CHAPTER V

JUDICIAL PROCEDURE

Judicial Procedure means the procedure followed by a Court of Law in deciding matters that are presented before it in a formal way for its decision by initiating a proceeding. Proceeding means the form in which an action is brought or defended before a court. As a rule, all court proceedings must be held in open court. There are exceptional circumstances in which the court may sit in camera. The court's jurisdiction may also be exercised in private, when the judges and other judicial officers transact such business as they are authorised by the rules of court to transact in chambers only, parties to the dispute and their lawyers being admitted.

CIVIL PROCEEDINGS

All civil actions follow adversary procedure and the cases are decided on the balance of probabilities. A civil proceedings is one which is taken for the enforcement or assertion of a civil right. It relates to private rights of properties, money or office and remedies given to individuals or corporations as members of the community. There may be proceedings which are neither civil nor criminal.

Civil proceedings are regulated by the law of civil procedure called the 'Civil Procedure Code' codified in 1908[1]. Prior to 1859, there was no uniform procedural law in the country.

1. The Code of Civil Procedure (Act V of 1908). The Code is based on provisions embodied in the English Judicature Act of 1873 and 1875 and the rules made thereunder.

The procedure in Mofussil Courts were regulated by Special **Regulations.** In 1859, the first Civil Procedure Code[2] was enacted. Thereafter, two Codes were enacted and repealed one after another in 1877[3] and 1882[4] and as they were insufficient to meet the requirements of civil litigations, the present Code came into force on the Ist day of January, 1909.

The existing Code consists of one hundred and fifty eight sections setting out vital principles of due process and fifty Orders each dealing with a specific subject. Each Order contains a number of Rules. These Orders and Rules are the machines to carry out the vital principle set out in the sections. Some of the provisions of the Code have been omitted or repealed.

The common form of proceedings is an action commenced by the plaintiff or his representative in a subordinate court with original jurisdiction by filing a plaint known as suit.[5] The plaint so filed is registered on being examined by the court, to see if the relief claimed has been properly valued and court fees paid and it discloses a cause of action. In the next step, summons with a copy of the plaint is served on the defendant. The summons together with the copy of the plaint 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 a debt, or recovery of possession of immovable property, or an *injunction* restraining the defendant from carrying out a course of conduct. If the defendant intends to contest the claim, he 'enters an appearance' by informing the court to this effect on the appropriate form. The defendant

2. Act VIII of 1859.
3. Act X of 1877. The Code of 1877 superseded the Code of 1859 and introduced new rules adapted from English rules which evolved during the Law Reform period in England culminating in the English Judicature Act of 1873.
4. Act XIV of 1882.
5. A suit triable by a civil court must be instituted in the court of the lowest grade competent to try it.

appears and files written statement. Plaint and written statement are called 'pleadings', which play a central role in the trial of civil cases. 'They are the nucleus around which the whole action revolve throughout all its stages'. 'Pleadings' may be and normally are drafted by a lawyer. Prior to the trial, either party may apply for an order that the other should clarify his pleadings or disclose additional documents relevant to the dispute.

Because civil proceedings are private matters, they can usually be abandoned or compromised without the court's leave. In fact, in many cases, the parties to a dispute are able to settle their difference through their lawyers before the stage of actual trial is reached.

If the case is not compromised, the disputants are brought before the court. Parties to the suit may be examined. Parties concerned make statements on oath. Interrogatories are delivered and answered. Documents produced by the parties are inspected and in the next step, the court frames issues for determination of the case on the basis of allegations made in the pleadings, the statements made by the parties on oath and the documents produced by them.

After the issues have been framed in a suit, the contending parties are in a position to make-up their mind about the persons who should be summoned by them to substantiate or disprove the issues of the case. The parties generally file the list of their witnesses. When the suit approaches the stage of final hearing, summons on the witnesses are issued. When all steps have been completed, the court has to fix up a date of hearing. On the appointed date, witnesses are examined, documents proved, arguments of the parties or their lawyers are heard. After final hearing, the court pronounces its *judgment* followed by a *decree*. The rule is that the plaintiff is to prove his case by best evidence, oral and documentary and

can not rely on the weakness of the defence, but then the defendant can admit his liability in part or whole. When plaintiff has proved his case, the defence must by evidence rebut it, otherwise the plaintiff wins. The entire proceedings are concluded by the stages set out above and it the takes normally a year to bring a suit to an end but because of accumulation of work, pendency of suits upto five years is not rare.

Suits that are brought to court are usually tried by a Subordinate Judge or a Munsif. Judgments in civil cases are enforceable through the authority of the court known as execution proceedings. Most of them are for payment of sums of money, and these may be enforced in cases of default by seizure of the debtor's goods or property. A judgment may also be enforced by attachment of earnings that is to say, by an order of court addressed to an employer to require him to make periodic payment to the court by deduction from the debtor's salary. A judgment for the possession of land is enforced by the court with the aid of the executive authority entering upon the land and putting the plaintiff in possession. Refusal to obey a judgment directing the defendant to do something or to abstain from doing something may result in imprisonment for contempt of judicial authority. As a rule, the costs of an action, i. e., the Lawyer-fees, court-fees and other disbursements, are in the discretion of the court, but normally the court orders the costs to be paid by the party losing the suit.

An appeal is instituted by filing in the appellate court a memorandum, stamped with the proper court fee, setting out the grounds of appeal, together with a copy of the decree appealed from, and a copy of the judgment or order and within a prescribed time. Unless lawyer can satisfy the appellate court that there are merits in the appeal, it will be summarily dismissed without notice to the respondent. If the

appeal is admitted, the trial court's record is sent for and notice is issued to the respondent, who may file a cross-objection if there is part decree against him. On hearing parties the appellate court delivers its judgment either confirming or setting aside or modifying the decree of the trial court, with or without cost.

Injunction

All the courts from the lowest level to the highest are authorized to issue orders of injunction both on the private citizen and on the Government. The courts may grant Injunctions in both civil and quasi criminal matters, and in Bangladesh, one of the sources of the law relating to Injunction is the Constitution itself[6]. Furthermore, the law relating to the grant of Injunctions in civil matters is contained in the Code of Civil Procedure, 1908,[7] and the Specific Relief Act, 1887[8], which is supplementary to the Code. Besides, the Criminal Procedure Code, 1898[9], deals with the issue *prohibitory order*[10] by criminal courts of the country in urgent cases of nuisance or apprehended danger.

