CHAPTER XVI

PREVENTIVE DETENTION AND THE SPECIAL POWERS ACT

Preventive Detention

The term 'preventive detention' is used in contradistinction to the term 'punitive detention. In other words, it may be said that 'detention' may be of two types-punitive detention and preventive detention. Preventive detention means detention of a person without trial and conviction by a court, but merely on suspicion in the minds of the executive authority. "Preventive detention is an abnormal measure whereby the executive is authorised to impose restraints upon the liberty of a man who may not have committed a crime but who, it is apprehended, is about to commit acts that are prejudicial to public safety etc'. [1] Punitive detention on the other hand, means the detention of a person only after trial for committing a crime and after his guilt has been established in a competent court of justice. According to justice Vinan Bose, preventive detention has three special features. The first is that it is detention and not imprisonment; the second is that it is detention by the executive without trial or inquiry by a court; and the third is that the object is preventive and not punitive.[2] According to Chief Justice Badrul Haider Chowdhury, preventive detention means detention the aim of which is to prevent a person from doing something which is likely to endanger the public peace or safety or causing public disorder.[3]

Distinction between Preventive Detention and Punitive Detention

The distinction between preventive and punitive detention has beautifully been described by Mukharjee J. in the following words:

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1 Brohi, A. K. *Ibid*, P. 424
2 Quoted by Pirzada, Sharifuddin, *Ibid*, P. 191
3 Chowdhury, Badrul Haider, *The Long Ecoes*.

> "A person is punitively detained only after a trial for committing a crime and after his guilt has been established in a competent court of justice. Preventive detention, on the other hand, is not a punitive but a precautionary measure. The object is not to punish a man for having done something but to intercept him before he does it and to prevent him from doing it. No offence is proved, nor any charge formulated and the justification is suspicion or reasonable probability and not criminal conviction which only can be warranted by legal evidence."[1]

There are following distinctions between preventive detention and punitive detention;

First, preventive detention is a detention by the executive authority whereas punitive detention is a detention by a court.

Second, the object of punitive detention is to punish a man for having committed a crime. The object of preventive detention, on the other hand, is not to punish anyone for any wrong done by him but to prevent him from doing any injurious activities in future by him.

Third, preventive detention is a precautionary measure adopted by the executive in time of emergency for the greater interest of the nation and state whereas punitive detention is an ordinary measure.

Fourth, in case of punitive detention the person under detention has committed a crime whereas in case of preventive detention the person under detention has not committed any crime. Punitive detention, therefore, comes after the illegal act is actually committed but preventive detention has reference to apprehension of wrong doing.

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1 Quoted by Pirzada, Sharifuddin, *Ibid,* P.191

Fifth, in case of punitive detention specific charge is brought against the detenu and through a formal judicial procedure the charge has to be proved by legal evidences. But in case of preventive detention no specific charge is formulated, no offence is proved; nor is any evidence present and the justification of such detention is suspicion or reasonable probability of the impending commission of the prejudicial acts.

Need For Preventive Detention

From the above discussion it is clear that preventive detention is an abnormal measure of curtailing personal liberty of a person. A question is then necessarily obvious- what is the justification or philosophy behind preventive detention?

The philosophy lying behind the preventive detention is the interest and security of the state and nation. National security and interest are more important than the personal liberty of citizens, for the enjoyment of personal liberty itself is dependent on the safe security of the state. This is why in times of grave emergency threatening to the security of the state preventive detention is authorised by law in all democratic countries including England and USA. Justifying the measure Lord Atkinson in *R* V. *Halliday* said:

> " ..... Where preventive justice is put in force some sufferings and inconveniences may be caused to the suspected persons. This is inevitable. But the suffering is ..... inflicted for something much more important than his liberty or convenience, namely for securing the public safety and the defence of the realm."[1]
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> " ..... However precious the personal liberty of the subject may be, there is something for which it may well be, to some extent, sacrificed by legal enactment, namely national success in the war, or escape from national plunder or enslavement...."[2]

In the same case Lord Finlay said-

> "Any preventive measure even if they involve some restraint or hardship upon individuals, do not partake in any way of the

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1 Quoted by, Brohi, A.K, *Ibid*, P. 424

2 Quoted by, Patwary, A.B.M. Mafizul Islam, *Liberty of the People*, (Dhaka : Institute of Human Rights and Legal Affairs, 1987), P. 29

nature of punishment, but are taken by way of precaution to prevent mischief to the state."[3]

As already mentioned in the earlier chapter, all international and regional documents of human rights recognise and make provision for derogation of rights in case of emergency and of national crisis. During the First and the Second World War the British Government was given extensive power by parliament to pass order for preventive detention. The US Congress has also given the executive power to make preventive detention. But this power can be exercised only in times of grave emergency like war or external aggression. Preventive detention is recognised as a war-time measure and not a peace-time measure. In times of peace preventive detention is not at all known in democratic countries.

History of Preventive Detention Law in the Sub-Continent and Bangladesh

Preventive detention in times of peace is repugnant to civilized society. Nevertheless preventive detention was first introduced in this Sub-Continent in 1818 by the Bengal State Prisoners Regulation III of 1818. Under this Regulation the Governor-General was authorised to order detention and for this purpose he was invested with wide discretion; the jurisdiction of a court of law to question the legality was barred. Under this Regulation detention order could be made only on grounds connected with the maintenance of public order and a person could be detained without trial for an unlimited period. Later on under the authority of the Government of India Act, 1919 several Emergency Power Ordinances were promulgated. Also the Anarchical and Revolutionary Crimes Act, 1919 popularly known as the Rowaltt Act was passed. All these dealt with preventive detention in peace time. Later on the Government of India. Act, 1935 also provided for scope of preventive detention and under this Act the Defence of India Ordinance was promulgated. Later on it was transformed into the Defence of India Act, 1939. This Act continued during the period of the

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3 Quoted by, Munim, F.K.M.A, *Ibid*, P. 107

World War II and was in force till 6 months after the war ended in 1945.

Besides the two instruments i.e. the Defence of India Act, 1915 and of 1939 of First and Second World War dealing with preventive detention in war time several ordinances dealing with preventive detention were promulgated both under the Government of India Act of 1919 and of 1935. Needless to say that these preventive laws in peace time which are alien to the British system, were made and used by the British rulers with a view to perpetuating their colonial interests and rule. "Hundreds and thousands of Indians both Muslims and Hindus and almost all their leaders had suffered imprisonment or regours of these laws in some way or other. Particularly a detention without trial was considered by all during the Indian Independence movement as a crime against humanity."[1] But it was the fact though it was unfortunate that after partition and independence both Pakistan and India retained these laws in peace time. The Indian constitution in article 22 empowers the parliament to legislate on preventive detention subject to limitation laid down by article 22.

Before the Pakistan Constitution of 1956 could be framed, several Ordinances and Acts dealing with preventive detention e.g. Pakistan Public Safety Ordinance, 1949, Pakistan Public Safety (Amendment) Act, 1950, the Pakistan Public Stately Ordinance, 1952 and lastly the Security of Pakistan Act, 1952 were made under the authority of the Government of India Act, 1935. Later on the Constitution of Pakistan of 1956 and of 1962 empowered and also of 1973 empowers parliament of Pakistan to enact preventive detention laws.

Immediately after independence the Constitution of Bangladesh was adopted on 4th November, 1972 and it came into force on 16th December, 1972. As mentioned in the preceding chapter, taking the bitter experience of arbitrary arrest and detention under various preventive laws during the 23 year history of Pakistan into serious consideration the Constitution

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1 Ahmed, Moudud. *Bangladesh : Era of Sheikh Mujibur Rahman., Ibid.* P. 100

makers did not want to leave any scope for preventive detention. As a result, in the original Constitution of Bangladesh no provision was embodied allowing preventive detention. But only after 9 months of its life by the Constitution (Second Amendment) Act Article 33 dealing with safeguards as to arrest or detention was substituted in line with Article 22 of the Indian Constitution so as to allow for laws to be made on preventive detention. Under the authority of this amended provision of Article 33 the parliament in February, 1974 enacted the most hated and democracy destroying draconian law – the Special Powers Act, 1974 providing for preventive detention for all times.

The Power of Preventive Detention caries with it the Risk of Abuse of Power

It is sometimes said that the power of preventive detention like that of emergency carries with it the risk of abuse of power. This is true particularly in most developing countries where these special laws like emergency and preventive detention are used as necessary and ready weapons to crash down the opposition and to perpetuate rule rather than to meet real emergencies. The abuse of preventive detention law particularly in Bangladesh, India and Pakistan-three neighbouring countries is well enough to conclude that this power carries with it the risk of abuse of power. 32 years have passed since we achieved our independence. Since then there occurred no situation of war or external aggression; nor any civil war or internal disturbance threatening the security of the state has ever occurred. But this Special Powers Act, 1974 has, since its enactment, been used by every government as a brutal weapon to suppress anti-government movement, sometimes democratic movement and to perpetuate rule. Hundreds and thousands of political leaders and workers have been and are being detained under this law sometimes, for years together without any trial. The following statistics will necessarily give the idea that the democratic governments are in the competition to abuse of this law.

Year basis number of detenus under the Special Powers Act , 1974

Year	Total Number of Detenus	Number of Released Persons Through Writ of Habeas Corpus
1974	513	13
1975	1114	31
1976	1498	46
1977	1057	25
1978	753	30
1979	960	31
1980	710	41
1981	1759	29
1982	1548	54
1983	872	44
1984	643	36
1985	882	48
1986	2194	94
1987	4585	327
1988	4907	741
1989	4482	871
1990	4615	1099
1991	5302	1710
1992	6497	1594
1993	3669	1066
1994	2968	630
1995	4173	1705
1996	5413	3376
1997 Upto July	2539	1393

Source : Ministry of Home Affairs.

To tell the truth, I had to undergo various troubles and expenses to get this small statistics from the Ministry of Home Affairs. Thanks to Mr. Rafiqul Islam, Minister of Home Affairs who lastly allowed my application in spite of strong protest from his personal secretary. Still I was not given the full statistics. I wanted to get the number of released persons through the government's own initiative and through the reports of the Advisory Board and also the total number of detenu held in prison throughout the country till June, 1997.

Of course, it is to be mentioned that power of preventive detention does not necessarily carry with it the risk of abuse of power if, the law dealing with the preventive detention or the Constitution allowing enactment of preventive detention law provides for stern safeguards against its abuse. For example, if it is specifically mentioned in the Constitution or law that preventive detention law cannot be used by the government except in times of emergency of war or external aggression and that the detenu will have the right to apply for judicial review of the grounds of his detention, then it would be difficult to say that preventive detention power necessarily carries with it the risk of abuse of power. For instance, like the Special Powers Act in Bangladesh, there is a permanent preventive detention law in USA namely the Internal Security Act (Popularly Known as Mc Carron Act) 1950. The US Government has little scope to abuse the power given by this law. Because the safeguards provided for in it do not allow so. The safeguards of this law are following-

1. This law can be used only in war time emergency.

2. Only the Attorney General is empowered to issue warrant for the arrest of any person whom he believes to be dangerous.

3. The arrested person is brought before a preliminary hearing officer who issues a detention order if he finds that there is a probable cause for detention.

4. Against the order of detention the detenu has right to appear to the Detention Review Board and this Board has power -

i) to confirm the detention order ; or
ii) to modify the detention order ; or
iii) to nullify the detention order ; or
iv) to indemnify the detention order.

5. Form the decision of the Board the detenu may, if he is still aggrieved, have a judicial review by way of appeal to the Federal Court of Appeal.[1]

Thus even in war time emergency so many stern safeguards have been provided for against the abuse of power by the

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[1] Pirzada, Sharifuddin, *Ibid*, P. 193

government. This is because right to freedom and personal liberty is the core of all rights. When the personal liberty of a person is taken away by arresting him, he cannot enjoy any other right except right to life; all rights, however fundamental or basic they may be, become meaningless to him. So there should be strong and effective safeguards against the abuse of preventive detention law so that personal liberty of citizens is not unnecessarily harassed.

In Britain there is no permanent law allowing preventive detention. If any emergency of war like that of First and Second World War occurs, it is the British Parliament which will make necessary law allowing detention.

Law of Preventive Detention in Bangladesh And Constitutional Safeguards for it

Article 33 of our Constitution deals with the rights of an arrested person, in other words, safeguards as to arrest and detention. This article as it stands now, after the Constitution (Second Amendment) Act has re-enacted it, has two parts:

a) the first part consisting of sub-Articles (1) and (2) deals with the Constitutional rights of a person arrested under ordinary law;[1] and

b) the second part consisting of sub-Articles (3), (4), (5) & (6) deals with the laws relating to preventive detention and rights or constitutional safeguards of a person arrested under preventive detention law.

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[1] Article 33 confers four constitutional rights or safeguards upon a person arrested under ordinary law. They are :

i) He cannot be detained in custody without being informed, as soon as may be, of the grounds of his arrest.

ii) He shall have the right to consult and to be represented by a lawyer of his own choice.

iii) He has the right to be produced before the nearest magistrate within 24 hours of his arrest: and

iv) He cannot be detained in custody beyond the period of 24 hours without the authority of the magistrate.

The second part of Article 33 provides for 3 Constitutional safeguards for a detention under preventive detention law:

1. Review by an Advisory Board.
2. Right to communication of grounds of detention; and
3. Right of representation against the order of detention.

1. Review by Advisory Board.

An arrested person under the preventive detention law shall have the right, if the government wants to detain him more than 6 months, to be produced before the Advisory Board which shall consist of 3 members – two from acting judges of the Supreme Court or qualified to be judges and one from senior civil servants. A person cannot be detained under the preventive detention law more than 6 months except under the authority of the Advisory Board. If the Board before the conclusion of the said period of 6 months reports that in its opinion there is sufficient cause for such detention only then government can detain him more than 6 months.

2. Right to Communication of Grounds of Detention.

Article 33(5) says that the detaining authority must communicate 'as soon as may be'[1] to the detenu the grounds on which the detention order has been made.

3. Right to Representation against the Orders of Detention

Article 33(5) again provides that the detaining authority must afford the detenu the earliest opportunity of making a representation against his detention order.

It is important to mention here that the third right i.e. right to make an effective representation depends on the second right i.e. right to communication of grounds. Because without getting

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[1] The word 'as soon as may be' is not defined in the constitution. It means that the grounds must be communicated to the detenu within a reasonable time. Section 8(2) of the Special Powers Act provides that grounds must be communicated within 15 days from the date of detention order.

grounds i.e. information and particulars sufficient to make an effective representation against the detention order it is not possible for the detenu to make a representation. But the proviso of Article 33(5) provides that the detaining authority may refuse to disclose facts which such authority considers to be against the public interest to disclose. Here lies the crux of the problem. Because 'grounds are reasons or conclusions drawn by the authorities from the facts or particulars on which the detention order is made.[2] If all the relevant facts and particulars of the grounds, therefore, are not supplied to the detenu, it is not at all possible for him to make an effective representation and the right to make a representation becomes illusory. It is, therefore, for this proviso of Article 33(5) that the second and third Constitutional rights of a detenu have become quite meaningless. Because only communication of grounds without facts and particulars of the detention order does not enable the detenu to make a representation. To give an example, suppose the following communication is sent to a detenu immediately after he has been taken into custody:

> "You are being detained under the Special Powers Act, 1974. Because the government has confidential information that you are doing something in various meetings and otherwise which are prejudicial to public order."

This communication discloses the ground on which the detention order is based. But the 'confidential information' here that is kept by the government is the real base or fact of the ground without which the detenu will not be in a position to make representation. To enable him to make a representation which might give him relief he must be told some details of his activities e.g. what was the nature of the meetings he was participating? when and how were these meetings held?, what type of people participated it? -particulars and documents relating to all these amount to the 'facts and particulars' of the grounds without the disclosure of which a detenu cannot make an effective representation.

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2 Shukla, V. N, *Ibid*, P.133

So it is clear that out of three Constitutional safeguards two are ineffective and the detenu has only one right to enjoy-right to be produced in person before the Advisory Board and the question of that right comes after the expiration of 6 months.[1]

This Advisory Board is not a judicial body; it does not follow strict judicial procedure; it is a quasi-judicial body. The detenu cannot appoint a lawyer before it; it neither works as a court; nor does it try the detenu; it is in fact in the nature of a body charged with the responsibility of advising the executive by giving its opinion in its report. Though the report of the body is binding on the executive it cannot be said, considering the procedure of the function of the Board, that the opinion of it will be independent and may not come under the influence of the executive.

It is important to mention here that in India to make the composition of the Advisory Board independent the 44th Amendment Act brought a change. Now the 'Advisory Board' in India is chaired by a serving judge of the appropriate High Court and the other two members must be serving or retired judges of any High Court. This change in the composition of the Advisory Board was made with a view to ensuring that the chairman and members of the Board shall be independent and may not come under the influence of the executive. It has, therefore, ensured the fair consideration of the representation made by the detenu.

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[1] Section 10 of the Special Powers Act, 1974, of course, provides that the government shall within 120 days from the date of detention, place before the Advisory Board the grounds on which the order has been made and the representation, if any, made by the detenu. And the Board has to submit its report to the government within 170 days from the date of the detention order.

Demerits of the Preventive Detention Law and its Impact over Constitutionalism in Bangladesh

First, both in Pakistan and Indian Constitution the initial period of detention is 3 months. But in Bangladesh Constitution the initial period is 6 months. Nowhere in the world such a long period of initial detention is found.

Second, there should be a fixed maximum period of detention. In Pakistan under Article 10(7) a person cannot be detained more than 8 months in a year. In India the maximum period is 2 years. But neither the Constitution of Bangladesh nor the Special Powers Act specifies any fixed period. It means that a person can be detained for an indefinite period once the Advisory Board opines that there exists sufficient cause for such detention.

Third, in democratically developed countries like USA it is specifically mentioned that only in time of emergency preventive detention law would be applied. But in our Constitution no such specification is provided for. As a result, preventive detention law has been an integral part of our Constitution and every government is using this law as a permanent weapon to crash down opposition and throttle personal liberty guaranteed by the constitution.

The statistics shows that every year a large number of political workers and leaders are detained without trial under the Special Powers Act. This law has popularly been titled as 'Black Law' or 'the Draconian Law'. Because, first, a detenu under this law has not been given any right, by appointing a lawyer, to know from a judicial body 'why has he been detained'? Second, this is the law by which the government can arrest and detain any person any time it wishes. Third, it is the law by which the government can, if it wishes, detain a person for an indefinite period. And fourth, this is the law which is factually negating all the avowed commitment and spirit of the preamble to the Constitution, particularly, the fundamental rights as guaranteed

in the Constitution. As mentioned earlier, once a person is detained illegally under this law, he finds his all fundamental rights except the right to life strangulated in a pincer-like trapping.

The Special Powers Act was adopted essentially keeping line with the Maintenance of Indian Security Act (MISA), 1971 and the East Pakistan Public Safety Act, 1958. But the provisions of the Special Powers Act were made more draconian than those of these two laws. It is also evident from the above discussion that the Special Powers Act was made absolutely with a savage-dog-motive to put attack on the enjoyment of personal liberty, in a sense, to put attack on the development of constitutionalism in Bangladesh.

