3A(5)

EFFECTIVE REGULATION OF ADMINISTRATIVE DISCRETION

In each society, a person is either a beneficiary or a victim of governmental power. In each society, there exists conflict between power and justice. Wherever there is power, there must be discretion. No power can be effectively exercised without discretion. If there is no discretion, there is no power.

Generally discretion means choosing from amongst the various available alternatives without reference to any pre-determined criterion no matter how fanciful that choice may be. A person writing his will has such discretion to dispose of his property in any manner, no matter how arbitrary or fanciful it may be. But the term discretion when qualified by the word 'administrative' has somewhat different overtones. 'Discretion' in this sense means choosing from amongst the various available alternatives but with reference to the rules of reasons and justice and not according to personal whims. Such exercise is not to be arbitrary, vague and fanciful, but legal and regular.[1] Discretion is a science or understanding to discern between falsity and truth, between right and wrong, and not to do according to will and private affection.[2]

With the increase of the powers of the State for various reasons in modern times the administration has acquired large powers and it is vested with vast amount of discretion; where it has been endowed with legislative powers in the form of delegated legislation, there could be certain judicial and parliamentary control. When it has been endowed with judicial and quasi-

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1 Sharp Vs. Wakefield, 1891 AC 173.

2 W.A. Robson, Justice and Administrative Law, 400 f. n. 3 (3rd edn.), Rook's case (1598) 5 co. Rep. 99 b.

judicial, there can be some control under Article 102 of the Constitution. But the main difficulty is to regulate the power and the discretion of the administration when such power is neither legislative nor quasi-judicial. In fact, uncontrolled discretion is a danger. It easily turns into arbitrariness. Arbitrariness consists in the attitude and action which say, in effect, "I have this and that power. I exercise it in this or that manner because I so wish. The only good reason why I exercise my power this or that way is that I have the power and I wish it to exercise in this or that manner." The will of the power-wielder becomes the sole justification for the exercise of power. This is the essence of arbitrariness.[3]

Dr. A.T. Markose has defined administrative discretion as a statutory power conferred on a public authority to make a choice, out of available alternatives, on considerations which are either not feasible or not possible to be declared beforehand, the element governing a non-personal exercise of that choice being statutory purpose.[4]

Administrative discretion is necessary and desirable in the interest of efficiency and justice in the modern administrative State. It is not equated with arbitrariness. It is not antithesis of rule of law. But administrative discretion is never unlimited.[5] Discretion is generally derived from a statute. In such a case, the judicial review of such discretion can be on the ground that the discretion has been exercised beyond the scope of the Act. Lord Denning, Master of Rolls in Breen Vs. Amalgamated Engineering Union[6] has said:

The Discretion of a statutory body is never unfettered. It is a discretion which is to be exercised according to law. That means

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3 Vide 'Introduction' by Upendra Baxi, page ix of Massey's Administrative Law (1985).

4 Dr. K. C. Joshi, Administrative Law (3rd edn.) p. 114.

5 K.C. Davis, Discretionary Justice : A Preliminary Inquiry (1969) is a detailed study on the subject.

6 (1971) 2 Q.B. 175, 190.

at least this: the statutory body must be guided by relevant considerations and not by irrelevant. If its decision is influenced by extraneous considerations which it ought not to have taken into account, then the decision cannot stand.

There is nothing like unfettered discretion, immune from judicial review ability.[7] Statutory finality given to the subjective satisfaction of the executive cannot, likewise, oust the right of judicial review. The executive should not act arbitrarily or capriciously. In view of modern judicial trends the myth of executive discretion is no longer there. The question is not to eliminate discretion, but the question is how far it is possible to reduce the discretionary element without destroying the effectiveness of a statute. Meaningful statutory standard, realistic procedural requirement and discriminating techniques of judicial review are among the tools to control the discretionary powers.[8]

In our country, courts have developed a few effective parameters for the proper exercise of discretion. And judicial control mechanism of administrative discretion is exercised at two stages as under:

(1) at the stage of delegation of discretion;

(2) at the stage of exercise of discretion.