An Injunction may be either Prohibitory or Mandatory. A *Prohibitory Injunction* forbids the defendant to do a wrongful act which would amount to an infringement of some legal right of the plaintiff. On the other hand, a *Mandatory Injunction* forbids the defandant to permit the continuance of a wrongful state of things though already exists at the time when the Injunction is issued. The effect of a Mandatory Injunction

6. Constitution of Bangladesh, Art. 102. Injunction is one of the ways of giving relief in writ matters.
7. Act V of 1908, Order XXXIX, Rules 1-5.
8. Act I of 1877, Chap IX & X.
9. Act V of 1898, Ss, 133, 142 & 144.
10. The *Prohibitory Order* has been termed as 'injunction' in Sec. 142 of the Code of Criminal Procedure, 1898.

is to call upon the defendant to do some positive act, for instance, to pull down a wall in existance which restricts light to the house of the plaintiff.

As regards duration, an Injunction may be either temporary or permanent . This classification is based on the time factor. A *Permanent Injunction* is based on a final determination of the rights of parties and is intended permanently to prevent infringement of those rights and to obviate the necessity of bringing action after action in respect of every such infringment. The *temporary injunction* which is also called '*interim*' or '*interlocutory*' injunction, may be granted at any time during the pendency of a suit but a perpetual injunction is granted only when the plaintiff establishes his right and the actual or threatend infringement of it by the defendant. The object of *Temporary Injunction* is to maintain status quo till the question at issue is decided. The court may by order grant temporary Injunction to refrain from such act or make such order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal or disposal of the property as the court thinks fit until the disposal of the suit or until further orders. The law lays down the circumstances under which temporary Injunction can be granted. Firstly, the applicant must show a *prima facie* case. He is not required to make out a clear legal title, but to satisfy the court he has to show that he has a fair question to raise at the trial. Secondly, the applicant must show that it is necessary to save him from some injury which is a serious and material one and not adequately reparable by way of damages. Thirdly, the balance of convenience must be in favour of granting the Injuction. Lastly, if a litigant seeks temporary Injunction, he must seek *permanent Injunction* on his plaint.

Before any Injunction is granted, a notice is issued to the defendant to show cause, but interim order may be passed

pending the final hearing for granting of the temporary Injunction if it apears to the court that the object of the Injunction would be defeated by delay. Disobedience to the order of Injunction amounts to contempt of court. An appeal lies to the superior court against an order of injunction passed by the trial court.

An Injunction is available in disputes between private individuals as well as between the subject and public authority. It is the remedy often used against local authorities and statutory corporations.

Receiver

A Receiver is appointed *pendente lite* or for the execution of a decree. A court may appoint a receiver either *suo motu*, or on the application of a party to the suit. A receiver may even be appointed by the court on the application of a third party having an interest in the preservation of the property. However, the appointment of a receiver is in the discretion of the court subject to a right of appeal and the court makes the appointment only when it is just and convenient to do so. A party to the suit is ordinarily not appointed a receiver except where the other parties consent or there are exceptional circumstances. The choice of the person to be appointed receiver remains within the discretion of the court but such person should be disinterested in the matter in dispute between the parties and the court may at the time of selecting a receiver, take into consideration the wishes of the parties to the suit.[11]

CRIMINAL PROCEEDINGS

If a person is charged with the commission of a crime which is being enquired into or tried, and the court or tribunal

11. The matters relating to appointment of receiver, his duties and functions, removal etc are regulated by the Code of Civil Procedure, 1908, Order XL and the Specific Relief Act, 1877, Chapter VII.

enquiring into or trying the same, has power to punish such an offence, the court or tribunal would be described as being engaged in conducting criminal proceedings. The object of criminal proceeding is to punish wrongs. All criminal proceedings in Bangladesh are regulated under the provisions of the Code of Criminal Procedure, 1898[12] unless otherwise excluded.

Under the present Code, a *summons* case is one in which the maximum punishment which may be awarded is two years' imprisonment. When the accused is brought before a magistrate, the substance of the allegation against him is explained. If he admits liability, he may be sentenced forthwith. If he does not, the prosecution witnesses are heard and the accused is examined by the court. The defence witnesses are next heard, and the advocate (lawyer) if present, addresses the court before judgment. If maximum punishment exceeds two years, and if the offence alleged is triable by a magistrate, and the magistrate's power admit of passing an adequate sentence, the case is tried as a *warrent case*, and a more elaborate procedure must be followed. Sufficient evidence to establish a *prime facie* case must be given by the prosecution witnesses. The accused is then examined by the court and if he cannot offer an adequate exculpatory explanation of the evidence recorded, a charge is framed. If he pleads guilty, he may be convicted. If he does not, the remaining prosecution witnesses are examined. The accused may recall and cross examine further the prosecution witnesses examined before charge. He is again examined by the court, and called upon to enter on his defence, and examine his defence witnesses.

In all criminal proceedings, the essential point is that accused is presumed to be innocent and the onus is always on the prosecution to prove the charge beyond all reasonable

12. Act V of 1898. The Code came into force on July 1, 1898. Though it has undergone much subsequent amendments, is still the law in force in Bangladesh.

doubt. All relevant facts against the accused in the evidence of the prosecution witnesses must be put to him by the court for the purpose of ensuring that he understands the case against him, and giving him an opportunity to answer them. An omission to give the accused the opportunity to answer any allegation of substance made against him, may vitiate the proceedings.

The examination of the accused must be recorded verbatim, in the form of question and answer, and, if practicable, in the language in which he is examined. Except in minor cases, the depositions must be recorded in full, but in narrative form and read out to the witnesses. The judgment, which must be written, must set out the points for determination, the decisions thereon, and the reasons.