To quote Justice Patanjali Sastri, "this is a sinister-looking feature, so strangely out of place in a democratic Constitution, which invest personal liberty with sacrosanctity of a fundamental right, and so incompatible with the promises of its preamble..... ".[1] He has also described preventive detention law as a serious invasion over personal liberty.[2] Justice B.K. Mukharjea also says, "no country in the word I am aware of has made this (preventive detention law) as integral part of their constitution as has been done in India. This is undoubtedly unfortunate ..... which cannot but be regarded as a most unwholesome encroachment upon the liberties of the people."[3]

It is important to mention here that one of the demands of the three alliances during the 1990 movement for democracy was the repeal of the Special Powers Act, 1974. It is said that the last act of President H. M. Ershad was signing an ordinance repealing the Special Powers Act but it was not gazetted, and so, had no validity. In 1991 acting President Shahabuddin Ahmed deleted certain provisions of the Act, but it seemed that the political

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1 *A.K. Gopalan* V. *State of Madras* AIR 1950 SC 27
2 *Ram Krishna Bhardwayj* V. *State of Delhi*
3 *A.K. Gopalan* V. *State of Madres*

leaders he consulted, wanted to keep the main provisions. The BNP leader coming to power quite forgot her pre-election commitment in this regard and she emphatically began to say that without this law the country could not be administered. Likewise, before coming to power Sheikh Hasina, Leader of the Awami League in the 7th parliament gave an avowed commitment to repeal this law. But coming to power she had pulled her tone quite in opposite direction by saying-

> "There is no question of repealing the Special Powers Act. This law is a must to run the government and to suppress terrorism.'

Is there any justification truly behind such logic of Sheikh Hasina and Khaleda Zia? The answer comes to my mind is 'absolutely No'; all these are lame excuses, for very few instances can be found where the High Court Division in its hundreds and thousands of habeas corpus cases opined or ruled that there is justification behind the detention of person arrested under the Special Powers Act, 1974. Every government is using this law only and only as a political weapon and as a result it has been a all-time pincer-like trapping to the enjoyment of personal liberty in the country which is only able enough to destroy democratic institutions.

Judicial Remedies of a Detenu in the Constitution and the Bulwark of the Supreme Court against Illegal Detention

In England enactments for preventive detention were made during the First and Second World Wars and they were known as respectively the Defence of Realm Act and the Emergency Powers (Defence) Act. The full implication and all aspects of the law were considered in the famous case of *Liversidge* V. *Anderson* by the House of Lords. Regulation 18B framed under the Emergency Powers (Defence) Act provided:

> "If the Secretary of State has reasonable cause to believe any person to be of hostile origin or associations or to have been recently concerned in acts prejudicial to the public safety or the defence of the realm or in preparation or instigation of such acts and that by reason thereof it is necessary to exercise control over

him, he may make on order against that person directing that he be detained"[1]

The decision of the case depended on the interpretation of the expression, "If the Secretary of State has reasonable cause to believe". Whether this expression was to be construed as meaning "if there is in fact reasonable cause for believing" or it should be construed to mean" if the Secretary of State thinks that he has reasonable cause to believe?" If the former construction was accepted, the Secretary of State must have objective basis for his belief and the court could examine whether there were materials on the basis of which a reasonable man could have formed the belief, but if the latter construction was accepted, the belief of the Secretary was merely subjective and was not open to scrutiny by the court.

The case was heard by 5 Law Lords. Four of the Lords took the view that the belief of the Secretary was subjective and not open to the scrutiny of the court. Lord Atkin alone took contrary view. In his dissenting judgment Lord Atkin said that the term 'reasonable cause' as a condition for any act or belief means and indicates an existing something the having of which can be ascertained. He said, for example, 'if A has a broken ankle' does not and cannot mean "If A thinks that he has a broken ankle."[2] He specifically said that 'reasonable cause' for an action or a belief is just as much as positive fact capable of determination by a third party, as is a broken ankle or a legal right. What he, therefore, indicated is that in question of preventive detention the executive should not be left with its subjective satisfaction. As there is the term 'reasonable cause' the court should have power to exercise its objective satisfaction to see if the detention is a justified one or not. His famous speech was as follows:

"In this country amidst the clash of arms, the laws are not silent. They may be changed, but they speak the same language in

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1 Quoted by, Chowdhury, Badrul Haidar, *The Long Echoes*, (Dhaka: 1990), P.4
2 Quoted by, Chowdhury, Badrul Haider, *Ibid*, P. 5

war as in peace. It has always been one of the pillars of freedom, one of the principles of liberty for which on recent authority we are now fighting, that the judges are no respecters of persons and stand between the subject and any attempted encroachment of his liberty by the executive, alert to see that any coercive action is justified in law."

This dissenting judgment of Lord Atkin became a milestone in the history of protection of personal liberty of people. C. K. Allen wrote to Lord Atkinson supporting his dissenting judgment:

"You alone among the judges have raised your voice against a gross abuse of power. Such events in the wilderness have strong and long echoes"

Lord Gardinar who was then at the Bar wrote:

"I think that history has taken the view that in *Liversidge* V.. *Anderson* the majority were wrong and Lord Atkin right."

Though in question of preventive detention the 'subjective satisfaction' of the detaining authority was upheld in the *Liversidge* case forty years later the same House of Lords finally ruled in favour of Lord Alkin's dissenting view i.e. objective satisfaction describing the majority view in *Liversidge* case as "beyond recall" and saying that "its ghost need no longer haunt the law."[1]

The doctrine of 'subjective satisfaction[2] of detaining authority formulated in the majority view in the *Liversidge* case

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1 Quoted by. Chowdhury. Badrul Haider. *Ibid,* P. 8

2 **Doctrine of Satisfaction :** In constitutional jurisprudence this doctrine has two dimensions—Subjective satisfaction and Objective satisfaction. When the legal basis of an action or decision taken by an authority or person is the sole personal satisfaction of that authority or person and no other authority or body has any jurisdiction to examine the reasonability of the satisfaction or to question whether such satisfaction has any foundation on facts. it is called subjective satisfaction. For example, declaration of emergency under Article 93 of the Constitution of Bangladesh depends on the subjective satisfaction of the President; no court can examine the justification of such declaration or promulgation. On the other hand, when the legal basis of an action or decision by an authority or body is determinable by any third party or court. it is called objective satisfaction. For

had a great impact on the interpretation of preventive detention laws in the Sub-Continent. In British India when preventive detention power was given under the Defence of India Act, 1939 the Privy Council uphold, following the *Liversidge* case subjective satisfaction of detaining authority.[1] After partition and independence the Indian Supreme Court began to follow the doctrine of subjective satisfaction giving the executive authority unfettered power of preventive detention.

In Pakistan the ghost of *Libersidge* haunted the courts for quite some time but had quickly been able to depart from it and to come forward to uphold objective satisfaction for the protection of the liberty of people. The Pakistan Supreme Court in *Jilani's* case pronounced its landmark judgment:

> "It is too late in the day to rely, as the High Court has done, on the dictum in the English case of *Liversidge* for the purpose of investing the detaining authority with complete power to be the judge of its own satisfaction ..... power is expressly given by Article 98 to the Supreme Court to prove into the exercise of public power by the executive authorities, howhighsoever, to decide whether they have acted with lawful authority. The judicial power is reduced to a nullity if laws are so worded or interpreted that the executive authorities may make what statutory rules they please there under and may use this freedom to make themselves the final judges of their own 'satisfaction' for imposing restraints on the enjoyment of the fundamental rights of citizens."[2]

In Bangladesh the Supreme Court from the very beginning began to follow the doctrine of objective satisfaction. Before the Special Powers Act was enacted the government resorted to

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example, if a person is detained in our country under any law the subjective satisfaction of the detaining authority is not enough; our court can examine the reasonability of such detention.

1 *Meer Singh* V. *Emperor* AIR 1941 All 321
Probhavakar Keshee Tare & others V. *Emperor* AIR 1943. Nagpur 26.
Kamala Kant Azad V. *Emperor* AIR 1944 Patna 354
Quoted by, Patwari, A.B.M. Mafizul Islam, *Liberty of the People*, Ibid, P.104

2 *Malik Ghulam Jilani* V. *Government of East Pakistan* 19 DLR(SC) 403.

Presidents Order 50(P.O.50 of 1972). The first reported case on preventive detention in Bangladesh is that of *Habibur Rahman* V. *Bangladesh.*[1] Habibur Rahman was arrested under section 54 Cr. P.C read with P.O.50 of 1972. On 3.9.73 a detention order for 30 days was served against him under section 41 of the Public Safety Ordinance, 1958.[2] The detention was challenged by way of writ of habeas corpus. The court hold that if a person is arrested by police on reasonable suspicion or he is ordered to be detained on the satisfaction of the detaining authority, the materials which led the police to entertain reasonable suspicion against him or the materials upon which the detaining authority was satisfied regarding his involvement in any prejudicial act must be placed before the court to justify that the suspicion entertained by the police was reasonable or that the satisfaction on the part of the detaining authority was reasonable. If the action of the police or of the detaining authority is challenged as malafide, the non-existence of reasonable suspicion on the part of the police or of reasonable satisfaction on the part of the detaining authority would be sufficient to prove that the order of detention is malafide and there for, illegal. The Appellate Division observed-

> "We have accordingly no doubt that the framers of the Constitution intended to empower the High Court Division to pass appropriate order in the case of illegal or improper deprivation of liberty of person and the power to do so is not at all fettered because of the absence of nomenclature of the nature of writ in the Constitution. ..... Under Part III of the Constitution, certain fundamental rights have been guaranteed. Clause 1 of Article 44

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1 26 DLR 201

2 It is important to mention here that an unprecedented Constitutional violation in respect of personal liberty of the citizens had been done by the then government in this case. The Constitution of Bangladesh came into force on 16th December, 1972. There was no provision in the Constitution providing for preventive detention. Therefore the Public Safety Ordinance, 1958 had no legality in Bangladesh. Sections 17 & 41 of this Public Safety Ordinance, 1958 being provisions of preventive detention those were *ultravires* under Article 26 of the Constitution as those were inconsistent with fundamental rights under Article 33 of the Constitution. So the action (detention on 3.9.73 under the Public Safety ordinance, 1958) under an unconstitutional law was wholly without lawful authority.

which also occurs under Part III lays down that the right to move the Supreme Court in accordance with clause 1 of Article 102 for the enforcement of the rights conferred by this part, is guaranteed. It is, therefore, evident that the enforcement of the fundamental rights and this remedial right is itself made a fundamental right by being included in part III of the Constitution. The Supreme Court is thus constituted, by the Constitution, the protector and guarantor of fundamental rights and so long as the fundamental rights specified under part III remain in force, it is the Constitutional responsibility of the Supreme Court to protect them when the right conferred under clause 1 of Article 44 of the Constitution is invoked".[1]

In another writ of *Mohsin Sharif* V. *State* it is found that Shahjahan, a young boy of 18 was arrested on 18.12.73 by Armed Personnel of Dhaka Cantonment, Artillery Head Quarters. He was taken to Ramna Police Station and a G.D. entry was made showing his arrest under section 54 Cr. P.C. Soon thereafter, the officer-in-charge of Ramna P.S. was asked by the Rakkhi Bahini authority to hand over Shahjahan to the Head Quarter of the Rakkhi Bahini. Shahjahan was handed over to the Rakkhi Bahini. It was alleged in this case by Mohsin Sharif, the brother of Shahjahan that Shahjahan had been inhumanly tortured by Rakkhi Bahini and he was last seen by his brother at the Head Quarter of the Rakkhi Bahini on 02.01.74. Since then there was no trace of Shahjahan. Mohsin Sharif then filed a *Habeas Corpus* writ petition for the production of his brother before the court. The High Court Division ordered that Shahjahan should be produced before it. But the Rakkhi Bahini could not produce Shahjahan before the court; actually he was killed by the Rakkhi Bahini. The court directed that an Inquiry Commission should be set up by the government to ascertain the true state of things as to the whereabouts of Shahjahan. But it was not done. To quote Justice Badrul Haider Chowdhury, " the court found that Rakkhi Bahini was functioning illegally. Shahjahan was never found again; just

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1 Ref. Arif, A.F. Hassan, *The Judiciary : Bulwark Against Illegal Detention*, (A paper read in the Seminar, "Rights in Search of Remedies".)

vanished in the air" This was the blackest chapter in the history of preventive detention law in Bangladesh.

In *Madan Mohan* V *Government* (writ petition No. 879 of 1977) Madan Mohan was arrested on 5.7.77. The HCD declared detention illegal and ordered his release. Madan Mohan was released but at the jail gate he was again arrested by serving a fresh order of detention. This was done just to frustrate the High Court Division's order.

In *Farzana Haq* V. *Bangladesh* (writ petition No. 271 of 1990)[1] Sanaul Haq Niru was arrested and detained first on 13.9.87 under the Special Powers Act. His detention was challenged in writ petition no 187 of 1988 and the court declared the detention illegal and directed the release of detenu on 10.5.1988. But Niru was not released. Another fresh order of detention was served against him on 29.9.1988. Niru was not placed before the Advisory Board within the statutory period of 120 days. The High Court Division again declared the detention illegal and directed his release. But Niru was not released; rather another fresh detention order (third time) was served and it was challenged by another writ petition (writ petition no. 989 of 1989). Again the court declared the detention illegal and directed the detenu's release. But even this time Niru was not released; rather another fresh detention order was served. The matter came up before a division Bench of the High Court Division in writ petition no 270 of 1990. The Court said:

> "The least can be said is that the detaining authority is paying little regard to the order of the court. It is unfortunate that the authority which is obligated under Article 32 of the Constitution to protect the liberty of the citizens and further required under Article 112 thereof to act in aid of the courts order should flout the laws by resorting to authoritarian acts .... we are satisfied that the detention is illegal and the detenu shall be set at liberty forthwith."

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1 43 DLR 501

This time, of course, Niru was released. Thus purely for political purposes every government is resorting to, as the statistics says, thousands of illegal detention under the Special Powers Act violating the constitutional mandates as enshrined in Article 32 of the Constitution and the judiciary is performing its bulwark against this illegal detention. The government is. therefore, unnecessarily killing major portion of the Supreme Court's valuable time giving it overload in cases and causing a huge pendency in genuine litigations.

CHAPTER XVII

WOMEN MEMBERS OF PARLIAMENT

General Women Members and Special Women Members

According to the existing provisions of the Constitution of Bangladesh women members may be of two types—general women members and special women members. Those who according to Article 65(2) of the Constitution are elected form single territorial constituencies by direct election are called general women members of parliament. And those who according to Article 65(3) of the Constitution as amended by 14th Amendment Act are elected indirectly in reserved seats for women by the directly elected members of parliament may be called as special women members of parliament.

Background of the Women Members' Reserved seats

Please see tenth Amendment (P.160)

Mode of Election in Reserved Seats

Article 65(3) of the Constitution provides that in 45 reserved seats women members shall be elected according to law by the members of parliament in accordance with law on the basis of procedure of proportional representation in the Parliament through single transferable vote. Thus reserved seats are allocated to parties in proportion to their overall share of the seats. On Novermber 29, 2004 the parliament enacted the Jatiya Sangsad (Reserved Seats for Women) Election Act 2004 for holding indirect election by the 300 directly elected MPs. According to the new law, 45 reserved seats for women will be alloted among the political parties and alliances on the basis of thier proportional representation in the parliament. On the basis of the calculation of so-called proportion the ruling party BNP was to get 29, its coalition partner Jamaat 3, Awami League 9 and Jatiya Party 2. However, the AL refrained from giving candidate for reserved seats. As a result, 9 seats for AL have again been allocated to other Parties proportionately. Women groups

vehemently ventilated their grievances against the 14th Amendment to the Consitution. They were eventually forced to go to the High Court by filing writ against the 14th Amendment Act and Jatiya Sangsad (Reserved Seats for Women) Election Act 2004 challenging the constitutional provision foe indirect election to the sereved seats for women. However, the court rejected the petition and upheld the 14th Amendment to the Constitution, providing for 45 seats for women in the parliament and approving the law for their indirect election.

Status of Women Member elected in the Reserved Seats

Though the 45 women members in the reserved seats are not elected directly by the people, they enjoy the same status, from legal point of view, as directly elected MPs do. They enjoy the same opportunities and privileges and have the same rights and standing in all kinds of functions in the parliament as general MPs in the House do and have. However, from the view point of representation they have weaker status than that of directly elected members. This is because these 45 women do not really represent any portion of population except the party proportional strength. Though they have national geographical constituency they have no link with it, for the people of that constituency do not elect them and, therefore, the constituencies they represent are fictitious only. They also cannot be said to represent women in general, as the women of the country have no role in their election. Again, since these women members of parliament have not gone through a competitive election process, they are taken less seriously by their directly elected colleagues who actually consider them more as a 'vote bank'.

Justification for Women Members Reserved Seats

The Constitution of the country recognises that all citizens are equal before law and undertakes to give them equal opportunities. However, it is also accepted that in reality all sections of society are not equal and, therefore, the need for special provisions for any disadvantaged sections of the society is also recognised. In question of reserved seats for women members in parliament it is argued that to compare with men women in our country are in a disadvantaged situation; their status is unequal and subordinate to that of men in

the society. This is why the provisions of reserved seats for women were incorporated in the Constitution. The purpose was to ensure a minimum representation of women in parliament, and to ensure a wider participation by them in national politics. But howsoever noble philosophy worked behind the incorporation of this special provision, one thing is clear that the Constitution makers did not apply their cautious mind in making this system democratic, effective and fruitful. They all had bitter experience that it is a trend of post-colonial governance in developing countries that law has been misused whenever any scope to that respect has been left. Although the provision was made for a specific period of 10 years only but method of election has made the whole pious purpose meaningless.[1]

It is for the method of election that these 45 women members are being used as a ready tool or a 'vote bank' at the hand of the majority party rather than true representation. Because they are elected or selected on the basis of proportional representation of the parties in the parliament. A democratic people's Assembly should discourage an influx of members through this process of 'backdoor styles'. The practice is being viewed by conscious people with contempt calling it 'backdoor democracy'. This provision for reserved seats for women in our Constitution is being misused as a 'vote bank' or a 'balance of power' in the following ways creating a bad impact over the constitutionalism in Bangladesh.

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1 In an interview with Barrister Amir-Ul Islam, he told the author that this provision was not incorporated in the first draft Constitution of the committee. Later on this provision was inserted and he vehemently opposed this provision. His opposition was supported by two women members of the Constituent Assembly (Begum Nurjahan Murshed and Badrunnesa Ahmed). I asked him "who first conceived the idea of indirect election for women members in the reserved seats "? He told that he could not recollect who first conceived this idea. Dr. Kamal Hossain, the Chairman of the drafting committee also told me that after 26 years it was impossible for him to recollect who conceived the idea. He told me that though women in reserved seats were to be elected indirectly, it was only for 10 years. In the Constituent Assembly debate no methodical rationale was disclosed behind providing for such provisions in the Constitution. The justification shown by Asaduzzaman Khan in the Assembly debate (Voll-II P.277) is not clear enough to get the true rationale behind such provision.

First, a party gaining simple majority in a general election can use the majority of these 45 seats as a tool to achieve its absolute majority paving its easy way to get to power. For instance, the result of the 1991 election i.e. the 5th Parliament Election gave the BNP 140 seats, AL and allies 100, the JP 35, the JI 18 and others 7. This did not give any party an absolute majority (151). So it was not possible for the BNP to form government without power-sharing with another party. However the BNP got support form the JI and according to the understanding between them the BNP took 28 women seats and the JI 2 (reserved seats were 30 then). Now bagging these 28 seats the BNP acquired its absolute majority. So had there been no reserved women seats or had it not been a 'vote bank' system, the BNP would have to have some power-sharing agreement with other parties if it were to form a government. Thus these 45 women seats are negating the peoples' mandate on one hand and these are making impossible politics possible, on the other hand.

