land of Bangladesh.

(b) all lands, minerals and other things of value underlying the ocean within the territorial waters, or the ocean over the continental shelf, of Bangladesh; and

(c) any property located in Bangladesh that has no rightful owner.

(2) Parliament may from time to time by law provide for the determination of the boundaries of the territory of Bangladesh and of the territorial waters and the continental shelf of Bangladesh.

Cases on Article143

In the case of *Conforce Limited and others-Vs-Titas Gas Transmission,* 42 DLR 33, question of enforcement of writ jurisdiction with regard to a contract entered into by dint of constitutional provision under Article 143 of our Constitution came up for consideration. In that decision, Abdul Matin Khan Chowdhury,J. at paragraph 33 observed as follows:-

> "In the present case, it has already been observed that the state is the owner of natural gas in its sovereign capacity by dint of a constitutional provision i.e. Article 143 of the Constitution and the Government is empowered to explore, distribute, sell etc. this wealth under the Bangladesh Petroleum Act, 1974. There is, therefore, no doubt that respondent No.1 entered into a contract with the petitioner for supplying this Wealth as a subsidiary of the Government authorized to exercise Government's Power to deal with this wealth. As such, the contract in this case was not an ordinary contract like "supply of charivs" and was not entered into by the respondent No.1 acting in the "Trading Capacity" and discharging an ordinary trading function of the Government. It was, on the other hand, a contract necessitated for performing the function of the state as a sovereign power and arising out of statutory rules. As such, respectfully following the principles enunciated in the above case. We are of the view that although the relief sought for in this petition arises out of a contract, the petition is maintainable."

Article 144. Executive authority in relation to property, trade etc.— The executive authority of the Republic shall extend to the acquisition, sale, transfer, mortgage and disposal of property, the carrying on of any trade or business and the making of any contract.

Article 145. (1) **Contracts and deeds—**All contracts and deeds made in exercise of the executive authority of the Republic shall be expressed to be made by the President, and shall be executed on behalf of the President by such person and in such manner as he may direct or authorise.

(2) Where a contract or deed is made or executed in exercise of the executive authority of the Republic, neither the President nor any other person making of executing the contract or deed in exercise of that authority shall be personally liable in respect thereof, but this article shall not prejudice the right of any person to take proceedings against the Government.

Article [1]**[145A. International treaties—**All treaties with foreign countries shall be submitted to the President, who shall cause them to be laid before Parliament:

[2][Provided that any such treaty connected with national security shall be laid in a secret session of Parliament.]].

Article 146. Suits in name of Bangladesh—The Government of Bangladesh may sue or be sued by the name of Bangladesh.

Case on Article 146

In the case of *Md. Al. Emdad –Vs- Labour Director and others,* 18 BLD (AD) 137, A. T. M. Afzal, C. J. while interpreting Article 146 of the constitution held at paragraph 21 as under:

> " In an application by a person in the service of the Republic the correct method is to follow article 146 of the constitution which provides that the government of Bangladesh may sue or be sued by the name of Bangladesh. The applicant has of course to mention a competent official in the facts of a particular case who can represent Bangladesh. If the

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1 Article 145A was inserted by the Second Proclamation (Fifteenth Amendment) Order, 1978 (Second Proclamation Order No.IV of 1978).

2 The proviso was substituted for the former proviso by the Constitution (Twelfth Amendment) Act, 1991 (Act XXVIII of 1991), s.20.

government or the statutory public Authority is not made party or is not properly described in the application, the opposite parties must raise objection if they want to at the earliest stage so that the applicant may get an opportunity to take necessary steps. If the proper party is not before, the Tribunal then whether any objection is raised or not the applicant will run the risk of having an effective order to his peril and his application may be adjudicated as incompetent."

Article 147. (1) **Remuneration, etc., of certain officers—** The remuneration, privileges and other terms and conditions of service of a person holding or acting in any office to which the article applies shall be determined by or under Act of Parliament, but until they are so determined—

(a) they shall be those (if any) appertaining to the person holding or, as the case may be, acting in the office in question immediately before the commencement of the Constitution; or

(b) if the preceding sub-clause is not applicable, they shall be determined by order made by the President.

(2) The remuneration, privileges and other terms and conditions of service of a person holding or acting in any office to which this article applies shall not be varied to the disadvantage of any such person during his term of office.

(3) No person appointed to or acting in any office to which this article applies shall hold any office, post or position of profit or emolument or take any part whatsoever in the management or conduct of any company, association or body having profit or gain as its object :
Provided that such person shall not for the purposes of this clause be deemed to hold any such office, post or position by a reason only that he holds or is acting in the office first above-mentioned.

(4)This article applies to the offices of—

(a) President;

[1]* * * * * *

[2] [*(b)* Prime Minister or Chief Adviser;]

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[1] Sub-clause (aa) was omitted by the Constitution (Twelfth Amendment) Act, 1991 (Act XXVIII of 1991), s. 21(a).

[2] Sub-clause (b) was substituted for the former sub-clause (b) by the Constitution (Thirteenth Amendment) Act, 1996), s.7(a).

(c) Speaker or Deputy Speaker;

[1][(d) Minister, Adviser, Minister of State or Deputy Minister;]

(e) Judge of the Supreme Court;

[2]* * * * * *

(f) Comptroller and Auditor-General;

(g) Election Commissioner;

(h) Member of a public service commission.

Case on Article 147

In the case of *Commissioner of Taxes Vs. Shahabuddin Ahmed,* 42 DLR(AD) 162, a question was raised as to whether the salary of Supreme Court Judges being exempted from taxation could it be included for the purpose of taxation while computing their total income.

B.H.Chowdhury, J. answered this in the negative and held in paragraph 13 as under:

> "Thus, the terms and conditions of service of a Supreme Court Judge was sanctified by constitutional provision and as such President's Order No.21 of 1973 having the backing of the constitutional provision achieved the status of Sub-constitutional legislation. Therefore, the question is whether such sub-constitutional legislation can be displaced by the notification exercise of section 60 of the Income Tax Act. Mr. Moksudur Rahman frankly conceded that the President's Order No.21 of 1973 is a legislative order and not merely executive power inasmuch as it has the backing of the constitutional provision, namely, Article 147."

Thus it was held that the notification has no manner of application in the case of the Judges of the Supreme Court.

Article 148. (1) **Oaths of office**—A person elected or appointed to any office mentioned in the Third Schedule shall before entering upon the office make and subscribe an oath or affirmation (in this article referred to as "an oath") in accordance with that Schedule.

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[1] Sub-clause (d) wad substituted for the former sub-clause (d) by the Constitution (Thirteenth Amendment) Act, 1996 (Act I of 1996),s.7(b).

[2] Sub-clause (ee) was omitted by the Second Proclamation (Tenth amendment)Order, 1997 (Second Proclamation Order No. I of 1977).

[1]* * * * * *

(2) Where under this Constitution an oath is required to be administered by a specified person [2]* * *, it may be administered by such other person and at such place as may be designated by that person.

(3) Where under this Constitution a person is required to make an oath before he enters upon an office he shall be deemed to have entered upon the office immediately after he makes the oath.

Article 149. Saving for existing laws—Subject to the provisions of this Constitution all existing laws shall continue to have effect but may be amended or repealed by law made under this Constitution.

Article 150. Transitional and temporary provisions—The transitional and temporary provision set out in the Fourth Schedule shall have effect notwithstanding any other provisions of this Constitution.

Comments on Article 150

In order to maintain continuity, with the adaptation of a new Constitution, necessity arises for making certain provisions for transition from the old loyal system to the new order set up by the Constitution. Hence Article 150 of our Constitution provides for such transitional provisions in the Fourth Schedule and states that those provisions would be effective inspite of the inconsistency with the Constitutional Provisions.

Article 151. Repeals—The following President's Orders are hereby repealed—

(a) The Laws Continuance Enforcement Order, made on 10th April, 1971;

(b) The Provisional Constitution of Bangladesh Order, 1972;

(c) The High Court of Bangladesh Order, 1972 (P.O.No.5 of 1972);

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[1] Clause (1A) was omitted by the Constitution (Twelfth Amendment) Act, 1991 (Act XXVIII of 1991), s. 22.

