CHAPTER I

LAW AND LEGAL SYSTEM

What is Law? A common phrase still haunts jurists as to precisely what law is. There is a saying that if any one were to state categorically that he knew the precise answer to the question "what law is?" he would deserve to be regarded either as a fool or as the greatest philosopher living. The universal problem about defining this term is that the process of definition is itself essentially arbitrary. One may use the term to understand "the laws of nature"; or "the laws of cricket"; or "the laws of morality" etc. If law is given a meaning of "what I choose it to mean" then there is certainly a danger to define it. A good working and practical definition should be that law is a body of rules, whether formally enacted or customary, which a state or community recognises as binding on its members or subjects. It may also be said that law is a body of rules which are enforceable in a court of law. The legal system supplies an orderly means for the settlement of disputes in the state. The law is the means by which the disobedience or violence which underpins the power of the state is sublimated into recognition of the legitimacy of the state's authority.

Law and Politics: From one point of view the two concepts of law and politics seem to be embroiled into the 'chicken and egg' debate. Which one does come first in the society? Law or politics? It is the politics which gives rise to law in the sense that most of the social claims between individuals and between society and individual come into being as a result of social interaction. This interaction between individuals or between society and individuals press for movement so that those claims are recognised as law in the society. This movement is nothing but politics and this politics compels the government to make law in the areas for which the movement is mounted. Seen from the other end of the spectra, it is the law made by the state mechanism and its shortcomings which give rise to movement for necessary change and this movement or politics is nothing but the result of the law.

There is another school of thought which believe that politics is regarded not only as something apart from law but as inferior to law. Law aims at justice, while politics looks only to expediency. The former is neutral and objective; the latter is the uncontrolled child of competing interests and ideologies. Examples may be drawn from international law (soft international law as opposed to hard international law) the obedience to which ultimately rests much more on political expedience than on enforcement machinery[1].

There is another way of contrasting between law and politics. Rules of political practice which are not enforceable by the courts play a crucial role in the unwritten constitution of the UK. Explaining that law means 'rules enforced through courts' may, therefore, provide a convenient practical test for distinguishing legal rules from political rules (politics). Taking this perspective it may be said that both law and politics are the rules of the game of state administration; they together form genus of which 'law is a special branch of politics in which certain kinds of rules are picked out as appropriate for handling by independent bodies known as courts'. However, it should be stressed that distinction between law and politics may be attempted but at the same time recognising that the distinction is neither fundamental nor absolute.

Law and Rights: Right means a claim of some interests adversed by an individual or a group of individuals which has either moral or legal basis and which is essential for his development in the society. In a sense right is not created by law; it originates itself as an obvious result of mutual interaction between man and society. Rights are primarily divided into two categories—moral rights and legal rights. Moral rights are those rights which have their basis on the rule of natural justice and the violation of which results in moral wrong. Legal rights, on the other hand, are those rights which are recognised by the positive law of the country and can be claimed on legal basis and the violation of which results in legal wrong. As mentioned earlier right originates in the society and remains as a moral right so long it is not recognised by law. Whenever a law recognises it and secures its protection, it transforms into a legal

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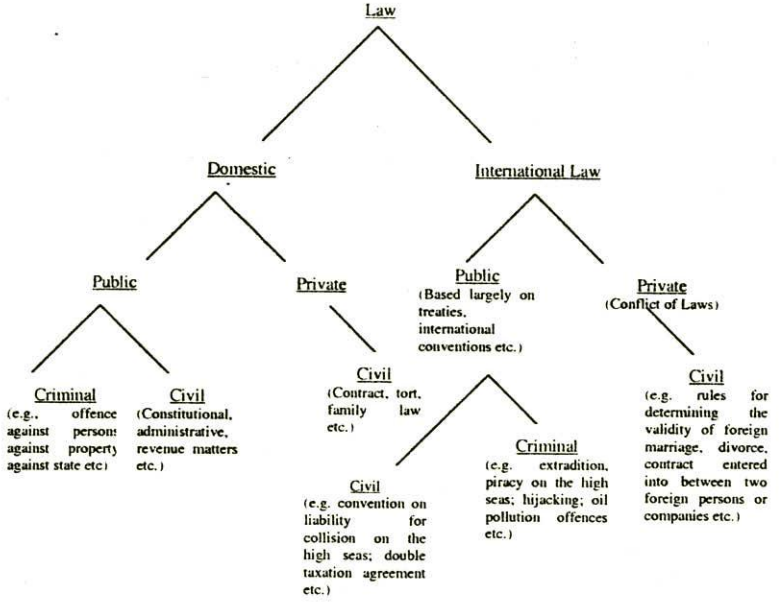
[1] Drewry, Gavin, *Law, Justice and Politics*, (Longman: 1975), p.25

right. All legal rights in this sense are moral rights and the distinction between the two is one of degree rather than of form.

Principal Categories of Law



Legal System: The best known definition of a legal system comes from Professor Hart. He listed five factors which had to co-exist to create a legal system. These are as follows:

(i) Rules which either forbade certain conduct or compelled certain conduct at pain of sanctions;

(ii) Rules requiring people to compensate those whom they injured;

(iii) Rules stating what needs to be done in certain 'mechanical' areas of law such as making a contract or making a will;

(iv) A system of courts to determine what the rules are, whether they have been broken and what the appropriate sanction is; and

(v) A body whose responsibility it is to make rules, and amend or repeal them as necessary.

The above five factors seem to be the minimum requirements for a legal system. Considering these in the context of the legal system of Bangladesh, the first three types of rule all exist the first one being the criminal law, and the second two being part of civil law in Bangladesh. There are both civil and criminal courts regarding the points in factor 4 and the parliament is the legislative body as pointed out in factor 5.

The legal system of a country the main purpose of which is the administration of justice has three aspect. The first is the institutional aspect which includes courts both civil, criminal and special; the judiciary, i.e. the judges; the legal profession, i.e. advocates; law officers, e.g. the Attorney-General, public prosecutors, public pleader, registrars of the court etc; and the jail and police. Second is the procedural or functional aspect which includes the procedure of the judicial or quasi-judicial dispensation of justice, i.e. the procedure of providing remedies through the institutional organs of the legal system. The procedure of investigation, inquiry, filing a suit, taking evidence, steps in appeal, review etc all are within the fold of this procedural aspect. The third aspect relates to all the conceptual components of the legal system and these include, *inter alia*, the historical development, the rules of judicial precedent, statutory interpretation, legislation, legal reform, legal aid etc.

Categories of Law

All existing laws in a country may be divided into two broad categories: national or domestic law and international law. Both these categories may again be divided into two sub-categories: public law and private law.

Public Law: Public law determines and regulates the organization and functioning of the state and determines the relationship of the state

with its subjects. The test of public law depends upon the nature of the parties in the relationship in question; if one of the parties is the state, the relationship belongs to public law. Thus constitutional law, criminal law, tax law, administrative law etc. are the branches of public law.

Private Law: Private law is that branch of law which determines and governs the relations of citizens with each other. In the domain of private law parties are private individuals and the state, taking the position of an arbitrator, through its judicial organ adjudicates the matters in dispute between them. Law of contracts, torts, of property etc. are examples of private law.

Substantive Law and Procedural Law: Both public and private law may be substantive law or procedural (adjective) law. When a particular law defines rights or crimes or any status, it is called substantive law. For example, penal law, law of contract, law of property etc. are substantive laws. When a particular law determines the remedies or outlines the procedures of litigation, it is called procedural law e.g. Civil Procedure Code, Criminal Procedure Code etc. The distinction between the substantive and procedural law is not an always easy and clear-cut. The same law may be procedural as well as substantive.[1]

Laws in Bangladesh

There are about 999 laws in Bangladesh of which 366 are pre-independence laws and 633 have been made after the independence. This statistics is based on the information given in recently published Bangladesh.

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[1] See, Salmond, *Jurisprudence*, 10th ed, P. 461

CHAPTER TWO

HISTORICAL DEVELOPMENT OF COURTS IN BANGLADESH

CHAPTER II

HISTORICAL DEVELOPMENT OF COURTS IN BANGLADESH

The present legal system of Bangladesh owes its origin mainly to 200-year British rule in the Indian Sub-continent although some elements of it are remnants of pre-British period tracing back to Hindu and Mughal administration. "It passed through various stages and has been gradually developed as a continuous historical process. The process of evolution has been partly indigenous and partly foreign and the legal system of the present day emanates from a 'mixed' system which have structure, legal principles and concepts modeled on both Indo-Mughal and English law."[1] The Indian sub-continent has a known history of over five hundred years with Hindu and Muslim periods which preceded the British period, and each of these early periods had a distinctive legal system of its own. For better understanding of the pace of this development it would be convenient to divide the history into five periods- Hindu period, Muslim period, British period, Pakistan period and Bangladesh period.

Hindu Period: Ancient Judicial System

This period extends for nearly 1500 years before and after the beginning of the Christian era. The ancient India was divided into several independent states and the King was the supreme authority of each state. As far as the administration of justice is concerned the King was considered the fountain of justice. He was entrusted with the supreme authority of the administration of justice in his kingdom. The essential features of judicial system of this period were as follows:

Organisation of Court Structure

A. The King's Court: The King's court was the highest court of appeal in the state. It was also a court of original jurisdiction for cases of vital importance to the state. In the King's Court the King was advised by

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[1] Azizul Hoque, *The Legal System of Bangladesh*, BILIA, 1980, p. 1.

learned Brahmins, the Chief Justice and other judges, ministers, elders and representatives of the trading community.

B. The Chief Justice's Court: Next to the King's Court was the Chief Justice's court which consisted of the Chief Justice and a board of judges to assist the Chief Justice. All the judges in the board belonged to three upper castes preferably Brahmins.

C. Special Tribunal: Sometimes separate tribunals with specified territorial jurisdiction used to be formed from among judges who were members of the board of the Chief Justice's court.

D. Town or District Court: In towns and districts courts were run by the government officials to administer justice under the authority of the king.

E. Village Council: The local village councils or Kulani was constituted at village level. This council consisted of a board of five or more members for administration of justice to villagers. The councils dealt with petty civil and criminal matters.

Judicial Procedure

A. Stages of a Suit: A suit or trial consisted of four stages- the plaint, the reply, the trial and investigation and finally the verdict or decision of the court.

B. Bench of more than one Judges: The courts were functioning on the principle that justice should not be administered by a single judge. Generally a bench of two or more judges would administer justice. Even the King decided cases in his council.

C. Appointment of Judges and Judicial Standard: In the appointment of the Chief Justice and other judges the question of caste consideration played vital role. The Chief Justice was mandatorily appointed from Brahmins. A *Sudra* was forbidden to be appointed as a judge. Appointments were made from among the persons who were highly qualified and learned in law. Women were not allowed to hold the office of a judge. Judges were required to take the oath of impartiality when deciding disputes between citizens.

D. Doctrine of Precedent: The decisions of the King's court were binding on all lower courts. The principles of law declared by higher courts were taken into consideration by the lower courts while deciding cases.

E. Evidence: During the course of proceedings both the parties were required to prove their case by producing evidence. Ordinarily, evidence was based on any or all the three sources, namely, documents, witnesses, and the possession of incriminating objects. In criminal cases, sometimes circumstantial evidence was sufficient to punish the criminal or acquit him.

F. Trial by Ordeal: Ordeal which was a kind of custom based on religion and faith in God was a means of proof to determine the guilt of the person. The application of trial by ordeal was limited only to the cases where any concrete evidence on either side was not available. This system ordeal was very painful and dangerous to the accused, and sometimes the person giving ordeal died during the ordeal. Some common ordeals are described below:

(i) Ordeal by Fire: According to the Hindu myth fire is considered to be God and it has purifying qualities. According to the ordeal of fire, the accused was directed to walk through or stand or sit in fire for some specified time. If the accused comes out from the fire without any harm, he was considered to innocent. Sometimes the accused was asked to carry a red hot iron ball in his hand and walk a few paces. If he had no signs of burns after the ordeal, he was considered to be innocent.

(ii) Ordeal by water: Water seen as a sign of purity under the Hindu mythology was used to test the guilt of the accused. The accused was required to stand in waist-deep water and then to sit down in the water, as an archer shot to an arrow. If the accused remained in the water during the time limit, he was held to be innocent. Alternatively the accused was required to drink water used in bathing the idol. If he had no harmful effects within next fourteen days, he was declared to be innocent.

(iii) Ordeal by Poison: This method was also based on the view that God protects innocent people. The accused was required to

drink poison without vomiting it. If he survived, he was declared to be innocent.

(iv) Ordeal by Rice-grains: The accused was required to chew unhusked rice and then asked to spit out. If blood appeared in his mouth, he was considered to be guilty, otherwise not.

(v) Ordeal by Lot: Two lots of the same type representing Right (*Dharma*) and Wrong (*Adharma*) were placed in a jar. The accused was asked to draw a lot. If the accused drew Dharma he was declared innocent.

G. Trial by Jury: The jury system existed in ancient India but not in the same form as understood in today's world. There is evidence that the community members used to assist the administration of justice. They were merely examiners of the cause of conflict and placed true facts before the judge though the verdict was declared by the presiding judge and not by the jury.

H. Crimes and Punishments: The philosophy of crime and punishment was based on the idea that the punishment removed impurities from the accused person and his character is reformed. Before punishment was to be awarded the judge had to consider the motive and nature of the offence, time and place, strength, age, conduct, learning and monetary position of the offender. There were four methods of punishment- by gentle admonition, by severe reproof, by fine and by corporal punishment. These punishments could be inflicted separately or together depending upon the nature of the offence. Judges always considered the relevant circumstances before deciding actual punishment. The severity of punishment depended on caste as well. Certain classes of persons were exempted from punishment. Old people over eighty, boys below sixteen, women and persons suffering from diseases were to be given half of the normal punishment. A child below five was considered to be immune from committing any crime and therefore was not liable to be punished. In adultery and rape, punishment was awarded on the basis of the caste considerations of the offender and of the woman. In abuse or contempt case every care was taken to see that each higher caste got due respect from persons of lower caste. For example, if a person of a lower caste sat with a person of higher caste,

the man of the lower caste was to be branded on the breech. For committing murder the murderer was to pay 1000 cows for killing a *Kshatriya*, 100 for a *Vaisyo* and 10 for a *Sudra*. These cows were given to the King to be delivered to the relatives of the murdered person. A bull was given to the King as a fine for murder. If a Brahmin was killed by a person of a lower caste, the murderer would be put to death and his property confiscated. If a Brahmin was killed by another Brahmin he was to be branded and banished. If a Brahmin killed a person from lower caste, he was to compound for the offence by fine. For plotting against the King, forcibly entering into the *harem* of the King, aiding the King's enemy, creating revolt in the army, murdering ones father or mother or committing serious arson, capital punishment was given in varied forms, namely, roasting alive, drowning, trampling by elephants, devouring by dogs, cutting into pieces, impalement etc. The above discussion on crime and punishment gives a necessary idea that infliction of punishment was not based on any broad principle rather on whim and caste consideration which was completely devoid of any humanity and ethics.

Muslim Period: Judicial System in Medieval India

This period starts with the invasion by Turkish Muslims in the Indian Sub-continent in 1100 A.D. The Hindu kingdoms began to disintegrate gradually with the invasion of Turkish race in the end of eleventh and the beginning of the twelfth century. When Muslim conquered the states, they brought with them the Turkish idea of administration. The theory of Muslims was based on Quran, their religious book. According to the Quran, sovereignty lies in Allah (God) and the King is His humble servant to carry out His will on the earth. The ruler was regarded as trustee, being the Almighty's chosen agent.

The whole Muslim period in India may be divided into two sub-periods- the Sultanate of Delhi and the Mughal Empire. By the end of twelfth century Muslim Sultanate was established at Delhi by Muhammad Ghor. This period existed for thirty years beginning from 1206 till 1526. On the other hand, in 1526 Delhi Sultanate came to an end when Delhi was captured by Zahiruddin Babar. Babar founded the Mughal Empire in India which existed until 1857.

Legal System under the Sultanate

The Sultan or the King was the supreme authority to administer justice in his kingdom. The judicial system under the Sultanate was organised on the basis of administrative divisions. A systemic classification and gradation of the courts existed at the seat of the capital, in Provinces, Districts, Parganahs, and villages. The powers and jurisdiction of each court were clearly defined.

Courts at Centre: The courts established at the capital of the Sultanate were as follows: The King's Court, Diwan-e-Mazalim, Diwan-e-Risalat, Sadre Jehan's court, Chief Justice's court and Diwan-e-Siyasat.

The King's court was presided over by the Sultan himself. This court exercised both original and appellate jurisdiction in all kinds of cases. It was the highest court of appeal in the realm. In discharging judicial functions the Sultan was assisted by two reputed Muftis highly educated and expert in law.

The court of Diwan-e-Mazalim and court of Diwan-e-Risalat were the highest courts of criminal and civil appeals respectively. Though the Sultan nominally presided over these courts, in the absence of the Sultan the Chief Justice (Qazi-ul Quzat) presided over these courts. Quazi-ul Quzat was the actual head of the judiciary and he tried all types of cases. Qazi-ul Quzat was appointed by the Sultan from amongst the most virtuous of the learned men in his kingdom. In 1248, Sadre Jahan was appointed by Sultan Nasiruddin. This post was superior to post of Qazi-ul Quzat. Now he became defacto head of the judiciary. The offices of Sadre Jahan and Chief Justice remained separate for a long period, but these were amalgamated by emperor Ala Uddin. However, these were again separated by Sultan Firoz Tuughlaq.

The court of Diwan-e-Siyat was constituted to decide the cases of rebels and high treason etc. Its main purpose was to deal with criminal prosecutions.

Some of the other officers attached to the court of Chief Justice were as under:

(a) **Mufti:** He was selected by the Chief Justice and appointed by the Sultan. He acted as legal expert and in case of difference

of opinion between the mufti and judge, the difference was referred to the Sultan for decision.

(b) **Pandit:** He was a Brahmin learned in law of Hindu and he acted as expert of law in civil cases of non-Muslims and his position was similar to the Mufti.

(c) **Mohtasib:** He was entrusted with the prosecution for the violation of cannon law.

(d) **Dadbak:** He was the registrar or the clerk of the court and his duty was to ensure attendance of persons summoned by the court. Sometimes he was also entrusted with the task of trying of petty civil cases.

Provincial Courts: In each Province (Subah) at the Provincial Headquarters four courts were established, namely Adalat Nazim-e-Subah, Adalat Qazi-e-Subah, Governor's Bench (Diwan-e-Subah) and Sadre-e- Subah.

(a) **Adalat Nazim Subah:** This court was presided over by the Nazim. In the Province the Sultan was represented by him and like the Sultan he exercised both original and appellate jurisdiction. In original cases he usually sat as single judge. From his judgment an appeal lay to the Central Appeal Court at Delhi. While exercising appellate jurisdiction, the Nazim sat with the Qazi-e-Subah constituting a Bench to hear appeals. From the decision of this Bench, a final second appeal lay before the Central Court at Delhi.

(b) **Adalat Qazi-e-Subah:** This court was presided over by the Chief Qazi of the Province. This court tried all cases of civil and criminal matters. It also heard appeals from the courts of District Qazis. Appeals from this court lay to the Adalat Nazim-e-Subah. This court also had the supervisory jurisdiction over the administration of justice in his province and to see that the Qazis in districts were properly functioning. Qazi-e-Subah was appointed by the Sultan, but selected by the Chief Justice amongst persons who had established reputation for learning and scholarship of law and possessed a high character and was a man

of unimpeachable integrity. Four officers namely Mufti, Pandit, Mohtasib and Dadbak were attached with this court too.

(c) **Diwan-e-Subah:** This court had both original and appellate jurisdiction in all revenue matters. It had the final authority in the Province over all cases concerning revenue.

(d) **Sadre-e-Subah:** This was the Chief Ecclesiastical court in the province. This court dealt with the matters relating to grant of stipend, lands etc.

District Courts: In each District, at the District Headquarter, following courts were established:

(a) **The District Qazi's Court:** This court had the jurisdiction to try all civil and criminal matters. It also heard appeals from the decisions of the Parganah Qazis, Kotwals and village panchayats. This court was presided over by the Qazi who was appointed by the Sadre Jahan on the recommendation of the Qazi-e-Subah. This court was also assisted by same four officials as mentioned above.

(b) **Faujder Court:** This court had jurisdiction to try petty criminal cases concerning security and suspected criminals.Appeal from this court lay with the court of Nazim-e-Subah.

(c) **Court of Mir Adils:** This court dealt with land revenue matters. Appeal from this court lay before the Court of Diwan-e-Subah.

(d) **Court of Kotwals:** This court was authorised to try police and municipality cases.

Parganah's Courts: The Courts of Qazi-e-Parganah and Kotwals were constituted at each Parganah Headquarter. The Court of Kazi-e-Parganah had all powers of a District Kazi in all civil and criminal cases except hearing appeals. The Kotwal was authorised to try petty criminal cases. He was also the principal executive officer of the town.

Village Courts: For each group of villages, a panchayat was functioning to look after the executive and judicial functions. The panchayat decided petty civil and criminal cases of purely local nature.

Legal System under the Mughal Administration

During the Mughal period (1526-1857) the Mughal emperor was considered the 'fountain of justice'. The emperor created a separate department of justice (Mahakuma-e-Adalat) to regulate and see that justice was administered properly. The important courts functioning during this period were as follows:

Courts at Capital

Three important courts were functioning at the capital city of Delhi. They were as follows:

(a) **The Emperor's Court:** The Emperor's court presided over by the emperor himself, was the highest court of the empire. This court had jurisdiction to hear both civil and criminal cases. The Emperor while hearing the cases as a court of first instance, was assisted by Daroga-e-Adalat, Mufti and Mir Adil. While hearing appeal the Emperor presided over a Bench consisting of the Chief Justice (Qazi-ul-Quzat) and other Qazis of the Chief Justice's court. The Emperor referred points for opinion regarding authoritative interpretation of law on a particular point to the Chief Justice's court.

(b) **The Court of Chief Justice:** This was the second important court at the capital. This court presided over by the Chief Justice was assisted by two Qazies of great importance who were attached to this court as puisne judges. This court had jurisdiction to try original, civil and criminal cases and also to hear appeals from the Provincial courts. It had also supervisory power over the working of the Provincial courts.

(c) **Chief Revenue Court:** This was the third important court in Delhi. It was the highest court of appeal to decide revenue cases. This court was also assisted by the same four officials as mentioned below.

In each court, as stated above, four officials were attached- Daroga-e-Adalat, mufti, Muhtasib and Mir Adil. Apart from the above-stated three important courts, there were also two courts in Delhi. The court of Qazi-e-Askar was a special court to decide military matters. This court moved from place to place with troops. Another court was the court of

Qazi of Delhi which sat in the absence of the Qazi-ul-Quzat to decide local civil and criminal matters.

Provincial Courts

In each Province there were following three types of courts:

(a) **The Governor's Court (Adalat-e-Nazim-e-Subah):** The Governor or Nazim presided over this court and he had original jurisdiction in all cases arising in the Province. This court had also jurisdiction to hear appeals from the subordinate courts. Further appeal from this court lay to the Emperor's court. This court had also supervisory power over the administration of justice in the Province. One Mufti and a Daroga-e-Adalat were attached to this court.

(b) **The Provincial Chief Appeal Court (Qazi-e-Subah's Court):** This court heard appeals from the decisions of the Qazis of the districts. The powers of Qazi-i-subah were co-extensive with those of Governors. This court had original civil and criminal jurisdiction as well. The officers attached to this court were, Mufti, Mohtasib, Daroga-e-Adalat-e-Subah, Mir Adil, Pandit, Sawaneh Nawis and Waqae Nigar.

(c) **Provincial Chief Revenue Court (Diwan's Court):** This court presided over by Diwan-e-Subah had original and appellate jurisdiction in all revenue matters. An appeal from this court lay to the Diwan-e-Ala at the Imperial capital. Four officers attached to this court were- Peshker, Darogha, Treasurer and Cashier.

District Courts

In each district there were following four courts:

(a) **District Qazi:** The chief civil and criminal court of the district was presided over by the Qazi-e-Sarkar. This court had jurisdiction to try all civil and criminal matters. Appeal from this court lay to the Qazi-e-Subah. Qazi-e-Sarkar was the principal judicial officer in the District. Six officers were attached to this court- Darogha-e-Adalat, Mir Adil, Mufti, Pandit, Mohtasib and Vakil-e-Sharayat.

(b) **Faujdar Adalat:** This court presided over by a Faujdar had jurisdiction to try cases concerning riots and state security. An appeal lay to the court of Governor from the decisions of this court.

(c) **Kotwali Court:** This court presided over by a Kotwal-e-Shahar decided all petty criminal cases. Appeals from this court lay to the Qazi-e-Sarker.

(d) **Amalguzari Kachari:** This court presided over by an Amalguzar decided revenue matters. An appeal from this court lay to Diwan-e-Subah's adalat.

Parganah's Court

In each Parganah there were three courts:

(a) **Qazi-e-Parganah's Court:** This court had jurisdiction over all civil and criminal cases arising within its original jurisdiction. This court had no appellate jurisdiction. Appeal from this court lay to the court of District Qazi.

(b) **Court of Kotwal:** This court decided all petty criminal cases. Appeals from this courts' decision lay to the Court of District Qazi.

(c) **Amin-e-Parganah:** This court presided over by an Amin decided all revenue matters. An appeal from this court lay to the District Amalguzar.

Village Courts

In each village two types of courts were working- court of village panchayat and the court of Zaminder. The village panchayat consisted of five persons headed by a headman. The panchayat had the power to decide petty local civil and criminal matters. No appeal was allowed from the decision of a panchayat. In the late Mughal period, Zaminder's courts were empowered to try petty criminal and civil matters.

Crime and Punishment in the Mughal Administration

A systematic judicial procedure was followed by the courts during the Mughal period. The judicial procedure was regulated by two Muslim Codes namely Fiqh-e-Firoz Shahi and Fatwai-i-Alamgiri. Evidence was

classified into three categories- (a) full corroboration; (b) testimony of a single individual; and (c) admission including confession. The court always preferred full corroboration to other classes of evidence. The Muslim criminal law broadly classified crimes under three heads: (i) crimes against God; (ii) crimes against the King; and (iii) crimes against private individual. During the Muslim period trial by ordeal as existed in Hindu period was prohibited. Instead three forms of punishments were executed by the courts under Muslim law for above three types of crimes.

(a) **Hadd (fixed penalties):** This is the form of punishment which was prescribed by the cannon law and could not be reduced or modified by human agency. *Hadd* meant specific punishments for specific offences. It thus provided a fixed punishment as laid down in *Sharia* for crimes like theft, robbery, whoredom (*zinah*), apostasy (*ijtidad*), defamation and drunkenness. It was equally applicable to Muslims and non-Muslims. The state was under a duty to prosecute all those who were guilty under *Hadd*. No compensation was granted under it. For instance, stoning to death was prescribed for adultery or drinking wine, cutting off the right hand for theft etc. All offences for which *Hadd* was prescribed as punishment are characterised as offences against God, in other words, against 'public justice'.

(b) **Tazir (Discretionary Punishment):** This was another form of punishment which meant prohibition and it was applicable to all crimes which were not classified under *Hadd*. Offences for which *tazir* was fixed were all offences against God. It included crimes like gambling, causing injury, minor theft etc. Under *Tazir* the kind and amount of punishment was left entirely with the judge's wish; courts were free to even invent new methods of punishing the criminals e.g. cutting out the tongue, impalement etc. The object was to reform the criminal.

(c) **Qisas (retaliation) and Diya (blood money):** *Qisas* meant, in principle, life for life and limb for limb. *Qisas* was applied to cases of willful killing and certain types of grave wounding or maiming which were characterisd as offences against human body. *Qisas* was regarded as the personal right of the victim or

his next of kin, to inflict a like injury on the wrong-doer as he had inflicted on his victim. Under *Qisas* the relatives or successors of the murdered person could excuse the murderer. *Qisas* became *Diya* when the next of kin of the victim was satisfied with money as compensation for the price of blood. This also could not be reduced or modified either by the *Qazi* or the Emperor. In cases where Qisas was available, it could be exchanged with *diya* or blood money.

Defects of Muslim Administration of Justice

The Muslim administration of justice particularly the criminal justice in medieval India suffered from many defects. The British people who gradually took over to administer justice here always had an owl-look over the Muslim criminal law. Warren Hastings declared it to be a more barbarous law than anything. The inherent defects of Muslim administration of justice were as follows:

(i) The judicial administration was defective in the sense that there was no separation between the executive and judiciary. The emperor who was the head of the government was also the fountain of justice and administered justice directly.

(ii) In many cases Muslim criminal law was not certain and uniform. In practice it was discovered that the law laid down in *Hidaya* and *Fatwa-e-Alamgiri* was mostly conflicting. There were differences of opinions among Muslim jurists which gave the *Qazis* a good deal of leeway to interpret the law and apply it to a specific fact before him. Thus in each case the interpretation of law depended on the Qazi.

(iii) The Muslim criminal law did not draw any distinction between public law and private law. Criminal law was regarded as a branch of private law. It had not developed the idea that crime was an offence not only against the injured individual but also against the society as well.

(iv) Muslim criminal law suffered from much illogicality. This is because crimes against God were regarded crimes of an atrocious character. Crimes against men were regarded as crimes of a private nature and punishment was regarded as private right of the aggrieved party.

(v) The most defective provision in Muslim criminal law was the provision of *Diya*. In many cases the murderer escaped simply by paying money to the dependants of the murdered person. Many evil practices developed out of it.

(vi) In cases where murdered person left no heirs to punish the murderer or to demand blood-money no specific provisions was available in Muslim law. A minor heir was to wait till he attained majority for punishing the murderer or demanding the blood-money.

(vii) Though Muslim law tried to distinguish between murder and culpable homicide, it did not rest on the intention or want of intention of the culprit. It rested on the method of weapons employed in committing the crime. This was peculiar and generated grave injustice.

(viii) The law of *tazir* which provided for discretionary punishment was also very vague which gave too much power to the judges. On the one hand, even innocent persons were punished by the courts while on the other hand, it led to corruption and injustice. Punishment could be unduly severe or ridiculously light as there was no standard or measure for them.

(ix) The law of evidence under Muslim law was very defective unsatisfactory, and of primitive nature which made conviction of offenders quite difficult. For example, no Muslim could be given capital punishment on the evidence of an infidel. In other cases evidence of one Muslim was regarded as being equivalent to those of two Hindus. Evidence of two women was regarded as being equal to that of one man. Again, evidence was to be direct; no circumstantial evidence was allowed. To convict a man for rape, for example, it was necessary to have four witnesses who would swear that they had actually seen the accused in the very act of committing the offence. A thief would be convicted only on the evidence of two men, or of one man and two women. It was an invariable case rule to exclude the evidence of women in all cases under *hadd* or *qisas*.

(x) The nature of punishment of stoning, mutilation etc were so cruel and inhuman that no flesh and blood could even think of it in a civilized society. The punishment of mutilation meant slow,

cruel and lingering death to the unfortunate person who had to undergo it, for he could not adopt any means of livelihood. The manner was one to give gooseflesh in ones body. The culprit was tied down. The executioner took a blunt hatchet and hacked off the hand by the joint of a wrist and the foot by the joint of an ankle. The bleeding stump was immediately immerged into a pot of boiling butter (ghee) in order to stop bleeding.

British Period: Modernisation of Ancient Indian Law

The modernisation of ancient Indian law took place in the hand of the British people who came in India as a trading company under a series of Royal Charters. The pace of the development of the administration of justice in British India may be divided into following five periods:

a. Early Administration of Justice until the Charter of 1726;
b. Administration of Justice from the Charter of 1726 till the Regulating Act of 1773;
c. Administration of Justice from the Regulating Act of 1773 till the era of Unification in 1861; and
d. From 1861 till the Independence in 1947.

First Period: Early Administration of Justice until the Charter of 1726

This period marks the beginning of the British involvement into the administration of justice in India. In another sense, this period deals with the intervention of the Company into the administration of justice in India as opposed to intervention by the British Queen. The East India Company gradually took possession of three factories and settlements at Bombay, Madras and Calcutta. Starting as trading stations, these settlements became known as the Presidency Towns and the territories around these towns came to be known as Mufassil. Till 1726 the administration of justice in three Presidency Towns was haphazard. The Company participated in administration of justice in cooperation with the local Mughal authorities. Some changes were brought in the administration of justice in three Presidency Towns with the intervention of some Charters issued from time to time by the Company though these changes were fringe and different in three Presidency Towns. For example, the first Mayor's court in India was established at Madras by

the Company's Charter of 1687. This was a Company's court as opposed to the Crown's court and no specific rules of law and procedure was laid down for this court by the Company. On the other hand, the Company first acquired the territorial acquisition of Bengal, Bihar and Orissa in 1765 as Mufassil area as opposed to Presidency Towns. Though the Company took the full control of Diwani and military power, the administration of both civil and criminal justice were left to the indigenous machinery at the hand of natives until 1772. The development of adalat system in Mufassil area will be discussed in a different heading.

Second Period: The Era of the Mayor's Court: Administration of Justice from the Charter of 1726 till the Regulating Act of 1773

This period may be divided into two parts: from the Charter of 1726 till the Charter of 1753; and from the Charter of 1753 till the Regulating Act of 1773. The first part of this period marks the beginning of the intervention by the British Crown in the administration of justice in India. The Charter of 1726 issued by King George I by way of granting Letters Patent[1] to the Company was the first gateway of the introduction of English law in India. The Charter of 1726 established a corporation for each Presidency towns. Following changes in the administration of justice were made by this Charter:

Civil Judiciary:

a. A Mayor's court was established in each Presidency town. Unlike earlier this Mayor's court was a Crown's court, i.e. the courts of the King of England. These courts consisted of the Mayor and nine aldermen. In British India Mayor's court was declared to be a court of record and thus had power to punish persons for its contempt. These courts were royal courts in true

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[1] 'Letters Patent' is derived from Latin *literae patentes* meaning writings sealed with the Great Seal of England, whereby a man is authorised to do or enjoy anything that otherwise of himself he could not. They are so termed by reason of their form, because they are open with the seal affixed, ready to be shown for confirmation of the authority given them. There are other Letters Patent of 1865 establishing High Courts at Calcutta, Bombay and Madras.

'Letters Patent' is not an Act but is granted by the Sovereign by virtue of an Act of Parliament, and it should be construed in the same way as an Act. (*Banwari Lal v Emperor*, AIR 1943 Cal 285).

sense as they derived their authority not from the company but from the British Crown.

b. The Mayor's court had jurisdiction to try, hear and determine all civil suits arising within the Presidency town and its subordinate factories.

c. Appeal was allowed to the Governor-in-Council from the decision of the Mayor's court.

d. From the decision of the Governor-in-Council a second appeal lay with the Privy Council in England in cases where the sum involved was either 1000 pagoda or more. This was the first time that a right of appeal to the Privy Council (King-in-Council) from the decision of the courts in India was created and thus was established a bridge between the English and Indian legal system. Thus the King of England was made the ultimate fountain of justice for litigation in India.

e. Though the Charter of 1726 did not expressly state that the law to be applied by the Mayor's court was to be the law of England, the Privy Council decided that the Charter introduced into the Presidency towns the law of England- both common law and statute law and the Mayor's courts were to be courts of English law.

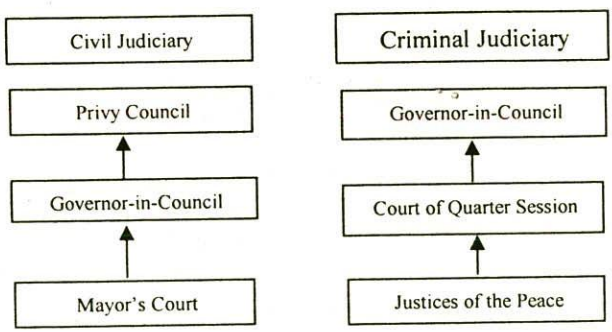
Criminal Judiciary:

a. **Justices of the Peace:** Under the Charter the criminal justice was fully executive dominated. In each Presidency town the criminal justice was vested in the Governor and five senior members of the Council of the Company. Each of them was to act in the same manner, and to have the same powers, as the justices of the peace in England. A justice of the peace could arrest persons accused of committing crimes, punish those who were guilty of minor crimes, and commit the rest to be tried by the Quarter Sessions.

b. **Court of Quarter Session:** Three justices of the peace collectively were to form a court of record and they were to hold quarter sessions four times a year to try and punish each and every criminal offence, except high treason, committed in the Presidency Towns. Trial at these session courts was to be

held with the help of grand jury and petty jury. All technical forms and procedures of the English criminal justice were introduced in the Presidency Towns as it was explicitly laid down in the Charter.

c. **Governor-in-Council:** Under the Charter criminal justice was vested in the Governor and five senior members of the Council of the Company. They had both original and appellate jurisdiction in some specified criminal matters, e.g. high treason and serious crimes like murder etc.