When a case is instituted on a police report or otherwise the accused appears or is brought before the Magistrate and it appears to him that the case is triable exclusively by the Court of Sessions, he sends the case, to the Court of Sessions together with record of the case and the documents and articles if any, which are to be produced in evidence. Besides, the Magistrate gives intimation of such transfer to the Public Prosecutor. This provision has been introduced by the Law Reforms Ordinance, 1978, in lieu of commitment proceedings.[13]

Before the Court of Sessions, when the accused appears or is brought, the Public Prosecutor opens his case by describing the charge brought against the accused and stating by

13. So long, if a case was to be committed to The Court of Sessions, the Magistrate examined the witnesses produced, and then the accused. If a prima facie case was established, a charge was framed and accused was required to give a list of defence witnesses. The magistrate could, in his discretion, summon them, and, if he thought their evidence a sufficient answer to the charge, he could cancel it. Otherwise, he bound over the prosecutor and witnesses, and committed the accused for trial. This part of the procedure has been annulled by the Law Reforms Ordinance, 1978, by amending and omitting the relevant sections of the Code of Criminal Procedure, 1898.

what evidence he proposes to prove the guilt of the accused. If, upon consideration of the record of the case and the documents submitted therewith, and after hearing the submission of the accused and the prosecution, the court considers that there is no sufficient ground for proceeding against the accused, the accused is discharged by recording reasons thereof. But if after such consideration and hearing as aforesaid, the court is of opinion that there is a ground for presuming that the accused has committed an offence, appropriate charge is framed against him in writing. When a charge is framed, it is read and explained to the accused and he is asked as to whether he pleads guilty of the offence charged or claims to be tried. If he pleads guilty, the court records the plea and may, at its discreation convict him thereon. If the accused does not plead or claims to be tried or is not convicted, the court on a date fixed by it, takes evidence produced in support of the prosecution, and at its discretion permit cross-examination of any witness to be deferred until any other witness has been examined or recall any witness for further cross examination. If, after taking the evidence for the prosecution, examining the accused and hearing the prosecution and the defence the court finds that there is no evidence of commission of the offence, the accused is acquitted. But if a *prima facie* case is made out against the accused, in the next step, he is called upon to enter on his defence and adduce any evidence he may have in his support. If the accused puts in any written statement, the court files the same with the record. If the accused applies for issue of any process for compelling the attendance of any witness or production of any document or thing, the court issues such process. Such a prayer of the accessed may be refused by the court on the ground that it is made for delay or for defeating the ends of justice. When examination of the defence witness is complete, the public prosecutor sums up his case and advocate for the defence replies. The Judge then gives judgment considering all points in the case and giving reasons for his decision. The decision results either in acquittal or conviction

followed by appropriate sentence either of imprisonment or fine or both.

Criminal proceedings before a Magistrate's Court takes six months and before a Court of Sessions a year to conclude, but delays mostly on account of accumulation of cases are not rare.

In Bangladesh, a person, whether personally affected or not, may set the machinery of criminal justice in motion, but courts cannot take cognizance of certain offences, except on the complaint of, or with the sanction of a specified person or authority. Most of the cases of contempt of the authority of a public servant require a complaint of the officer concerned or his superior officer. The offences of giving false evidence, using false documents and other offences against public justice, require a complaint from the court before which they were committed. A court cannot take cognizance of an offence relating to marriage except on the complaint of specified persons aggrieved. A limited number of less heinous offences may be compounded and, some only with the leave of the court.

Some magistrates are empowered to open criminal proceedings on their own knowledge or suspicion. A private person may initiate proceedings by presenting a complaint to a magistrate. Crimes in Bangladesh are either non-cognizable, in which case a complaint to the magistrate is normally the only way in which an enquiry into them can be started, or cognizable, in which case it is possible to set the machinery of law in motion by reporting the matter to a police station, for the police have a duty to investigate cognizable offences and the power to arrest without warrent any person reasonably suspected of being concerned in a cognizable offence. All crimes designed to cause public alarm or to prejudice the maintenance of public order are cognizable.

When a report of cognizable offence is made to a police station, a written record is made, and the informant is required to sign it. This report is called the 'First Information Report'. The investigating officer may summon and examine any person who appears to know anything about the case, and such person is obliged to answer, but there is no penalty for not telling the truth. The investigating officer notes the progress of the investigation in a special diary, and records statements made by the persons he examines. If the case is subsequently sent up for trial, prosecution witnesses, may be contradicted but not corroborated by the statements recorded by the investigating officer. The investigating officer, if he thinks a search is necessary, must record his reasons, and then conduct the search in the presence of two respectable inhabitants of the locality, who attest the record he prepares of the things found and the places in which they were found.

Bail

Bail means to liberate or deliver the accused from arrest or out of the custody, to the keeping of other persons, on their undertaking to be responsible for his appearance at a certain day and place to answer to charges against him. These persons are called his sureties.[14]

According to the criminal law of the country, the magistrates exert free discretion in the matter of grant of bail and are governed by the Criminal Procedure Code. The bulk of bail applications are filed before the magistrates. Their power to refuse bail are generally restricted to cases where the defendant is accused of a serious offence or is likely to commit further offences or to abscond or where remand in custody is necessary for the defendant's protection.

14. *Aiyer's* Criminal Procedure Code, 1898, (3rd Edition) page clxiv.

An order on a bail application does not finally determine the guilt or innocence of a person accused or convicted of an offence. All that such an order postulates is that pending an inquiry or trial and in the case of a convicted person, pending an appeal by him, it is not necessary that his liberty should be curtailed.

Applications can be made to the Court of Sessions and to the High Court Division against refusal of bail by the Magistrates. In granting bail the court concerned has to consider the seriousness of charge, nature of evidence, severity of punishment prescribed for the offence and character, means and standing of the accused.

On the recommendation of the Law Committee of 1976, the law relating to bail has been liberalized so as to give an opportunity to a person who wishes to avoid the ignominy of an arrest to apply for and obtain an *Anticipatory Bail* from the court. Under the Law of Criminal Procedure[15], when a person has a reasonable apprehension that he may be arrested on an accusation of having committed a non-bailable offence, he may apply to the High Court Division of the Supreme Court of Bangladesh or the Court of Sessions, or the Sub-divisional Magistrate, concerned for a direction that, in the event of his arrest, he shall be released on bail ; and that the Court or the Magistrate, if it or he thinks fit, direct that in the event of such arrest, he shall be released on bail. Since it is not feasible to enumerate the situations when such a direction may be justified, the Law leaves the matter to the discretion of the court moved for the purpose.