[2] The words "and for any reason it is impracticable for the oath to be made before that person" were omitted by the Constitution (Fourth Amendment) Act, 1975 (Act II of 1975,s.30.

(d) The Bangladesh Comptroller and Auditor-General Order, 1972 (P.O. No. 15 of 1972);

(e) The Constitutent Assembly of Bangladesh Order, 1972 (P.O. No. 22 of 1972);

(f) The Bangladesh Election Commission Order, 1972 (P.O. No. 25 of 1972);

(g) The Bangladesh Public Service Commissions Order, 1972 (P.O. No. 34 of 1972);

(h) The Bangladesh Transaction of Government Business Order, 1972 (P.O. No. 58 of 1972).

Article 152. (1) **Interpretation**—In this Constitution, except where the subject or context otherwise requires–

"administrative unit" means a district or other area designated by law for the purposes of article 59;

[1]["Adviser" means a person appointed to that office under article 58C;]

[2]["the Appellate Division" means the Appellate Division of the Supreme Court;]

"article" means an article of this Constitution;

"borrowing" includes the raising of money by annuity, and "loan" shall be construed accordingly;

"the capital" has the meaning assigned to that expression in article 5;

[1]["Chief Adviser" means a person appointed to that office under article 58C;]

"Chief Election Commissioner" means a person appointed to that office under article 118;

[2]["The Chief Justice" means the Chief Justice of Bangladesh;]

"citizen" means a person who is a citizen of Bangladesh according to the law relating to citizenship;

"clause" means a clause of the article in which the expression occurs;

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1 The expressions "Adviser" and "Chief Adviser" were inserted by the Constitution (Thirteenth Amendment) Act, 1996 (Act I of 1996), Ss. 8(a) and 8(b).

2 The expressions "the Appellate Division" and "the Chief Justice" were inserted the Second Proclamation (Tenth Amendment) Order, 1977 (Second Proclamation Order No. I of 1977).

[1]["court" means any court of law including Supreme Court;]

"debt" includes any liability in respect of any obligation to repay capital sums by way of annuities and any liability under any guarantee, and "debt charge" shall be construed accordingly;

"disciplinary law" means a law regulating the discipline of any discipined force;

"disciplined fore" means–

(a) the army, navy or air force;

(b) the police force;

(c) any other force declared by law to be a disciplined force within the meaning of this definition;

"district judge" includes additional district judge;

"existing law" means any law in force in, or in any part of, the territory of Bangladesh immediately before the commencement of this Constitution, whether or not it has been brought into operation;

"financial year" means a year commencing of the first day of July;

"guarantee" includes any obligation undertaken before the commencement of this Constitution to make payments in the event of the profits of an undertaking falling short of a specified amount;

[2]["the High Court Division" means the High Court Division of the Supreme Court;]

[2]["judge" means a judge of a division of the Supreme Court;]

"judicial service" means a service comprision persons holding judicial posts not being posts superior to that of a district judge;

"law" means any Act, ordinacne, order, rule, regulation, bye-law, notification or other legal instrument, and any custome or usage, having the force of law in Banglasdesh;

"Parliament" means the Parliament for Bangladesh established by article 65;

"Part" means a Part of this Constitution;

"pension" means a pension, whether contributory or not, of any kind whatsoever payable to or in respect of any person, and includes

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1 The expression "court" was inserted by the Second Proclamation (Fifteenth Amendment) Order, 1978 (Second Proclamation Order No. IV of 1978).

2 The expressions "the High Court Division" and "Judge" were inserted by the Second Proclamation (Tenth Amendment) Order, 1977 (Second Proclamation Order No. I of 1977).

retired pay or gratuity so payable by way of the return or any addition thereto of subscriptions to a provident fund;

"political party" includes a group or combination of persons who operate within or outside Parliament under a distinctive name and who hold themselves out for the purpose of propagating a political opinion or engaging in any other political activity;

"the President" means the Presient of Bangladesh elected under this Constitution or any person for the time being acting in that office;

"property" includes property of every description movable or immovable corporeal or incorporeal, and commercial and industrial undertakings, and any right or interest in any such property or undertaking;

"public notification" means a notification in the Bangladesh Gazette;

"public officer" means a person holding or acting in any office of emolument in the service of the Republic;

"the Republic" means the People's Republic of Bangladesh;

"Schedule" means a schedule to this Constitution;

"securities" includes stock;

"the service of the Republic" means any service, post or office whether in a civil or military capacity, in respect of the Government of Bangladesh, and any other service declared by law to be a service of the Republic;

"session", in relation to Parliament, means the sittings of Parliament commencing when it first meets after the commencement of this Constitution or after a prorogation or dissolution of Parliament and terminating when Parliament is prorogued or dissolved;

"stting" in relation to Parliament, means a period during which Parliament is sitting continuosly without adjournent;

"the Speaker" means the person for the time being holding the office of Speaker pursuant to article 74;

"the State" includes Parliament, the Government and statutory public authorities;

"satutory public authority" means any authority, corporation or body the activities or the principal activities of which are authorised by any Act. ordinance, order or instrument having the force of law in Bangladesh;

"sub-clause" means a sub-clause of the clause in which the expression occurs;

[1]["the Supreme Court" means the Supreme Court of Bangladesh constituted by article 94;]

"taxation" includes the imposition of any tax, rate, duty or impost, whether general, local or special, and 'tax' shall be construed accordingly [;][2]

[3] * * * * * * * *

(2) The General Clauses Act. 1897 shall apply in relation to—

(a) this Constitution as it applies in relation to an Act of Parliament;

(b) any enactment repealed by this Constitution, or which by virtue thereof becomes void or ceases to have, effect, as it applies in relation to any enactment repealed by Act of Parliament.

Article 153. Commencement, citation and authenticity—This Constitution may be cited as the Constitution of the People's Republic of Bangladesh and shall come into force on the sixteenth day of December, 1972, in this Constituion referred to as the commencement of this Constitution.

(2) There shall be an authentic text of this Constitution in Bengali, and an authentic text of an authorised translation in English, both of which shall be certified as such by the Speaker of the Constituent Assembly.

(3) A text certified in accordance which clause (2) shall be conclusive evidence of the provisions of this Constitution :

Provided that in the event of conflict between the Bengali and the English text, the Bengali text shall prevail.

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1 The expression "the Supreme Court" was inserted by the Second Proclamation (Tenth Amendment) Order, 1977 (Second Proclamation Order No. I of 1977).

2 The seamy-colon was substitued for the full-stop by the Constitution (Ninth Amendment) Act. 1989 (Act XXXVIII of 1989), s. 16.

3 The expression 'the vice-president' was omitted by the Constitution (Twelfth Amendment) Act. 1991 (Act. XXVIII of 1991), s. 23.

FIRST SCHEDULE

[Article 47]

Laws effective notwithstanding other provision

The State Acquisition and Tenancy Act, 1950 (E. B. Act XXVIII of 1951).

The Bangladesh (Taking over of Control and Managment of Industrial and Commercial Concerns) Order, 1972 (A. P.O. No. 1 of 1972).

[1] * * * * * * * *

* The Government of Bangladesh (Services) Order, 1972 (P.O. No. 9 of 1972).

The Bangladesh Shipping Corporation Order, 1972 (P.O. No. 10 of 1972).

The Bangladesh (Restoration of Evacuee Property) Order, 1972 (P.O. No. 13 of 1972).

** The Bangladesh Public Servants' (Retirement) Order, 1972 (P.O. No. 14 of 1972).

The Bangladesh Abandoned Property (Control, Management and Disposal) Order, 1972 (P. O. No. 16 of 1972).

The Bangladesh Banks (Nationalisation) Order, 1972 (P. O. No. 26 of 1972).

The Bangladesh Industrial Enterprises (Nationalisation) Order, 1972 (P. O. No. 27 of 1972).

The Bangladesh Inland Water Transport Corporation Order, 1972 (P. O. No. 28 of 1972).