Second, sometimes even in bringing a constitutional amendment these 45 women can play a crucial role. For instance, it was possible for Ershad to pass the 7th Amendment to the Constitution mustering a two-third majority only because he could bag these 30 women member as his ready weapon. This is why Ershad was so paranoid about winning the 30 women seats that he did not trust even his own party member in voting for the party women candidates. He promulgated a special Ordinance (Ordinance No. XLVII of 1980) which provided for that if the returning officer receives a nomination paper proposed and seconded by more than half of eligible voters (MPs) the candidate would be declared automatically elected.

Third, these 45 women members are likely to act as all time bonds-servants for the ruling party to gear its expectation in legislative business. Because in making laws, approving ordinances or in defending a no-confidence motion the ruling party uses them as a necessary handy tool. They can never raise even a minimum voice against the decision of the ruling party, for they do not represent truly any locality; neither do they represent women of Bangladesh; they are to remain under the grip of the ruling party. It

is due to this dependency relationship and low profile that the female MPs in reserved seats so far have been branded as "30 sets of ornaments in parliament" (now 45 sets of ornaments).

Thinking for an Alternative to ensure Women's True Representation

It cannot be denied that though women constitute half of our population, they continue to be an under privileged section of our society. So reservation of seats for women members are nothing undemocratic ; rather a good sign of social and political development. But the present system does not allow for any meaningful method of selecting women candidates who can truly represent women section of our population. Nominations by majority are a gift given to selected women who are not required to get through any election process. The absence of a contest restricts the number of women entering the political arena and can never lead to achieving the primary objective of the constitutional provision that was framed for this purpose. In some countries, of course, there are provisions for reserved seats for women members in legislature but they provide for direct election in reserved seats. Nowhere in the democratic world such ignominious women representation as exists in Bangladesh is visible.[1] We should, therefore, suggest a way for making these reserved seats truly representative. Three alternative options are suggested below.[2]

Alternative One: Direct Election

Among the various ways of electing representatives, direct elections are considered the most democratic. If we were to follow a system of one person two ballots, women candidates could be directly elected by the people to the women seats. Each political party would nominate candidates to the women seats as it does in

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1 There are, of course, 6 other countries (Burnia Faso, Nepal, Uganda, United Republic of Tanzania and Iritrea) where the constitution provides for a proportion of seats to be reserved for women in parliament but it could not be known if practically these reserved seats are used as 'vote bank' [based on information supplied by the Commonwealth Parliamentary Association Secretariat, London and 'Women in Parliament' (poster) printed by Inter Parliamentary Union, Geneva]

2 In suggesting these alternatives I took help from *CAC Briefing Paper-2, January, 1995*

general seats. Each voter would have two ballot papers; one for the candidates to the general seats, and other for the women seat. He or she would cast one ballot for the general seat and one for the women seat resulting in 330 directly elected Members of parliament. Administratively or logistically this would not be a major problem if different coloured ballot papers are used.

One argument against this method would be that the constituencies would become too large and would be difficult for women candidates to mount an effective campaign. The other argument would be that in practice, only major party candidates could contest. The answer to these arguments are that in any case, 88% of the voters in 1991 and 1996 voted for the four major parties. General elections are based on party lines and modern democracies are based on the party system. If we take this premise as a base, then women party candidates would be supported by the party organisation and the party candidates in the general seats. Whereas a candidate in a general seat would campaign at union and village levels, these women candidates would campaign at thana levels with projection meetings at major centre. The advantage of this method would be that:

i) all major parties would nominate candidates to the 30 seats and therefore more women would be in electoral process;
ii) this would ensure better selection of candidates;
iii) they would be exposed to an effective electoral campaign;
iv) general voters would see women on the campaign husting and would be more amiable to future women candidates in general seats;
v) the distribution of seats to political parties would reflect more accurately the popular mandate ;
vi) gradually, more women could enter the general electoral process so that this particular constitutional provision would succeed in its objectives.

Alternative Two: Proportional Representation

A second alternative to electing members to the reserved women seats could be through proportional representation. There can be two ways of doing this. One could be based on the total

popular votes obtained by political parties in national elections. Each party would nominate 30 women candidates, and this lists would be published in order of priority. Seats would then be appropriated to the parties based on the votes obtained by them . The advantage of this method is that, as the political parties would have to list their candidates, a larger number of women would be exposed to the political field. The selection process would be prior to the election, and not gifted later. However since the lists would be on a national basis there would not be any particular women's constituency, and therefore it would lack geographical representation.

A second method of proportional representation would be to allot seats to parties in relation to their strengths in the parliament. Here also the members elected would not really fulfill the purpose for which the constitutional provision has been provided.

Alternative Three: Election by MPs of the General Seats Comprising the Geographical Women Constituencies.

The election law provides for 30 women constituencies with geographical areas. The law also says that a candidate would have to be nominated for a particular women's seat and election would be seatwise. Every women reserved seat, therefore, comprises more than one general seats. If, according to this principle, the election to women seat is restricted to Members of Parliament of that women's constituency, then the party position would be different ; an electoral adjustment would have to have taken place. In case of a tie, the result can be decided by a toss. This system, therefore, provides for a more equitable distribution of seats.

THE FOURTEENTH AMENDMENT

Background: This amendment was passed on 16 May, 2004. As mentioned above in Tenth Amendment, the last extension of 30 reserved seats for women members in parliament expired in 2001 and as a result the 8th parliament did not have reserved seats. However, after three years of the life of the 8th parliament, on 16 May, 2004 the ruling BNP placed and passed the 14th Constitution Amendment Act to re-introduce reserved seats for women in parliament. This time the number of reserved

seat for women member have been increased from 30 to 45. The main provisions of the Act are as follows:

> "65(3): Until the dissolution Parliament occurring next after the expiration of the period of ten years beginning from the date of the first meeting of the Parliament next after the Parliament in existence at the time of the Commencement of the Constitution (Fourteenth Amendment) Act, 2004, there shall be reserve forty fives seats exclusively for women members and they will be elected by the aforesaid members in accordance with law on the basis of procedure of proportional representation in the Parliament through single transferable vote."
>
> Insertion of new paragraph in Fourth Schedule:
>
> "23. **Temporary special Provision regarding women members in the Parliament.** (1) for the residual period of the Parliament in existence at the time of the Commencement of the Constitution (fourteenth Amendment) Act, 2004 there shall be reserved forty five seats exclusively for women members and they will be elected by members of the Parliament in accordance with law on the basis of procedure of proportional representation in the Parliament through single transferable vote.
>
> (2) During the period mentioned in sub-paragraph (1), the Parliament shall consist of the three hundred members mentioned in clasue (2) of article 65 and the forty five women members mentioned in sub-paragraph (1) of this paragraph."

Criticism: The 14th Amendment as a whole has more political ramification than real. The provision for 45 reserved women seats in the parliament has demoralised the idealism and spirit embedded in the original constitution of 1972 particularly articles 10, 19(1), 27, 28(1), 28(2) of it. The thinking of the Constitution makers was to keep this vote bank system operative only ten years which has been extended from time to time by various government by amendments. When the 8th Parliament increased the number of reserved seats for women from 30 to 45 with indirect election system and extended for another ten years, it is clear that the government's aim is to strengthen stigmatic vote bank system rather than true democracy or women representation (See more discussion in Chapter XVII).

CHAPTER XVIII

OMBUDSMAN

Definition, Origin and Development

The modern concept of ombudsman is a Scandinavian institution and Sweden was the first country to introduce this system. The Swedish word 'Ombudsman' means a delegate, agent, spokesman, representative etc. So ombudsman means the man or official who represents the people in their grievances or who acts as a commissioner of parliament to redress the grievances of the people. He is also called a 'grievance man'. The Oxford Companion to Law[1] says that 'Ombudsman is a person appointed by parliament to investigate citizens' complaints of executive or bureaucratic incompetence or injustice but not illegality'. From the functioning of the office established so far in various countries it may be said that Ombudsman is an office created either by the constitution or law which is a body independent of the executive and responsible only to parliament and the principal function of which is to investigate complaints of maladministration[2] against various government departments or other public bodies.

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1 David, M. Walker, Clarendon Press, Oxford, 1980

2 **Maladministration :**
Since the Ombudsman's principal function is to fight and investigate against the maladministration of public servants and civil servants it is important to mention here what maladministration is. There is no legal definition of maladministration. Richard Crossman, then Leader of the House of Commons, while piloting the Parliamentary Commissioner Bill through parliament in 1967 described maladministration as bias, neglect, inattention, delay, incompetence, ineptitude, perversity, turpitude, arbitrariness and so on. To be mentioned more, the present parliamentary Ombudsman of UK, W.K. Reid adds the following as his definition of maladministration :

- Neglecting to inform a complainant on request of his or her rights or entitlement;
- Knowingly giving advice which is misleading or inadequate ;
- Ignoring valid advice or overruling considerations which would produce an uncomfortable result for the overruler;
- Offering no redress or manifestly disapproportionate redress;
- Showing bias whether because of colour, sex or any other grounds;
- Omission to notify those who thereby lose a right of appeal ;
- Faulty procedures;
- Failure by management to monitor compliance with adequate procedure;
- Cavalier disregard of guidance which is intended to be followed in the interest of equitable treatment of those who use a service;
- Rudeness (though that is matter of degree)

The office of ombudsman was created first in 1809 when Sweden adopted its new Constitution. The office came to be known as the ombudsman of the parliament or Parliamentary Ombudsman. In 1915 the office of the military ombudsman was created in regard to defence and military administration. In 1968 these two types of ombudsman were amalgamated and now there are four parliamentary ombudsmen working in Sweden. One of them is the Chief Parliamentary Ombudsman.[1] Besides these parliamentary ombudsmen there are some non-parliamentary ombudsmen in Sweden like -

i) Equal Opportunities Ombudsman;
ii) Children Ombudsman;
iii) The Press Ombudsman;
iv) The Ombudsman against Ethnic Discrimination; and
v) The Consumer Ombudsman etc.

Following the footsteps of Sweden the institution of ombudsman was adopted in other countries-by Finland in 1919, Denmark in 1955, New Zealand in 1961 and Norway in 1963. A similar office styled as Parliamentary Commissioner (popularly known as Ombudsman) was created in UK in 1967 by the Parliamentary Commissioner Act, 1967. Australia created the office in 1973. So far there are 46 countries who have parliamentary ombudsman.[2] Among our neighbouring countries Pakistan has successfully adopted this institution, In India ombudsmen are known as Lokpal and Lokayakta. In SriLanka it has one ombudsman known as Parliamentary Commissioner for Administration which was introduced in 1981.

- Unwillingness to treat the complainant as a person with rights.
- Refusal to answer reasonable questions.
- Partiality: and
- Failure to mitigate the effects of rigid adherence to the letter of the law where that produces manifestly inequitable treatment. (source : *Making Parliament Effective* : A Parliamentary Report by L. K. Siddiqui & others Published by CAC in 1994)

1 Ganguli, Basudev, *Administrative Tribunal Act, 1980*, (Dhaka : Warsi Book Corporation, 1993). P.3
also. Kabir, Abul Hasnat Monjurul. *Ombudsman for Bangladesh : Problems & Prospects* .(a paper read in 1996)

2 Kabir, Abul Hasnat Monjurul. Ibid. P. 7

Why was the Institution created ?

In Sweden the purpose of creating the office of ombudsman was to safeguard the rights of citizens from the administrative excess, to examine complaints of infringement of the Swedish Bill of Rights. There, are, of course, some traditional methods whereby numerous organs of the government may be monitored and kept under control in the interests of the governed and various grievances of citizens can be redressed. These methods are mostly legislative and judicial. Among the legislative methods parliamentary questions,, no-confidence motion, censure, cut motion, adjournment motion etc. are prominent. But due to strict party discipline these devices are no longer devices to bring the administration under strict control and the citizens' grievances can little be redressed. The legislature is 'more a forum for the ventilation of grievances than for securing their redress.'[1] Again, the members of parliament have little time to attend to all the grievances of their constituents. With the enormous growth of governmental authority the volumes of request for such assistance has placed an impossible burden on individual members. Hence something more is needed to meet current needs and the answer has been found in creation of the office of ombudsman.

Again, the technological development and the growing complexity of governmental functions and responsibilities are forcing the state to leave a wide discretion to the bureaucracy. With this wide discretion has increased administrative abuse of powers affecting the lives and rights of ordinary people in varying degrees. Also the bureaucrats are not directly accountable to parliament. Complaints can, therefore, always be heard that public authorities, although they have acted within the law, have failed to observe the proper standard of administrative conduct and these are the situations which neither court nor any tribunal can offer remedy. Experience shows that normal judicial system is not effective in preventing such abuse of power. Also judicial remedies are mostly time-consuming and expensive. These considerations and factors led the development of a system of ombudsman enabling proper investigation of the citizens' complaints against abuse of power by administrative officials and redress made in a easier and quicker way.

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1 Garner, *Administrative Law*, 7th ed., London : Butterworths, 1989) ,P.90

It was an appreciation of the short-comings of the traditional parliamentary devices of redress which led *justice*–an all party organisation of lawyers, to establish in 1960 a committee to consider alternative procedures in Britain. The Committee noted that in practice complainants have grievances requiring different types of redress procedures. Large number of cases exist where the complainant is based on some allegation of maladministration in the exercise of power. The contention may, for example, be that injustice has resulted from inordinate delay in reaching a decision, in misleading advice having previously been given by the administration, or in bias against the complainant having been displayed by officials. In such type of cases where what is needed is not so much reconsideration of the merits of the decision the committee recommended for an institution of ombudsman or 'grievance man'. The Committee recommended that the ombudsman would act as an agent of parliament 'for the purpose of safeguarding citizens against abuse or misuse of administrative power by the executive ..... . He is not a super-administrator to whom an individual can appeal when he is dissatisfied with the discretionary decision of a public official in the hope that he may obtain a more favourable decision. His primary function ... is to investigate allegations of maladministration[1]. This he will do in informal manner, inquiring into the matter of the complaint fully, and having access to the departmental files.

How far Ombudsman has been effective Citizen's Watchdog in various Countries

There are now over a hundred local and national ombudsmen around the world covering almost 80 countries who maintain various categories of ombudsmen with or without parliamentary ombudsman. Such an overwhelming adoption of the institution proves its success,

While the institution was being adopted in Scandinavian countries apprehension was expressed that the ombudsman might turn into a parallel branch of government constantly looking over the shoulder of the hurried officials. Instead of setting as a public

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1 Justice Report, Para 2 & 8. Quoted by, Garner, *Ibid*, P 91

watchdog over the official's acts the ombudsman, it was alleged, might become a blood hound sniffing after his every decision. In Denmark, before the scheme was introduced the civil servants opposed it, but after its adoption they soon realised that the office was an aid rather than a hindrance. Furthermore, the minor officials soon found that the ombudsman was conducive to the development of harmonious boss-subordinate relationship. As Garner says, 'friendly relations between the ombudsman and the administration was, and remains an important feature of the institution in all the four Scandinavian countries and elsewhere, where the office has been operating, enabling the ombudsman to achieve many positive results "behind the scenes' in an informal manner."[1]

Secondly, it is sometimes argued that in a large populous country the ombudsman would not be able to handle a huge number of complaints. This logic, however, does not carry much weight. Because the ombudsman has power to reject or accept the complaints paying due consideration to the socio-economic conditions and limitations of national wealth.

Thirdly, it is also argued that the publicity about the activities of the officials may be dangerous to maintain the necessary secrecy. This point also does not carry much weight since the names of complainants and officials involved in cases are not ordinarily revealed and publicity is voluntarily controlled by the Press. In the nature of things no publicity is given to minor cases.

Fourthly, it was also stated that the office of ombudsman was too personal and too dependent upon one man's integrity and understanding. The demands of the offices were such that it was not possible to find the right man for the right job. This argument also does not hold good in view of the observation that the ombudsman has not been constituted to serve as a panacea for all the ills of administration. With sincerity of purpose it was found possible to locate the best man among the jurists in the country.

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1 Garner, *Administrative Law*, Ibid, P. 91

Fifthly, it is also argued that in true sense the ombudsman has no real power, for he can make a recommendation for redress only; he himself cannot take action for redress. But such an argument is a common ready-made one, for it may be raised in every case of controlling agency including the judiciary. Actually the ombudsman is appointed by the legislature; he is fully independent of the executive; he has the power to interfere in any sphere of administration. If gross maladministration is found, he can make order to rectify and the experience in countries which has introduced this institution, shows that his orders are promptly complied with. If, however, in any case, his order is not complied with, he may make report to parliament and debate may take place in the House; also the media can publicise it. Ultimately the administration will have to rectify it.

On the whole, it has been generally accepted that the office of the ombudsman has been very useful in safeguarding the rights of the citizens from bureaucratic excesses. The successful working of this institution in Scandinavian countries has aroused great interest in both developed and developing countries.

Categories of Ombudsman

From the view point of appointment procedure and accountability ombudsman may be of two types-

i) Legislative or Parliamentary Ombudsman; and

ii) Executive Ombudsman.

When an ombudsman is appointed by the parliament and he remains responsible to the parliament only, it is called parliamentary ombudsman. The ombudsmen of Scandinavian countries are parliamentary ombudsmen. On the other hand, when an ombudsman is appointed by the executive authority and it remains accountable to the executive authority, it is called executive ombudsman. The Nigerian Ombudsman is an executive ombudsman. It is worthy of notice here that an executive ombudsman cannot act as the citizens' defender, watchdog or public safety valve against the violation of public rights. Because he cannot act independently in favour of citizens. As he is responsible

to the executive, he may always be dictated by the executive. This type of ombudsman may be branded as 'Yes Boss Ombudsman'. Generally the military rulers appoint such type of sham ombudsman.

It is also to be mentioned here that a comparative study of this institution will give idea that there are some ombudsmen which are neither parliamentary nor executive type as has been mentioned just now. For example, in Sweden there is the Press Ombudsman which is not based on legislation. It is entirely voluntary and wholly financed by the press organisation. Likewise, the office of the Consumer Ombudsman in Sweden was created under the Marketing Practices Act, 1970. He is neither appointed by parliament nor responsible to it; rather he is appointed by the King-in-Council and has position like that of other civil servants.[1]

Mode of Appointment of Ombudsman

There are three available modes of appointment of ombudsman in the world :

1. Appointment by National Assembly or Legislature;
2. Appointment by the Head of the State; or
3. Appointment by the Head of the State on the recommendation of parliament.

In Scandinavian countries ombudsmen are appointed by the parliament. But when an ombudsman is appointed by the executive in an unfettered way there is a question of objective or impartial appointment, particularly, in developing countries. In Britain, the Parliamentary Commissioner for Administration (PCA) (Ombudsman) is appointed by the Crown on the advice of the government but before any such appointment is made, there should be consultation with the chairman of the House of Commons Select Committee on the Parliamentary Commissioner for Administration. The chairman of this Committee is, by convention, always a member of the opposition party. The third mode of appointment is also good. Because the executive cannot, without recommendation

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[1] Rahman, Mizanur. *Consumer Protection Law and Swedish Approach*, (Dhaka: Prudential Publication, 1994), P.39

of parliament, appoint anyone it wishes. The Ombudsman Act, 1980 of Bangladesh provides for this type of appointment.

The vital point to be borne in mind here is the question of accountability of the ombudsman. Whatever may be the mode of appointment, if ombudsman is made accountable to the executive, it will not be able to discharge its function independently and impartially. This is why in all democratic countries the ombudsman is made responsible to parliament.

