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DEVELOPMENT OF ADMINISTRATIVE LAW IN BANGLADESH: CONCEPTUAL IMPEDIMENTS

It has already been referred to in the previous chapter[1] that the rapid growth of administrative law in modern times is the direct result of the growth of administrative powers and functions. And the rapid growth of powers and functions of the administration is indeed a by-product of an intensive form of government which conduces to the stability as well as growth of the society and the maintenance of just social order and welfare of mankind by reconciling power with liberty. Today, administrative law has a tremendous social function to perform. And without a good system of administrative law any society would die because of its own administrative weight like a Black Hole - which is a dying neutron star that collapses due to its own gravity. But in spite of this fact, previous history relating to growth and development of administrative law reveals that the way of development of administrative law in Bangladesh, like other countries, was not free from conceptual impediments. Many obstacles have hindered the inherent development of administrative process as well as administrative law. Even today the way of changes and growth of administrative law in Bangladesh is not unhindered. And in actual practice, the conceptual impediments which are now acting against the development of administrative law in Bangladesh are:

(A) Traditional Concept of Rule of Law

(B) Doctrine of Separation of Powers

(C) Negative attitude towards Bureaucracy and Bureaucratic Expansion

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1 Chapter 1, p. 15.

(D) Concept of absence of effective Accountability - Mechanism

Now, attempts have been made hereafter to discuss how the foregoing contents of conceptual impediments are acting against the development of administrative law in Bangladesh.

A. TRADITIONAL CONCEPT OF RULE OF LAW

While on the continent, Administrative Law has been, for a century and a half, a separate branch of law and a subject for academic study, it is only for the last few decades that, in U. S. A. and the common law world, it has attained full stature as a 'respectable' field of study for the law students and practitioners. The reason seems to be that the people had a mistrust regarding the growth of administrative process, and hence did not recognise its independent existence.[2] The weapon which the people in Bangladesh used to strike against the growth of administrative law since British period[3] was Traditional Concept of Rule of Law.

The Rule of Law is a viable and dynamic concept and, like many other such concepts, is not capable of any exact definition. This, however, does not mean that there is no agreement on the basic values which it represents. The term 'Rule of Law' is used in contradistinction to 'Rule of man' and 'Rule according to Law'. Even in most autocratic forms of government there are some laws according to which the powers of the government are exercised but it does not mean that there is the Rule of Law. Therefore, Rule of Law means that the law rules, using the word 'Law' in the sense of 'just' and 'lex' both. In this sense 'the Rule of Law' is an ideal and as a higher norm it has always found place in the writings of thinkers.

In legal sphere, the term 'Rule of Law' is derived from the French phrase la principe de legalite (the principle of legality)

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2 Massey: Administrative Law, 2nd edn., p, 26.

3 Bangladesh as a British colony was ruled by the British from 1757 to 1947. And this period, in legal history, is known as British period.

which refers to a government based on principles of law and not of men. In this sense the concept of 'la principe de legalite' was opposed to arbitrary powers.[4]

From legal history we find that the concept of the Rule of Law is of old origin. Edward Coke is said to be the originator of this concept when he said that the King must be under God and Law and thus vindicated the supremacy of law over the pretensions of the executives. Professor A. V. Dicey later developed this concept in the course of his lectures at the Oxford University. Dicey was an individualist; he wrote about the concept of the Rule of Law at the end of the golden Victorian era of laissez fair in England, when Bangladesh as a part of greater India was under British rule and, as such, was greatly influenced by the Dicey's concept of the Rule of Law.

Legal history reveals that the concept of the Rule of Law acquired significance with A. V. Dicey. He successfully used it as a tool against the growth of Administrative Law. It is argued that Dicey had much to borrow from his predecessors H. Cox. and W. E. Hearn. In fact Hearn deserves some of the credit (and criticism) which has gone to Dicey as the originator of Dicean concept of the "Rule of Law".[5]

The main opposition to the introduction of Administrative Law was based on the point that it undermines the rule of law. The characteristics of rule of law are that "as between a Sovereign and his subject there is no such thing as an act of State" and "that the warrants of no man, not even the King himself, can excuse the doing of an illegal act". Officials must like private individuals adduce rule of municipal law in justification or be held answerable in law.[6]

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4 Massey : Administrative Law, 2nd edn., p. 26.

5 H. W. Arnt: The Origins of Dicey's Concept of the Rule of Law, 31st Aust. L. J. 1, 117, 123 (1957).

6 Nagendranath Ghose : Comparative Administrative Law, p. 99(1919).

According to A. V. Dicey, the rule of law is meant "no man is punishable or can be lawfully made to suffer in body or goods except for the breach of law established in the ordinary legal manner, before the ordinary courts of the land".[7] In this sense, the Rule of Law implies:

(a) Absence of special privileges for a government official or any other person;

(b) all the persons irrespective of status must be subjected to the ordinary courts of the land; and

(c) everyone should be governed by the law passed by the ordinary legislative organs of the State.

Another significance which Dicey attributed to the concept of Rule of Law was absence of wide discretionary power in the hands of the government officials.[8] By this Dicey implies that justice must be done through known principles. Discretion implies absence of rules, hence in every exercise of discretion there is room for arbitrariness.

Griffith and Street explain the concept of the rule of law as advocated by Dicey giving five meanings. In the first place, rule of law means "the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power". Secondly, "Englishmen are ruled by the law and by the law alone; a man with us may be punished for a breach of law, but he can be punished for nothing else". Thirdly, rule of law demands compensation in circumstances where an individual suffers damage as a result of a change in the law or the exercise of discretionary authority granted in general interest. Fourthly, all the powers of the administration are derived from statutes or from the prerogatives and that the individual rights cannot be

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7 Dicey: Introduction to the Law of the Constitution, p. 188 (8th edn.).

8 Ibid, p. 198.

infringed without the authority of these sources of power. And fifthly, the law binds the administration.[9]

The concept of rule of law as formulated by Dicey had no place for duality of courts as existed in France and official discretion. Dicey propounded his theory and opposed administrative law on the basis of French droit administrative. However, it is admitted that droit administrative is not the whole Administrative Law. Moreover, special tribunals were not totally absent in England when Dicey opposed these institutions.[10] Dicey's distrust on administrative process and administrative adjudication though has been proved wrong in the French context is still valid in the context of Bangladesh where administrative action is often arbitrary and based on extraneous consideration and very often administrative justice is an euphemism for the denial of justice.