The Bangladesh (Vesting of Property and Assets) Order, 1972 (P. O. No. 29 of 1972).

The Bangladesh Insurance (Emergency Provisions) Order, 1972 (P. O. No. 30 of 1972).

*** The Bangladesh Consumer Supplies Corporation Order, 1972 (P. O. No. 47 of 1972).

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1 The entry 'The Bangladesh Collaborators (Special Tribunals) Order. 1972 (P. O. No. 8 of 1972)' was omitted by the Second Proclamation (Third Amendment) Order, 1975 (Second Proclamation Order No. III of 1975).

* Repealed by Ordinance No. XLIV of 1975.

Spent on 26-9-1975

** Repealed by Ordinance No. XXVI of 1973.

*** Repealed by Act III of 1981.

* The Bangladesh Scheduled Offences (Special Tribunals) Order, 1972 (P. O. No. 50 of 1972).

** The Bangladesh Nationalised and Private Organisations (Regulation of Salary of Employees) Order, 1972 (P. O. No. 54 of 1972).

*** The Bangladesh Jute Export Corporation Order, 1972 (P. O. No. 57 of 1972).

The Bangladesh Water and Power Development Boards Order, 1972 (P. O. No. 59 of 1972).

**** The Government of Bangladesh (Services Screening) Order, 1972 (P. O. No. 67 of 1972).

+ The Bangladesh Government Hats and Bazars (Management) Order, 1972 (P. O. No. 73 of 1972)

**The Bangladesh Government and Semi-autonomus Organisations (Regulation of Salary of Employees) Order, 1972 (P. O. No. 79 of 1972).

The Bangladesh Insurance (Nationalisation) Order, 1972 (P. O. No. 95 of 1972).

The Bangladesh Land Holding (Limitation) Order, 1972 (P. O. No. 98 of 1972).

± The Bangladesh Biman Order, 1972 (P. O. No. 126 of 1972).

The Bangladesh Bank Order, 1972 (P. O. No. 127 of 1972).

The Bangladesh Shilpa Rin Sangstha Order, 1972 (. O. No. 128 of 1972)

The Bangladesh Shilpa Bank Order, 1972 (P. O. No. 129 of 1972).

And all Presidential Orders and other existing law effecting amendment to the above-mentioned Act and Orders.

1 * * * * * *

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* Repealed by Act XIV of 1974.

** Repealed by Ordinance No. XLII of 1977.

*** Repealed by Ordinance No. XXX of 1985.

**** Repealed by Ordinance No. XV of 1977.

\+ Repealed by Ordinance No. LIX of 1975.

± Repealed by Ordinance No. XIX of 1977.

1 "SECOND SCHEDULE-Election of President" was omitted by the Constitution (Fourth Amendment) Act, 1975 (Act II of 1975), s. 31.

THIRD SCHEDULE
[Article 148]

1. **The President.**—An oath (or affirmation) in the following form shall be administered by the [1][Chief Justice]-

"I, ..., do solemnly swear (or affirm) that I will faithfully discharge the duties of the office of President of Bangladesh according to law :

That I will bear true faith and allegiance to Bangladesh :

That I will preserve, protect and defend the Constitution :

And that I will do right to all manner of people according to law, without fear or favour, affection or ill-will.

[2] * * * * * *

[3][**1A. The President in the case of performing the functions of the Chief Adviser.** —Oaths (or affirmations) in the following forms shall be administered by the Chief Justice–

(a) **Oath (or affirmation) of office :**

"I, ..., do solemnly swear (or affirm) that I will faithfully discharge the duties of the office of Chief Adviser of the Non-Party Care-taker Government according to law :

That I will bear true faith and allegiance to Bangladesh :

That I will preserve, protect and defend the Constitution :

And that I will do right to all manner of people according to law, without fear or favour, affection or ill-will."

(b) **Oath (or affirmation) of secrecy :**

"I, ..., do solemnly swear (or affirm) that I will not directly or indirectly communicate or reveal to any person any matter which shall be brought under my consideration or shall become known to me as Chief Adviser of the Non-Party Care-taker Government except as may be required for the due discharge of my duty as Chief Adviser."]

2. **The [1][Prime Minister [2]* * * and other Ministers, Ministers of State and Deputy Ministers.**—Oaths (or affirmations) in the following forms shall be administered by the President—

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1 The words "Chief Justice" were substituted for the words "Chief ustice of the Supreme Court" by the Second Proclamation (Tenth Amendment) Order, 1977 (Second Proclamation Order No. I of 1977).

2 Form IA "Vice-President" was omitted y the Constitution (Twelfth Amendment) Act, 1991 (Act XXVIII of 1991), s. 24(a).

3 Form IA was inserted by the Constituion (Thirteenth Amendment) Act, 1996 (Act I of 1996), s.9(1).

(a) **Oath (or affirmation) of office :**

"I, ..., do solemnly swear (or affirm) that I will faithfully discharge the duties of the office of Prime Minister (or as the case may be) according to law :

That I will bear true faith and allegiance to Bangladesh :

That I will preserve, protect and defend the Constitution :

And That I will do right to all manner of people according to law, without fear or favour, affection or ill-will."

(b) **Oath (or affirmation) of secrecy :**

"I, ..., do solemnly swear (or affirm) that I will not directly or indirectly communicate or reveal to any person any matter which shall be brought under my consideration or shall become known to me as Prime Minister (or as the case may be) except as may be required for the due discharge of my duty as Prime Minister (or as the case may be)."

[3][**2A The Chief Adviser and Advisers**–Oaths (or affirmations) in the following forms shall be administered by the President–

(a) **Oath (or affirmation) of office :**

"I, ..., do solemnly swear (or affirm) that I will faithfully discharge the duties of the office of Chief Adviser (or Adviser) of the Non-Party Care-taker Government according to law :

That I will bear true faith and allegiance to Bangladesh :

That I will preserve, protect and defend the Constitution :

That I will do right to all manner of people according to law, without fear or favour, affection or ill-will."

(b) **Oath (or affirmation) of secrecy :**

"I, ..., do solemnly swear (or affirm) that I will not directly or indirectly communicate or reveal to any person any matter which shall be brought under my consideration or shall become known to me as Chief Adviser (or Adviser) of the Non-Party Care-taker Government, except as may be required for the due discharge of my duty as Chief Adviser (or Adviser)."]

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1 The words and comma "Prime Minister, Deputy Prime Ministers" were substituted for the words "Prime Minister" by the Second Proclamation (Fifteenth Amendment) Order, 1978 (Second Proclamation Order No. IV of 1978).

2 The comma and words ", Deputy Prime Minister" were omitted by the Constitution (Twelfth Amendment) Act, 1991 (Act XXVIII of 1991), s. 24(b).

3 Form 2A was inserted by the Constitution (Thirteenth Amendment) Act, 1996 (Act I of 1996), s. 9(2).

3. **The Speaker.** —An oath (or affirmation) in the following forms shall be administered by the [1][President]–

"I, ..., do solemnly swear (or affirm) that I will faithfully discharge the duties of the Speaker of Parliament and (whenever I am called upon so to do) of the President, according to law :

That I will bear true faith and allegiance to Bangladesh :

That I will preserve, protect and defend the Constitution :

And That I will do right to all manner of people according to law, without fear or favour, affection or ill-will."

4. **Deputy Speaker.**—An oath (or affirmation) in the following forms shall be administered by the [2][President]–

"I, ..., do solemnly swear (or affirm) that I will faithfully discharge the duties of the Deputy Speaker of Parliament and (whenever I am called upon so to do) of the President, according to law :

That I will bear true faith and allegiance to Bangladesh :

That I will preserve, protect and defend the Constitution :

And That I will do right to all manner of people according to law, without fear or favour, affection or ill-will."

5. **Member of Parliament.**—An oath (or affirmation) in the following forms shall be administered [3]* * * by the Speaker—

"I, ..., having been elected a member of Parliament do solemnly swear (or affirm) that I will faithfully discharge the duties upon which I am about to enter according to law :

That I will bear true faith and allegiance to Bangladesh :

And That I will not allow my personal interest to influence the discharge of my duties as a member of Parliament."