Control at the Stage of delegation of discretion

The court exercises control over delegation of discretionary powers to the administration by adjudicating upon the constitutionality of the law under which such powers are delegated. If the law confers discretionary power on any administrative authority it must be backed by policy and specific guidelines, otherwise it may be declared *ultra vires*.

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7 Khudi Ram Vs. State of West Bengal, AIR, 1975, SC 550, 558 (1975).

8 H.W. Jones, The Rule of Law and the Welfare State, 58 Columbia Law Rev. 143-152 (1958).

Notable Instance:

Administrative discretion and Articles 27 and 29 of the Bangladesh Constitution and Sec. 9(2) of the Public Servants (Retirement) Act (XII of 1974), Dr. Nurul Islam Vs. Bangladesh[9] : In the case, the Appellate Division of the Bangladesh Supreme Court held that 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 hit by Articles 27 and 29 of the Constitution relating to fundamental rights.

Control at the stage of the exercise of discretion

In Bangladesh, unlike the U.S.A., there is no Administrative Procedure Act providing for judicial review on the exercise of administrative discretion. Therefore, the power of judicial review comes from the constitutional configuration of courts. However, our courts have developed some formulations to control the exercise of administrative discretion. For example:

That the administrative authority has not exercised its discretion properly:- This is an all embracing formulation developed by the courts in Bangladesh to control exercise of discretion by the administrative authority. Improper exercise of discretion includes everything which English courts[10], indeed, include in 'unreasonable' exercise of discretion. Further, improper exercise of discretion includes such things as 'taking irrelevant

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9 1981 BLD(AD) 140.

10 In England, where Parliament is supreme and can confer any amount of discretion on the administrative authority, the courts have always held that the concept of 'unfettered discretion' is a constitutional blasphemy.

considerations into account', 'acting for improper purpose', 'acting in bad faith', or 'acting unreasonably'.

Notable Instance:

Md. Nazrul Islam Chowdhury Vs. Abdul Hamid Master[11] : In the case, the Appellate Division of the Bangladesh Supreme Court held that ordinarily an order passed in discretion is hardly interfered with. But circumstances of the case must be taken into consideration, and discretion shall not be exercised arbitrarily. It must be exercised on sound judicial principles.

Habibullah Khan Vs. Shah Azharuddin Ahmed & others[12] : Retirement Order— validity— no instance of misconduct on the part of the respondent prior to passing of the impugned order of retirement— the Government's justification that the action was taken with a view to enforce strict discipline in the office— such justification for taking exemplary punishment only on finding the Government servant's absence for a short period is undoubtedly arbitrary— Law does not empower the Government to pass such arbitrary order of retirement.

From the above analysis it becomes clear that though some discretion is necessary to keep the giant wheels of administration moving in this age of an intensive form of government, if the power is misused the arms of the court are long enough to reach it.

In judicial sphere, it has been firmly established that the discretionary powers given to the governmental or quasi-governmental authorities must be hedged by policy, standards, procedural safeguards or guidelines, failing of which the exercise of discretion and its delegation may be quashed by the

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11 1983 BLD(AD) 136.

12 1983BLD(AD) 143.

courts. This principle has been reiterated in many cases.[13] The courts have also insisted that before the exercise of discretion, the administrative authority must also frame rules for the proper exercise of the discretion. Courts have emphasized that even the power of the President or the Governor to grant pardon and to suspend, remit or commute sentences or power of the Chief Minister to allot cement, plots or houses from discretionary quota or to make nominations to medical or engineering colleges must conform to this norm. Recently the Himachal Pradesh High Court struck down the nomination of three students to the State Medical College made by the Chief Minister out of his discretionary quota for 1982-83. The main thrust of attack in a bunch of petitions challenging these nominations was that no guidelines have been prescribed for the exercise of discretion and hence the power is uncanalised and liable to be abused and may be subject to political pulls and pressures. Quashing these nominations, the court emphasized that while the college prospectus leaves nominations to the discretion of the Chief Minister, it has not provided any clear policy or guidelines with reference to which the Chief Minister was to exercise his discretion.[14] Thus within the area of administrative discretion the courts have tried to fly high the flag of Rule of Law which aims at the progressive diminution of arbitrariness in the exercise of public power.