Indeed, this thesis of Dicey had a tremendous impact on the growth of administrative law in England as well as British - ruled India where people were not ready still very recently to accept that anything like the administrative law had come into being there. The results of this have been that Administrative Law as a subject of study in Bangladesh came on the scene quite late in the day. Indeed, people of Bangladesh till also believe that ordinary courts can control the administration in all its actions and they are dubious regarding proper functioning of tribunals or special courts because of the following vitally important reasons:

(a) In discharging functions, special courts or tribunals do not strictly follow the principles of Natural Justice. For examples-

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9 Griffith and Street: Principles of Administrative Law, pp. 19 and 22 (4th edn.).

10 Sir Cecil Carr: Concerning English Administrative Law, p. 4 (1941).

(i) some special courts as well as tribunals allow unrestricted legal representation, others allow none;

(ii) some special courts or tribunals allow full examination and cross-examination of witnesses, others allow witnesses to be questioned only through the chairman;

(iii) some special courts as well as tribunals give reasoned decisions, others do not; and etc.

(b) Generally special court or tribunal can not discharge its function in an independent manner. In most of the cases, special courts or tribunals can not follow the rule against dictation, which requires that decisions must be actually his who decides. Because, in many cases, special court or tribunal is a part of the machinery of administration and not free from executive influence due to its very nature.

(c) The fundamentals of proper procedure- 'fairness, openness and impartiality' - are not effectively observed and that uniform standards are not commonly applied to all the numerous different special courts or tribunals.

(d) From many tribunals or special courts, there is no general right to appeal. In the King Vs. Fulham Rent Tribunal (1950) 2 A.E.R. 211, it was held that "If the tribunal is acting within its jurisdiction and no appeal from it is provided by the statute, then it is immune from the control of the High Court".

In the context, it is exigent to mention here that appeal and review are in theory two distinct procedures, appeal being concerned with merits and review being concerned with legality.

Moreover, a word may be said of Martial Law Courts by quoting a passage from a monograph of the International Commission of Jurists in Review of July 1983:

"It is deplorable that the Martial Law Administration in Bangladesh has resorted to the use of Martial Law Courts to deal with ordinary crimes of civilians. Such a Court composed of almost entirely of army personnel without legal qualifications, with no provisions for appeal or review and with procedure that contravened established international norms of fair trial cannot be considered 'competent, independent, and impartial' as required under International Covenant on Civil and Political Rights."

A grave defect in Dicey's analysis is his insistence on the absence not only of "arbitrary" but even of "wide discretionary" powers. Apart from misconceiving the French system, Dicey failed to distinguish between discretionary power and arbitrary power. If discretion is taken as arbitrariness there may not be a single political system having rule of law.[11] Discretion is essential for the viability of any political system. The needs of the modern government make wide discretionary power inescapable.[12] The only important aspect is checks against abuse and misuse of the discretion. But in Bangladesh perspective, Administration frequently exercises arbitrariness in the name of discretion leading to insecurity of legal freedom of the citizens.

It is pertinent to mention here that the most significant features of Part III of the Constitution of Bangladesh as originally enacted in 1972 have been : (1) the absence of a provision for preventive detention in Article 33 and (2) absence of provisions for Emergency and suspension of fundamental rights conferred by Part III of the Constitution although it has been a common practice in the Constitution-making of this Subcontinent to include such provisions in the Constitution[13] not only to handle

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11 Wade and Phillips : Constitutional Law, pp. 64, 65 (6th edn.).

12 Davis : Discretionary Justice (1969).

13 The Constitution of India adopted in 1949 contained provisions for preventive detention and proclamation of Emergency. Both in the 1956 and 1962 Constitutions of Pakistan, similar provisions were embodied.

a situation of war or threat of external aggression but also to combat internal disturbances. But in the Constitution of Bangladesh enacted in 1972, the right of protection from arrest and detention has been guaranteed without the proviso for preventive detention. So, the provisions for preventive detention without trial as contained in laws like the Security of Pakistan Act, 1972, or the East Pakistan Public Safety Ordinance, 1958, could no longer be applicable in Bangladesh. This achievement in establishing a living democracy after repealing all black laws was admirably noticeable. But this was not to remain for a long period.

Keeping in view the extremely bitter experience of the arbitrary exercise of power by the chief executives by application of the emergency provisions in Pakistan which weakened the political institution and led to suppression of opposite party,[14] the framers of the Constitution of Bangladesh considered such arbitrary authoritarian power as contradictory to the concept of nourishing a living democracy and the 'Rule of Law' and as such no provision or article for any emergency situation was embodied in the original 1972 Constitution. Those decisions were bold and courageous. And the most significant and outstanding feature for which the Constitution of Bangladesh as originally enacted in 1972 may be called distinguishable from others in the Subcontinent is the absence of any provision relating to (1) preventive detention and (2) proclamation of Emergency and suspension of fundamental rights. But unfortunately, when hardly 9 months had gone, like the change made in Article 33, the Constitution was also amended to include provisions for Emergency. On the 22nd September, 1973, the Constitution (Second Amendment) Bill was passed to amend Article 33 and to add a new Part IXA containing provisions for

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14 The unconstitutionalism set in by Ghulam Mohammad in 1954 through the use of emergency powers under the Government of India Act 1935, and the Emergency imposed by Ayub Khan in 1965 never allowed the country to build a normal democratic system.

Emergency and suspension of fundamental rights. Article 33 was substituted in the line with Article 22 of the Indian Constitution so as to allow laws for preventive detention.

However, after 2nd amendment of the Constitution of Bangladesh Article 33 authorises the Legislature to make law for preventive detention for reasons connected with the security of State, the maintenance of public order. So the Legislature is competent to enact that a person should be detained or imprisoned without trial for internal danger or external aggression or war, and against such law, the individual shall have no right of personal liberty.