[4][**6. Chief Justice or Judges.**—An oath (or affirmation) in the following forms shall be administered, in the case of the Chief Justice by the President, and in the case of a Judge appointed to a division, by the Chief Justice—

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1 The word "President" was substituted for the words "Chief Justice" by the Constitution (Fourth Amendment) Act, 1975 (Act II of 1975), s. 32(c).

2 The word "President" was substituted for the words "Chief Justice" by the Constitution (Fourth Amendment) Act, 1975 (Act II of 1975), s. 32(d).

3 The words "at a meeting of Parliament" were omitted *ibid.*, s. 32(e).

4 Form 6 was substituted for the original form 6 by the Second Proclamation (Tenth Amendment) Order, 1977 (Second Proclamation Order No. I of 1977).

"I, ..., having been appointed Chief Justice of Bangladesh (or Judge of the Appellate/High Court Division of the Supreme Court) do solemnly swear (or affirm) that I will faithfully discharge the duties of my office according to law :
That I will bear true faith and allegiance to Bangladesh :
That I will preserve, protect and defend the Constitution and the laws of Bangladesh :
And That I will do right to all manner of people according to law, without fear or favour, affection or ill-will."

7. **Chief Election Commissioner or Election Commissioner.–** An oath (or affirmation) in the following forms shall be administered, by the [1][Chief Justice]–
"I, ..., having been appointed Chief Election Commissioner (or Election Commissioner), do solemnly swear (or affirm) that I will faithfully discharge the duties of my office according to law :
That I will bear true faith and allegiance to Bangladesh :
That I will preserve, protect and defend the Constitution :
And that I will not allow my personal interest to influence my official conduct or my official decisions."

8. **Comptroller And Auditor-General.**—An oath (or affirmation) in the following forms shall be administered, by the [1][Chief Justice]–
"I, ..., having been appointed Comptroller and Auditor-General do solemnly swear (or affirm) that I will faithfully discharge the duties of my office according to law ·
That I will bear true faith and allegiance to Bangladesh :
That I will preserve, protect and defend the Constitution :
And that I will not allow my personal interest to influence my official conduct or my official decisions."

9. **Member of Public Service Commission.**—An oath (or affirmation) in the following forms shall be administered, by the [1][Chief Justice]–

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1 The words "Chief Justice" were substituted for the words "Chief Justice of the High Court" by the Second Proclamation (Tenth Amendment) Order, 1977 (Second Proclamation Order No. I of 1977).

"I, ..., having been appointed Chairman (or Member) of a Public Service Commission do solemnly swear (or affirm) that I will faithfully discharge the duties of my office according to law :
That I will bear true faith and allegiance to Bangladesh :
That I will preserve, protect and defend the Constitution :
And that I will not allow my personal interest to influence my official conduct or my official decisions."

FOURTH SCHEDULE

[Article 150]

Transitional and temporary provisions

1. Dissolution of Constituent Assembly— Upon the commencement of this Constitution, the Constituent Assembly, having discharged its responsibility of framing a Constitution for the Republic, shall stand dissolved.

2. (1) **First elections**— The First general election of members of Parliament shall be held as soon as possible after the commencement of this Constitution and for this purpose the electoral rolls prepared under the Bangladesh Electoral Rolls Order, 1972 (P. O. No. 104 of 1972) shall be deemed to be the electoral rolls prepared in accordance with article 119.

(2) For the purpose of the first general election of members of Parliament, the delimitation of constituencies made for the purpose of elections to constitute the erstwhile Provincial Assembly, and published on 1970, shall be deemed to be made under article 119, and the Election Commission shall, after incorporating such changes, as it may consider necessary, in the nomenclature of any constituency or any subdivision or thana included therein, publish, by public notification, the list of such constituencies :

Provided that provision may be made by law to give effect to the provisions relating to seats for women members referred to in clause (3) of article 65.

3. (1) **Provisions for maintaining continuity and interim arrangements**—All laws made or purported to have been made in the period between the 26th day of March, 1971 and the commencement of this Constitution, all powers exercised and all things done during that period, under authority derived or purported to have been derived from the Proclamation of Independence or any law, are hereby ratified and confirmed and are declared to have been duly made, exercised and done according to law.

(2) Until the day upon which Parliament first meets pursuant to the provisions of this Constitution, the executive and legislative powers of the Republic (including the power of the President, on the advice of the Prime Minister, to legislate by order) shall, notwithstanding the repeal of the Provisional Constitution of Bangladesh Order, 1972, be exercised in all respects in the manner in which, immediately before the commencement of this Constitution, they have been exercised.

(3) Any provision of this Constitution enabling or requiring Parliament to legislate shall, until the day upon which Parliament first meets as aforesaid, be construed as enabling the President to legislate by order, and any order made under this paragraph shall have effect as if the provisions thereof had been enacted by Parliament.

[1][**3A.** (1) **Validation of certain Proclamations, etc.**—The Proclamations of the 20th August, 1975, and 8th November, 1975, and the Third Proclamation of the 29th November, 1976, and all other Proclamations and Orders amending or supplementing them, hereinafter in this paragraph collectively referred to as the said Proclamations, and all Martial Law Regulations, Martial Law Orders and all other laws made during the period between the 15th day of August, 1975 and the date of revocation of the said Proclamations and the withdrawal of Martial Law (both days inclusive), hereinafter in this paragraph referred to as the said period, shall be deemed to have been validly made and shall not be called in question in or before any Court or Tribunal on any ground whatsoever.

(2) All orders made, acts and things done, and actions and proceedings taken, or purported to have been made, done or taken, by the President or the Chief Martial Law Administrator or by any other person or authority, during the said period, in exercise or purported exercise of the powers derived from any of the said Proclamations or any Martial Law Regulation or Martial law Order or any other law, or in execution of or in compliance with any other made or sentence passed by any Court or authority in the exercise or purported exercise of such powers, shall be deemed to have been validly made, done or taken and shall not be called in question in or before any Court or Tribunal on any ground whatsoever.

(3) No suit, prosecution or other legal proceeding shall lie in any Court or Tribunal against any person or authority for or on account of or in respect of any order made, act or thing done, or action or proceeding taken whether in the exercise or purported exercise of the powers referred to in sub-paragraph (2) or in execution of or in compliance with orders made or sentences passed in exercise or purported exercise of such powers.

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1 Paragraph 3A was inserted by the Proclamations (Amendment) Order, 1977 (Proclamations Order No. I of 1977).

(4) All amendments, additions, modifications, substitutions and omissions made in this Constitution by the said Proclamations shall have effect as if such amendments, additions, modifications, substitutions and omissions were made in accordance with, and in compliance with the requirements of, this Constitution.

(5) Upon the revocation of the said Proclamations and the withdrawal of Martial Law this Constitution shall, subject to amendments, additions, modifications, substitutions and omissions as aforesaid, have effect and operate as if it had been in continuous operation.

(6) The revocation of the said Proclamations and the withdrawal of Martial Law shall not revive or restore any right or privilege which was not existing at the time of such revocation and withdrawal.

(7) All laws in force immediately before the revocation of the said Proclamations and withdrawal of Martial Law shall, subject to the Proclamation revoking the said Proclamations and withdrawing the Martial Law, continue in force until altered, amended or repealed by the competent authority.

[1](8) The General Clauses Act, 1897, shall apply to the said Proclamations and the Martial Law Regulations and Martial Law Orders made during the said period and also to the revocation of the said Proclamations and the withdrawal of Martial Law and the repeal of the said Martial Law Regulations and Martial Law Orders as it applies to, and to the repeal of, an Act of Parliament as if the said Proclamations and the Proclamation revoking them and withdrawing the Martial Law and the Martial Law Regulations and Martial law Orders were all Acts of Parliament.

(9) In the event of any conflict, contradiction, discrepancy or inconsistency between the Bengali and the English text of the Constitution, in so far as it relates to any amendment, addition, modification, substitution or omission made in any of the texts or in both the texts by the said Proclamations, the English text shall prevail.