15. The Code of Criminal Procedure, 1898, Sec. 497A. This is a new Section inserted in the Code by the Law Reforms Ordinance, 1978, schedule to Sec. 2. The new provision came into force on June 1, 1979.

CHAPTER VI

THE PERSONNEL OF THE LAW

The personnel of the law most in the public eye are those who are connected with the administration of the legal system in Bangladesh. They are, the Chief Justice of Bangladesh, the Judges of the Supreme Court of Bangladesh, Judicial Officers of the inferior or subordinate courts, Magistrates, Law Officers of the Government, and members of the legal profession. The administration of the legal system nonetheless depends upon many others such as the Officers and subordinate officials of the superior as well as subordinate courts.

The Chief Justic of Bangladesh

The Chief Justice of the Supreme of Bangladesh is constitutionally known as the Chief Justice of Bangladesh[1]. He is the head of the judiciary of the State. He is appointed by the President and his appointment is made to the Appellate Division[2] of the Supreme Court. The Constitution does not prescribe any consultation to precede the making of such an appointment. In practice, the senior-most Judge of the Appellate Division of the Supreme Court is appointed to the office of the Chief Justice. All Judges of the Supreme Court of Bangladesh are appointed by the President[3] in consulation with the Chief Justice which is a practice.

Judges of the Supreme Court of Bangladesh

Judges of the Appellate Division of the Supreme Court are appointed by the President of Bangladesh. The convention

1. Constitution of Bangladesh, Art, 94(2).
2. Arts, 94(1) & 94(3).
3. Art, 95(1).

so far has been to appoint the senior most member of the High Court Division to the bench of the Appellate Division, though it is not required by the Constitution. Although the President appoints, he acts on the recommendation of the Chief Justice of Bangladesh.

The Republic of Bangladesh has partly followed the English practice of recruiting the Judges of the High Court Division from full time professional advocates accepting the understandable principle that from amongst those who have a thorough working experience of the trial procedure and well versed in the values implicit in the adjudication process are best able to preside and give judgment. In result, the majority of the Judges of the High Court Division are selected from amongst those who have put in a good length of standing practices in the Bar, commanding excellence and experience with abilities well-recognized by the Judges before whom they long practised. This system has been deemed to be a conducive one and effectual for the purpose of safeguarding and maintaining the traditional standards of the Judiciary.

As to the Constitutional qualification for the appoinment of Judges of the High Court Division of the Supreme Court of Bangladesh, the condition precedent is that they must have either been, of necessity advocates of the Supreme Court for at least ten years[4] or must have held judicial office for ten years.[5] Appointments from judicial service to the bench of the High Court Division are made on the basis of seniority and efficiency.

The salaries and pensions of the Judges of both the Divisions of the Supreme Court are not subject to vote of the Parliament. They are charged on the consolidated fund. A

4. Constitution of Bangladesh, Art. 95(2) (a).
5. Art. 95(2) (b).

Judge of the Supreme Court may hold office until he attains the age sixty two.[6] The remuneration, privileges and other terms and conditions of service of the Judges may not be varied to their disadvantage after appointment.[7] A Judge can neither hold any office, post or position of profit or emolument, nor he can take part in the management or conduct of any Company or Association or Body having profit or gain as its object.[8] An ex-Judge of the Appellate Division of the Supreme Court shall not practise at the bar, but a Judge of the High Court Division may practise only before the Appellate Division on retirement.[9]

Supreme Judicial Council

A special provision in the Constitution of Bangladesh relating to the Judiciary is contained in Article 96 (3) which sets up a Supreme Judicial Council of three persons, namely the Chief Justice of Bangladesh and the two next senior Judges. The Supreme Judicial Council is ruquired to issue a Code of Conduct to be observed by all the Superior Judges in Bangladesh and such a Code in fact, is issued to each new Judge on his appointment. Under Constitutions following the English pattern, the removal of Judges is brought about by an address to the Parliament of the country moved on behalf of the Government, but in Bangladesh, the provision is that when the President is of the opinion that a Superior Judge has been guilty of gross misconduct, or suffers from physical or mental incapacity in the performance of his duties, he shall issue a direction to the Supreme Judicial Council to enquire into the matter where the Judge concern is given an opportunity to defend, and make a report. If the report is adverse to the Judge, the

6. Constitution of Bangladesh, Art, 96(1).
7. Art. 147(2).
8. Art. 147(3).
9. Art. 99.

President would remove him from his office. No Judge may be removed otherwise than by this procedure which is calculated to maintain the integrity of the superior judiciary for it casts upon the serving Judges a duty to perform the disciplinary function in respect of the whole body of the superior judiciary.

Judicial Officers

Judicial Officers serve as presiding officers of different grades of courts subordinate to the High Court Division. The officers belong to a cadre service known as judicial service.[10] Appointment of persons to the offices in judicial service is made by the President or an officer authorized by him.[11]

Qualification for appointment as judicial officers are decided according to the regulations made by the Bangladesh Public Service Commission. For first appointment to the service, a candidate must possess at least a law degree of a recognized University. Age limit for entry in the service has been fixed at 30 years, relaxable in the case of practising advocates. The control and discipline of judicial officers stand vested in the President on consultation with the Supreme Court[12]. A channel of regular promotion exists in this service.

Judicial Officers are first appointed as Munsifs. Normally, a few years after crossing of the efficiency bar, they are promoted to serve as Subordinate Judges, if vacancies exist. Subordinate Judges also function as Assistant Sessions Judges in their criminal jurisdiction From the post of Subordinate Judge, promotion lies to the post of Additional District Judge. Additional District Judges, when invested with sessions power, act

10. At present there exists fourteen cadre services in Bangladesh under Bangladesh Civil Services (Reorganisation) Order, 1980. Judicial service is one of them. The cadre service is called Bangladesh Civil Service (Judicial).
11. Constitution of Bangladesh, Art. 115, and Bangladesh Civil Service (Judicial) Composition and Cadre Rules, 198 , Rule 5.
12. Art. 116.

as Additional District and Sessions Judges. District Judges are appointed from the senior Additional District Judges. District Judges are known as Sessions Judges in their criminal jurisdiction. (Criminal Jurisdiction of subordinate judiciary has been dealt with in the Chapter captioned 'Courts of Law'.)