There is a defect pointed out by the critics that the Constitution has played a trick with citizens, what it gives with one hand, it takes away with the other. Too many restrictions and exceptions have rendered the fundamental rights sound hallow and meaningless and it is difficult to understand what actually is left with the people by way of fundamental rights. In emergency times, the Constitution withdraws or suspends all fundamental rights. Even in normal times, people's right to freedom is taken away by preventive detention.[15] It is clear that after 2nd amendment of the Constitution, Article 33 authorises the Legislature to make law for preventive detention for reasons connected with the security of State, the maintenance of public order. Accordingly, in 1974, the Special Powers Act, 1974 (Act No. XIV of 1974) was passed by the Parliament. Under this Act

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15 Preventive detention means the detention of a person without trial in such circumstances that the evidence in possession of the authority is not sufficient to make a legal charge or to secure the conviction of the detenu by legal proof, but may still be sufficient to justify his detention for preventing him from doing prejudicial act. It is a precautionary measure. The object is not to punish a man for having done something but to intercept him before he does it and to prevent him from doing it. No offence is proved, nor any charge formulated; and the justification is suspicion or reasonable probability and not criminal conviction which only can be warranted by legal evidence.

of 1974, a person can be detained without trial for indefinite period, although under section 10 of the Act, the Govt. shall refer the detention case to the duly constituted Advisory Board within 6 months. But now it is fact that in recent days, the Govt. has developed a dangerous trend in the country and the orders for detention are being issued in respect of pending cases by the administration so that persons can not be enlarged on bail. This practice has not yet been ceased in spite of judgments of the highest court that such orders were not sustainable under law being malafide. Instances are many when one detention order was followed by another because the other one had been found illegal by the court.[16]

On the other hand, due to the existence of the Court (Interim Injunction Order) Act, 1989, the fundamental rights of the people have been limited. Seeking justice against administrative arbitrariness of government organization in the courts is meaningless under this law. It is stipulated in the Act that in order to issue interim order, the party concerned will have to be notified and heard before the court, but nothing has been mentioned if the concerned party failed to appear. It is also contended that what will be the benefit of a hearing after the damage was done? Even if the government demolished somebody's property arbitrarily/illegally in the name of development work, the court would not be able to restrain it before hearing the government side.

Hence, the idea which is being commonly rooted in the minds of the people of Bangladesh is that the growth of administrative law particularly regarding special courts, wide discretionary powers in the hands of government officials, etc. shall not be conducive to lead public welfare, rather these may limit people's fundamental as well as human rights in practice. The people especially politicians, administrative law experts, lawyers, law students and others interested in the subject fear that these

16 "The New Nation" 17 June, 1989 (A Daily Newspaper).

aspects of administrative law in Bangladesh will certainly jeopardise establishment of Rule of Law in the Country. Thus Dicey's concept of the Rule of Law i.e., in other words, traditional concept of the Rule of Law has taken an influential position in practice in the Administrative Law sphere of Bangladesh and it is, at the same time, virtually impeding the inherent changes and growth of Administrative Law in Bangladesh specially in relation to increase of wide discretionary powers in the hands of government officials, establishment as well as development of special courts or tribunals, conferment of special privileges as well as immunities to administration and administrative officers, and particularly making as well as application of special laws instead of ordinary laws duly passed by the ordinary legislative organ of the State.

Pertinent to mention here that the modern concept of the Rule of Law is fairly wide and was developed by the International Commission of Jurists, known as Delhi Declaration, 1959, which was later on confirmed at Lagos in 1961.[17] According to this formulation, the Rule of Law implies that the functions of the government in a free society should be so exercised as to create conditions in which the dignity of man as an individual is upheld. This dignity requires not only the recognition of certain civil or political right but also creation of certain political, social, economical, educational and cultural conditions which are essential to the full development of his personality.

However, as regards traditional concept of the Rule of Law, it may now be concluded that this concept in Bangladesh has generated an irrational mental attitude insofar people do not want to face the realities of the situation and find correctives to the problems in the area of administrative law if that involves an overt departure from the Dicean tradition. And as a result of

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17 The modern concept of the Rule of Law has been discussed in detail in the previous Chapter 4(1).

this, Administrative Law in Bangladesh is not developing into a neat and satisfactory system.

B. THEORY OF SEPARATION OF POWERS

Corresponding to three kinds of power-legislative, executive and judicial, every modern government has generally three organs, namely, the Legislature, the Executive and the Judiciary. So the question arises: what should be the proper relation between these organs, whether the three powers should be exercised by the same person or a body of persons or should be entrusted to separate persons. The theory of separation of powers tries to answer this question.[18]

The idea of this separation of powers is traceable to Aristotle.[19] And we also find traces of the idea of separation of powers in the writings of Polybious and Cicero. Jean Bodin also advocated separation of powers. Bodin said, "To be at once legislator and judge is to mingle together justice and the prerogative of mercy, adherence to the law and arbitrary departure from it." But the writings of Locke[20] and Montesquieu[21] gave the theory of separation of powers a base on which modern attempts to distinguish between legislative, executive and judicial power are grounded. Locke distinguished between what is called:

(i) Discontinuous legislative power;
(ii) continuous executive power;
(iii) federative power.

He included within 'discontinuous legislative power' the general rule-making power called into action from time to time and

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18 H. Rahman : Political Thought, Organisation and Governments, p. 336 (1st edn.).

19 Aristotle : Politics, IV, 14.

20 Second Treatise of Civil Government, Chs. 12 and 13.

21 L'Espnt des Lois, (1748), Ch. 12.

continuously. 'Continuous executive power' included all those powers which we now call executive and judicial. By 'federative power' he meant the power of conducting foreign affairs.