Defects of the Judicial System under the Charter of 1726

(i) The criminal justice was fully executive dominated as it was at the hand of the Governor-in-Council.

(ii) The Mayor's courts were not free from the executive influence. The aldermen were either Company's servants or other English traders who depended upon the Company's permission to stay in India and were at the mercy of the local government. In other words, the Governor and Council were the maker and unmaker of the judges.

(iii) Judges were non-professionals. The Company had a policy of confining administration of justice to its servants and hence it avoided appointing lawyers.

(iv) The Mayor's court was constituted to work independently. But its relationship with the executive was not stated clearly and there emerged an unhappy clash between the executive and the

judiciary. This clash is evident from some important cases like Shrimpy's case, Arab Merchant's case, Pagoda Oath case etc.

(v) The Charter did not mention anything about the jurisdiction of the Mayor's court. When the Mayor's court decided that it was empowered to decide cases where both the parties were native Indians, it created great dissatisfaction and unrest among native people.

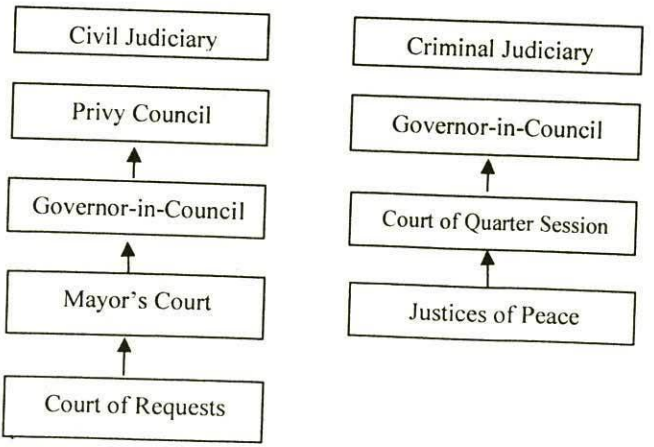
The Administration of Justice under the Charter of 1753

This period starts with the Charter of 1753 issued by King George II out of the deficiencies created by the operation of the previous Charter of 1726. The reforms introduced by this Charter were as follows:

a. All suits and actions between natives only were excluded from the jurisdiction of the Mayor's court unless both the parties involved in the matter submitted it for the courts decision.

b. The Mayor's court was made completely subordinate to the Government of the Company by introducing changes to the appointment in the post of the Mayor and aldermen.

c. A new court namely the Court of Requests at each Presidency Town was created. This was to decide cheaply, summarily and quickly cases up to 5 pagodas or Rs. 15. The idea behind was to help poor litigants with small claims who could not afford to go to the Mayor's court.



Further Explanation:

(i) Privy Council had only appellate jurisdiction.

(ii) Court of the Governor-in-Council had both civil and criminal jurisdiction. For criminal matter it had both appellate and original jurisdiction. For civil matter it had only appellate jurisdiction.

(iii) The Mayor's Court heard civil cases involving more than 5 pagodas, one for each Presidency Towns.

(iv) The Court of Requests heard civil suits up to 5 pagodas, one for each Presidency Towns.

Defects of the Judicial System under the Charter of 1753

(i) The Charter made the judicial machinery a branch of the Company's executive.

(ii) The judiciary was manned by the servants of the Company.

(iii) Judges were ignorant of law. Particularly the Governor-in-Council were quite ignorant about the technicalities of the English criminal law on the basis of which they were expected to decide cases in India.

(iv) The appeal system in Kings-in-Council was difficult and expensive.

(v) Indians were excluded from having any share in the administration of justice.

(vi) The criminal justice being at the hand of the Governor and Council was too much a political farce.

Third Period: The Era of the Supreme Court: Administration of Justice from the Regulating Act of 1773 till the era of Unification in 1861

Though the Charter of 1753 was issued with a view to removing the defects of the Charter of 1726, the Mayor's Court suffered from certain drawbacks having far-reaching consequences. In 1772 the House of Commons appointed a secret committee to prove into the affairs of the Company. The committee reported, *inter alia,* that the Mayor's court had

degenerated into an engine of oppression rather than acting as a court of justice. On the basis of report of the committee the House of Commons intervened and passed the Regulating Act 1773. The Act empowered the King to establish by Charter a Supreme Court at Calcutta. Accordingly the King issued the Charter of 1774 establishing the Supreme Court at Calcutta. Subsequently Supreme Courts were established in Madras in 1801 and in Bombay in 1824 abolishing the Mayor's Court. After the establishment of the Supreme Court under the Regulating Act of 1773 the judicial reform took the following shape:

(i) A Supreme Court was established in place of Mayor's Court in each Presidency Town of Calcutta, Bombay and Madras.

(ii) Three Courts of Requests in three cities were retained and they were made subordinate to the Supreme Court. However, in 1850 these Courts of Requests were abolished and in their place Small Causes Courts were established in three Presidency Towns.

(iii) The Supreme Court consisted of a Chief Justice and three other puisne judges. They were to be all professional barristers sent out to India from England. They held office during the pleasure of the King.

(iv) The Supreme Court was empowered to supervise the Court of Collector, Quarter Session, Justice of Peace and the Court of Requests. Under this supervisory jurisdiction the Supreme Court could issue various prerogative writs.

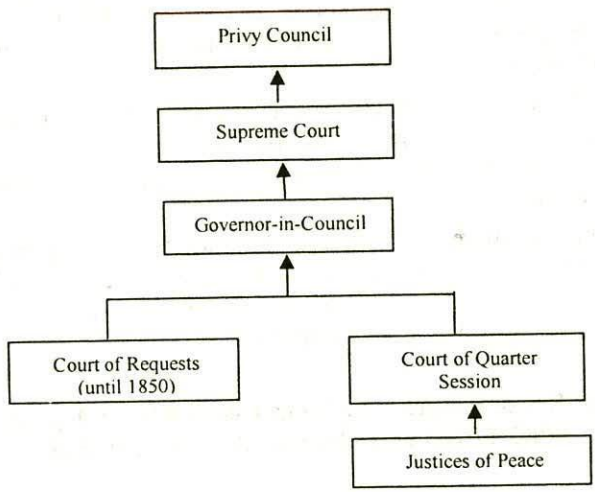
(v) The general jurisdiction of this court was limited within the geographical limits of the Presidency Town. Beyond the Presidency Towns, the court exercised a personal jurisdiction over three categories of persons- British subjects and persons employed directly or indirectly to the service of the Company.

(vi) The Supreme Court had both original, appellate, civil, criminal, ecclesiastical and admiralty jurisdiction. It heard appeal from the decisions of the Mufassil courts and Company's courts.

(vii) A second appeal from the decision of the Supreme Court where the cause of action exceeded 1000 pagodas lay with the King-in-Council within six months from the decision of the Supreme Court. In criminal cases the Supreme Court had full and

absolute discretion to allow or deny permission to make an appeal to the King-in-Council.

(viii) In 1850 the Courts of Requests were abolished and in their place Small Causes Courts were established in three Presidency towns.



Defects with the Working the Supreme Court

(i) In actual functioning both the judiciary and the executive came into serious conflicts and dissatisfaction arose between them under the following points:

(ii) There appeared huge debate over the point of jurisdiction. In Patna and Cossijurah's cases the Supreme Court came into an open conflict with the Company on the issue whether the Indian Zaminder and farmers of revenue came under the jurisdiction of the Supreme Court or not.

(iii) There emerged conflict between the Supreme Court and the Company's court. This was because neither the Regulating Act nor the Charter of 1774 clarified the question of relationship between the Supreme Court and the Company's Courts.

(iv) There occurred conflicts on point of superiority between the Council and the Supreme Court. There was a great deal of

vagueness in the crucial area of relationship between the Company and the Supreme Court.

(v) The two distinct and parallel judicial systems- the Supreme Court in the Presidency Towns and Adalat in the Mufassil area soon gave rise to conflict over the question of jurisdiction. For example, the Supreme Court cliamed jurisdiction over the whole native population which was opposed by the Council of the Company.

(vi) Raja Nandkumar's, Radha Charan, Kamaluddin, Saropchand, Patna, Cossijurah etc cases provide glaring examples of lacunae and defective provisions of the Regulating Act and the Charter of 1774.

Thus though the Supreme Court was designed to be independent in discharging its functions, two fundamental things- shortcomings in the Regulating Act and the Charter and the violent interference of the executive- did not allow it to work independently.

Fourth Period: Era of Unification: From 1861 till the Independence in 1947 (Judicial Reform under the Direct British Rule).

Unification:

This period may be divided into two sub-heads: from 1861 till 1935 (the era of High Court); and from 1935 till 1947 (the era of High Court and the Federal Court).

As a result of severe clash between the executive and the Supreme Court, within only seven years time the Supreme Court came to be a body disliked by all. Petitions in the form of allegation were submitted to the King of England not only by the Governor-General but also by the inhabitants of Bengal which followed by the appointment of a Select Committee in 1780 to enquire into administration of justice in Bengal. The Committee's report led to the passage of the Act of Settlement, 1781 which in fact curtailed the power of the Supreme Court to accommodate the Council's opinion. The Supreme Court now was deprived of its jurisdiction in revenue matters and Company's Court. Though the plan did away with the clash between the executive and judiciary, it virtually undermined the position and prestige of the Supreme Court as a highest court and also as a court of record, for no longer was it in a position to

Judicial System after the Unification

a. Two parallel judicial systems, namely, the Company's courts in Mufassil areas and three Supreme Courts (King's Courts) in three Presidency Towns were merged into a unified system under three High Courts of Judicature at three Presidency Towns.

b. The Supreme Courts and the Courts of Sadar Diwani Adalat and Sadar Nizamat Adalat were abolished.

c. The ordinary original jurisdiction of the High Court was limited to the local limits of the Presidency Towns. Its predecessor the erstwhile Supreme Court did in fact exercise a broader jurisdiction in the sense that in certain circumstances persons and property beyond the local limits of the presidency towns fell within its jurisdiction.

d. In its ordinary civil jurisdiction the High Court was empowered to try and determine suits of every description except those falling within the jurisdiction of the Small Causes Courts.

e. The High Court had original criminal jurisdiction within the local limits of its civil jurisdiction.

f. The High Court exercised its appellate jurisdiction to hear appeals from both civil and criminal courts from which appeals were preferred to the Sadar Diwani and Sadar Nizamat Adalats. To be more specific, the original side of the High Court was the immediate successor to the Supreme Court and the appellate side of the High Court was the immediate successor of the Sadar Diwani Adalat and Sadar Nizamat Adalat.

g. The High Court had supervisory jurisdiction over all subordinate courts both civil and criminal.

h. Unlike the erstwhile Supreme Court, the High Court was empowered to exercise jurisdiction over revenue.

i. A further appeal from the decision of the High Court involving a sum not less than Rs. 10,000 lay to the Privy Council. The High Court was also empowered to certify that the case was fit one for appeal to the Privy Council.

Aftermath of Unification: Regular Hierarchy of Civil And Criminal Courts

After establishment of the High Courts, a regular hierarchy of civil courts were established by Civil Courts Act 1887. On the criminal side the Criminal Procedure Code 1898 re-organised all criminal courts. The present system of both civil and criminal courts in Bangladesh have their legal basis in Civil Courts Act 1887[1] and the Criminal Procedure Code 1898[2]. Section 3 of the Civil Courts Act created the following four classes of civil courts:

(1) the Court of the District Judge;
(2) the Court of the Additional Judge;
(3) the Court of the Subordinate Judge; and
(4) the Court of the Munsif.

Apart from the abovementioned four types of civil courts, the Courts of Small Causes operated in both Presidency Towns and Mufassil area were retained by the Small Causes Courts Act, 1887.

In criminal side the Code of Criminal Procedure, 1898 the operation of which extended to the whole of the British India provided for the following five classes of criminal courts:

(1) Courts of Session;
(2) Presidency Magistrates;
(3) Magistrates of the First Class;
(4) Magistrates of the Second Class; and
(5) Magistrates of the Third Class.

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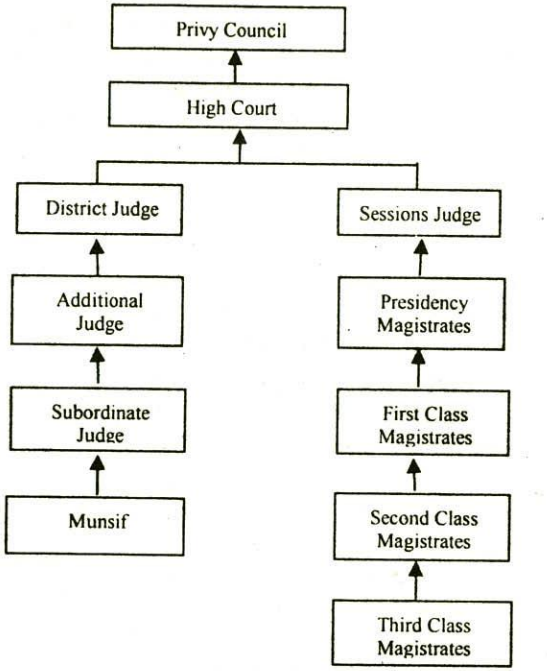
[1] This Act of 1887 (Act No. XII of 1887) was entitled 'Bengal, Agra and Assam Civil Courts Act 1887. This Act was passed by the then Governor-General and his Council as he had the power to make law under the Indian Councils Act, 1861.

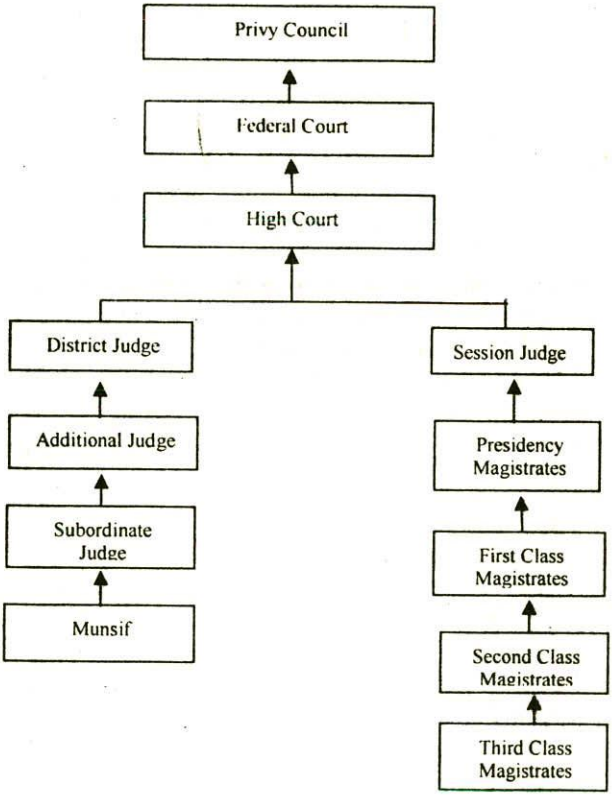
[2] This Act was also passed by the Governor-General and his Council under the Indian Council Act, 1892.

Structural Shape of the Legal System after the Unification in the Province of Bengal



The Era of Federal Court and the High Court

The Government of India Act 1935 changed the structure of the Indian Government from 'unitary' to that of 'federal' type. It, therefore, distributed powers between the centre and the constituent units. And consequently it had provided for the establishment of a Federal Court. The Federal Court of India was inaugurated on 1st October 1937. Below is the structure of judicial system after the Government of India Act 1935 which follows the discussion on relationship and jurisdiction of the Federal Court.



Constitution and Jurisdiction of the Federal Court

a. The Federal court was composed of three judges- one Chief Justice and two puisne judges. A person having (i) five years experience as a judge of the High Court; or (ii) a barrister of at least ten years standing; or (iii) a pleader/ advocate in the High Court having ten years standing was qualified to be a judge in the Federal Court.

b. The judges were appointed by His Majesty and would hold the office until the age of sixty five.

c. The Federal Court was given exclusive jurisdiction to decide cases between the Centre and the units. Its advisory jurisdiction was limited only to those cases which were

referred to it by the Governor-General for its advise on any legal question of public importance.

d. This court also exercised appellate jurisdiction from the decisions of the High Court but it was a very limited one. An appeal was allowed to the Federal Court from any judgment, decree or final order of a High Court, if the High Court certified that the case involved a substantial question of law as to the interpretation of the constitution.

e. An appeal would lie to the Privy Council from any judgment of the Federal Court given by it in the exercise of its original jurisdiction, and in any other case by leave of the Federal Court or of the Privy Council itself.

f. Apart from the cases in which appeals from the High Courts lay to the Federal Court, the system of appeals from the High Courts to the Privy Council, which had been in operation hitherto, was left intact and unaffected.

The Independence and the Aftermath

The British Parliament declared India and Pakistan as independent Dominions on the 15th of August, 1947 by the Indian Independence Act 1947. This Act also provided that until the new constitutions were framed for independent India and Pakistan, the governments of India and Pakistan were to be run according to the Government of India Act 1935. Accordingly in both India and Pakistan the Federal Court was retained to function until the highest judicial organs were established under new constitutions. In 1949 the Indian Constituent Assembly passed the Abolition of the Privy Council Jurisdiction Act, 1949 which abolished the system of appeal to the Privy Council from India.

In 1950 after the adoption of the Constitution of independent India the Federal Court itself was replaced by the Supreme Court of India and all the Federal Court judges became the judges of the Indian Supreme Court.

On independence in 1947 immediately by an order of the Governor-General of Pakistan a new Federal Court was established at Karachi according to the provisions of the Government of India Act 1935. By another order (the High Courts (Bengal) Order 1947) a High Court was established out of constitutional necessity in Dhaka. Judicial structure in all other area remained same as it was before 1947. As like as India the

Federal Court Order allowed the Federal Court of Pakistan and High Courts in provinces to continue as subordinate courts to the Privy Council for the time being. In 1950 two important Acts were passed- the Federal Court (enlargement of Jurisdiction) Act and the Privy Council (Abolition of Jurisdiction) Act. Under these two Acts Pakistan's tie with the Privy Council was severed and the Federal Court appeared as the highest court in Pakistan and it continued till 1956 when the Supreme Court of Pakistan was established under the new constitution of Pakistan.

Development of Judicial System in Mufassil Area

As mentioned earlier the evolution of judicial institutions in British India can be traced from two sides of its development: (a) the evolution of judicial institutions (Royal Courts) in the Presidency Towns; and (b) the evolution of judicial institutions (Company's Courts) in Mufassil area, i.e., the territory beyond the presidency towns. The evolution of judicial system in Presidency Towns started with the Charter of 1726 which passed through the era of the Mayor's Court and then the Supreme Court and then culminated into the unification by establishment of High Courts in 1861. This has been discussed above. On the other hand, the evolution of judicial systems in the Mufassil area started in 1772 with the judicial plan of Warren Hastings in Bengal, Bihar and Orissa. Unlike in the Presidency Towns, the whole judicial development in the Mufassil area took place at the absolute control of the Company. The elementary system of judiciary established by Hasting's was in time modified, improved and redefined by different Lords. As a result "Bengal served as a laboratory where experiments were made in the adalat system, and when workable results were obtained they were transmitted to the provinces of Bombay and Madras."[1] Because of the division of Presidency Towns and Mufassil area the judicial system operated by Crown Courts in Presidency Towns came to be known as Presidency system of justice and the system of the company's court in Mufassil area came to be known as the provincial or Mufassil system of justice. Cowell stated that this two separate streams of judiciary flowed in the province of Bengal for 88 years starting from 1772 and ending with the unification of these two systems in 1861.

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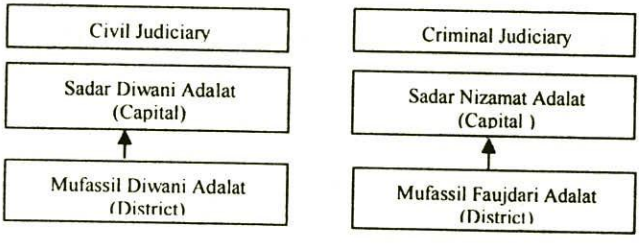
[1] Jain, M.P. *Outlines of Indian Legal History*, 5th ed. 1993.

Warren Hasting's Judicial Plan of 1772:

Beyond the Presidency Town of Calcutta the first territorial acquisition of the company consisted of Bengal, Bihar, and Orissa. After the grant of Diwani in 1765 the company did not change anything as to the administration of justice. All civil and criminal courts were left intact till 1772 at the hand of natives. In 1772 with a view to regulating the machineries of administration of justice Hastings divided the whole territory of Bengal, Bihar and Orissa into a number of districts taking each as a unit. The judicial organisation took a new turn which was as follows:



Civil Courts:

(b) **Sadar Diwani Adalat** was the chief court of Appeal at the capital presided over by the Governor-in-Council. It heard appeals from the Mufassil Diwani Adalat.

(c) **Mufassil Diwani Adalat** was established at each district with a collector, an English man as the judge. Appeal against its decision in cases above Rs. 500 lay to the Sadar Diwani Adalat.

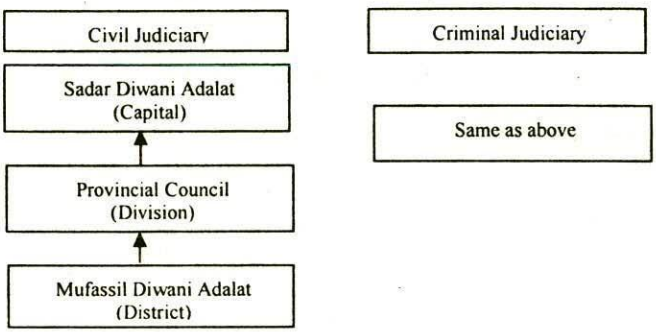
Criminal Courts:

(a) **Sadar Nizamat Adalat** was the chief court of criminal appeal at the capital presided over by an Indian judge known as Daroga-i-Adalat who was appointed by the Nawab on the advice of the Governor.

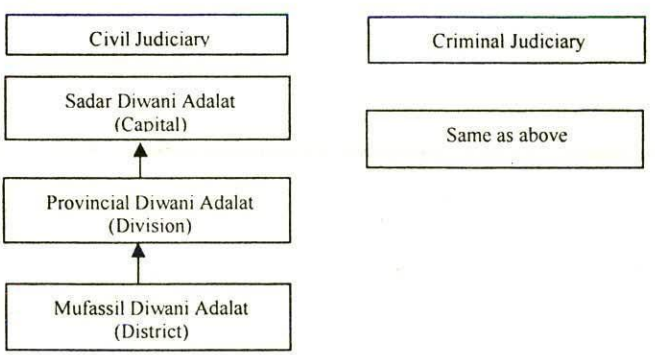
(b) **Mufassil Faujdari Adalat** established in each district was presided over by a collector to try all kinds of criminal cases. Appeal lay to the Sadar Nizamat Adalat.

New Plan of 1774: Under this plan the whole territory of Bengal, Bihar and Orissa was divided into 6 divisions each having several districts. No change was brought into the criminal judiciary but one court

named Provincial Council or Provincial Sadar Adalat was added to the civil judiciary at each division which was presided over by 4/5 servants of the company. This court had three-fold functions: (i) looking after the revenue collection; (ii) hearing appeals in civil cases; and (iii) deciding civil cases as a court of first instance at its seat. The court structure in the civil judiciary came to be as follows:



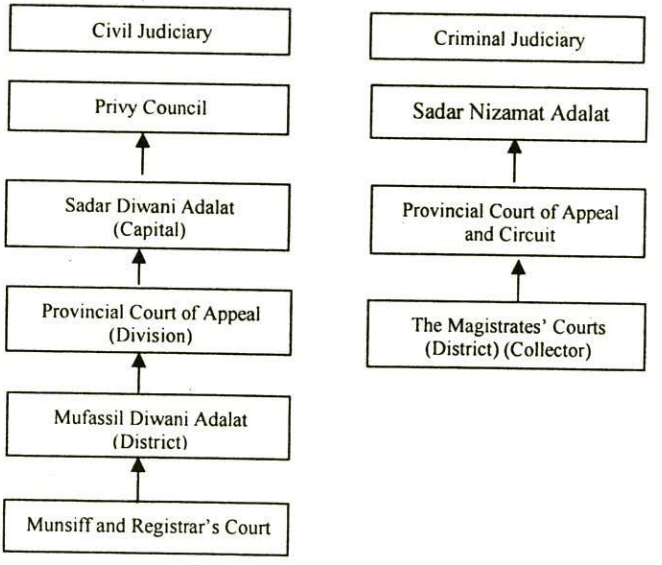
Judicial Plan of 1780: The most important feature of this plan was the separation of revenue from the administration of justice. The Provincial Council was divested of their judicial work and were to confine themselves only to the collection of revenue. A separate Provincial Diwani Adalat was established in each of the six divisions. This adalat was presided over by a servant of the company known as the Superintendent of the Diwani Adalat. The decision of this court were final in cases involving up to Rs. 1000. In matters of higher value appeal lay to the Sadar Diwani Adalalt. The structure of civil judiciary took the following shape:



Judicial Reforms by Lord Cornwallis (1787-1793):

In 1781 Elijah Empay who was the Chief Justice of the Calcutta Supreme Court was appointed by the company as the Chief Justice of the Sadar Diwani Adalat as well. After being so appointed Empay introduced some important reforms like the number of Mufassil Diwani Adalat was increased from 6 to 18; a Civil Code was compiled for the guidance of the Sadar Diwani and Mufassil Diwani Adalat. Before any further improvement could be done Justice Empay was recalled by the British Parliament to explain his conduct in accepting two posts at the same time and one being subordinate to the Governor-General and Council.

After Empay Lord Cornwallis introduced judicial changes in three phases- in 1787; in 1790 and in 1793. After his scheme of 1793 the judicial structure took the following look:



Appeal to the Privy Council: It was the Act of Settlement 1781 which for the first time made provisions for appeal to the Privy Council from Sadar Diwani Adalat in civil suits valuing Rs.50,000 or more.

Provincial Court of Appeal was established in place of four Courts of Circuits in four divisions in the scheme of 1790. The predecessor of this court was the Provincial Diwani Adalat under the plan of 1780. These four appeal courts had jurisdiction to try both criminal and civil suits. Suits were sent to them by the Government or Sadar Diwani Adalat. They could also entertain original

suit which a Mufassil Diwani Adalat referred to them. They also heard appeals from all decisions of the Mufassil Diwani Adalats.

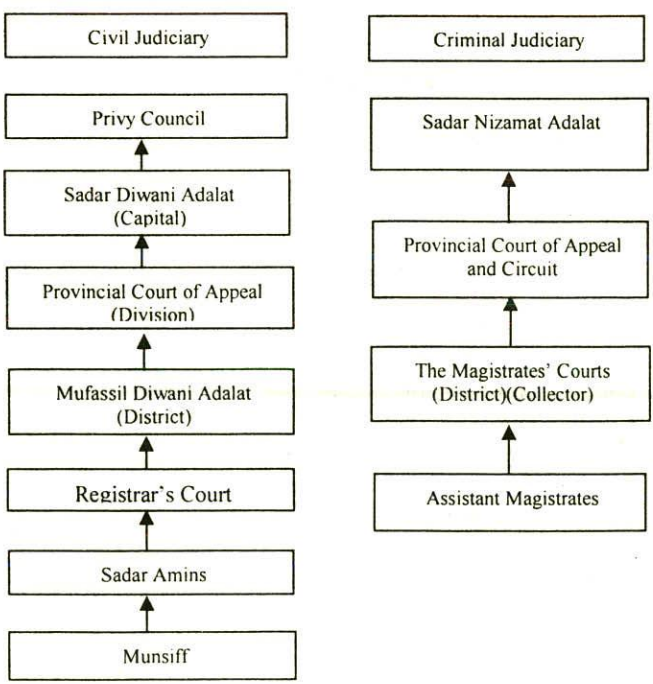
Magistrate's Courts were not a separate tire of court; magisterial powers of the collectors was shifted to the Mufassil Diwani Adalat. Thus unlike earlier the Mufassil Diwani Adalat was to exercise dual functions- civil and criminal.

Registrar's Court was a subordinate court run by a servant of the company. It heard cases up to value of Rs.200. Up to Rs.25 the Registrar's court's decision was final and in case of more than Rs. 25 appeal lay to the Provincial Court of Appeal.

Munsiff's Court was established within 10 miles of the residence of the defendant to bring justice nearer to the people and to save them from inconveniences of attending the diwani adalat. This court presided over by tehsilder, landholders, farmers etc native commissioner heard cases up to Rs.50 in value.

Judicial Reforms by Lord Hastings (1814)

Though reforms were made by Sir John Shore in 1795, Lord Wellesley in 1798 and Lord Minto in 1812, the big change was done by Lord Hastings in 1814 which were as follows:



Registrar's Court established in 1793 had jurisdiction to hear cases up to Rs.500 during the time of Hastings.

Sadar Amin's Court was established by Wellesley at each district headquarters was to decide cases up to Rs.100 which was raised up to Rs.150 by Hasting.

Munsiff's Court was established by Wellesley in every thana to decide cases up to Rs.50 which was raised up to Rs.64 by Hastings.

In 1796 the District Magistrates, i.e, Mufassil Diwani Adalat were authorised to employ their assistants in execution of their duties. In 1807 Lord Minto enhanced the power of the District Magistrates so as to enable them to award sentences up to six months' imprisonment with a fine not exceeding Rs.200 and in default, a further period of imprisonment not exceeding six months. Thus the entire period of imprisonment under the sentence of a District Magistrate could in no case exceed one year. Cases deserving severe punishment than this had to be referred to the Court of Circuit for trial.

Reform by Lord Bentick (1828-1835)

(a) Provincial Court of Appeal was abolished and the original jurisdiction of the District Diwani Adalat became unlimited.

(b) Registrars no longer had any judicial power.

(c) A new court of Provincial Sadar Amin was created with native judges at every district. This court had jurisdiction to try cases up to Rs.1000-5000.

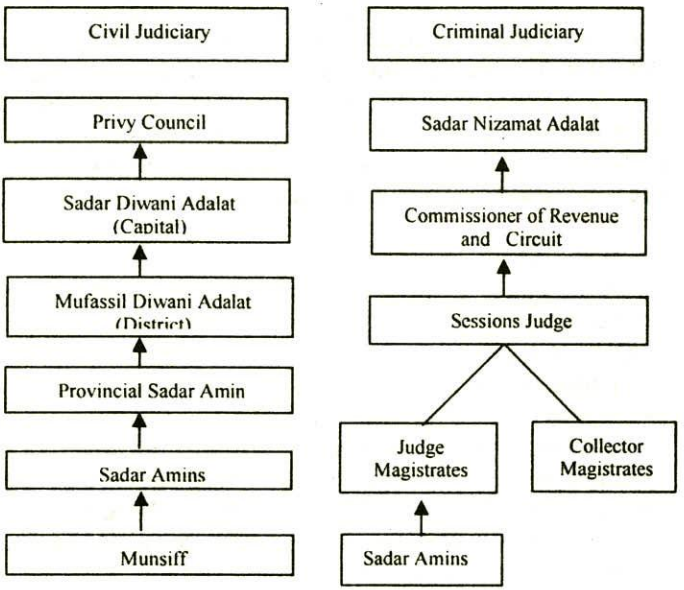
(d) Sadar Amins were given criminal jurisdiction by Lord Hastings In 1821. The District Magistrates could refer petty criminal cases for trial and punishment to Sadar Amins.

(e) Earlier collectors were devoid of any judicial power. However, in 1821 Hastings gave collectors magisterial powers. As a result, two types of district magistrates' court appeared: Judge-Magistrates and Collector-Magistrates.

(f) Circuit Courts were abolished and in their place Commissioner of Revenue and Circuit were appointed at each division. They were under the control of the Sadar Nizamat Adalat in their judicial functions and to the Board of Revenue in their revenue duties. These Commissioners had superintendence and control over the magistrates, police, collectors and other executive revenue officers. They were to exercise powers vested in the previous courts of circuits. The Commissioners were also to conduct sessions and for this purpose they were to exercise all powers and authority hitherto exercised by the Circuit Court. With this new arrangement coming into force, the Provincial Courts of Appeal were to cease to act as Circuit Courts. A Commissioner was therefore loaded with triple functions: he had to supervise collection of revenue, superintend police and try criminal cases. As a result of this pressure of the Commissioners Lord Bentinck by the regulation No VIII of 1831 permitted the Commissioners to invest the Sadar Diwani Adalats power to conduct sessions. The Sessions Judges so appointed were to try cases committed to them by the Magistrates. As the Commissioners were generally unable to manage the sessions in addition to their duties, so trial of criminal cases invariably came to be transferred to the judges of the district adalats. Thus were born the District and Sessions Courts which subsists even today and exercise judicial functions in both civil and criminal matters.

(g) The jurisdiction of the Munsiff court was increased to Rs.300 and Sadar Amins to Rs.1000.

The structural shape of the judiciary came to be as follows:



The above structure of the judiciary remained intact until the establishment of the High Court in 1861 under the unification plan. As mentioned earlier, after the adoption of the Civil Courts Act 1887 and the Code of Criminal Procedure 1898 both civil courts and criminal courts were re-organised and these two Acts are the legal basis of the present system of courts in Bangladesh.

Pakistan Period

As mentioned earlier, with the adoption of the Constitution of 1956 the highest court in Pakistan became the Supreme Court of Pakistan and the High Courts were retained at provinces as earlier. The subordinate courts were the same as in 1947. After the adoption of the Constitution of 1962 the whole judicial structure was the same as under the Constitution of 1956.

CHAPTER THREE

STRUCTURE AND FUNCTIONING OF COURTS IN BANGLADESH: THE SUPREME COURT

CHAPTER III

STRUCTURE AND FUNCTIONING OF COURTS IN BANGLADESH: THE SUPREME COURT

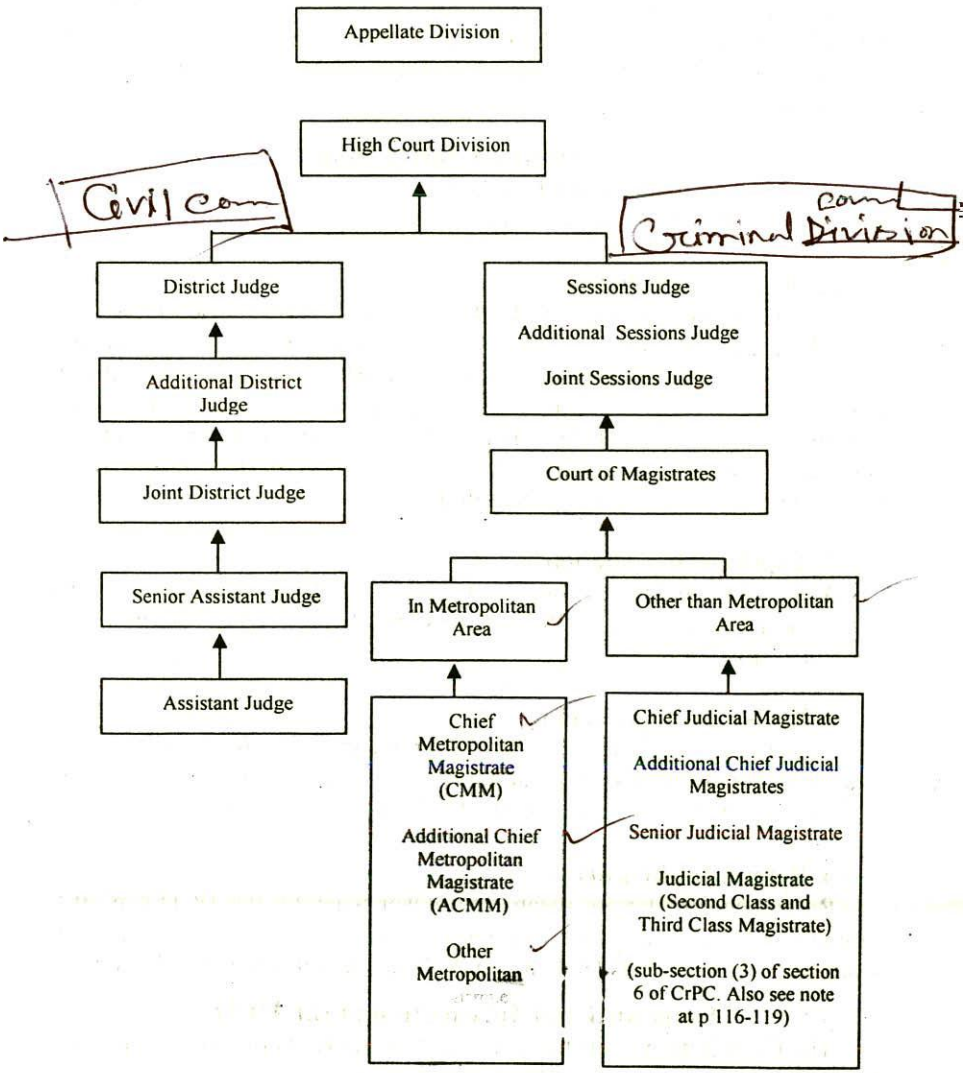
As mentioned in the previous chapter the present legal system of Bangladesh owes its origin mainly to 200-year British rule in Indian Sub-Continent. The present court structure particularly the subordinate judiciary in both civil and criminal side has their legal basis in the Civil Courts Act, 1887 and the Criminal Procedure Code, 1898 as amended up to 2009. Apart from these two pieces of legislation, the Constitution of Bangladesh provides the structure and functioning of the Supreme Court comprising the High Court Division and the Appellate Division which are also called the constitutional courts. There are some other special laws providing for the basis of some special courts like Juvenile court, Labour Court, Family Courts, Special Courts, VAT Appeal Tribunal, Administrative Tribunal etc. For better understanding of students courts of law in Bangladesh will be discussed in the following three heads of which the first head is the subject matter of this chapter and the second head is the subject matter of the next chapter (chapter IV) and the third head will be discussed in Chapter V:

a. The Supreme Court of Bangladesh (Constitutional Courts;
b. Civil and Criminal Courts of law under subordinate hierarchy; (Courts of Sessions and District Judges Courts); and
c. Tribunals and Special Courts of law under various special legislation.