Method of Work

Generally an ombudsman may receive complaints from three sources :

i) Complaints sent to him by members of the people (MPs);
ii) Complaints made to him by any person ;
iii) The ombudsman may, on the basis of a newspaper comment or otherwise, proceed *suo motu.*

Of these, of course, the individual complaints are the main source of cases brought to the Ombudsman's attention. Any individual feeling aggrieved by any administrative action or inaction may file a complaint to the ombudsman. It is not necessary for the complainant to employ legal advice. What he needs is to make the complaint in writing and whenever possible, with appropriate evidences and relevant documents supporting the complaint. Once the complaint has been received in the office of the ombudsman, the case proceeds largely by correspondence. The ombudsman forwards the complaint to the official concerned and asks for an explanation; the officer returns its version of the matter together with any relevant documents. The ombudsman, if satisfied, informs the complainant of the official explanation. If he is not satisfied, or if the complainant produces further evidences or challenges the official version, the ombudsman continues his investigation until either the complaint is found to be justified or the complaint is eventually dismissed as unjustified. It may be mentioned here that during the investigation, the ombudsman shall have access to all files and minutes of courts and agencies even to those normally

privileged or secret; he may ask the department concerned to produce and submit such information as may be necessary for the ombudsman to decide upon the complaint or information.

Besides this, the Swedish ombudsman undertakes periodic tours of inspection in the provinces or central offices, normally giving only a day's notice of his intention. These inspections are at random and they may concentrate on the financial affairs of the office concerned. Normally the ombudsman or his deputy carries out about four or five tours of inspection a year, each tour lasting a week or so.

Why is an Ombudsman must for Bangladesh

There are some justifiable and practical reasons which necessitates the immediate establishment of ombudsman in Bangladesh.

Firstly, like other states Bangladesh is a welfare state and also it is one of the largest populous countries in the world. As a result, there has been an wide expansion of governmental functions of various kinds. The executive officials have been vested with unlimited and often unguarded discretionary power. And this unlimited power has given rise to widespread abuse of power and maladministration causing an indescribable sufferings to the ordinary people. The most significant area where our officials in general lack integrity is corruption in administration. Corruption is the biggest evil in our administration. it is not only an evil but also a fatal disease which has adversely affected it; it is a dangerous evil of democracy. Corruption breeds corruption. When it sets in, it grows like weeds in a garden. Corruption is seen in different forms such as bribery, illegal gratification, frauds, embezzlements and misappropriation in commercial transactions and monetary disbursements of the government, tempering with the official records, use of official position for personal gain and acquisition of property, nepotism and favouritism, violation of official rules for personal interests, involvement in smuggling, investment in others' name inside or outside the country and even unwillingness to

perform the official duties properly.[1] As mentioned by a commentator, the evil effect of deficient laws can be mitigated by good officials, but the evil effect of bad administration cannot be surmounted by good laws.[2] Public men and government officials should subject themselves to regorous discipline. This is without doubt the prime need of society. There can be no democracy if administration lies in the hands that are tainted. This is why there is, what Wade[3] calls "an ombudsman fever", that is to say, demand for a functionary who can hear and investigate complaints on behalf of citizens against the administration. So in quest of a good and efficient administration a strong and effective institution of ombudsman is a must. So far in the world the office of the ombudsman has been recognised as creative office. It is creative in that it is always seeking or monitoring towards improvement in administrative practices and the breaking down of 'red tape', a 'taboos' of by-gone era of administration.

Secondly, though we have a court system to resolve legal disputes of various types, it is beset with some chronic problems. The most prominent of them is the inordinate delay due to which our courts can provide only technical justice rather than 'substantial justice'. But the problem of delay lies not in the paucity of judges only (judges attribute only 10–20% of the delay for their business and paucity[1]) but mainly in the lack of controlling system, defective investigation procedure, corruption by the iudges, clerks, peons, *peshakar* and *sherestadars* who by taking 'illegal gratification, misplace records, remove documents and sometimes even destroy the records'[3] resulting in the setting hindrances to the smooth functioning of the system. But these artificial and technical problems can easily be mitigated by establishing a department of ombudsman,

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1 Ahmed, Ali, *Ombudsman for Bangladesh*, Ibid, P.45

2 Islam, Mahmudul, *Constitutional Law of Bangladesh*, Ibid, P. 45

3 Towards Administrative Justice. Quoted by, Hidayatullah, M. *Democracy in India and the Judicial Process*. (Calcutta : Asia Publishing House, 1965), P. 27

1 According to the report on a project *"Delay in Courts and Court management"* by the BILIA of 1985.

3 FOCUS – a journal of legal studies Vol-I, 1993, P.87

Thirdly, in most cases our courts give the declaration of remedy whereas the real remedy lies with the administration and law enforcement agency which frequently flouts the decision of the courts. The case of ombudsman in Bangladesh, therefore, came in focus in a number of cases of arbitrariness of the executive which called for remedial measures through a proceeding for writ in the High Court division. The following instances will suffice to substantiate the point.

In *Farzana Hoque* V. *Bangladesh* (writ petition no 271 of 1990) Sanaul Hoque Niru was arrested and detained first on 13.9.87 under the Special Powers Act. His detention was challenged in writ petition no 187 of 1988 and the court declared the detention illegal and directed the release of detenu on 10.5.1988. But Niru was not released. Rather another order of detention was served against him on 29.9.88. Niru was not placed before the Advisory Board within the statutory period of 120 days. The High Court Division again declared the detention illegal and directed his release. But government did not release Niru. Another order (3rd time) was passed and it was again challenged by another writ petition (writ petition no 989 of 1989). Again, the court declared the detention order illegal and directed the release of the detenu. But even this time Niru was not released. Rather another detention order was served. The matter came up before a Division Bench of the High Court Division in writ petition no 271 of 1990. The High Court Division said:

> "The least can be said that the detaining authority is paying little regard to the orders of the court. It is unfortunate that the authority which is obligated under Article 32 of the Constitution to protect the liberty of the citizens and further required under Article 112 thereof to act in aid of the courts order should flout the laws by resorting to authoritarian acts ....."

Had there been an ombudsman the government would not be able to flout the courts order in such a manner.

Likewise it is frequently observed that in many cases relating to property matter where the government or the administrative authority is a party the decree holder cannot realise the decree due to artificial barricade created by the administration and law

enforcement agencies. In *Radha Kanta* V. *Deputy Commissioner* (31 DLR 352) the petitioner's property was requisitioned. This was challenged and the Pakistan Supreme Court declared the requisition order illegal. But the petitioner's property was not released. The Deputy Commissioner asked the petitioner to file a civil suit for restoration of possession of his property thereby giving a permission to the respondent who illegally enjoyed the property already for 9 years. This case clearly shows the executive's arbitrariness on the face of it. Nothing is more tyrannical than the tyranny in the name of law. The whole device was in the name of establishing the title 'so the proceedings may take another decade to finalize and the respondent may be able to enjoy the fruits of the illegal possession till such time". The idea is simple –'you go on fighting in court, in the meantime I enjoy the fruits of my ill-gotten endevour."[1] Had there been an ombudsman, the petitioner could easily, through the intervention of the ombudsman ,realise the decree and had not to suffer for 9 years.

Likewise in Nazrul Islam's case[1] it is found that Nazrul Islam, a young boy was illegally detained over 12 years. The then chairman of Satkhira District Council in collaboration with a police officer filed a case against Nazrul Islam. He was sent to jail. This was done by the interested group just for grabbing his paternal property. Had there been an ombudsman the necessity for bringing the above mentioned cases to courts would not have arisen and the administration would not be able to neglect the courts order.

Fourthly, criminal cases filed in a year are far greater in number than civil cases. And these criminal cases are dealt primarily with Magistrates' courts. But these Magistrates' courts are hot-bet of

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1 Chowdhury, Badrul Haider, C.J. *'Ombudsman is a must for Parliamentary Democracy'* – a paper.

1 (*State v. DC Sathkhira* 45 DLR 1993) Nazrul Islam's case is the first *suo motu* case of the High Court Division in Bangladesh. The word *'suo motu'* means 'upon own initiative'. These cases are not filed by any particular person; the court itself on the basis of a news form any source takes the case by issuing rule against appropriate authority. In Nazrul Islam's case the High Court Division, on the basis of a news in the *Ittefaq* (a Bengali daily) on 18th October 1992, issued rule under section 491 of the Cr.P.C. To be mentioned here that the second *suo motu* rule was issued by the High Court Division on 18.07.95 against the detention of US girl Elieda Moccord.

corruption. It is horrible to hear from advocates about corruption in Magistrates' courts in the form of partial judgment, bails in non-bailable cases depend not on the merit of the case but on the amount of money offered to the granter.[2] Had there been an ombudsman these magistrates would not be able to take bribes and to be so corrupt as they are now.

Fifthly, public servants of some autonomous bodies like various corporations and particularly most of the teachers of government universities are doing the most corruption and illegalities by evading their classes and engaging themselves in extra-profitable works. If there is an office and proper functioning of a duly appointed ombudsman by the parliament, then the accountability of these public servants is likely to be well ensured and our public administration will be more effective and clean for the benefit of the people.

Law and Constitutional Provisions for Ombudsman in Bangladesh

From the above discussion it is clear that the establishment of an ombudsman in Bangladesh will undoubtedly go a long way in helping to establish a real democratic social order and polity based on parliamentary system of government for the wellbeing of the people at large. Because the ombudsman will function informally without the assistance of lawyers to be engaged by the complainants. Hence justice may be within the reach of common men who are often unable to pay the fees demanded by the lawyers. And also it will be able to investigate complaints quickly and give redress to the grievances of public. After examining the performance of the Parliamentary Commissioner (British Ombudsman) Professor Wade Commented

> "The Commissioners reports show that he has been able to remedy a great many cases of injustice where, almost certainly no remedy would otherwise have been obtained. In general, he has found that the government departments are willing to pay compensation or otherwise make reasonable amends when he has

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2 The *Ittefaq*, daily Bengali News paper. 17.06.91 & 23.6.91.

exposed maladministration, though in some cases he has had to press hard for it."

Keeping in vigilant line with the importance and performance of Ombudsman in different countries and also being convinced by the fact that an institution of Ombudsman would be essential for safeguarding the rights of the common people from maladministration or administrative excesses, our Constitution makers inserted in Article 77 of the Constitution the provision for an institution of Ombudsman in 1972. But no positive attempt was made to introduce this institution till 1980. In 1980 President Ziaur Rahman took initiative to establish the office of Ombudsman in Bangladesh and accordingly an Act was passed by the then parliament in 1980.[1] However, the subsequent governments, particularly Ershad during his 9 years dictatorial rule never thought about the establishment of this office. After long struggle against Ershad regime Zia's party BNP again came to power through a free and fair election. The leader of the BNP and Prime Minister Khaleda Zia was said to be determined to fulfill the commitments made by her husband and the establishment of the office of Ombudsman was expected to receive priority. But unfortunately BNP did not bring the Act into force. The AL Government in the seventh parliament also did not bring the law into force. The real problem lies with the leadership weakness which I will discuss in the last chapter. If democracy is to give a fair trial in Bangladesh an office of Ombudsman is a must.

How effective would be the Act if implemented

Though the initiative of making the Ombudsman Act 1980 has been a promising step, the examination of its different provision will reveal the idea that the Act suffers from many democratic mechanisms.

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1 The ombudsman Act, 1980 (Act no XV of 1980).

First, under section 6 of the Act the Ombudsman is empowered to investigate only such actions of a Ministry, a public officer or a statutory public authority as-

(i) has caused injustice to any person;
(ii) has resulted in undue favour being shown to any person; or
(iii) has resuslted in accrual of undue personal benefit or gain to any person.

Second, besides the above three types of actions specified in section 6 of the Ombudsman Act 1980, the Ombudsman cannot investigate into any other matter. This the Act does not allow the Ombudsman to scrutinise complaints against the President, Prime Minister, cabinet Ministers, CAG and Chairman of the PSC.

Third, the Ombudsman does not have any jurisdiction to examine complaints against the local government bodies.

Fourth, under this Act the permanent secretaries of different ministries have been given wide power to refuse to release documents or information or proceedings of the Council of ministers on the grounds of security and maintaining proper international relations etc.

Fifth, under the Act the Ombudsman will have no effective independence, he will have to seek permission from at least 3 ministries including the Ministry of Finance to spend money.

Sixth, the Act empowers the government to exempt any public functionary or class of functionaries from its jurisdiction (Section 15). This is the most dangerous element in this Act. The exercise of this power is likely to make the office of the Ombudsman into a toothless tiger[1]. The Law Commission has expressed the view that

[1] The Law Commission Report, 2001 (second part).

if corruption of public functioneries are kept out of the jurisdiction of the Ombudsman as in the present Act, this institution will virtually be ineffective and will not be able to meet the expectation of the nation. The Commission also opines that both the maladministration, corruption and illegal acquisition of property by public functioneries should be within the jurisdiction of the Ombudsman.

Seventh, the Law Commission also reports that the Ombudsman Act 1980 was passed in view of Presidential system of government. Since there is parliamentary form of government at present in the country the Ombudsman's jurisdiction should be wide enough to cover all ministerial and public activities including local governments[1].

[1] The Laws Commission Report, 2001 (second part).

CHAPTER XIX

THE JUDICIARY

One of the there organs of the government is judiciary. The judiciary of a country comprises all courts and tribunals which interpret law, settle legal disputes, enforce rights of the citizens and impose penalty to the offenders.

Philosophy Underlying the Formation of Judiciary

One of the primary objects for which a state was established in the society was the creation and protection of individual's rights. But an independent organ as the means through which this object might be accomplished has been recognised and existed from early times. This independent organ is judiciary. An investigating look from broader point of view will reveal the idea that the existence of a judiciary does not depend on the existence of a legislature. Because the legislature does not, in a sense, create the rights of individuals; it only recognises the rights. Rights originate in the society as ultimate results of mutual interactions among individuals *interse* or individuals and other social organisations. This is why even in the absence of legislative organs the courts might apply rules derived from other source like form their own previous decisions or from customs and thereby recognise rights of individuals. A society without a legislative organ is conceivable, and indeed fully developed legislative organs did not make their appearance in the life of the state until modern times, but a civilized state without judicial organs is hardly conceivable.

The Independence of Judiciary

The first thing which must come into consideration of the administration of justice in a society is the independence of judiciary. A sound and independent judiciary is the *sine qua non* and pre-requisite of a healthy society. A society without crime and dispute is unthinkable. Again a society laden with the influx of crimes and disputes is not at all a safe abode for human habitation. So a balance must be maintained to live in a society. And that very balance is maintained by the judiciary administering justice in the

society. But if the judiciary is not independent, it can hardly be expected to render impartial justice. "There is no better test of the excellence of a government", rightly says James Bryce, "than the efficiency of its judicial systems, for nothing more nearly touches the welfare and security of the average citizen than his sense that he can rely on the certain and prompt administration of justice ..... if the law be dishonestly administered, the salt has lost its savour; if it be weakly or fitfully enforced, the guarantees or order fail, for it is more by the certainty than by the severity of punishment that offences are repressed. If the lamp of justice goes out in darkness, how great is that darkness!"[1] Referring to the importance of the independence of the judiciary, an eminent authority, namely, Henry Sidgwick, has gone so far as to say that, "in determining a nation's rank in political civilization, no test is more decisive than the degree in which justice as defined by the law is actually realized in its judicial administration; both as between one private citizen and another, and as between private citizens and members of the Government."[2]

Independence of judiciary truly means that the judges are in a position to render justice in accordance with their oath of office and only in accordance with their own sense of justice without submitting to any kind of pressure or influence be it from executive or legislative or from the parties themselves or from the superiors and colleagues. And this concept of independence of judiciary, as recent international efforts to this field suggests, comprises following four meanings of judicial independence[3]:

a. Substantive Independence of the Judges;
b. Personal Independence of the Judges;
c. Collective Independence of the Judges; and
d. Internal Independence of the Judges.

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1 Bryce, James, *Modern Democracies* (1929), P. 384, Quoted in The Dhaka University Studes Part. F, Vol. 4 , P. 4
2 Henry Sidgwick , The Elements of Politics (1897), P. 481
3 Bari, M. Ershadul, The Dhaka University Studes Part. F, Vol.IV No.1 (1993), P.2

It is pertinent to mention here that the concept of personal and substantive independence of individual judges is universally recognised by law and legal experts. But the concept of collective and internal independence of the judiciary as a body was recognised first by the International Bar Association's Minimum Standards of Judicial Independence, 1982 and following them by the Montreal Universal Declaration on the Independence of Justice, 1983. This recognition is considered as one of the significant contributions to the international standards of judicial independence.[1]

a. Substantive Independence of the Judges.

Substantive independence, which is also described as functional or decisional independence, means the independence of judges to arrive at their decisions in accordance with their oath of office without submitting to any kind of pressure- outside or inside-(from government and other centres of power, public and private; and, on the other hand, the inside pressures from parties themselves) but only to their own sense of justice. In determining the minimum standards of judicial independence the International Bar Association suggests in 1982 that in discharge of his judicial function a judge is subject to nothing but the law and the commands of his conscience.

b. Personal Independence of the Judges.

Personal independence means that judges are in no way under any interference of the executive or legislative in discharging their judicial functions. In respect of personal independence of the judges the International Bar Association says that it means that the terms and conditions of judicial service are adequately secured so as to ensure that individual judges are not subject to executive control.

c. Collective Independence of the Judges.

Collective independence means the institutional, administrative and financial independence of the judiciary as a whole vis-a-vis other branches of the government namely the executive and legislative.

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[1] *Ibid*, P.3

d. Internal Independence of the Judges.

Internal independence of the judiciary means the independence of a judge from the interference of his judicial superiors and colleagues. In other words, it is the independence of a judge or a judicial officer from any kind of order, indication or pressure from his judicial superiors and colleagues in deciding disputes.

Of these four types of independence of judges the substantive independence is most important. Because it is the inner-strength of the judges which provides the steering-force for them to maintain their impartiality in discharging judicial functions. Again, unlike collective, individual and internal independence, it cannot be ensured by law; it is a quality which is attained by the judges depending on their own sense of justice. When a judge administers justice, it is presumed and expected that he will administer justice impartially. If he, inspite of having a better protection of collective, individual and internal independence, administers justice in a partial way nothing can prevent him. So it is the substantive independence i.e. the sense of justice which is a cardinal virtue for the judges to maintain impartiality in administering justice. And for this very reason it is suggested that positive wording should be inserted in the law concerning the appointment of judges so that men of keen intellect, high legal acumen, integrity and independence of judgment can be taken as judges.

Conditions for Independence of Judiciary

The above discussion reveals a necessary idea that the independence of judiciary depends on some conditions which are as follows:

A. Mode of appointment;
B. Security of tenure; and
C. Adequate remuneration and privileges.

A. Mode of Appointment

As mentioned earlier the conditions for appointment of judges should be a healthy one so that men of keen intellect, high legal

acumen, integrity and independence of judgment from among the lawyers gets opportunity to act as judges. If there is any scope of personal favouritism and political bias in appointments, men of integrity and sense of justice will not be appointed as judges and when the judges lack these qualities, they will administer justice in a partial way resulting in low quality of judgment and such a situation will compel the people to withdraw their confidence from the judiciary. So the substantive independence which is the cornerstone of judicial impartiality depends on the method of appointment. As professor Garner says-"if the judges lack wisdom, probity and freedom of decision, the high purpose for which the judiciary is established cannot be realised. The existence of these necessary qualities depend in large measure upon the method by which the judges are selected."[1]

The existing methods by which judges are chosen in different countries of the world are of following there:

1. Election by the people;
2. Election by the legislature; and
3. Appointment by the executive.

Election by the People

This system of popular election of judges was first introduced in France in 1790. But this system was not a successful, for the masses of voters do not always possess the understanding necessary to appreciate the soundness of judicial opinion. It was the result of the elections which took place in 1793 that most of those who were elected were engravers, stone-cutters, clerks, gardeners and common labourers who had no quality to administer justice. This is why with the advent of Napoleon the system of popular election was abolished.