At present, no regular arrangement exists for training of Judicial Officers. At the most, new Judicial Officers are asked to watch a senior officer at work for a few months before they start deciding cases by themselves. The Law Committee constituted in 1976, in its report has given much stress for establishment of Judicial Service Academy for regular training of new entrants in the service.

Judicial Officers draw their salaries in the pay scales meant for them in the New National Grade and Scale of Pay introduced by the Government in 1977. Their salaries like those of the Superior Judges, are charged upon the *consolidated fund* so that unlike other items of national expenditure, they do not have to be reviewed in the Parliament every year. The Judicial Officers are entitled to travelling allowance, on the first appointment as well as on transfer to a new place of posting. Transfer to a new station is normally made on completion of three years' service at one place.

Judicial Officers are subject to retirement at the age of 57. Retired officers receive a pension equal to sixty per cent of their salary if they have held office for 25 years, or a smaller pension for shorter service. They are immune from civil liability while acting in their judicial capacity.

At the end of 1978, eighteen District & Sessions Judges; thirtyfive Additional District & Sessions Judges and thirty-seven Subordinate & Assistant Sessions Judges were working in the country. Besides, at the end of that year one hundred and fortyone Munsifs were serving in the cadre service.

Magistrates

Except Metropolitan Magistrates, there is no whole-time Judicial Magistrate in Bangladesh. Magistrates of different tiers spare a portion of their time for judicial works and the rest of time in doing miscellaneous executive works.

Magistrates performing judicial functions are appointed by the President[13] or an Officer authorized by him. Qualifications for appointment as Magistrates are determined by the regulations of the Bangladesh Public Service Commission. It is not necessary for them to be holders of law degree, but they must be at least a Graduate of a recognized University. It is axiomatic that they should be suitable in character, integrety and understanding of the work they have to do. The control including the power of posting, promotion and grant of leave and discipline of the Magistrates performing judicial functions vests in the President.

On first appointment, they are designated as Deputy Magistrates and are required to undergo a basic training course at the Gazetted Officers Training Academy (GOTA). This helps them to understand the nature of their duties, to understand the nature and purpose of sentencing.

At the time of entry in the service, they must have attained at least the age of twentyone years. The statutory retiring age is 57 years like all other Government servants. Their salaries and pensions etc, like other Government servants, are determined according to the Government's service Rules and orders.

Law Officers of the Government

Law Officers of the Government are meant for conducting cases on behalf of the Government of Bangladesh before superior court of the country. They are appointed by the President. The terms of their appointment, duties, and other

13. Constitution of Bangladesh, Art, 115.

conditions of service are governed by special statutes[14] and statutory rules.

Attorney-General for Bangladesh is the principal Legal Officer of the Government. Other Law Officers are *Additional Attorney General, Deputy Attorney General* and *Assistant Attorney General.* They hold offices at the pleasure of the President of Bangladesh. The Law Officers enjoy the right of audience in all courts of Bangladesh.

The statutory qualification for appointment as Attorney General, Additional Attorney General or Deputy Attorney General is that they must be qualified to be appointed as Judges of the Supreme Court. For appointment as an Assistant Attorney General, a person must have at least seven years standing as an advocate of the Supreme Court. Generally, appointment as Law Officers are made from the senior practising advocates. Attorney General for Bangladesh has to give advice to the Government upon those legal matters which are referred to him. According to the rules of business, no Ministry can consult the Attorney General for Bangladesh except through the Ministry of Law and Parliamentary Affairs.

The Attorney-General has to appear before the Supreme Court in cases in which the Government is a party or is otherwise interested. However, he may ask any other Law Officer of the Government to appear in the courts instead of him. Besides, he has to represent the Government in any reference made by the President under the Constitution of Bangladesh, to the Supreme Court and that he may be required to discharge other functions of legal character as may be conferred upon him by or under the Constitution or any other law in force in Bangladesh.

14. Bangladesh Law Officers Order, 1972 (President's Order No. 6 of 1972) and Bangladesh Law Officers (Amendment) Ordinance, (Ordinance XI of 1977).

The Law Officers of the Government are entitled to private practice subject to certain restrictions. They cannot advise or hold briefs against the Government and cannot take up cases in which they are likely to be called upon to advise or appear for the Government. In criminal prosecution, they are not entitled to defend an accused person without the Government's prior permission.

Apart from the position shown above, there are two other categories of Officers who work as lawyers on behalf of the State and the Government in courts subordinate to the Supreme Court of Bangladesh. They are, (a) the *Public Prosecutor*, and (b) the *Government Pleader*. Public Prosecutor conducts prosecution before inferior criminal courts and special tribunals. He is assisted by Assistant Public Prosecutor, if any. Government Pleader conducts civil cases in subordinate civil courts. Assistant Government Pleaders assists him in those matters. These lawyers of the Government are selected from advocates of repute who practice as members of Local Bar Associations. The terms of their appointment as well as other conditions of service are determined by the Government.

Legal Profession

Throughout Bangladesh, there is only one class of legal practitioners known as *Advocates*. The advocates are enrolled and governed under the provisions of the Bangladesh Legal Practitioners and Bar Council Order[15] and Rules, 1972.[16]

The Law empowers the advocates as of right to appear, act and plead on behalf of parties before any court or tribunal from

15. President's Order No. 46 of 1972.
16. Amended by the Bangladesh Legal Practitconers and Bar Council (Amendment) Rules, 1980. The Amended Rules came into force on August 2, 1980, introducing, new provisions for enrolment of Advocates.

the highest to the lowest, throughout Bangladesh. But the fact of appearance, taking action and pleading is subject to the provisions of the law relating to legal practice and any other law in force in the country.

The functions of advocates have two aspects. Firstly, they are to give expert legal opinions to their clients, and secondly, to conduct cases in courts. The former relates to matters outside the courts, the latter, inside the courts. A lay client must go to them in the first instance. They draft pleadings and other documents needed in the judicial process. They advise on the other documents needed to support a case. They are specialists in legal arguments.