The Supreme Court and the General Hierarchy of Ordinary Courts

These courts include all the courts shown in the diagram at next page. The general hierarchy includes both civil and criminal courts. At the top of the hierarchy is the Supreme Court of Bangladesh. Article 94(1) of the Constitution provides that 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.

General Hierarchy of Courts in Bangladesh at a glance



The High Court Division: Powers and Functions

According to Article 101 there are two sources of powers and jurisdiction of the High Court Division: the Constitution and ordinary law. Hence the jurisdiction of the High Court Division may be divided into two categories: ordinary or general jurisdiction and Constitutional jurisdiction.

Ordinary Jurisdiction

Jurisdiction conferred on the HCD by any ordinary law is its ordinary jurisdiction which may be of following types:

1. Original Jurisdiction

Original jurisdiction of the HCD means that jurisdiction whereby it can take a case or suit as a court of first instance. It is for the ordinary laws (laws passed by parliament) to prescribe what particular subject matter will come under the ordinary jurisdiction of the HCD. For example, the Companies Act, 1913, the Admiralty Act, 1861 and the Banking Company's Ordinance, 1962 etc. have conferred on the High Court Division the ordinary jurisdiction.

2. Appellate Jurisdiction

Any law may confer on the HCD appellate jurisdiction on any matter. For example, the CrPC and the CPC have conferred on the HCD appellate jurisdiction.

3. Revisional Jurisdiction

Revisional jurisdiction of the HCD means the power whereby it examines the decisions of its subordinate courts. For example, section 115 of the CPC has conferred on the HCD the revisional power.

4. Reference Jurisdiction

Reference jurisdiction means the power whereby the HCD can give opinion and order on a case referred to it by any subordinate court. For example, section 113 of the CPC gives the HCD reference jurisdiction.

Constitutional Jurisdiction of the HCD

The Constitution itself has conferred on the HCD the following three types of jurisdictions:

A. Writ Jurisdiction;
B. Jurisdiction as to Superintendence and Control over courts; and
C. Jurisdiction as to Transfer of Cases.

A. Writ Jurisdiction

The Constitution has conferred on the HCD original jurisdiction only in one case and this is the field of writ matters. The basis of writ jurisdiction is Article 102 of the Constitution. Writ jurisdiction means the power and jurisdiction of the HCD under the provisions of the Constitution whereby it can enforce fundamental rights as guaranteed in part III of the Constitution and can also exercise its power of judicial review. Detailed discussion on writs is available in this author's another book titled "Constitution, Constitutional Law and Politics: Bangladesh Perspective" though a brief discussion is given here.

Writ: Writ means a written document by which one is summoned or required to do or refrain from doing something. Historically writ originated and developed in British legal system. As defined by Blackstone, 'writ is a mandatory letter from the king-in-parliament, sealed with his great seal, and directed to the Sheriff of the country wherein the injury is committed or supposed so to be, requiring him to command the wrongdoer or party caused either to do justice to the complainant, or else to appear in court and answer the accusation against him."[1] Initially writs were royal prerogatives. Since only the King or Queen as the fountain of justice could issue writs, they were called prerogative writs. "They were called prerogative writs because they were conceived as being intimately connected with the rights of the crown."[2] The king issued writs through the court of Kings' Bench or the Court of Chancery. The prerogative writs were five in number—Habeas Corpus, Certiorari, Prohibition, Mandamus, and Quo-Warranto. The King issued them against his officers to compel them to exercise their functions properly or to prevent them from abusing their powers. Subjects being aggrieved by the actions of the king's officials came to the King and

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1 Quoted by, Pirzada, Sharifuddin, *Fundamental Rights and Constitutional Remedies in Pakistan, (Lahore: All Pakistan Legal Decisions, 1966),* P.417

2 Smith's Judicial Review of Administrative Action, P. 167, Quoted by, Amin Ahmed, J. *Judicial Review of Administrative Action in Pakistan.*, (Dhaka University : 1969), P. 33

appealed for redress. And the King through the above mentioned two courts issued them against his officials to give remedies to his subjects. Gradually as the governmental functions increased and the concept of rule of law emerged and the courts became independent, these writs came to be the prerogatives of courts instead of the King and lastly they came to be the prerogatives of the people, for they are now guaranteed rights in the constitutions of many countries and citizens can invoke them as of right.

1. Writ of Habeas Corpus

The word 'Habeas Corpus' means 'have his body' i.e. to have the body before the court. So it is a kind of order of the court that commands the authorities holding an individual in custody to bring that person into court. The authorities must then explain in the court why the person is being held. The court can order the release of the individual if the explanation is unsatisfactory. Thus the writ of 'Habeas Corpus' is a process for securing the personal liberty of the subjects by affording an effective means of immediate release from unlawful or unjustifiable detention, whether in prison or in private custody.[1] This writ is the most important weapon forged by the ingenuinity of man to secure the liberty of the individual. There is no judicial process more familiar or important than this. Lord Acton points out that it is often said that the British Constitution "attained its final perfection in 1679 when Habeas Corpus Act was passed".[2]

2. Writ of Mandamus

Literally the term 'mandamus' means 'we command' and reminds one of the times when the King of England "as the autocratic head of a vast administrative system had occasion to mandamus his subjects many

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1 *Zabrivsky* v *General Officer* 1947 All C246 Quoted by Pirzada, *Ibid*, P. 435

2 *Essays on Freedom and Power*, P. 54, Quoted by Hidayatullah. M, *Democracy in India and Judicial Process*, (New Delhi: Asia Publishing House, 1965) P. 76
The application for writ of *habeas corpus* is one and an application for bail is another. Both secure the freedom of the individual in different ways. Every person who is placed under arrest is entitted to know the reason, to have assistance of counsel of his choice and to have his case heard. These rights are fundamental to liberty and they can be enforced by the writ of *habeas corpus*.

times in the course of the day". In Halsbury's Laws of England[1] mandamus is described as follows:

> The order of mandamus is an order of a most extensive remedial nature, and is in form, a command issuing from the High Court of Justice directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertaining to his or their office and is in the nature of public duty.

Thus it is clear that when a court or tribunal or an authority or a person has refused or failed to perform his statutory obligation, it is the writ of mandamus by which the higher court can compel the authority or court or person to do his statutory obligation. So mandamus is a positive remedy.

3. Writ of Prohibition

Prohibition is an original remedial writ, as old as the common law itself. Originally the primary purpose of prohibition was to limit the jurisdiction of the ecclesiastical courts. Prohibition as a writ means one which prevents a tribunal possessing judicial or quasi-judicial powers from exercising jurisdiction over matters not within its cognizance. Thus prohibition is originally a judicial writ since it can be used against a judicial or quasi-judicial body and not against an administrative body or public corporation or body. But no longer it remains limited to be used only against judicial and quasi-judicial body. The wording in 1962 Constitution of Pakistan and also in present Bangladesh Constitution makes it clear that this writ can be used against any public body. It is thus clear that when a court, or a tribunal or an authority or a person is about to violate the principles of natural justice[2] or is about to abuse the power or is about to act in excess of its jurisdiction, the higher court by issuing a writ of prohibition can prohibit the tribunal, court or authority from doing such act. So prohibition is a preventive remedy.

4. Writ of Certiorari

The term 'certiorari' means 'to be certified' or 'to be more fully informed of'. The writ of 'certiorari' is so named because in its original

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1 Vol. 11 3rd ed. Para 159, P.84

2 The Principle of natural justice basically means two principles :
i) No one should be condemned unheard; &
ii) No one can be a judge of its own cause.

form it required the King 'should be certified' of the proceedings to be investigated. This writ was drawn up for the purpose of enabling the Court of King's Bench to control the action of inferior courts and to make it certain that they should not exceed their jurisdiction; and therefore, the writ of certiorari is intended to bring into the High Court the decision of inferior tribunal, in order that the High Court may be certified whether the decision is within the jurisdiction of the inferior courts.[1]

Initially at common law certiorari used to be used either form the King's Bench or the Chancery for the purpose of exercising superintending control over inferior courts. So certiorari was necessarily a judicial writ at its initial stage. But gradually, the jurisdiction was enlarged to include within its fold all authorities performing judicial, quasi-judicial and even administrative functions. Thus certiorari is no longer a judicial writ. When a court or a tribunal or an authority or a person has already violated the principle of natural justice, or misused the power or acted in excess of its jurisdiction, the higher court by issuing certiorari can quash that act i.e. can declare that act illegal. This is certiorari.

Distinction between Certiorari and Prohibition

1. The grounds of both the writs are same but the distinction lies in that prohibition is a preventive remedy while certiorari is a curative or corrective remedy. Prohibition applies where the authority is about to misuse the power whereas certiorari applies where the authority has already abused the power.

2. A writ of certiorari will be issued when the proceeding is closed, while an order of prohibition can be issued only so long as the proceeding remains pending. It cannot be issued after the authority has ceased to exist or becomes *functus officio.*[1]

3. Prohibition is issued with a view to stopping an act at its starting whereas certiorari is to quash or declare the act illegal.

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1 Scrutton, L.J. Quoted by, Pirzada, *Ibid,* P. 421

1 *Hari Vishnu Kamath v Ahmed Ishaque* AIR 1955 SC 233

5. Writ of Quo Warranto

The term "quo-warranto" means "by what warrant or authority." Quo-warranto is a writ by which any person who occupies or usurps an independent substantive public office or franchise or liberty, is asked to show by what authority he claims it, so that the title to the office, franchise or liberty may be settled and unauthorised occupants be ousted by judicial order. More precisely, when a person illegally holds a public office created by law, the higher court may, on the application of any person, by issuing quo-warranto, ask the person to show on what authority he holds the office and can make him not to hold such office further.

The names of various writs have not been used in Article 102 but the true contents of each of the major writs have been set out in self-contained propositions.

Background

In British India a Supreme Court was first established in 1774 under the Regulating Act of 1773. This court was first empowered to issue prerogative writs. Later two Supreme Courts were established in Madras (in 1800) and Bombay (in 1823) and these two courts were also given writ power. In 1862 three Supreme Courts were abolished and in their place three High Courts were established. These three High Courts were empowered to issue prerogative writs. After the partition in 1947 India and Pakistan became two independent Dominions. The Indian Constitution adopted in 1949 gave both the Supreme Court and the High Courts power to issue writs and specific names of all writs were incorporated in both Articles of 32 (for the Supreme Court) and 226 (for the High Courts). Under the 1956's Constitution of Pakistan both the Supreme Court and the High Courts were given power to issue writs and specific names of all writs were incorporated in the Articles 22 for the Supreme Court and 170 for the High Courts. But it was 1962's Constitution of Pakistan where for the first time a change was introduced in writ matters. Unlike earlier the Supreme Court was not given any original writ jurisdiction. Only the High Courts were empowered under Article 98 to issue writs but the particular names of specific writs were not used in wording of this Article. Provisions were made instead where

true contents of each of the major writs had been set out in self-contained propositions. As to this change Cornelius, C.J. said:

> "Now in Pakistan we have Article 98, and the ancient names of the writs have been eliminated from the Constitution, although the categories distinguish themselves easily under those names, and they will always be used with their specific meanings in judgments. In Article 98 true content of each of the major writs has been set out in the long form of words. The object probably was to attain certainty as to the limits within which the courts may act. Previously, in each case the courts referred to precedents from England, the United States, India and several other countries, to determine whether they had power to interfere in the case before them. It is perhaps supposed that this may not be necessary now that the powers are stated not by label, but by full expression. However, it is to be remembered that the earlier precedents will lose their value as guidance. In the new article there are verbal changes in respect of the availability of the writ to public servants, for the protection of their rights in the public service."[1]

Following the instance of the Pakistan 1962 Constitution the Constitution makers of our country also did not incorporate the specific names of various writs in Article 102 of the Constitution; rather contents of each of the writs have been kept in self-contained provisions. Why have the specific names of various writs been omitted?

No specific reasons have been stated by the Constitution makers though it is assumed that for following two reasons the names of various writs were omitted in 1962 Constitution of Pakistan and the same applies to the Bangladesh Constitution.

First, in Britain the Administration of Justice (Miscellaneous Provisions) Acts, 1933 and 1938 were passed whereby *mandamus*, *prohibition, Certiorari* and *quo-warranto* were abolished as writs. Of these *mandamus, prohibition,* and *certiorari* have been turned into orders and quo-warranto into injunction. Thus in Britain there is only one independent writ and it is *habeas corpus.* This might have influenced the Constitution makers of 1962 Constitution of Pakistan in not using the specific names of various writs.

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1 PLD 1964 'Journal Section', PP.74-79.

Second, some writs have limited scope in their application. For instance, *prohibition* and *certiorari* these—two writs are basically judicial writs and are applicable only in respect of judicial and quasi-judicial bodies. Thus if the specific names of *prohibition* and *certiorari* are used, then the courts will not be able to apply them to control administrative actions for which separate procedure is to be provided for. To avoid this inconveniences the specific names of writs have not been incorporated; rather provisions have been inserted so that the contents of those writs are retained and the control of administrative actions may, as well, be possible by the same device. The words of Munir Qadir, C.J. is pertinent to mention in this respect—

> "The present Constitution by its 98th Article, appears to have made an attempt to reduce (the matters of writs) into self-contained propositions. ..... In the course of their evolution some distinguishing incidents had come to attach separately to some of these writs. Those distinguishing features, it seems, have not been incorporated in Article 98, apparently because they were not regarded as being of the essence of the remedy. The conditions of exercise of jurisdiction in relation to the various writs have thus become more uniform. As a consequence, in some cases the field covered by the earlier writ has become somewhat enlarged .... . The writ of *certiorari,* for example, was available originally in respect of judicial or quasi-judicial determination only. It was not available in respect of non-judicial determinations. Article 98 has not preserved any such distinction, with the result that all orders passed in excess of lawful authority, whether by judicial, quasi-judicial or non-judicial functionaries, are equally liable to be declared as being of no legal effect."[1]

Now we will investigate Article 102 of our Constitution to see how the true contents of each of the major writs have been set out in self-contained propositions.

As Article 102 proceeds—

> "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 function in the affairs of the Republic or of a local authority *to refrain from doing that which he is not permitted by law to do."*

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1 *Mahboob Ali Malik v Province of West Pakistan* PLD 1963 Lah 575.

This italic part of the section contains the true idea of prohibition. Here "which he is not permitted by law" means that he may be about to misuse or abuse his power or to act in excess of his jurisdiction prescribed by law. In such a case the High Court Division, on application, may issue the writ of prohibition with a view to prohibiting or refraining the person concerned from doing that act.

The same sub-Article continues—

" ..... *to do that which he is required by law to do."*—This part of the Article contains the true concept of mandamus. "to do that which he is required by law to do" means that the person concerned is under statutory obligation to do something but he has refused or failed to perform his obligations. In such a case the HCD by issuing the writ of mandamus, can compel the person or authority to perform his statutory obligation.

Now the sub-Article 102(2) (a)(ii) proceeds—

"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." Here lies the concept of certiorari.

Now the sub-Article 102(2) (b)(i) proceeds—

"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". Here the very concept of the writ of *habeas corpus* is hidden.

Lastly sub-Article 102(2) (b)(ii) states—

"requiring a person holding or purporting to hold a public office to show under what authority he claims to hold that offce" —this part contains the concept of quo-warranto.

B. Jurisdiction as to Superintendence and Control

Article 109 of the Constitution states that the HCD shall have superintendence and control over all courts and tribunals subordinate to it. This power is also called the supervisory power of the HCD. So the condition for supervisory power is that the court or tribunal must be subordinate to the HCD. Now a question necessarily arises—when is a

court or tribunal said to be subordinate to the HCD? To be subordinate to the HCD the court or tribunal must be subject to its either appellate or revisional jurisdiction. In other words, the courts and tribunals against whose decision either appeal or revision lie before the HCD are called subordinate courts and tribunals to the High Court Division.

Nature of the Supervisory Power of the HCD

1. The supervisory power of the HCD as conferred by Article 109 is a Constitutional power. And this power of superintendence is in addition to the power conferred upon the HCD to control inferior courts or tribunals through writs under Article 102. This supervisory power and the revisional power of the HCD under section 115 of the CPC and section 439 of the CrPC are of the same nature. But the revisional powers under the CPC and CrPC are only statutory supervisory powers whereas power under Article 109 of the Constitution is a Constitutional supervisory power. Statutory supervisory power extends to judicial, but not to administrative matters, while the Constitutional supervisory power extends to both judicial and administrative matters.[1] The statutory supervisory power covers only courts but Article 109 covers courts as well as tribunals subordinate to the HCD. The statutory supervisory power can be curtailed by legislation but Constitutional supervisory power under Article 109 cannot be curtailed except by an amendment to the Constitution.

2. The supervisory power under Article 109 is a discretionary power and so no litigant can invoke this power as of right.[2]

3. Being a supervisory power the HCD can apply it *suo motu;* again it can be exercised on application by a party.

4. Under this supervisory power the HCD can interfere in the functioning of subordinate courts or tribunals in the following circumstances :

i) want or excess of jurisdiction.[3]

ii) failure to exercise jurisdiction.[4]

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1 *A.T. Mridha* V. *State* 25 DLR 335

2 *A.B. Sarin* V. *B.C. Patel.* AIR 1951 Bom 423

3 *Gulab Singh* V. *Collector of Farrukhabad* AIR 1953 All 585.

4 *Waryam Singh* V. *Amarnath* AIR 1954 SC 215

iii) violation of procedure or disregard of principles of natural justice.[5]

iv) findings based on no materials,[6] or order resulting in manifest injustice.[7]

Distinction between Writ Power under Article 102 and the Supervisory Power under Article 109

1. The writ power under Article 102 can be exercised only on application by a party, while the supervisory power under Article 109 can be exercised *suo motu* by the HCD without any application by any party.

2. The supervisory power under Article 109 can be exercised only in respect of courts and tribunals subordinate to it. But the writ power under Article 102 can be exercised irrespective of the question whether the court or tribunal is subordinate to HCD. Of course, this writ power is not applicable to those tribunals which comes under the preview of Article 102(5).

3. The supervisory power is purely a discretionary power with the HCD and no litigant can invoke this jurisdiction as of right. But the writ power under Article 102 is not a discretionary power. A person whose fundamental rights have been infringed can file, as of right which is guaranteed in Article 44, an application for enforcement of his rights and if the HCD finds that his fundamental rights have been violated, then it is obligatory on the HCD to give remedy. And if the applicant is not satisfied with the HCDs remedy, he may appeal to the Appellate Division under Article 103 of the Constitution.

C. Jurisdiction as to Transfer of Cases

Under article 110 of the Constitution the HCD may transfer a case form subordinate court to itself. But the condition is that the HCD is to be satisfied that—

i) a substantial question of law as to interpretation of the constitution is involved in the case ; or

ii) a point of general public importance is involved in the case.

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5 *Narayandeju* V. *Labour Appellate Tribunal* AIR 1957 Bom 142

6 *Orissa* V. *Muralidhar* AIR 1963 SC 404

7 *Trimbak Gangadhar* V. *Ramchandra* AIR 1977 SC 1222

If the HCD, on being so satisfied, withdraws a case from a subordinate court, it will take following three alternatives :

i) It may dispose of the case itself; or

ii) It may determine the question of law and return the case to the court from which it has been so withdrawn together with a copy of the judgment of the division on such question, and the court to which the case is so returned, on receipt thereof, proceed to dispose of the case in conformity with such judgment; or

iii) It may determine the question of law and 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 transferred shall, on receipt thereof, proceed to dispose of the case in conformity with such judgment.

Nature of the Power of Transfer of Cases under Article 110

The power of transfer under Article 110 is a discretionary power and so no litigant can invoke this power as of right. This power can be exercised *suo motu* by the HCD or on an application by any party to a suit. Again, the subordinate court before whom the case is pending may also refer the case to the HCD. It is to be mentioned here that the HCD has been given power of transfer of civil suits and criminal cases by the CPC and CrPC under certain circumstances. But this latter power of transfer is a statutory power whereas the power under Article 110 is a Constitutional power.

The Appellate Division: Power and Functions

The Appellate Division of the Supreme Court has no original jurisdiction. As like as the High Court Division the source of jurisdiction of the Appellate Division is also two —the Constitution and ordinary law. But an ordinary law can give the Appellate Division only appellate jurisdiction as stated in Article 103 (4) of the Constitution. For example, section 6A of the Administrative Tribunals Act, 1980 provides that appeal may be preferred to the Appellate Division against the decision of the Administrative Appeal Tribunal by way leave petition.

Constitutional Jurisdiction of the Appellate Division

The Constitution itself has conferred on the Appellate Division the following four types of jurisdictions:

A. Appellate Jurisdiction;
B. Jurisdiction as to issue and execution of process;
C. Jurisdiction as to review; and
D. Advisory Jurisdiction.

A. Appellate Jurisdiction

The constitutional appellate jurisdiction of the Appellate Division applies only against the judgment, decree, order or sentence of the HCD as stated in Article 103 of the Constitution. This constitutional appellate jurisdiction has two dimensions:

(a) Cases where appeal lies as of right; and
(b) Cases where appeal can be made if the Appellate Division grants leave to appeal.

(a) Under Article 103 an appeal to the Appellate Division from the judgment, decrees, order or sentence of the High Court Division lies as of right in the following three cases:

(i) Where the High Court Division certifies that the case involves a substantial question of law as to the interpretation of the Constitution; or
(ii) Where the HCD sentences a person to death or imprisonment for life; or
(iii) Where the High Court Division punishes a person for its contempt.

It is stated in the last line of Article 103(2) of the Constitution that parliament may by law add to this list other cases in which appeal as of right may be filed.

(b) In all other cases except the abovementioned three cases appeal shall lie from the judgment, decree, order or sentence of the HCD only if the Appellate Division grants leave to appeal.

B. Jurisdiction as to Issue and Execution of Process

This power of the Appellate Division is also called power to do complete justice. Article 104 of the Constitution provides that the Appellate Division shall have power to issue such orders or directions as may be necessary for doing complete justice in any case or matter

pending before it. This power is discretionary and extra-ordinary in nature. The Appellate Division may use this power *suo motu* or on the application of any party. This power has not been circumscribed by any limiting words and no attempt has been made to define or describe 'complete justice.' This is because any such attempt would certainly defeat the very purpose of the conferment of such power.

C. Jurisdiction as to Review

Article 105 of the Constitution empowers the Appellate Division to review its own judgment or order but this power is to be exercised—

(i) Subject to the provisions of an Act of parliament; and

(ii) Subject to the rules made by the Appellate Division.

Accordingly, the Supreme Court of Bangladesh (Appellate Division) Rules were framed by the Appellate Division in 1988. According to this Rules, the Appellate Division may either of its own motion or on the application of a party to a proceeding, review its own judgment or order in a civil proceeding on grounds similar to those mentioned in Order XLVII Rule 1 of the Code of Civil Procedure and in a criminal proceeding on the ground of error apparent on the face of the record (Rule 1 of Order XXVI) of the above Rules.

D. Advisory Jurisdiction

Article 106 provides that the President may seek the opinion of the Appellate Division on a question of law which has arisen or is likely to arise and which is of such nature and of such public importance that it is expedient to obtain the opinions. There are some important features of this advisory jurisdiction:

(i) For its advisory opinion only a question of law may be referred to the Appellate Division and not a question of fact.[1]

(ii) It is not obligatory on the part of the Appellate Division to express its opinion in the reference made to it. Because it has a discretion in the matter and may, in a proper case, for good reasons, decline to express any opinion on the question

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[1] The Indian Constitution, of course, permits the President to seek opinion on questions of both law and fact. [Art. 143(2)]

submitted to it. Such a situation may perhaps arise if purely socio-economic or political questions having no constitutional significance are referred to the court or a reference raises hypothetical issues which it may not be possible to answer without a full setting of facts.

(iii) The opinion rendered is essentially in the nature of an advice and is not binding as a judicial pronouncement and is also not binding on the referring authority.[2]

The advisory jurisdiction of the Supreme Court has its origin in the Government of India Act, 1935 section 213 of which is almost in the same terms as in Article 106 of our Constitution providing for Reference to the Federal Court by the Governor-General. Similar provision was there both in the Constitution of 1956 (Article 162) and of 1962 (Article 59) of the then Pakistan. Constitutions of India (Article 143), Pakistan (Article 186), Sri Lanka (Article 129) and Malaysia (Article 130), among other countries, bear more or less identical provisions. The Supreme Court of Canada also exercises advisory jurisdiction. Under section 60 of the Canadian Supreme Court Act, 1906 the Governor-General-in-Council may refer important question of law concerning certain matters to the Supreme Court for its advisory opinion.

On the other hand, there is no provision similar to this in the US Constitution or in the Australian Constitution. The US Supreme Court has consistently refused to render advisory opinions on abstract legal questions as it does not wish to exercise any non-judicial function. Giving such an advice would involve the court in too direct participation in legislative and administrative processes. The reason of this reluctance is formally based on the doctrine of separation of powers which forms one of the bases of the US Constitution. In 1793, when Secretary of State Jefferson wanted to know whether the Supreme Court would give advice to the President on questions of law arising out of certain treaties, the Supreme Court refused saying that there was no such provision in the Constitution, and that it was not proper for the highest court to decide

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2 In *Re Estate Duty*, AIR 1944 FC 73

questions extra-judicially. Again, in *Muskrat* V. *US*[1] the court refused to give an advisory opinion arguing that under the Constitution its jurisdiction extends to a 'case or controversy' and so it cannot give an opinion without there being an actual controversy between adverse litigants. In Britain, the highest court is the House of Lords but it has no advisory jurisdiction. It is the Judicial Committee of the Privy Council which exercises this advisory power.

Though there are weighty arguments both for and against this advisory power of the Supreme Court, normally it is not the function of the court to give advice to the executive and hence the practice of invoking advisory judicial opinions is not universally approved.

In India till 1978 seven references have been made to the Supreme Court under Article 143(1) of the Indian Constitution.[1] In Bangladesh during the last over 32 years since the Constitution came into force, only one reference has been made to the Supreme Court under Article 106 of the Constitution. This was the reference of 4th July, 1995. In the reference the President of Bangladesh asked the Appellate Division for its opinion on the following:

(i) Whether the walkout and non-return to parliament by all the opposition parties be construed as 'absent' form parliament?

(ii) Whether the boycott of parliament means 'absent' from parliament without leave of parliament resulting in the vacation of the seats?

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1 (1911) L Ed 246, 252 Ref : Jain, M.P. *Indian Constitutional Law*, 4th ed. P. 144

1 Seven references are following :
1. *In re Delhi Laws Act* in 1951. AIR 1951 SC 332
2. *In re Kerala Education Bill* in 1958. AIR 1958 SC 956
3. *In re Berubari* in 1960, AIR 1960 SC 845
4. *In re the Sea Customs Act* in 1962, AIR 1963 SC 1760
5. *Keshav Singh* Case in 1965, AIR 1965 SC 745
6. *In re Presidential Poll* in 1974. AIR 1974 SC 1682
7. The Special Court Refrence Case in 1978, AIR 1979 SC 478

(iii) Whether ninety consecutive sitting days be computed excluding or including the period between two sessions intervened by prorogation of the parliament?; and

(iv) Whether the speaker of parliament will compute and determine the period of absence?

Accordingly the Appellate Division after a hearing of some prominent legal minds ('amicus curia') gave its opinion.[2]

2 See Special Referrence No. 1 of 1995, 47 DLR (AD) (1995) P.111

CHAPTER FOUR

STRUCTURE AND FUNCTIONING OF COURTS IN BANGLADESH: SUBORDINATE COURTS UNDER GENERAL HIERARCHY

CHAPTER IV

STRUCTURE AND FUNCTIONING OF COURTS IN BANGLADESH: SUBORDINATE COURTS UNDER GENERAL HIERARCHY

Lower Judiciary separate from the Executive Organs:

In line with the land mark judicial decision by the Appellate Division in *Masder Hossain* case back in 1999 the Caretaker Government headed by Dr. Fakhruddin Ahmed amended the Criminal Procedure Code, 1898 in November, 2007 and along with these changes the lower judiciary was separated from the organs of the executive. Although the term 'executive magistrate' still exists in the Code of Criminal Procedure, 1898, 'executive magistrates' are no longer vested with any judicial functions; their functions are administrative in nature. However, it is to be noted that by the Mobile Court Ordinance, 2007 (Ordinance No. 31 of 2007) some judicial powers have been given to the executive magistrates. After November 1, 2007 the basic laws with regard to the separation of judiciary and newly constituted Judicial Service Commission are as follows:

(1) Bangladesh Judicial Service Commission Rules, 2007.
(2) Bangladesh Judicial Service Commission (Pay-Commission) Rules, 2007.
(3) Bangladesh Judicial Service (Constitution of Service, Appointment to the Service, Suspension, Dismissal, and Removal) Rules, 2007.
(4) Bangladesh Judicial Service Commission (Posting, Promotion, Grant of Leave, Control, Discipline and other Conditions of Service) Rules, 2007.
(5) Code of Criminal Procedure, 1898 (Amendment) Act, 2009.

(6) Mobile Court Ordinance, 2007 (This Ordinance has lapsed as the same has not been passed by the parliament in its first session; however, the pending bill is likely to be passed in the next session).

The Code of Criminal Procedure Amendment Act, 2009 and Cognizance Power of Executive Magistrates:

The 9th parliament adopted and passed the contents of the both the Code of Criminal Procedure Amendment Ordinances passed by the Caretaker Government headed by Dr. Fakhruddin Ahmed with one major exception. This exception is the addition of sub-section (4) of section 190 of CRPC which states as follows:

> "(4) Notwithstanding anything contained to the contrary in this section or elsewhere in this Code, the Government may, by an order specifying the reasons and the period stated therein, empower any Executive Magistrate to take cognizance under clause (a), (b) or (c) of sub-section (1) of offences and the Executive Magistrates shall send it for trial to the court of competent jurisdiction."

This new sub-section containing a *non-obstante* clause has left the law inconsistent with the directives in *Masder Hossain* case. Judicial Service Association as well as the lawyers community in general expected that the two ordinances would be passed as laws by the parliament without any amendment as this would be in line with the directives in *Masder Hossain* case. On the other hand, the parliamentary standing committee on law, in line with the mounting pressure from the admin cadre, decided to recommend that the parliament vest authority in the government to empower executive magistrates to take cognizance in 'extra-ordinary circumstances' or 'in all circumstances' and then to send the same for trial to judicial magistrates. The Committee has also suggested that this power of cognizance will be given to executive magistrates for maintaining law and order situation and this has nothing to do with the trial and giving punishment. This easy logic sounds easy but the

consequence will lead to a very sordid picture in ensuring rule of law in the country. The strength of this easy logic of mere cognizance power is being cemented by another argument that the provisions in Article 22 of the Constitution on the basis of which separation has been done are not judicially enforceable.

Cognizance Power and Separation of Judiciary:

Giving cognizance power to executive magistrates will give rise to a very usual question: will it be an executive and/or administrative power or judicial power? It has been repeatedly held by our apex court in line with consistent decisions in Indian Sub-continent that taking cognizance is a judicial power and any misuse or abuse of such power is to be corrected thorough judicial process. Usually this is done by filing an application in the High Court Division under section 561A of the CrPC. However, an executive power cannot be questioned in 561A application. Thus if cognizance power is given to executive magistrates, how will the apex court exercise its supervisory power? So the accommodation of powers between judicial and executive magistrates will be difficult. Let me give an example. An executive magistrate refuses to take cognizance of a petition or FIR. What will be the remedy for the petitioner or informant? Where will he file application against the decision of the executive magistrate, given that an executive magistrate is not under the jurisdiction of judicial authorities? As taking cognizance is a judicial proceeding, a revisional application to an upper judicial organ is always possible but if that power is exercised by an executive magistrate, this will not be possible and the ultimate result will lead to power clash between two authorities. Let me give another concrete example. Suppose an executive magistrate has taken cognizance or for taking cognizance set another date and refused bail prayer. What will the remedy for the accused against the rejection of bail prayer? Where will he file prayer for consideration of bail?

Secondly, the CrPC is a general law and the provisions of general law are always subject to the provisions in special laws. Cognizance powers including power of trial are often given to executive or administrative authorities by special laws like Mobile Court Ordinance, 2007, Pure Food Ordinance, 1959, the Animals Slaughter and Meat Control Act, 1957, Prevention of Smoking Act etc. The parliament may give cognizance power to executive magistrates by special law like Special Powers Act if needed in special circumstances but giving a blanket power to take cognizance in a general law like CrPC will mean dependent dispensation of judicial functions like before.

Thirdly, as cognizance power is a judicial power[1], and the same would be exercised by an executive magistrate, he must be armed with subsequent powers associated with it as laid down in section 200 of CrPC which will ultimately lead to a clash with the historic verdict in *Masder Hossain* case as there will no longer remain a separate judiciary. This is because the Appellate Division held in Masder Hossain case that *"judicial service is fundamentally and structurally distinct and separate service from the civil executive and administrative services of the Republic with which the judicial service cannot be placed on par on any account and that it cannot be amalgamated, abolished, replaced, mixed up and tied together with the civil executive and administrative services."* (para 76).

Article 22 of the Constitution and Separation of Judiciary:

Argument is also given that since Article 22 is not judicially enforceable, the separation of judiciary as implemented by the two ordinances amending CrPC by the Caretaker Government are invalid. However, it is to be emphasized that the Appellate Division while delivering its judgment nowhere mentioned that it was giving

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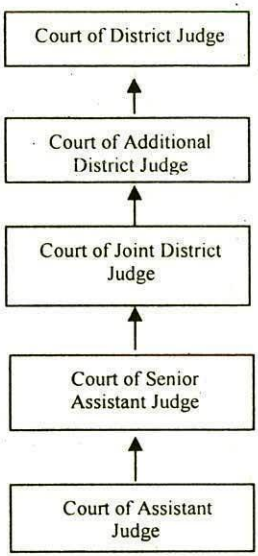
[1] For better understanding of cognizance power and its relation with power of trial, please see pages 169-175 of this book.

directions to government to implement Article 22 although Justice Latifur Rahman referred to this Article in paragraph 78 of the judgment. The decision and directions given in *Masdre Hossain* case are based on interpretation of Articles 115, 116, 116A of the Constitution which are mandatory in nature. Further, like Article 22 there are 18 Articles in the Constitution which are not judicially enforceable. They are not judicially enforceable as such but the Constitution itself makes it clear that these directives shall be applied in making laws by the Government and parliament and they shall act as guide to the interpretation of the constitution and laws of the country. Fundamental principles enunciated in the constitution like Article 22 are not mere homily; they are political commitments to the nation and the elected governments are to oath bound to implement them on priority basis.

Now it remains to be seen how the government will give this judicial power to the executive magistrates and once this power is given the question of legality of such power might come before the apex court by way of writ petition.

To be mentioned here that with the enactment and enforcement of Code of Criminal Procedure, 1898 (Amendment) Act, 2009 and the other four rules as mentioned above, the nature and structure of the subordinate courts in civil side in Bangladesh are as follows:

Subordinate Civil Courts under General Hierarchy



Subordinate Civil Courts under General Hierarchy

Section 3 of the Civil Courts Act 1887 as amended by the Civil Courts (Amendment) Act 2001[2] provides for following five classes of civil courts, namely:

(1) The Court of the District Judge;
(2) The Court of Additional District Judge;
(3) The Court of the Joint District Judge;
(4) The Court of the Senior Assistant Judge; and
(5) The Court of the Assistant Judge.