This method, of course, is now in vogue in some of the States of the American Federal Union. The chief disadvantage of this method is that different political parties nominate their candidates and people being influenced by the parties elect a candidate though that particular candidate has no quality to administer impartial justice.

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1 Garner, James Wilford, *Political Science & Government*, Ibid, P.722

Judges, therefore, elected by this method become subject to popular passion and prejudice. It tends to lower the character of judiciary. Again, it is impossible for a judge to put for the electorate either a programme or a personal success concerning his judicial conduct. This is why Laski says that "of all the methods of appointment that of election by the people at large is without exception the worst."

Election by the Legislature

This method exists in Switzerland and in two States of American Federal Union. This system is not considered good because in this system judges are nominated by political parties in the parliament and the majority is sure to get his candidate elected whatever be his quality to administer justice. It is contended that when a judge is elected with the support of a majority party, he will have to appease that party and it will be quite impossible for him to administer impartial justice.

Appointment by the Executive

The appointment of judges by the executive is the most common and available method of choice and this system is in vogue in nearly all countries. Appointment by the executive may be of two types -

i) by the executive independently ; or

ii) by the executive after consultation with the court or from a list of nominees presented by the court or with the consent of the legislature.

The first method is sometimes contended to be objectionable in the sense that personal favouritism or political consideration may determine the appointments and instances are cited from Britain, France, USA and largely from third world countries. Mr. Briand, when minister of justice of France in 1912 himself declared that the judges had become the prey of the politicians.[1]

The second method is most democratic and objective. Because when the court prepares a list or the Chief Justice consults he, who is closely associated with the performance of Bar, will select the name of those lawyers who are men of high legal acumen, integrity,

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1 Garner, J.W, *Political Science & Government*, Ibid, P. 728

independence of justice etc. Such a method of appointing judges is conducive to the development of the standard of judicial decisions on the one hand and on the other hand, it is best able to ensure impartial justice in the country.

Appointment of the Chief Justice:

Please see pages 353.

So far there has been 14 Chief Justices in Bangladesh since independence. Their name, date of appointment and of retirement has been given below:

Name	Appointment	Retirement	Comment
1. *A.S.M. Sayem*	*12.01.1972*		*He was sworn in as the first Chief Justice of the High Court of Bangladesh on 12th January,1972 under the Provisional Constitution Order read with the Proclamation of Independence. He was sworn in on 17th December, 1972 as the first Chief Justice of the Supreme Court of Bangladesh under the new constitution of Bangladesh.*
	17.12.1972	*06.11.1975*	
2. *A.B. Mahmud Hussain*	*07.11.1975*	*01.02.1978*	
3. *Kemaluddin Hussain*	*02.02.1978*	*12.04.1982*	
4. *F.K.M.A. Munim*	*13.04.1982*	*30.11.1989*	
5. *Badrul Haider Chowdhury*	*01.12.1989*	*31.12.1989*	

6. Sahabuddin Ahmed	*14.01.1990*	*01.02.1995*	*From 01.01.1990 no appointment was given to the office of the Chief Justice until 14.01.1990. Justice Shahabuddin Ahmed acted as temporary Chief Justice under Article 97 of the Constitution. From 6th December, 1990 to 9th October, 1991 Sahabuddin Ahmed acted as Acting Presedent of Bangladesh and in this period Justice Habibur Rahman acted as Acting Chief Justice.*
7. Muhammad Habibur Rahman	*01.02.1995*	*30.04.1995*	
8. A.T.M. Afzal	*01.05.1995*	*01.06.1999*	
9. Mustafa Kamal	*01.06.1999*	*31.12.1999*	
10. Latifur Rahman	*01.01.2000*	*28.02.2001*	
11. Mahmudul Amin Chowdhury	*28.02.2001*	*18.06.2002*	
12. Mainur Reza Choudhury	*19.06.2002*	*22.06.2003*	
13. K.M. Hasan	*23.062003*	*26.01.2004*	
14. J.R. Mudassir Hossain	*27.01.2004*		
15. Muhammad Ruhul Amin	*01.03.2007*	.....	

Source: Collected from dailies.

B. Security of Tenure

Security of tenure for the judges is most important in securing their independence and impartiality. Security of tenure means that—

i) either judges are to be appointed for the whole life i.e. during good behaviour or for a definite period extending up to e.g. 65 years or 70 years.

ii) during this tenure the conditions of service must be such that they can fearlessly administer justice.

In other words, the power of transfer and removal of a judge must be a strict and difficult one to obviate the abuse of power and its capricious operation by the executive. If the transfer or removal of a judge is to depend upon the pleasure of a particular person or the executive, neither independence nor impartiality can be ensured. Because in such a situation judges will be under a constant fear of being removed or transferred from office, if they give decisions against the executive.

In the UK judges are guaranteed their security of tenure; they can be removed by the King only when both the Houses pass a resolution inducting him for corruption or moral turpitude. In the USA judges of the Supreme Court can be removed by impeachment. The process of impeachment is difficult in that the House of Representatives prefers the charges and the trial is held by the Senate.

C. Adequate Remuneration and Privileges

In order to ensure the independence and impartiality of the judiciary it is essential, next to the permanency of office, to provide judges with adequate remuneration and privileges. Adequate remuneration and privileges include the following three things:

Firstly, the salaries, housing facilities, allowances and other privileges are to be such that they can easily maintain a reasonable standard of life and they do not have to think for corruption or bribery. Again, if judges are ill-paid, able persons will not be attracted to this profession, for they will have no prestige in the society.

Secondly, the conditions of salaries and other privileges must be such that they cannot be varied to their disadvantages during the tenure of their office. This is why in democratic countries judges are paid their salaries and allowances from the consolidated fund and there is no need for the approval of the parliament for these payments every year.

Thirdly, after retirement a judge should receive pension so that during his tenure he need not indulge in corrupt practices and he can lead a peaceful retired life.

How far Judiciary is Independent in Bangladesh

To know how far the judiciary in Bangladesh is independent first of all we have to evaluate our system and provisions and to see how far conditions for independence of judiciary have been maintained. And in doing this it would be convenient to discuss the present system of judiciary in two broad divisions:

A. Higher Judiciary; and B. Lower Judiciary.

A. Independence of Higher Judiciary

(a) Method of Appointment

As mentioned earlier the conditions for appointment of judges in the Higher Judiciary should be a healthy one so that men of keen intellect, high legal acumen, integrity and independence of judgment from among the lawyers can be taken as judges. But the provisions for appointment of judges of the Supreme Court in the present Constitution are not healthy enough to satisfy this requirement. The present provision for appointments is that the Chief Justice and other judges shall be appointed by the President (Article 95). Thus the appointment depends on the sole wish of the executive which may create personal favouritism and political bias in the appointments. Unchecked nomination by the executive is not accepted in a democratic country; an objective assessment from the Chief Justice or consultation with the judiciary is essential to ensure independence of judiciary as has been suggested in the International Congress of Jurist held in New Delhi in 1959.

It has, of course, to be mentioned that though there is no constitutional requirement of consultation with the Chief Justice, a practice of such consultation before appointing judges of the Supreme Court has all along been followed by the President. However, we will see that this practice of consultation has been violated by governments in recent history of judicial appointments.

Appointment of Additional Judges

Under Article 98 the President is empowered to appoint one or more qualified persons as additional judges for two years. But here the objectionable point is the 'proviso' of the Article where it is said that the President may appoint such an additional judge as a regular

judge or for a further period. This is objectionable in the sense that the power-expectation among such additional judges to get regular judgeship may greatly hamper their discharging impartial justice.

Disabilities of the Judges

Under Article 99 a retired or removed judge may be appointed by the president in judicial or quasi-judicial offices and may also be appointed as a Minister, Deputy Minister or President which are not regarded as profitable posts under Article 66(2). This provision is a great hindrance to the independence of judiciary in Bangladesh. Because as Ahmed J. said, "opening up of opportunities for appointment after retirement will serve as a temptation and temper with his independence during the concluding period of his service"[1] The International Law Commission Report also holds the same view that where there is any chance for the judges to be appointed in honourable posts after their retirement or removal, impartial judgment may not be expected from them especially where the government itself is a party to a suit.

The ultimate consequences of Articles 95, 98 and 99 is that only those lawyers would be appointed as judges who are the members of the ruling party or who are likely to favour the government. There is no healthy provision for appointment of men of keen intellect, high legal acumen, integrity and independence of judgment from among lawyers. This has the likelihood of resulting in low degree in judicial decisions even though the judges are completely free after their appointment. Because as mention by K.C. Wheare, "the success of judicial decisions depends as much upon a well-drafted Constitution as upon the caliber of the judges themselves."[2]

Consultation with the Chief Justice and Politics in the Appointment of Judges

The Higher Judiciary of a country is seen by ordinary people not as a necessary part of the government but as a forum of justice: a forum of last hope to get redress against the governmental actions; an

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1 Quoted by, Chowdhury, Badrul Haider, *Evolution of the Supreme Court of Bangladesh*, (1990), P.168

2 Wheare, K.C, *Modern Constitutions*, (1966), P.120

image and prestige built on time-honoured undisturbed organisational independence within the judiciary is the bastion of this aspiration by the people. However, in the very recent history of our higher judiciary people have seen to their dismay that the last bastion of judicial independence is on the verge of being crumbled. Evidence of this dismal scenario is clear from the three spheres of appointment of judges in the higher judiciary. First, appointment of additional judges in the High Court Division under Article 98 of the Constitution; second, confirmation of additional judges as regular judges after the expiry of two years under Article 95 of the Constitution; and third, appointment of the Chief Justice under Article 95 of the Constitution.

Some incidents attached to the above spheres will be discussed and then the focus will be on their constitutional implication in view of the concept of judicial independence.

Incident One:

In February 1994 the then BNP Government issued a Gazette Notification with a list of 9 judges to be appointed as Additional Judges in the High Court Division. The arrangement of these appointments was made without consulting the Chief Justice. It was revealed on the same day when the Chief Justice in inaugurating the lawyers conference of Bangladesh Bar Council stated that he was 'Mr. Nobody'. This obviously meant that the appointments were made without consulting him. The following day the Supreme Court Bar Association unanimously condemned the action of the President and demanded the cancellation of the notification. In another resolution the Bar requested the Chief Justice not to administer oath to newly appointed judges. The Bar also decided not to accord any felicitation to any of the newly appointed judges. This decision of the Bar was communicated to the Attorney- General. In view of this strong resistance from the Bar, the Government had to cancel the notification and a fresh appointment was made after consultation with the Chief Justice.

Incident Two:

In 2001 before the AL Government ended its term, it appointed some additional Judges in the High Court Division on two

occasions. In the first instance in February 2001 the government appointed 9 Additional High Court Judges under Article 98 of the Constitution. After two years in February 2003 the confirmation of these appointments as regular judges came to be considered by the BNP led coalition government. However, the government did not confirm the services of 7 additional judges out of 9. It is alleged that the Chief Justice recommended for confirmation in favour of at least 5 of them, but the government ignored the suggestions in a break with constitutional convention.

Incident Three:

In the second instance in July 1, 2001 the AL Government appointed 9 Additional High Court Judges. On July 2, 2003 the BNP Government did not confirm the services of 4 of these 9 additional judges. It is contended that the Chief Justice had recommended in favour of all of them.

It is to be mentioned that following the non-confirmation of 7 judges out of 9 additional judges in February 2003 three Writ Petitions were moved to the High Court Division; a rule was issued on May 05, 2003 on the Government asking it to explain why non-appointment of additional judges should not be declared illegal. The Appellate Division has, however, stayed the proceedings of the writs till September 2003 following a Government petition.

In view of the above three incidents, it may now be turned to the constitutional implications of appointment procedure. Is the President constitutionally bound to appoint and confirm judges in consultation with the Chief Justice? The plain and blunt answer would be 'No', as nowhere in Articles 95 or 98 is there any reference to the concept of 'consultation with the Chief Justice'. True is also the fact that under Article 48(3) the President has to perform every functions in accordance with the advice of the Prime Minister except that of appointing the Prime Minister and the Chief Justice. Given this blunt wording in three Articles of the Constitution one should not forget the spirit and philosophy of the Constitution; the true and historic background of those wording in the Articles; the significance of the oath of the offices of the Chief Justice, the President and the Prime Minister.

In the original Constitution of 1972 in both Articles 95 and 98 there were provisions for consultation with the Chief Justice. By the 4th Amendment this provision of 'consultation with the Chief Justice' was withdrawn. It is to be noted that though the provision of the consultation with the Chief Justice has been wiped out by the 4th Amendment, that very 4th Amendment has not received any respect even from military dictators; ignoring the mandate of that Amendment and upholding the spirit of the Constitution consultation with the Chief Justice in question of appointment of judges has all along been followed by every subsequent government like a binding constitutional convention. It has also been settled in many constitutional decisions both in India and Bangladesh that mere literal interpretation would be outweighed by the purposive construction in view of the philosophy or basic structure of the Constitution. Both the President, the Chief Justice and the Prime Minister take their oath of offices in the form that they "will preserve, protect and defend the Constitution." This wording of 'preserve', 'protect' and 'defend' have far greater interpretative value in view of the philosophy of the Constitution as enshrined in its Preamble than they are understood in common parlance. "Method of appointment of judges in the higher judiciary is so fundamental to the independence of judiciary that any attempt on the part of the executive to exclude the Supreme Court or the Chief Justice from the process of selection and appointment would be disastrous not only to the independence of judiciary but also to the entire democracy.[1]" As has already been mentioned earlier, the Supreme Court is considered by ordinary people the last hope of justice and they have a legitimate expectation to see it impartial both conceptually and functionally; they never expect it to be a political forum. The first incident in 1994 as has been mentioned above paved the way for politicisation of the higher judiciary for the first time though it did not work. However, the second and third incidents nakedly violated the constitutional convention and it is widely contended that this bad practice by the Government in confirming the services of the judges ignoring the advice of the Chief Justice has already politicised the judiciary. In the case of an advocate of the Supreme Court to be selected as a judge, the Chief Justice is better placed than anyone else to assess the competence, character and

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[1] Md. Abdur Rashid. *Challenge to the Independence of Judiciary*, 46 DLR (1994)

integrity of such advocate. When the court prepares a list or the government consults Chief Justice he, who is closely associated with the performance of the Bar, will select the name of those lawyers who are men of high legal acumen, integrity, independence of justice etc. Such a method of appointment is conducive to the development of the standard of judicial decisions on the one hand and on the other hand, is best able to ensure impartial justice in the country. Likewise, in the case of confirmation of the service of an Additional Judge of the High Court Division it is the Chief Justice who is better placed to determine by way of examining, *inter alia*, some judgments of the Additional Judges whether their service should be confirmed or not. To overrule or ignore the views of the Chief Justice would subvert the independence of the judiciary, particularly the Higher Judiciary where litigants set their footsteps as a last resort of legal remedies. Thus for the greater interest of the administration of justice and to save the prestige of the Supreme Court as the highest seat of the judiciary this practice of the government should be stopped from now.

Politics of Superseding and the Appointment of the Chief Justice

The Constitution provides that the President may appoint the Chief Justice on his own; he does not need to consult the Prime Minister or anyone. The time-honoured practice has been to appoint the senior-most judge in the Appellate Division as the Chief Justice though in recent history of the Higher Judiciary this practice has been violated. On 23rd June 2003 Justice K.M. Hasan was given the appointment as the Chief Justice on retirement of Chief Justice Mainur Reza Chowdhury. However, Mr. Justice Hasan was given this appointment superseding two other senior judges in the Appellate Division. This is unprecedented that the President puts a judge ahead of two of his superior in the chain of the Chief Justice. The reason behind this superseding is political which should not creep into judicial appointments. The BNP led coalition government contends that Justice Hasan was the senior-most judge in the High Court Division when Mr. Ruhul Amin and Justice Fazlul Karim superseded him to be appointed to the Appellate Division during the AL Government.

What is the position in Britain and India on this point? In question of appointment of Chief Justice a trend is obvious in most countries including some democratically developed countries like Britain. The appointment of the Chief Justice is left mostly in the hand of the executive in an unfettered way. However, no complaint as to partiality in this appointment has ever been heard in developed countries. For example, Lord Chancellor is appointed by the Queen. She appoints him in accordance with the advice of the British Prime Minister. Lord Chancellor is at once the head of the Judiciary in Britain, head of the House of Lords and an important member of the cabinet. An apprehension may, therefore, arise in question of his appointment that Prime Minister will advise the King to appoint such a person who is likely to act in favour of the government. But the truth is that no such complaint was ever raised in Britain regarding this important appointment.

However, the question of appointment to this post in some countries is sometimes criticised for partiality on the part of the government. It is sometimes the case that government, without considering the question of seniority and by-passing a senior-most judge appoints a judge as the Chief Justice in the highest court who is likely to favour the government. This trend has, on the one hand, invariably resulted in resignation of senior-most judges superseded depriving thereby the country from the services of able and experienced judges who could make a significant contribution to the cause of law and justices and on the other hand, brings political consideration in appointment of new judges which gradually undermines the independence and impartiality of judges lowering the prestige and dignity of the highest court.

Over the years a convention was developed in India that the senior-most puisne judge would become the Chief Justice whenever the vacancy arose. But this convention was set aside first in 1973 when C.J. Sikri retired. Mr. Justice A.N. Roy was appointed the Chief Justice in preference to three senior judges – Justice Shelat, Justice A.N. Grover and Justice K.S.H Hedge who in protest resigned. Again, in 1977 on the retirement of Justice A.N. Roy, Justice M.H. Beg was appointed the Chief Justice by-passing the senior-most judge Justice H.R. Khanna who in protest resigned.

It is, of course, argued that a Chief Justice should not only be an able and experienced judge but also a competent administrator and, therefore, succession to this office should not be regulated by mere seniority. However, it may again be argued conversely that when the government has discretion to appoint the Chief Justice, there is no guarantee that the best man for the post will always be appointed and that consideration other than merit will not come into play. Moreover, the rule of seniority, though a mechanical rule, is beyond controversy and is better able to maintain the independence and impartiality of the judiciary. The three judges and then Justice Khanna of India as mentioned earlier were superseded not because of consideration of merit but because they had decided two important cases (*Fundamental Rights* case and *Habeas Corpus* case) against the government.

Turning back to Bangladesh scenario an incident during the Ershad regime may now be recalled. An attempt was made by the President Ershad to supersede Justice Sahabuddin Ahmed when the then Chief Justice B. H. Chowdhury retired. However, under the continuous boycotting of the courts by the lawyers Ershad was bound to appoint Sahabuddin Ahmed as the Chief Justice of Bangladesh. The recent appointment of Justice K. M. Hasan as the Chief Justice of Bangladesh has already signaled the politics of superseding in the appointment of the Chief Justice which bear a likelihood of casting far reaching bad impact on this honorable post. It is fortunate that the superseded two senior judges have accepted this. The Government also contends that by appointing Mr. Hasan as the Chief Justice has been done to him as he was superseded in the High Court Division. If this be the rationale, let it be an exception; an exception once and for all in view of the fact that the image and prestige of the whole judicial administration is attached to this honorable post.