Locke pleads for, but does not fully develop, the doctrine of separation of powers. He suggests the principle of separation. The legislature and the executive must be separated in their functions, powers and personnel, for otherwise the legislators "may exempt themselves from obedience to the laws they make, and suit the law, both in its making and its execution, to their own private wish, and thereby come to have a distinct interest from the rest of the community, contrary to the end of society and government".[22]

However, the most clear interpretation and statement of the theory has been given by the famous French writer Montesquieu. He derived the content of the theory from the development in British constitutional history of the early 18th century. At that time, the King exercised executive powers, Parliament exercised legislative powers, and the Courts exercised judicial powers.[23] Though later on England did not stick to this structural classification of functions and changed to the parliamentary form of government. And Montesquieu referred to the British Government to illustrate his theory. According to him, the government should be entrusted to the three organs, and each organ should be entrusted to a separate person or a body of persons. The legislature will only legislate, the executive will execute the laws passed by the legislature, and the judiciary is to apply laws to individual cases. In the discharge of the duty, each organ should confine itself to its own jurisdiction and should not encroach on the jurisdiction of other organs.

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22 H. J. Laski : Political Thought in England, From Locke to Bentham, p. 40.

23 Massey : Administrative Law, p. 40 (2nd edn.).

Moreover, Montesquieu in his famous book "The Spirit of Laws" stated: when the legislative and executive powers are united in the same person or in the same body of magistrates, there can be no liberty, because apprehensions may arise lest the same monarch or senate should enact tyrannical laws, execute them in a tyrannical manner. Again, there is no liberty if the judiciary be not separated from the legislature and the executive.

On the other hand, Madison, a celebrated American statesman, said that if the judicial power is combined with the executive power, "the judge might behave with violence and oppression".

So the theory of separation of powers signifies that: (a) the legislative, the executive and the judicial powers of a government should be separated into three organs, and each will be entrusted to different body or authority; (b) each organ will be limited to its own sphere; and (c) within its own sphere each will be independent and supreme.

Actually the doctrine of separation of powers propounded by the French jurist Montesquieu in his L'Esprit des Lois (The Spirit of Laws) in 1748 is invoked to challenge the legitimacy of administrative law although no separation of powers in the strict sense of the term is possible. Actually, some degree of separation of powers may be essential, but complete separation of powers is neither possible nor desirable. No system of government can work when all three departments are completely independent of one another. Perhaps Montesquieu himself did not mean by his theory an absolute separation of powers. Because we find that he referred to the British Government to illustrate his theory. And in British Constitution, there is no complete separation but only organic separation of powers. According to Prof. H.W.R. Wade, the objection of Montesquieu was against accumulation and monopoly rather than interaction.[24]

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24 Wade : Administrative Law, p. 251 (2nd edn.)

Now if we analyse and evaluate the theory of separation of powers in our national context, then we understand that the doctrine of separation has itself been influenced by, and has influenced, the growth of Administrative Law in Bangladesh.

Regarding appointments of persons to subordinate courts, Article 115 of the Constitution of Bangladesh says-

"Appointments of persons to offices in the judicial service or as magistrates exercising judicial functions shall be made by the President in accordance with rules made by him in that behalf."

As regards Article 115 aforesaid, it is exigent to mention here that this Article 115 was substituted for the original Article 115 by the Constitution (Fourth Amendment) Act, 1975 (Act II of 1975). With regard to the appointment of persons to offices in the judicial service or as magistrates exercising judicial functions, it was, among other, provided in the original Article 115 that the President would make the appointment but in case of District Judges the appointment would be made on the recommendation of the Supreme Court. Thus, powers in relation to appointments of persons to subordinate courts have been taken away clearly concentrating the same to the President himself.

Provision relating to control and discipline of subordinate courts is given in Article 116 of the Constitution of Bangladesh. This Article says -

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

As regards control and discipline of subordinate courts, it is pertinent to mention here that in the original Article 116 as enacted in 1972, it was provided that "The control (including the power of posting, promotion and grant of leave) and discipline

of persons employed in the judicial service and magistrates exercising judicial functions shall vest in the Supreme Court", while both the Constitutions of 1956 and 1962 of Pakistan retained such power of superintendence and control for the High Courts, none provides such extra-ordinary power to their Supreme Court. But by the Constitution (Fourth Amendment) Act, 1975 (Act II of 1975), the power of controlling the subordinate courts was taken away from the Supreme Court and vested in the President who shall exercise these powers in consultation with the Supreme Court.

Article 22 of the Constitution of Bangladesh emphasises independent judiciary by way of separating the same from the executive organ of the State. This Article provides that the State shall ensure the separation of the judiciary from the executive organ of the State. This principle involves two consequences first, that a Judge or Magistrate who tries a case must not be in any manner connected with the prosecution, or interested in the prosecution. Second, that he must not be in direct administrative subordination to any one connected with the prosecution. Quite clearly it is impossible for a Judge to take a wholly independent view of the case he is trying if he feels himself to any extent interested in or responsible for the success of one side or the other. This is the first aspect. It is equally impossible for him to take an independent view of the case before him if he knows that his posting, promotion, and prospects generally depends on his pleasing the executive head. Thus the separation of functions means and involves the elimination of these two evils.

During the British days, there was a demand for the separation of the Judiciary from the Executive and Article 22 as aforesaid meets that demand. But very little has been done by the State in this count in practice. The Executive Magistrate who is not a judicial officer but executive officer can prosecute a person for some specified small offences. It is, therefore, generally contended that such a practice is not in accordance with the theory of separation of powers.

So, in view of the foregoing, it may be concluded that concentration of judicial powers to the executive i.e. to the President depriving the Supreme Court and also concentration of the executive and judicial powers in one person i.e., in the hand of Executive Magistrate is obviously contrary to the theory of separation of powers.

On the other hand, as parliamentary form of government exists in Bangladesh where the Executive is accountable to the Legislature for its actions[25] and 90% of the total number of ministers is required to be Parliament members[26] it is convincing that the Constitution of Bangladesh has not accepted the theory of separation of powers in rigid form and no separation of powers in the strict sense of the term exists in Bangladesh. Indeed what exists in Bangladesh are-

(a) Organic separation[27] as distinct from personal separation;

(b) partial union[28] ; and

(c) mutual interaction between the organs.[29]

In fact, in the face of new demands on the government to solve many complex socio-economic problems of the modern society,

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25 Article 55, the Constitution of Bangladesh (up to 14th Amendment).