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13 R. R. Verma Vs. Union of India, (1980) 3 SCC 402: AIR 1980 SC 1461; Ramakanyadevi Vs. State, AIR 1980 Knt 182; Subash Chandra Vs. State of U.P., (1980) 2 SCC 324: AIR 1980 SC 800; Chanderbhan Vs. S. Kumar, AIR 1980 Bom 48; State of Punjab Vs. Gurdial Singh, (1980) 2 SCC 471: AIR 1980 SC 319; Accountant General Vs. S. Doraiswamy, (1981) 4 SCC 93: AIR 1981 SC 783.

14 Indian Express, November 20, 1982. The bench consisted of Chief Justice Vs. D. Misra and Justice H. S. Thakur. Two of the three nominees had appeared for the Pre-Medical Test of the H. P. University but failed to qualify for admission. Supreme Court not only upheld the decision of the High Court but also directed on appeal the Union Government and State Government that they must refrain from making such nominations without proper guidelines. Indian Express, February 10, 1983.

3A(6)

LIABILITIES OF THE GOVERNMENT IN TORT AND CONTRACT

The extent of liability of the government in tort is a complex issue. In England, the Crown Proceedings Act, 1947, makes the crown liable to a large extent for the torts committed by its servants. In U.S.A., the Federal Tort Claims Act, 1946 defines the tortuous liability of the government. According to this Act, the liability of the US government for torts committed by its servants is more restricted than the government in England. In Bangladesh, the root of the liability of the government in tort exists in Article 146 of the Bangladesh Constitution. It lays down that the government of Bangladesh may sue and be sued in court of law in the same way as ordinary persons sue and are sued although there may in certain cases be limitations and reservations or exceptions specially provided by the legislature. But the extent of liability of the government in tort is governed by the principles of public law inherited from British common law.

In our legal sphere, any government can be sued for the torts committed by its servants provided the act is within the powers and purposes of the Government and is such that it would be actionable if committed by a private individual. And the extent of liability of this government for the torts committed by its servants will be the same as that of a private person unless circumscribed by the statute.

Recent judicial trend is, undoubtedly, in favour of holding the government liable in respect of tortuous acts committed by its servants. In cases of wrongful arrest and detention, keeping the under trial prisoners in jail for long periods, etc. the courts have awarded compensation to the victims or to the heirs and legal representatives of the deceased.[1]

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[1] For decided cases, see C. K. Thakker: Administrative Law, 1996, pp. 601-604.

In legal sphere, any government can enter into contract and can sue or can be sued for the breach thereof. And any contract made beyond its powers is void and the Government incurs no liability.

The requirements for a valid government contract have been laid down in Article 145 of the Constitution of Bangladesh which provides as follows:

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

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

Article 145(1) mandates that all contracts and deeds made in exercise of the executive authority of the Republic shall be expressed to be made by the President and shall executed on behalf of the President by such person and in such manner as he may direct or authorise. Article 146 provides that the Government of Bangladesh may sue and be sued by the name of Bangladesh. In view of the provisions of article 145 neither the President, nor any person executing any contract or deed in exercise of the executive authority of the Republic shall be personally liable in respect thereof. Further provision of the article that this immunity shall not prejudice the right of any person to take proceedings against the government makes it clear that an individual can sue the government on such contract or deed.