Every court mentioned above is a separate court and has jurisdiction assigned to it by the Civil Courts Act or any other law

[2] The contents of the Civil Courts Act 1887 have been given in Appendix 1 of this book.

which may be either territorial, original jurisdiction, appellate jurisdiction or transferred jurisdiction (can hear suit or cases when transferred to it).

Territorial Jurisdiction:

Section 13 of the Civil Courts Act, 1887 deals with the local or territorial limits of civil courts.

Power to fix local limits of jurisdiction of courts:

(1) The Government may, by notification of the official Gazette, fix and alter the local limits of the jurisdiction of any Civil Court under this Act.

(2) If the same local jurisdiction is assigned to two or more Joint District Judges or two or more Senior Assistant Judges or Assistant Judges, the District Judge may assign to each of them such civil business cognizable by the Joint District Judge or Senior Assistant Judge of Assistant Judge, as the case may be, as, subject to any general or special orders of the High Court Division, he thinks fit.

(3) When civil business arising in any local area is assigned by the District Judge under sub-section (2) to one of two or more Join District Judges or to one or two or more Senior Assistant Judge or Assistant Judge, a decree or order passed by the Joint District Judge or Senior Assistant Judge or Assistant Judge shall not be invalid by reason only of the case in which it was made having arisen wholly or in part in a place beyond the local area if that place is within the local limits fixed by the Bangladesh Government under sub-section (1).

(4) A Judge of a Court of Small Causes appointed to be also a Joint District Judge or Senior Assistant Judge or Assistant Judge is a Joint District Judge or Senior Assistant Judge or Assistant Judge, as the case may be, within the meaning of this section.

(5) The present local limits of the jurisdiction of every Civil Court under this Act shall be deemed to have been fixed under this section.

Pecuniary Jurisdiction:

(1) The pecuniary jurisdiction of the Assistant Judge is taka 2 lac and of the Senior Assistant Judge is taka 4 lac (section 19 of Civil Courts Act, 1887). That means if a claim in a civil suit is up to taka 2 lac, then the suit must be filed in the Assistant Judge's court. On the other hand, if the value of a claim is above taka 2 lac but does not exceed taka 4 lac, then the claim must be filed in the Senior Assistant Judge's Court.

(2) When the value of a claim exceeds taka 4 lac, it must be filed in the Joint District Judge's court. This is because of the combined effect of section 18 of the Civil Courts Act 1887 and section 15 of the Code of Civil Procedure. Section 15 of the Civil Procedure Code states that every suit must be instituted in the court of the lowest grade competent to try it. Now section 18 of the Civil Courts Act 1887 reads that subject to the provisions of section 15 of the CPC the jurisdiction of a District Judge or Joint District Judge extends to all original suits.

(3) The pecuniary jurisdiction of the Joint District Judge is unlimited. No suit is filed in the Court of District Judge or Additional District Judge as a court of original jurisdiction.

It is thus also clear that the District Judge or the Additional District judge usually do not try original suits. However, under different special laws they have original jurisdiction, for example, section 73 of the Trade Marks Act, 1940 gives the District Judge original jurisdiction to deal with cases under this law.

Jurisdiction to transfer or withdrawal of suits:
According to section 24 of the CPC the District Judge may, on the application of any party or *suo motu*, at any stage-

(i) transfer any suit, appeal or other proceeding pending before it for trial or disposal to any court subordinate to it;

(ii) withdraw any suit or appeal or other proceeding pending in any subordinate court and transfer the same for trial or disposal to any court subordinate to it;

(iii) retransfer the same for trial or disposal to the court from which it was withdrawn.

Jurisdiction to transfer Appeals:
Section 22 provides the following rule with regard to transfer of appeals by the District Judge:

(1) Under its administrative control a District Judge may transfer to any Joint District Judge any appeals pending before him from the decrees or orders of Senior Assistant Judge or Assistant Judge.

(2) The District Judge may withdraw any appeal so transferred, and either hear and dispose of it himself or transfer it to a Court under his administrative control competent to dispose of it.

(3) Additional District Judges discharge functions of a District Judge which the District Judge may assign to them and in that case the Additional District Judges shall exercise the same powers as the District Judge (section 8).

Special Jurisdiction:
Chapter IV with sections 22 to 25A of the Civil Courts Act, 1887 deals with special jurisdiction. This chapter basically covers the following types of special jurisdictions:

(i) Power of the District Judges to transfer appeals (sec 22);

(ii) Jurisdiction imposed by general or special order by the High court Division (sec. 23);

(iii) Power to invest Joint District Judge and Senior Assistant Judge or Assistant Judge with Small Causes Court Jurisdiction (sec. 25).

The first type of jurisdiction has already been discussed. The last two types of jurisdictions are discussed below:

Jurisdiction imposed by general or special order by the High Court Division:

Section 23 of the Civil Courts Act, 1887 provides that the High Court Division may, by general or special order, authorize any Joint District Judge or Senior Assistant Judge or Assistant Judge to take cognizance of, or any District Judge to transfer to a Joint District Judge or Senior Assistant Judge or Assistant Judge under his administrative control any class of those proceedings specified in the order.

The District Judge may withdraw any such proceedings taken cognizance of by, or transferred to, a Joint District Judge or Senior Assistant Judge or Assistant Judge, and may either himself dispose of them or transfer them to a Court under his administrative control competent to dispose of them.

Power to invest Joint District Judge and Senior Assistant Judge or Assistant Judge with Small Causes Court Jurisdiction:

Section 25 provides that the Government may, by notification in the official gazette, confer, within such local limits as it thinks fit, upon any Joint District Judge or Senior Assistant Judge or Assistant Judge the jurisdiction of a Judge of a Court of Small Causes under the Provincial Small Cause Courts Act, 1887, for the trial of suits, cognizable by such Courts, upto such value not exceeding twenty

thousand taka in the case of a Joint District Judge or ten thousand taka in the case of a Senior Assistant Judge whose jurisdiction has been extended under sub-section (2) of section 19 or six thousand taka in the case of any other Assistant judge as it thinks fit, and may withdraw any jurisdiction so conferred.

The Court of District Judge:

This court which is next in the hierarchy down from the High Court Division is headed by a District Judge.

(1) A District Judge usually does not try original suits. This is because of the provision in section 15 of the Code of Civil Procedure that every suit must be instituted in the court of the lowest grade competent to try it. However, under various special laws the District Judge is the only court to try certain cases, like insolvency, probate and administration, Trade Marks Act, 1940 etc.

(2) The District Judge's pecuniary jurisdiction is unlimited. Under sections 8, 11, 22, 23 etc of the Civil Courts Act 1887 he has power to delegate his function or transfer appeal to the Additional District Judge or any other civil court under his administrative control.

(3) Subject to the superintendence of the High Court Division, the District Judge shall have administrative control over all the Civil Courts under the Civil Courts Act 1887 within the local limits of his jurisdiction (section 9).

(4) This court has power to try, transfer, withdraw any suit, appeal or other proceedings in any civil courts below the High Court Division (section 24 Civil Procedure Code).

(5) The appellate jurisdiction of this Court has already been discussed above.

(6) This court has also jurisdiction with regard to probate and letter of administration. In some districts there are Courts of Additional District Judges who try and dispose of cases which have been transferred by the District Judge.

(7) The District Judge has been given **revisional power** by section 115 of the Code of Civil Procedure in 2003. To this effect it is provided in section 115 that where an order has been passed by a Court of Joint District Judge, Senior Assistant Judge, or Assistant Judge from which no appeal lies, and if such court appears to have committed any error of law resulting in an error in such order occasioning failure of justice, the Court of District Judge may revise such order and, make such order as it may thinks fit.

(8) The District Judge has pecuniary jurisdiction of taka five lacs valuation of the subject matter giving rise appeal or revision. In all other cases where the valuation of the subject matter of the proceeding exceeds taka five lacs the revisionsl application originating therefrom shall lie to the High Court Division under sub-section (1) of section 115 of the CPC (*Bangladesh v A.H.M. Khurshed Ali*,14 MLR (AD) 57).

(9) We will see later in this chapter that every District Judge is appointed as a Session Judge as well to adjudicate criminal matters in any Sessions Division.

Court of Additional District Judge:

(1) The judicial functions of an Additional District Judge are similar to those of a District Judge.

(2) He tries those cases which are transferred to his court from the Court of the District Judge.

(3) Appeal from this court normally lies to the High Court Division. However, an appeal shall not lie to the High Court Division from a decree or order of an Additional District Judge in any case in which, if the decree or order had been made by the District Judge, an appeal would not lie to the High Court Division (section 20).

(4) We will see later that Additional District Judges are appointed as Additional Session Judges as well to adjudicate criminal matters.

Court of Joint District Judge:

(1) This court exercises two types of jurisdictions- original and appellate (transferred).

(2) As mentioned above the Joint District Judge's pecuniary jurisdiction in original suit is unlimited. This court has jurisdiction to try those cases the value of which exceeds taka 4 lac. Thus its jurisdiction starts with taka 4 lac.

(3) Appeal from this court will lie to the District Judge where the value of the original suit did not exceed taka 5 lac. In case the value exceeds taka 5 lac, appeal will lie to the High Court Division.

(4) The District Judge may transfer to a Joint District Judge under his administrative control any pending appeal from the decrees or orders of a Senior Assistant Judge or Assistant Judge (section 22).

(5) As per section 25 of the Civil Courts Act, 1887, this court is also empowered to act as Small Causes Court.

(6) The High Court Division may, with the previous sanction of the Government, direct, by notification in the Official Gazette, that appeals lying to the District Judge under sub-

section (2) from all or any of the decrees or orders of any Senior Assistant Judge or Assistant Judge shall be preferred to the Court of such Joint District Judge as may be mentioned in the notification, and the appeals shall thereupon be preferred accordingly.

(7) As we will see later, all Joint District Judges are also appointed as Joint Session Judges to adjudicate criminal matters.

Senior Assistant Judges' Court

This court has original jurisdiction of a claim the value of which does not exceed taka 4 lac. Appeal from this court lies to the Court of the District Judge. This court is also empowered to act as Small Causes Court (section 25 of the Civil Courts Act).This court also acts as Family Court under the Family Courts Ordinance, 1985. This court also acts as the Election Tribunal under the Local Government (Upzilla Parishad) Ordinance, 1983.

Assistant Judges' Court

This court stands at the base of hierarchy of civil courts. Its original jurisdiction is limited to a claim the value of which does not exceed taka 2 lac. Appeal from this court lies to the Court of District Judge. This court is also empowered to act as Small Causes Court. This court has also been invested with the revisional power in petty civil matters coming from Village Courts under the Village Courts Ordinance 1976 (section 4(2)).

Appeals- wherefrom and to which Court

An appeal from a decree or order of a District Judge or Additional District Judge shall lie to the High Court Division. However, an appeal shall not lie to the High Court Division from a decree or order of an Additional District Judge in any case in which, if the decree or order had been made by the District Judge,

an appeal would not lie to that court (section 20 of the Civil Courts Act 1887).

(1) An appeal from a decree or order of a Joint District Judge shall lie-
   (a) to the District Judge where the value of the original suit does not exceed taka 5 lac; and
   (b) to the High Court Division in any other cases.

(2) An appeal from a decree or order of a Senior Assistant Judge or Assistant Judge shall lie to the District Judge.

(3) Where the appeals lie to the District Judge and the District Judge has assigned the function of receiving appeals to the Additional District Judge, the appeals may be directly preferred to the Additional District Judge (section 21).

(4) There is no provision of second appeal in the CPC. The provisions of second appeal as appeared in sections 100, 101, and 103 have been omitted by the Law Reforms Ordinance, 1978.

Exclusiveness of Civil and Criminal Matters

It will be clear later that only the Senior Assistant Judges and Assistant Judges deal exclusively with civil matters; they are not invested with any power to deal with criminal matters. On the other hand, all Magistrates deal only with criminal matters. District Judges, Additional District Judges and Joint District Judges are appointed as Sessions Judge, Additional and Joint Sessions Judge within their local jurisdiction. Thus at the same time they are civil judges as well as Session Judges.

Subordinate Criminal Courts under General Hierarchy

As mentioned at the beginning of this Chapter, the ordinary criminal courts have their legal basis in the Code of Criminal Procedure, 1898. Section 6 of the Code of Criminal Procedure states that besides the Supreme Court and the courts constituted under any law other than this Code for the time being in force, there shall be following two classes of Criminal Courts in Bangladesh, namely: Courts of Session; and Magistrate Courts.

Two Types of Criminal Courts:

In other words, there are two tires of subordinate criminal courts: Court of Sessions and Courts of Magistrates (sec. 6 of CrPC). The Court of Sessions is presided over by three types of judges:

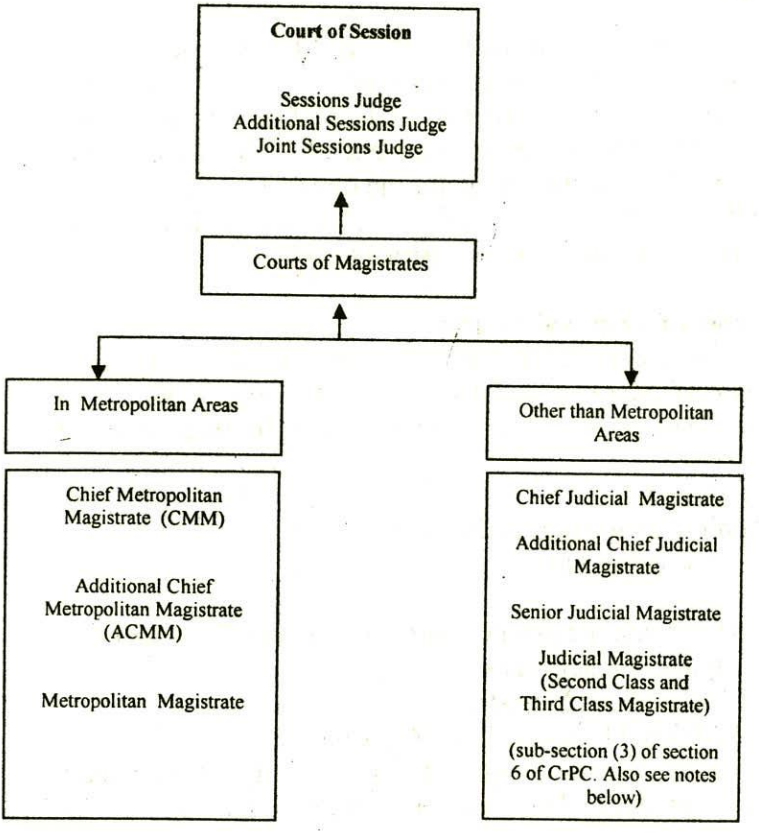
(i) Sessions Judge
(ii) Additional Sessions Judge; and
(iii) Joint Sessions Judge.

On the other hand, magistrate courts may be presided over by as many as five types of magistrates:

(1) Chief Judicial Magistrate;
(2) Additional Chief Judicial Magistrates;
(3) Senior Judicial Magistrates (First Class Magistrates, Metropolitan Magistrates and Special Magistrates)
(4) Second Class Magistrate;
(5) Third Class Magistrate

To be noted that before the amendment in November 2007 section 6 of the CrPC provided for five types of criminal courts but now there are only two types of criminal courts.

Subordinate Criminal Courts under General Hierarchy



Note: 1
All Metropolitan Magistrates are First Class Magistrates. All Senior Judicial Magistrates and Judicial Magistrates are first class Magistrates.

Note: 2 (Senior Judicial Magistrate):
According to Part 2 of Schedule of the Bangladesh Judicial Service (Constitution of Service, Appointment to the Service, Suspension, Dismissal, and Removal) Rules, 2007, First Class

Magistrates, Metropolitan Magistrates and Special Magistrates are all classed as Senior Judicial Magistrates. On the other hand, Second Class and Third Class Magistrates are all classed as Judicial Magistrates. The CrPC nowhere mentions the post of Senior Judicial Magistrate; this post is created under the aforementioned Rules.

Note:3

It is to be emphasized that there is a distinction between a court and the person who will preside over a particular court. Section 6 of CrPC provides, apart from the Supreme Court, for two types of courts: *Courts* of Session and *Courts* of Magistrates. That means more than one court of session and more than one court of magistrates. The confusion over courts starts from here. Because **firstly**, sub-section (3) of section 6 does not speak about court; it speaks about four classes of judicial magistrates. **Second**, the Code is completely silent about the post or court of Senior Judicial Magistrate whereas Part two of Schedule of the Bangladesh Judicial Service (Constitution of Service, Appointment to the Service, Suspension, Dismissal, and Removal) Rules, 2007 provides for the post of Senior Judicial Magistrate. Question arises- Is there any court of Senior Judicial Magistrate? The Rule does not establish any court; rather it establishes a post or office only. However, the common practice or misinterpreted perception in our system is that whenever a judge holds a post we tend to associate with him the court also though there is no such court in the eye of law. **Third**, sections 9, 10, 11 and 12 of the Code, confusingly, uses the posts of different magistrates and do not speak about courts. **Fourth**, with regard to subordination of judges and magistrates the Code and Rules provide inconsistent and conflicting provisions.

Full Bench Decision in *Nurul Huda v Bahauddin & Others* 9 BLD (HCD) 271, 41 DLR 395

Court of Session and Sessions Judge- whether they mean the same thing- By establishing a Court of Session the Government constitutes a class of criminal court, mentioned in section 6(1), for the purpose

of trial of criminal cases as a court of original jurisdiction. But by appointing a Judge of such court the Government does not constitute a court; it creates an office. The Court of Session is a criminal court, but the Sessions Judge, appointed to man the Court, is an office. Throughout the Code the legislature maintain a sharp and obvious distinction between the Court of Session and the Sessions Judge. They are not interchangeable. They do not mean the same thing (Para 42 BLD).

When the government appoints an Additional Sessions Judge or an Assistant Sessions Judge under sub-section (3) of section 9, it does not constitute an Additional or Assistant Sessions Court. There can be only one judge of such Sessions Court and that is the Sessions Judge. If an Additional Sessions Judge is appointed, he can try only such cases, which, under section 193(2) of the Code, the Government by general or special order may direct him to try or the Sessions Judge of the Division, by general or special order, may make over to him for trial. If an Assistant Session Judge is appointed under section 17(3) of the Code, he shall be subordinate to the Sessions Judge in whose court he exercises jurisdiction. The Sessions Judge will distribute business among the Assistant and Additional Sessions Judges. In other words, the Additional Sessions Judge and Assistant Session Judge do not have any independent jurisdiction of their own (Para 43 BLD).

Deeming Clause and Assistant Sessions Judge deemed to have been appointed as Additional Sessions Judge does not require the status of an Additional Sessions Judge- An Assistant Sessions Judge deemed to have been appointed as Additional Sessions Judge under a proviso does not acquire the status of an Additional Sessions Judge. He only acquires the same jurisdiction as an Additional Sessions Judge has in respect of trial of cases in the Courts of Session (Para 65 BLD). It is a case where the statute enacts that all Assistant Sessions Judge in a given situation, shall be deemed to have been appointed as Additional Sessions Judges and this deeming clause is restricted to the appointment only.....Assistant Sessions Judge have not been appointed as Additional Sessions Judges but by a legal fiction they are to be deemed to have been so appointed (para 73 BLD).....The

Assistant Sessions Judge deemed to have been appointed as Additional Sessions Judge owes his birth during trial and meets his death after trial. His functioning as an Additional Sessions Judge starts with trial and ends with trial. He ceases to be an Additional Sessions Judge thereafter.

In view of the above decision by the apex court and the changes made by the CrPC Amendment Act, 2009 (Act No. 25 of 2009), it is clear that Additional Sessions Judge and Joint Sessions Judge are appointed to man those Courts of Sessions; in other words, there are no independent courts of Additional Sessions Judge and Joint Sessions Judge (see para 49 of the case in BLD).

Subordination of Joint Sessions Judges:

The Additional Sessions Judges are not subordinate to Sessions Judges. They exercise coordinate powers with the Sessions Judges. Assistant Sessions Judges (now Joint Sessions Judges) are subordinate to the Sessions Judge in whose court they exercise jurisdiction. This subordination is emphatically stated in sections 17A and 528(1) of CrPC (see also para 66 of the BLD case).

Courts of Session[2]

(1) For the purpose of administration of criminal justice the whole territory of Bangladesh has been divided into some Sessions Divisions each containing a Court of Sessions. As per section 7 of the Code of Criminal Procedure every Sessions Division shall be a district or consists of districts. Thus there might be less number of Sessions Court compared to total number of districts. A Metropolitan Area

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[2] When it refers to court it is "Court of Session" but when it refers to a judge it is a "Sessions Judge". This consistency was maintained in the earlier Code arranged and compiled by the Ministry of Law in its first edition of Bangladesh Code. However, the recent edition of CrPC published by the Bangladesh Supreme Court does not maintain this consistency.

is deemed to be a Sessions Division. The Government may alter the limit or number of such divisions.

(2) Under section 9 of the CrPC the Government is bound to appoint a judge in each Session Court. A Court of Session is presided over by a Sessions Judge or Additional Sessions Judge or a Joint Sessions Judge. The Court of Session for a Metropolitan Area is called the Metropolitan Court of Session. As a rule, the District Judges of districts concerned are appointed as Sessions Judges of the district and Additional District Judges are appointed as Additional Sessions Judges. When a Joint District Judge is given the sessions powers, he acts as a Joint Sessions Judge. To be noted that unlike earlier, there is no post of Assistant Sessions Judge. To be noted further that there is still an error in sub-section 9(3) of the CrPC as it did not omit the word "Assistant Sessions Judge". This error is easily detectable and curable by reading sub-section 4A(1) which specifies that "an Assistant Sessions Judge shall be construed as a reference to a Joint Sessions Judge.

(3) As per sub-section 9(3) Sessions Judge, Additional Sessions Judge and Joint Sessions Judge shall be appointed from among the members of the Bangladesh Judicial Service.

(4) All Joint Sessions Judges shall be subordinate to the Sessions Judge in whose court they exercise jurisdiction (S. 17A).

(5) All Judicial Magistrates including the Chief Judicial Magistrate shall be subordinate to the Sessions Judge and all Metropolitan Magistrates including the Chief Metropolitan Magistrate shall be subordinate to the Metropolitan Sessions Judge (S. 17(4)).

(6) The Sessions Judge may also, when he himself is unavoidably absent or incapable of acting, make provision for the disposal of any urgent application by an Additional or Joint Sessions Judge and such Judge shall have jurisdiction to deal with any such application (S.17A(2)).

Jurisdiction of the Court of Session

The Court of Session exercises following types of jurisdiction: original, appellate, revisional and administrative.

Original Jurisdiction

The term 'jurisdiction' may be used in different senses. Original jurisdiction in the case of a criminal court may mean two specific things: firstly, jurisdiction to take cognizance of an offence; and secondly, jurisdiction to try an offence. Two jurisdictions are completely different. The original jurisdiction of the Court of Session means the jurisdiction to try a case and not to take cognizance. This is because the cognizance is normally taken by a Magistrate at the initial stage and after cognizance has been taken, the case, if triable by the Court of Session, will be sent to that court for trial. Column 8 of the Second Schedule of the Criminal Procedure Code provides the list of cases which are triable by the Court of Session. For example, murder, culpable homicide, attempt to commit suicide etc. are exclusively triable by the Court of Session.

With regard to taking cognizance by the Courts of Sessions section 193 of CrPC specifies that except as otherwise provided by the Code or any other law, no Court of Session shall take cognizance of any offence as a Court of original jurisdiction unless the accused has been sent to it by a Magistrate duly empowered in that behalf.

It is to be emphasized that sometimes the parliament makes special laws that empower the Court of Session to take cognizance and also try an offence. In such a case the Sessions Judge takes

cognizance as well as try the concerned offence. For instance, under the Drugs Act, 1940, Anitquities Act, 1968 , the special tribunal which is presided over by a judge having the same power as the judge of the Court of Session has power to accept complaint under the law, take cognizance of the offence and then try the same.

Appellate Jurisdiction

Under sections 406 and 408 of the CrPC the Court of Sessions has been conferred the appellate jurisdiction and has been given the status of an appellate court.

(1) A Sessions Judge hears appeal from the conviction and sentence passed by the Joint Sessions Judge, Metropolitan Magistrates, or any Judicial Magistrate of the first class (sec. 408)[3].

(2) Appeal to the Court of Sessions shall be heard by the Sessions Judge or by an Additional Sessions Judge (sec. 409).

(3) If any magistrate passes any order under section 118 to give security for keeping the peace or for good behaviour, appeal against such order has to be made before the Sessions Judge (sec. 406).

(4) No second appeal lies from the judgment and order of a Sessions Judge given in an appeal though revision may be filed against it to the High Court Division (section 404 and 561A, CrPC).

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[3] When in any case of Joint Sessions Judge passes any sentence of imprisonment for a term exceeding five years, the appeal of all or nay of the convicted persons shall lie to the High court Division.

When any person is convicted by a Metropolitan Magistrate or Judicial Magistrate specially empowered to try an offence under section 124A of the Penal Code, the appeal shall lie to the High Court Division.

Revisional Jurisdiction:

Sections 435, 436 and 439A of the CrPC basically provide that a Sessions Judge may exercise the power to call for records or inferior courts, may order inquiry, may report to the High Court Division and my exercise power of revision. Full Bench of the Supreme Court held in ***Nurul Huda v Bahauddin & Others* 9 BLD (HCD) 271** that the power of revision is given to the Sessions Judge and not to the Court of Session (see para 81). This revisional power is exercisable only by two persons: the Sessions Judge and the Additional Sessions Judge under sub-section (3) of section 439A which states that an Additional Sessions Judge shall have and may exercise all powers of a Sessions Judge under this chapter which may be transferred to him under any general or special order of the Sessions Judge.

(1) Under sections 435 of the CrPC a Sessions Judge may call for and examine the records of any inferior criminal court within his jurisdiction for the purpose of satisfying himself as to the correctness, propriety or legality of the finding, sentence or order and the regularity of any proceeding before such subordinate court.

(2) Under section 439A the Sessions Judge has the power of revision in case of any proceeding the record of which has been called for. The revisional power under section 439A may be transferred to the Additional District Judge and if so transferred, he will exercise all powers of a Sessions Judge.

Jurisdiction as to Transfer or Withdraw cases

(1) Under its administrative and supervisory power the Sessions Judge may order that any particular case be transferred from one criminal court to another criminal court in his Sessions Division (section 526B).

(2) A Sessions Judge may withdraw any case from, or recall any case which he has made over to, any Joint Sessions Judge subordinate to him. Likewise, he may recall any case or appeal which he has made over to an Additional Sessions Judge. And by doing this he may try the case or hear the appeal in his own court or make it over to another court (section 528).

The Court of Additional and Joint Sessions Judge

It is to be mentioned that the CrPC speaks about Court of Session only and nothing about the Court of Additional or Joint Session Judge. This is because the Additional Sessions Judge and Joint Sessions Judge are not separate courts; rather they are the part of the Session Court. However, the CrPC provides for the provisions for different sentencing powers for the Additional Sessions Judge and Joint Sessions Judge.

Sentences which Sessions Judges may pass

Section 31 of the CrPC provides following provisions with regard to sentences which the Court of Session may pass:

(1) A Sessions Judge or Additional Sessions Judge may pass any sentence authorized by law; but any sentence of death passed by any such Judge shall be subject to confirmation by the High Court Division.

(2) A Joint Sessions Judge may pass any sentence authorised by law, except a sentence of death or of transportation for a term exceeding ten year or of imprisonment for a term exceeding ten years.

The Courts of Magistrates

Sub-section 6(2) of the CrPC provides that there will be two types of magistrate courts: Judicial Magistrates and Executive

Magistrates. Apart from these two types of magistracy the other forms of Special Magistracy and Justices of Peace have also been kept unchanged.

Judicial Magistrates

Sub-section 6(3) provides that there shall be following four types of Judicial Magistrates:

(1) Chief Metropolitan Magistrate in Metropolitan areas and Chief Judicial Magistrate in other areas.
(2) First Class Magistrate who is also known as Metropolitan Magistrate in Metropolitan areas.
(3) Second Class Magistrates; and
(4) Third Class Magistrates.

The explanation of Section 6 specifies that the word "Chief Metropolitan Magistrate" and "Chief Judicial Magistrate" shall include "Additional Chief Metropolitan Magistrate" and "Additional Chief Judicial Magistrate" respectively. This means Additional Chief Metropolitan Magistrate or Additional Chief Judicial Magistrate are not any separate courts; they are part of the Metropolitan Magistrate and Chief Judicial Magistrate. However, the Additional Chief Metropolitan Magistrate or Additional Chief Judicial Magistrate may exercise the same power of sentence as that of the Chief Metropolitan Magistrate and Chief Judicial Magistrate.

Court of Metropolitan Magistrates

The CrPC provides for separate provisions for courts of Metropolitan Magistracy under its sections 18 to 21. All Metropolitan Magistrates are also judicial first class magistrates.

Appointment of Metropolitan Magistrates:

Section 18 provides that in every Metropolitan Area, the Chief Metropolitan Magistrate, Additional Chief Metropolitan Magistrate and other Metropolitan Magistrates shall be appointed from among persons employed in the Bangladesh Judicial Service. Sub-section

(2) provides that the Government may appoint one or more Additional Chief Metropolitan Magistrates, and such Additional Chief Metropolitan Magistrates shall have all or any of the powers of the Chief Metropolitan Magistrate under this Code or under any other law for the time being in force, as the Government may direct.

Chief Metropolitan Magistrate:

Section 21 provides that the Chief Metropolitan Magistrate shall exercise within the local limits of his jurisdiction all the powers conferred on him or on a Metropolitan Magistrate under this Code or under any law for the time being in force and may, from time to time, with the previous sanction of the Government, make rules consistent with this Code to regulate-

(a) the conduct and distribution of business and the practice in the Courts of Metropolitan Magistrate;
(b) the constitution of Benches of Metropolitan Magistrates;
(c) the times and places at which such Benches shall sit;
(d) the mode of settling differences of opinion which may arise between Metropolitan Magistrates in session; and
(e) any other matter which could be dealt with by a Chief Judicial Magistrate] under his general powers of control over the Magistrates subordinate to him.

Executive Magistrate:

The following provisions have been made in section 10 with regard to the Executive Magistrates:

(1) In every district and in every Metropolitan Area, the Government shall appoint as many persons as it thinks fit to be Executive Magistrates and shall appoint one of them to be the District Magistrate.

(2) The Government may also appoint any Executive Magistrate to be an Additional District Magistrate, and such

Additional District Magistrate shall have all or any of the powers of a District Magistrate.

(3) The Government may, or the District Magistrate may, from time to time, by order define local area within which the Executive Magistrate may exercise all or any of the powers.

(4) The Government may appoint any persons employed in the Bangladesh Civil Service (Administration) to be an Executive Magistrate and confer the powers of an Executive Magistrate on any such member.

(5) All persons appointed as Assistant Commissioners, Additional Deputy Commissioners or Upazila Nirbahi Officer in any district or Upazila shall be Executive Magistrates and may exercise the power of Executive Magistrate within their existing respective local areas.

(6) The government may confer on a Commissioner of a Police all or any of the powers of an Executive Magistrate in relation to a Metropolitan area.

(7) The executive Magistrates shall not exercise any judicial function. He or she will do the work which are administrative or executive in nature, such as the granting of a licence, sanctioning a prosecution or withdrawing from a prosecution etc. (sec 4(2)(b)).

Special Executive Magistrate:

Sub-sections 12(1), (2) and (3) of the CrPC the following provisions have been made with regard to Special Executive Magistrates:

(1) The Government may confer upon any person all or any of the powers conferred on an Executive Magistrate. The

persons on whom the powers are conferred shall be called Special Executive Magistrates and shall be appointed for such term as the Government may by general or special order direct.

(2) Such Magistrate will be appointed for dealing with cases or a class of cases in any local area outside a Metropolitan area.

(3) No power of special Magistracy shall be conferred upon any police officer below the grade of an Assistant Superintendent of Police.

Special Magistrates (Judicial):

Sub-sections 12(3), (4), and (5) provide following with regard to Special Judicial Magistrates:

(1) The Government may, in consultation with the High Court Division confer upon any Magistrate all or any of the powers conferred or conferrable by or under this Code on a Judicial Magistrate of the first, second or third class in respect of particular cases or a particular class or classes of cases or in regard to cases generally in any local area outside a Metropolitan Area [sub-sec. 12(3)].

(2) The Magistrate on whom the powers under sub-section (3) are conferred shall be called Special Magistrates and shall be appointed for such term as the Government may, in consultation with the High Court Division, by general or special order direct [sub-sec. 12(4)].

Special Metropolitan Magistrate:

(3) The Government may in consultation with the High Court Division confer upon any Metropolitan Magistrate all or any of the powers conferred or conferrable by or under this Code

on Metropolitan Magistrate in respect of particular cases or a particular class or classes of cases, or in regard to case generally in any Metropolitan Area [sub-sec. 12(5)].

(4) The persons on whom the powers under sub-section (5) are conferred shall be called Special Metropolitan Magistrates and shall be appointed for such term as the Government may in consultation with the High Court Division by general or special order direct [sub-sec. 12(6)].

Justices of the Peace

Sections 22 and 25 of the CrPC provides for provision of justices of the peace. It is stated in section 25 that by virtue of their respective offices, the Judges of the Supreme Court are Justices of the Peace within and for the whole of Bangladesh, Session Judges, Chief Judicial Magistrates and Metropolitan Magistrates are Justices of the Peace within their respective jurisdictions[1].

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[1] The term 'Justices of the Peace' has its origin in the legal system of the UK. 'Justice of the Peace' and 'Magistrate' are used to mean the same thing; they are used interchangeably. The origin of the justices of the peace is to be found in a royal proclamation of 1195 creating the knights of the peace (keepers of the peace) to assist the sheriff in enforcing the law by arresting and punishing those who offended against the King's peace. This function was of an administrative and police character rather than of a judicial character. With the decline of the office of Sheriff in the fourteenth century the 'keepers of the peace' were given a judicial function in addition to their administrative tasks. With the passage of time this judicial function increased and the administrative tasks decreased. Their jurisdiction was fixed by statute in 1368 and included the determination of criminal offences. Their criminal jurisdiction was at first exercised solely in the sessions which were, by statute, compelled to hold in each county four times a year. These were the 'quarter session' and in 1590 the justices in quarter session were given jurisdiction over almost all criminal offences. Later, in Tudor times, a number of statutes conferred jurisdiction on justices to try offences out of sessions. From these statutes stems the summery jurisdiction of the justices

Jurisdiction and Powers of Magistrates

Power of Trial and Awarding Sentence:

According to section 32 of the CrPC the Courts of Magistrates may pass sentences as follows:

(a) **Courts of Metropolitan and of Magistrates of the first class can impose**

- imprisonment for a term not exceeding five years;
- such solitary confinement as authorised by law;
- fine not exceeding ten thousand taka;
- whipping.

Courts of Magistrates of the second class can impose

- imprisonment for a term not exceeding three years;
- such solitary confinement as authorised by law;
- fine not exceeding five thousand taka;

Court of Magistrates of the third class can impose

- imprisonment for a term not exceeding two years;
- fine not exceeding two thousand taka.

(d) **To award imprisonment in default of fine:** Where fine is imposed on a convicted person and it is not paid, the law provides that he can be imprisoned for a further term

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of the peace in 'petty sessions'. This summery jurisdiction, which is entirely statutory, is exercised without a jury and justices exercising this jurisdiction are now termed a 'magistrates court'. Thus in the UK Justices of the Peace are only the magistrates. However, in Bangladesh section 25 of the CrPC gives the Supreme Court Judges, Session Judges, District Magistrates and Metropolitan Magistrates ex-officio Justices of the Peace. These provisions about the Justices of Peace in the CrPC seem to have been dead letters as they do not have any practical application.

in addition to the substantive imprisonment awarded and this can be done under following conditions (section 33):

- the term of imprisonment in default of fine must not exceed the power of the Magistrate under the CrPC.
- where an offence is punishable with imprisonment and fine, the imprisonment in default of fine can only extend to one fourth of the maximum imprisonment which the Magistrate has power to impose.
- where the offence is punishable with fine only, the imprisonment in default of fine can only be simple.