Although the advocates by themselves create a single class in the field of legal profession, yet there are three categories of advocates engaged in the profession of law. The first category includes those advocates who are entitled to practise before ordinary civil and criminal courts subordinate to the Supreme Court of Bangladesh. They can also appear and plead before courts and tribunals of special jurisdiction except Village Courts and Conciliation Boards. In the second category falls those advocates who, in addition to the right of practise enjoyed by the first category, are entitled to practice before the High Court Division of the Supreme Court of Bangladesh. The last category constitutes Advocates having right to practise before the Appellate Division of the Supreme Court, and *Advocates on-Record* who have the enclusive right to act and plead before the Appellate Division of the Supreme Court of Bangladesh. Their enrolment is regulated under Supreme Court (Appellate Division) Rules, 1973.

At present there are about ten thousand advocates in Bangladesh. This figure includes about nine hundred advocates who are members of the Supreme Court Bar Association with the right to practise before that Court. A prospective advocate

must possess at least a degree in law of a recognised University and must be citizen of Bangladesh and must have completed twentyone years in age. Besides, he must undergo training under a practising advocate for a period of at least one year This is called '*pupillage*', the trainee advocate a '*pupil*'. During the training period, he must assist his teacher advocate in hearings before courts. He must obtain a certificate of his practical training. Thereafter, the prospective advocate is required to pass such examination and pay such fees for enrolment as may be prescribed by the Bangladesh Bar Council. On enrolment, he may become a member of a Bar Association in order to practise the profession of law. For getting permission to appear and practise before the High Court Division of the Supreme Court of Bangladesh, an advocate must complete at least two years practice before subordinate courts. Advocates with seven years standing (including at least two years practice before the High Court Division of the Supreme Court) may be admitted and enrolled as Advocates-on-Record of the Appellate Division subject to the fulfilment of certain other conditions and payment of additional fees.

An advocate may suspend his practice in such manner as may be prescibed by the Bar Council. An advocate who has been guilty of professional or other misconduct may be punished by a reprimand, temporary suspension, or by being debarred from practising in any court, authority, or person in Bangladesh. When he appears before a Tribunal constituted under the Law, an advocate has all the rights of a defendant before an ordinary court of law. Advocate aggrieved by an order of the Tribunal may prefer an appeal to the High Court Division of the Supreme Court of Bangladesh within ninety days of the order. Such appeal are determinable by a division bench of the High Court Division.

Every practising advocate normally occupies Chambers with or without colleagues, having the services of a clerk and

sometimes of a junior. Some advocates, after a number of years of private practice, work as legal advisers in statutory bodies or a commercial organisation. Most of the appointments to the benches of the superior court are made from amongst the Senior Advocates of the Supreme Court of Bangladesh.

The Bangladesh Bar Council constituted by election for advocates exercises regulatory and disciplinary powers over all the advocates in Bangladesh. It is an independent statutory body and consists of fifteen members elected by advocates with Attorney-General as ex-officio Chairman. The functions of the Council is normally distributed among some committees.

A Bar Association is the professional home of every advocate throughout his career. Each Bar Association is governed by a body elected from its members and each Bar Association is required to be recognised by the Bangladesh Bar Council. At present, there are seventythree Bar Associations in Bangladesh including the Supreme Court Bar Association and a National Bar Association known as *Bangladesh Jatiya Ainjibi Samity*.

CHAPTER VII

THE COURTS AND THE EXECUTIVE

As judicial bodies, the Courts in Bangladesh cannot initiate proceeding, but, according to the Rule of Law which asserts that every citizen is entitled to claim his rights in an ordinary law court, they can and do interven if requested to do so by a person who feels himself to have been injuried by the act or omission of public authority and wishes to seek a remedy at law.

Judicial Review

The powers of the courts to review governmental action start with the doctrine of *Judicial Review*.[1] The doctrine presupposes the truth of certain propositions namely, Constitution is a law of higher obligation than the ordinary law ; Constitution is a law enforceable by courts; In the event of conflict between Constitution and ordinary law, it is for the courts to declare the ordinary Law, on the ground of its repugnance to higher law, as void.

The Constitution of Bangladesh provides that all existing law in so far as it is inconsistent with the fundamental rights embodied in the Constitution shall to the extent of such inconsistency, be void.[2] The Constitution imposes restriction upon the State and forbids it from making any law inconsistent with the fundamental rights and proceeds to decree that any law so made shall, to the extent of such inconsistency, be void.[3] These provisions relating to Funda-

1. The doctrine originated in United States of America in connection with the case *Murbury v. Madison*, 1 Cranch 137.
2. Art, 26(1). 3. Art, 26(2).

mental rights are expressly declared to be the Supreme Law of the land. Besides, the right to move the Supreme Court by appropriate proceedings for enforcement of these rights is guaranteed,[4] which in turn, a fundamental right in itself.

The combined effect of these provisions is to confer on the Supreme Court of Bangladesh the power of judicial review of State-action be it in the sphere of law making or law-executing and of declaring it to be of no legal effect in case it appears to it to be inconsistent to any of the provisions relating to fundamental rights.

The species of cases where the power of judicial review is exercisable by the Supreme Court of Bangladesh may be sub-divided into certain categories, namely, the cases where there is an absolute prohibition to pass certain or to act in a certain way, as for instance, no person shall be deprieved of his life or liberty save in accordance with law ; and cases where although there is no absolute prohibition to act in a certain way or pass a certain type of law there is a qualified limitation on State action, as for instance, freedom of speech, freedom of association, freedom of movement, freedom to hold and dispose of one's property etc. guaranteed subject to reasonable restrictions imposed by law.[5] What is and what is not reasonable restriction would in each case, depend upon the judgment of the forum in which the question of the enforcement of any of the fundamental rights in question is raised and the judgment itself would depend on the court's appreciation of the existing economic and political situation in the country.

Public authorities must act within the powers the law allows them. If they take on unauthorised functions they

4. Constitution of Bangladesh, Art. 44.
5. Justice F. K. M. A. Munim, '*Rights of the Citizen under the Constitution and Law*' (1975 Edn), at pp. 12-15.

are acting beyond their powers, and the court can intervene to stop the *ultra vires* action. Sometimes a decision which is within an authority's powers, can be challenged on the ground that it was based on some mis-interpretation of the law. Besides, courts have applied to legislation further implied requirements, establishing a number of principles applicable to all public authorities unless expressly excluded by the relevant legislation. They have frequently applied the rules of natural justice as minimum fair standards of decision-making. The concept does not require the technicalities usually associated with courts of law, but is based on two main rules that-the decision-maker must be free from bias, no one is to be a judge in his own cause, and that all parties to a dispute are to be given a fair hearing. When an official body fails to carry out a duty, or exercises a power for an unauthorised purpose, or uses power beyond the limits placed on it, a wide range of remedies can be sought from the courts.