3B

OUTCOMES–NEGATIVE TO WELFARE-ORIENTED ADMINISTRATION

Tremendous development of administrative law in Bangladesh in the 20th century has not only solved many crucial problems of our society, it has created many new problems also. The outcomes of the development of administrative law which appear to be negative to welfare-oriented administration and may be treated as problems in our legal sphere are discussed hereunder:

1. ADMINISTRATIVE ARBITRARINESS

Arbitrariness takes myriad forms. I may so act as to favour some and disfavor others. I may so act as to give an impression that I am acting within my power and jurisdiction but in reality I may be acting outside it. I may act within my power and jurisdiction but I may be predisposed towards certain persons or policies; I may decide to be a judge in my causes. I may decide by myself what your rights are without giving you any chance to be heard or I may make your opportunity to be heard into a meaningless ritual as a prelude to depriving you of your legal rights. I may decide but decline to let you know the reasons or grounds of my decision. I may use power to help you only if I am gratified in cash or kind or I may choose to use my power only after a good deal of delay and inconvenience to people. Indeed, I may just refuse to exercise the power I have.[1]

In our modern societies, wide powers vest with the administrators. They can if so wished, act quite arbitrarily in any or all of the ways specified in the preceding paragraph. Actually

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1 Vide 'Introduction' by Upendra Baxi, page ix of Dr. I.P. Massey's Administrative Law (2nd edn.).

in our country, the trouble and tension arise from the fact that those who have the power to rule do not generally or always like the demand that they account for their actions. They tend to believe, and would like all people to believe, that the very fact that they are the rulers should be a sufficient assurance that they will exercise their powers justly. One reason for this thinking is the fact that they in a 'rule-of-law society' has conceded some claims of general accountability. Legislators go to polls periodically; people, they say, can always withhold the 'mandate' from them if they ruled badly or exercised power arbitrarily. Errant judges could be removed. Bureaucrats (including law enforcement personnel) are broadly within the control and direction of elected politicians. Trade union groups, opposition parties, and a 'free press' would always act as mechanisms of general accountability. And there are the courts with wide powers to review governmental action.

In Habibullah Khan Vs. Shah Azharuddin Ahmed & others,[2] the Appellate Division of the Bangladesh Supreme Court held:

The Public Servants (Retirement) Act, 1974 (XII of 1974), Section 9(2)— Retirement Order— validity— no instance of misconduct on the part of the respondent prior to passing of the impugned order of retirement— the Government's justification that action was taken with a view to enforce strict discipline in the office— such justification for taking exemplary punishment only on finding the Government servant's absence for a short period is undoubtedly arbitrary— Law does not empower the Government to pass such arbitrary order of retirement.

On the other hand, in Mansurul Aziz & another Vs. Secretary M/0 L.A. & L.R. & others[3], the Appellate Division of the Bangladesh Supreme Court held that arbitrary exercise of power is itself malafide, that is malice in law.

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2 1983 BLD (AD) 143.

3 1981 BLD (AD) 75.

And in Nasiruddin Vs. Government of Bangladesh[4], the Appellate Division of the Supreme Court, among others, held that malafide act is not protected from challenge before court.

In our country, if we analyse and evaluate the application of the Special Powers Act, 1974, we find that this law is an instance which is conducive for the administrators to act arbitrarily in exercising public powers.[5] Actually, constitutional limitations on the right to liberty have been supplemented by the Special Powers Act, 1974 (S P A), which provides for preventive detention. The use and abuse of the SPA in the name of protecting security/interests has resulted in a steady pattern of human rights violations. It allows the authorities to detain any person on certain specific grounds. Such detention can extend to 6 months, and may extend beyond this period if so sanctioned by the Advisory Board. The authorities must supply the detenu with the grounds of detention "at the time of his detention or as soon thereafter as is reasonably practicable", but within a maximum period of 15 days. Pursuant to Article 33(4) of the Bangladesh Constitution, the detenu must be produced before the Advisory Board within 120 days from the date of the order, and the Board shall after due investigation, including affording a hearing to the detenu, submit its report to the government within a period of 170 days from the date of detention. There is no right to legal representation before the Advisory Board (section 11 of SPA). In practice, the detenu is rarely even brought before the Advisory Board. The SPA has been widely used to detain opposition activists.