So the method of appointment is not conducive to the conditions of constitutionalism in Bangladesh. To make the appointment procedure a sound one the provisions of original Article 95 of the Constitution as it stood on 4th November, 1972 should be restored.

Because in the original Article there were provisions, as to the appointment of judges, for consultation with the Chief Justice. Also the provisions for additional judges in Article 98 and disabilities of judges in Article 99 should be restored to those of respective Articles of the original Constitution. Because they provided for, in respect of appointment of additional judges, the provisions of consultation with the Chief Justice.

Appointment of the Supreme Court Judges by Supreme Judicial Commission:

The military baked caretaker government headed by Dr. Fakhruddin Ahmed passed an ordinance in 2008 (Supreme Judicial Commission Ordinance, 2008) to pave the way for appointment of Supreme Court Judge. Although it is suggested that this law has been passed to make appoint of judges in the apex court more rule-oriented and influence free, the mechanism provided in the law does not seem so strong. The Ordinance establishes a Commission consisting nine members. They are

(i) The Chief Justice as the Chairman of the Commission
(ii) Minister for the Law, Justice and Parliamentary Affairs
(iii) Senior-most Judges of the Appellate Division
(iv) Second senior-most Judge in the Appellate Division
(v) Attorney-General
(vi) An MP selected by the leader of the parliament
(vii) An MP selected by the leader of the opposition in parliament
(viii) President of the Bangladesh Supreme Court Bar Association
(ix) Secretary, Ministry of Law, Justice and Parliamentary Affairs.

Sub-section 4(4) provides that the quorum of the commission will be five and sub-section 4(7) provides that the decision will be taken by votes of majority of the present members. It is thus evident from the composition of the commission that there is still possibility that fair selection of judges may not be ensured. This is because first, out of nine members four members are directly from the executive branch of the government and if the president of the Supreme Court Bar Association is one elected from the ruling party supporters, then the majority will be executive dominated and in such a situation objective

selection of judges for the apex court may be hampered. Secondly, the status of the secretary of Law Ministry is much lower compared to an would-be judge of the apex court and in appointing judges in the Supreme Court the law secretary should not have any role. Third, not only for the sake of the concept of separation of power but also for ensuring fair and proper selection of judges in the Supreme Court the Minister of Law, Justice and Parliamentary Affairs should not be a member of the appointing body. Fourth, secretarial assistance for the Commission will be provided by the secretariat of Ministry of Law, Justice and Parliamentary Affairs. This is also not conducive to fair selection of a judge for the Supreme Court as the Commission should have its own secretariat or the Chief Justice's department may provide secretarial assistance. Fifth, the scheme seems to be also unconstitutional. This is because of the provision in Article 48(3) of the Constitution which provides that "in the exercise of all his functions, ...the President shall act in accordance with the advice of the Prime Minister." However, the ordinance now compels the President to act in accordance with the advice of the Supreme Judicial Commission which seems run counter to the express provision of the constitution. Although the law has been effective and the Commission has been formed, it remains to be seen how effective the commission makes it way forward.

How to Make Appointments more Rule-oriented

Muhammed Samsul Hoque, an advocate of the Appellate Division of the Supreme Court wrote in Journal 23 and 25 of 54 DLR that to maintain the sanctity of equality scheme of the Constitution and the oaths and affirmation of the high dignitaries of the country and directions in Art. 95(2)(c) there must be a law, rules or regulations, having consistency with the consultation, prescribing in detail the qualifications and disqualifications of a judge of the Supreme Court making those similarly applicable in case of a deputy Attorney- General and above. The learned advocate also suggested some methods of making the appointment more effective which I feel obliged to quote here:

1. An advocate shall be considered to have completed 5 years practice in the High Court Division if he has dealt with certain specified number of cases of different nature in the High Court

Division and appeared in at least 25 cases with a learned senior in the High Court Division.

2. An advocate shall be considered to have completed 10 years practice in the High Court Division if he has independently dealt with at least 25 cases of at least 5 nature (such as civil appeal, criminal appeal, civil revision, criminal revision, writ of various nature, income tax, company etc) in the High Court Division being regular in the profession of law.

3. An advocate shall not be qualified to be a judge in the High Court Division unless he is enrolled as an advocate in the Appellate Division and has dealt with certain specified number of cases independently in the Appellate Division.

For appointment of Attorney-General and Additional Attorney-General prefernce shall be given to the Senior Advocates enrolled in the Appellate Division.

(b) Security of Tenure

As to the security of tenure it has been provided in Article 96 that a judge shall hold office till he attains the age of 65. During this tenure he can be removed only on two grounds- physical or mental incapacity to perform the function of his office or gross misconduct. But on these two grounds a judge can be removed by the executive only when the Supreme Judicial Council consisting of the Chief Justice and the two next senior judges, inquiring into the grounds, makes an affirmative report thereon to the President. The condition of security of tenure is, therefore, a healthy one, for during the tenure a judge in strongly protected from any harassment or whimsical removal by the executive. The provision of Supreme Judicial Council [1] as provided in

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[1] **Backgrounds of the Provision of Supreme Judicial Council :** There was no provision of Supreme Judicial Council in the original Constitution of 1972. In the original constitution it was provided that a judge could be removed on the ground of misbehaviour or incapacity by an order of the president only when such order was supported by a majority of not less than two-thirds of the total number of members of the parliament. This provision of the original constitution was a sound and healthy one because a judge could not be removed except by adopting the constitution amending process which is very difficult to mastermind.

article 96 is harmonious with the suggestion given in the International Congress of Jurists held in New Delhi in 1959 when it was suggested that "the grounds for removal of judges should be before a body of judicial character assuring at least the same safeguards to the judges as would be accorded to an accused person in a criminal trial."

(c) Adequate Remuneration & Privileges

The remuneration given to the judges of the Supreme Court is a handsome one in our society. And their salaries and pensions are charged on the consolidated fund and not subject to vote in the parliament. And according to article 147 the remuneration, privileges and other terms and conditions of service of the judges of the Supreme Court cannot be varied to their disadvantages. So conditions for adequate remuneration and privileges of the judges are conducive to the conditions of constitutionalism.

Accountability of the Higher Judiciary

The independence of judiciary does not mean that the absence of responsibility for the action of a judge. Judicial independence without judicial accountability may generate both abuse and misuse and hence judicial independence involves the concept of judicial accountability of the judges. Agreeing fully with the views expressed by the Chief Justice Latifur Rahman in his extra-judicial capacity this author quotes him:

> The original Constitution Article 96(2) provided that the parliament by not less than two-thirds of the total number of member of parliament can remove a judge on the grounds of proved misbehavour or incapacity. The removal procedure in most of the countries remain with the parliament. After amendment of Article 96(2) this power has been given to the Supreme Judicial Council which consists of the Chief Justice and two next senior judges of the Supreme Court of Bangladesh. As the Constitution reposed this power in the Judges themselves the obligation and responsibility lies on them to formulate a Code of Conduct under the Constitution to be strictly followed for proper functioning of the superior courts. It

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But during the first martial law regime the parliament was dissolved on 8th November. 1976. A question was, therefore, raised as to how a judge could, if neeeded, be removed when parliament would stand dissolved or not in existence. Thinking for such an unforseen situation Presiden Ziaur Rahman by Second Proclamation (10th Amendment) Order substituted the provistion of Supreme Judicial Council for the earlier one.

may be mentioned here that the Supreme Judicial Council never sat in the past nor did any deliberation take place. A Code of Conduct was formulated in 1977. In view of changing social, economic and political condition another new Code of Conduct was formulated on 7th May 2000 by Supreme Judicial Council and it was circulated to all the judges of the Appellate Division and the High Court Division to adhere to the said Code of Conduct for proper meaningful functioning of the judiciary by guaranteeing accountability so that people can repose faith, trust and confidence in the Higher Judiciary of Bangladesh.

Article 96(4) authorises the Supreme Court to prescrive a Code of Conduct for the judges in both the Divisions. Though Article 96 provides for removal of judges from their posts, the idea of accountability has nothing to do with his removal from his office.Judicial accountability means accountability to the Code of Conduct formulated under the Constitution.

The courts are acting for the people who have reposed confidence in them. Lord Denning said, "justice is rooted in confidence and confidence is destroyed when right-minded go away thinking that the judge is biased."

The accountability of the higher judiciary is of prime importance as because the judges of the constitutional court has taken oath to defend, protect and preserve the Constitution of Bangladesh. The Supreme Judicial Council which consists of the senior most judges themselves have a greater responsibility to see, that the judges of the superior court remain committed for the Code of Conduct and thereby remain accountable to the Constitution[1].

The Constitution has envisaged certain basic and fundamental rights for the people and made the judiciary the guardian of those rights. In that context it has been rightly said that judges of the higher judiciary without public accountability may endenger democracy.

B. Independence of Lower Judiciary

The larger portion of our population is directly connected with the litigation in the courts of the subordinate judiciary. The

[1] C.J. Latifur Rahman, *Judicial Independence and Accountability of Judges and the Constitution of Bangladesh*, 20 BLD (2000), journal 85

subordinate judiciary is the base and foundation of the judiciary. However, unfortunately since our independence the subordinate judiciary lacked independence and hazardous problems beset with it where the mass of litigants come with a hope to get justice. In line with the judgment of the Appellate Division in *Masder Hosain* case the caretaker government headed by Dr. Fakhruddin Ahemd finally completed the task of separation of judiciary from the clutches of the executive on 1st November, 2007. However, the history of the separation of judiciary from executive seems relevant for students and researchers of law and this is why the historical part of judiciary separation is given below. The lower courts comprises the following two types of courts:

a. Magistrates' Courts ; and
b. Other Lower Courts.

Constitutionalisation of Subordinate Courts and Controversy with their Independence and Separation

Part VI of the Constitution of Bangladesh provides for the 'Judiciary' of which Chapter II deals with 'subordinate Courts'. There are four Articles i.e., 114, 115, 116, 116A dealing with constitutional safeguards of the subordinate courts. Article 115 deals with the appointment in the subordinate judiciary. It states that appointments of persons to offices in the judicial services or as magistrates exercising judicial functions shall be made by the President in accordance with rules made by him in that behalf. Thus the executive is the absolute maker of the judges and judicial officers in the subordinate judiciary as well as in the magistracy. In the original Constitution there was provision of consultation with the Supreme Court which was deleted by the 4th Amendment. Thus no objective assessment is possible in the appointment of judges in the subordinate judiciary. As to the control and discipline of subordinate courts Article 116 states that this shall be exercised by the President in consultation with the Supreme Court. However, this consultation with the Supreme Court has never been institutionalised and there are practical problems in doing this. This is because, first, the appointment was done absolutely by the executive; second, all logistics and staff of the subordinate courts were provided and regulated by the Ministry of Law; third, neither the Supreme Court

nor subordinate courts had any power to regulate the finance to moderate and devise its plan and functions; fourth, though there is Public Servants (Discipline and Appeal) Rules 1985 prescribing different modes of punishment of a judicial officer, the Supreme Court has not yet made any rule in this regard to be followed by the executive in question of control and discipline of judicial officers; fifth, every power of posting, promotion, grant of leaves, and determination of pay scale etc were determined by the executive only. The biggest problem had been with the magistrates exercising judicial functions. Three tires of Magistrates' Courts, i.e. 3rd Class, 2nd Class and 1st Class Magistrates' Courts- all these were the courts of first instance for criminal cases. Given that criminal cases filed in a year are far greater in number compared to the number of civil cases, these criminal courts have a great potential in shaping the base of our legal system. However, unfortunately for reasons, principally, of some legal shortcomings these courts were playing negative role at a greater extent frustrating the very purpose of criminal justice. The shortcomings were as follows:

i) All Magistrates were linked with the executive functionaries. Magistrates were discharging dual functions - judicial and executive. They were controlled by the Ministry of Establishment, the Ministry of Home Affairs and also the Ministry of Law, Justice and Parliamentary Affairs. In discharging their judicial functions they were very often dictated and influenced by the executive. As a result, they could not independently discharge their judicial functions. It is impossible for a judge to take a wholly independent view of the case he is trying, if he feels himself to any extent interested in or responsible for the success of one side or the other. It is equally impossible for him to take an independent view of the case before him if he knows that his posting, promotion and prospects generally depend on his pleasing the executive hand.

ii) Magistrates discharging judicial functions were never appointed from persons with legal discipline. It is sometimes impossible to expect justice from a person with no institutional legal education. Being first class executive officers Magistrates often did injustice. This is mostly the case because, firstly, they took the opportunity of illiteracy and

ignorance of law of mass indigent litigants and secondly, there was inherent lack of administrative check and balance in Magistracy and thirdly, they were not under the unfettered control of the Supreme Court.

iii) Magistrates are not judicial officers and are not under any administrative control of the District Judges or the Supreme Court.

The main crux of the problem of separation of judiciary lay in the Magistrates' courts. The dual function of magistrates and also the dependency of the lower judiciary upon the executive is a legacy of the British rule. During the very British days there was a demand for the separation of judiciary from the executive. The British administration did not make this separation thinking that separation might go against their colonial interest. After independence in 1947 the first Constitution in united Pakistan was adopted in 1956 which did not provide for any provision regarding 'subordinate courts' or 'magistracy'; these were to be regulated by the Code of Civil Procedure and the Code of Criminal Procedure. In 1957 the East Pakistan Provincial Assembly passed the Code of Criminal Procedure (East Pakistan Amendment) Act 1957 (No. 36) which dealt with separation. However, this Act was never given effective. In 1958 the Pakistan Law Commission recommended to bring the judicial magistrates under the control of the High Court. In 1967 the Law Commission again recommended to give effect to the Cr. P. C Act 1957 (No. 36) though nothing was done until 1972.

Drafting the Constitution and the Question of Separation of Judiciary

In the new constitution adopted in 1972 it was provided in article 22 that "the state shall ensure the separation of judiciary from the executive organ". Article 115 provided further that "Appointments of persons to offices in the judicial service or as magistrates exercising judicial functions shall be made by the President in accordance with the rules made by him in that behalf." Compared to earlier initiatives what differences do we see in the constitution of 1972? We see that the matter of subordinate judiciary including the magistracy has been given

place in the Constitution unlike the Constitutions of Pakistan and India.

Though it is sometimes argued that the original Constitution of Bangladesh ensured full independence of the judiciary, the fact is that it has ensured the independence of the higher judiciary but not of the lower judiciary. It is the Magistrates' courts where the largest section of our population set their footsteps to get justice. While the Constitution was being drafted Dr. Kamal Hossain, the Chairman of the Drafting Committee and Barrister Amir-Ul Islam, a member-these two persons were most famous legal experts and they played the key role in drafting. In 1997 while writing this book this author asked them some questions-Was there any problem to provide for separation of judiciary at first hand? What principle prompted the Constitution makers to retain the mixed judicial function with the executive? What was the problem in using the term 'judicial magistrates' in place of the term 'magistrates exercising judicial function'? Dr. Kamal Hossain just by-passed all the questions by saying that by the term 'magistrates exercising judicial function' the constitution makers wanted to mean judicial type of magistrates and after the Constitution was given effect everybody took this term for judicial type of magistrates but the government did not separate them. In response to the first question Barrister Amir-Ul Islam told that at the first hand, provision was not incorporated to separate Magistrate's courts from the executive considering the question of departmental flexibility; if provisions were made for separating magistrate's courts, a separate department would have to be created which would certainly claim a huge amount of money from the public purse. Mr. Islam also told that actually by the term 'magistrates exercising judicial function' the Constitution makers wanted to mean a separate type of magistrates like judicial magistrates and to that end, as he went on to say, provisions were made in article 137 for one or more Public Service Commissions and also provisions were made in article 115(1)(b) (of the original constitution) for consultation with the appropriate Public Service Commission and the Supreme Court. So the Constitution makers, as he insisted, intended a separate type of magistrates' courts.

Law Commission's Recommendation

It is important to mention here that the Law Commission in its recommendation on the issue of separation of judiciary has reported that there are three main aspects of the concept of 'separation of judiciary' from the executive namely, constitutional aspect, statutory aspect and systematised aspect. As to the materialisation of the constitutional aspect of separation of judiciary the Commission has suggested to introduce the provisions of the original constitution of 1972 so far as they relate to the judiciary.

Now the questions are-

1. If the constitutional aspect of separation of judiciary so far as it relates to the Magistrates' courts was fulfilled in the original constitution can the Law Commission or Constitution makers now say that under the Criminal Procedure Code (statutory law) the empowerment of judicial function over the executive officers (Magistrates) was (during 1972-75) or is now unconstitutional?

2. If the original Constitution ensured the constitutional aspect of 'separation of judiciary' from the executive, was it necessary or convincing to say by that very constitution in article 22 that "the state shall ensure the separation of judiciary from the executive organ"?

Problem lies with the wording 'magistrates exercising judicial function'. Because if the government now under the authority of a law declares some medical surgeons as magistrates and gives them judicial functions to discharge, they will come under the constitutional category of 'magistrates exercising judicial functions' and in that case they will be under twin control- 'rope in the wrist- like control by the Supreme Court so far as they will discharge judicial functions and 'rope in the neck'- like control by the Ministry of Health and Establishment. In such a case to which one will they lean? Surely to the latter where they will have their promotion and factually they will give less

emphasis in discharging judicial functions howsoever powerful control the Supreme Court may exercise over them. I asked a member of the Law Commission in 1998- "Will it be possible for magistrates under such as twin control to discharge judicial functions independently?" He answered, "such a situation will not exist after 20 or 25 years. We expect that after 20-25 years all Magistrates Courts will be separated". How can the Law Commission be sure that after 20-25 years this situation will not exist?

Will the restoration of the original Constitution ensure separation of the Magistrates Courts?

Of course, the term 'magistrates exercising judicial functions' in the Constitution is not at all a bar for the government to introduce by law a department of separate 'judicial magistrates' and that can be done even in the absence of any such constitutional provision. This is because the separation of judiciary is largely a statutory matter. Had the term 'magistrates exercising judicial function' not been at all used in the Constitution, the perspective of magistrate's courts would have been completely different; a matter completely out of constitutional consideration. Generally subordinate courts are not counted as a subject matter of constitutional law. This is why most of the democratic constitutions do not even mention anything about subordinate courts. The Pakistan Constitutions of 1956, of 1962 and even the present Constitution does not mention anything about subordinate courts; everything of subordinate courts is dealt with in statutory law. It is also a recognised principle of common law jurisprudence that in common law countries judicial system is an integrated system, and hence all courts and tribunals within the country are subordinate to the Supreme Court if anything otherwise is not mentioned in the constitution.

Again, it is also a recent trend of constitutional jurisprudence in some of the common law countries that their constitutions specify some conditions or standards as to subordinate courts so that the executive cannot transgress those conditions or transform some of the subordinate courts into instruments of oppression rather than of

justice. If this is the objective, then constitution makers seems to have done a wrong by using the term 'magistrates exercising judicial functions'. By using this term they have, on the one hand, provoked or allowed the executive to keep some of the lower courts mixed with the executive; and on the other hand, ensured colonial type of independence of magistrate's courts. Rather than using this term the constitution makers could have made some transitional provisions.

Of course, someone might argue here that the executive magistrates have been discharging judicial functions commencing from the British rule and this situation continued even during the whole Pakistan period and it was not possible for the constitution-makers to insert provisions for separating them at a stroke of a pen. Against such an argument my question is— Why did the Constitution makers take it as their headache to bring the matter of magistrates' courts in the Constitution? Why was not an explanatory statement given in the Constituent Assembly concerning the thinking of the Constitution makers about 'magistrates exercising judicial functions'? The Constitution of Pakistan of 1956 provided that "the state shall separate judiciary from the Executive as soon as practicable". But the Constitution makers in Bangladesh did not use the term 'as soon as' giving virtually a leeway to the executive to hang the matter of separation of Magistrates' courts from the executive. Thus it is clear that the restoration of the provisions of the original constitution will fulfill neither the constitutional aspect of separation of judiciary nor of its independence fully. And this is largely the view of the Appellate Division of the Supreme Court in much-talked *Masder Hossain* case when it reversed the decision of the High Court Division on the point that to implement the separation of judiciary no constitutional amendment would be required.

Five-point Directions in the Masder Hossain Case

The *Masder Hossain's*[1] case, popularly known as the separation of the judiciary case was finally decided by the Appellate Division of the

[1] 52 DLR 82

Supreme Court on December 2, 1999 with 12-point directives to the government. The judgment was given against the background of intervention by the executive in the matter of appointment, promotion, pay-scale determination, transfer, granting leave and other benefits of the personnel in the subordinate judiciary. It has been typical to report that in *Masder Hossain* case the Supreme Court gave 12 directions. In fact these 12 points in the operative part of the judgment are not all directions in true sense of the term. Of these 12 points five are in the nature of directions and seven are in the nature of declaration. The five directions are as follows:

(1) The government is to take necessary steps forthwith for the President to make Rules under Article 115 to implement its provisions; nomenclature of the judicial service shall be designated as the Judicial Service of Bangladesh; either by legislation of rules or order a Judicial Service Commission is to be established forthwith with the majority of members from the Senior Judiciary of the Supreme Court and the subordinate courts for recruitment to the judicial service;

(2) Under Article 133 law or rules relating to posting, promotion, grant of leave, discipline, pay, allowance and other terms and conditions of service consistent with Article 116 and 116A shall be enacted separately for the judicial service;

(3) Government is directed to establish a separate Judicial Pay Commission forthwith as part of the Rules to be framed under Article 115;

(4) The conditions of judicial independence in Article 116A namely, (i) security of tenure (ii) security of salary and other benefits and pension and (iii) Constitutional independence from the parliament and the executive shall be secured in the law or Rules made under Article 113 or in the executive orders having the force of Rules;

(5) The executive government shall not require the Supreme Court of Bangladesh to seek their approval to incur any

expenditure on any items from the fund, allocated to the Supreme Court.

As evident from the above five directions in the judgment the executive has been ordered to undertake the task of overhauling the whole lower judiciary with two big commissions- Judicial Service Commission and Judicial Pay Commission which is certainly a matter of policy rather than a dispute. However, there are strong evidences to show that our Supreme Court has dealt with policy matter under the paradigm of 'judicial review' or the doctrine of 'basic structure' of the Constitution as we saw it in the celebrated 8th Amendment Case and this is not something unsupported by the constitutional arrangement. It is true that except appointing the Prime Minister and the Chief Justice the President has to exercise every function in consultation with the Prime Minister. However, a harmonious construction of articles 114, 115, 116 and 116A of the Constitution will give a necessary idea that in the matter of subordinate judiciary the policy matter has not been left to the sweet will of the parliament or the President alone; the executive has to exercise its power in consultation with the Supreme Court in this sphere. Under article 115 appointments in the subordinate judiciary are to be made as per rules made by the President; article 116 envisages that control and discipline of the subordinate judiciary have to be exercised in consultation with the Supreme Court; and article 116A envisages the independence of the judicial officials and magistrates. Given this integrated scheme as designated in these articles, if the Parliament or the President attempts to make law to separate judiciary without involvement of the Supreme Court, that law will certainly come under judicial attack. The task of separation of lower judiciary is thus a shared responsibility of the executive, legislative and judiciary as envisaged in articles 114 - 116A of the Constitution and, therefore, the government cannot claim it as a sole executive or legislative policy prerogative. The best course for the government, therefore, would be to implement the judgment of the

Masder Hossain case rather than flouting it on the ground of policy matter or public demand[1].

Magistrates' Courts finally separated

In view of the land mark judicial decision by the Appellate Division in *Maser 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 clutches of the executive. Although the term 'executive magistrate' still exist 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 (Service, Constitution, Appointment to the service, Temporary 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) Ordinance, 2007.
(6) Mobile Court Ordinance, 2007[1]

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[1] For details see author's article on "Masder Hossain Case: How long will it be a matter of pull and haul?" published in the daily Independent dated 29th August, 2003.

[1] All these laws and rules are available in the appendix of the author's book *Legal System of Bangladesh.*

b. Other Lower Courts

Assistant Judges, Sub-Judges, District and Additional District Judges comprise the lower courts other than the Magistrates' Courts. It is sometimes contended that these courts are better independent as Article 116 of the Constitution stipulates:

> "The control (including the power of posting, promotion and grant of leave) and discipline of persons employed in the judicial service and magistrates exercising judicial functions shall vest in the President and shall be exercised by him in consultation with the Supreme Court".

Though there is provision for consultation with the Supreme Court, the reality is little different. Because it is frequently heard that in many cases all acts of posting, promotion, grant of leave etc. are done by the Ministry of Law, Justice and Parliamentary Affairs and sometimes they do it without any approval of the Supreme Court. The prior approval of the Supreme Court is a mandatory one and certainly the Ministry has to obtain the approval but the Ministry obtains it later on and in between some particular judges or a judge is harassed whom the Ministry has intention to harass. Such type of harassment is a great hindrance to the way of the judges to discharge impartial justice. They sometimes lose heart. Sometimes the Ministry illegally detains the file of promotion or grant of leave. It is also heard that frequently judges are threatened over the telephone. So what is needed urgently is to submit all powers of controlling judges including their salaries to the unfettered hand of the Supreme Court. If the whole control is given to the Supreme Court, it will certainly ensure the collective as well as individual independence of the judges. To that end what should be done is that Article 116 of the Constitution of Bangladesh should be amended to the following effect :

> "The control (including the power of posting, promotion and grants of leave) and discipline of persons employed in the judicial service and Judicial Magistrates shall vest in the Supreme Court."

Accountability of the Subordinate Judiciary:

Agreeing fully with the views expressed by the Chief Justice Latifur Rahman in his extra-judicial capacity this author quotes him:

> Public Servants (Discipline and Appeal) Rules 1985 prescribes different modes of punishment of a judicial officer, from censure to

dismissal on grounds of misconduct. This is in view of the method of removal of subordinate judge and is not connected with his judicial accountability. With regard to the accountability of the judges of the subordinate courts and tribunals Article 109 of the Constitution of Bangladesh authorises the High Court Division to use full power of superintendence and control over subordinate courts and tribunals. The power under Article 109 is a general power and includes the power to control all subordinate courts administratively and judicially. This jurisdiction given under Article 109 has not been effectively implemented by the High Court Division.

Sometimes, the High Court Division judges are sent to inspect subordinate courts but the inspection reports are not strictly followed. No surprise visit or inspection is made and the accountability of the subordinate judges remains meaningless[1].

The Supreme Court should under Article 109 formulate Code of Conduct for the subordinate judges for the effective control and supervision of the High Court Division. The Supreme Court also can issue an appropriate order if it thinks fit that some sort of directions is necessary for the better adminstration of justice.

Masder Hossian Case and A Brief History of the Separation of Judiciary in Bangladesh

British Period

During the British rule there was a demand for separation of judiciary from the executive. The British administration did not make this separation thinking that separation might go against their colonial interest. In 1919 the matter of separation of judiciary was raised in the House of Commons but it was not discussed on the contention that it was a matter within the jurisdiction of provincial government. In 1921 a resolution regarding separation of judiciary was passed in the Bengal Legislative Assembly which was followed by formation of a committee. The committee reported that there was no practical problem in separation. However, nothing more was done.

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[1] C.J. Latifur Rahman, *Judicial Independence and Accountability of Judges and the Constitution of Bangladesh*, 20 BLD (2000), journal 85

Pakistan Period

After separation and independence in 1947 no step was taken in East Pakistan. The United Front included the idea of separation in its 21 points formula in 1954. The first Constitution in independent Pakistan was adopted in 1956. Unlike the Government of India Act 1935 (Ss 253, 254, 255 and 256) and the Constitution of India (Art. 233 to 237 in Chapter VI) this Pakistan Constitution of 1956 did not provide for any provision regarding 'subordinate courts' or 'magistracy'; these were to be regulated by the Code of Civil Procedure and the Code of Criminal Procedure. In 1957 the East Pakistan Provincial Assembly passed the Code of Criminal Procedure (East Pakistan Amendment) Act 1957 (No. 36) which dealt with separation. However, this Act was never given effective. In 1958 the Pakistan Law Commission recommended to bring the judicial magistrates under the control of the High Court. In 1967 the Law Commission again recommended to give effect to the Cr. P. C Act 1957 (No. 36) though nothing was done until 1972. In the Code of Criminal Procedure (East Pakistan Amendment) Act 1957 (Act No. 36 of 1957) an overhauling amendment was made in the Criminal Procedure Code with a view to separating the judicial and executive functions of the magistrates. A full discussion of that amendment is beyond the scope of this work.

Bangladesh Period

In 1972 after independence of Bangladesh the Constitution of the Peoples' Republic of Bangladesh was adopted. Provision was made in Article 22 in the Fundamental Principles of State Policy that the state shall ensure the separation of the judiciary from the executive organs of the state.

In 1976 a Law Committee headed by Justice Kemaluddin reported to implement separation of lower judiciary in three stages which are as follows:

First Stage: The government may by notification, appoint some particular Magistrates at each station exclusively for judicial work. This can be given effect forthwith without any additional expenses or administrative difficulties.

Second Stage: This should be the nature of separation of judicial functions from executive as envisaged in the Code of Criminal Procedure (East Pakistan Amendment) Act 1957 (Act No. 36).

Final Stage: The final stage would be not only complete separation of judicial functions from executive but also constitution of a separate integrated judicial service under the control of the High Court Division for civil and criminal work right up to the level of the District and Session Judge. The Committee also recommended that for creation of an integrated judicial service, it would be necessary to enact new legislation.

In 1987 by an amendment to the Criminal Procedure Code President Ershad prepared a bill for separation of judiciary. However, the bill did not see the light of the day. In Pakistan separation was done in 1973 and in India in 1974 by an amendment to the Criminal Procedure Code. In 1990 the issue of separation of judiciary was put into the manifesto of the Three-Party Alliance movement against Ershad regime. In every election after 1990 both the BNP and AL had avowed commitment in their manifesto that going to power they would separate judiciary from the executive.

In 1991 a private member's Bill by Mr. Salauddin Yusuf namely the Constitution (14th Amendment) Bill 1991 was introduced for further amendment of Articles 95, 98, 115 and 116 of the Constitution. The Bill was sent to a select committee which had about 13 meetings to consider it. The Bill tried to reinstate the provisions of the 1972 original Constitution envisaged by the Constitution-makers. The revised bill was submitted in parliament in 1994. The comparison of the original bill and the revised bill reveals that 'the BNP has come out as the champion for the 4th Amendment of the Constitution though it is the BNP which never misses any opportunity to condemn AL for the 4th Amendment of the Constitution'[1]. However, nothing was done to pass the Bill. The Bill, however, did not deal with anything about the separation of subordinate judiciary. The government side did not accept any proposal for amendment of Article 115 and 116 of the Constitution. 'By not agreeing to restore the original provisions of

[1] *Challenge to the Independence of Judiciary*, Md. Abdur Rashid 46 DLR

Articles 115 and 116 the government has unmistakably demonstrated that they are opposed to the separation of subordinate judiciary from the executive'[2]. Shekh Hasina as the Prime Minister in the 7th parliament kept echoing her commitment that she would do all for separation of judiciary. A committee was formed headed by the secretary of Law and Parliamentary Affairs. Abdul Motin Khasru, the Law Minster stated that a bill for separation of judiciary from the executive was under way but nothing more was done.

Masdar Hossain Case in 1999[3]

441 judicial officers who were judges in different civil courts filed writ petition No. 2424 in 1995. The petitioners alleged *inter alia* that:

(i) Inclusion of judicial service in the name of BCS (Judicial) under the Bangladesh Civil Services (Re-organisation) Order 1980 is ultra vires the Constitution;

(ii) Subordinate Judiciary under chapter II is the part of the PART-THE JUDICIARY of Part VI of Constitution and thereby the Subordinate Judiciary has already been separated by the Constitution. Only the rules under Article 115 of the Constitution and/or enactments, if necessary, are required to be made for giving full effect to this separation of judiciary.

(iii) Judges of the subordinate Judiciary being the presiding Judges of the courts cannot be subordinate to any tribunal and as such, the judicial officers are not subject to the jurisdiction of the Administrative Tribunal.

The matter came up for hearing on 13.06.1996. However, because the petitions for time on behalf of the government were allowed several times, it could not be heard before 01.04.1997. Government did not contest the Rule and the court heard the learned Advocates for the petitioners only. After a long hearing with valuable comments and citations by Dr. Kamal Hossain, Syed Istaiq Ahmed and Mr. Amir-Ul Islam the court delivered its judgment on 7th May 1997 (reported in 18 BLD 558). Against this judgment of the HCD the government preferred an appeal by leave (Civil Appeal No. 79/1999) and the

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[2] Barrister Syed Istiaq Ahmed, Workshop of '*Independence of the Judiciary*', CAC 1994

[3] Secretary, *Ministry of Finance* V. *Md. Masdar Hossain and Others* 52 DLR (AD) 82

Appellate Division partly reversed the decision of the HCD by its judgment delivered on 2nd December 1999 (reported in 52 DLR 82). It would, therefore, be better to discuss the important points of the judgment of the Appellate Division as far as they concern the concepts of separation of subordinate judiciary from the executive. The main part of the judgment was delivered by Chief Justice Mustafa Kamal. The operative part of the judgment came to be known as 12 point directions[1] which are as follows:

(1) Judicial service is a service of the Republic within the meaning of Article 152(1) of the Constitution, but it is functionally and structurally distinct and separate service from the civil, executive and administrative services of the Republic.

(2) The word 'appointment' in Article 115 means that it is the President who under Article 115 can create and establish a judicial service and a magistracy exercising judicial functions, make rules etc; Article 115 does not contain any rule-making authority with regard to other terms and conditions of service; Article 133, 136 of the Constitution and Services (Reorganisation and Conditions) Act 1975 have no application in respect of the judicial functions.

(3) Creation of BCS (Judicial) cadre along with other BCS executive and administrative cadres by Bangladesh Civil Service (Reorganisation) Order, 1980 with amendment of 1986 is ultra vires the Constitution, Bangladesh Civil Service Recruitment Rules 1981 are inapplicable to the judicial service.

(4) (i) Government is directed to take necessary steps forthwith for the President to make Rules under Article 115 to implement its provisions. (ii) Nomenclature of the judicial service shall be designated as the Judicial Service of Bangladesh. (iii) Either by legislation or rules or order a Judicial Service Commission is to be established forthwith with the majority of members from the

[1] It has been typical to report that in *Masder Hossain* case the Supreme Court gave 12 directions. In fact these 12 points in the operative part of the judgment are not all directions in true sense of the term. Of these 12 points 5 are in the nature of directions and 7 are in the nature of declaration. Points 4,5,6,8 and 9 are in the nature of diretions.

Senior Judiciary of the Supreme Court and the subordinate courts for recruitment to the judicial service.

(5) Under Article 133 law or rules relating to posting, promotion, grant of leave, discipline, pay, allowance and other terms and conditions of service consistent with Article 116 and 116A shall be enacted separately for the judicial service.

(6) Government is directed to establish a separate Judicial Pay Commission forthwith as part of the Rules to be framed under Article 115.

(7) In increasing control and discipline of persons employed in the judicial service and magistrates exercising judicial functions under Article 116 the views and opinion of the Supreme Court shall have primacy over those of the Executive.

(8) The conditions of judicial independence in Article 116A namely, (i) security of tenure (ii) security of salary and other benefits and pension and (iii) Constitutional independence from the parliament and the executive shall be secured in the law or Rules made under Article 113 or in the executive orders having the force of Rules.

(9) The executive government shall not require the Supreme Court of Bangladesh to seek their approval to incur any expenditure on any items from the fund, allocated to the Supreme court.

(10) The members of the judicial service are within the jurisdiction of the administrative tribunal.

(11) Amendment of the Constitution for separation of judiciary from the executive may be made by the parliament.

(12) Until the Judicial Pay Commission gives its first recommendation the salary of judges in the judicial service will continue to be governed by *status quo ante.*

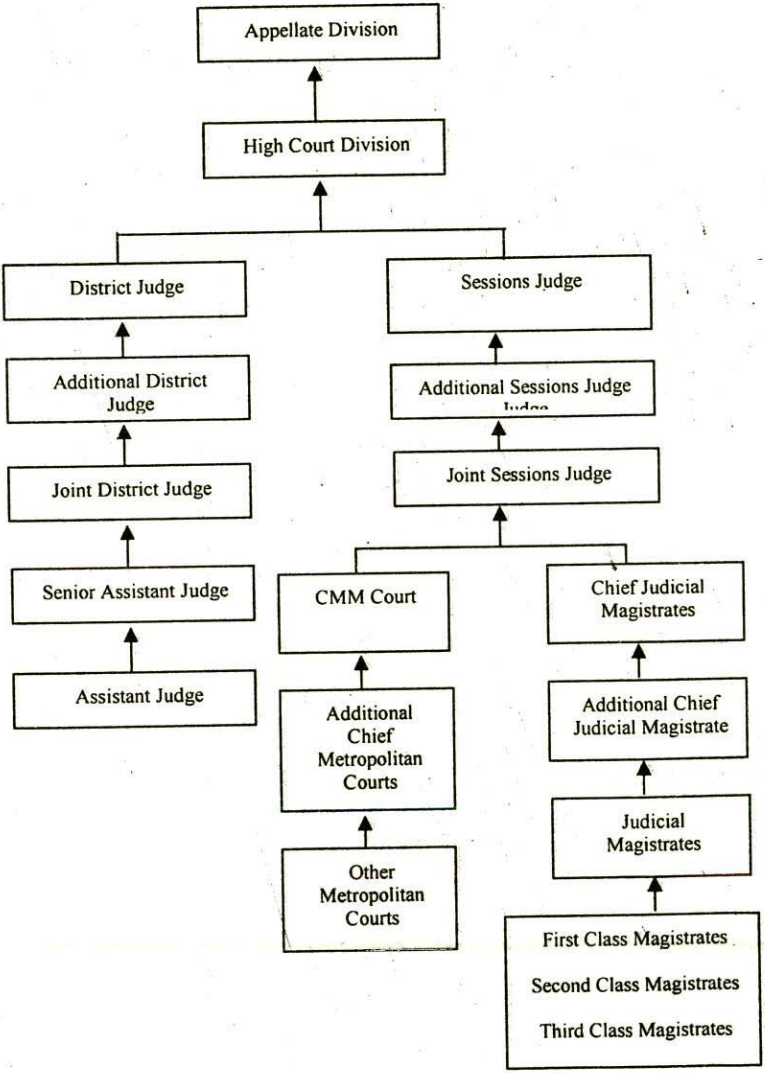
Implementation of the Judgment in Masder Hossain Case

The judgment was pronounced by the Appellate Division in 1999. Up to February 2006 the successive governments took 23 adjournments to implement the judgment on this or that plea. During the last Caretaker Government in 2001 4 drafts were prepared: (1)The Code of Criminal Procedure 1898 (Amendment) Ordinance 2001; (2) Judicial Service Commission Rules, 200; and (3) two rules on Judicial Service.

The Caretaker Government did not implement any of those drafts and the responsibility came to be for the subsequent BNP Government to implement the judgment. The incumbent upon the BNP Government to implement came to be based on three-sided pledge: first, it was BNP's avowed manifesto in the 8th Parliament election to implement separation of judiciary; second, after wining the election the BNP promised the Caretaker Government that after formation of the newly elected government, it would implement the judgment of the Masder Hossain case without any delay and relying on that pledge the Caretaker Government did not implement the judgment in their last cabinet meeting; third, it was mandatory for the government to implement the judgment of Masder Hossain case as an order of the Highest Court of the land. However, the BNP Government which completed its five year term in power did not do anything substantive to implement their pledge. Barrister Moudud Ahmed who was the Minister of Law and Parliamentary Affairs told the dailies that it would take another 6-7 years to implement the separation of judiciary.[1] Lastly on 1st February, 2006 the Appellate Division rejected time prayer by the Government for third time and fixed February 22 as the date of the contempt petition against the Government for not separating judiciary from the executive as per Supreme Court's direction. Earlier the court twice rejected similar government pleas- on August 7, 2004 and again on October 20, 2004. Finally 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 clutches of the executive on 1st November, 2007. Although the term 'executive magistrate' still exist in the Code of Criminal Procedure, 1898, executive magistrates are no longer vested with any judicial functions; their functions are administrative in nature.

[1] Jugantor, 26th May, 2003

The Judicial System of Bangladesh at a glance



Besides the above mentioned courts there are some tribunals and special courts like Juvenile court, Labour court, Administrative Tribunal etc.

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.

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 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

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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

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 times in the course of the day". In Halsbury's Laws of England[3] 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

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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 entitled 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*.

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

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[1] 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 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.[2]

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

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1 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.

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

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.

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.

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

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.

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

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

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.*"

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.

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

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.

Writ Jurisdiction, Public Interest Litigation (PIL) and the Concept of 'Aggrieved Party'.

Of the five writs two can be invoked by any person according to the provisions of Article 102 of our Constitution. These are writs of *habeas corpus* and *quo-warranto.* But other three writs (*prohibition, certiorari* and *mandamus)* can be invoked only by an 'aggrieved person'. It is important to mention here that in one sense these latter three writs are most important. Because most of the public authorities, bodies and officials frequently violate law and act in excess of jurisdiction causing repeated sufferings to the people and giving rise to huge grounds of

application for these three writs. But any one cannot apply for these writs due to the following two barricades:

Firstly, writ powers of the HCD is not any discretionary power. As a result, it cannot issue writs *suo motu* against any public bodies.

Secondly, any person cannot apply for these three writs; only an 'aggrieved person' has *locus standi* (right to sue).

A person is said to have *locus standi* when he is aggrieved by actions or inactions of a public servant or official or authority. Now when a person is said to be aggrieved? A person is said to be aggrieved-

(i) when he has suffered a legal injury by reason of violation of his legal right or interest [1]; and

(ii) when he has shown that he has a direct personal interest in the act which he challenges.[2]

If these two conditions are not fulfilled, the High Court Division will not allow a writ petition. This is why it is not possible to file public interest litigation (PIL).[3] This barricade of 'aggrieved person' does not, of course, exist in India. Because under Articles 32 and 226 of the Indian Constitution the writ jurisdiction of the Supreme Court and High Courts depends on their discretion. As a result, they can issue *suo motu* writs even on the basis of a letter or an information in a newspaper. Again, unlike ours, in Indian Constitution it is not mentioned who can apply for enforcement of fundamental rights and Constitutional remedies. As a result, any person may file petition for any of the writs and this has made PIL a great success in India.

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1 *S.P. Gupta* v *India* AIR 1982 SC149 at para 14-16

2 *Tariq Transport* V. *Sargodha-Vera Bus Service* 11 DLR (SC) 140

3 PIL : It means litigation in the interest of public and not in the inerest of the litigant himself. PIL is a concept of recent origin evolved by the Indian Supreme Court on the plinth of equal justice by giving liberal interpretation to the long standing rigid concept of *locus standi.* The Supreme Court has advocated for social justice for the poor by way of this PIL and the Court has devised this new tool for mitigating the sufferings of the poor people. It is a device in the way of constitutional promise of social and economic transformation to usher in an egaliterian social order and a welfare state. Ref. AIR 1983 SC 1477, De, D.J, *New Dimension of Constitutional Law,* (Calcutta : Eastern Law House, 1991).

The first reported case on PIL in India is *S.P. Gupta* V. *Union of India* AIR 1982 SE 149 where Bhagwati C.J. observed-

> "It may now be taken as well as established that where a legal wrong or injury is caused to a person or to a determinate class of persons by reason of violation of any constitutional or legal right ..... and such person or determinate class is by reason of poverty or disadvantaged position unable to approach the court for relief, any member of the public can maintain an application for an appropriate direction, order or writ in the High Court under Article 226 and in case of breach of any fundamental rights of such person or persons in the Supreme Court under Article 32."

Justice Bhagwati also described PIL as the strategic arm of the legal aid movement and he said that it aims at bringing justice within the reach of the poor vulnerable masses and helpless victims of injustice. It brings justice to the doorsteps of the weak, the unorganised and exploited section of the society who have no access to the courts because of the prohibitive cost of litigation. Following the footsteps of the Indian Supreme Court, both the SriLankan and Pakistan Supreme Courts, despite the Constitutional limitation, are widely allowing PIL.

But in our Constitutional system the court confines itself to asking whether the petitioner is an 'aggrieved person'[1] -a phrase which has received a meaning and dimension over the years. No doubt, it is a Constitutional rule, as the expression, 'any aggrieved person' is worded, that the petitioner must be an aggrieved person for the enforcement of his rights. But who is an aggrieved person? When can a person be said to be aggrieved? -All these are questions to be decided and explained by the judges themselves. Here is the sphere where judges can launch their contribution to the development of judicial review. The court can explain a word e.g. the 'aggrieved person' either in liberal sense or in narrow senses. To be mentioned here that the concept of 'aggrieved person' has got much more wider consideration in the present Constitutional jurisprudence than the old 19th century's conception. During the 19th century these words were construed very restrictively in Britain. It was said that a man was not a 'person aggrieved' unless he

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[1] One of the most discussed cases where our Supreme Court has taken restrictive view and rejected PIL is *Bangladesh Sangbadpatra Parished* V. *Bangladesh* 43 DLR (AD) 126

himself had not suffered particular loss in that he had been injuriously affected in his money or property rights. But in 1957 in a case Lord Justice Parker and Lord Denning departed from this old conception. It was 4 Blackburn Cases[1] which extended the concept of 'aggrieved person' and particularly the scope of *locus standi*.

In one of these Blackburn cases Lord Denning stated the liberal concept of 'aggrieved person' -

> "I regard it as matter of high constitutional principle that if there is good ground for supposing that a government department or a public authority is transgressing the law or is about to transgress in a way which offends or injures thousands of her Majesty's subjects then any one of those offended or injured can draw it to the attention of the courts of law and seek to have law enforced and the courts in their discretion can grant whatever remedy is appropriate."

Finally he says about *locus standi* -

> "But I do not think grievances are to be measured in pounds, shillings and pence. If a rate-payer or other person finds his name included in a valuation list which is invalid, he is entitled to come to the court ... He is not to be put off by the plea that he has suffered no damage. The court will not listen to a busy body who is interfering in things which do not concern him, but it will listen to an ordinary citizen who comes asking that the law should be declared and enforced, even though he is only one of a hundred, or one of a thousand or one of a million who are affected by it."[2]

Following the decisions of these Blackburn cases in England new Rules of Court were brought into force in 1978 providing for that applicant having a sufficient interest' in the matter to which the application relates will be considered as aggrieved person. (Order 53 of the Rules of the Supreme Court).

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1 For details, see, Kamal, Mustafa, J, *Bangladesh Constitution : Trens and Issues,* PP 162 – 165
Blackburn V. *Attorney General* (1972)1 WLR 1037
R. V. *Blackburn* (1973) QB 241
R. V. *GLC exparte Blackburn* (1976)1 WLR 550
R. V. *Commissioner of Police of the Metropolis*

2 Quoted by, Islam, M. Amir-Ul, Rights in Search of Remedies. A paper, now compiled in Public Interest Litigation in South Asia, (Dhaka : UPL, 1997)

Thus in today's world revolutionary changes are taking place in the judicial process and the problems of the deprived section of the community are coming on the forefront. The courts in various countries have to innovate new methods and devices, new strategies for the purpose of providing access to justice to large masses of peoples who are deprived and to whom freedom and liberty have no meaning. Considering all these developing judicial trends the Supreme Court of Bangladesh should expressly come forward to allow PIL. In favour of liberal interpretation of the term "aggrieved person" some more important points should be mentioned-

1. Article 102 of our Constitution uses the term 'any person aggrieved'. It does not use the expression as "aggrieved party" or "any person personally aggrieved."

2. Sri Lanka and Pakistan- these two neighbouring countries have, although they have same Constitutional constraints as we have in our Constitution, already overcome the barricade of 'aggrieved person' and they are now widely allowing PIL. So why not our Supreme Court?

3. Besides the question of *locus standi* and procedural rules there is yet another aspect of public right which need special mention. In the increasing and expanding role of the state in socio-economic activities public are affected by the legislative and executive action. It often involves public money, sales or parchase with public fund. State purse as well as the state largees are used for political or personal gains. This also breads corruption and nepotism. From political side, there is neither any provision for individual responsibility of ministers nor does any strong committee system exist in Bangladesh. This has resulted in uncontrolled corruption and nepotism in every department of the government. In such a situation if the highest court, the supreme object and functions of which are to protect fundamental rights and to control the arbitrary actions on the part of the government, does not come forward from within its possible bounds, then promises of the people of equality, justice, rule of law etc. as enshrined in the preamble to the Constitution will remain as meaningless versions.

Breaking the Barricade

As to the issue of '*locus standi*' and 'aggrieved person' which were issues knocking the door of the Supreme Court for nearly a decade Justice Mustafa Kamal commented in 1994—

> "But the emerging trend of constitutional litigation is that it is not only the person whose interest is adversely affected by an order of a public official who is coming to the court to seek a redress, but also other persons, voluntary societies, representative organisations, trade unions etc. which are coming in increasing numbers to test the validity of a law or an action of public official in which their own direct personal interests are not involved, but in which they have a sufficient interest. It is these groups of new generation of constitutional litigants who are knocking at the door of the Supreme Court to gain entry into the threshold point. Constitutional lawyers, judges and courts all over the world are now facing them and providing adequate response to their loudly raised voice for access to justice. It will be interesting to see how the Supreme Court of Bangladesh finds its own answer to this issue."[1]

However, lastly our Supreme Court has come forward to untie the knots of procedural technicalities in respect of *locus standi* and respond to the loudly raised voice for access to justice. It was the case of *Dr. Mahiuddin Farooque* v. *Bangladesh* (Civil Appeal No. 24 of 1995)[2] where the Supreme Court extended scope of writ jurisdiction through which voluntary society, representative organisations, trade unions and constitutional activists and individuals having no personal interest in the case would be able to test the validity of a law or an action of the executive affecting public interest. We hope that this judgment will act as a beacon-light for future initiation of PIL in Bangladesh which can ultimately pave the way for ensuring social justice and legal aid to all.

It is, of course, pertinent to mention here that in Bangladesh the first challenge to the concept of *locus standi* was thrown in the case of *Kazi Mukhlesur Rahman* V. *Bangladesh* 26 ILR (AD) 44. But the implications of this decision have not yet been fully grasped, for there has been no follow-up of the decision, either from the Bar or from the

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1 Kamal, Mustafa. J. *Ibid*, P. 161

2 Judgment delivered on 25th July, 1995

Bench, blossoming the decision in varied directions.[1] However, after 22 years of this decision allowing PIL our Supreme Court has again moved towards the positive turn of PIL in *Dr. Mahiuddin Farooque's* case.

Following the decision in the *Dr. Mahiuddin Farooqu* case the Supreme Court has subsequently expanded and confirmed the scope of *locus standi* in some important case like *Professor Nazrul Islam and others v. Bangladesh,* 52 DLR 413, *Bangladesh Sangbad Patra Parishad v. The Government of Bangladesh*, 43 DLR (AD) 126.

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

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[1] For details, see, Kamal, Mustafa J. *Ibid,* P. 164-166

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]
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.

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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
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

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.

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

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

reasons, decline to express any opinion on the question 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

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

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 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.[2] 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

2 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.[1]

Politics of the Judiciary

The Image of the Supreme Court has been tarnished

It has been commented that our judiciary now faces the erosion of credibility[2] in recent years although in our historical movement at various stages, judiciary has been a very vibrant in playing its neutral and positive role. In the context of clashes between the executive and legislative or between two or more organs of the executive it is the judiciary which still continues to be an institution of 'last hope'. All the judges of the Supreme Court, particularly the Chief Justice is seen as the one holding the most important balancing power under the constitution. However, some recent incidents relating to interferences by some Chief Justice of the Supreme Court have raised a fundamental question of image, impartiality and credibility of the judiciary as a whole in the country.

First, following the assumption to the office of the Chief of Caretaker Government by Dr. Iajuddin Ahmed three writ petitions were filed in the High Court Division in November, 2006 challenging his assumption of the office of Chief Advisor as it was in violation of the provisions of the Constitution; the Chief Advisor's powers to take decisions unilaterally without consultation with the council of advisors; and the declaration of the election schedule prior to the correction of the electoral rolls. When the matter was being heard for issuing rule, the Attorney General submitted that he wished to file an application for a larger bench to hear the matter, given its constitutional

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

[2] Md. Asadullah Khan, *Judiciary faces erosion of credibility*, Daily Star, December 20, 2006.

importance, and the court should therefore not continue to hear the matter. The Bench was, however, adamant to issue rule after lunch break. A Rule Nisi is just the first stage of a motion matter, which in the present case would have involved the court asking the Chief Adviser to show cause why his assumption of office should not be held to be without lawful authority. So the AG would have had ample opportunity, even if a Rule were issued, to make a full reply, and if this was found cogent by the court, even perhaps to obtain a judgment in its favour. However, the AG was insisting that even this preliminary order not be issued and the matter be rejected summarily. This difficulty was further exacerbated when the AG, accompanied by Mr. Moudud Ahmed and others rushed to the Chief Justice's office to obtain an stay order. Sadly, the Chief Justice of the Supreme Court Syed J R Mudassir Hossain, in an unusual display of constitutional power, sopped the proceeding of the Bench. The Chief Justice's stay order came minutes before the High Court bench was to issue a rule. Shocked by the order, lawyers and others present in the court burst into anger and vandalised different sections of the Supreme Court, and set fire to the vehicle of the state minister for law, justice and parliamentary affairs. This step by the Chief Justice was seen by many as unprecedented in the judicial history[3]. It is unprecedented that a Chief Justice stayed a preliminary order of Rule Nisi to be issued for show cause purpose only. Although the immediate past BNP led 4 party alliance found this as an acknowledgment of 'victory', it have pulled off an unprecedented and gross manipulation of judicial process[4]. The lofty image of impartiality and neutrality of the apex court as the defender and guardian of our constitution has seriously been hampered by the unnecessary interference of the Chief Justice.

As a result of the above vandalism in the judges of the Supreme Court started unprecedented protest by abstaining from work. They started abstaining from work demanding apologies from the SC lawyers and punishment of vandals responsible for the vandalism at the SC premises on November 30, that was triggered by a stay order by

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[3] Commented by former Chief Justice Mustafa Kamal.

[4] Sara Hossain, Bar-at-Law, *Beyond Contempt*. Daily Star, 4th Dec ember, 2006

the Chief Justice. Subsequently Barrister Omar Sadat and SC keeper Rafiqul Islam filed a sedition case with the CMM court against 200 lawyers including eminent jurists like Dr. Kamal Hossain, Rokonuddinn Mahmud, Barrister Amir-ul-Islam etc. of vandalising the offices of the Attorney General and Chief Justice as well as for creating disturbance in court proceeding on 30th November.

Second, during his tenure a good number of judges were appointed in the Supreme Court with political consideration and this Chief Justice did not even protest.

Third, on several occasions he dissolved certain benches that had given verdicts on sensitive cases against the government. On June 18, 2005, a Division Bench, comprising Justice Shah Abu Nayeem Mominur Rahman and Justice Mainul Islam Chowdhury, of the High Court Division issued a rule calling upon the respondents to show cause as to why the holding of two constitutional posts at the same time by CEC Justice M A Aziz should not be declared to have been done without any lawful authority. Interestingly enough, within an hour of issuance and hearing of rule, the concerned judges' writ jurisdiction was taken away.

Fourth, in another writ petition the HCD on May 24, 2005 directed the EC to collect and make public some vital information including educational qualification, profession, source of income, criminal records and wealth statement of the candidates for general elections and publish the same to help voters choose their representatives properly. In line with the HCD directive the EC prepared a three-page form for the candidates to give eight types of personal information. Abu Safa hailing from Swandip filed a petition against the directive of the HCD to the Chamber Judge of the AD on July 3, 2005 but the judge asked the petitioner to file a regular appeal in the AD. On July 10, 2006 a regular appeal was filed by Abu Safa. On 19th December, 2006 just two days before nomination submission deadline for 9th parliament the appeal was heard without any hearing from the other sides by a one-member vacation bench of Justice Joynal Abedin of the Appellate Division.

On 1st March, 2007 CJ Syed JR Mudassir Husain retired from service. He was not given any traditional farewell reception from the Supreme Court Bar Association because of his controversial steps taken in favour of the then PNP led four party alliance government. This was for the second time that the SCBA refrained from according farewell to a retiring CJ. Earlier in 1989, SCBA also refrained from giving farewell to the then CJ AFM Munim.

Following retirement of CJ Syed JR Mudassir Hossain, Mohammad Ruhul Amin took over as new Chief Justice in the Supreme Court and his role as an impartial Chief Justice is being seen as critical as former CJ Mudassir Husain. This is because of his following interference on the judicial process:

First, the opposition leader Sheikh Hasina was arrested by the joint forces on 16th July, 2007 and later that day a magistrate court sent her to a sub-jail in the national parliament complex. She was shown arrested in an extortion case filed by business man Noor Ali. The government approved the case to be tried under Emergency Power Ordinance, 2007. A bench comprising Justice Shah Abu Nayeem Mominur Rahman and Zubayer Rahman Chowdhury on August 7, granted her bail and also asked the government to reply within four weeks why its approving the case to be tried under emergency rules should not be declared illegal. However, on August 27, 2007 Sheikh Hasina's bail in two extortion cases granted by the High Court Division was stayed by the full bench of the Appellate Division. In the same way, Khaleda Zia's bail granted by the High Court Bench was stayed by the Appellate Division. Although the Appellate Division has certainly legal power to do so but the general people perceive the Supreme Court as forum of justice and it is questionable whether by staying the bail the Appellate Division has served justice in a criminal case or undermined the image of the Supreme as an impartial forum given that it is the last resort for people to turn to with the hope of receiving justice.[5]

Second, the writ power of a Bench of the High Court Division which was discharging writ jurisdiction against government actions or inactions by the government was taken away.

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[5] Kaxi SM Khasrul Alam Quddusi