(10) **President**–In this paragraph, laws includes Ordinances, rules, regulations, by-laws, orders, notifications and other instruments having the force of law].

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1 Sub-paragraphs (8), (9) and (10) were substituted for the former sub-paragraphs (8) and (9) by the Second Proclamation (Fifteenth Amendment) Order, 1978 (Second Proclamation Order No. IV of 1978).

4. (1) The person holding office as President of Bangladesh immediately before the commencement of this Constitution shall hold office as President, as if elected to that office under this Constitution, until a person elected as President under article 48 enters upon office :
Provided that the holding of office under this paragraph shall not be taken into account for the purposes of clause (2) of article 50.

(2) The persons holding office as Speaker and Deputy Speaker of the Constituent Assembly immediately before the commencement of this Constitution shall, notwithstanding that Parliament has not yet been constituted, be deemed to hold office respectively as Speaker and Deputy Speaker until an election to each of those offices is made under clause (1) of article 74.

5. Prime Minister and Other Ministers— The person holding office as Prime Minister, immediately before the date of the commencement of this Constitution shall, until his successor appointed under article 56 after the first general election held under this Constitution enters upon office, hold office as Prime Minister as if appointed to that office under this Constitution, and the persons holding offices as Ministers immediately before that date shall continue to hold office as Ministers until the Prime Minister otherwise directs, and nothing in article 56 shall prevent the appointment of other Ministers on the advice of the Prime Minister.

6. (1) **Judiciary—**The person holding office as Chief Justice immediately before the date of the commencement of this Constitution and every person who then held office as judge of the High Court constituted by the Provisional Constitution of Bangladesh Order, 1972, shall as from that date hold office as if appointed under article 95 as Chief Justice or, as the case may be, as judge.

(2) The persons (other than the Chief Justice) holding office as judges pursuant to sub-paragraph (1) of this paragraph shall at the commencement of this Constitution be deemed to have been appointed to the High Court Division, and appointments to the Appellate Division shall be made in accordance with article 94.

(3) All legal proceedings pending in the High Court immediately before the commencement of this Constitution (other than those referred to in sub-paragraph (4) of this paragraph) shall be transferred to, and be deemed to be pending before the High Court Division for determination, and any judgement or order of the High Court delivered or made before the commencement of this Constitution shall have the

same force and effect as if it had been delivered or made by the High Court Division.

(4) All legal proceedings pending before the Appellate Division of the High Court immediately before the commencement of this Constitution shall be transferred to the Appellate Division for determination and any judgment or order of the former division delivered or made before the commencement of this Constitution shall have the same force and effect as if it had been delivered or made by the Appellate Division.

(5) Subject to the provisions of this Constitution and of any other law—

(a) all original, appellate and other jurisdiction which was vested in the High Court constituted by the Provisional Constitution of Bangladesh Order, 1972 (other than jurisdiction vested in the Appellate Division of that Court) shall from the commencement of this Constitution, vest in and be exercised by the High Court Division;

(b) all civil, criminal and revenue courts and tribunals exercising jurisdiction and functions immediately before the commencement of this Constitution shall continue to exercise their respective jurisdictions and functions, and all persons holding office in such courts and tribunals shall continue to hold their respective offices.

(6) The provisions of Chapter II of Part VI (which relate to subordinate courts) shall be implemented as soon as is practicable, and until such implementation the matters provided for in that Chapter shall (subject to any other provision made by law) be regulated in the manner in which they were regulated immediately before the commencement of this Constitution.

(7) Nothing in this paragraph shall affect the operation of any existing law relating to the abatement of proceedings.

[1][**6A.** (1) **Provisions As to existing Judges and pending proceedings**—The person holding office of Chief Justice of Bangladesh immediately before the commencement of the Second Proclamation (Seventh Amendment) Order, 1976 (hereinafter referred to as the said Order), and every person who then held office as Judge or Additional Judge of the

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1 Paragraph 6A was inserted by the Second Proclamation (Seventh Amendment) Order, 1976 (Second Proclamation Order No. IV of 1976) *(w. e. f.* the August, 1976).

Appellate Division of the Supreme Court shall as from such commencement hold office as Chief Justice, Judge or Additional Judge of the Supreme Court, as the case may be, on the same terms and conditions as to remuneration and other privileges as were applicable to him immediately before such commencement.

(2) A person holding office as Judge or Additional Judge of the High Court Division of the Supreme Court immediately before the commencement of the said Order shall as from such commencement hold office as Judge or Additional Judge of the High Court as the case may be, on the same terms and conditions as to remuneration and other privileges as were applicable to him immediately before such commencement.

(3) All legal proceedings pending before the Appellate Division of the Supreme Court immediately before the commencement of the said Order shall on such commencement stand transferred to, and be deemed to be pending before, the Supreme Court for determination; and any judgement, or order of the Appellate Division of the Supreme Court delivered or made before such commencement shall have the same force and effect as if it had been delivered or made by the Supreme Court.

(4) All legal proceedings pending before the High Court Division of the Supreme Court immediately before the commencement of the said Order shall on such commencement stand transferred to, and be deemed to be pending before, the Supreme Court for determination; and any judgement or order of the High Court Division delivered or made before such commencement shall have the same force and effect as if it had been delivered or made by the High Court.

(5) Subject to the other provision of this Constitution, the Supreme court shall have the same functions, jurisdiction and powers as were, immediately before the commencement of the said Order, exercisable by the Appellate Division of the Supreme Court, and reference in any law, legal instrument or other document to the Appellate Division of the Supreme Court shall, unless the context otherwise requires, be construed as references to the Supreme Court.

(6) Subject to the other provisions of this Constitution, the High Court shall have the same functions, jurisdiction and powers as were, immediately before the commencement of the said Order, exercisable by the High Court Division of the Supreme Court, and references in any law, legal instrument or other document to the High Court

Division of the Supreme Court shall, unless the context otherwise requires, be construed as references to the High Court.]

[1][**6B.** (1) **Provisions as to Judges of the Supreme Court and High Court existing before the Second Proclamation Order No. 1 of 1977 Proceedings pending before commencement of that Order, etc.** –A person holding office as Chief Justice or Judge or Additional Judge of the Supreme Court or Chief Justice or Judge or Additional Judge of the High Court immediately before the commencement of the Second Proclamation (Tenth Amendment) Order, 1977 (hereinafter referred to as the said Order), shall, if he has attained the age of sixty-two years on the date of such commencement, stand retired on that date.

(2) A person holding office as Chief Justice or Judge or Additional Judge of the Supreme Court immediately before the commencement of the said Order shall, if he has not attained the age of sixty-two years on the date of such commencement, as from such commencement hold office as Chief Justice of Bangladesh or Judge or Additional Judge of the Appellate Division as the case may be, on the same terms and conditions as to remuneration and other privileges as were applicable to him immediately before such commencement.

(3) The person holding office as Chief Justice of the High Court immediately before the commencement of the said Order shall, if he has not attained the age of sixty-two years on the date of such commencement, as from such commencement hold office as Judge of the High Court Division on the same terms and conditions as to remuneration and other privileges as were applicable to him immediately before such commencement.

(4) A person holding office as Judge or Additional Judge of the High Court immediately before the commencement of the said Order shall, if he has not attained the age of sixty-two years on the date of such commencement, as from such commencement hold office as judge or Additional Judge of the High Court Division, as the case may be, on the same terms and conditions as to remuneration and other privileges as were applicable to him immediately before such commencement.

(5) All legal proceedings pending before the Supreme Court immediately before the commencement of the said Order shall on such commencement stand transferred to, and be deemed to be pending

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1 Paragraph 6B was inserted by the Second Proclamation (Tenth Amendment) Order, 1977 (Second Proclamation Order No. 1 of 1977).

before, the Appellate Division for determination; and any judgement or order of the Supreme Court delivered or made before such commencement shall have the same force and effect as if it had been delivered or made by the Appellate Division.