The Judiciary has in innumerable cases acted as a "bulwark against illegal detention". Detenus have been released by order

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4 (1980) 32 DLR (AD) 266.

5 S.M. Hassan Talukder, History of Constitutional Development: Bangladesh Perspective, p. 146 (1993).

of the High Court Division following the filing of writs of Habeas Corpus or the initiation of proceeding under section 491 of the Criminal Procedure Code 1898. It is reported that 2688 writs of Habeas Corpus were moved between August 1991 and June 1992; the High Court Division gave judgment in 1795 of these cases, and declared 1742 orders of detention to be illegal and without lawful authority (Amnesty International, 1993). In the vast majority of such cases, the Court has found the grounds of detention to be vague, indefinite and lacking in material particulars. In some particularly gross cases, the court's order to release the detenu has been flagrantly violated, with the detenu being served with a fresh detention order at the jail-gate when about to walk to freedom.

Anyway, compared with non-rule-of-law societies, the rule-of-law societies do have, in theory, much greater scope for accountability. Those who are ruled are thus not entirely at the mercy of those who rule. But there is a difference between general accountability and more specific form of accountability. That is why even in a 'rule-of-law' society there remains scope for grave and continuing excesses of power, which may not always be spectacular but which occur almost everyday. It is difficult in a society guaranteeing freedom of speech and expression and of association to prevent, in the long run, an increased public awareness of the excesses of power and pacific and militant responses by the victims to such abuses. Thus there arises the need to evolve specific and concrete mechanisms of accountability in addition to the diffuse and general ones like elections, impeachment, public opinion, etc.

Naturally, this effort does not wholly or even substantially succeed. But what matter is that the effort is made and the underlying conviction that such an endeavor is worthwhile and necessary. And one would like to think that one general result of such an effort in the long run would be to help diminish

arbitrariness in the exercise of public power. This progressive diminution of arbitrariness in the exercise of public power is ultimately what the rule-of-law notion is all about.[6] Indeed, in one sense, that is what we mean, and ought to mean, by a "civilized society."

2. BUREAUCRATIC CONTROL AND RED-TAPISM

Any Constitution may provide clearly defined instructions for the carrying out of public administration. This may severely constrain the way that the public bureaucracy may operate. The public bureaucracy is also subject to a much greater degree of public scrutiny. In many parts of the world, the public review of the government's administrative processes and activities have been increasing with the introduction of such devices as freedom of information legislation, administrative review tribunals and public ombudsmen.[7] Since bureaucracy does not depend upon persons but rather upon offices (literally, desks,), virtually everything about its structure and operation is written down in a formal fashion. Bureaucracy operates according to formal rules that are in writing and can be learned. The object of the rules is to specify proper office procedure and to assure regularity in dealing with outsiders.[8]

In Bangladesh, bureaucracy is regulated by legislative enactments. Public Service Acts define how the human element in the machinery of government should be recruited, advanced, remunerated, disciplined and separated. The parliament provides the bureaucracy with necessary guidelines for the implementation of public policy. Thus, for policy direction, political and financial support, the bureaucracy has to depend on the legislature. Actually there are three sources which form

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6 Cf- P. Selznick : Law, Society and Industrial Justice (1969).

7 Habib Zafarullah, Understanding Bureaucracy A Primer, p. 9 (1992).

8 Ibid. p. 19 (1992).

the basis of the legal framework of public administration: the Constitution, legislative enactments, and administrative law. The Legislature has the power to determine how a bureaucracy should function and what rights and privileges should be accorded to its members. It can make laws (Viz, Civil/Public Service Acts) in that direction and also ensure that such laws are followed.

Many programs undertaken by the bureaucracy must have the sanction of the legislature and many public policies are ratified by it before they are implemented. The Legislature may also delimit the administrative process by other means.