26 Ibid.

27 The powers of the government in Bangladesh have been entrusted to three separate and distinct organs, namely, the Executive (Part IV of the Bangladesh Constitution), the Legislature (Part V of the Bangladesh Constitution) and the Judiciary (Part VI of the Bangladesh Constitution).

28 90% of the total number of Ministers shall have to be from the Parliament members (Article 55, Constitution of Bangladesh).

29 (a) The Legislature legislates and controls the Executive as the Executive is accountable to the Parliament for its actions; (b) the Executive has the power of delegated legislation and executes the laws passed by the Parliament; and (c) the Judiciary, besides judicial functions, has the power to declare administrative actions or any law null and void on the ground of *Ultra Vires*. It has the power of rule- making as well as interpretation of laws passed by the Legislature.

new institutions have been created and new procedures evolved by which the doctrine of 'separation' has been largely diluted in Bangladesh. But in spite of this fact, the growth as well as character of administrative law in Bangladesh itself has been influenced and conditioned to some extent by this doctrine. The strict separation theory has been dented to some extent when the Constitution of Bangladesh authorises the Parliament to delegate to any person or authority, by Act of Parliament, power to make orders, rules, regulations, bye-laws or other instruments having legislative effect.[30] But, because of the separation theory, courts of this subcontinent have clearly laid down that the legislature cannot confer an unlimited amount of legislative power on an administrative organ, and that it must itself lay down the policy which the administration is to follow while making the rules.[31]

Again, the flagrant violation of the theory of separation of powers still continues in Bangladesh in the alarming concentration of the executive and judicial powers in the hands of the Executive Magistrates. In Bangladesh, an Executive Magistrate, who is an executive officer, can arrest and prosecute a person for specified small offences. Pertinent to point out here that it is actually inconvenient for a Magistrate to take an independent view of the case before him when he knows that his posting, promotion and prospects generally depends on his pleasing the executive head. However, to avoid this inconvenience and keep the application of judicial powers by the Executive Magistrates free from any executive influence or interference, the Constitution of Bangladesh because of separation theory, provides that "all magistrates shall be independent in the exercise of their judicial functions."[32]

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30 Article 65, the Constitution of Bangladesh.

31 AIR 1951 SC 332 (Delhi Laws Act case), AIR 1954 SC 569 (Rajnarian Singh Vs. Chairman, Patna Administration Committee), PLD 1965 DNC 576.

32 Article 116A, the Constitution of Bangladesh. This Article was inserted in the Constitution by the Constitution (4th Amendment) Act. 1975 (Act II of 1975).

Actually the aim of the doctrine is to guard against tyrannical and arbitrary powers of the State. The rationale underlying the doctrine has been that if all power is concentrated in one and the same organ, there would come the danger that it may enact tyrannical laws, execute them in a despotic manner, and interpret them in an arbitrary fashion without any external control. Though, in the face of the complex socio-economic problems demanding solution in a modern welfare State, it may no longer be possible to apply the separation theory strictly, nevertheless, it has not become completely redundant and its chief value lies in emphasizing that it is essential to develop adequate checks and balances to prevent administrative arbitrariness. Thus, it has been stated about the doctrine: "Its object is the preservation of political safeguards against the capricious exercise of power; and incidentally, it lays down the broad lines of an efficient division of functions. Its logic is the logic of polarity rather than strict classification... the great end of the theory is, by dispersing in some measures the centres of authority', to prevent absolutism."[33]

In conclusion, it is of vital importance to point out here that although by force of circumstances administrative law has inevitably grown in Bangladesh but the separation doctrine, unlike U.S.A., has generated an attitude of indifference towards it, as generated in England under the spell of the Dicean concept of the 'Rule of Law'. Many people of our country criticise the growth of administrative process as doing violence to the concept of separation of powers. Hence, this theory has been characterized in the country as a principal conceptual barrier to the changes and growth of administrative law in Bangladesh.

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33 Jaffe and Nathason, Administrative Law : Cases and Materials, 38 (1961).

C. NEGATIVE ATTITUDE TOWARDS BUREAUCRACY AND BUREAUCRATIC EXPANSION

In his recent book[34] on administrative law, Friedman includes his concern for:

(i) failure of the administrative agencies to conform to the constitutional parameters;

(ii) public ambivalence to the substantive policies sought to be achieved by some agencies;

(iii) apparent absence of direct political accountability; and

(iv) skepticism about administrative expertise as well as bureaucratic expansion.

Fradrick Riggs, a modern theoretician on public administration, criticised bureaucracy particularly saying it as heterogeneity, formalism and overlapping. In bureaucracy, he also marked selfishness, biasness, undue behavior, unlimited power and influence, lack of co-ordination, imbalances, etc.[35]

Substantially Friedman's concern, and also the characteristics pointed out by Riggs are very true in case of Bangladesh particularly in relation to administrative expertise, bureaucracy and bureaucratic expansion.

According to Justice Abdur Rahman Chowdhury : "We have too much government and too little administration; too many public servants but too little public service; too many controls and too little welfare; too many laws and too little justice."[36] In truth, bureaucracy in Bangladesh, as evaluated by critics, is not free from heterogeneity, formalism and overlapping rather it is inert,

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34 Friedman : Crisis and Legitimacy (1978).

35 Bangladesher Amlatantra, edited by Mustafa Majid, p. 8 (1991).

36 SOUVENIR, 16th February, 1989, published by the Bangladesh Law Association, p. 19.

passive, complex and instrumental. Moreover, according to the critics, corruption, indiscipline and red-tapism are the inevitable character of bureaucracy in Bangladesh.[37]

Though in Bangladesh, the role played by the Executive is ultimately being determined and controlled by the Parliament nonetheless in formulating programmes and policy of the administration, the role of bureaucracy is now considered as of vital importance. Even in Bangladesh like other developing countries of the world, bureaucracy, due to various reasons, also plays vitally important role in the law-making process. No doubt, this role of the bureaucracy in Bangladesh is hampering the essential roles of our political institutions, and it is one of the formidable obstacles to establish a very strong political State-structure in the country. And unless this structure is firm-rooted, dependency of the Legislature on the bureaucracy in Bangladesh must remain impact and all political institutions will have to adhere to the same.[38]

Though in Bangladesh the role played by the Executive is ultimately being determined and controlled by the Parliament but as Bangladesh had the unfortunate experience of the rule of Martial Law Government, when Bangladesh suffered the eclipse of constitutional government by the onset of two military regimes first in August, 1975, and second, in March 24, 1982, where all powers of the State were exercised and controlled by the civil and military bureaucrats and in practice, the most unfortunate aspect is that democracy in Bangladesh was never allowed to function and since the days of Pakistani rule we have continuously been under Martial Law since 1958 in some form or other except for lucid intervals, bureaucracy, as a result, is playing the key role of all State functions.