(6) All legal proceedings pending before the High Court immediately before the commencement of the said Order shall on such commencement stand transferred to, and be deemed to be pending before, the High Court Division for determination; and any judgment or order of the High Court delivered or made before such commencement shall have the same force and effect as if it had been delivered or made by the High Court Division.

(7) Subject to the other provisions of this Constitution, the Appellate Division shall have the same functions, jurisdiction and powers as were, immediately before the commencement of the said Order, exercisable by the Supreme Court, and references in any law, legal instrument or other document to the Supreme Court shall, unless the context otherwise requires, be construed as references to the Appellate Division.

(8) Subject to the other provisions of this Constitution, the High Court Division shall have the same functions, jurisdiction and powers as were, immediately before the commencement of the said Order, exercisable by the High Court, and references in any law, legal instrument or other document to the High Court shall, unless the context otherwise requires, be construed as references to the High Court Division.

(9) The person holding office as Advocate-General immediately before the commencement of the said Order shall on such commencement cease to hold that office.

7. Interim rights of appeal– An appeal to the Appellate Division of the Supreme Court shall lie, notwithstanding any limitation as to time, against any judgment, decree, order or sentence delivered, issued or pronounced since the 1st day of March, 1971 by any High Court (but excluding the Appellate Division constituted by the High Court of Bangladesh (Amendment) Order, 1972 (P.O. No. 91 of 1972) functioning in the territory of Bangladesh :

Provided that article 103 shall apply in respect of an such appeal as it applies in respect of appeals from the High Court Division :

Provided further that no appeal under this article shall be lodged after the expiration of the period of ninety days from the commencement of this Constitution.

8. (1) **Election commission**–The Election commission existing immediately before the date of commencement of this Constitution, shall, as from that date, be deemed to be the Election Commission established by this Constitution.

(2) The person holding office as Chief Election Commissioner, and every person holding office as Election Commissioner, immediately before the date of the commencement of this Constitution, shall, as from that date, hold office as if appointed to such office under this Constitution.

9. (1) **Public service commission**—The public service commissions existing immediately before the date of the commencement of this Constitution, shall, as from that date, be deemed to be public service commissions established under this Constitution.

(2) Every person holding office as chairman or other member of a public service commission immediately before the date of the commencement of this Constitution, shall, as from that date hold office as if appointed to that office under this Constitution.

10. (1) **Public service**—Subject to this Constitution and to any other law—

(a) any person who immediately before the commencement of this Constitution was in the service of the Republic shall continue in that service on the same terms and conditions as were applicable to him immediately before such commencement.

(b) all authorities and all officers, judicial, executive and ministerial throughout Bangladesh exercising functions immediately before the commencement of this Constitution, shall, as from such commencement, continue to exercise their respective functions.

(2) Nothing in sub-paragrapgh (1) of this paragaph shall—

(a) derogate from the continued operation of the Government of Bangladesh (Services) Order, 1972 (P.O. No. 9 of 1972), or the Government of Bangladesh (Services Screening) Order, 1972 (P.O. No. 67 of 1972); or

(*b*) prevent the making of any law varying or revoking the conditions of service (including remuneration, leave, pension rights and rights and rights relating to disciplinary matters) of persons employed at any time before the commencement of this Constitution or of persons continuing in the service of the Republic under the provisions of this paragraph.

11. Oaths for continuance in office—Any person who, under this Schedule, is continued in an office in respect of which a form of oath or affirmation is set out in the Third Schedule shall, as soon as practicable after the commencement of this Constitution, make and subscribe before the appropriate person an oath or affirmation in that form.

[1] * * * * * * * * * *

13. Taxation–All taxes and fees imposed under any law in force in Bangladesh immediately before the commencement of this Constitution shall continue to be imposed but may be varied or abolished by law.

14. Interim Financial arrangements—Unless Parliament otherwise resolves, the provisions of articles 87, 89, 90 and 91 of this Constitution shall not have effect in respect of the financial year current at the commencement of this Constitution, and expenditure defrayed during that year out of the Consolidated Fund or the Public Account of the Republic shall be deemed to have been validly incurred:

Provided that the President shall, as soon as is practicable, cause a statement of all such expenditure, authenticated by his signature, to be laid before Parliament.

15. Audit of past accounts—The powers of the Comptroller and Auditor-General under this Constitution shall apply in respect of all accounts relating to the financial year current at the commencement of this Constitution and to earlier years, and the reports of the Comptroller and Auditor-General relating to such accounts shall be submitted to the President who shall cause them to be laid before Parliament.

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1 Paragraph "12 Local Government" was omitted by the Constitution (Fourth Amendemtn) Act, 1975 (Act II of 1975), s. 33.

16. (1) **Property, assets, rights, liabilities and obligations of the Government**—All property, assets and rights which immediately before the commencement of this Constitution were vested in the Government of the People's Republic of Bangladesh or any person or authority on its behalf shall vest in the Republic.

(2) All liabilities and obligations of the Government of the Republic as they existed immediately before the commencement of this Constitution shall continue to be the liabilities and obligations of the Republic.

(3) No liability or obligation of any other Government which at any time functioned in the territory of Bangladesh is or shall be a liabilities and obligation of the Republic unless it is expressly accepted by the Government of the Republic.

17. (1) **Adaptation of laws and removal of difficulties**—For the purpose of bringing the provisions of any law in force in Bangladesh into conformity with this Constitution of President may, within the period of two years from the commencement of this Constitution, by order, amend or suspend the operation of such provisions and any order so made may have retrospective effect.

(2) The President may, for the purpose of removing any difficulties in relation to the transition from the provisional constitutional arrangements existing before the commencement of this Constitution to the arrangements under this Constitution by order, direct that this Constitution shall, during such period as may be specified in the order, have effect subject to such adaptations, whether by way of modification, addition or omission, as he may deem necessary or expedient :

Provided that no such order shall be made after the first meeting of the Parliament, constituted under this Constitution.

(3) Every order made under this paragraph shall have effect notwithstanding any other provision of this Constitution, shall be laid before Parliament, and may be amended or revoked by Act of Parliament.

[1][**18. Ratification and confirmation of Proclamations, etc.**— All Proclamations, Proclamation Orders, Martial Law Regulations, Martial Law Orders and other laws made during the period between the 15th

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[1] Paragraph 18 was added by the Constitution (Fifth Amendment) Act, 1979 (Act I of 1979), s.2.

August, 1975, and the 9th April, 1979 (both days inclusive), all amendments, additions, modifications, substitutions and omissions made in this Constitution during the said period by any such Proclamation, all orders made, acts and thing done, and actions and proceedings taken, or purported to have been made, done or taken, by any person or authority during the said period in exercise of the powers derived or purported to have been derived from any such Proclamation, Martial Law Regulation, Martial Law Order or any other law, or in execution of or in compliance with any order made or sentence passed by any court, tribunal or authority in the exercise or purported exercise of such powers, are hereby ratified and confirmed and are declared to have been validly made, done or taken and shall not be called in question in or before any court, tribunal or authority on any whatsoever.]

[1][**19**. (1) **Ratification and confirmation of the Proclamation of the 24th March, 1982, etc.**–The Proclamation of the 24th March, 1982, hereinafter in this paragraph referred to as the said Proclamation, and all other Proclamations, Proclamation Orders, Chief Martial Law Administrator's Orders Martial Law Regulations, Martial Law Orders, Martial Law Instructions, Ordinances and all other Laws made during the period between the 24th March, 1982, and the date of commencement of the Constitution (Seventh Amendment) Act, 1986 (Act I of 1986) (both days inclusive), hereinafter in this paragraph referred to as the said period, are hereby ratified and confirmed and declared to have been validly made and shall not be called in question in or before any court, tribunal or authority on any ground whatsoever.

(2) All orders made, acts and things done, and actions and proceedings taken, or purported to have been made, done or taken, by the President or the Chief Martial Law Administrator or by any other person or authority during the said period, in exercise or purported exercise of the powers derived from the said Proclamation or from any other Proclamation, Proclamation Order, Chief Martial Law Administrator's Order, Martial Law Regulation, Martial Law Order, Martial Law Instruction, Ordinance or any other Law, or in execution of or in compliance with any order made or sentence passed by any court, tribunal or authority in the exercise or purported exercise of such powers, shall be deemed to have been validly made, done or taken and

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[1]Paragraph 19 was added by the Constitution (Seventh Amendment) Act, 1986 (Act I of 1986), s.3.

shall not be called in question in or before any court, tribunal or authority on any ground whatsoever.