Extra-ordinary enhanced Power (Sec. 29C and 33):

Section 29C of the CrPC deals with enhanced power to magistrates with regard to trial of offences not punishable with death. It specifies that the Government may in consultation with the High Court Division-

(a) invest the Chief Metropolitan Magistrate, Chief Judicial Magistrate or any Additional Chief Judicial Magistrate with power to try as a Magistrate all offences not punishable with death; মৃত্যু দন্ড ছাড়া সকল ক্ষমতা প্রদান করতে পারবে।

(b) invest Metropolitan Magistrate or any Magistrate of the first class with power to try as a Magistrate all offences not punishable with death or with transportation or with imprisonment for a term exceeding ten years.
মৃত্যু দন্ড ছাড়া ২০ বছর পর্যন্ত ক্ষমতা প্রদান করতে পারে

In line with these provisions of enhanced power of trial by magistrates section 33A of the Code further provides for enhanced power imposing sentence by Magistrates which is as follows:

Higher powers of certain Magistrate (Sec. 33A):

The Court of a Magistrate, specially empowered under section 29C, may pass any sentence authorised by law, except a sentence of death or of transportation or imprisonment for a term exceeding seven years.

Appeal from the Magistrates' Courts

Appeal may be against an order or against a sentence imposed by a magistrate. Detail discussion of appeal can be found in respective chapter. However, appeal against sentence by different magistrates would be as follows:

(1) Appeal from a sentence passed by any Magistrate of the second or third class shall lie to the Chief Judicial Magistrate (sec. 407).

(2) Appeals from a sentence passed by any First Class Magistrate lies to the Court of Session (Sec. 408(a)).

(3) Appeals from a sentence passed by a Magistrate of an offence under section 124A of the Penal Code will lie to the High Court Division (section 408(b)).

CHAPTER FIVE

STRUCTURE AND FUNCTIONING OF COURTS IN BANGLADESH: TRIBUNALS AND SPECIAL COURTS

CHAPTER V

STRUCTURE AND FUNCTIONING OF COURTS IN BANGLADESH: TRIBUNALS AND SPECIAL COURTS

Alongside the ordinary civil courts already described in the preceding chapter there are many tribunals and special courts in the country dealing with a wide variety of disputes arising between the individual citizen and the state or between citizen and citizen. The first part of this chapter will deal with both special tribunal and some regular tribunals and the second part with some special courts.

TRIBUNALS

The proliferation of tribunals in the twentieth century has been a special feature of the development of judicial administration in almost every commonwealth countries. The number of tribunals and their importance have increased so significantly that it is no longer justifiable to regard tribunals merely as an appendage to the ordinary court of law. They are an integral part of the ordinary legal process. This system of administrative justice has in the past caused some concern as Professor Dicey rejected notions of separate system of justice (*droit administratiff*) for resolving disputes between citizen and the state. Such a view, however, is no longer tenable given the widespread functioning of various tribunals now-a-days. What prompted this development of administrative justice through tribunals? The reasons for this growth of a system of tribunals reflect both the perceived disadvantages of the common law courts, in terms of formality, lack of speed, lack of expertise in some specialist areas of law, cost etc and the context of social or welfare state with the rise of welfare legislation. They also reflect the perceived advantages of tribunals as bodies which follow informal procedures, can hear cases relatively quickly, are cheap, and which have expertise in the particular subject matter. In tribunals proceedings are relatively informal. The strict rules of evidence do not apply. Any person may appear before it. Awards of cost are not usually made unless a party has acted frivolously or vexatiously.

Difference between a Court and a Tribunal

The distinction between a court and a tribunal is sometimes blurred. While every court is a tribunal, every tribunal is not necessarily a court. The nomenclature used is not a sure guide. For example, in the UK the Employment Appeal Tribunal is a court while a local valuation court is only a tribunal. In *Attorney-General v BBC* [1980] 3 All ER 161 the House of Lords held that a local valuation court was not an inferior court because, although it was called a 'court', its functions were essentially administrative rather than judicial. Though it is sometimes argued that tribunals are in the nature of administrative bodies, this is invariably not the case. The House of Lords held in *Pickering v Liverpool Daily Post and Echo Newspapers* [1991] 2 WLR 513 that a Mental Health Review Tribunal was a court whose proceedings were subject to the law of contempt. The main distinction seems to be the nature of jurisdiction they exercise. Tribunals are regarded as inferior to the ordinary courts of law, even though for the most part they are independent in the exercise of their various jurisdictions. Because of this inferiority and by reason of the fact that even tribunals described as 'administrative' are exercising judicial functions, they are subject to the supervisory jurisdiction of the High Court so that complaints of unlawful conduct on the part of tribunals may lead to the granting of remedies against them by the High Court. Commentators have gone so far as to say that if the precise distinction between tribunals and courts is a matter of uncertainty, what is certain is that tribunals are inferior to the courts (Slapper, 263).

From the Bangladesh perspective the difference between a court and a tribunal is largely a matter of statutory designation and in most cases the real difference is difficult to draw since almost invariably tribunals have got all trappings of a court. The nomenclature of a tribunal bears the significance of specialisation only rather than any substance compared to the proceedings of a court. Sometimes it is argued that a tribunal is a quasi-judicial body whereas a court is a full judicial body but this is true from the viewpoint of the concerned legislative designation. If a particular law creates it in the form of a quasi-judicial body it will turn out to be a quasi-judicial body. In Bangladesh most of the tribunals, e.g. Administrative Tribunals, Special Tribunals under the Special Powers Act, VAT Tribunal etc under special laws are quasi-judicial in the sense of their formation as they are composed of both judicial and non-judicial

members but from the view point of their function and jurisdiction they are judicial in nature. This is because of the fact that full hearing with the presence of lawyers for both the sides is held; judicial review of the decisions of tribunals under the supervisory or appellate power of the Supreme Court is invariably available; also most of the appellate tribunals are given contempt power. For instance, the Advisory Board under the Special Powers Act 1974 and article 33 of the Constitution has all trappings of a tribunal in true sense of the term though it has not been termed as a tribunal. On the other hand, Administrative Tribunal[1], Special Tribunal under the Special Powers Act 1974 are tribunals by name but they are all courts subordinate to the Supreme Court and they have to follow normal judicial procedure. As mentioned at the beginning of this chapter the reason behind the creation of tribunals instead of courts lies in the shortcomings of the formal courts in giving speedy and inexpensive remedy; delay in the formal court procedure; too much formalities as to forms and procedure; cumbersome and long evidential procedure; lack of special expertise to dispense with special matters. In England most of the tribunals are free from the bonds of forms and procedure as to evidence and other matters and they have been able to discharge their functions in line with the spirit of the purpose of their creation. How far this been successful in Bangladesh? This is largely a matter of empirical study though it is frequently evident that most of the tribunals are eventually embroiled with cumbersome and long process of usual litigation frustrating the pious purposes behind their creation. For example, rule 7 of the Administrative Tribunals Rules 1982 provides that the tribunal shall follow as far as practicable the provisions of the CPC relating to the procedure of the execution of decree or judgment. However, this is the longest chapter in the CPC which is considered 'in many respects cumbersome process costing much time and energy of a weary decree holder. There can be no logic to put the decisions or orders under a marathon process for execution and implementation after deciding the cases under a short and simplified procedure.' Not only that most of the tribunals are facing a huge backlog of pending cases.

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[1] A detailed discussion on the nature of a tribunal and particularly the nature and jurisdiction of the Administrative Tribunals has been outlined by the Appellate Division of the Supreme Court in *Mujibur Rahman v Bangladesh*, 44 DLR (AD) 111.

Different Types of Tribunals

Tribunals are largely classified into statutory and domestic though both the categories are the creation of different statutes. This classification is based on the nature of the subject matter they adjudicate. Statutory tribunals adjudicate matters of public concern, e.g. Tax Appeal Tribunal deals with tax claim between the state and individual, Administrative Tribunal deals with dispute relating to employment between the government and its employees. On the other hand, there are some other tribunals which has no relevance to public concern; they mainly relate to matters of private rather than public relevance although at times the two can overlap. These second category of tribunals are sometimes classified as domestic tribunals. Examples of these domestic tribunals are the disciplinary committees of professional institutions such as the Bar Council, the Bangladesh Medical Association, trade unions, universities etc. The power that each of these tribunals has is very great and it is controlled by the ordinary courts through ensuring that the rules of natural justice are complied with and that the tribunal does not act *ultra vires*, i.e., beyond its powers. Domestic tribunals refer to committees or associations like trade unions, social clubs, professional bodies who have a right to adjudicate upon the rights of or disputes between their members. Sometimes such tribunals are also set up by statute, i.e. the Bar Council etc. When created by statute or under the authority of a statute, they should strictly be called 'statutory tribunals' rather than domestic tribunals. In the case of statutory tribunals the jurisdiction of the tribunal rests upon the statute or the rules framed thereunder. But the jurisdiction of a 'domestic tribunal' is founded on the contract of its members, express or implied. The rules of the association, subscribed by all the members, constitute the contract between the members and create the jurisdiction of the tribunal. In the case of non-statutory 'domestic tribunal' certiorari cannot lie, though other remedies, such as declaration, injunction of damages may be available in proper cases. Where a domestic tribunal is created by statute, certiorari would lie against it in the same manner as in the case of other statutory tribunals.

Control by the Courts of Tribunals

The modern system of tribunals has its origin in the French *droit administratiff* which owes its existence to peculiar conditions prevailing in France. This system of tribunals in France is completely separate from the ordinary court of law and these tribunals are also not under any supervisory jurisdiction or judicial review of the highest court in the country. However, the adoption of this system in commonwealth countries has not been blind against the background of the idea that administrative justice can create dangers unless subject to effective safeguards and control. Accordingly, the Donoughmore Committee in the UK back in 1932 recommended that the supervisory jurisdiction of the High Court over tribunals be maintained and the tribunals be compelled by the High Court to observe natural justice. In accordance with this recommendation no tribunal has been kept outside the supervisory jurisdiction of the High Court in the UK legal system. On an application for judicial review of a tribunal's decision, the Queen's Bench Division of the High Court may issue prerogative writs of certiorari, mandamus and prohibition.

A. Special Constitutional Administrative Tribunals

I have categorised the Administrative and Administrative Appellate Tribunals as the special Constitutional administrative tribunals and all other tribunals in the country as regular tribunals. This is because of constitutionalisation of administrative tribunals compared to other regular tribunals which are all inferior to the Supreme Court and has nothing to do with the Constitution.

Constitutionalisation of Administrative Tribunals in Bangladesh

Following the footsteps of other commonwealth countries the Constitution makers of our country has made provisions in the Constitution regarding the establishment of administrative tribunals. It has been argued in some developing countries that administrative tribunals should be kept outside the supervisory power of the highest court in the country. This is because of the view that in developing countries it is not possible to achieve objectives, if administrative

disputes and service matters are subjected to judicial review. For this reason in the then Pakistan before the establishment of separate administrative courts, the Law Reform Commission 1967-70 was asked to give report on the matter. Before going to discuss the substance of the report first I would like to discuss the provisions inserted by the Constitution makers in relation to administrative tribunal in Bangladesh. The constitutional provisions as to administrative tribunals are as follows:

"117. Administrative Tribunals- (1) 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;
(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 tribunals:

Provided that parliament may, by law, provide for appeals from, or review of, decisions of administrative tribunal."

Drawbacks in Constitutionalisation of Administrative Tribunals

1. The Constitutional plan of administrative tribunal has been designated as a deviation to a fundamental principle of common law jurisprudence. According to common law jurisprudence as opposed to civil law jurisprudence all courts and tribunals in a country are subordinate to one Supreme Court or High Court. However, as per the Constitutional provisions in Article 117 administrative tribunals in Bangladesh are not constitutionally subordinate to the High Court Division or Appellate Division. According to Articles 117(2) and 102(5) all administrative tribunals are outside the ambit of judicial review by the Supreme Court. Though it may be contended that under the doctrine of

convergence[1] judicial specialisation is taking place in many common law countries, it is difficult to find out even a single instance except in some dictatorial constitutions where total specialisation has taken place negating the minimum jurisdiction of the Highest Court of the country. Neither in Pakistan Constitution (Art. 212) nor in Indian Constitution (Art. 323 A) are administrative tribunals exempted from the power of judicial review by the Supreme Court. In both the Constitutions the right to special leave to appeal by the Supreme Court against any decision of the administrative tribunal is granted. But in Bangladesh Constitution the whole plan has been designed in a way that a parallel Supreme Court could be established for services and property matters of the Republic.

2. The whole Constitutional plan for administrative tribunal as has been designed by the Constitution-makers seems to have gone against the concept of rule of law. This is because since the Constitution has envisaged completely a separate hierarchy of administrative tribunals, it was imperative on the Constitution-makers to outline in the Constitution the conditions of services and of appointment of persons who are to chair these tribunals and also the conditions of ensuring their independence and impartiality. This was needed to make sure that any government by simple majority do not make undemocratic law relating to administrative tribunals or administrative appellate tribunal to use the whole machinery in their favour frustrating the pious purpose behind them.

It is worthy to note here that in Pakistan, as mentioned earlier, the Law Reform Commission, 1967 was asked to give report on the establishment of administrative tribunals. The Commission gave its interim report in 1967 and final report in 1970. In it the Commission states-

(i) "..... Those who advocate curtailment of the power of the judiciary to review administrative actions appear to be oblivious of the fact that in a welfare state the rule of law is the basic requirement, so as to serve as a check on arbitrary executive action and to achieve a balance between collective requirements and individual rights..... In a

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[1] **Doctrine of Convergence:** It is a developing doctrine under comparative law. It means that the two judicial system i.e. civil law system and common law system are coming nearer to each other. Common law is taking many elements of civil law system. Similarly civil law system is taking many elements, though not fundamental ones, of common law system.

true welfare democratic state, review of administrative actions of the executive by some independent organ of the state is a must....."

(ii) "The system of *'Council d' Etat'* and *'Tribunaux Administratif'* owes its existence to peculiar conditions prevailing in France. This system is totally different from the common law system with which we are familiar."

(iii) "The success of an institution like the *'Council d' Etat'* in France primarily depends on the availability of really intelligent, experienced and independent civil servants to serve as its member which we lack in our system."[1]

Lastly the Commission recommended that the Administrative Tribunal should not be kept outside the ambit of judicial review and it should be presided over by retired judge of the Supreme Court or High Court who should have the same security of office as a serving judge. However, our Constitution-makers did not take a look at this report.[2]

Establishment of the Administrative Tribunal

In accordance with the provisions of the Constitution with regard to administrative tribunals the Administrative Tribunals Act 1980 was passed[3]. In pursuance of section 12 of the Act the Administrative Tribunals Rules were framed in 1982 to supplement the Act as to the manner of making the application or appeals, the particulars to be contained therein, court fees etc. Two types of tribunals were created by this Act: the Administrative Tribunals and Administrative Appeal Tribunal. As envisaged in article 117 of the Constitution the parliament enacted the Administrative Tribunals Act in a contradictory manner which is evident from the points mentioned below:

(1) In the original Act the jurisdictional provisions in section 4 and the bar on jurisdiction of court in section 10 were such that both the jurisdiction of the civil courts and the jurisdiction hitherto exercised by the High Court Division vested in the Administrative Tribunals in all those matters as specified in section 4.

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1 The Report of the Law Reform Commission 1967-70 Chapter XXVII

2 I asked both Dr. Kamal Hossain and Barrister Amir-Ul Islam whether they considered the report while drafting the constitution. They told that they had no knowledge of it.

3 Before the establishment of the Administrative Tribunals the disputes relating to all service matters were to be tried by the civil courts under the Code of Civil Procedure.

(2) The decision of the Administrative Appellate Tribunal as envisaged in section 6 of the original Act was final and was not subject to appellate power of the Appellate Division of the Supreme Court.

Subsequent Developments

At present there are seven administrative tribunals in Bangladesh. There are three in Dhaka and one in each of the four regions: Barishal, Bogra, Chittagong and Khulna. In 1991 by an amendment to the Administrative Tribunals Act 1980 a new section 6A was inserted which states that the provisions of article 103 of the Constitution shall apply in relation to the Administrative Appellate Tribunal as they apply in relation to the High Court Division[1]. Thus the finality of the decision of the Appellate Tribunal is now subject to judicial review by the Appellate Division of the Supreme Court which is in line with the concept of rule of law. However, this is an amended provision of an ordinary law which can be repealed any time by the government. Constitutional changes would be an effective solution both from conceptual and practical point of view.

Constitution of Administrative Tribunal

As per section 3 of the Administrative Tribunals Act, 1980 the Tribunal would consist of one member who is appointed by the Government from among persons who are or have been District Judges.

Jurisdiction:

(1) Exclusive jurisdiction to hear and determine applications made by any person in the service of the Republic in respect of the terms and conditions of his service.

(2) Exclusive jurisdiction to hear and determine applications made by any person in the service of any statutory public authority specified in the Schedule to the Act in respect of the terms and conditions of his service (section 4).

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[1] It is to be noted that Justice Sahabuddin Ahmed while acting as interim President made this amendment to the Administrative Tribunal Act, 1980 by an Ordinance and inserted section 6A. Subsequently the ordinance was transformed into an Act of Parliament.

(3) A person in the service of the Republic or in any statutory public authority has right apply to the Administrative Tribunal against an order or decision or action of the departmental authority relating to any terms and conditions of his service. The departmental higher authority is bound to give decision within a period of two months from the date on which the appeal or application was made (sec. 4).

Composition of Administrative Appellate Tribunal

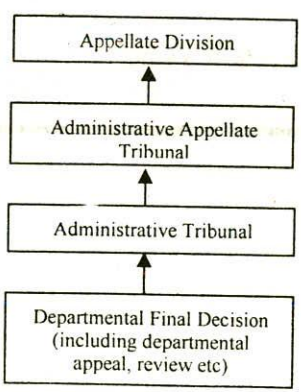
The constitution of the Administrative Appellate Tribunal as envisaged in section 5 of the Act has undergone several changes. As the provision stands now the Appellate Tribunal consists of one Chairman and two other members. The Chairman is appointed form among the persons who are or have been judges of the Supreme Court. Of two members one is a Joint Secretary and the other is a District Judge. The decision of the Appellate Tribunal has to be by majority of its members.

Jurisdiction:

(1) The Appellate Tribunal will have jurisdiction to hear and determine appeals from any order or decision of an Administrative Tribunal.

(2) Any person aggrieved by an order or decision of an Administrative Tribunal may, within three months from the date of making of the order or decision, prefer an appeal to the Administrative Appellate Tribunal (section 6).

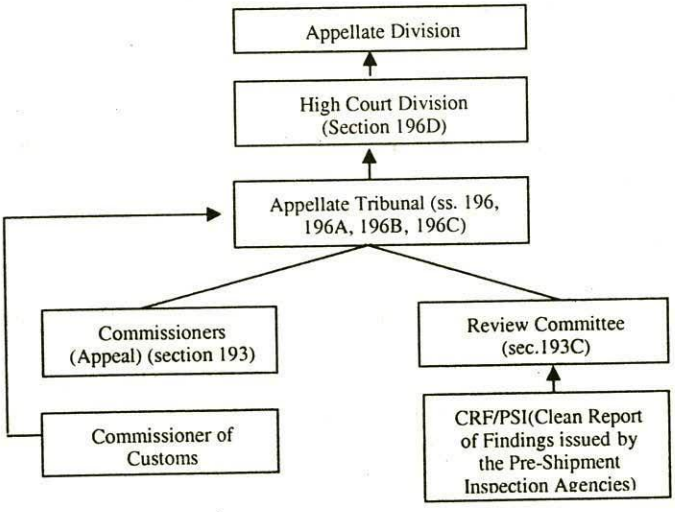
(3) Against the decision of the Administrative Appellate Tribunal a party may apply to the Appellate Division of the Supreme Court for leave to appeal as per article 103 of the Constitution (section 6A).



B. Other Regular Tribunals

Apart from the Administrative and Appellate Administrative Tribunals as specifically mentioned in the Constitution there are many other regular tribunals created under different statutes. One common elements of these regular tribunals is that they are regarded as inferior to the Supreme Court and are under the power of judicial review of the High Court Division. A brief discussion of some of the important regular tribunals have been given below.

Tribunals under the Customs Act, 1969



Appellate Tribunal

Section 196 of the Customs Act 1969 provides for an Appellate Tribunal to be called the Customs, Excise and VAT Appellate Tribunal which shall consist of as many technical and judicial members as it thinks fit to exercise the powers and discharge the functions conferred on the Appellate Tribunal by this Act.

A technical member shall be a person who has held or is holding the post of Member of the Board or has held or is holding the post of

Commissioner of Customs and Excise or any equivalent post for at least two years.

A judicial member shall be a person who has for at least ten years held a judicial office in the capacity of a District and Session Judge in the territory of Bangladesh or who has been a member of the Bangladesh Civil Service (Judicial) and has held a judicial post for at least three having earned pay in the selection grade of the scale of pay, or who has been an advocate for at least ten years in a court, not lower than the court of District and Session Judge.

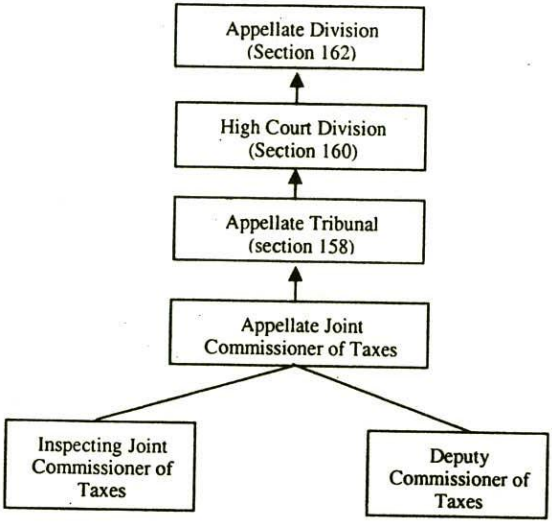
Power of the Appellate Tribunal: Though from the view point of its formation the Appellate Tribunal is a quasi-judicial body, section 196C provides that the Appellate Tribunal shall for the purpose of discharging its functions, have the same powers as are vested in a court under the CPC when trying a suit.

Any proceeding before the Appellate Tribunal shall be deemed to be a judicial proceeding.

Appeal to the High Court Division: The Commissioner of Customs or the other party may, within 90 days of the date upon which he is served with notice of an order under section 196B, by an application, prefer an appeal to the High Court Division against such order.

Appeal to the Appellate Division of the Supreme Court: This is not mentioned in the Customs Act. So appeal in the Appellate Division is by way of leave to appeal as usually is the case.

Tribunals under the Income Tax Ordinance, 1984



The diagram shows the dispute settlement bodies created by the Income Tax Ordinance 1984. The lowest three bodies, i.e. the Commissioner of Taxes, Deputy Commissioner of Taxes and the Appellate Joint Commissioner of Taxes are all administrative bodies. The Appellate Tribunal is a tribunal but its functions are not in the nature of quasi-judicial; it has got all the trappings of a court though it is not manned by purely judicial officers. It consists of both administrative (technical) and judicial members and as such it is a quasi-judicial body from the view point of its formation.

Taxes Appellate Tribunal: According to section 11 of the Ordinance the Tax Appellate Tribunal shall consist of a President and such other judicial and accountant members as the Government may from time to time appoint. A judicial member shall be a person who is or has been a District Judge or who has practised as an advocate in a court not lower than that of a District and Sessions Judge for a period not less than ten years.

Appeal against order of Deputy Commissioner of Taxes and Inspecting Joint Commissioner (Section 153): This will lie to the Appellate Joint Commissioner of Taxes if the assessee is not a company. If the assessee is a company then appeal shall lie to the Commissioner (Appeals).

Appeal against order of Tax Recovery Officer (Section 157): Any person aggrieved by the order of TRO under section 139 may within 30 days appeal to the Inspecting Joint Commissioner to whom the TRO is subordinate and the decision of the IJC on such appeal shall be final.

Appeal to the Appellate Tribunal (Section 158): Against an order of an Appellate Joint Commissioner or the Commissioner (Appeals) appeal will lie to the Appellate Tribunal.

Reference to the HCD (Section 160): Against the order of the Appellate Tribunal reference shall lie to the High Court Division of the Supreme Court.

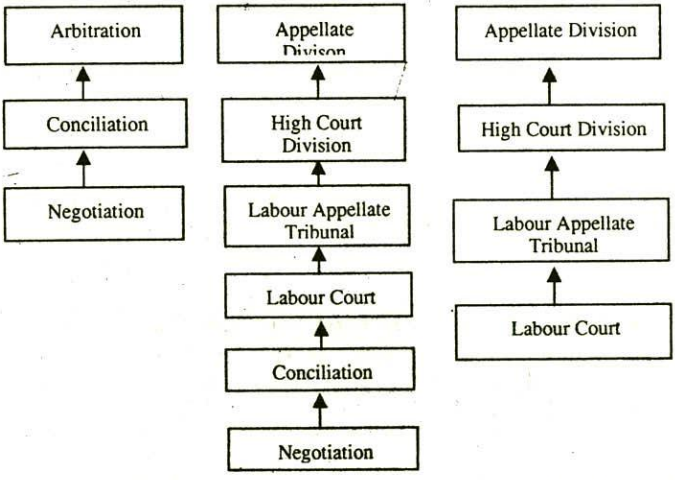
Appeal to the Appellate Division (Section 162): Appeal form the decision of the High Court Division to the Appellate Division will lie only with the certificate of the High Court Division as specified in section 162.

Tribunals and Labour Courts under the Labour Code 2006

Three Routs of Dispute Resolution:

The Labour Code 2006 provides for both non-judicial and mediation-type mechanism as well as judicial mechanism to resolve an industrial dispute (any dispute between the employer and employee or between two workers or between employer and employer which is connected with the employment of or non-employment or the terms of employment or the conditions of work of any person). There are three different routes for industrial dispute resolution. The first route is the non-judicial mediation process which includes negotiation, conciliation and arbitration. If a dispute reaches the stage of an award by an arbitrator, it is final and the first route ends here. The second route is non-judicial via judicial route which includes negotiation, conciliation and then application to the

Labour Court up until the Appellate Division. The third route is completely judicial starting with the Labour Court and ending in the Appellate Division. The Labour Appellate Tribunal is the highest judicial body created by the Labour Code. However, the jurisdiction of the High Court Division and the Appellate Division can be invoked only through the constitutional process of writ application which is not contemplated in the usual course of adjudication under the Code. Thus the two highest judicial bodies shown in the diagram below is not mentioned or created in the Code.



Negotiation: If a dispute is likely between an employer and an employee the employer or the CBA shall communicate the same in writing to the other party. Within ten days the parties will try to resolve the matter by way of negotiation; if a settlement reached, a memorandum shall be recorded accordingly (Sub-section 210(2)(3)).

Conciliation: Failing a negotiation under sub-section 210(2)(3), any party may report to the conciliator that the negotiation have failed and request the conciliator in writing to conciliate the dispute and conciliator shall, on receipt of such request, proceed to conciliate in the dispute. Under sub-section 210(9) the conciliator has ten days time for conciliation. If he fails to settle the dispute within ten days, the CBA or

the employer may go for strike or lock out by serving notice of twenty-one days.

Arbitration: If conciliation fails the conciliator shall try to persuade the parties to agree to refer to the dispute to an Arbitrator. In case the parties agree, they shall make a joint request in writing for reference of the dispute to an Arbitrator agreed upon by them. The arbitrator shall give his award within thirty days from the date on which the dispute is referred to him or within such period as may be agreed upon by the parties. The award of the arbitrator shall be final and no appeal shall lie against it (sub-section 210(16)).

Application to the Labour Court: If no settlement is arrived by way of conciliation and the parties agree not to refer the dispute to an arbitrator, the workmen may go on strike or the employer may declare lock-out. However, the parties at dispute may, either before or after the commencement of a strike or lock out, make joint application to the Labour Court for adjudication of the matter. Again, if a strike or lock-out lasts for more than 30 days the government may prohibit such strike or lock-out and in that case the government must refer the dispute to the Labour Court (Sub-section 211(2)).

Usual Jurisdiction of the Labour Court: Apart form the provisions mentioned above, any collective bargaining agent or any employer or workman may apply to the Labour Court for the enforcement of any right guaranteed or secured to it or him or under any law or any award or settlement (Section 213).

Formation and Constitution of Labour Court: Under section 214 the Government may establish one or more Labour Courts consisting of a Chairman and two members. One of the members is to represent the workmen and the other to represent the employers. A person shall not be qualified for appointment as Chairman unless he has been or is, or is qualified to be, a Judge or an Additional Judge of the High Court Division or is a District Judge or an Additional District Judge. The members shall be appointed after consultation with the employers and workmen.

The Labour Court has the power to give award or decision and also to impose sentence as per section 214. All decisions and sentence of the Labour Court other than awards are final.

Labour Appellate Tribunal: The Appellate Tribunal shall consist of one member who shall be a person who is or has been a Judge or an Additional Judge of the High Court Division (Section 218). Any person aggrieved by an award given by the Labour Court, may prefer an appeal to the Labour Appellate Tribunal within 60 days of the delivery thereof (Section 217).

Labour Appellate Tribunal: Is it a court or tribunal?: To be mentioned here that in industrial disputes the Labour Court which is one step behind of the Appellate Body is a court in proper sense when section 215 and 216 stipulate that for the purpose of punishing offences it shall follow the summery procedure as prescribed in the CrPC and for the purpose of adjudicating industrial disputes it shall be deemed to be a civil court and it will follow the rules prescribed in the CPC. On the other hand, the appellate body created by the Code has been designated as a tribunal rather than a court. Why is that? No rationale has been given in the preamble or anywhere. Is the Labour Appellate Tribunal a court or tribunal in real sense of the term? It is clear from the provisions of the Code and Rules that the Tribunal has been given all powers of a civil appellate court. First, it has to follow the procedure of hearing under the CPC (Rule 41 of the Industrial Relations Rules, 1977); second, it has been given the same status as the High Court Division of the Supreme Court with regard to the contempt of court. Thus the Appellate Tribunal is more in the nature of a court than a tribunal. However, it is to be remembered that there are inherent differences between the terms and the judicial decisions from our apex court has made it clear that the Labour Court or Labour Appellate Tribunal are not courts proper; they are tribunal.

In the case of *Pubali Bank V the Chairman, 1st Labour Court*, 44 DLR (AD) 40, the question was raised whether a Labour Court is a Civil Court or not. Their Lordship of the Appellate Division upon consideration of relevant provisions of the Industrial Relations Ordinance 1969 held that the Labour Court acts as Civil Court for limited purpose but not a Civil Court at

all. It is only by a legal fiction or a statutory hypothesis that it is to be treated as a Civil Court.

> "Under section 34 of the IRO a Labour Court may decide both industrial and non-industrial disputes. When the Labour Court decides a non-industrial dispute under section 34 of the IRO it follows the procedure provided in sub-section (1) of section 36 of the Ordinance which states that a Labour Court shall follow as nearly as possible summary procedure as prescribed under the Code of Criminal Procedure. Thus a Labour Court acts purely as a statutory tribunal with all the trappings of a court but not a Court proper.
>
> Similarly when the Labour Court decides an individual complaint from a worker under section 25 of the Employment of Labour (Standing Order) Act, it does not act as a Civil court, nor shall it be deemed to be a civil court. The Labour Court shall be deemed to be a Civil Court and shall have the same powers as are vested in such court under the Code of Civil Procedure subject to the limitation provided in the beginning of the sub-section, namely, "for the purpose of adjudicating and determining any industrial dispute". It shall therefore not be deemed to be a Civil Court nor shall it enjoy such powers as are available to a Civil Court under the Code of Civil Procedure (Per Mustafa Kamal, J.).
>
> An adjudication of an industrial dispute or a proceeding for enforcement of any guaranteed right though a matter of civil nature, is not a suit and does not attract all the panoply of powers of the Code of Civil Procedure. From a plain reading of section 36(2) it is clear that in adjudication of an industrial dispute, the Labour Court acts as a Civil Court for limited purpose- it will not exercise powers like those given in Order IX or Order XXXIX of the Code which civil court may exercise in a suit (Per MH Rahman, J)".

Special Tribunal under the Special Powers Act 1974

(i) Under section 26 of the Special Powers Act 1974 the offences specified in the schedule of this Act shall be exclusively triable by a Special Tribunal.

(ii) The Schedule of the Act provides for offences punishable under the Special Powers Act, 1974, offences punishable under the Arms Act, 1878, offences punishable under the Explosive Substances Act, 1908, offences punishable under any rule made under the Emergency Powers Act, 1975, and any attempt or any abetment or any preparation of for commission of any of the above offences. Thus all these offences are exclusively triable by the Special Tribunal under the Special Powers Act 1974.

Composition of Special Tribunal:

Section 26 of the Special Powers Act lays down following provisions with regard to composition of Special Tribunals:

(i) specifies that every Sessions Judge, Additional Sessions Judge and Joint Sessions Judge shall for the areas within the Sessions Division, be a Special Tribunal for the trial of offences triable under the Act.

(ii) The Government may, for the purpose of trial of offences mentioned in paragraph 3 and 4 of the Schedule to this Act, constitute one or more additional Special Tribunal for such areas as may specified by the Government and an additional Special Tribuanl so constituted shall consist of one member, to be appointed by the Government who shall be a person who is a Metropolitan Magistrate or a Magistrate of the first class.

(iii) Special Tribunal consisting of the Sessions Judge may transfer, at any stage of the trial, any case from one Special Tribunal to another Special Tribunal within his sessions division.

Appeal from the decision of the Special Tribunal

Section 30 of the Special Powers Act 1974 provides that an appeal from any order, judgment or sentence of a Special Tribunal may be preferred to the High Court Division within thirty days from the date of delivery of passing thereof.

The Special Powers Act was passed in 1974 (Act No. XIV of 1974). However, it was amended in the same year in 1974 by Act No. LIX of 1974 which substituted section 30 as under:

30. Appeals from confirmation of death sentence-

(1) An appeal from the judgment, or sentence passed by a Special Tribunal may be preferred to the Appellate Tribunal, constituted under sub-section (2) within 30 days of delivery or passing thereof, but save as aforesaid there shall be no appeal from any order, judgment or sentence of a Special Tribunal and no court shall have authority to revise such order, judgment or sentence.

(2) The Government shall for the purpose of this Act, constitute an Appellate Tribunal consisting of one member to be appointed by the Government.

(3) The member of the Appellate Tribunal shall be a person who is, or is qualified to be appointed as a judge of the Supreme Court.

(4) The Appellate Tribunal may ....., the decision of the Appellate Tribunal shall be final.

(5) The Appellate Tribunal shall have the same procedure as are vested in and followed by the High Court Division under the Code of Civil Procedure.

After this amendment the Supreme Court held that the Special Tribunal constituted under section 26 of the Special Powers Act 1974 did not appear to be a court subordinate to the High Court Division, nor did the Special Powers Act confer upon the High Court Division any jurisdiction whatever to question the legality or propriety of any proceedings before the Special Tribunal particularly after its amendment by Act LIX of 1974 with effect from 29.8.1974. With this amendment jurisdiction of the High Court Division over a Special Tribunal has been completely ousted (*Salimuddin Ahmed v State*, 28 DLR 187). Given this, a parallel Supreme Court was designed to be established in matters of offences under the Special Powers Act as was done in relation to the administrative tribunal in the original Administrative Tribunals Act 1980.

Section 30 was subsequently amended in 1985 by Ordinance No. XXXIII of 1985 (Section 2). The present provisions in section 30 is democratic and is not in breach with the norm of subordination of the Supreme Court. Now the provisions of section 30 is as under:

30. **Appeals and confirmation of death sentences-**
(1) Appeal from any order, judgment or sentence of a Special Tribunal may be preferred to the High Court Division within thirty days from the date of delivery or passing thereof.
(2) Where a Special Tribunal passes a sentence of death, the proceedings shall be submitted forthwith to the High Court Division and the sentence shall not be executed unless it is confirmed by that Division.

Subordination to the High Court Division

Under section 26 of the Special Powers Act 1974, every Sessions Judge, Additional Sessions Judge and Assistant Sessions Judge shall be Special Tribunal being a court of law is a court as defined in Article 152(1) of the Constitution. This being so, these courts (being subordinate to the Supreme Court) are amenable to the superintendence and control of the Supreme Court's High Court Division under Article 114. A Special Tribunal under the Special Powers Act is not only a Criminal Court as classified under section 6 of the Code but is also a court meaning a Court of law as defined in Article 152(1) of the Constitution, such definition being applicable to the reference of Court made in Article 114 red with Article 109 of the Constitution (*Safar Ali v A.R. Chowdhury,* 32 DLR (1980) 142). Thus Special Tribunal under the Special Powers Act 1974 is a regular tribunal though the nomenclature itself suggests something like 'Special'.

B. SPECIAL COURTS

Special courts may of different types. The parliament by its legislative power may create special courts with special jurisdiction. Whatever my be their jurisdiction as a special court, one common element attached to them is that they are all subordinate courts under the supervisory power of the High Court Division of the Supreme Court. Features of some of the important special courts are given in brief below.

Small Causes Courts

The system of Small Cause Court is designed to ensure speedy justice and early disposal of disputes of small amounts.

(1) As per section 25 of the Civil Courts Act 1887 the Joint District Judge, Senior Assistant Judge or Assistant Judge may be conferred jurisdiction to try cases mentioned in the Small Cause Courts Act 1887 (Act No. IX of 1887).