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37 Bangladesher Amlatantra, edited by Mustafa Majid, p. 17 (1991).

38 Ibid.

According to Max Weber, the fundamental characteristics of bureaucracy are rules, specialization, hierarchy and impersonality.[39] And also according to him, the probable consequences which may be portended because of application of bureaucracy are, among others, perverted democracy, malice or madness, etc.[40] According to R.K. Merton, bureaucracy makes the gap between administration and general people wider and also creates conflicts/differences between administration and general people[41] although Philip Selznick, Blau and Mayer strongly advocated for bureaucracy to ensure dynamic administration.[42]

According to M. Crozier, bureaucracy taking lesson from its mistakes does not amend its behaviour/character and, as such, it is a vicious circle.[43] Regarding bureaucracy in British India, Nehru in his book 'Glimpses of World History' pointed out that-

"We have a great deal about the I.C.S. They have been a curious set of persons. They were efficient in some ways. They organised the government, strengthened British rule, and, incidentally, profited greatly by it themselves... Not being appointed by, or responsible to, the people, the I C S paid little attention to these other departments which concerned the people most. As was natural under the circumstances, they become arrogant and overbearing and contemptuous of public opinion. Narrow and limited in outlook, they began to look upon themselves as the wisest people on earth. The good of India meant to them

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39 A. H. Handerson and Talcot Parsons, Trans. Max Weber: The Theory of Social and Economic Organisation, London, 1964, pp. 329-341.

40 M.M. Khan : Bureaucratic Self Preservation, 1980, p. 30.

41 R. K. Merton, Bureaucratic Structure and Personality: Social Theory and Social Structure, quoted in M. M. Khan, Bureaucratic Self Preservation, 1980, p. 34.

42 Bangladesher Amlatantra (Bureaucracy in Bangladesh), edited by Mustafa Majid, pp. 23-26 (1991).

43 Michel Crozier. The Bureaucratic Phenomenon, 1964, p. 187.

primarily the good of their own service. They formed a kind of mutual admiration for society and were continually praising each other. Unchecked power and authority inevitably lead to this, and the Indian Civil Service were practically masters of India.... Even feeble criticism of their action was resented by them, so intolerant they were."

It is very fact that in the western democratic countries, where the idea of modern bureaucracy has been originated, the usual meaning of bureaucracy is viewed negatively by the people. And in Bangladesh perspective, like other developing countries, it is observed that besides many positive roles of bureaucracy, there are many criticisms against it. Even there is a very strong general tendency to think bureaucracy and its activities with suspicion and from very negative point of view. Moreover, the people in Bangladesh have started losing faith in the integrity of public administration. And we heard from all sides that corruption has, in recent years, spread even to those levels of administration from which it was conspicuously absent in the past.

In Bangladesh where the democratic system is not strong and firm-rooted, bureaucracy, clearly instead of serving general people often acts as helper of Oligarchy or Martial Law Government. And like the past, bureaucracy in Bangladesh now enjoys unchecked power and authority.[44] On the other hand, the relations between bureaucracy and political institutions are always conflicting and suspicious.[45]

In consequences, politicians as well as legislators while formulating any policy or making any law relating to administration keep their suspicious eyes open so that bureaucrats can not gain more power and authority, and bureaucracy can not be strong and independent in expanding its area of usual functions. Since bureaucracy, administration and

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44 Bangladesher Amlatantra, edited by Mustafa Majid, p. 209 (1991).

45 Ibid.

administrative law are inseparable and one can not function properly without the existence of other, therefore, it is thought that the usual negative attitude of the politicians, legislators and general people towards bureaucracy and bureaucratic expansion in Bangladesh has hindered the inherent growth and development of public administration and administrative law. And moreover, the very truth is that this negative attitude towards bureaucracy and bureaucratic expansion is still effective as one of the most important conceptual impediments against the changes and growth of administrative law in Bangladesh.

D. CONCEPT OF ABSENCE OF PROPER ACCOUNTABILITY-MECHANISM

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 are excesses in exercise of the power. In each modem State, wide powers vest with legislators, judges and administrators. Each group can, if it so wished, act quite arbitrarily. Often enough it may not be the group, but just one single person. In this latter case, we speak of dictatorship, or tyranny. When one group with a strong leader concentrates all powers in itself, we speak of 'authoritarianism'. When power is dispersed in dominant institutions of governance and when those affected by power can, in theory, hold their rulers accountable (in one way or the other), we speak of a liberal democracy or a 'rule-of-law society'. This type of society basically seeks to ensure that grants of power to the rulers are at the same time charters of accountability for the ruled.

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 (legislators, judges, bureaucrats) should be a sufficient assurance that they will exercise their powers justly. One reason

for this belief is the fact that each group in a democratic 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 always be impeached. Bureaucrats are 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 legislative and governmental action. What more, indeed, can one have by way of accountability in the exercise of public or governmental power?

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.[46] And accountability is the effective mechanism to make holders of public power adhere to the law and justify the exercise of power, in terms of law, policy and constitutional values, which distinguishes a democratic or rule-of-law society from others. The basic expectation in a democratic society is that holders of public power and authority must be able to publicly justify socially wise and just. But these forms of general accountability become very feeble in any developing country like Bangladesh because of poverty, illiteracy, ignorance of the masses and absence of effective democratic norms and values. In a country where democracy is not firm-rooted, the concept of effective accountability-mechanism can never be perfect in practice.

We know democracy is the structural or constitutional parameter of State power for the preservation and protection of human rights under the Rule of Law. The United Nations' Universal Declaration of Human Rights consists of 30 (thirty)

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[46] I. P. Massey: Administrative Law (1985). 'Introduction' by Upendra Baxi, p.x.