However, it is true that in the policy-making in Bangladesh, bureaucratic agencies play a variety of roles. These may be identified as rule-making, adjudication, enforcement, policy initiation, program operations and policy advice. Finally, through policy advice, bureaucrats can directly assist policy makers at the political level (Cabinet or Parliament) in formulating policy proposals and drafting legislation. This last role is the most significant and has direct bearing on the power of the bureaucracy. Another factor which has the tendency to increase bureaucratic power in Bangladesh is discretion. Bureaucratic discretion is frequently exercised because of ambiguity, contradiction, and lack of specificity in the laws that govern public agencies as well as uncertainty in the political arena. But such discretion threatens the idea of political accountability. It endangers the idea of rule of law. In other words, discretion widens the scope for bureaucratic influence in the administration.

In our country it is observed that the formal external controls of bureaucracy are parliament and parliamentary committees, cabinet and cabinet committees, courts, and enabling legislations. The general public, political parties and party committees, interest groups and their representatives and mass

media are the informal external means of control. In Bangladesh, these controls are not very effective in protecting the public from bureaucratic excesses.[9]

With rapid expansion of governmental functions especially in the welfare field, the points of interaction between the bureaucracy and the public have multiplied manifold. There are now more changes for an ordinary citizen to be affected by unwarranted bureaucratic behavior. Rules and regulations are major sources of complaints about bureaucracy, which tend to make bureaucracy arbitrary. Bureaucrats often do not respond to substantive needs because of vertical and horizontal pressures, and rules which are inadequate for the situation.

Indeed, bureaucracy is structurally undemocratic. It has the tendency to undermine the power of elected representatives, and becomes in itself a power without accountability. As the decision-making system in Bangladesh is virtually centralised, participation of people in the policy process is not encouraging, people's access to government's services is not improving, therefore, the relationship between the people and the bureaucracy is not harmonising, and finally accountability mechanisms are not being applied effectively.

We frequently hear about bureaucratic abuse or misuse of power and decline of morality among public servants. Bureaucrats are often censured for breaching the public trust and for manifesting behavior that undermine moral principles. They are accused of acting in ways which serve particular interests rather than the general interests. They are reproached for resorting to corruption and for violating professional standards.

From the previous discussion it is clear that with the expansion of government functions and growth of administrative law in

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9 Habib Zafarullah, Understanding Bureaucracy A Primer, p. 82 (1992).

Bangladesh, the power of bureaucracy as well as the concept of bureaucratic control & red-tapism have grown tremendously and will continue to grow unless checks and restraints are placed on it. And indeed the elements which can cause responsible conduct among bureaucrats are professionalism, participation, publicity and accountability.

3. EXTENSIVE DELEGATION OF LEGISLATIVE POWERS TO THE ADMINISTRATION

In our legal sphere, it is observed that sometimes power is given to administration to make rules to elaborate, supplement or help to work out some principles laid down in the Act. In other words, the power is delegated to the authority to make rules to carry out the purposes of the Act. For example, the Borstal Schools Act, 1928,[10] empowers the Government to "make rules for carrying out the purposes of this Act."

Sometimes power is delegated not to make rules but to approve the rules framed by other specified authority. The Bangladesh Sromo Ain, 2006,[11] empowers the Inspector, appointed by the government, to approve or disapprove the service rules made under this Act by the employer to regulate employment of workers of any class thereof in any shop or commercial or industrial establishment.

Sometimes power is delegated to administrative authority to make exemptions from all or any provision of the Act in a particular case or class of cases or territory when, in the discretion of the authority, circumstances warrant it. The Cotton Industry (Statistics) Act, 1926,[12] provides that "the Government

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10 Section 16 (1).

11 Section 3.

12 Section 8.

may, by notification in the official Gazette, exempt from the operation of this Act or of any specified provision thereof any mill or class of mills, or any goods or class of goods, specified in the notification.