(3) No suit, prosecution or other legal proceedings shall lie in any court or tribunal against any person or authority for or on account of or in respect of any order made, act or thing done, or action or proceedings taken whether in the exercise or purported exercise of the powers referred to in sub-paragraph (2) or in execution of or in compliance with orders made or sentences passed in exercise or purported exercise of such powers.

(4) All appointments made during the said period to any office mentioned in the Third Schedule shall be deemed to have been validly made and shall not be called in question in or before any court, tribunal or authority on any ground whatsoever, and any person appointed under the said Proclamation to any such office during the said period and holding such office immediately before the date of commencement of the Constitution (Seventh Amendment) Act, 1986 (Act I of 1986), hereinafter in this paragraph referred to as the said Act shall, as from that date hold such office as if appointed to that office under this Constitution; and shall, as soon as practicable person an oath or affirmation in the form set out in the Third Schedule.

(5) All appointments made by the Chief Martial Law Administrator during the said period to any office or post which is continuing after the date of commencement of the said Act shall, as from that the date, be deemed to be appointments made by the President.

(6) All Ordinances and other laws in force immediately before the date of commencement of the said Act shall, subject to the Proclamation revoking the said Proclamation and withdrawing the Martial Law, continue in force until altered, amended or repealed by competent authority.

(7) Upon the revocation of the said Proclamation and withdrawal of Martial Law, this Constitution shall stand fully revived and restored and shall, subject to the provisions of this paragraph, have effect and operate as if had never been suspended.

(8) The revocation of the said withdrawal of Martial Law shall not revive or restore any right or privilege which was not existing at the time of such revocation and withdrawal.

(9) The General Clauses Act, 1897, shall apply to the said Proclamation, and all other Proclamations, Proclamation Orders, Chief Martial Law Administrator's Order, Marital Law Regulations, Martial Law Orders and Martial Law Instructions made during the said period and also to

the revocation of the said Proclamation and other Proclamations and the repeal of the said Proclamation Orders, Chief Martial Law Administrator's Orders, Martial Law Regulations, Martial Law Orders and Martial Law Instructions as it applies to, and to the repeal of, an Act of Parliament as if the said Proclamation, and other Proclamations, Proclamation Orders, Chief Martial Law Administration's Orders, Martial Law Regulations, Martial Law Orders and Martial Law Instruction and the Proclamation revoking the said Proclamation were all Acts of Parliament.

(10) In this paragraph, "law" includes rules, regulations, bye-laws, orders, notifications and other instruments having the force of law.]

[1] * * * * * * * * * * *

[2][**21.** (1) **Ratification and confirmation of the appointment of Vice-President, etc.**— The appointment of, and the administration of oath to the Chief Justice of Bangladesh as Vice-President on the 21st day of Agrahayan, 1397 B. S. corresponding to the 6th day of December, 1990, and the resignation tendered to him by the then President and all powers exercised, all laws and Ordinances made and all orders made, acts and things done, and actions taken, or purported to have been made, done or taken by the said Vice-President acting as President during the period between the 21st day of Agrahayan, 1397 B. S. corresponding to the 6th day of December, 1990, and the date of commencement of the Constitution (Eleventh Amendment) Act, 1991 (Act XXIV of 1991) (both days inclusive) or till the new President elected under article 48 (1) of the Constitution has entered upon his office (whichever is later), are hereby ratified and confirmed and declared to have been validly made, administered, tendered exercised, done and taken according to law.

(2) The said Vice-President shall, after the commencement of the Constitution (Eleventh Amendment) Act, 1991 (Act XXIV of 1991), and after the new President elected under this Constitution has entered upon his office, be eligible to resume the duties and responsibilities of the Chief Justice of Bangladesh and the period between the 21st day of Agrahayan, 1397 B. S. Corresponding to the 6th day of December, 1990, and the date of which he resumes such

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1 Paragraph "20. Provisions relating to Vice-President" was omitted by the Constitution (Twelfth Amendment) Act, 1991 (Act XXVIII of 1991), s. 25(a).

2 Paragraph 21 was added by the Constitution (Eleventh Amendment) Act, 1991 (Act XXIV of 1991), s.2.

duties and responsibilities shall be deemed to be the period of actual service within the meaning of section 2(a) of the Supreme Court Judges (Leave, Pension and Privileges) Ordinance, 1982 (Ordinance No. XX of 1982).]

[3][**22.** Notwithstanding anything contained in the Constitution, the Parliament functioning immediately before the commencement of the Constitution (Twelfth Amendment) Act, 1991 (Act XXVII of 1991) shall be deemed to have been duly elected and constituted in accordance with the Constitution and Law and shall continue to function under provisions of article 72 of the Constitution.]

Comments Fourth Schedule

In the Fourth Schedule of the Constitution, certain amendments were made by incorporating Paragraphs 3A, 6A and 6B by the Martial Law Proclamation Orders of 1976 and 1977. By Constitution (Fifth Amendment) Act; 1979, paragraph 18 was inserted which gave validity to acts and things including Constitutional amendments under taken during the first Martial Law period ousting the jurisdiction of the Courts of all acts and things done during the period. The Constitution (Seventh Amendment) Act, 1986, by incorporating paragraph 19 in the Fourth Schedule protected all acts and things done during the second Martial Law.

Under mentioned cases will show that the challenge of unconstitutionality of paragraphs 3A, 18 and 19 in the Fourth Schedule was protected by the Court.

Paragraph 3A and 18 of the Fourth Schedule

(1) In the case of *Shahriae Rashid Khan –VS- Bangladesh and others*, 18 BLD(AD)(1998) 155, Latifur Rahman,J. mentioned the object of paragraph 3A and 18 of the Fourth Schedule and held in Paragraph 68 as follows:

"The object of Paragraphs 3A and 18 is to maintain the constitutional continuity of those Laws after the revival of the Constitution till they are repealed, altered or amended by the competent authority. If paragraphs 3A and 18 were not incorporated in the Constitution then there would be utter confusion in the filed of Constitutional dispensation and law. There would be discontinuity of Constitutional

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3 Paragraph 22 was added by the Constitution (Eleventh Amendment) Act, 1991 (Act XXVIII of 1991), s. 25 (b).

dispensation and the period in issue would remain out-side the Constitution . Martial Law having ceased, the operation of ordinary civil law continued ."

In that decision A.T.M. Afzal,C.J. held that Indemnity Ordinance No 50 of 1975 can be repealed by an Act of Parliament, and held at paragraph 34 as under:

> "Nowhere in the 4th Schedule or in any other Provision of the Constitution it was stipulated that the laws which were continued and saved under Paragraphs 3A and 18 of the 4th Schedule of the Constitution would require two-third majority member of the Parliament for necessary amendment or alternation or repeal."

19(2) 4th Schedule

(2) In the case of *Helaluddin Ahmed –VS- Bangladesh*, 44 DLR (AD) 1, the question raised was whether the Chief Martial Law Administrator has jurisdiction to convert an order of acquittal into one of conviction in exercise of his power of review under Regulation 3(4) of the Martial Law Regulation No 1 of 1982, conferring immunity from challenge to such an order on any ground under Paragraph 19(2) of the Fourth Schedule of the Constitution.

In that case at paragraph 29, A.T.M.Afzal,J. held as follows:

> "The provision in Regulations 3(8) rather shows that representation by lawyer has been specifically barred at the tine of review of a case. This being the position and having regard to the language used in paragraph 19(2) of the Fourth Schedule, we do not think that it will be possible to successfully invoke any violation of the principles of natural justice."