(2) As per section 15 of the Small Cause Courts Act all suits of a civil nature of which value does not exceed 25 thousand taka shall be cognizable by a Court of Small Causes. This is the upper limit set by the Act. However, section 25 of the Civil Courts Act 1887 provides that for the trial of suits, cognizable by Small Cause Courts, the pecuniary jurisdiction of three categories of judges will be as follows:

   (i) Up to such value not exceeding twenty thousand taka in the case of a Joint District Judge;
   (ii) Up to such value not exceeding ten thousand taka in the case of a Senior Assistant Judge whose jurisdictin has been extended under sub-section (2) of section 19; and
   (iii) Up to such value not exceeding six thousand taka in the case of any other Assistant judge.

(3) A suit cognizable by a Court of Small Causes shall not be tried by any other court having jurisdiction. This is because of section 15 of the CPC which states that every suit shall be instituted in the court of the lowest grade competent to try it.

(4) Appeal will lie to the District Judge's Court; this is as per section 104 of the CPC and grounds are as there in that section clause (ff) or (h) (section 24/ SCC Act 1887).

(5) The High Court Division has the power of revision of decision of Small Causes Court (section 25/ SCCA).

(6) A Court of Small Causes shall be subject to the administrative control of the District Judge and to the superintendence of the High Court Division (section 28/ SCCA).

(7) The District Judge has power to withdraw a case from the Small Causes Court (section 28A/ SCCA).

(8) **Jurisdiction:** Small Causes Courts will not have jurisdiction in the following matters:

- execution of decrees;
- execution of immovable properties
- section 9
- sections 91 and 92
- attachment of immovable properties
- injunctions
- appointment of receiver of immovable property

(9) **Procedure:** The procedure of the Small Cause Courts Act will be in the nature of summary procedure; the judge does not need to follow the procedure of framing of issues; lengthy procedure of recording of evidence given by the parties etc (Order 50 the CPC).

Family Court

Under the Family Courts Ordinance, 1985 the Assistant Judge is to act as a Family Court to try family matters specified in the Ordinance. Section 5 of the Ordinance provides that subject to the provisions of the Muslim Family Laws Ordinance 1961, a Family Court will have jurisdiction over the following matters:

(i) dissolution of marriage;
(ii) restitution of conjugal rights;
(iii) dower;
(iv) maintenance;
(v) guardianship and custody of children.

Pre-trial Hearing/ Reconciliation Proceeding: Section 10 of the Family Courts Ordinance, 1985 provides that following the filing of the

plaint when written statement is filed in the court, the court shall fix a date within 30 days for a pre-trial hearing. On that date the court after examination of the plaint and written statement shall ascertain the issues and attempt to effect a compromise or reconciliation between the parties, if possible.

Post-trial Reconciliation:

(i) Sub-section 13(1) provides that after the close of evidence of all parties, the Family court shall make another effort to effect a compromise or reconciliation between the parties.

(ii) Sub-section 13(2) specifies that if such compromise or reconciliation is not possible the Court shall pronounce judgment.

(iii) Section 14 specifies that where a dispute is settled by compromise or reconciliation, the Court shall pass a decree or give decision in the suit in terms of compromise or conciliation agreed between the parties.

Village Courts

The Village Courts have been established under the Village Courts Act, 2006 (Gram Adalat Ain, 2006) with a view to adjudicating petty civil and criminal matters in rural areas. A list of criminal cases and civil matters has been outlined in the schedule of the Act which provides the Court's jurisdiction. Section 4 specifies that if any one wants file a case with regard to any matter specified in the Schedule, be it civil or criminal, he/she has to file a case in the Village Court. According to section 5 of the Act a village court consists of a Chairman and two Members nominated by each party to the dispute totaling five Members including its Chairman. One of the two members nominated by each party to the dispute must be a member of the local Union Parishad. When the decision of such a court is unanimous or by a majority of four to one, or by a majority of three to one when there are four members present, that decision is final and there will be no option for filing appeal. On the other hand, if the decision of the court is by a majority of three to two, any party to the dispute may prefer a revision application to the First Class Magistrate in criminal cases and to the Assistant Judge if the same

arises from and out of a civil matter (sec. 8). No lawyer is allowed to appear before such a court on behalf of any of the party to the dispute. This courts pecuniary jurisdiction is limited to matters involving taka five thousand and the compensation awarded by the Village Court must not exceed taka five thousand.

CHAPTER SIX

CRMINAL PROCEEDINGS: VARIOUS STAGES

CHAPTER VI

CRIMINAL PROCEEDINGS: VARIOUS STAGES

Having described the structure of different ordinary criminal courts and their jurisdiction, we shall be now considering the procedure in those major courts which leads to a prosecution for crime. Judicial proceeding, be it criminal or civil, means the way or form in which a legal action is brought or defended in a court of law. It largely encompasses the whole process of beginning to end of a litigation. However this chapter will discuss only up to trial-stage of a criminal suit; appeal, review, revision or reference etc. which are post-trial steps will be discussed in spearate chapters.

Nature of Criminal Proceeding

(i) **Adversarial Process:** The criminal process in Bangladesh is, essentially, adversarial or accusatorial in nature meaning that the whole process is a contest between two parties. As regards crime, these two parties are the state on the one hand and the person accused of the crime concerned on the other hand. In the process court takes a non-partisan role; court plays no significant role in preparation of a case; the trial itself is not an investigation into events or allegation but rather a hearing to decide within a complex set of rules, whether the accused is proved to be guilty of the particular offences which the prosecution have charged him with[1].

(ii) **Presumption of Innocence/ Criminal Standard of Proof:** A person accused of a crime is presumed to be innocent until

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[1] On the other hand, in inquisitorial system which exists in most of the European counties judges and magistrates supervise the pre-trial investigations and preparation of the case, to a greater extent, and play a significant part in the questioning of the witness at trial, and in the decisions as to what evidence should be considered by the court. In brief, the trial is much more of an investigation rather than a contest.

the prosecution proves his guilt beyond every reasonable doubt. If there is a little doubt in proving the elements of the offence concerned, the accused will be set free. This is the criminal standard of proof, i.e., proof of guilt beyond reasonable doubt.

(iii) Criminal justice consists in the punishment of wrongs whilst civil justice consists in the enforcement of rights. In a criminal proceeding the injured person claims no right but accuses the defendant of wrong. He is thus not a claimant for redress but an accuser and the court makes no attempt to constrain the defendant to perform a duty or to respect a right but penalises him for the duty already disregarded and for any right already violated. It is the function of the state to prosecute the offender, even if there is not other accuser, in the case of grave and serious offences.

(iv) All criminal proceedings in Bangladesh are regulated under the Code of Criminal Procedure Code 1898 and Criminal Rules and Orders unless otherwise excluded or specifically provided for.

(v) Four agencies are involved in a criminal administration of justice: Police, Prosecution, Courts, Jail and Probation authority.

Stages in a Criminal Proceeding:

The stages may be divided into four periods:

(1) Pre-Proceeding Stage;
(2) Proceeding Stage (Court);
(3) Trial Stage (Court); and
(4) Post-trial Stage (Police or Jail authority or Probation authority etc).

Pre-Proceeding Stage

This is the initial stage of inquiry or investigation and preparation of a criminal case and this stage may be discussed under the following sub-heads:

(i) **FIR in Cognizable Offence:** First, any individual may file an FIR (First Information Report) under section 154 about the commission of a cognizable offence to police station; second, police may come to know about the commission of a cognizable offence from any other source, e.g. on a phone call, from hearsay source or on their own (section 157); third, after taking cognizance of an offence, cognizable or non-cognizable, under section 190 a Magistrate may send the same to a police station for investigation and report (sections 155(3) and 156(3) (also see Regulation 245 of the Police Regulation, Bengal, 1943); fourth, having accepted a complaint under section 200 a Magistrate may send the same under section 202 to a police station for inquiry. Having received information from any of the above sources the officer-in charge must record the same in a book to be kept at every police station and this written information will be treated as First Information Report[1].

(ii) **Complaint in Non-Cognizable and Cognizable Offence:** On the other hand, when a police officer receives information as to the commission of a non-cognizable offence, he cannot investigate it without the order of a Magistrate; he just makes a case entry in the General Diary and forwards the informant to the Magistrate and then the

[1] There are some cases in which no FIR is required and these cases are referred to as non-FIR prosecutions. For instance cases under the Motor Vehicles Act, 1988 municipal or railway bye-laws, section 34 of the Police Act 1861, cases under sections 107, 109, 110, 144 and 145 of the CrPC. For initiation and investigation in these cases see Regulation No. 254 of the Police Regulations Bengal, 1943.

Magistrate examines the informant under oath (sections 155 and 200). Secondly, any person may complain to the Magistrate in writing about the commission of a non-cognizable offence. The Magistrate having received such information will examine the complainant upon oath under section 200. Upon such examination, the Magistrate may take cognizance of the case; or he may dismiss it or he may order for inquiry or investigation on the matter. If cognizance is taken the complaint is registered as a Complaint Registered Case (C.R.Case). On the other hand, if inquiry or investigation is ordered before cognizance is taken, the complaint is entered as a petition (Complaint Registered Petition (C.R.P.) with a CRp case number).

(iii) **Reporting to the Magistrate (P.S case, G.R. case and C.R. case):** As soon as an FIR is filed in the police station a number is put against every FIR to be called as FIR No. 4, 5 etc or Police Station (PS) Case No. 4, 5 etc. Almost every criminal case except complaint cases starts with a Police Station Case number[1]. Once an FIR is recorded in the police station the original copy of it has to be sent without any delay (within 24 hours) to the Magistrate through the court officer as per requirement of section 157 of the CrPC[2]. Once the

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[1] To be noted that it is not essential that every criminal initiation or information will result in a P.S. case, C.R. case or G.R. case. An information or investigation under any special law may not have any relevance with any P.S. case, C.R. case or G.R. case. For example, when a detention order is issued under section 3 (2) for arrest and detention of a person, the order and consequent arrest will not have any P.S., G.R. or C.R. case number.

[2] For details as to copies of FIR see Regulation 246 of the Police Regulation Bengal, 1943 (Volume-1). Four copies of FIR are to be made of which the first carbon copy of the FIR has to be sent to the Superintendent. The second copy shall be kept at the police station for future reference. Third

Magistrate court receives any such report, a number is put against the case and this number is called G.R. Case number (General Registered Case number). This is purely administrative and automatic as the Magistrate does not see the papers or anything or does not examine anything. On the other hand, if it is a complaint case, it starts with a C.R.P. (Complaint Registered Petition Case) number or C.R. Case number (Complaint Registered Case) in the Magistrate court and there is no corresponding P.S. Case number as it does not start with filing an FIR[1] in the police station. After receiving the report upon complaint, if the magistrate sees reason for proceeding, the complaint petition case turns into C.R. case.

(iv) **Investigation and maintaining Case Diary:** If the offence is a cognizable one, the police may investigate the same without any order of a Magistrate (section 156). On the other hand, if the offence is non-cognizable[2] one, a police officer can investigate only after a Magistrate has given him an order

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copy has to be sent to the Circle Inspector at the same time as the original and first carbon copy are dispatched.

[1] **G.D. Entry:** This is completely different from FIR. Every occurrence which may be brought to the knowledge of the officers of police shall be entered in a book which is called General Diary. FIR is made in B.P. Form No. 27 in accordance with the instruction printed on it. On the other hand, General Diary is to be kept in B.P. Form No. 65 as referred to in section 44 of the Police Act, 1861and detailed in Regulation No. 377 of the Police Regulations Bengal, 1943.

[2] Cognizable offence means an offence for which a police officer may arrest the suspect without warrant whilst a non-cognizable offence means an offence for which a police officer cannot arrest the suspect without warrant. How do you know that a particular offence is cognizable or non-cognizable? This is specifically mentioned in the Schedule II of the Code of Criminal Procedure.

to do so (section 155). An investigation relates to the steps taken by an investigating officer (IO) or a person other than a Magistrate who is authorised by a Magistrate for this purpose[3]. An investigation consists of the following steps: (i) proceeding to the spot; (ii) ascertainment of facts and circumstances of the case; (iii) discovery and the arrest of the suspected offender or offenders; (iv) collection of evidence relating to the commission of the offence alleged which may consist of (a) examination of various persons including the accused and the reduction of their statements into writing if the officer thinks fit; (b) the search of places or seizure of things considered necessary for the investigation and to be produced at the trial; and (iv) formation of opinion as to whether on the materials collected there is a case to place the accused before a court for trial and if so, taking the necessary steps for the same by filling of a charge-sheet under section 173 (*Mosharraf Hossain v State*, 30 DLR (SC) 112); (v) making a case diary (C.D.) containing the record of facts ascertained by the officer during investigation and action he has taken showing the time and date against every action he has taken. The Case Diary is of crucial importance for both the court and the prosecuting authority. It gives a pen-picture of facts, circumstances and other activities of the officer in respect of a crime and also his findings. If any arrest is made during the

[3] The CrPC is a general procedural law. A special law, however, may provide otherwise. In the Special Powers Act 1974 section 27 provides a procedure of investigation which is completely separate from the procedure specified in section 173 of the Code. The Special Powers Act provides for special machinery for the purpose of investigation by an officer not below the rank of Sub-Inspector of Police. The Sub-Inspector is alone is competent to investigate and report the Special Tribunal who alone is competent to take cognizance of such an offence. The Special Powers Act has thus superseded the provisions of the Code (*Taslima Begum v State* 42 DLR (1990) 136).

investigation and the investigation could not be completed within 24 hours of arrest, the police officer must produce the arrested person before a Magistrate and may seek police remand[1] for the arrested person for more interrogation.

(v) **Final Report/ Charge Sheet:** Police enjoys an unfettered right on an investigation to submit either a charge sheet or a final report in a particular case and without any interference from the court. On conclusion of investigation the Investigating Officer is required to submit either Final Report or Charge Sheet (section 173) (Police report may be as many as five types. For details, see author's text book on CrPC). If final report is given, it means that no case of the offence has been made out of the investigation and as such the accused should be released from the custody or discharged from the bail bond as the case may be. On the other hand, if charge sheet is given, this means that there is a recommendation for prosecuting the offender. The charge sheet or final report as the case may be, shall be forwarded to the Magistrate empowered to take cognizance of the offence (section 173)[2].

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[1] The power of police remand has been given in section 167(2) of the CrPC. There is no specific mention in that section that 'remand' can be allowed for the purpose of interrogation. However, the practice is that an accused is taken on 'remand' only for the purpose of interrogation or for extorting information from the accused through interrogation. "The very system of taking an accused on 'remand' for the purpose of interrogation and extortion of information by application of force is totally against the spirit and explicit provisions of the Constitution," *BLAST v Bangladesh*, 55 DLR (2000). (See more at Chapter 8).

[2] Final report, charge sheet- these terms are not used in the Code of Criminal Procedure. They have been used in the Police Regulations Bengal, 1943 (Regulations 272-274 for charge sheet and 275-277 for final report). What should be the contents of a charge sheet and final report and what should go with them? All these have been detailed in the Regulation.

(vi) **Final Report and Naraji Petition:** If police submits a final report recommending that there is no case against the accused, the Magistrate after carefully scrutinising the report may accept or reject it. After rejecting the final report he may order for further investigation[2]. He may direct inquiry and after examination of the complainant if satisfied may take cognizance of the case (*Munshi Lal v Khan Abdul Jalil*, 5 BLD 24). If the Magistrate accepts the final report, the aggrieved informant can file a naraji petition in the court. Naraji petition is considered a complaint and the Magistrate if upon examination of the complainant or other witnesses if any, is satisfied may issue process upon the accused or he may direct inquiry into it by any other Magistrate (*Syed Azharul Kabir v Syed Ehsan Kabir*, 4 MLR (AD) 343).

Proceeding Stage/ Commencement of a Proceeding

This stage consists of taking cognizance of an offence by the court, commencement of a criminal proceeding and transfer etc though taking cognizance as such does not always mean the commencement of a criminal proceeding. A criminal proceeding commences either on taking cognizance of the offence or on issuing process. This stage has been broken into following steps:

(i) **Taking Cognizance:** Taking cognizance indicates the point when a Magistrate or a Judge takes first judicial notice of an offence. It is different from the initiation of proceedings by Magistrate; it is rather the condition precedent to the initiation of proceedings. There are conflicting decisions on this point. Under section 190 any CMM, Metropolitan

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[2] In such a situation when the matter goes back to the police station for investigation, it is as usually put into the general diary but no separate PS number is given; rather investigation, inquiry etc will be done and report will be given on the same earlier PS number as was put at the very beginning of the case.

Magistrate, or Chief Judicial Magistrate or Magistrate of the First Class or any other Magistrate specially empowered in this behalf may take cognizance of an offence. Any of these five officers may take cognizance of an offence on the basis of any of the three sources- (i) upon a police report in the form of a charge sheet; (ii) upon a complaint; or (iii) upon own knowledge or private information.

(ii) **How Cognizance is taken:** Normally cognizance is taken in front of the accused person. If the accused is in custody, he is brought before the court while taking cognizance. On the other hand, if the accused is not arrested, the Magistrate must issue process, i.e., either summon or warrant to compel the attendance of the accused. When the accused is before the Magistrate, the Magistrate will examine the record of the case and will see if there is any basis for initiating any judicial proceeding. To avoid confusion, for a complaint case, cognizance is taken in the absence of the accused as specified in section 200. This matter has been explained more in the next head.

(iii) **Start of a Criminal Proceeding:** If cognizance is taken on the basis of a charge sheet, a criminal proceeding starts at once in the eye of law. On the other hand, if cognizance is taken either on basis of a complaint or private information, there are still some steps left for a proceeding to start. This is because of two reasons: first, after taking cognizance the Magistrate may order for an investigation which will determine whether to start proceeding or not; second, a close scrutiny of sections 200-2004 with regard to complaints reveals that though cognizance is taken under section 200, proceeding as such does not start until the issue of process under section 204. When a police officer receives information as to the commission of a non-cognizable offence, he makes a case entry in the General Diary and forward the informant

to the Magistrate and then the Magistrate examines the informant under oath (section 200); then the Magistrate may dispense with the issue of process and proceed to an inquiry[1] or order for investigation. If this is the case, then the proceeding starts once the investigation or inquiry is finished and the Magistrate has issued the process under section 204. Issue of process means that the Magistrate shall issue either summons or warrant[2] for causing the accused to be brought or to appear at a certain time before the Magistrate.

Criminal proceeding starts after cognizance by the court is taken. ***(Nasiruddin Mahmud v Momtazuddin Ahmed, 36 DLR (AD) 14***

Proceeding before a court starts when the Magistrate takes cognizance of an offence on police report or on complaint. Before such cognizance, there is no proceeding that may be quashed under section 561A CrPC. Process is issued only after taking of cognizance of an offence (Paragraph 29).

When a complaint is filed before a Magistrate, he may at once take cognizance and proceed under Chapter XVI of the Code or he may simply direct the police to investigate under section 156(3) of the Code and in that case he does not take cognizance of the offence (Para 25).

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[1] **Difference between investigation and inquiry:** As far as criminal proceedings are concerned an inquiry relates to a proceeding held by a court or Magistrate while an investigation relates to the steps taken by a police officer or a person other than a Magistrate for the purpose. An investigation is not normally a judicial act; it is an administrative act; on the other hand, an inquiry may be judicial or administrative.

[2] The difference between **summons and warrant** is that when summon is issued by a court or Magistrate, the person to whom it is served is ordered to appear in the court on a certain date and time. On the other hand, if it is a warrant, it is an order for the arrest of the person to whom it is served while the summons is not an order of arrest.

In the instant case, a complaint was filed before the Magistrate on 10.06.1976 but the Magistrate forwarded it to the Police to treat it as FIR whereupon Khulna Police Case No. 90 was started on 21.06.1976. It appears that the police on receipt of the complaint treated it as FIR and started investigation during which they arrested the accused and produced them before the Court which ultimately released them on bail in the corresponding G.R. Case No. 1308 of 1976 in usual course.But the accused within seven months of the lodging of the FIR sought quashment of the proceedings by filing an application under section 561A although the investigation was not yet completed. The High Court Dvision took a wrong view that cognizance was already taken by the Magistrate and as such a criminal proceeding started against the accused persons (Para 22).

In the present case complaint was filed before the Magistrate and on perusal of the same he thought it proper to refer the case to the police under section 156(3) for investigation. Apparently he did not find any prima facie case against the accused persons although the complainant has given in detail the prosecution story. The learned Magistrate could have dismissed the complaint on that finding (para 26).

Proceeding before a Court starts when the Magistrate takes cognizance of an offence on police report or on complaint. Before such cognizance, there is no proceeding that may be quashed under section 561A of CrPC. Process is issued only after taking cognizance (Para 29).

Cognizance Power and Power of Trial:

The power to take cognizance and power to try an offence are not the same thing ***Abdus Salam v State, 36 DLR (AD) 58.*** During the Presidential election campaign in 1981 two groups of rival political parties came to a clash in a place called Joginin Hatkhola in the District of Tangail. In that incident one Kallayan Bihari Das received dagger blows to which he immediately succumbed to death. He was a member of the

procession brought out by the supporters of the Presidential candidate Dr. Kamal Hossain, while the other procession was brought by the suypporters of Presidential candidate Justice Sattar. On the same day, 9th November, 1981, one Shaukat Raja lodged a FIR with police alleging that his group was attacked by the supporters of the candidate, Justice Sattar and that the accused persons dealt dagger blows to Kallyan Bihari Das causing his death. The police registered a case and after investigation submitted Final Report. The Magistrate of Tangail accepted the final report and discharged the accused persons by an order dated 26th December, 1981. The informant, Shaukat Raja, challenging the Final Report, submitted a naraji petition before the Magistrate on 6th January, 1982, but on 3rd February he withdrew the naraji-petition which then ordered by the Magistrate to be filed. But on 3rd March, 1982 one Khorshed Alam who was cited as a witness in the first information report, filed a fresh complaint before the Magistrate against the same accused persons on the same allegation and this was registered as C.R. Case No. 299(1) 82 under various sections including section 302 of the Penal Code. The Magistrate examined the complainant on oath, held an enquiry himself and on the basis of the materials thus obtained took cognizance of the offence of murderand issued warrant of arrest against 17 persons under section 302 read with sections 34 and 109 of the Penal code, by an order dated 10th June, 1982. This proceeding was challenged by an application under section 561A of the CrPC. The learned judges of the High Court Division dismissed the application refusing to quash the proceeding. In this case the Appellate Division also dismissed the appeal on the ground that (i) power of taking cognizance is not the same as the power to try an offence; (ii) dismissal of a complaint by way of accepting a final reportr by a Magistrate cannot be treated as acquittal and as such fresh complaint may be made against the same persons with same allegation. The grounds are discussed below quoting from the decision:

"After investigation the investigating officer has to report under section 173 of the CrPC. He shall either recommend that the accused should be prosecuted or that the accused should be released. However, the Magistrate is not bound to accept the recommendation made by the investigation officer in his report but he is required to apply his judicial discretion and he may disagree with the investigation officer. When a final report is submitted, the Magistrate may, on refecting the recommendation adopt either of the two courses: If he finds from the statements of the witnesses recorded by the police that there are materials which warrants prosecution of the accused, the Magistrate may take cognizance of the offence on that Final Report and this cognizance must be treated as taken under clause (b) of section 190(1) of the CrPC. The cognizance taken thus will not be treated as one taken under clause (c) of section 190(1) that is, it is not a cognizance taken on the Magistrate's own knowledge of information. However, this course is hardly adopted by a Magistrate obviously because to proceed on the this line requires painstaking examination of the police report including statements of the witnesses examined under section 161 of CrPC, and also in appropriate case, police diary itself. The Magistrates generally adopts the other course of action which is rther easy, to direct the police to hold further investigation. And in case a Naraji Petition is filed either by the informant or any other complainant, the Magistrate is free to take cognizance upon examination of the complainant and if necessary, on examination some witnesses or by getting an enquiry held under section 202 by some other persons submission of final report by the olice therefore is nto an end of the whole matter. Acceptance of the final report necessarily results in the release of the accused from custody or from bail bond as the case maey be, and the Magistrate's order releasing the accused is ordinarily referred to an order of discharge although the term 'discharge' nowhere appears in section 173. This discharge must not be confused with discharge under section *241A*. Discharge there takes place after cognizancew is taken and process is issued against a person. There is, however, provision of dismissal of a

complaint under section 202. Dismissal takes place where no cognizance is taken and no process is issued, but for the purpose of entertaining a fresh complaint dismissal and discharge are often placed on the same footing. In a number of cases both before and after partition of India dismissal or complaint under section 202 or discharge of an accused either under section 209 or 253 CrPC have been used in synonymous terms when the question arises whether a proceeding against the accused who have been discharged or in whose favour complaint has been dismissed can be revived. Again, distinction has been made between the same proceeding revived after dismissal or discharge and the entertainment of a fresh complaint or fresh police report instead of revival of the previous proceedings. The distinction is in fact technical but still it is a distinction which cannot be ignored. In the case of revival the question of the Magistrate coming *functus officio* may arise but no such question can arise if a fresh complaint is entertained though on the same allegation. This view has also been taken by the Pakistan Supreme Court in the case of ***Abul Hossain Sana v Swalal Agarwala*** 14 DLR (SC) 96 (para 5).

It is not disputed that after dismissal of a complaint or discharge of an accused, a fresh complaint may be entertained on the same allegation against the same person whether it is filed by the same complainant or by a different complainant but only in certain exceptional circumstances (Para 6) ***Abdus Salam v State, 36 DLR (AD) 58.***

"In this case the police submitted final report on the ground that they did not find any 'disinterested witness' to connect the accused with the incident resulting in the death of a person belonging to the complainant's party. It is not the case that there was no witness at all to implicate the accused, but it is a case of whether the witnesses who made statements to the police implicating the accused should be relied upon. This relates to weighing and assessment of evidence and credivbility of witnesses- a duty which is not of the Magistrate taking cognizance. This is the the duty of the court trying a case after

cognizance has been taken. So, when the police recommended the release of the accused on the ground that the witnesses were not disinterested, the Magistrate should have ignored the recommendation simply on the ground that the assessment of evidence is not the duty of the investigating officer, as of himself- particularly when the offence alleged is exclusively triable by the Court of Session (para 11) ***Abdus Salam v State, 36 DLR (AD) 58.***

Limit of the power of taking cognizance:
Magistrate taking cognizance of the case on the report made under section 202 is not competent to go in the question whether the accused has been implicated out of enmity- this shall be matter of the court trying the accused. At the stage of taking cognizance the jurisdiction of the Magistrate is limited to ascertaining the truth or otherwise of the allegation (Para 12) ***Abdus Salam v State, 36 DLR (AD) 58.***

Cognizance without examining the accused under section 200:
It is not always necessary for the cognizance Magistrate to examine the complainant under section 200 of the CrPC. The cognizance Magistrate is also competent to take cognizance in a case on the basis of a judicial inquiry provided the omission to examine the complainant under section 200 by the cognizance Magistrate did not cause any prejudice or failure of justice ***Mohammad Ismail v Md. Rafiqul Islam & Ors*** 16 BLT (AD) 24.

Cognizance and Prosecution:
Cognizance and prosecution are not the same thing. Cognizance means taking notice of an offence by a criminal court initiating a judicial proceeding against an accused or taking steps to see whether there is any basis for initiating any proceeding. 'Prosecution' on the other hand, means bringing specific accusations against the accused before the court which, if satisfied, frames a formal charge and calls upon the accused to answer the same and proceeds with the trial. If no

satisfactory ground for presenting the accused is found, he is discharged by the court. Prosecution of the accused commences when the court hears the accusations and examines the amterials on record for framing a formal charge against the accused, ***Abdul Gafur v The State,*** 15 BLD (HCD) 604.

Sessions Judge cannot direct the Magistrate to take cognizance:
Neither the High Court Division nor the Sessions Judge can direct the Magistrate to take cognizance of a case. Their power is strictly limited to directing a further enquiry into the petition of complaint. It will be for the Magistrate concerned to take or not to take cognizance after the result of the further enquiry. ***A. Rouf and Others v The State,*** 20 BLD (HCD) 162, ***Yusuf Hasan v KM Rezaul Firdous*** 16 BLD (AD) 55.

When the dispute between the parties is of civil nature and it should be declared by the court and the contesting parties have already filed civil suit for adjudication of their respective claims, the criminal court should not take cognizance of a such a dispute ***Ansarul Haque v Abdur Rahim***, 17 BLD (AD) 143.

(iv) **Transfer for Trial to an Appropriate Court:** Once cognizance has been taken or proceeding commences, either on the application of the accused under section 191 or by a Magistrate under section 192, or under section 205C when the case is exclusively triable by the Court of Session, or under section 205CC when the case is triable by CMM or CJM the case is to be transferred accordingly. Once transfer is complete to an appropriate court, another number is usually put against the case, e.g. Special Case No. 5 of 2003 etc, or Sessions Case No. 6 of 2003 etc. Once this is done the case becomes ready for trial.

Trial Stage

The trial stage will be discussed in two heads: trial in the Magistrate Court and trial in the Sessions Court. This is because the nature and procedure of trial in these two courts are different.

Trial in the Magistrate Court

Trial in the Magistrate court takes two forms: summery trial and regular trial. Sections 260 and 261 outline cases which shall be tried summarily by Magistrates. Unlike in regular trials the court in summery trials has to simplify and shorten trial procedure by dispensing with the recording of evidence and not allowing many adjournments. There is a limit of imprisonment in summary trial and this is that a Magistrate cannot impose a sentence exceeding two years. In summery trials the Magistrate has to follow all the steps of a regular trial but the difference between the two is that in summary trial of offences where no appeal lies the Magistrate need not have to record the evidence of the witnesses or frame a formal charge (section 263). Secondly, in case of summary trials of offences where appeal lies, the Magistrate has to record the substance of evidence (still not the full evidence) (section 264).

Steps of a Regular Trial in Magistrate Court

(i) **Pre-trial Hearing[1]/ Discharge before Framing of Charge:** On the day fixed for the trial to begin the accused, if he has been detained in custody, will be brought from the prison. If he is on bail he must appear in the court or he must surrender to his bail and will be then placed in the cell to

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[1] To avoid confusion for the students it is to be noted that 'pre-trial hearing', 'no case to answer', pre-proceeding stage, post trial stage- all these are not legal terms; they have been used for academic purpose and for better understanding of the different stages of a proceeding. It is also to be noted that in Bangladesh all stages of a trial are not properly followed in courts. The environment of proper trial procedure has not developed yet though all steps are written down in the CPC, CrPC and their Rules.

await his trial. It may be that the accused has been on bail and does not appear, in which case the court of trial may issue warrant, called a 'bench warrant' for the arrest of the accused. Whatever the way, when the accused appears, or is brought before the Magistrate, the Magistrate will first consider the record of the case and he will hear the parties. Having done that if he considers the charge to be groundless, he may discharge the accused (section 241A). This is when the defence lawyer may raise the point of **'no case to answer'**[2]. It means that if the prosecution does not raise a prima facie case in favour of their allegation against the accused, there may be 'no case to answer' for the defence and in that case the judge or Magistrate will discharge the accused before framing of charges.

(ii) **Framing of Charges:** If on the other hand, the Magistrate is of the opinion that there is a prima facie case for the accused; and he is competent to try the case, he shall frame a formal charge. The charge must contain sufficient particulars as to time, place, person and circumstances, so that the accused may have notice of the matter with which he is charged (section 242). It is very important to note that formal trial starts with the framing of charge.

(iii) **Plea and Conviction:** Once the charge is framed, the accused will be asked whether he admits that he has committed the offence with which he is charged. If the accused pleads guilty to the charge, i.e., admits his guilt to the charge, the Magistrate may convict him accordingly (section 243).

(iv) **Hearing/ Taking Evidence:** If the Magistrate does not convict the accused on plea or if the accused does not make

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[2] **'No case to Answer'**: Few lawyers in Bangladesh are familiar with this term though this happens at one or more than one stages of the trial.

admission, the Magistrate shall proceed to hear the case on the basis of evidence. The accused and all witnesses will be examined and cross-examined according to the law of evidence and CrPC (section 244).

(v) **342 Steps/ Examination of the Accused:** After the witness for the prosectuion have been examined and before the accused is called for his defence, the court may without previously warning the accused asked him any question for the purpose of enabling him to explain any circumstances appearing in the evidence against him. The accused may answer such question or refuse to answer and the court may draw such inferences from such refusal or answers as it thinks just.

(vi) **Acquittal**[1]**:** If after hearing evidence and examining the accused the Magistrate finds the accused not guilty, he shall record an order of acquittal.

(vii) **Sentence and transfer for Sentence:** On the other hand, if the Magistrate finds the accused guilty, he shall pass the sentence. However, if he finds that the accused is guilty and he ought to receive a punishment different in kind from, or more severe than what he can inflict, he will forward his proceedings to the CJM or Magistrate of the Fisrt Class to whom he is subordinate (section 349).

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[1] **Difference between discharge and acquittal:** Discharge occurs before the start of actual trial whereas acquittal occurs in the form of judgment which is definitely the result of a trial. Section 241A refers to discharge in a trial before a Magistrate; section 265C refers to discharge in a trial before a Court of Sessions. On the other hand, section 245 refers to acquittal in a trial before a Magistrate Court and section 265H refers to acquittal before the Court of Sessions.

Trial Stage in Sessions Court

Trial in Sessions Court is more formal and lengthy compared to those in the Court of a Magistrate. Unlike in the Magistrate Court there are formal opening, argument and closing of every case.

(i) **Opening of the Prosecution Case:** When the accused appears or is brought before the court, the Public Prosecutor opens the case by describing the charge brought against the accused and stating by what evidence he will prove the guilt of the accused (section265B).

(ii) **Pre-trial Hearing/ Discharge before framing of Charge:** After the opening of the prosecution case, the Session Judge will give both the sides chance to argue in favour of framing charge or discharge. (There will be no scope for examination of witnesses at this stage). After such hearing and considering the record of the case if the Judge considers that there is no sufficient ground or prima facie case for proceeding against the accused, he shall discharge the accused and record the reason for so doing (section 265C). This is when for the first time the defence lawyer avails the opportunity to raise the point of **'no case to answer'**. It means that if the prosecution does not raise a prima facie case in favour of their allegation against the accused, there may be no case to answer for the defence and in that case the judge will discharge the accused before framing of charges.

(iii) **Framing of Charge:** If, on the other hand, the Judge considers that there is a prima facie case against the accused, it shall frame a charge (section 265D). Formal trial starts with the framing of charge.

(iv) **Plea and Conviction:** After the charge is framed, it shall be read and explained over to the accused and the accused shall be asked whether he pleads guilty of the offence charged or claims to be tried. If the accused pleads guilty,

the Court shall record the plea and may convict him accordingly (section 265E).

(v) **Prosecution Evidence: Examination-in-Chief and Cross Examination:** If, on the other hand, the accused refuses to plead, or does not plead or claims to be tired, or the judge dose not accept his plea, the court shall fix a date for the examination of witnesses. The Public Prosecutor will first examine all prosecution witnesses. After prosecution witnesses are examined, cross-examination by the accused and re-examination, if any, will follow immediately (sections 265F and 265G).

(vi) **Acquittal on the basis of Prosecution Evidence:** If, after considering the prosecution evidence and the defence on the point, the Court considers that there is no evidence that the accused committed the offence, it shall record an order of acquittal (section 265H).

(vii) **Defence Evidence: Examination in Chief and Cross:** If the accused is not acquitted, he shall be called upon to enter on his defence and adduce any evidence in his favour. The defence counsel will examine all defence witnesses. After defence witnesses are examined, cross-examination by the Public Prosecutor and re-examination, if any, will follow immediately (section 265I).

(viii) **Summing Up/ Closing of the Prosecution and Defence Case:** After hearing of both the defence and prosecution evidence, the prosecutor will first sum up his prosecution case highlighting particularly the strength of the prosecution case and weaknesses of the defence case. This is because the prosecution bears the burden of proving beyond all reasonable doubt that the offence was committed by the accused. In other words, the prosecution closing speech should contain two important things:

- a summery of the evidence which shows that the defendant is guilty; and
- an explanation of the burden and standard of proof[1].

Once the prosecution summing up is complete, the defence counsel will have his reply; he will sum up the strength of the defence evidence and weakness of the prosecution evidence. His objective would be to convince the court that the prosecution has failed to prove the guilt of the accused beyond every reasonable doubt (section 265J). In particular the defence closing speech should contain the following things:

- a summery of the defence case;
- a summery of the weaknesses in the prosecution case;
- any answers to the questions in cross-examination which prosecution witnesses gave which suggest that the accused is not guilty.
- an explanation of any evidence which damages the defence case, eg that the prosecution witness is mistaken etc.