Sometimes the technique of administrative rule-making is used for extension and application of an Act in respect of a territory or for duration of time or for any other such object. Power may be delegated to extend the operation of the Act to other territories. For example, the Vehicles Act 1927,[13] provides that-

"The Government may, by notification—

(a) extend this Act or any portion thereof, to any town or local area in Bangladesh; and

(b) exclude from, or include in, town or local area to which this Act is extended under clause (a), and local area in the vicinity of the same and defined in the notification."

Sometimes the Parent Act empowers the administrative agencies to impose penalty for violation of the rules made thereunder. For example, the Insurance Act, 1938,[14] among others, provides that every provident society shall in its rules set forth—

(i) the rates of premium or contribution, and the periods for which or the times at which premium or contributions are payable; and

(ii) the penalties for delay in paying or failure to pay premiums or contributions.

Hence, it is convincing in our legal sphere that administrative law-making has become defacto primary and the law-making by the Legislature secondary. Though it is correct to say that the

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13 Section 2.

14 Section 74.

delegation of legislative powers is a constitutional impropriety condoned only on the ground of expediency but such extensive delegation of legislative power is a serious threat to the liberties of the people.

4. EXCESSIVE PRIVILEGES AND IMMUNITIES OF THE GOVERNMENT IN SUITS

Privileges:

Though the equality clause of the Constitution envisages absence of any special privileges to anyone including government, but since government is a government in contradistinction to a private individual, law allows certain privileges to the government as a litigant. From among the numerous privileges available to the government under various statutes a few important ones which appear to be excessive may be referred to hereunder:

Section 80 (1) of the Civil Procedure Code, 1908, provides that no suit shall be instituted against the government or against a public officer in respect of any act purporting to be done by such public in his official' capacity, until the expiration of long two month's next after notice in writing in the manner provided in the section has been given. The requirement of notice is a mandatory and admits of no exception.

Indeed, the requirement of notice applies to all kinds of relief and forms of action, whether injunctive or otherwise. Whatever else may be the merit of the rule; it certainly creates hardships for the litigants seeking immediate injunctive relief against the government.

Under section 82 of the Civil Procedure Code, 1908, when a decree is passed against the government, it shall not be executed

unless it remains unsatisfied for a period of three months from the date of such decree.

Rule 8-A of Order 27 of the Civil Procedure Code, 1908 provides that no security shall be required from the Government.

In Bangladesh the privileges of the government to withhold documents from the courts are claimed on the basis of the Evidence Act, 1872,[15] which lays down that no one shall be permitted to give any evidence derived from unpublished official records relating to the affairs of the State except with the permission of the head of the concerned department, who shall give or withhold such permission as he thinks fit. This Act of 1872[16] also extends this privilege to confidential official communication also.

The privilege if claimed is not conclusive in the sense that the courts can do nothing except to admit it. This proposition is also based on the Evidence Act[17] which provides that when a witness is required to produce a document, he must bring it to the court and then may raise an objection to its production and admissibility. However, it is held that in order to determine the claim of privilege the court can inspect the document.

Immunities:

In many cases the government has immunity from the operation of the doctrine of Estoppel. In other words, Estoppel does not operate against the government in certain matters. These are, among others, as follows:-

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15 Section 123.

16 Section 124.

17 Section 162.

(1) If it jeopardizes the constitutional powers of the government, since government is pledged bound to the Constitution, the supreme law of the Republic.[18]

(2) If it had the effect of repealing any provision of the Constitution.[19]

(3) The doctrine of Estoppel cannot be used against the government so as to give defacto validity to *ultra vires* government acts.[20]

But where non-application of Estoppel against the government creates real hardship for the persons who act on its advice or representation, the court on the basis of equity may grant relief. However, in legal sphere this measure of relief based on equity is preventive but not curative.

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18 C. Sankaranarayanan Vs. State of Kerala (1971) 2 SCC 361; AIR 1977 SC 1997.

19 Mulamchand Vs. State of M. P., AIR 1968 SC 1218.

20 Shrije Sales Corpn. Vs. Union of India (1997) 3 SCC 398.