(3) In the case of *Abdur Rashid Sarkar–VS-Bangladesh & others*, 48 DLR (AD) 99. Latifur Rahman,J. held at paragraph 5 as Under:

> "The Martial Law was promulgated on 24-3-82 and the petitioner was compulsory retired from his service on 2-3-86 and, as such, all actions were taken during the continuance of the Martial Law. The Petitioner filed the review petition on 7-4-1986 and the same was rejected on 13-3-89. In the case of *Majibur Rahmen, EX- Collector of Customs –VS- Government of Bangladesh* reported in 13 BLD (AD) (1993) 54, it has been held by this Division that all actions of Martial Law Authorities are protected by the 7th Amendment of the Constitution. In that view of the matter, the rejection of the review

petition does not materially affect the position as the impugned order of compulsory retirement stands as the same was passed when Martial Law was in force. Hence, there is no illegality in the impugned Judgment."

Appendix

New Amendment of the Constitution

14. Constitution (Fourteenth Amendment) Act 14 of 2004 passed in the eighth Parliament on 17 May 2004 amending Article 65(3) by inserting forty five women seats in the Parliament on proportional representation from various political parties and etc.

Case on Articles 27 and 28

In the case of *Bangladesh Biman* Vs. *Rabia Bashri Irane,* 55 DLR(AD) 132, Md Ruhul Amin, J. while interpreting Article 27 of the Constitution observed that since some employees of the Corporation interse standing in the similar situation have not been treated in the similar manner or, in other words, have been treated differently from the others the contention of the writ-petitioners that they have been discriminated against has rightly been found by the High Court Division.

In the same decision, in interpreting article 28, it was held that the matter of fixing the age of retirement of the stewards and stewardesses being gender-based the same is discriminatory and violative of article 28 of the Constitution.

Case on Article 27

In the case of *M.A. Gafur and another* Vs. *Bangladesh,* 56 DLR(AD) 205, the Appellate Division took note of two previous decisions of this Division, namely, 33 DLR(AD) 201 and 35 DLR(AD) 72 and held that retirement with full pension benefits after completion of 25 years of service is not a punishment nor does it contain any stigma and it is altogether different from dismissal, removal or compulsory retirement.

Cases on Articles 31 and 32.

In the case of *M. Saleemullah, Advocate and others* Vs. *Bangladesh,* 55 DLR 1, question was raised as to whether the respondents could convert the open space meant for park and in interpreting Articles 31 and 32 of the Constitution, M.M. Ruhul Amin, J. held that state is bound to protect the health and longevity of the people living in the country as right to life guaranteed under Articles 31 and 32 of the Constitution includes protection

of health and normal longevity of a man free from threats of man-made hazards unless that threat is justified by law. It was further observed in that decision that right to life under Articles 31 and 32 of the Constitution being a fundamental right it can be enforced by this court to remove any unjustified threat to the health and longevity of the people as the same are included in the right to life.

Case on Article 65

In the case of *Bangladesh and others* Vs. *M/S. Eastern Beverage Industries Ltd.*, 23 BLD(AD) 68, while interpreting article 65(1) of the Constitution, the Appellate Division rejected the contention that the delegated legislation is in excess as article 65(1) of the Constitution provides that nothing shall prevent the Parliament from delegating to make order, rules or other enactments having legislative effect. In that decision it was further held that the Parliament has authorized the National Board of Revenue by way of Contingent legislation to make rules under Section 3(4) of the excise and salt Duty Act, 1944 and this could not be termed as excessive delegation. The legislature is not always required to legislate in its entirety to carry out all its work. Some of its function is left out to be performed fully by persons technically conversant with levy and realisation thereof, or else the legislative scheme as to levy and realisation may be frustrated.

Case on Articles 66 and 67.

In the case of *Hussain Mohammad Ershad* Vs. *Zahedul Islam Khan and others*, 54 DLR(AD), Mahmudul Amin Chowdhury, C.J. while interpreting articles 66 and 67 of the Constitution held that 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 will definitely come within the ambit of moral turpitude. Consequently, when a person is convicted for moral turpitude and sentenced to suffer imprisonment for a minimum period of two years he cannot be elected a Member of the Parliament and cannot retain his position as such Member.

Case on Article 102, Alternative remedy in case of violation of legal right

In the case of *Bangladesh Bank* Vs. *Zafar Ahmed Chowdhury*, 56 DLR (AF) 175, MD Fazlul Karim, J. while disposing the leave petition held two very important points in the case. First, if an order affects one legal right as wholly without authority, an alternative remedy provided by the nature will not stand in the way of the exercise of writ jurisdiction under article 102 of the Constitution. Secondly, without issuing a rule while disposing of the application under article 102 of the Constitution the High Court Division was not authorised in law to pass any ad-interim relief which it could pass in aid of or ancillary to the main relief upon final determination of the rights of parties.

Case on Article 103 privilege

In the case of *Bangladesh and others* Vs. *Md. Abul Hossain*, 23 BLD (AD) 129, Mahmudul Amin Chowdhury, C.J. held that once privilege is given to a person on condition of doing any act and if such condition is fulfilled and continues to be fulfilled, such privilege or right cannot be taken away or cancelled without giving him a chance of being heard. Hence it was held that the High Court Division committed no illegality in making the rule absolute.

Case on article 102

In the case of *SSA Bangladesh Ltd.* Vs. *Engineer Mahmudul Islam and others*, 24 BLD (AD) 92, Mohammad Fazlul Karim, J. held at para 60 as follows.

> "The principle of legitimate expectation as enunciated in Schmidt Vs. Secretary of State of House Affairs reported in (1969) 1 Ch. 140 imposed upon the Government of the concerned Authorities a duty to act fairly and reasonably in dealing with the rights and/or interest of the people and in case of any breach thereof the court should act upon in striking down any order in exercise of judicial review of executive action and in case of any unreasonableness or inertness or even latches in its part of which benefit it lost causing prejudice to the people at large the court may direct the concerned authority to exercise its functions

fairly, reasonably and in accordance with law and established principles."

Case on Article 102(2)

High Court's power of reconsideration of its own judgment.

In the case of *Md. Serajuddin Ahmed and others* Vs. *A.K.M. Saiful Alam and others,* 24 BLD(AD) 145, MD. Ruhul Amin, J. held in para 28 as follows:

"Moreover provision of Article 102(2) or any other provisions of the Constitution do not preclude the High Court Division either to reconsider or to review or to see the correctness of its judgment earlier made on furnishing of fresh materials by a party to the case which according to him if were before the Court the judgment would have been otherwise than the one made."

Thus it was observed that the High Court Division was Competent to reconsider or review its judgment on the ground of justice, equity and good conscience.

Case on article 102(2)

In the case of *Hazerullah* Vs. *Assistant Commissioner,* Board of management of Abandoned Property and others, 55 DLR(AD)–15, Md. Fazlul Karim,J. held at para 5 as follows:-

"Thus one could only avail the forum by way of mandamus for enforcement of any legal right or to redress the violation thereof."

Case on article 102
Commercial Contract

In the case of *Bangladesh Power Development Board* Vs. *Md. Asaduzzaman Sikder*, 24 BLD(AD) 33, the appeal was allowed holding that the contract that was entered into by the appellants with the respondent was not in terms of the statutory provision or in exercise of the statutory power but was an ordinary commercial contract or contract of general nature, and consequently, the High Court Division wrongly granted relief to the respondent.

Case on articles 104 & 105

In the case of *ETV* Vs. *Dr. Chowdhury Mahmood Hasan,* 55 DLR(AD)–37, K.M.Hasain, J. while rejecting the review petition observed at para 25, that the fundamenta! is that an error is necessary to be a ground for review but it must be one, which is apparent on the face of the record, and so obvious that keeping it on the record will be legally wrong.

Case on article 146

In the case of *Secretary, Ministry of Health* Vs. *Principal Barguna Alia Madrasha,* 24 BLD(AD) 245, a question was raised as to whether the government ought to be made a party when admittedly the property belongs to the Government. In that case it was held by Syed J.R. Mudassir Husain,J. that as per provision of Article 146 of the Constitution, a suit in respect of any government property could only proceed in the name of Bangladesh, represented by the Deputy Commissioner concerned and not in the name of any Secretary of the Ministry.