Writ Petitions

Though the English prerogative writs were not previously unknown in this part of the Sub-continent, they are given a new prominence in the Constitution, which give to every person in Bangladesh a fundamental right to enforce any other fundamental right given to him by the Constitution by petition to High Court Division for an appropriate *order* or *writ* of prohibition, mandamus, certiorari, habeas corpus and quo-warranto. Writ Jurisdiction may be invoked to keep public authorities within their jurisdiction, to compel them to perform duties imposed on them, and to secure compliance with the rules of natural justice. These powers have been discussed earlier.

Injunction

An injunction as a remedy in law in this country rests on a variety of sources and its effectiveness depends on the

source of authority as well as the body against which it is directed. This has been discussed earlier in the Chapter on 'Judicial Procedure'.

Declarations

In Bangladesh, the main statutory basis of declaration is formed by the law relating to Specific Relief.[6] The statute does not sanction every forms of declarations but only a declaration that a plaintiff is 'entitled to any legal character or to any right as to any property'.[7] It is only when the plaintiff is entitled either to any legal character or to any right that the court may in its discretion, make a declaration that he is so entitled. It extends only to the cases where the plaintiff has an interest in the property in respect of which the declaration is claimed.

A person entitled to any legal character, or any right in property, may bring a declaratory suit against any person denying the character or right. For instance, a person claiming a benefit under a will may sue the executor, if the repudiates the claim. Jurisdiction to grant a declaration is discretionary, and will in any case be refused if the plaintiff fails to join a prayer for any further relief to which he is entitled. The Courts in Bangladesh have determined innumerable types of questions in declaratory suits having a bearing on 'legal character' in private litigation as well as that involving the public authorities and private individuals.

Separation of the Judiciary from the Executive

An independent Judiciary free of executive control has been recognised to be an indespensable institution in the Constitution of Bangladesh wherein it has been declared as one of the fundamental principles of State Policy, that the State shall ensure the separation of the judiciary from the executive.[8] This principle

6. The Specific Relief Act (1 of 1877).
7. See, 47.
8. Constitution of Bangladesh, Art. 22.

has been based upon the long cherised aspirations of the common man. The fundamental principles of State Policy, as enunciated in the Constitution form the basis of the work of the State.

Before liberation, in erstwhile East Pakistan, the matter of separation of the Judiciary from the Executive received occasional attention from the erstwhile Government and ultimately in 1956, the Legislature in East Pakistan decided to effect a complete separation of the judicial and executive function in the Province. Accordingly, an Act known as the Code of Criminal Procedure (East Pakistan Amendment) Act, 1957,[9] was passed by the provincial legislature. The statute depicted basic and far-reaching changes in the hierarchy of courts and devided the courts into Courts of Sessions and Courts of Magistrates, beside the High Court. It incorporated a complete separation of the Judiciary from the Executive by creating two classes of Magistrates known as Judicial Magistrates and the Executive Magistrates. Judicial Magistrates had further been sub-divided into Magistrates of the First Class, Magistrates of the Second Class and Magistrates of the Third Class, placing them under the High Court through the District and Sessions Judge and they were to be appointed in consultation with the High Court. The Executive Magistrate, had been sub-divided into District Magistrate, Additional District Magistrate and Special Executive Magistrate. All executive magistrates were placed under the District Magistrates. A notification is necessary to put the law into operation.

In Bangladesh, appointments of persons to offices in the judicial service or as magistrates exercising judicial functions are made by the President in accordance with the rules made by him in that behalf.[10] Besides, the powers relating to control including the powers of posting, promotion, grant of leave and discipline of the persons exercising judicial function is conferred

9. East Pakistan Act No. XXXVI of 1957.
10. Constitution of Bangladesh, Art. 115.

on the President. These powers are to be exercised by him in consultation with the Supreme Court.[11] Nonetheless, all persons employed in the judicial service and all Magistrates are said to be independent in the exercise of their judicial function.[12]

11. Constitution of Bangladesh, Art. 116.
12. Art, 116 A.

CHAPTER VIII

LAW COMMISSIONS

There had never been any permanent statutory body in this part of the Sub-continent with law reforms programmes. Early Law Commissions were set-up during the British regime from time to time. After partition of the British Indian Empire, a few Law Reform Commissions were constituted by the erstwhile Government of Pakistan. After the emergence of Bangladesh, a committee named 'The Law Committee' was set up in 1976 which practically performed the functions of a Law Reform Commission in the country.

LAW COMMISSIONS AFTER PARTITION

Law Commission of 1954

After partion of the Sub-continent, the erstwhile Government of Pakistan set up the First Commission in August, 1954 to examine the Muslim Marriage and Family Laws and to suggest suitable reforms therein. The Commission made certain recommendations,[1] some of which were accepted by the Government and a law giving effect to the recommendation known as the Muslim Family Laws Ordinance, 1961, was promulgated.[2]

1. The Commission submitted its report in June, 1956.
2. Ordinance VII of 1961; It came into force with effect from July 15, 1961, on both the wings of Pakistan under Notification No. S.R.O. 56(R) of July 12, 1961, issued by the Government of Pakistan, Ministry of Law.

Law Commission of 1958

In 1958, a Law Reform Commission was set up to examine the causes of delay in the disposal of cases. The Commission recommended a number of amendments in the procedural law with a view to eliminating delays. The Civil Procedure Code and the Registration Act were amended to give effect to some of the recommendations made by the Commission. But soon, it was found that the amendments in the Civil Procedural Law were not received with approval by the litigant public, the members of the Bar and the members of the bench. A Committee was set up to examine the amendments. On the recommendation of the Committee, almost all amendments were withdrawn.

Law Commission of 1967

Again in 1967, a Law Reform Commission was set up mainly to investigate the causes of delays in the disposal of civil and criminal cases and to suggest remedies. The Commission made recommendations. It suggested separation of the Judiciary from the Executive. But nothing was done and delays in the disposal of cases continued to persist.