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[1] **Difference between burden of proof and standard of proof:** Both of these concepts are actually matters of the law of evidence. According to section 104 of the Evidence Act the burden of proving a relevant fact in order to determine whether evidence is admissible or not lies on the person who wishes to give such evidence. On the other hand, standard of proof is a condition as to by what measure particular evidence is to be proved. In criminal proceedings the burden of proof for the prosecution is beyond reasonable doubt, i.e. the prosecution must prove beyond reasonable doubt that relevant conditions of admissibility are satisfied. If however, any burden is imposed on the defence in criminal proceeding, the requisite standard will be on the balance of probabilities and not beyond reasonable doubt. This is because of the concept of presumption of innocence in criminal proceedings.

- an explanation of the burden and standard of proof.

(ix) **Judgment of Acquittal or Conviction:** After hearing arguments and summing up the judge will normally not deliver the judgment at once; it will rather fix a date for judgment. On the day fixed for judgment the judge would declare the judgment in open court and in front of the accused, if not tried in absentia (section 366). A sentence may be of different types: imprisonment, fine, probation, death sentence etc.

Post-trial Stage

(i) A criminal judgment ends either with acquittal or conviction. If it is an acquittal and the accused is in jail, a copy of the judgment will be passed to the jail authority that will release the acquitted offender as per the judgment.

(ii) On the other hand, if it is a conviction of imprisonment, the accused will be taken from the court to jail and will be serving the sentence as per the judgment unless his sentence is suspended or remitted by the Government.

(iii) When a sentence is fully executed, the officer executing it shall return the warrant to the court from which it was issued, with an endorsement under his hand certifying the manner in which the sentence has been executed (section 400).

(iv) If it is death sentence, the proceedings shall be submitted tot he High Court Division and the sentence shall not be executed unless confirmed by the High Court Division (section 374).

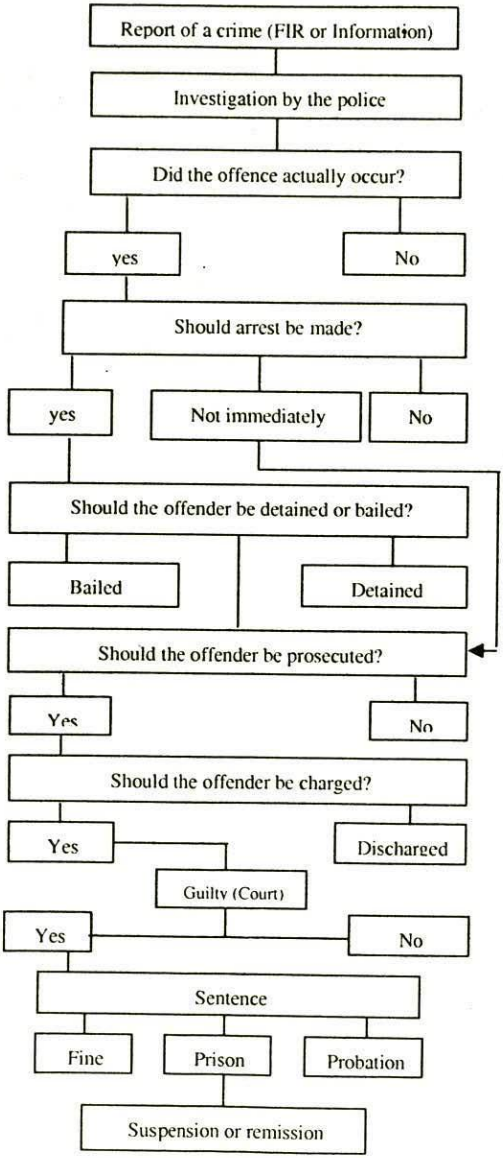
(v) When a person under the age of sixteen is sentenced by a criminal court, the court may direct that such person, instead of being imprisoned in a criminal jail be confined in

any reformatory establishment or in any training centre or be serve in a probation etc (section 399).

How is Sentence Imposed? Any Guideline for Magistrates?

Every Magistrate has specific sentencing power and that power is in between an upper and lower limit. For example, a Magistrate of the third class has power to impose sentence up to two years; a Second Class Magistrate has power to impose sentence up to three years; a First Class Magistrate has power to impose sentence up to five years. How will he impose sentence in between the limits? What will he consider in imposing sentence? There is no guideline set either by the Government or the Supreme Court for the Magistrates to follow. In most of the developed countries like the UK, USA there is a specific guidelines for the Magistrates to follow before imposing any sentence.

The diagram shows the steps of a criminal suit.



CHAPTER SEVEN

CIVIL PROCEEDINGS: VARIOUS STAGES

CHAPTER VII

CIVIL PROCEEDINGS

Nature of Civil Proceeding

(i) **Adversarial Process:** The civil litigation process in Bangladesh is, essentially, adversarial or accusatorial in nature meaning that the whole process is a contest between two parties. As regards civil litigation, these two parties are the plaintiff on the one hand and the defendant on the other hand. In the process court takes a non-partisan role; court plays no significant role in preparation of a case; the trial itself is not an inquiry into events but rather a hearing to decide within a complex set of rules, whether the plaintiff is entitled to the right which the defendant denies[1].

(ii) **Balance of Probabilities:** As opposed to criminal standard of proof (beyond reasonable doubt), in civil litigation the standard of proof is balance of probabilities, i.e., more probably true than false. Thus if the plaintiff can establish a prima facie case before the court in favour of his claim and the other party does not adduce any evidence in his defence, the judge should find for the plaintiff. Making a prima facie case (more than 50% truth) is enough for the plaintiff and this is civil standard of proof. On the other hand, if the plaintiff fails to raise a prima facie case in relation to his claim, a defence submission of 'no case to answer' is likely to be successful.

(iii) The expression 'civil proceeding' covers all proceedings in which a party asserts civil rights conferred by a civil law. Civil justice consists in the enforcement of civil rights while criminal justice consists in the punishment of wrongs-doers. In a civil

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[1] On the other hand, in inquisitorial system which exists in most of the European counties judges supervise the pre-trial inspections and preparation of the case, to a greater extent, and play a significant part in the questioning of the witness at trial, and in the decisions as to what evidence should be considered by the court. In brief, the trial is much more of an investigation rather than a contest.

proceeding the affected person claims a right which has been denied by the defendant. He is thus a claimant for redress and the court makes an attempt to constrain the defendant to perform a duty or to respect a right.

(iv) All civil proceedings in Bangladesh are regulated under the Code of Civil Procedure Code 1898 unless otherwise excluded.

(v) Generally three types of laws are involved in a civil proceeding: the CPC, the CRO (Civil Rules and Orders) and Civil Suits Instruction Manual.

Stages in a Civil Proceeding:

The stages may be divided into four periods:

(1) Pre-Proceeding Stage;
(2) Proceeding Stage;
(3) Trial Stage;
(4) Judgment; and
(5) Enforcement and execution

post Trial

Pre-Proceeding Stage

This is the initial stage of conciliation and mediation with a view to resolving the dispute amicably between the parties. However, unlike the system in the UK there are no statutory provisions for mediation in civil proceedings as a pre-proceeding step. The only available mandatory mediation process is in the family matters under the Muslim Family Law Ordinance 1961 and the Family Court Ordinance, 1985. As per section 10 of the Family Court Ordinance, 1985 after filing the written statement, the court is to fix a date within 30 days for a pre-trial hearing. On that date the court after examination of the plaint and written statement shall ascertain the issues and attempt to effect a compromise or reconciliation between the parties, if possible. Apart from reconciliation proceeding under the Family Court Ordinance there has, however, been a recent change in the CPC adding the provision of ADR in all civil cases which has been discussed in this chapter. However, this is also not a pre-proceeding step.

The Proceeding Stage

Institution of Suit/ Issue of Plaint: According to section 26 of the CPC every suit shall be instituted by the presentation of a plaint[1]. Once the plaint is ready, it is to be filed in the court which has both territorial and pecuniary jurisdiction. According to section 15 of the CPC a suit triable by a civil court must be instituted in the court of the lowest grade competent to try it. Once a plaint is taken to the court, the court officer, i.e. the Sheristadar shall examine, *inter alia*, if the relief claimed has been properly valued and the court fees paid etc. After such examination he puts a serial (consecutive) number of the suit and will enter the suit into a Register called the Register of Suits. The date of filing shall also be stamped on the plaint as soon as it is filed. Once this is done a civil suit is said to have been started. The machinery of a court is set in motion by the presentation of a plaint, which is the first stage in a civil suit.

Issue of Process: Once the suit is filed and registered, the next step is to issue of process, i.e, issue of summons[2] by the court to the defendant to appear and answer the claim (section 27, Order V/CPC).

Service of Summons: Summons with a copy of the plaint which is served on the defendant states the nature of the plaintiff's claim against the defendant and the remedy he seeks to obtain, which may be damages or the recovery of debt, or recovery of possession of property, or an injunction etc. Normally service of summons is done by the court officer and the normal method is by registered post (Order V/CPC).

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[1] Plaint is a statement of claim, a document, by presentation of which a suit is instituted.

[2] A summons is a document issued from the office of a court of justice, calling upon the person to whom it is directed to attend before a judge or officer of the court for a certain purpose.

4. **Return of Summons/ Filing Written Statement**[1] etc: On the summons a date is put by the court for the appearance of the defendant. Once the defendant receives the summons and he intends to contest the claim, he is to appear in the court on the day fixed in the summons to appear. On this day the defendant either submits his written statement or asks for time to file the same in some future date. The defendant has to file his written statement either on or before the date of first hearing (Order VIII/R-1). Again, on this date if the court finds that the plaintiff has failed to pay the required court fee or postal charges for service of summons, the court may dismiss the suit on that day (Rule 2/Order IX).

5. **Alternative Dispute Resolution (ADR):** Once pleading is complete, the disputes between the parties become clear and the court normally fixes a date for first hearing. However, in 2003 a new method of ADR[2] was introduced in the CPC in sections 89A and 89B and chapter V of the Artha Rin Ain, 2003. In sections 89A and 89B two methods of ADR has been enacted- 'mediation' and 'arbitration'. The term 'mediation' has been used in section 89A which lays down that except in a suit under the Artha Rin Ain, 1990 after filing of written statement, if all the contesting parties are in attendance in the court or in person or by their respective pleaders, the court may by adjourning the hearing, mediate in order to settle the dispute in the suit or refer the dispute in the suit to the engaged pleaders of the parties, or where no pleader or pleaders have been engaged, to a mediator from the panel as may be prepared by the District Judge under sub-section 10 of section 89A, for undertaking efforts for settlement through mediation.

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[1] For plaint and written statement there is common term called 'pleading'. Pleadings are normally drafted by lawyers.

[2] In the recent past the alternative dispute resolution (ADR) system has been developed in the USA, UK and also in Hong Kong, Australia etc and the rate of success of ADR is significantly high under this system. The system of ADR is easier; time saving and cheap compared to traditional adversary system of litigation. In line with this view ADR has been introduced in the CPC.

As far as **arbitration** in section 89B is concerned, it is stipulated that if the parties to a suit at any stage of the proceeding, apply to the court for withdrawal of the suit on the ground that they will refer the dispute in the suit to arbitration for settlement, the court shall allow the application and permit the suit to be withdrawn; and the dispute shall be settled in accordance with Salish Ain, 2001.

6. **First Hearing and the Examination of Parties by the Court:** If the system of ADR is undertaken and it is successful, the dispute will end there. However, if ADR fails, the court shall proceed with hearing of the suit from the stage at which the suit stood before the decision to mediate. Given that an ADR is not undertaken or fails, the court will fix the date for first hearing. The first hearing of a suit means the day on which the court goes into the pleadings of the parties in order to understand their contentions. At the first hearing of the suit the court shall ascertain from each party or his pleader whether he admits or denies such allegations of fact as are made in the plaint or written statement. The court will record such admission or denials (R-1/Or-X). Issues are normally framed at this first hearing.

7. **Framing of Issues:** Issues are of two kinds- issues of fact and issues of law. Issues arise when a material proposition of fact or law is affirmed by the one party and denied by the other. Each material proposition affirmed by one party and denied by the other shall form the subject of a distinct issue. Thus no issues arise in regard to admitted facts. At the first hearing of the suit the court shall, after reading the plaint and the written statements and after examination of the parties, if required, ascertain upon what material propositions of fact or law the parties are at variance, and shall thereupon proceed to frame and record the issues on which the right decision of the case appears to depend. The duty to frame issues primarily rests with the court. However, the advocates appearing for both the parties also should assist the court in framing issues. Issues must be confined to the material questions of law or fact and not on subordinate facts or evidence

by which the material questions fact or law are proved or disproved. If the court is of the opinion that the issues cannot be framed without the examination of some person not before the court or without the inspection of some document not produced in the court, it may adjourn the framing of issues to a future date (Order XIV). In cases in which no issues need be framed, e.g. a small cause suit, the first hearing would be the day on which the trial starts.

8. **Section 30 Step and Settling of Date for Hearing (SD):** Though these two steps are known in civil suits, they are not that much followed by the courts now a days. Section 30 step is related to the orders with regard to the delivery and answering of interrogatories, the admission of documents and facts, and the discovery, inspection, production, impounding and return of documents or other material objects producible as evidence. Apart from the section 30 steps, once the issues are framed, the court will fix a date for settling the date of final or peremptory hearing, i.e. the trial. On this 'settling date' (SD) the court insists on the parties for filing their lists of witnesses and applying for any commission that may be required for examination of witnesses. On the SD the presiding judge should fix the date of peremptory or final hearing. After a peremptory hearing date has been fixed, no further adjournment is normally granted except for the most urgent and special reasons.

Trial Stage

1. **Opening of the Case:** The plaintiff will have the right to start his opening speech first but occasionally it might be the right of the defence to start the trial with a speech. It really depends upon who bears the burden of proof on the matters in issue in the trial (Order XVIII/ Rule 1). In the opening speech the opening advocate will state the following things:
   (i) State the nature of the case, e.g. claim for damages, breach of contract, negligence etc;

(ii) State the issues in the case, i.e. the areas of dispute between the parties;

(iii) Summaries the fact in issue[1] or the theory of the case, i.e., the facts which have been established or will be established during the trial;

(iv) State briefly the evidence of the witnesses, i.e. how the issues in the case will be proved.

The opening of the case is very important since it sets the course of the trial in right and transparent track but unfortunately in most civil trials in subordinate courts the provisions of Order 18 and Rule 1 and 2 are seldom followed. If the party does not open the case and state exactly the line which he proposes to take, he will have an opportunity to change the case which he originally had in his mind. Secondly, he will not only call witnesses whom he had originally intended to call, but also call other witnesses on different points to support different case if he sees that the case which he had in his mind is not progressing as satisfactorily as he wanted. Thirdly, if the case is not opened, a party cannot be confined to his original case, for the judge does not know what the original case is.

2. **Peremptory Hearing (P.H.[1])/ Examination in Chief/ Producing Evidence in Support of the Case:** As soon as the case is opened by the plaintiff, he will call the witnesses on the plaintiff's side one after another and will examine them in line with the plaintiff's case. If there is any documentary evidence to produce this is the stage to present the same to the court. The

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[1] The facts in issue are the facts which the plaintiff is required to prove in order to establish his claim and those which the defendant is required to prove in order to establish a defence which he has raised.

[1] Peremptory hearing is also known as main or principal hearing and this includes not only the examination in chief but also cross-examination. There are basically three types of hearings- first hearing which may be termed as pre-trial hearing; peremptory hearing and lastly further hearing (F.H.). Further hearing is nothing but the extended name of the peremptory hearing. When peremptory hearing has started but could not be finished within the same day or adjournment has been granted in the middle, in that case the part of the hearing which has been left to be done is called 'further hearing'.

evidential rule of burden of proof requires that the plaintiff has to discharge his burden by raising a prima facie case in relation to the relevant issue. Where the plaintiff fails to discharge his burden on a balance of probabilities, i.e. fails to raise a prima facie case in relation to his claim, the suit should be dismissed at once by the judge and it would not be proper to call for the defence evidence (25 CWN 409 PC). In other words, where the plaintiff fails to raise a prima facie case, it is the duty of the defence lawyer to raise the point of **'no case to answer for the defendant'**. If the judge is convinced that the plaintiff has really failed to prove a prima facie case in favour of his claim, he will dismiss the suit. It is to be remembered that if the defendant has to give any opening speech, it will come after the evidence of the plaintiff has been presented to the court. Any defence opening speech should, therefore, concentrate on the matters which it is intended to establish through the evidence to be tendered on behalf of the defence, together with a summery of the case theory for the defence.

3. **Cross-Examination and Re-examination:** After a party examines his witnesses in chief, his opponent has the right to cross-examine him. The cross-examination usually follows immediately upon the examination-in-chief. After cross-examination is complete, a party calling a witness may recall him to re-examine. The purpose of re-examination is to clarify, explain or develop matters arising out of cross-examination so as to limit, where possible, any damage to the case.

4. **Summing Up/ Closing Speech/ Argument:** As soon as evidence is closed, i.e., after hearing of both the evidences for the plaintiff and the defendant, the pleaders will be called upon to argue their cases. The party beginning will have his argument at the end (Order XVIII/Rule 2 and Part-XIII of the Civil Suit Instruction Manual). Thus usually the defendant's counsel goes first with his closing speech. In a closing speech of a civil trial the counsel will normally substantiate the following points:
    a. reinforcing the client's story into a coherent whole in so far as the evidence has backed it up. This is to persuade

the judge of the merits of the of the case (but definitely not by misleading the court);

b. an argument on law and legal principles if any on the point, e.g. referring to case laws, authorities etc.

The Judgment

1. **Pronouncement of Judgment:** Once the hearing is complete, the court will pronounce judgment at once or will reserve the judgment for a future date. If a judgment is reserved, a definite date should be fixed by the court for its delivery and notice of such date should be given to the parties. The essential elements of a judgment is that there should be a statements of grounds of decision. Every judgment other than of a court of Small Causes should contain (i) a concise statement of the case; (ii) the points for determination; (iii) the decision thereon; and (iv) the reason for such decision. A judgment of a court of Small Causes may contain only points (ii) and (iii). The detail you get of these from Order 20 of the Code of Civil Procedure.

2. **Decree and Order:** The adjudication of a court of law may be of two types: (i) orders; and (ii) decrees. Decree has been defined in section 2(2) of the Code.

Enforcement and Execution of Decree

1. **Application for Execution:** Execution is the enforcement of a decree by a judicial process which enables the decree-holder to realise the fruits of the decree passed by the competent court in his favour. All proceedings in execution commence with the filing of an application for execution. Such application should be made to the court which passed the decree or where the decree has been transferred to another court, to that court. Once an application for execution of decree is received by the court, it will examine whether the application complies with the

requirements of Rules 11 to 14. If they complied with, the court must admit and register the application. For detail see Order 21 of the Code of Civil Procedure.

2. **Hearing of the Application:** The court on which the application is pending may fix a date for hearing on the execution application. When the application is called out for hearing and the applicant is not present, court may dismiss the application. On the other hand, if the applicant is present and other party is absent, then the court may hear the application *ex parte* and pass such order as it may thinks fit. Rules 106 lays down that if the application is dismissed for default or *ex parte* order is passed, then the aggrieved party may apply to the court to set aside the order.

3. **Show Cause Notice for Execution:** Rule 22 Order 21 provides for the issue of show cause notice to the person against whom execution is applied for in certain cases.

4. **Procedure after Notice:** If the person to whom the notice is issued does not appear or does not show causes against the execution, the court may issue process for execution of the decree.

5. **Mode of Execution:** By delivery of any property specified in the decree or by attachment and sale or by sale without attachment, or by arrest and detention in civil prison of the judgment debtor or by appointing a receiver, or by affecting a partition, or in such other manner as the nature of the relief may require.

Distinctions between Civil and Criminal cases

Areas of difference	Civil Cases	Criminal Cases
Purposes of the law	To uphold rights of individuals	To maintain law and order; to protect society and to punish offender.
Person starting the case	The individual whose rights have been infringed or threatened.	Usually the State through the police and informant.
Legal name for the persons	Plaintiff/ defendant	Prosecutor/ defendant or accused
Standard of proof	The balance of probability	Beyond reasonable doubt
Courts dealing with the case	Small Cause Courts, Assistant Judge, Senior Assistant Judge, Joint District Judge, Additional District Judge, District Judge and the Supreme Court.	Magistrate Courts (3rd Class, 2nd Class and 1st Class), Metropolitan Magistrate Courts, Joint Sessions Judge, Sessions Judge and the Supreme Court.
Decision	Liable/entitled or not liable/not entitled.	Guilty or not guilty
Powers of the court	Declaration, Award of damages, injunction, specific performance of contract, restitution, rectification, Rescission etc	Prison, fine, probation, discharge etc.
Commuting power of the Crown	The Crown cannot commute any civil judgment.	The Crown can commute a sentence in criminal law.
Nolle prosequi	Even if the suit has been started, it can be settled at any stage by the parties.	Once started criminal proceedings cannot be stopped except by the authority of the Govt/or Attorney-General
Evidence	The defendant can be compelled to give evidence.	The accused cannot be compelled to give evidence.

CHAPTER EIGHT

BAIL AND POLICE POWER OF ARREST AND REMAND

CHAPTER VIII

BAIL AND POLICE POWER OF ARREST AND REMAND

What is Bail? The concept of bail emerges from the conflict between the 'police power' and to restrict the liberty of a man who is alleged to have committed a crime and the presumption of innocence in his favour. 'Bail' is derived from the old French verb 'baillier' meaning to 'give or deliver'. Bail in English Common law is the freeing or setting at liberty a person arrested or imprisoned on security or on surety being taken for his appearance on certain day and a place named. The surety is termed 'bail' because the person arrested or imprisoned is placed in the custody of those (surety) who bind themselves or become bailer for his due appearance when required. Surety must be those persons who have authority to bail the arrested person to appear before the court on a certain date. It is upon the bonds of those sureties that the person arrested or imprisoned is bailed, i.e., set at liberty until the day appointed for his appearance. The effect of granting bail is not to set the prisoner free from jail or custody, but to release him from the custody of law and to entrust him to the custody of his sureties who are bound to produce him to appear in the court at a specified time and place. The necessary corollary is that it is open to the sureties to seize the prisoner at any time and may discharge themselves by handing him over to the custody of law and the result would be that he (the prisoner) would be then imprisoned.

Bail under the CrPC: In the CrPC the term 'bail' has been used sometimes singly and more often it has been used in juxtaposition with other terms which are as follows: 'bail', 'security for bail', 'bond with sureties', 'bail with surety', 'bail or bond', 'bail or security'. They all connote the same thing for the purpose of the CrPC. Under the CrPC both the police and the court are competent to grant bail in appropriate circumstances.

There are varieties of purposes behind granting a bail. This may be, for example, for appearance before a court; for presenting appeal; pending reference or revision; or for the purpose of giving evidence etc.

Bail to a convicted person is dealt with in sections 426 and 435 whereas bail before conviction is dealt with in sections 496 and 498.

Stages of a Bail Petition: Application for bail can be made at the first appearance of the accused before the Magistrate court. As per Article 35 of the Constitution and section 61 of the CrPC every person arrested must be produced before the Magistrate within 24 hours of his arrest. Once he is brought before the Magistrate, he has right to apply for bail. If the bail application is rejected, he may appeal to the Court of Sessions pending which he cannot apply for bail again in the Magistrate court. However, once the appeal in the Sessions Court is disposed of, he may apply for bail in the Magistrate Court again with fresh grounds. Even if the appeal in the Sessions Court is rejected, still the accused person will have right to apply for bail in the Magistrate Court with fresh grounds if any.

Magistrate has jurisdiction to grant bail during the course of investigation when the accused person is produced before him.

Persons who are arrested or detained by the police as well as persons who appear or are otherwise brought before the court can apply for bail in the Magistrate Court. However, the person must be accused of some offence. Generally bail can be granted at any stage prior to conviction being recorded.

Cancellation of Bail: Though there is no express provision in the Code about cancellation of bail, if at any subsequent stage of the proceeding it is found that any person accused of a bailable offence is intimidating bribing or tempering with the prosecution witness or is attempting to abscond, the High Court Division has the power to cause him to be arrested and to commit him to custody such persons as it thinks fit.

Bail Bond and Surety: Bail bond is a prescribed form kept in the court; the person who is released on bail has to execute it by filing it up; the security money fixed by the court or the police officer is to be mentioned in the bond. Surety is a person/persons who undertakes by signing the bail bond that they would pay a certain amount (security money) mentioned in the bond in case the person on bail fails to comply with the bail conditions or absconds. Thus both the person on bail and the sureties have to execute the bail bond. The bond such executed is to be conditioned that the person released on bail shall attend at the time and place mentioned in the bond and shall continue so to attend until otherwise directed by the police officer or the court as the case may be. These are all requirements of section 499.

Who can be Sureties: Only a natural person can be a surety. There is no exception to it. An accused has the right to furnish surety of his own choice and under law he cannot be compelled to produce a particular person. However, the surety must be reliable and the court granting bail should verify solvency of the surety itself and not act upon the advice of others. Execution of bail bond by the surety is a simple contract between the court and the surety whereby the custody of the person is given to him and for his production in Court according to the terms of the bond.

Discharge of Sureties: The object of surety bond is to ensure presence of accused person. Where a surety has applied for cancellation of the bail bond and the Magistrate has received the application, there is no alternative left to the Magistrate but to cancel the bail bond and to issue warrant for the arrest of the accused. The provisions of section 502 provides for the continuity of the surety bond so as to enable the accused to offer other surety bond.

Bail without executing Bond: Under section 514 it is permissible for the court to accept a bond executed by a surety or sureties only where the person who is required to execute the bond is a minor. In all other cases both the sureties and the person released on bail must execute the bond and this is mandatory.

Bond and Cash Security: Section 513 provides for a concession to an accused person to enable him in certain cases when he is unable to produce his surety to offer cash deposit in lieu of the bond required under section 499 (*A.K.M Reza v State*, 33 DLR 146). The Magistrate is not bound to accept cash but he may permit an accused person to deposit a sum of money in lieu of executing a personal bond and giving surety of some persons.

Bailable and Non-bailable Offence: Bailable offence means an offence shown as bailable in the second schedule, or which is made bailable by any other law for the time being in force and non-bailable offence means any other offence. 5th column of Schedule II of the Code shows offences which are bailable and non-bailable. The term bailable has been selected first and then the expression non-bailable derived from it. Thus the term non-bailable means any offence other than bailable offence.

Right of Bail in Bailable Offence: A bailable offence is an offence where bail can be claimed as of right. As soon as it appears that the accused person is prepared to give bail bond, the police officer or the court before whom he offers to give bail bond, is bound to set him free on bail on such terms as to bail as may appear to the officer or the court. Neither the court nor the officer can reject bail where the offence is bailable because the language of section 496 is imperative. It is only the HCD which has power to order him to be arrested and remand to custody in bailable offences. In every bailable offence bail is a right and not a favour. Accused of a bailable offence cannot be taken into custody unless the accused is unable or unwilling to offer bail bond or furnish moderate security[1]. The Court or police may ask for securities or executing a bond without sureties for his appearance in police station or court. The object of demand of security is not to punish the accused but to ensure his presence in the court. The amount of security must be fixed with due regard to the means of the accused and the nature of the offence and

[1] To be released on bail a person must be in custody or some sort of confinement. Otherwise it is not understood from what custody or confinement he would be released (*Abdus Samad v State*, 41 DLR 291).

should not be excessive. If the person on bail suborns witness there may be other remedies at law open to him e.g. contempt proceeding, or proceeding to bind him over to keep the peace or be of good behavior.

Right of Bail in Non-bailable Offence: When a person is arrested for a non-bailable offence and is brought before the court, the court may release him on bail. Thus bail in non-bailable offence is a matter within the discretion of the courts and cannot be claimed as of right (section 497).

Bail by the Police: An officer in charge of a police station is bound to grant bail in bailable offence and an improper refusal to do so will amount to a violation of duty (section 497(1) and (2)).

For the purposes of bail in non-bailable offence the legislature has classified the non-bailable offences into two heads, namely, (1) those which are punishable with death or imprisonment for life; and (2) those which are not so punishable. In the case of an offence punishable with death or imprisonment for life, an officer in charge of a police station cannot enlarge a person on bail if there appear reasonable grounds for believing that he was guilty for such offence. The age, sex, or sickness or infirmity of the accused cannot be considered by the police officer for the purpose of granting a bail under section 497(1).

Interim or Ad-interim Bail: There is no express legal provision of ad-interim or interim bail. However, this sort of bail may be granted at any stage of a case by way of court's inherent power. If the case is pending in the Magistrate Court, application for such a bail will have to be filed in the Sessions Court under section 497 and if the case is in the Sessions Court, application will go to the HCD against the order of the Sessions Court. An ad-interim bail may be pending appeal or revision. It may also be pending investigation or inquiry (section 426, 426(2A)).

Anticipatory Bail (bail before arrest): When a person is granted bail in apprehension of arrest, this is called anticipatory bail. This is an extra-ordinary measure and an exception to the general rule of bail. When any person has reason to believe that he may be arrested on an accusation of having committed a non-bailable offence, he may apply to

the High Court Division or the Court of Sessions for a direction and the court may, if it thinks fit, direct that in the event of such arrest, he shall be released on bail. There is no section or provision which specifically authorise the court to grant an anticipatory bail. However, application is made under section 498 of the CrPC for an anticipatory bail. This is because of the wording in the section, "in any case. Thus the power given in this section is very wide and can be exercised by both the High Court Division and the Court of Session in any case without any limitation.

Bail to an Under-trial Prisoner

(1) A Magistrate has to conclude the trial of a case within 180 days from the date on which the case is received by him for trial.
(2) A Session Judge, Additional Session Judge or an Assistant Session Judge shall conclude trial within 360 days.
(3) If a trial cannot be concluded within the specified time, the accused in the case, if he is accused of a non-bailable offence, may be released on bail to the satisfaction of the court, unless for reasons to be recorded in writing, the court otherwise directs (section 339C).

Police Power of Arrest and Remand

Abuse of Police Power of Arrest (section 54)

Both the methods of policing in this country and the police power have been questioned over times. The work of the police is often characterised by brutality. Abuse of power by the police under section 54 of the CrPC and the Special Powers Act 1974 have been identified by different human rights watchdog agencies as the main sources of human rights violation in the country. This is because the provisions of both the laws allow the arrest of any person by the law enforcers without recourse to court order. Legal loopholes provide the police with the excuse for arresting someone with impunity. The arrest is not everything. The method of extracting information from the arrested persons by the police is barbarous and this is the reason behind so many custodial deaths. The most of the custodial deaths are pure ransom killing by criminals in uniform are a fact of life in Bangladesh. Abuse of power under sections 54 and 167 by the police and Magistrates have been elaborately discussed by the High Court Division of the Supreme Court in *BLAST v*

Bangladesh (55 DLR 363). In this case the HCD has given 15 directives to the Government to follow along with recommendations to implement by way of amending the CrPC. Of these 15 directions first 8 relates to the police power of arrest under section 54 of the CrPC which are as follows:

Recommendation with regard to arrest and detention:

(1) No police officer shall arrest a person under section 54 of the Code for the purpose of detaining him under section 3 of the Special Powers Act, 1974.

(2) A police officer shall disclose his identity and, if demanded, shall show his identity card to the person arrested and to the persons present at the time of arrest.

(3) Immediately after bringing the person arrested to the police station, the police officer shall record the reasons for the arrest including the knowledge which he has about the involvement of the person in a cognizable offence, particulars of the offence, circumstances under which arrest was made, the source of information and the reasons for believing the information, description of the place, note the date and time of arrest, name and address of the persons, if any, present at the time of arrest in a diary kept in the police station for that purpose.

(4) If at the time of arrest, the police officer finds any marks of injury on the person arrested, he shall record the reasons for such injury and shall take the person to the nearest hospital or Government doctor for treatment and shall obtain a certificate from the attending doctor about the injuries.

(5) He shall furnish the reasons for arrest to the person arrested within three hours of bringing him to the police station.

(6) If the person is not arrested from his residence or place of business, he shall inform the nearest relation of the person over phone, if any, or through a messenger within one hour of bringing him to the police station.

(7) He shall allow the person arrested to consult the lawyer of his choice if he so desires or to meet any of his nearest relations.

(8) When such person is produced before the nearest Magistrate under section 61, the police officer shall state in his forwarding letter under section 167(1) if the Code as to why the investigation could not be completed within 24 hours, why he considers that the accusation or the information against that person is well-founded. He shall also transmit copy of the relevant entries in the case diary BP form 38 to the same Magistrate.

Police Remand, Use of Force and Extorting Information from the Accused (Section 167)

Section 167 of the Code implies two situations: (1) when an investigation can be completed within 24 hours; and (2) when investigation cannot be completed within 24 hours. The provision of section 167 also implies that while producing a person arrested without warrant before the Magistrate, the police officer must state the reasons as to why the investigation could not be completed within 24 hours and what are the grounds for believing that the accusation or information received against the person is well-founded. Second, the police officer also shall transmit to the Magistrate the copy of the entries in the case diary (B. P. Form No. 38) (B. P. Police Regulation No. 236). After examining information in the case diary and the reasons shown by the police officer, the Magistrate will decide whether the person shall be released at once or detained further. This is the mandatory law which the Magistrates have to follow. However, in absence of any proper guideline unfortunately the Magistrates have been accustomed to follow a 'parrot like' order on the forwarding letter of the police officer authorising detention either in the police custody or in jail. And this non-application of proper judicial mind in view of sub-sections (1), (2) and (3) of section 167 of the Code by the Magistrates has ultimately resulted in so many custodial death and incidents of torture in police custody.

Application for Remand and the Abuse of Power

A police officer makes a prayer for 'remand' stating that the accused is involved in a cognizable offence and for the purpose of interrogation 'remand' is necessary. In sub-section (2) of section 167 though it is not mentioned that 'remand' can be allowed for the purpose of interrogation, at present, the practice is that an accused is taken on 'remand' only for the purpose of interrogation or for extorting information from the

accused through interrogation. There is no proper guide line as to when such prayer should be accepted and when rejected by the Magistrate and this legal lacunae gives both the police officer and Magistrates power to abuse the same. Police officers being motivated or dictated by the executive organ or out of their personal conflict or aggrandisement seek unreasonable remand under section 167 of the Code. And the Magistrates in absence of any proper guideline, either being dictated by the executive organ or otherwise have been accustomed to follow a 'parrot like' order on the forwarding letter of the police officer authorising detention either in the police custody or in jail. The views expressed in favour of police remand is that it is a civil necessity that if some force is not used, no clue can be found out from hard-nut criminals. On the other side of the spectra there is a widely held view that to send the arrested person to the police remand *prima facie* upholds the idea that the accused person did not give the confession voluntarily. When the entire state machinery acts against him, he cannot confess voluntarily and as such the provision for granting police remand several times (although not exceeding 15 days in the whole) totally destroys the purpose behind it. This is because a person coming before the Magistrate has no guarantee that he will not be sent again to the police remand unless he has already completed 15 days. It is therefore imperative on the Magistrate to give reasons for granting a remand. Again, article 35(4) of the Constitution states that no person shall be compelled to be a witness against himself. So the provisions of the CrPC under section 167 are in direct contrast with the provisions of the Constitution. This CrPC was passed by the British Government back in 1898 when there was no fundamental right as we have now in our Constitution. In view of the present provision in article 26 this provision of police remand seems to be void and this is largely the decision of the HC in the BLAST case which is outlined next. However, given that fact that there is provision of police remand in most democratic countries including the UK, we need to wait until the apex seat of the Supreme Court, i.e. the Appellate Division gives its judgment on the matter

High Court Division's Decision on Police Remand

Recently the HCD has ruled in the *BLAST v Bangladesh* 55 DLR 363 that this view is contrary to the express Constitutional provisions in articles 27, 30, 31, 32, 33 and 35. The court also held that if the purpose

of interrogation of an accused is to extort information, in view of the provisions of article 35(4), information which is extorted from him cannot be used against him. Clause (4) of Article 35 clearly provides that no person accused of an offence shall be compelled to be a witness against himself. Second, the court also held that Clause (4) of Article 35 is so clear that information obtained from the accused carries no evidentiary value against the accused person and cannot be used against him at the time of trial. Third, in view of Article 35 of the Constitution which provides that no person shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment, the court held that even if the accused is taken in police custody, no law in the country gives any authority to the police to torture that person or to subject him to cruel, inhuman and degrading treatment. Fourth, the court suggested that interrogation may be made while the accused is in jail custody if interrogation is at all necessary but not in police custody and no torture or inhuman treatment is allowed by the Constitution. Apart from the recommendations about interrogation into jail custody as mentioned above, the court has also given following recommendations regarding interrogation into police custody which are as follows:

Recommendations regarding interrogation into Police Custody

(1) If the investigating officer applies for remand of the accused into a police custody for interrogation, he shall state in detail the grounds for taking the accused in custody and shall produce the case diary for consideration of the Magistrate. If the Magistrate is satisfied that the accused be sent back to police custody for a period not exceeding three days, after recording reasons, he may authorise detention in police custody for that period.