Articles prefaced by a preamble. The Declaration has declared the inalienable rights of human person and, by necessary implication, envisaged a welfare democracy comprising among others (a) accountability, signifying that those who govern are regularly accountable at least to a portion of the governed; and (b) openness and disclosure meaning democracy rest on popular participation and so there must be disclosure and openness of the affairs of the government. Hence, we can appreciate the unavoidable role of democracy and democratic government particularly to ensure accountability- mechanisms worthy and effective. Moreover, experience has shown, historically and with contemporary systems of government, that it is only under a democratic government with a welfare goal, accountability-mechanisms for the bureaucrats, legislators and judges can be made most proper and effective.

But in Bangladesh perspective, if we take a short glance at the working of democracy and democratic government, we find that democracy in Bangladesh was never allowed to function and since the days of Pakistani rule we have been under Martial Law since 1958 in some form or other except for lucid intervals although history has proved and more so in our country that the alternatives of democracy such as Monarchy, Oligarchy, Martial Law Government, etc are so horrifying that we should count our blessings in a democracy rather than be frustrated by its dark side. Despite all its short-comings, democracy is and remains, as Sir Winston Churchill has so aptly put it 'the least unsatisfactory of all forms of government.'

Though in Bangladesh perspective, it is at present fact that a truly elected new democratic government is in power nonetheless the foundation of democracy in the country is very weak as democracy in practice was never allowed to work freely in the past. In consequences, the existing accountability mechanisms in Bangladesh required for administrators, legislators and judges are not strong and sufficient as per necessity. Even the accountability- mechanisms so far exist in

Bangladesh can not properly function in practice because of the following important reasons:

A. Reasons for not giving proper account by the bureaucrats for their actions:

(i) General tendency of the bureaucrats to avoid accountability.

(ii) Lack of sincerity on the part of the bureaucrats to give account for their action to the elected politicians as generally bureaucrats are not free from corruptions.[47]

(iii) Lack of efficiency on the part of the elected politicians to ensure effective accountability to be accounted for by the bureaucrats.[48]

(iv) In practice, no parliamentary committee can function properly as the same is generally headed by a treasury bench member.

(v) In the Parliament, treasury bench members are not equally free to discuss any thing like opposition member and they have, in practice limited scope to discuss or criticise government officers as they are in power .[49]

(vi) In the Parliament, opposition members have, in real practice, limited power to control bureaucrats through discussion/criticism as they are not in power.[50]

(vii) As elected politicians are not free from corruptions[51] and with the help of the bureaucrats always indulging

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47 Bangladesher Amlatantra, edited by Mustafa Majid, pp. 63-67 (1991).

48 Ibid, p. 80.

49 Ibid, p. 79.

50 Ibid.

51 SOUVENIR, 16 Feb '89 published by the Bangladesh Law Association, p. 13.

themselves in corruptions,[52] as such bureaucrats while giving account for their actions get undue concession from the elected politicians.

(viii) In practice, absence of the establishment of the office of Ombudsman.

B. Reasons for weak political accountability:

(i) Irresponsibility and negligence of the politicians.

(ii) Political unrest or instability.

(iii) Politics has not been institutionalised.

(iv) Amongst the political parties, absence of general consensus on important fundamental issues.

However, because of the facts/ reasons as pointed out earlier, people in Bangladesh are convinced that accountability-mechanisms in the country are not effective and in the circumstances, they do believe that administrators in Bangladesh can easily abuse power & authority and behave arbitrarily. And with the same general believe, elected politicians i. e., Legislators in Bangladesh, whose relations with the bureaucrats/ administrators are not easy rather psychologically conflicting and suspicious, apprehend that if by any means power is granted to the administration as well as to the administrators, this may jeopardise the interest of the people and may lead to unnecessary harassment although grant of such power may be an unavoidable necessity for the smooth functioning of the administration and administrators. Hence, we may come to the conclusion that the concept of absence of effective accountability-mechanisms as exists in the country is acting as a conceptual impediment against the growth of administration and administrative law in Bangladesh.

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52 Bangladesher Amlatantra, edited by Mustafa Majid, p. 115 (1991).

APPENDICES

APPENDIX I

THE AMERICAN ADMINISTRATIVE PROCEDURE ACT, 1946

(Extracts)

Section 2.- As used in this Act—

(a) Agency.- "Agency" means each authority (Whether or not within or subject to review by another agency) of the government of the United States other than Congress, the courts, or the governments of the possessions, Territories, or the District of Columbia. Nothing in this Act shall be construed to repeal delegations of authority as provided by law. Except as to the requirement of Section 3, there shall be excluded from the operation of this Act (1) Agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them, (2) courts martial and military commissions, (3) military or naval authority exercised in the field in time of war or in occupied territory, or (4) functions which by law expire on the termination of present hostilities, within any fixed period thereafter or before July 1, 1947 and the functions conferred by the following statutes: Selective Training and Service Act, 1940; Contract Settlement Act, 1944; Surplus Property Act, 1944.

(b)Person and Party.- "Person" includes individuals, partnerships, corporations, associations, or public or private organizations of any character other than agencies. "Party" includes any person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in any agency proceeding; but nothing herein shall be construed to prevent an agency from admitting any person or agency as a party for limited purpose.

(c) Rule and rule making.- "Rule" means the whole or any part of any agency statement of general or particular applicability and future effect designated to implement, interpret, or prescribe law or policy or to describe the organization, procedure, or practice requirements of any agency and include the approval or re-organisations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing upon any of the foregoing. "Rule making" means agency process for the formulation, amendment or repeal of a rule.

(d) Order and adjudication.- "Order" means the whole or any part of the final disposition (whether affirmative, negative, injunctive, or declaratory in form) of any agency in any matter other than rule making but including licensing. "Adjudication" means agency process for the formulation of an order.