LAW REFORMS AFTER LIBERATION

After the emergence of Bangladesh as an Independent State, the overall position of disposal of cases had been deteriorating and the Government set up a Law Committee for reviewing the recommendations made by the Law Reform Commissions of 1958 and 1967 and the Law Commission of India. The Committee was to suggest remedies in the light of the circumstances prevailing in Bangladesh so as to meet the judicial needs. The Law Committee practically functioned as a Law Reforms Commission and submitted its report on October 31, 1976 suggesting amendments of the civil and criminal procedural laws in order to arrest delays in the

disposal of cases. Besides, the Committee also recommended some amendments of laws relating to Evidence, Court-fees, Limitation, and Arbitration. Apart from this, the Committee recorded the need for separation of the Judiciary from the Executive organ of the State. Suggestion on certain other important issues like training of subordinate judicial officers, eradication of corruption etc were also made in the Report. It strongly recommended establishment of Family Courts in Bangladesh for adjudication of family disputes relating to dissolution of marriage, maintenance of wife, restitution of conjugal rights, custody of children and guardianship. The procedures of Family Courts was also out-lined in the Report. It suggested the setting up of a permanent Law Commission.

Some of the recommendations of the Law Committee were accepted by the Government and a law giving effect to those recommendations known as the Law Reform Ordinance, 1978, was promulgated[3]. The Ordinance, effective from the Ist day of June, 1979[4], mainly amended the Civil and Criminal Procedural Laws, Law relating to Court-fees, and the Law of Arbitration. The Ordinance also amended the Small Cause Courts Act of 1887.

3. Ordinance XLIX of 1978, promulgated on December 5, 1978.
4. The Ordinance came into force under Notification No. S. R. O. 11-L/79/3 "O". 30/79-Law/252 dated the 25th April, 1979, of the Ministry of Law and Parliamentary Affairs, Government of the People's Republic of Bangladesh.

CHAPTER IX

LEGAL AID

The extent of Legal Aid in Bangladesh is rather limited. The existing legal aid and its availability to those who suffer from financial inability either to obtain access to a Court of Law for having legal relief or for defending himself in a proceeding, may be broadly grouped under a few heads, namely, Aid in Civil Proceedings, Aid provided in Criminal Proceedings and Aid provided by Legal Aid Societies.

Aid in Civil proceedings

The Civil Procedural Law enables persons who are too poor to pay the prescribed court-fee to institute suits without payment of such fee[1]. In law, a person is a *pauper* when he does not have sufficient means to pay the court fee for the plaint in a suit, or when he is not entitled to property worth taka one hundred other than his necessary wearing apparel and the subject-matter of the suit. To sue as a *pauper*, a person must seek permission from the court to that effect. An application for permision to sue as a pauper contains the particulars required in a plaint and a schedule of properties with value thereof signed and verified in the manner prescribed for the signing and verification of pleadings. Besides, it is accompanied by the plaint on which the plaintiff wants to sue which is to be presented in person unless exempted from appearance in court. On presentation of the application, the court may examine the applicant or his agent. Notice of such a pauper suit has to be served on all the opposite parties and since the Government remains interested in the matter of court-fee, a notice of the pauper suit is also sent to the Government-lawyer of the

1. The Code of Civil Procedure, 1908, Order XXXIII and XLIV.

district who, on receipt, sends the same to the Collector or Revenue Officer concerned. An inquiry is made by him and a report is submitted to the court stating as to whether applicant is a pauper or not. The report is taken into consideration and is of great value in deciding the question as to *pauperism*. Besides, the applicant and the opposite parties are given opportunity to adduce evidence in proof and disproof of pauperism. Arguments of the parties are also heard. The Court then either allows or refuses the applicant to sue as a pauper. But a defendant is never allowed to defend as a pauper. In pauper appeals[2], the provisions relating to pauper suits are followed. Many persons, including minors are benefitted by these provisions in the field of Civil Law.

Aid In Criminal Proceedings

Undefended accused persons in capital-punishment trials are provided with a defence lawyer by the State. But there is no other provision for State assistance in criminal trial. The law provides for presentation of an appeal by a prisoner in jail.[3] It is available to him both in the Appellate Court and the Supreme Court. As a rule, every facility such as pen, paper and even a writer are to be allowed to the prisoner in jail so as to enable him to prepare the petition of appeal. He may present his petition of appeal to the officer incharge of the jail, who is required to forward such petition with requisites to the proper Appellate Court. Generally, notice is served on appellant in jail unrepresented by an Advocate. The convict from jail can explain a difficulty in his case. If he is not represented by a lawyer is entitled to appear in person to argue his case but generally the appeals are desposed of in chambers without the presence of the prisoner. In death sentence appeal, the prisoner is represented by an Advocate provided by the State.

2. The Code of Civil Procedure, 1908, Order XLIV.
3. The Code of Criminal Procedure, 1898, s. 420.

Legal Aid Societies

In Bangladesh, voluntary legal aid is very meagre. However, the members of the legal profession have come forward to form Legal Aid Societies on voluntary basis for rendering their services to the poor litigants. A number of Bar Associations have already taken resolutions to form Legal Aid Societies. These are steps towards rendering legal aid to the deserving and needy litigant public in the spirit of humanitarian social services.

The Law Committee's View

The Law Committee in its report of 1976, appreciated the need for legal aid and has recommended certain measures for the same. Firstly, the defence of the indigent accused by a lawyer assigned by the Government should be made available not only to every person accused of an offence triable by a Court of Sessions, but also in those cases which are triable by Magistrates in which important questions of law are involved beside being of the nature that may entail heavy sentences if end in conviction. Secondly, in criminal appeals, apart from death sentence cases, an undefended prisoner should be defended at Government's expense where an important question of law is involved and the appellate court thinks it fit that the prisoner should be so defended. Thirdly, engagement of a lawyer should be made available at Government's expense to the indigent applicants in proceedings for maintenance of wife and children. Lastly, the civil procedural law should be amended so as to enable a person to defend a suit or other proceeding as a pauper. Besides, provisions should be made in rules so that the High Court Division and its subordinate courts, in proper cases, can provide lawyer to the pauper litigant. Apart from this, the Law Committee has given certain other suggestions on voluntary legal aid.

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