(2) Before passing an order as above, the Magistrate shall ascertain whether the grounds for the arrest was furnished to the accused and the accused was given opportunity to consult lawyer of his choice. The Magistrate shall also hear the accused or his lawyer.

(3) If such order is passed as above, the accused, before he is taken in custody of the investigating officer, shall be examined by a doctor designated or by a Medical Board constituted for the purpose and the report shall be submitted to the Magistrate concerned.

(4) After taking the accused in custody, only the investigating officer shall be entitled to interrogate the accused and after expiry of the period, the investigating officer shall produce him before the Magistrate. If the accused makes any allegation of any torture, the Magistrate shall at once send the accused to the same doctor or Medical Board for examination.

(5) If the Magistrate finds from the report of the doctor or Medical Board that the accused sustained injury during the period under police custody, he shall proceed under section 190(1)(c) of the CrPC against the investigating officer for committing offence under section 330 of the Penal Code without filing of any petition of complaint by the accused.

(6) When a person dies in police custody, or in jail, the investigating officer or the jailor shall at once inform the nearest Magistrate of such death[1].

Recommendations regarding Remand and Custodial Death:

Apart from the above recommendations the court has also given some directions to the Government to follow with immediate effect. Out of 15 directions 8 of which has already been discussed above the rest of following 7 directions relate to change in the law about the system of remand and custodial death sentence:

(9) If the Magistrate is satisfied on consideration of the reasons stated in the forwarding letter as to whether the accusation or information is well-founded and that there are materials in the case diary for detaining the person in custody, the Magistrate shall pass an order for further detention in jail. Otherwise, he shall release the person forthwith.

(10) If the Magistrate releases a person on the ground that the accusation or information against the person produced before him is not well-founded and there are no materials in the case diary against that person, he shall proceed under section 190(1) (c) of the Code against that police officer who arrested the person without warrant for committing offence under section 220 of the Penal Code.

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[1] These six recommendations are the summary of recommendations for necessary amendment in section 54 of CrPC (*BLAST v Bangladesh* 55 DLR 374).

(11) If the Magistrate passes an order for further detention in jail, the Investigating Officer shall interrogate the accused, if necessary, for the purpose of investigation in a room in the jail till the room as mentioned in recommendation B2(b) is constructed[1].

(12) In the application for taking the accused in police custody for interrogation, the investigating officer shall state in detail the grounds for taking the accused in custody and shall produce the case diary for consideration of the Magistrate. If the Magistrate is satisfied that the accused be sent back to police custody, he may, after recording reasons, authorise detention in police custody for a period not exceeding three days.

(13) (i) Before passing an order as above, the Magistrate shall ascertain whether the grounds for the arrest was furnished to the accused and the accused was given opportunity to consult lawyer of his choice. The Magistrate shall also hear the accused or his lawyer. (ii) If such order is passed as above, the accused, before he is taken in custody of the investigating officer, shall be examined by a doctor designated or by a Medical Board constituted for the purpose and the report shall be substituted to the Magistrate concerned. (iii) After taking the accused in custody, only the investigating officer shall be entitled to interrogate the accused and after expiry of the period, e investigating officer shall produce him before the Magistrate. If the accused makes any allegation of any torture, the Magistrate shall at once send the accused to the same doctor or Medical Board for examination. (iv) If the Magistrate finds from the report of the doctor or Medical Board that the accused sustained injury during the period under police custody, he shall proceed under section 190(1)(c) of the CrPC against the investigating officer for committing offence under section 330 of the Penal Code without filing of any petition of complaint by the accused.

(14) The police officer of the police station who arrests a person under section 54 or the Investigating Officer who takes a person in police custody or the jailor of the jail, as the case may be, shall at once inform

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[1] To be noted that in recommendation B2(b) which is at page 376 of the 55 DLR the court recommended for the purpose of interrogation that the investigating officer shall interrogate the accused, if necessary, in a room specially made for the purpose with glass wall and grill in one side, within the view but not within hearing of a close relation or lawyer of the accused.

the nearest Magistrate about the death of any person who dies in custody.

(15) A Magistrate shall inquire into the death of a person in police custody or in jail. When any information of death of a person in the police custody or in jail is received by the Magistrate, he shall proceed to the place, make an investigation, draw up a report of the cause of death describing marks of injuries found on the body stating in what manner or by what weapon the injuries appear to have been inflicted. The Magistrate shall then send the body for post mortem examination. The report of such examination shall be forwarded to the same Magistrate immediately after such examination.

CHAPTER NINE

APPEAL, REVIEW AND REVISION

CHAPTER IX

APPEAL, REVIEW AND REVISION

In Chapters VI and VII we have discussed about the various steps of a suit up to trial. The present chapter will discuss some steps which happens after the completion of trial. Appeal, review, revision and reference all these are different post-trial stages of a suit, be it civil or criminal. Chapters III, IV and V of this book deals with different court structure and procedure. As a part of court procedure each of these chapter has discussion about appeal. For example, it has been mentioned in detail in Chapter III when and under what conditions appeal from the decisions of the High Court Division will lie to the Appellate Division. Apart from the discussion in those chapters, this chapter will concentrate on some general and conceptual rules of appeal, revision, review and reference and their interrelation.

Appeal: There is no definition of 'appeal' in the CPC or CrPC. 'Appeal' means the right of carrying a particular case from an inferior to superior court with a view to ascertaining whether the judgment is sustainable or not. Appeal is a kind of application by a party to an appellate court, asking it to set aside or reverse a decision of a subordinate court.

General Rule as to Appeal

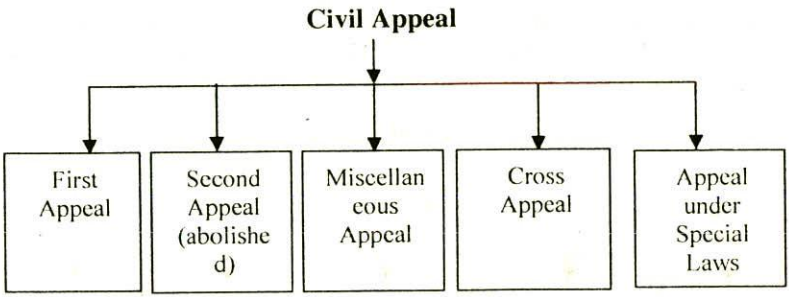
(i) The right of appeal is created by statute and there is no inherent right of appeal;

(ii) An appeal is considered to be the continuation of the trial of the lower court;

(iii) General rule as laid down in section 404 of the CrPC and section 96 of the CPC is that no appeal lies except as otherwise provided by the Code or by any other law. Appeal does not lie as a matter of course being merely a creature of law;

(iv) Appeal may lie on a matter of law as well as a matter of fact.

(v) The appellate court must consider both the points of law and fact in its judgment of appeal. An appellate court must discuss the evidence in detail, make critical analysis of the evidence and consider the facts and circumstances of the case, independent of the decision of the trial court and arrive at its own finding. The appellate court is both a court of law and fact (6 BLD 191 (AD)).



(For details of this diagram please see author's book on *Practice and Procedure in the Supreme Court*).

Provisions in CPC: Sections 96 to 112 of the CPC deal with provisions for appeal in civil cases.

(i) Appeal is allowed from every decree passed by any court exercising original jurisdiction;

(ii) No appeal shall lie from a compromise decree, i.e. a decree passed by the court with the consent of the parties;

(iii) Appeal from orders will lie only in some specified cases as mentioned in section 104 of the CPC;

(iv) There is no provision of second appeal, be it from a decree or order (Sections 104(2) and 100 omitted).

Civil Courts Act: Apart from the above provisions in the CPC, sections 20 and 21 of the Civil Courts Act, 1887 provide for some provisions with regard to civil appeal. Section 20 provides that an appeal from a decree or order of a District Judge or Additional District Judge shall lie to the High court Division. Section 21 provides following:

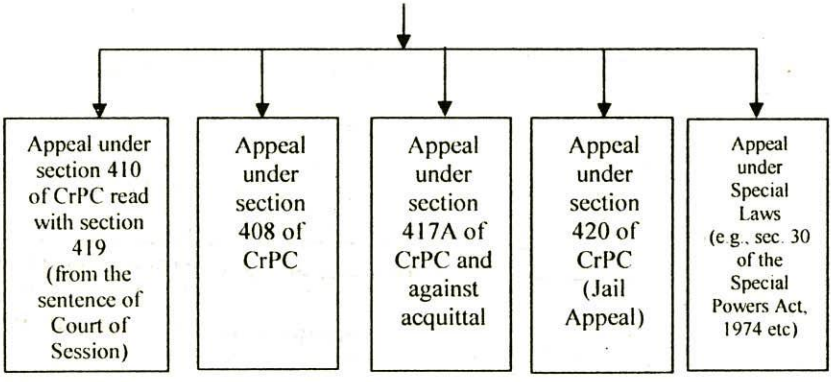
(1) an appeal from a decree or order of a Joint District Judge shall lie-
   (a) to the District Judge where the value of the original suit in which or in any proceeding arising out of which the decree or order was made did not exceed five lac taka; and
   (b) to the High Court Division in any other case.

(2) An appeal from a decree or order of a Senior Assistant Judge or Assistant Judge shall lie to the District Judge.

(3) Where the function of receiving any appeal which lie to the District Judge under sub-section (1) or sub-section (2) has been assigned to an Additional District Judge, the appeals may be preferred to the Additional District Judge. (See more at page 113-114 of this book).

Procedure of Appeal: The detailed discussion of the procedure of appeal is beyond the scope of this book. However, the procedure is dealt with in detail in Order XLI of Code of Civil Procedure.

Criminal Appeal



(For details of this diagram please see author's book on *Practice and Procedure in the Supreme Court*).

(i) Sections 404 to 431 of the CrPC deal with the provisions relating to criminal appeal;

(ii) Judgment and order of an appellate court shall be final except in two cases: (a) appeal in case of acquittal (section 417); and (b) appeal against inadequacy of sentence (section 417A). Thus unlike in civil cases there are provisions for second appeal in criminal cases in two specified cases;

(iii) The appellate court can reverse the order appealed against and order for further inquiry; may order for retrial (remand the case for fresh trial or retrial); in an appeal from an order of acquittal it may reverse the order and find the accused guilty and pass sentence according to law; it may make any amendment or any consequential or incidental order that may be just or proper (section 423);

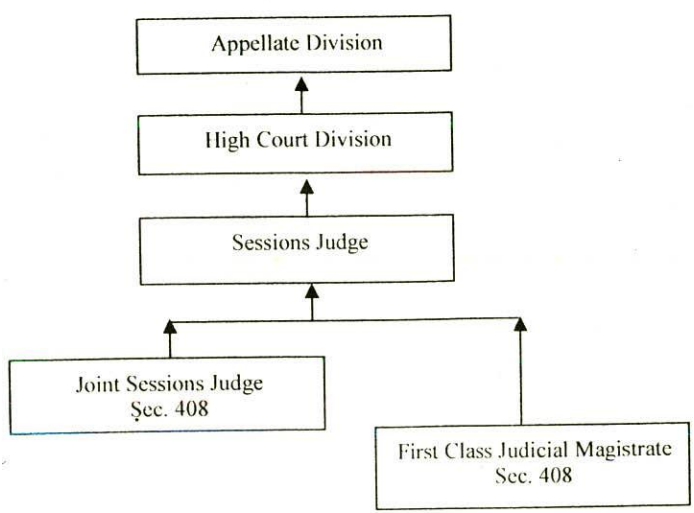
(iv) Appeal against an order requiring security for keeping the peace or for good behaviour by a Magistrate will lie to the Court of Sessions (Section 406);

(v) Any person convicted on a trail held by a Joint Sessions Judge, Metropolitan Magistrate, or any Judicial Magistrate of the first class, may appeal to the Sessions Judge (sec. 408). There are two exceptions to this rule: (a) When in any case a Joint Sessions Judge passes any sentence of imprisonment for a term exceeding five years, the appeal of all or any of the convicted person shall lie to the High Court Division; and (b) When any person is convicted by a Metropolitan Magistrate or Judicial Magistrate specially empowered to try an offence under section 124A of the Penal Code, the appeal shall lie to the High Court Division.

(vi) Appeal from sentence of Assistant Sessions Judge or Magistrate of the First Class will lie to the Court of Sessions (section 408);

(vii) Appeal from sentence of Court of Session or Additional Session Judge will lie to the High Court Division (sec. 410).

Tires of Criminal Appeal



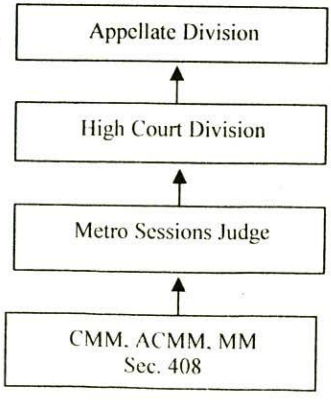
Note: 1:

- When Joint Sessions Judge passes a sentence exceeding 5 years, the appeal shall lie to the High Court Division.
- When it does not exceed 5 years, the appeal will lie to the Session Judge.
- When any person is convicted by a Metropolitan Magistrate or Judicial Magistrate specially empowered to try an offence under section 124A of the Penal Code, the appeal shall lie to the High Court Division (sec. 408(b)).

Note: 2:

- An appeal to the Court of Sessions may be heard by an Additional Sessions Judge as the Government may by general or special order, direct or the Sessions Judge of the same division may make over to him (sec. 409).
- When a Metropolitan Magistrate or Judicial Magistrate especially empowered to try offence under section 124A of the Penal Code, appeal lies to High Court Division (Sec. 408(b)).
- If it is an acquittal by any Magistrate, the appeal shall lie to the Court of Session.

Tires of Criminal Appeal



Note:
With regard to appeal CMM, ACMM, MM are all on the same status. CMM does not have any appellate power.

Note: 2 (Appeal from Chief Judicial Magistrates)
Chapter XXXI of the CrPC is completely silent about the forum of appeal against conviction or order of a Chief Judicial Magistrate or Additional Chief Judicial Magistrate, Chief Metropolitan Magistrate or Additional Chief Metropolitan Magistrate. They are all deemed as first class judicial magistrate. How deemed? First, Schedule III (clause 4) specifies that the ordinary powers of a Chief Judicial Magistrate shall be the ordinary powers of a Magistrate of the first class. Likewise, schedule IV of the CrPC specifies that a Magistrate of the First Class may be invested with power to try offence not punishable with death or imprisonment for life etc. Second, sub-section 1A of section 11 of CrPC provides that an Additional Chief Judicial Magistrate shall have all or any of the powers of the Chief Judicial Magistrate under this Code or any other law for the time being in force, as the Government may direct.

Note 3: Metropolitan Magistrate:
The Schedules of the CrPC is silent about the powers of the Metropolitan Magistrates. However, section 21(1) of CrPC provides that the Chief Metropolitan Magistrate shall exercise within the local limits of his jurisdiction all the powers conferred on him or on a Metropolitan Magistrate under this Code or under any law for the time being in force and may, from time to time, with the previous sanction of the Government, make rules consistent with this Code to regulate-

(a) the conduct and distribution of business and the practice in the Courts of Metropolitan Magistrate;
(b) the constitution of Benches of Metropolitan Magistrates;
(c) the times and places at which such Benches shall sit;
(d) the mode of settling differences of opinion which may arise between Metropolitan Magistrates in session; and
(e) any other matter which could be dealt with by a Chief Judicial Magistrate under his general powers of control over the Magistrates subordinate to him.

When Appeal does not lie:

(i) When an accused person has pleaded guilty and has been convicted by a Court of Sessions or any Metropolitan Magistrate or Magistrate of the First Class on such plea, there shall be no appeal except as to the extent and legality of the sentence (sec. 412).

(ii) There shall be no appeal by a convicted person in cases in which a Court of Session passes sentence of imprisonment not exceeding one month only, or in which a Court of Session or Chief Judicial Magistrate or Metropolitan Magistrate or other Magistrate of the first class passes a sentence of fine not exceeding fifty Taka only (sec 413).

(iii) There is no appeal from a sentence of imprisonment passed by such Court or Magistrate in default of payment of fine when no substantive sentence of imprisonment has also been passed (sec. 413 Explanation).

(iv) There shall be no appeal by a convicted person in any case tried summarily in which a Magistrate empowered to act under section 260 passes a sentence of fine not exceeding two hundred Taka only (sec. 414).

REVISION

Revision is a purely discretionary remedy granted by a higher court with a view to correcting miscarriage of justice. This is a kind of supervisory jurisdiction exercised by the superior courts over inferior courts. Revision is applicable both in civil and criminal matters though there are differences between criminal revision and civil revision.

Criminal Revision

(i) Sections 435, 436, 439 and 439A of the CrPC deal with the provisions of revision.

(ii) Unlike in civil revision both the Sessions Court and the High Court Division have been given criminal revisional power.

(iii) Section 439 read with section 435 gives the High Court Division power of revision and section 439A read with section 435 gives the Sessions Judge power of revision. Thus both sections 439 and 439A must be read along with and subject to section 435.

(iv) The order of the Sessions Judge under section 439A is final and no further revision by the High Court Division is permissible under section 439(4) read with section 439A(2). Revision against revision is barred. A second revision does not lie under section 439 against the judgment and order of the Session Judge passed under section 439A as the same has been made absolute under section 439 (*Marium Begum v State*, 53 DLR 226). No second revision lies in view of the law in sections 439(4) and 439A(2) (*Alauddin and Others v State*, 35 DLR 186), (*Shafiqur Rahman v Nurul Islam Choudhury*, 35 DLR (AD) 127), (*Alauddin and Others v Jamaluddin and another*, 37 DLR 164).

(v) It is sometimes argued that normally questions of facts are not considered by a court under its revisional jurisdiction. However, it has been decided in Shamsuddin v Amjad Ali, 15 BLD 196 that while deciding a revisions application a Session Judge or Additional Session Judge can deal with questions of facts of a case as much as an Appellate court and on consideration of the evidence on record he may reverse the judgment of the learned Magistrate.

(vi) A revision is not a continuation of the original proceeding like an appeal (22 DLR (SC) 192).

(vii) Application for revision may be made in every case where appeal has been heard.

(vii) Revision lies against any order of a proceeding. This is because miscarriage of Justice may result from correctness or legality of finding, sentence or order or anything in the proceeding of the inferior court. Findings include a conviction or an acquittal. Proceeding covers everything done and recorded by an inferior court acting as a court.

Conditions of Criminal Revision

(i) Where an appeal lies but no appeal has been filed in time, no proceedings by way of revision shall be allowed. Thus application for revision may be made against a non-appellable order straightway. However, where an order is appellable, application for revision will not lie until the appeal is heard and decided.

(ii) The decision against which revision is sought must be of an inferior criminal court.

(iii) In deciding the case the inferior court appears to have committed any error of law resulting in an error in the decision occasioning failure of justice or resulting miscarriage of justice.

(iv) Application for revision may be made either in the Sessions Court or in the High Court Division.

(v) No party has any right to heard either personally or by pleader before any court when exercising its powers of revision (sec. 440).

(vi) A court having power of revision shall dispose of a proceeding in revision within ninety days from the date of service of notice upon the parties (sec. 442A).

Nature of Civil Revision

Section 115 of the CPC provides for the revisional power of the High Court Division and of the District Judge. This section as amended in 2003 has brought about some fundamental changes in the substantive provisions of the civil revision. Unlike before revisional power can now be exercised by the District Judge. Secondly, there is now provision for

second revision under sub-section 115(4). The nature of revisional power is as follows:

(i) Under section 115 of the Code of Civil Procedure (as amended in 2003) civil revisional power can be exercised by the High Court Division and the District Judge.
(ii) This power is also called supervisory power or power to do complete justice or power to call for records.
(iii) Exercise of this power can be only at the instance of a party. Previously this power could have been exercised *suo motu* by the High Court Division.
(iv) It is purely a discretionary remedy and this cannot be claimed as of right.
(v) Normally questions of facts are not considered by a court under its revisional jurisdiction (15 BLD 196).
(vi) A revision is not a continuation of the original proceeding like an appeal (22 DLR (SC) 192).
(vii) Being it a purely discretionary remedy, the HCD or the District Judge may not interfere even after the fulfillment of all the conditions of revision.
(viii) The revisional power under section 115 is concerned with error of law committed by trial court or appellate court occasioning failure of justice.

Conditions of Civil Revision

Revisional Power of the High Court Division:

The High Court Division may, on the application of any aggrieved, call for the record of any suit or proceeding, in which a decree or an order has been passed by a Court of District Judge or Additional District Judge, or a decree has been passed by a Court of Joint District Judge, Senior Assistant Judge or Assistant Judge, from which no appeal lies; and if such Court appears to have committed any error of law resulting in an error in such decree or order occasioning failure of justice, the High Court Division may, revise such decree or order and, make such order in the suit or proceeding, as it thinks fit.

(i) Application for revision must be filed by a person aggrieved. Usually any party to the suit or appeal can file revision against a decree or order. However, if a third party is affected by such

order or decree, he can file revision application against such decree or order.

(ii) Revision to High Court Division can be filed against a decree or order passed by a Court of District Judge or Additional District Judge from which no appeal lies. Further, revision to the High Court Division can be filed against a decree which has been passed by a Court of Joint District Judge, Senior Assistant Judge or Assistant Judge from which no appeal lies.

(iii) Condition of revision to the High Court Division is that by passing the impugned order or decree, the court appears to have committed an error of law resulting in an error in such decree or order occasioning failure of justice.

Revisional Power of the Court of District Judge:

The Court of District Judge may, on the application of any person aggrieved, call for the record of any suit or proceeding, in which an order has been passed by a Court of Joint District Judge, Senior Assistant Judge or Assistant Judge, from which no appeal lies; and if such Court appears to have committed any error of law resulting in an error in such order occasioning failure of justice, the Court of District Judge may, revise such order and, make such order as it thinks fit.

(i) Application for revision in the Court of District Judge must be filed by a person aggrieved. Usually any party to the suit or appeal can file revision against a decree or order. However, if a third party is affected by such order or decree, he can file revision application against such decree or order.

(ii) Revision to the Court of District Judge can be filed against a decree or order passed by a Court of Joint District Judge or Senior Assistant Judge or Assistant Judge from which no appeal lies. Further, revision to the Court of District Judge can be filed against an order (not decree) which has been passed by a Court of Joint District Judge, Senior Assistant Judge or Assistant Judge from which no appeal lies.

(iii) Condition of revision to the Court of District Judge is that by passing the impugned order or decree, the court appears to

have committed an error of law resulting in an error in such decree or order occasioning failure of justice.

Second Revision to the High Court Division:

An application to the High Court Division for revision under sub-section (4) of an order of the District Judge or, Additional District Judge, as the case may be, made under sub-section (2) or (3) shall lie, where the High Court Division grants leave for revision on an error of an important question of law resulting in an erroneous decision occasioning failure of justice, and the High Court Division may make such order in the suit or proceeding as it thinks fit. The expression 'grant leave' does not put any additional limit in the second revision and is simply a verbal exercise as the High Court Division issues rule in revisional application only when it is prima facie satisfied about the existence of an error of law[1].

Dual Forum of revision from the same decree: which one is to be selected?

Thus it is clear that revision lies both in the High Court Division and in the Court of District Judge from decree passed by a Court of Joint District Judge or Senior Assistant Judge or Assistant Judge from which no appeal lies. This has given rise inconsistency and duality of revisional jurisdiction. Secondly, section 115 indicates that the District Judge will have revisional jurisdiction against non-appellable orders passed by a Joint District Judge without specifying any limitation as regards the valuation of the suit.

Nirmal Chandra Dutta v Ansar Ahmed and others, 10 MLR 344

A[2] as plaintiff instituted a Title Suit No. 5 of 2003 for specific performance of contract [enforcement of a (Bainapatra)] in the Court of Joint District Judge, Comilla against B, the defendant. In that suit the defendant filed a petition under Order 7 Rules 11

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[1] Mahmudul Islam. *Code of Civil Procedure*. Vol-1, page 402 (First Edn. 2006).

[2] Although these decisions are real, the original names of the parties have not been used; rather the author has used alphabatic name so that students can get themselves introduced with various stages easily and without any difficulty.

for rejecting the plaint alleging that the suit was barred by law of limitation. On hearing the petition the learned Joint District Judge rejected the petition. Being aggrieved by this rejection order the defendant filed a revision petition to the Court of District Judge and the learned District Judge returned the petition vide order dated 03.06.2004 in Civil Revision No. 33 of 2004. Against this order dated 03.06.2004 by the Court of District Judge, a second revision was filed in High Court Division (Civil Revision No. 2096 of 2004). The ratio of the decision by the High court Division is as follows:

> "The learned District Judge has not looked into the latest amendment of the Code of Civil Procedure (Act 40 of 2003) which empowers the District Judge to entertain revisional application against any order passed by the Joint District Judge, Senior Assistant Judge irrespective of the valuation of the suit provided the impugned order is non-appellable."[3]

This decision is based on object of the legislation which was passed with a view to reducing the pressure of the High Court Division in civil suits. However, in another case the High Court Division gave a completely different judgment which is as follows:

Jyosna Ara Amin v Sudhangshu Bimal Dhar, 25 BLD (HCD) 593

A and B filed a partition suit against C in the Assistant Judges Court, Chittagong. During the pendency of the suit C died but her heirs were not substituted in the suit and without doing this A and B obtained an exparte decree in the suit behind the back of the heirs of C. After obtaining the decree A and B also started an Execution Case. During the pendency of the execution case the heirs (D & E) of C instituted Other Suit No. 18 of 2004 against A and B for a declaration that the decree obtained in the partition suit is fraudulent, collusive, inoperative and as such not binding upon the heirs (D & E) of C. D and E filed an application under

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[3] This decision is no longer the authority in view of the Full Bench decision in *Khurshed Ali v Hashem Ali*, 58 DLR 211.

pecuniary jurisdiction of the District Judge (para 12). A District Judge cannot entertain an application under section 115(2) of the Code beyond its pecuniary jurisdiction which is fixed for appellate jurisdiction (para 16).

(iii) In the absence of any express provision in the new sub-section (2) of section 115 of the Code it must presumed that the legislature intended that the revisional forum will be as before determined by the pecuniary jurisdiction of the Appellate Court (para 12).

Decision of Full Bench[4] of the High Court Division:
Khurshed Ali v Hashem Ali, 58 DLR 211

In view of two conflicting decisions by the High Court Division *irmal Chandra Dutta v Ansar Ahmed and others*, 10 MLR 344 and *na Ara Amin v Sudhangshu Bimal Dhar*, 25 BLD (HCD) 593 the f Justice referred the matter to a Full Bench for decision. The Bench decision affirms the view taken by a Division Bench in *na Ara Amin v Sudhangshu Bimal Dhar*. The Full Bench held inter

i) Reading section 6 of the Code of Civil Procedure, sections 8 and 11 of the Suit Valuation Act and the relevant provisions of the Civil Courts Act the conclusion would follow that the value of the suit or proceeding would conclusively determine the forum where a suit of proceeding will be filed and tried and the appeal will be heard and disposed of. The forum of appeal is to be determined according to the value of the suit or proceeding and the value of appeal consequently will lead to the revisionsl

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Bench in the High Court Division may be of as many as four types: Single consisting of only one Justice, Division Bench consisting of two Justices, Full consisting of three Justices and Larger Bench consisting of as many Justices ided by the Chief Justice. All these are contemplated in the Rules of the High of Judicature. To avoid confusion, Rules of the High Court of Judicature for akistan printed in 1960 is still the rules for our High Court Division as there t been any fresh Rules enacted for this purpose.

Order 39 Rules 1 and 2 of the Code of Civil Proce
for an injunction to restrain A and B from di
possession of the suit property and also to sta
proceedings of the Execution Case. The trial court
cause notice and ad-interim order of status quo. Ho
B did not file any written statement and the court
dated 23.05.2004 confirmed the order of status
stayed all futher proceeding of the execution
aggrieved by the aforesaid order A and B filed
application before the District Judge, Chit
subsequently transferred the same for disposal to t
District Judge under section 115(3). Learned Addi
Judge allowed the revisional application and
impugned order dated 23.05.2004. Being aggrieved
of the learned Additional District Judge D and E
revision to the High Court Division under sectio
High Court Division discharged (rejected) the peti
of the decision is as follows:

(i) The parent Act is the Civil Courts Act,
provisions of the said Act must be read in co
the provisions of the CPC. On a scrutiny of
the laws, it becomes obvious and clear that a
not invested with appellate power over a mat
not intended to exercise its revisional juri
that court which has appellate jurisdictio
revisional jurisdiction as per law. Thus it
court which cannot exercise jurisdiction o
appeal is not authorized to exercise
jurisdiction (Para 7).

(ii) There is no doubt that an appeal against
order of Joint District Judge can be filed bef
Judge only when the value of the subject m
or proceeding is up to Tk. 5,00,000/-. If
revision can be preferred before a District J
value of the suit is above Tk. 5,00,000/- as i

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forum and jurisdiction and that would be the basis for determining revisional forum (para 17).

(ii) Section 115(2) was enacted by the Code of Civil Procedure (Third Amendment) Act, 2003 to prevent the overflowing effect of revision cases in the High Court Division in Civil Jurisdiction and to obviate the sufferings of the litigants. But in enacting such provisions the legislature has not expressly amended the other provisions of Civil Courts Act and Suit Valuation Act and the effect of those provisions remained unaffected after the introduction of sub-section (2) of section 115. Therefore, unless specific rules to the contrary have been framed the revisional jurisdiction must be determined according to the value of the suit or proceeding (para 20).

Appellate Division's View:

Government of Bangladesh, represented by the Deputy Commissioner, Chittagong v AHM Khurshed Ali and Others, 14 MLR (AD) 57

The decision by the above Full Bench of the High court Division was challenged in this case before the Appellate Division. However, the Appellate Division also affirms the view taken by the Full Bench of the High Court Division. The Appellate Division held *inter alia*:

(i) The High Court Division further held that while enacting sub-section 2 of section 115 the legislature has not expressly amended the other provisions of law such as section 6 of the Code, the provisions of Civil Courts Act and the Suit Valuation Act and the effect of those provisions remained unaffected after the introduction of sub-section (2) of section 115. Therefore, unless specific rules to the contrary have been framed, the revisional jurisdiction must be determined according to the value of the suit or proceeding. The High Court Division then held that "the courts having jurisdiction to entertain an appeal shall have jurisdiction on revisional application as per valuation of the original suit or proceeding. In the instant case the plaintiff valued the suit at Tk.

3,77,61,225/- and the order proposed to be revised was passed by the Joint District Judge and a revisional application was taken to the District Judge and the learned District Judge rejected the application summarily by his order dated 14.05.2005 on the ground of pecuniary jurisdiction. In view of our above discussion, the learned District Judge rightly turned down the revisional application. The High Court Division further held that some other orders passed by the Joint District Judge may be revisable by the High Court Division, as for instance, if an order of temporary injunction is or has been passed by the Senior Assistant Judge or the Assistant Judge as the case may be, against that order an appeal will lie to the District Judge and if such appeal is transferred to the Joint District Judge, the appeal is heard and disposed of by the Joint District Judge having concurrent jurisdiction with the District Judge (para 12).

(ii) Ordinarily the forum of choice is dependent on the pecuniary value of the subject matter of suits or proceedings unless there are contrary provisions. Procedure for filing revisional application will require the petitioner to state the value of the suit from which it arises and in this case the note of Chapter II of Part I of the High Court Rules states as follows:

> "Every memorandum of appeal from orders and every application for revision should state the value of the suit from which it arises." (para 13).

Problems with the Decision:

If an appeal against an order of an Assistant Judge is transferred by the District Judge to the Joint District Judge in exercise of power under section 22 of the Civil Courts Act read with section 24 of the Code and in disposing of the appeal the Joint District Judge exercises the power of the District Judge, in such a situation the exercise of power by the Joint District Judge is concurrent with the power of the District Judge. The order of the Joint District Judge in such a case is equivalent to the order of the District Judge and the

order should be subject to revision by the High Court Division and not by the District Judge. This was the fact and view of the Bench in *Nirmal Chandra Dutta v Ansar Ahmed and others* as mentioned above. However, the decision of the Full Bench and of the Appellate Division is silent on this point.

Secondly, as Mahmudul Islam[5] pointed out, the Civil Courts Act deals with the jurisdiction of courts in respect of suits and appeals and is totally silent about revisional jurisdiction of the courts. Revision like appeal or review is creation of statute and the Code having provided for revision in one way, its purport cannot be decided by reference to the provisions of the Civil Courts Act which is silent about revision. The concept of 'court subordinate' which was traditionally the basis of entertaining revisional application against non-appellable orders of such subordinate courts have been done away with deliberately by the legislature in 2003. Neither the Division Bench nor Full Bench nor the Appellate Division gave proper attention to these changes.

Distinction between Appeal and Revision :

(i) Ordinarily appellate jurisdiction involves rehearing on question of law as well as on facts of the case whereas revisional jurisdiction involves only the question of law and this jurisdiction is never considered a rehearing;

(ii) Appeal can never be *suo motu*; the aggrieved party must have to invoke appellate jurisdiction whereas the revisional jurisdiction may be exercised by the court *suo motu*;

(iii) An appeal is considered to be a continuation of the original proceeding whereas unlike appeal revision is not

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[5] *The Law of Civil Procedure*, (1st Edn, p. 405).

the continuation of the original proceeding (22 DLR (SC) 192).

(iv) Revision is a discretionary remedy and cannot be claimed as of right but appeal is a right-based remedy and can be claimed as of right if there is statutory existence of it;

(ix) Revision being it a purely discretionary remedy, the HCD may not interfere even after the fulfillment of all the conditions of revision. However, after the fulfillment of conditions of an appeal the appellate court cannot reject the appeal.

Inherent Power of the High Court Division/ Power of Quashing (Section 561A) vs Revisional Power

Remedy under section 561A is available to a party in an appropriate case even after the Session Judge exercised his power under section 439A (15 BLD 196). This power is completely different from the nature of the power given in sections 435 and 439. Section 439 read with section 435 refer to inferior court under the High Court Division whereas power under section 561A is not limited to the inferior courts only (35 DLR 192). This power is the exclusive power of the High Court Division. The Session Judge cannot quash a proceeding of subordinate court acting under section 439A (37 DLR 290).

A second application under section 561A to a first application which was unsuccessful under section 439A is perfectly valid. This is because such a second application under section 561A does not amount to a second revision (6 BCR 146). The High Court Division can entertain an application under section 561A when the petitioners application under section 439A on the same subject matter was rejected (6 BCR 146).

After insertion of section 439A Session Judge in exercise of revisional power can set aside any order of the subordinate courts in addition to directing further enquiry under section 436 of the Code but cannot quash a proceeding.

Reference: Reference is exclusive jurisdiction of the High Court Division. It may be made either for civil or criminal matter. It normally means referring to a case to the High Court Division for its opinion and order.

Criminal Reference

Section 438 of the CrPC provides for reference to the High Court Division by the Sessions Judge, CMM or the District Magistrate. In view of amendment of CrPC by adding section 439A giving power to Sessions Judge for revision, the provision of section 438 has lost importance. Formerly the Sessions Judge could not pass any final order but had to report to the High Court Division for final order. Now the orders of the Sessions Judge are made final under section 439 and no further proceeding by way of revision will be entertained by the High Court Division. However, if there is any important question of law and facts involved then a revisional application should be presented under section 438 read with section 435 to the High Court Division (40 DLR (AD) 196). Reference is to be made on point of law and not facts. Reference can be done suo motu. If reference is made as per section 438, the sending judge must make it in the form prescribed by the High Court Division; the reasons for reference must accompany the records; a brief facts of the case and the grounds upon which the sending court recommends that the order of the lower court to be incorrect and should be set aside by the High Court Division.

Civil Reference

Section 113 of the CPC provides that any court may state a case and refer the same for the opinion of the High Court Division, and

the High Court Division may make such order thereon as it may thinks fit. Conditions of civil revision are that (i) only a court can make reference to the HCD; (ii) reference is to be made only when an important issue of law has arisen; (iii) the power of reference by the HCD is discretionary.

Review means a judicial re-examination of a case in certain specified and prescribed circumstances. Review is possible almost in every judicial organs. It is done by the same court which gave the order or judgment against which review is sought for. Section 114 of the CPC provides that if a person is aggrieved –

(a) by a decree or order from which an appeal is allowed but no appeal has been preferred;

(b) by a decree or order from which no appeal is allowed ; or

(c) by a decision on a reference from a Court of Small Causes,

may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit