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DEVELOPMENT OF ADMINISTRATIVE LAW IN BANGLADESH: OUTCOMES

Bangladesh is a new name in political map of the world. It took birth as an independent and sovereign State on the 16th December, 1971, out of the ashes of a bloody war for national independence carried out for nine months beginning from March 25, 1971.[1]

In truth, the independence of Bangladesh brought a great change in the administrative process of the country. It also greatly influenced the development of administrative law in the country. However, before we go to discuss the outcomes of the development of administrative law in Bangladesh, it is first of all necessary to go back to the early stage of the war of independence including the formation of first free Provisional Government of independent Bangladesh, the Proclamation of Independence, etc.

1. Formation of the Bangladesh Government in Exile and the Proclamation of Independence, 1971

Following the Pakistan military crackdown on March 25, 1971, most of the Awami League leaders, who could escape and assemble in India after crossing the border, formed a government of Bangladesh in exile in Kolkata and in order to legalise the Government and the Independence War, they had to adopt a legal instrument to enable them to receive assistance from India. Accordingly, the Proclamation of Independence was

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1 S. M. Hassan Talukder, History of Constitutional Development: Bangladesh Perspective (1993), p. 113.

drafted and adopted on the 10th April, 1971, with retrospective effect from the 26th March, 1971.[2]

According to the Proclamation, the elected representatives (MNAs and MPAs) constituted themselves into a Constituent Assembly which, after having mutual consultations, declared and constituted Bangladesh as a sovereign People's Republic and thereby confirmed the declaration of independence that had already been made by Sheikh Mujibur Rahman on March 26, 1971. The Proclamation empowered the President to summon and adjourn the Constituent Assembly. The Proclamation made the President the supreme commander of all the Armed Forces.

The Proclamation served as a Provisional Constitution providing for a presidential system of government giving the President absolute power in views of the war situation. It laid down the fundamental law for the country in war. So it continued to provide legal cover for all the acts done by the Government not only during the war but also thereafter. It became the fountain of law and the source of authority; it was the Constitution of the country till the new Constitution was framed and made effective on and from December 16, 1972. The Proclamation which was made to handle a special situation, invested the President with all the executive and legislative powers of the Republic including the power to grant pardon.[3] The President was empowered to appoint Prime Minister and other Ministers and do all things necessary to give the people of Bangladesh "an orderly and just" Government.

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2 Moudud Ahmed, Bangladesh : Constitutional Quest for Autonomy (1979) pp. 264-269.

3 H. Rahman : Political Thought, Organisation and Governments, Chapter IX (From General Election to Independence of Bangladesh, 1970-71, pp. 139-141), 1st edn., 1981.

With the establishment of Bangladesh as a sovereign Republic after the surrender of the Pakistan Army on December 16, 1971, the Proclamation of Independence gained significant importance both from the historical and the constitutional point of views and continued to remain fully effective as the fundamental law for the country. The Proclamation became a reality - it created a new nation on the map of the world.

2. The Laws Continuance Enforcement Order, 1971

In exercise of the powers conferred by the Proclamation, the 'Laws Continuance Enforcement Order' was made on April 10, 1971, giving it retrospective effect from March 26, 1971, in order to ensure continuity in all spheres. The Continuance order legalised and made effective all the existing laws inherited from Pakistan subject to the Proclamation. The existing laws would not be effective if they were inconsistent with consequential changes as would be necessary on account of the creation of Bangladesh as a sovereign State. It provided that all officials of the Government, civil, military, judicial and diplomatic, who would take oath of allegiance to Bangladesh would continue in their offices on terms and conditions of service so long enjoyed by them. The administration of such oath of allegiance was to be arranged by all District Judges, Magistrates and the diplomatic representatives within their respective jurisdiction.[4]

This may be noted that both Proclamation of Independence and the Laws Continuance Enforcement Order remained, for obvious reasons, silent on the creation of a High Court for Bangladesh and on the function of the High Court at Dhaka where the constitutional vacuum continued to exist till January 11, 1972,

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4 Vide the Laws Continuance Enforcement Order, 1971.

when Provisional Constitution of Bangladesh Order, 1972, was made to provide for the establishment of the High Court of Bangladesh.

3. The Provisional Constitution of Bangladesh Order, 1972

This Presidential Order called the Provisional Constitution of Bangladesh Order, 1972, was issued on 11 January, 1972. By virtue of this Order, the entire character of the Government was changed. The Presidential form was substituted by form aiming at a Westminster type parliamentary system. However, the main provisions of the Provisional Constitution of Bangladesh Order, 1972, are as follows:[5]

(a) This Constitution shall establish a parliamentary democracy in Bangladesh in accordance with the will of the people.

(b) There shall be a Cabinet of Ministers, with the Prime Minister as the head.

(c) The President shall, in exercise of all his functions, act in accordance with the advice of the Prime Minister.

(d) There shall be a Constituent Assembly comprising of the elected representatives of the people of Bangladesh returned to the National Assembly and Provincial Assembly seats in the elections held in December, 1970, January 1971, and March 1971, who are not otherwise disqualified by or under any law.

(e) There shall be a High Court of Bangladesh, consisting of a Chief Justice and so many other Judges as may be appointed from time to time.

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5 Vide the Provisional Constitution of Bangladesh Order, 1972.

Exigent to point out here that the Proclamation of Independence was silent on the function of the Constituent Assembly, but the Provisional Order not only defined the Constituent Assembly but clearly envisaged that it would frame the Constitution of the country. Here the interesting point is that the Constituent Assembly was not given any law-making power other than framing the Constitution and for a period up to the 16th December, 1972, although the country was run in the line of a parliamentary system with the Prime Minister as the head of the Cabinet under the Provisional Constitution Order, the system operated within the framework of the Proclamation of Independence, and the Constituent Assembly having no other function than the framing of the Constitution, the law-making function remained vested in the Executive and the Government which although claiming to be elected, remained unanswerable to any body or forum. The Proclamation of Independence continued to be the supreme law till the present Constitution took effect from the 16th December, 1972.[6] It is also exigent to point out here that indeed no provision was made in the Provisional Order nor was any step taken regarding the status, appointment and function of the Judges of the High Court till January 17, when the High Court of Bangladesh Order, 1972, was promulgated by Presidential Order No. 5 of 1972.[7]

It is now convincing from the previous Chapters that the development of Administrative Law in Bangladesh since Ancient period have brought some effects in the present day administrative system which we can understand from our inquisitive observations also.

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6 S. M. Hassan Talukder, History of Constitutional Development: Bangladesh Perspective (1993), pp. 117-118.

7 Ibid.

Indeed, the outcomes of the development of Administrative Law in Bangladesh which are, in actual practice, positive to welfare-oriented administration are as follows:

A . Outcomes—Positive to welfare-oriented Administration

(1) Easy access to Justice and speedy disposal of Cases: Tribunals

(2) Effective regulation of Public Corporation

(3) Effective regulation of Administrative Rule-making or Delegated Legislation

(4) Effective regulation of Rule-Application Action or Administrative Action

(5) Effective regulation of Administrative Discretion

(6) Liabilities of the Government in Tort and Contract

And the outcomes of the development of Administrative Law in Bangladesh which are virtually negative to welfare-oriented administration are also as follows:

B. Outcomes— Negative to welfare-oriented Administration

(1) Administrative Arbitrariness

(2) Bureaucratic Control and Red-tapism

(3) Extensive delegation of legislative powers to the Administration

(4) Excessive privileges and immunities of the Administration in Suits

Sources of Administrative Law in Bangladesh:

The term 'source' means place of origin. Accordingly sources of Administrative Law mean places wherefrom Administrative Laws have been originated. Administrative Law is a gigantic law and has many sources as follows:

1. Bangladesh Constitution:- Articles 133 to 141 of Part IX of the Bangladesh Constitution deal with services of Bangladesh. As such these are part of Administrative Law and can be considered as an important source in Bangladesh.

2. Acts:- There are many Acts made by the Parliament which can be considered as an important source of Administrative Law in Bangladesh as they are related to services of Bangladesh. For example: The Public Servants (Retirement) Act, 1974; the Administrative Tribunals Act, 1980, etc.

3. Ordinances:- There are many Ordinances in Bangladesh which deal with services of Bangladesh. As such they can be treated as an important source of Administrative Law in Bangladesh. For example: the Government Servants (Special Provisions) Ordinance, 1979; the Public Servants (Dismissal on Conviction) Ordinance, 1985; the Public Employees Discipline (Punctual Attendance) Ordinance, 1982, etc.

4. Rules:- Like Acts and Ordinances, there are many Rules in Bangladesh which act as a source of Administrative Law in Bangladesh as they are related to administration. For example: the Public Servants (Retirement) Rules, 1975; the Bangladesh Civil Service Seniority Rules, 1983, etc.

5. Regulations:- There are many regulations in Bangladesh which are related to services and as such can be considered

as a source of Administrative Law. For example: Bangladesh Shilpa Bank Employees Service Regulations, 1984; Sonali Bank Employees Services Regulations, 1981, etc.

6. Bye Laws:- There are many bye laws in Bangladesh which can be treated as an important source of Administrative Law. For example: the Paurashava Water Supply (Model) Bye Laws, 1999.

7. Case Laws: Like statutory laws there are many case laws in Bangladesh which play an important role as an important source of Administrative Law in Bangladesh. For example: Abdul Latif Mirza Vs. Government of Bangladesh;[8] Secretary, Ministry of Finance Vs. Masdar Hossain,[9] etc.

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8 34 DLR (1982) (AD) 173.

9 52 DLR (2000) AD 86.

3A(1)

EASY ACCESS TO JUSTICE AND SPEEDY DISPOSAL OF CASES: TRIBUNALS

Outside the ordinary courts of law there is a host of Tribunals with jurisdiction to decide legal disputes in Bangladesh. They are one of the by- products of an age of intensive Government. The movement of our modern society nowadays might be said (inverting the famous remarks of Maine) to be from contract to status. Less and less are people left to rely on personal transactions enforced by the ordinary law courts, more and more are they made subject to regulatory schemes- national insurance, the health service, State education, agricultural control, rent control and many other such things are administered under elaborate Acts of Parliament. Here a new source of social friction, for there is bound to be many disputes. What benefit may A claim under the insurance scheme? Ought Dr. B to be removed from the health service? Is C entitled to a reduction of rent? Should D be allowed to give notice to his farm tenant?

To add all his work to the tasks of the ordinary courts would not only cause a breakdown: it would also in many cases be wrong in principle. The process of the courts is elaborate, slow and costly. Its defects are those of its merits, for the object is to be given the highest standard of justice; generally speaking, the public wants the best possible article and is prepared to pay for it. But in administering social services the aim is different. Disputes must be disposed of smoothly, quickly and cheaply. The object is not the best article at any price, but the best article that is consistent with efficient administration. Moreover, many of these disputes are best decided by bodies on which technical experts can sit. Special forms of tribunal have, therefore, been devised and a new system of Tribunal for the disposition of justice has grown up side by side with the old one.

In common parlance, the dictionary meaning of the word "Tribunal" is seat of a judge and the word judge means authority by which contested matters are decided between parties and if used in this sense, it is a wide expression which includes within it court also. The word "Court" is used to mean those "tribunals" which are set up for the administration of justice. By administration of justice is meant the exercise of judicial power of the State. The word "Court" means the ordinary courts of civil judicature. The courts are invested with judicial power of the State and their authority is derived from the Constitution or constituted under some Act of Legislature on the authority derived from the Constitution. By "tribunals" is meant those bodies of men who are appointed to decide controversies of special nature arising under certain special laws between contesting parties.[1]

However, in legal sphere, the word Tribunal is used in special sense which refers to adjudicating bodies outside the sphere of the ordinary courts of law, though there are many things in common between a court of law and a tribunal. The definition of Court which distinguishes it from Tribunal is, Court is that adjudicating institution which settles disputes of conventional nature under ordinary law between contesting parties.

However, all existing tribunals in Bangladesh, in wider sense, may be grouped into:

(i) Statutory Tribunal

(ii) Domestic Tribunal

STATUTORY TRIBUNAL- General Statutory Tribunal is that adjudicating body, which is constituted by express provision of a statute and derives power and authority from the same to decide disputes. Labour Appellate Tribunal, Administrative Tribunal,

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1 Bangladesh Vs. Dhirendra Nath Sarker, (1982) 34 DIR (AD) 173.

Administrative Appellate Tribunal, etc. are the examples of statutory tribunals in Bangladesh.

Labour Court

Labour Court[2] in Bangladesh is a Tribunal created under labour law.[3] Each Court consists of a Chairman and two Members to advise the Chairman. A Labour Court acts both as civil and criminal court. The Government fixes the local limit of each Labour Court. This court determines, among others, industrial disputes relating to matters in respect of which applications are filled before it. It also decides large number of cases arising out of employment of labour. The decision of a Labour Court may be either an award or an order. An appeal may be taken to the Labour Appellate Tribunal against an award given by a Labour Court.

Labour Appellate Tribunal

The constitution, status, functions and procedure of the Labour Appellate Tribunal are regulated under the Bangladesh Sromo Ain, 2006. The Labour Appellate Tribunal is presided over by one Member. He is appointed by the Government. As a rule, a Judge of the High Court Division is appointed to as the Member of the Tribunal. As its name indicates, the Tribunal exercises appellate power only.

Administrative Tribunal

Under the Administrative Tribunals Act 1980 (Act No. VII of 1981), an Administrative Tribunal settles applications made by

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2 In Pubali Bank Vs. Chairman, Labour Court, Dhaka (1992) 44 DLR (AD) 40, it was clearly held by the Appellate Division of the Bangladesh Supreme Court that Labour Court is not to be considered as a Court; as such, it is a tribunal.

3 Bangladesh Sromo Ain, 2006.

any person in service of the Republic or any statutory public authority[4] in respect of the terms and conditions of his service including pension right or in respect of any action taken in relation to him as a person in the service of the Republic or of any statutory public authority.[5] An Administrative Tribunal consists of one Member appointed by the Government from among persons who are or have been District Judges.[6]

Administrative Appellate Tribunal

There is an Administrative Appellate Tribunal in Bangladesh. This Appellate Tribunal hears and determines appeals from any order or decision of an Administrative Tribunal.[7] It consists of one Chairman and two Members. Here the Chairman shall be a person who is, or has been, or is qualified to be, a judge of the Supreme Court, and of the two other Members, one shall be a person who is or has been an officer in the service of the Republic not below the rank of Joint Secretary to the Government and the other a person who is or has been a District Judge. Here District Judge may be called as judicial member of the Tribunal and Joint Secretary as Tribunal's administrative member.[8] Subject to the decisions and orders of the Appellate Division of the Bangladesh Supreme Court, all decisions and orders of the Administrative Appellate Tribunal are binding upon the Administrative Tribunals and parties concerned.[9] Only

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4 Here Statutory Public Authority includes only 11 financial institutions. These are: Sonali Bank, Agrani Bank, Janata Bank, Bangladesh Bank, Bangladesh Shilpa Rin Sangstha, Bangladesh Shilpa Bank, House Building Finance Corporation, Bangladesh Krishi Bank, Investment Corporation of Bangladesh, Grameen Bank and Civil Aviation Authority.

5 Section 4, the Administrative Tribunals Act, 1980.

6 Section 3, ibid.

7 Section 6, ibid.

8 Section 5, ibid.

9 Section 8, ibid.

the Appellate Division of the Supreme Court can modify, vary or set aside the decisions and orders of the Administrative Appellate Tribunal.[10]

DOMESTIC TRIBUNAL- The term "domestic tribunal" refers to those administrative agencies which are designed to regulate professional conduct and to enforce discipline among the members by exercising investigating and adjudicating powers.[11] And it may be studied under various heads:

1. Professional e.g.: Bar Council
2. Trade e.g.: Chamber of Commerce
3. Social Clubs e.g.: Sporting, Relaxation

The first category of the professional domestic tribunal is the creature of statute. The second category arises out of an agreement among groups of people. Social club also originates on mutual agreement.

However, in legal sphere, domestic tribunals are classified as:

1) Statutory Domestic Tribunal
2) Contractual Domestic Tribunal

Contractual domestic tribunals are those which exercise jurisdiction arising out not from any statute but from an agreement between the parties. An agency constituted by a private club to decide disputes between its members is a contractual domestic tribunal. Such tribunal is not subject to the writ jurisdiction of the Court but in certain situations remedy by way of injunction, declaration or damages may be available.[12]

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10 Section 6A, the Administrative Tribunals Act, 1980.

11 I. P. Massey, Administrative Law (2nd edn.) p. 165.

12 Ibid, pp. 165-166.

Statutory domestic tribunals are those which derive power and authority from statute and exercise regulatory and disciplinary jurisdiction over its members.[13] Such agencies have been established under the Bangladesh Legal Practitioners and Bar Council Order and Rules 1972; Medical Councils Act; Press Council Act. The list is merely illustrative and not exhaustive. The decisions of statutory domestic tribunals are subject to the writ jurisdiction of the Supreme Court in the same manner as any other statutory tribunal. It may be mentioned here that the scope of judicial review in case of domestic tribunals is highly limited because the essential function of a domestic tribunal is discipline among its members.[14]

Under Article 102 of the Constitution of Bangladesh, the High Court Division of the Supreme Court of Bangladesh can issue orders, directions in the nature of writs of Habeas Corpus, Mandamus, Certiorari, Quo Warranto, and Prohibition to a statutory public authority or any court or tribunal, other than a court or tribunal established under a law relating to the defence services of Bangladesh or any disciplined force or a tribunal to which article 117[15] applies.

Advantages for creation of Tribunal:

The advantages for creation of tribunals in Bangladesh in presence of ordinary courts of law greatly lie on the fact that

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13 I.P. Massey, Administrative Law (2nd edn.), p. 166.

14 S.M. Hassan Talukder, Independence of Judiciary in Bangladesh : Law and Practice (1994), p. 131.

15 Article 117 of the Bangladesh Constitution provides, inter alia, that Parliament may by law establish one or more Administrative Tribunal to exercise jurisdiction in respect of matters relating to or arising out of the terms and conditions of service of persons in the service of the Republic or of any statutory public authority. Accordingly, the Administrative Tribunals Act, 1980, was passed by the Parliament, which came into effect from 1 February, 1982.

tribunal decides disputes of rather special nature which require expert knowledge of the particular subject and also to avoid the unavoidable high costs and intricate laws bristling with technicalities and formalities and delay in the proceedings before the ordinary courts of law. The real advantages in the proceedings before tribunals, which are conducive to poor litigants and judicial independence, are that:

Disputes of Special Nature:

A tribunal decides disputes of rather special nature arising under certain special laws between parties. But an ordinary court of law decides disputes of conventional nature.

Expert Knowledge:

In case of a tribunal, decision is made by a specially qualified person having expert knowledge on the disputed matter, but this is absent in case of ordinary court of law.

Informality and Flexibility:

A tribunal is not bound to follow Civil Procedure Code as compared with an ordinary court of law. A tribunal follows the procedure as laid down in the statute under which the tribunal is established or sometimes the tribunal is left free to devise its own procedure. A tribunal does not follow the complicated rules of evidence like Evidence Act as compared with a ordinary court of law.

A tribunal does not tend to follow the rigid doctrine of binding precedent. But the courts generally follow intricate laws bristling with technicalities and formalities and also tend to follow their own precedent.

Cheap and Easily Accessible:

In case of tribunal, the total process is neither expensive nor dilatory. It is cheap and easily accessible. It is short and is

disposed of quickly. But in case of ordinary courts of law, the total decision-making process is long and dilatory.

It is fact that in the field of civil litigation and public administration, tribunals have assumed tremendous proportions and importance and a vast number of cases are now being decided by tribunals. Litigation before a court of law is not only time consuming but is a luxury for the rich man. The Supreme Court of India lamented on the failure of justice in Mahabir Jute Mills Vs. Shibban Lai Saxena[16] where after a long drawn legal battle, the case was finally decided after a period of twenty five years, when most of the 400 persons who claimed justice on the ground of wrongful dismissal had died and the new appointees in their place had completed twenty five years of service.

However, it may be said in conclusion of this chapter that tribunals, by-product of intensive form of government and consequential socialisation of law, are cheap, rapid and easily accessible.

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[16] (1975) 2 SCC.

3A(2)

EFFECTIVE REGULATION OF PUBLIC CORPORATIONS

A 'Corporation' is indeed a collection of natural persons united into one body, under a special denomination, having perpetual succession under an artificial form and vested by the policy of the law with the capacity of acting in several respects as an artificial being.

The term "Corporation" is divided into those which are private only, formed by voluntary agreement for private purposes, and those which are created by the State for the purposes of Government and management of public affairs, which are public or quasi-public corporations (Murphy Vs. Chosen).

However, any government may undertake to accomplish its objectives either through its own department or through an autonomous statutory' corporation or through a government company registered under the Companies Act.

According to Oxford Law Dictionary, Public Corporation is a corporation established for exercising public function. Normally such public corporations are statutory.

According to Kailash Rai, a renowned author of administrative jurisprudence, states "A Public Corporation is taken to mean a corporate body created by or under a statute, entrusted with various function of public importance, and owned or controlled by the Govt."

The growth of a statutory public corporation is a by-product of an intensive form of government. And the reasons of its growth are as follows:

Reasons for growth of statutory public corporation

1) **Quick and immediate decision and performance:** To increase the competitive capacity of the government organization so that it can maintain adjustment with similar private organizations especially in relation to commerce, finance and social.

2) **Proper control and maintenance:** For proper control and maintenance of increasing volume of government functions in public affairs.

3) **Free from Bureaucratic Control:** To avoid bureaucratic control and red-tapism of government departments.

4) **Effective Accountability and Transparency:** To ensure effective accountability and transparency of government organizations.

5) **Dynamic and action - oriented:** To keep government organizations more dynamic and action-oriented.

6) **Fast and Convenient:** For best adaptation of government organizations with the changing free market economy.

Indeed, statutory public corporations have certain advantages over other forms of organizations because of their autonomy, financial and managerial, freedom of action and commercial accountability. Substantially a statutory public corporation is a hybrid organization combining features of a government department and a business company. However, in the field of Administrative Law, a statutory public corporation may be defined as an agency created by an Act of Legislature, operating a service on behalf of the government but as an independent legal entity with funds of its own and largely autonomous in management.[1]

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1 Dr. I.P. Massey, Administrative Law (2nd edn.), p. 371.

Unlike government department, a statutory corporation presents much difficulty as regards its status, rights of its employees, its liabilities in tort and contract and its privileges and immunities in suits.

Status of a Statutory Public Corporation

i) A statutory public corporation has a separate legal entity and, therefore, can sue and be sued in its corporate name.

ii) A statutory corporation does not enjoy the privilege to withhold documents from the courts.

iii) Without statutory immunity, the activities of a statutory corporation are liable to tax. It is considered as an 'assessee' under the Income Tax Act and a 'dealer' under the Sales Tax Act.

iv) As compared with government department, a statutory corporation has more autonomy, financial and managerial, freedom of action and commercial accountability.

v) In case of statutory corporation, its employees are not government servants, their appointments are made by the corporation.

vi) The statute may delegate rule-making power to a corporation; such rules and regulations are binding if they are not *Ultra Vires* the Constitution or the enabling Act.

vii) A statutory corporation can hold and dispose of property in its corporate name.

Classification of Public Corporations

No conventional pattern has been followed in the establishment of statutory public corporations. They have grown like mushrooms in rainy season. However, they may be classified as follows:

A. **Commercial and Financial-** Bangladesh Life Insurance Corporation is an example of this nature.

B. **Social-** Bangladesh Road Transport Authority (B.R.T.A.) is an example of this nature.

C. **Commodity-** Such as, Bangladesh Chemical Industries Corporation, Bangladesh Sugar and Food Industries Corporation.

D. **Development-** Such as, Bangladesh House Building Finance Corporation is an example of this nature.

Liabilities of Statutory Public Corporation in Tort and Contracts

Statutory Corporation can be sued for the torts committed by its servants provided the act is within the powers and the purpose of the Corporation and is such that it would be actionable if committed by a private individual. And the extent of liability of the Corporation for the torts committed by its servants will be the same as that of a private person unless circumscribed by the statute.

A statutory corporation can sue for torts committed by any person against it. It can maintain an action for libel or slander if it adversely affects its business.[2]

Statutory corporations can also incur criminal liability. Statutory corporations have been held to be liable for the offences committed by its servants who are the organs of the corporation. The liability even extends to offences involving mens rea, such as, libel, fraud and public nuisance.[3] However, since statutory

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2 South Helton Coat, Vs. North—Eastern News Assn. Ltd, (1891) 1 Q.B. 133 : (1891-94) All ER 548.

3 D.P.P. Vs. Great North England Rly, 9 QB 315.

corporation possesses only a corporate identity it cannot be punished with death or imprisonment. It naturally follows that a corporation cannot be found guilty of an offence for which the prescribed punishment is death or imprisonment.

A statutory public corporation can enter into contract and can sue or can be sued for the breach thereof. And any contract made by it beyond its powers is void and the corporation incurs no liability.

The requirements for a valid government contract as laid down in Article 145 of the Bangladesh Constitution do not apply to corporation contracts.

The requirement of two month's notice as laid down under Section 80 of the Civil Procedure Code does not apply to statutory corporations.

Control of Statutory Public Corporations

Control of statutory public corporations in Bangladesh is exercised through the Parliament, Government and the Court. Public control is also treated very effective in this count.

A. Parliamentary Control:

i) By way of passing the Statute- Parliamentary control over statutory corporation is initially exercised at the time when the Bill proposing creation of the corporation is introduced for discussion in the House. Members can propose changes in the Bill and Parliament may, if majority members desire, pass it accordingly.

ii) Through the Technique of 'Laying'- Parliamentary control over statutory corporation may also be exercised through the technique of 'Laying'. Sometimes the statute creating a corporation may prescribe that the rules, regulations, financial

statement and audit report be laid on the table of the House. This provides an opportunity for the Parliament to scrutinize the functioning of a corporation and take necessary measures. The truth is that this technique of 'Laying' is absent in Bangladesh.

iii) Through Parliamentary Committees- The real and effective parliamentary control is exercised through Parliamentary Committees, such as, Public Accounts Committee. This Committee may examine the reports and accounts of the corporation and report of the Comptroller and Auditor-General on statutory corporation and propose necessary measures which the parliament may take.

B. Government Control:

i) By way of Dissolution, Removal and Appointment- The statute creating the corporation may provide for the appointment and removal by the government of the authority managing the affairs of the corporation. Going a step further, the statute may also provide that the government shall have the power to dissolve the corporation.

ii) By way of issuing Direction- The statute may provide that the government shall have the power to issue directions to the corporations especially regarding its policy matters. These directions may be directory, mandatory, specific or general depending on the provisions of the statute.

iii) By way of controlling Finances- Sometimes the whole capital of the corporation may be provided by the government. And to control the finances of the corporation, the statute creating the corporation may further provide for audit by the Auditor-General or by an auditor appointed by the government. Thus, the government may control the finances of a statutory corporation.

iv) By way of Enquiries- The statute may empower the government to institute enquiries into the working of the corporation under certain circumstances and take necessary measures properly to control the situation.

C. Judicial Control:

A statutory corporation is subject to writ jurisdiction of the Supreme Court. It can sue and can be sued like any ordinary person. In matter of suits, a statutory corporation is not entitled to the privileges and immunities of the government department. However, any act done or any rule made by the corporation can be declared invalid by the Court if the said act or rule is *Ultra Vires* the Constitution or the enabling Act. Moreover, a statutory corporation is liable for the torts committed by its servant and is also liable for damages in case of breach of contract. Thus, the functions of statutory corporations are controlled by the judiciary.

D. Public Control:

Effective public control over statutory corporations is exercised through the following channels:

(a) Mass Media- Radio, Television, and Newspapers are the important mass media which can go a long way in making statutory corporations respond to the need and opinion of the people as the aim of the public corporations is to undertake various programmes for the benefit of the people.

(b) Consumer Organisations- Consumer organizations may provide an effective check on the planning, policies, and actions of statutory corporations. In U.S.A., on various occasions, the corporations had to bring down the prices of their commodities because consumer organizations decided not to purchase their products. Through such organizations, the consumers also ventilate their grievances and make their views known to the

corporations. Pertinent to mention here that Consumer Organisation movement in Bangladesh is not as strong as in the developed countries.

(c) Interest Representation- In order to make statutory corporations directly responsive to the consumers, it is desirable that real consumers of services and products of these corporations must have some say in the policy planning and actions of such corporations. In Britain, the Parliament by law requires that members of certain public corporations are to be nominated by local bodies or other bodies interested in the working of a particular corporation. But this system of interest representation is not active in Bangladesh.

3A(3)
EFFECTIVE REGULATION OF ADMINISTRATIVE RULE-MAKING OR DELEGATED LEGISLATION

With the growth of administrative process in the 20th century, Administrative Rule-Making or Delegated Legislation has assumed tremendous proportions and importance. Today the bulk of the law which governs people comes not from the legislature but from the chambers of the administrators. The fact is that the direct legislation of the Parliament is not complete unless it is read with the help of the rules and regulations framed thereunder; otherwise by itself it becomes misleading.[1] Statutes are generally passed in skeleton form and details are supplied by the Executive in the form of rules, regulations, bye laws, orders, etc.

Reasons for the Growth of Administrative Rule-Making or Delegated Legislation

The followings are the important reasons for the growth of delegated legislation or administrative rule-making:

i) Speed: Generally administration is in better position to allow rules to be made more quickly than they could be in the parliament. Delegated legislation often has to be made in response to emergencies and urgent problems.

ii) Technicality of the subject matter: Generally Parliament members do not usually have the technical knowledge required, whereas delegated legislation case use experts who are familiar with the relevant areas.

Dr. I.P. Massey, Administrative Law (1985), p. 79.

iii) Flexibility: The truth is that delegated legislation or administrative rule making can, in actual practice, be put into action quickly, and easily revoked if it proves problematic. But it is not equally possible in case of parliament because of cumbersome procedure.

iv) Need for local knowledge: Local bye-laws in particular can only be made effectively with awareness of the locality, which is not effectively possible by parliament.

v) Insufficient parliamentary time: Parliament does not have the time to debate every detailed rule necessary for efficient government. But can be done by administration.

The truth is that if parliament were not willing to delegate law-making power, parliament would be unable to pass the kind and quality of legislation which modern public opinion requires — the Committee on Minister's Powers has rightly observed.

Meaning of Delegated Legislation:

In Administrative Law, the term delegated legislation is generally used in two senses:

a) the exercise of legislative power by a subordinate agency delegated to it by the legislature; or

b) the subsidiary rules which are made by the subordinate agency in pursuance of the power as mentioned in (a).

But in strict sense, Administrative Law is more concerned with the first.[2]

According to Dr. I.P. Massey, the term delegated legislation refers to all law-making which takes place outside the legislature and is generally known as rules, regulation, bye-laws, etc.[3]

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2 Jain &. Jain, Principles of Administrative Law (1986), p. 26.

3 Dr. I.P. Massey, Administrative Law (1985), p. 79.

The term delegated legislation has been defined by Salmond as "that which proceeds from any authority other than sovereign power and is, therefore, dependent for its continued existence and validity on some superior or supreme authority". Such authority may be the Central Government or State Government depending upon whether the statute is a Central or State law.

As a matter of fact delegated legislation is that which is made outside the legislature only under the authority of the law of the legislature and is generally known as rules, regulation, bye-laws, etc.

Criticisms or Disadvantages of Delegated Legislation or Administrative Rule-Making:

i) The concept of delegated legislation is contrary to the theory of separation of powers. According to the theory of separation of powers, the executive should not have legislative power.

ii) Extensive delegation of legislative powers sometimes creates legal difficulties. In delegated legislation, administrative agency creates as well as applies laws and thereby exercises discretion sometimes in the sense of arbitrariness, which is contrary to the concept of 'Rule of Law'.

iii) In delegated legislation, there is, in most of the cases, no scope for ante-natal publicity to allow people's criticism and opinion in the matter.

iv) Parliamentary control over delegated legislation is insufficient as Parliament cannot afford enough time to examine the laws made by the subordinate agencies.

v) Judicial control over delegated legislation is not complete. Exclusion of judicial review by using formula that the rules made under the Act would have effect as if they were 'enacted or included in the Act itself are made use of by the

legislative draftsmen. In India, the Courts rejected such formula purporting to exclude judicial review.[4]

Restrictions on Delegated Legislation:

i) The legislature must retain in its own hands the essential legislative functions. In other words Parliament can neither create a parallel legislature nor destroy its legislative power. It can delegate only subsidiary and ancillary powers. The essential legislative powers are repeal of parent law, modification of enabling law, power of exemption etc.[5]

ii) A delegate cannot further delegate unless so provided in the enabling Act (Pritam Bus Ltd. Vs State of Punjab, AIR 1957 Punj. 145)

iii) Retrospective operation of delegated legislation is not acceptable unless it is so provided in the enabling Act either expressly or by necessary implication.[6]

iv) No act or activity should be made an offence and punishable by a rule, regulation or order unless such expressed authority is given by the statute itself. The Legislature must also lay down definite limits of such authority (Kharak Singh Vs. State of U.P., AIR 1963 SC 1295).

v) Several statutes provide that, regarding matters covered under the statute, the jurisdiction of the courts is excluded. Such exclusion may be valid. But the power to exclude the jurisdiction of a court can never be delegated by the legislature to any other authority. Such delegation will be considered excessive (State of Kerala Vs. Abdullah and Co., AIR 1965 SC 1585).

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4 State of Kerala Vs. Abdulla and Co., AIR 1965 S.C. 1585.

5 Rajnarain Singh Vs. Chairman, Patna Administration Committee, AIR 1954 SC 569.

6 B. S. Yadav Vs State of Haryana, AIR 1981 SC 561.

vi) Delegated legislation must be intra vires the enabling Act or the Constitution and the enabling Act must also be intra vires the Constitution (Doctrine of *Ultra Vires*).

vi) The power to repeal or abrogate an existing law is legislative power and it cannot be delegated [(Gwalior Rayon Silk Mfg. Co. Vs. Asst. Commissioner of Sales Tax (1974) 4 SCC 1998)].

Henry VIII Clause or 'Power to Remove Difficulties' Clause

Sometimes the enabling Act through its clause confers powers on the executive to modify or repeal any provision of enabling Act to remove difficulties so as to meet the needs of the society. In Administrative Law such clause in the enabling Act is commonly known as 'power to remove difficulties' clause or Henry VIII Clause.[7] Section 310 of the Government of India Act, 1935, confers powers on His Majesty in Council to remove such difficulties. In India, there are various enactments which confer on the executive 'power to remove difficulties'. For examples, section 14 of the Central Regulation, 1962; section 128 of the States Reorganisation Act, 1956.

Conditional Legislation

There are practical difficulties in the enforcement of laws contemporaneously with their enactment as also to their uniform extension to different areas. The legislature cannot foresee these difficulties at the time of making the laws. It, therefore, becomes necessary to leave to the judgment of an outside agency the question as to when the law should be brought into force and to which area it should be extended from time to time. Therefore, in some cases, the coming into force of an enactment is made dependent on the determination by the outside authority. The parent Act provides that the law "shall come into force on such

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7 Henry VIII was the monarch of England from 1509 to 1547. In England, he is known as the "impersonation of executive autocracy".

date as the Government may by notification in Official Gazette appoint."[8]

In conditional legislation the law is complete in itself and certain conditions are laid down as to how and when law would be applied by the delegate. In other words, the delegate has only to be satisfied if what is going to do is in conformity with the conditions laid down in the law. The delegate cannot supply the details and he has to work within the framework of law.[9]

Executive Legislation

Sometimes administration is empowered to make rule or regulation directly by the Constitution. Generally such law made by the administration is called executive legislation. Articles 107, 79 and 118 of the Bangladesh Constitution are the examples which directly empower the administration to make rule. Generally executive legislation is that law which takes place outside the legislature under the authority of the law of the Constitution and is generally called law of the order, rule, etc.

Sub-delegated Legislation

In certain cases, the parent Act[10] authorises the subordinate law maker not only to make law but also to delegate law-making power to yet another government agency or other body and this is called Sub-delegated Legislation. In other words, when a statute confers some legislative powers on an executive authority and the latter further delegates those powers to another subordinate authority or agency then the law made by the further delegate i.e. another subordinate agency is called Sub-Delegated Legislation.

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8 Garner, Administrative Law (3rd edn.), pp. 55-59.

9 Dr. K.C. Joshi, Administrative Law (3rd edn,), p. 42.

10 The Statute which authorises delegated or subordinate legislation is known as the Parent Act or Enabling Act.

Example: Section 3 of the Essential Commodities Act, 1955 (India) empowers the Central Government to make rules. Further, Section 5 of the Act empowers the Central Government to delegate powers to its officers, the State Governments and their officers. Here the rule to be made by the State Governments and their officers is to be called Sub-delegated Legislation.

Various Control Mechanisms of Administrative Rule-Making or Delegated Legislation

Indeed, if law-making is taken over by the government it may make its administration by barrel of the secretariat pen. Therefore, if the technique of administrative rule-making is to serve its laudable task, the norms of the jurisprudence of delegation of legislative power must be dutifully observed. These norms include a clear statement of policy, procedural safeguards and control mechanisms.[11]

In Bangladesh, control mechanisms of delegated legislation comprise three components as under:

A. Parliamentary Control:

Parliamentary control over delegated legislation may be exercised in the following ways:

Direct General Control- Parliamentary control over delegated legislations is implied as they owe their origin and continued existence to an Act passed by the Parliament. However, direct general control over delegated legislation is exercised when the bill containing delegation of legislative power is introduced in the House for discussion, vote on grant, etc. Members can discuss and propose changes in the bill and Parliament can, if majority members desire, pass it accordingly.

Direct Special Control- Direct special control of the Parliament over delegated legislation or administrative rule-making is

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11 Dr. I.P. Massey, Administrative Law (1985), p. 82.

exercised through the technique of 'laying'. According to this technique, the rules made by the administrative agency are placed on the table of the House. Sometimes, the enabling Act, containing delegation of legislative powers, provides that the rules made by the administrative agency be laid on the table of the House. This provides an opportunity for the Parliament to examine them and do the needful accordingly. But this mechanism is absent in Bangladesh.

Indirect Control- This control mechanism over delegated legislation is exercised through Parliamentary Committee.[12] Generally Parliamentary Committee on subordinate legislation performs this assignment. This Committee examines the rules and recommends necessary measures that Parliament may take.

B. Procedural Control:

Procedural control over administrative rule-making or delegated legislation comprises the following elements:

Drafting— Procedural control over delegated legislation can be or is maintained by way of drafting the delegated legislation by expert draftsmen.

Ante-natal Publicity- Sometimes the statute containing delegation of legislative powers prescribes that the rules be published in draft form so as to give the people an opportunity to have their criticism and opinion in the matter. For example, Section 23 of the General Clauses Act, 1897, may be referred to which requires ante-natal publicity.

Consultation- Sometimes, the enabling Act, containing delegation of legislative powers, prescribes for consultation with the interested person or persons. For example, Article 79 (3) of the Bangladesh Constitution requires consultation with the Speaker while making rules by the President in relation to parliament secretariat.

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12 Article 76, Bangladesh Constitution.

Post-natal Publicity- Post-natal publicity is a necessary element in the rule-making process because the dictum that ignorance of law is no excuse is based on the justification that laws are accessible to the public. Generally, rules in Bangladesh are published in the Official Gazette.

C. Judicial Control:

Judicial review of delegated legislation is an effective control mechanism which the courts exercise. The court can declare any law made by the subordinate agency invalid simply on the following grounds:

1) That the delegated legislation is *Ultra Vires* the Constitution.

2) That the delegated legislation is *Ultra Vires* the enabling Act.

3) That the enabling Act is *Ultra Vires* the Constitution.

Again, the challenge to the constitutionality of any delegated legislation[13] on the ground that it is *Ultra Vires* the enabling Act can be sustained on the following ground:

i) That it is in excess of the power conferred by the enabling Act.

ii) That it is in conflict with the enabling Act.

iii) That it is in conflict with the terms of some other statutes.

iv) That it is malafide (1981 BLD AD 107).

v) That it is unreasonable ((AIR 1981 SC 561).

vi) That it is in conflict with the procedure prescribed by the enabling Act.

Pertinent to mention here that the term *Ultra Vires* is a Latin term. *Ultra* means excess, beyond or outside. And Vires means

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13 Generally the provisions contained in Sections 20, 21, 22, 23 and 24 of the General Clauses, Act, 1897, are applicable for interpreting delegated legislation.

competence or power. Therefore, the term '*Ultra Vires*' denotes beyond the competence of or outside the power of. Here the notion of unlimited power has no place. Excess of power or abuse of power attracts the doctrine of *Ultra Vires* in court actions.

In Bangladesh, the High Court Division of the Supreme Court, under Article 102 of the Constitution of Bangladesh, can exercise/apply the doctrine of *Ultra Vires*. Under Article 102 of the Constitution of Bangladesh, the supreme judiciary has been conferred with the power of judicial review of legislative acts. In this count, decisions of some important cases held by the Appellate Division of the Supreme Court of Bangladesh are referred to hereunder:

Articles 27 and 29 and Sec. 9 (2) of the Public Servants (Retirement) Act (XII of 1974) : The Act without any guideline gives unrestricted discretion to the authority— In the absence of such guideline either in the Act XII of 1974 or the Rules framed thereunder, Section 9 (2) of the Public Servants (Retirement) Act suffers from unconstitutionality— Consequently notification based on Section 9 (2) of the Act issued in discriminatory manner injuring a Government servant's right to public employment stand vitiated by malice in law being in violation of the equality provision of the Constitution relating to fundamental rights.[14]

In Anwar Hossain Chowdhury Vs. Bangladesh[15] (Constitution 8th Amendment Case), the Appellate Division of the Supreme Court of Bangladesh declared the 8th Amendment to the Constitution specially relating to the High Court Division of the Supreme Court (amended Article 100— seat of the Supreme Court, etc.) and rule making power of the Supreme Court (amended Article 107) *Ultra Vires* the Constitution of the Republic.

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14 Dr. Nurul Islam Vs. Bangladesh, 1981 BLD (AD) 140 (Appeal allowed).

15 1989 BLD (SPL) 1.

3A(4)

EFFECTIVE CONTROL OF ADMINISTRATIVE ACTION OR RULE-APPLICATION ACTION

Administrative action, according to Robson, consists of those activities which are directed towards the regulation and supervision of public affairs and the initiation and maintenance of the public services.[1] The Donoughmore Committee has treated 'purely administrative' action as distinct from 'judicial' and 'quasi-judicial' actions. Though, at the present time, the distinction between quasi-judicial and administrative action has become blurred, yet it does not mean that there is no distinction between the two. If two persons are wearing a similar coat, it does not mean that there is no difference between them. The difference between quasi-judicial and administrative action may not be of much practical consequence today but it may still be relevant in determining the measure of natural justice applicable in a given situation.[2]

In A.K. Kraipak Vs. Union of India,[3] the court was of the view that in order to determine whether the action of the administrative authority is quasi-judicial or administrative, one has to see the nature of power conferred, to whom power is given, the framework within which power is conferred and the consequences. In G.G. Patel Vs. Gulam Abbas,[4] the court came to the conclusion that since there is nothing in the Act to show that the Collector has to act judicially or in conformity with the recognised judicial norms and as there is also nothing requiring the Collector to determine questions affecting the right of any

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1 W.A. Robson, Justice and Administrative Law, p. 16 (3rd edn.).

2 Dr. I.P. Massey, Administrative Law, p. 55 (3rd edn.).

3 (1969) 2 SCC 262.

4 (1977) 3 SCC 179.

party, the function of the Collector in giving or withholding permission of transfer of land to a non-agriculturist under Section 63 (1) of Bombay Tenancy and Agricultural Lands Act, 1947, is administrative. The Delhi High Court applying the same para-meters held that the function of the Company Law Board granting authority to shareholders to file a petition in the High Court is an administrative and not a quasi-judicial function.[5]

Therefore, administrative action is the residuary action which is neither legislative nor judicial. It is concerned with the treatment of a particular situation and is devoid of generality. It has no procedural obligations of collecting evidence and weighing argument. It is based on subjective satisfaction where decision is based on policy and expediency. It does not decide a right though it may affect a right. However, it does not mean that the principles of natural justice can be ignored completely when the authority is exercising 'administrative powers'.[6] Unless the statute provides otherwise a minimum of the principles of natural justice must always be observed depending on the fact and situation of each case.

No exhaustive list of such actions may be drawn; however, a few may be noted for the sake of clarity:

(a) Issuing directions to subordinate officers not having the force of law.

(b) Making a reference to a tribunal for adjudication under the Industrial Disputes Act.

(c) Internment, externment and deportation.

(d) Fact-finding action.

(e) Requisition, acquisition and allotment.

(f) Entering names in the surveillance register of the police.

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5 Krishna Tiles & Potteries (P) Ltd. Vs. Company Law Board, ILR (1979) 1 Delhi 435, Per V.S. Deshponde, CJ.

6 Dr. I.P. Massey, Administrative Law, p. 56 (2nd edn.).

Administrative action may be statutory having the force of law, or non-statutory, devoid of legal force. The bulk of the administrative action is statutory because a statute or the Constitution gives it a legal force but in some cases it may be non-statutory, such as issuing directions to subordinates not having the force of law, but its violation may be visited with disciplinary action. Though by and large administrative action is discretionary and is based on subjective satisfaction, however, the administrative authority must act fairly, impartially and reasonably.[7]

According to H.W.R. Wade, there are some faults in the administrative actions which render them *ultra vires*. Such faults might arise either on account of lack of power or improper exercise of power. Such improper exercise of power may also be due to either wrong manner in which it is exercised or on account of the state of mind with which it is exercised.[8]

However, the grounds on which an administrative action can be challenged in a court of law are, among others, as follows:

(i) lack of power;[9]

(ii) mala fides;[10]

(iii) colourable exercise of power;

(iv) the unreasonable exercise of power;

(v) non-application of mind;

(vi) Error of law; and

(vii) Procedural Impropriety.

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7 Dr. I.P. Massey, Administrative Law, p. 57 (2nd edn.).

8 Kautilya, Administrative Law, p. 37 (9th edn.).

9 Govt. of Bangladesh Vs. Dr. Nilima Ibrahim, 1981, B.L.D. (AD) 303.

10 Kh. Ehteshamuddin Ahmed & Iqbal Vs. Bangladesh & others, (1981) BLD(AD)107.

In brief, administrative action is not immune from judicial reviewability. And, in administrative law, the mechanism of judicial review of administrative action in Bangladesh falls into two distinct groups:

1. Public law review which is exercised through writs under Article 102 of the Constitution.

2. Private law review which is exercised through suit for damages, injunction and declaratory actions.

The issue of writ under Article 102 of the Constitution of Bangladesh has been discussed below with reference to its development in the subcontinent:

The term 'writ' means the declared rule or order of the Court or other appropriate authority. In other words 'writ' means a written document by which one is summoned or required to do or refrain from doing something. Literally a writ means 'A written order. As defined by Blackstone[11]: "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 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".

Charter defines writ as: "It was the King's order to his liege, written or parchment and sealed with the Royal seal, and disobedience of the writ was a contempt of the royal authority and punishable as such."[12] In fine, writ is a judicial process, by which any one is summoned as an offender; a legal instrument to enforce obedience to the orders and sentences of the courts. [Wharton's Law Lexicon, 1976 Reprint Edn. p. 1078].

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11 Blackstone's Commentaries (111) C. 18.

12 Maitland, History of English Courts, p. 25.

Historically writ was originated and developed in the UK under British legal system, where 5 different writs namely, Habeas Corpus, Mandamus, Prohibition, Certiorari and Quo Warranto were in existence. Initially all writs were called prerogative writs, since the King issued writs through the court of Kings' Bench or the Court of Chancery. Only the King or Queen as the fountain of justice could issue writs and they were conceived as being intimately connected with the rights of the crown. In Britain now there is only one independent writ and it is Habeas Corpus, since 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.

In British India a Supreme Court was first established at Kolkata in 1774 by the Charter of 1774 in pursuance of the Regulating Act, 1773. This court was first empowered to issue prerogative writs. The Indian Constitution adopted in 1949 gave both the Supreme Court and the High Courts powers 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 Constitution of Pakistan both the Supreme Court and the High Courts were given power to issue writs and specific names of all writs were mentioned in both the Articles of 22 (for the Supreme Court) and 170 (for the High Courts). But it was 1962 Constitution of Pakistan where for the first time a change was introduced in writ matters. 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 the wording of this Article 98.

Following the instance of the 1962 Constitution of Pakistan, the Constitution makers of our country (Bangladesh) also did not mention the specific names of various writs in Article 102 of the Constitution; rather the contents of each of the writs have been kept in self-contained provisions.

Indeed, under Article 102 of the Constitution, the High Court Division of the Supreme Court can issue directions, orders, in the nature of the following writs without using their technical names, and the jurisdiction can be exercised only when no other adequate remedy is provided by law. The power to issue the writs is given, not to individual Judges, but to the Court, so that successive applications to different Judges of the same court would not be permitted. If a petition for a writ were dismissed by a bench of the High Court Division, there might be an appeal to the Appellate Division of the Supreme Court.

Writ of Habeas Corpus

Habeas Corpus is a judicial order by which a person who is illegally confined by any public or private agency may secure his release.

Writ of Quo Warranto

A writ of Quo Warranto can be filed by any person to challenge the appointment of a person to a public office, whether or not he has a personal interest in it.

Writ of Mandamus

Mandamus is a judicial remedy issued in the form of an order to any constitutional, statutory or non-statutory agency to do that which is required by law to do.

Writ of Certiorari

Writ of Certiorari can be issued only when the action is judicial or quasi-judicial is no more valid. Certiorari can be issued to quash actions which are administrative in nature.

Writ of Prohibition

Prohibition is a judicial order issued to any constitutional, statutory or non-statutory agency to prevent these agencies from continuing their proceedings in excess of their jurisdiction or in contravention of the law of the land.

Provisions of Article 102 of the Constitution

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

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

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

(i) directing a person performing any functions in connection with the affairs of the Republic or of a local authority to refrain from doing that which he is not permitted by law to do[13] or to do that which he is required by law to do[14]; or

(ii) declaring that any act done or proceeding taken by a person performing functions in connection with the affairs of the Republic or of a local authority has been

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13 Writ of Prohibition.

14 Writ of Mandamus.

done or taken without lawful authority and is of no legal effect;[15] or

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

(i) directing that a person in custody be brought before it so that it may satisfy itself that he is not being held in custody without lawful authority or in an unlawful manner;[16] or

(ii) requiring a person holding or purporting to hold a public office to show under what authority he claims to hold that office.[17]

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

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

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

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

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15 Writ of Certiorari.

16 Writ of Habeas Corpus.

17 Writ of Quo Warranto.

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

From the provisions of Article 102, it is clear that as in other Constitutions of this Subcontinent, the High Court Division of the Supreme Court of Bangladesh has been provided along with other extraordinary original jurisdiction for the enforcement of fundamental rights with powers to issue writs in the form of Mandamus, Prohibition, Certiorari, Quo Warranto and Habeas Corpus with one major exception that the power will not be applied to matters to which Article 47 applies. Moreover, under Article 102(1) and 102(2)(a), no interim order be given/issued by the High Court Division where said order may be harmful to public interest or any development programme or any development work. Subject to the restrictions, the High Court Division has been provided with wide power under Article 102 in as much as besides the enforcement of fundamental rights, the court can issue writ of Mandamus and Certiorari against person performing any function in connection with the affairs of the Republic or of a local authority which includes a statutory public authority or any court or tribunal.

Thus, under the writ jurisdiction the High Court Division is vested with powers to interfere not only for the enforcement of fundamental rights but also in matters of legislative and executive excesses and judicial errors. With regard to judicial errors of Courts and Tribunals subordinate to it, the High Court Division's jurisdiction to issue writs is excluded in two exceptional cases:

(i) with regard to court or tribunal established under a law relating to the defence services of Bangladesh or any disciplined force like Police, Ansar, etc; and

(ii) administrative tribunals established under Article 117 of the Constitution.

Apart from these areas, the writ jurisdiction of the High Court Division of the Bangladesh Supreme Court is considered to be comprehensive in the area of law and administration of justice, which is conducive for independence of judiciary in Bangladesh. Even in cases of aforesaid limitations, the supreme judiciary can exercise/apply the doctrine of *Ultra Vires*. In actual practice, the doctrine of *Ultra Vires* is specially designed to check arbitrary exercise of powers by any authority. For example-

CASE REFERENCES:

The Constitution of Bangladesh, 1972

Arts. 45 & 102 (5): High Court Division has no jurisdiction to interfere with the decision and order of Court Martial convened under the Army Act, 1952, except on limited grounds of coram non judice and mala fide.[18]

Art. 102 (5): A member of any disciplined force, if aggrieved by an order of a court or tribunal established under law relating to the disciplined force, is debarred from invoking the writ jurisdiction subject to the rule that the order is coram non judice or mala fide.[19]

As regards mala fide, in Mansurul Aziz & another Vs. Secretary M/O L.A. & L.R. & others (Civil Appeal No. 62 of 1980), the Appellate Division of the Supreme Court of Bangladesh held that "Arbitrary exercise of power is itself malafide that is malice in law."

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[18] Jamil Huq & others Vs. Bangladesh & others, 2 BCR 1982 AD 65 (Petition dismissed).

[19] Bangladesh & others Vs. A. K. M. Zahangir Hossain, 2 BCR 1982 AD 65 (Appeal disposed of).

In Mostaque Ahmed Vs. Bangladesh, 34 DLR (AD) 222, the conviction of Mostaque Ahmed, an ex-President of another Martial Law regime, by a Martial Law Court, which was also reviewed by the Chief Martial Law Administrator, was set aside on ground of mala fide.

Now, in view of previous discussion, it may, however, be concluded that while exercising/applying the doctrine of *Ultra Vires*, our Judiciary enjoys proper and sufficient independence. And accordingly, independence of Judiciary in Bangladesh may be said satisfactory.

Finally, it is, however, pertinent to point out here that under Article 102(2)(a), only an aggrieved person can apply to the High Court Division of the Supreme Court of Bangladesh for writs of Prohibition, Mandamus and Certiorari and no other person interested in any such matter can move a writ petition for public benefit. In this context, it is contended by critics that suitable provisions should be made in the Constitution so as to enable any person to move the Supreme Court's High Court Division for such writs on the ground of pro bono publico for the public good in order to safeguard public interest and thereby to meet the ends of justice.

Limits of writ jurisdiction based on case laws:

Laches or unreasonable delay:- There is maxim based on equitable principle that, 'delay defeats equity'. Inordinate and unreasonable delay in filing a writ petition may bar the remedy under Article 102 of the Constitution.[20] However, if the delay is unintentional and properly explained, then at times the writ jurisdiction may be exercised on the facts and circumstances of each case.

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[20] Sarwarjan Bhuiyan and others Vs. Bangladesh, 44 DLR 144: Delwar Hossain (Md) Vs. Bangladesh, 54 DLR 494.

Disputed question of facts:- Disputed question of title cannot be the subject matter of writ. Writ jurisdiction is not the proper forum for seeking remedy in disputed question of fact.[21]

Economic and Political policies of the Government:- The Court cannot issue prerogative writ directing the Government to implement its policies. Policies are directory, it cannot be enforced through Court.[22]

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

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

The principle of resjudicata: The petitioner has no right to move the Supreme Court under 102 of the Constitution more than once on the same facts. In the absence of new circumstances, after dismissal of a writ petition, the same matter cannot be reagitated by a fresh petition.

However, as regards private law review it is essential to mention here that private law review refers to the power of the ordinary courts of the land, exercised in accordance with the ordinary law of the land, to control administrative action. The means of private law, being ordinary remedies, are free from the

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21 Tasmina Chowdhury Vs. Deputy Commissioner, 49 DLR 29.

22 Younus Mia Vs. Ministry of Public Works, 44 DLR 488; Dr. Md. Monirul Huq Vs. Bangladesh, 45 DLR (AD) 39.

technicalities of the writs as regards locus standi, nature of administrative action and the nature of administrative authority. Private law remedies are also broad based when compared with writs in so far as they allow production of evidence and examination of witnesses as a fundamental requirement for decision. Private law review is cheaper and easily available. However, a short description of private law review which is exercised through Injunction, Declaration and Suit for Damages is given hereunder:

A. Injunction— Injunction may be defined as an ordinary judicial process that operates in personam by which any person or authority is ordered to do or to refrain from doing a particular act which such person or authority is obliged to do or to refrain from doing under any law. The remedy is coercive but not rigid and can be tailored to suit the circumstances of each individual case. It can be negative or affirmative, absolute or conditional, temporary or perpetual or it can operate immediately or at a future date. The court in its proceedings for injunction can review all actions: judicial, quasi-judicial, administrative, ministerial or discretionary. Its equitable nature leaves discretion with the court to prevent its abuse. It can operate against any authority or person, constitutional, statutory, non-statutory or private.[23] The jurisdiction of our courts to issue injunctions is statutory. Sections 52 to 57 of the Specific Relief Act, 1877, govern the grant of injunctive relief.

Actually, Injunction is an effective method of judicial control of administrative action where the authority has acted without jurisdiction or has abused its jurisdiction or has violated the principles of natural justice.

B. Declaration- Declaratory action may be defined as a judicial remedy which conclusively determines the rights and

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23 Dr. I.P. Massey, Administrative Law, p. 260 (2nd edn.).

obligations of public and private persons and authorities without the addition of any coercive or directory decree.

In the words of Jennings, declaratory action is a symbol of the 20th century conception of law, because it is highly democratic. In an age where more and more an individual action is liable to bring him in conflict with the administration, declaratory action satisfies the need of a simple but all-embracing method of redress against the administration. Sometimes coercive relief is unnecessary against public authorities where merely a declaration is enough to keep the authority within the bounds of legality.

The history of declaratory action in Bangladesh begins with the Act of 1854 by which the provisions of the Chancery Procedure Act, 1852, relating to the grant of declaratory relief were made applicable to the Supreme Courts in India at the Presidency towns. At that initial stage, the courts declared the rights of the parties, as introductory to directory relief which they ultimately granted. In 1859, the same provisions found place in Section 19 of the Civil Procedure Code, 1959. In 1877 the declaratory relief was transferred to Section 42 of the Specific Relief Act.

C. Suit for Damages- Whenever any person has been wronged by the action of an administrative authority, he can file a suit for damages against such authority. Such suit is filed in the civil court of first instance and its procedure is regulated by the Civil Procedure Code. The requirement of two months' notice is mandatory under Section 80 of the amended Code before filing the suit, unless it is waived by the court in special circumstances.