(e) License and relief.- "Licence" includes the whole or part of any agency (1) prohibition, requirement, limitation, or other condition affecting the freedom of any person; (2) withholding of relief; (3) imposition of any form of penalty or fine; (4) destruction, taking, seizure, or withholding of property; (5) assessment of damages, costs, reimbursement, restriction, compensation, charges of fees; (6) requirements, revocation or suspension of a license; or (7) taking of other compulsory or restrictive action. "Relief" includes the whole or any part of any agency (1) grant of money, assistance, license, authority, exemption, privilege, exemption or exception; or (3) taking of any other action upon the application or petition of, and beneficial to, any person.

(g) Agency proceeding and action.- "Agency proceeding" means any agency process as defined in sub-sections (c), (d), and (e) of this section. "Agency action" includes the whole or part of every agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act.

PUBLIC INFORMATION

Section 3.- Except to the extent that there is involved (1) any function of the United States requiring secrecy in the public interest, or (2) any matter relating solely to the internal management of an agency-

(a) Rules.- Every agency shall separately state and currently publish in the Federal Register (1) descriptions of its central and field organization including delegations by the agency of final authority and the established places at which and methods whereby, the public may secure information or make submittals or requests; (2) statements of the general course and method by which its functions are channelled and determined, including the nature and requirements of all formal or informal procedures available as well as forms and instructions as to the scope and contents of all papers, reports, or examinations; and (2) substantive rules adopted as authorised by law and statements of general policy or interpretations formulated and adopted by the agency for the guidance of the public, but not rules addressed to and served upon named persons in accordance with law. No person shall in any manner be required to resort to organization or procedure not so published.

(b) Opinions and orders.- Every agency shall publish or, in accordance with published rule, make available to public inspection all final opinions or orders in the adjudication of cases (except those required for good cause to be held confidential and not cited as precedents) and all rules.

(c) Public records.- Save as otherwise required by statute, matters of official record shall in accordance with published rule be made available to persons properly and directly concerned except information held confidential for good cause found.

RULE-MAKING

Section 4.- Except to the extent that there is involved (1) any military, naval or foreign affairs function of the United States or (2) any matter relating to agency management or personnel or to public property, loans, grants, benefits or contracts—

(a) Notice.- General notice of proposed rule making shall be published in the Federal Register (unless all persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law) and shall include (1) a statement of the time, place, and nature of public rule making proceedings; (2) reference to the authority under which the rule is proposed; (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved. Except where notice or hearing is required by statute, this sub-section shall not apply to interpretative rules, general statements of policy, rules of agency organization, procedure, or practice, or in any situation in which the agency for good cause finds (and incorporates the finding and a brief statement of the reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(b) Procedures.- After notice required by this section, the agency shall afford interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity to present the same orally in any manner; and, after consideration of all relevant matter presented, the agency shall incorporate in any rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, the requirements of Sections 7 and 8 shall apply in place of the provisions of this sub section.

(c) Effective dates.- The required publication or service of any substantive rule (other than one granting or recognising exemption or relieving restriction or interpretative rules and statements of policy) shall be made not less than thirty days prior to the effective date thereof except as otherwise provided by the agency upon good cause found and published with the rule.

(d) Petitions.- Every agency shall accord any interested person the right to petition for the issuance, amendment, or repeal of a rule.

ADJUDICATION

Section 5.- In every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved (1) any matter subject to a subsequent trial of the law and the facts *de novo* in any court; (2) the selection or tenure of an officer or employee of the United States other than examiners appointed pursuant to Section 11; (3) proceedings in which decisions rest solely on inspections, tests, or elections; (4) the conduct of military, naval, or foreign affairs functions; (5) cases in which an agency is acting as an agent for a court; and (6) the certification of employee representatives-

(a) Notice.- Persons entitled to notice of an agency hearing shall be timely informed of (1) the time, place, and nature thereof; (2) the legal authority and jurisdiction under which the hearing is to be held; and (3) the matters of fact and law asserted. In instances in which private persons are the moving parties, other parties to the proceeding shall give prompt notice of issues controverted in fact or law; and in other instances agencies may by rule require responsive pleading. In fixing the times and places for hearings, due regard shall be had for the convenience and necessity of the parties or their representatives.

(b) Procedure.- The agency shall afford all interested parties opportunity for (1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment where time, the nature of the proceeding and the public interest permit, and (2) to the extent that parties are unable so to determine any controversy by consent, hearing and decision upon notice and in conformity with Sections 7 and 8.

(c) Separation of functions.- The same officers who preside at the reception of evidence shall make the recommended decision or initial decision ... save to the extent required for the disposition of exparte matters ... no such officer shall consult any person or party on any fact in issue upon notice an opportunity for all parties to participate; nor shall such officer be responsible to, or subject to the supervision or direction of any officer ... engaged in the performance of investigative or prosecuting functions. ...

ANCILLARY MATTERS

Section 6.- *(a) Appearance.*- Any person compelled to appear in person before any agency, ... shall be accorded the right to be accompanied, represented and advised by counsel. ...

(b) Investigations.- No process, requirement of a report, inspection or investigative act or demand shall be issued, made, or enforced in any matter, or for any purpose except as authorised by law. Every person compelled to submit data or evidence shall be entitled to retain or, on payment of lawfully prescribed cost, procure a copy or transcript thereof. ...

(c) Subpoenas.- Agency subpoenas authorised by law shall be issued to any party upon request and, as may be required by rules of procedure upon a statement or showing of general relevance and reasonable scope of the evidence sought. ...

(d) Denials.- Prompt notice shall be given of the denial in whole or in part of any written application, petition, or other request of

any interested person made in connection with any agency proceeding. Except in affirming a prior denial or where the denial is self- explanatory, such notice shall be accompanied by a simple statement of procedural or other grounds.

HEARINGS

Section 7.- *(a) Presiding Officers.-* There shall preside at the taking of evidence (1) the agency, (2) one or more members of the body which comprise the agency, or (3) one or more examiners ... the functions of all presiding officers and participating in decisions. . . shall be conducted in an impartial manner. Any such officer may at any time withdraw if he deems himself disqualified; and upon the filing in good faith of a timely and sufficient affidavit of personal bias...

(b) Hearing Powers.- Officers presiding at hearings shall have authority, subject to the published rules of the agency and within its powers, to (1) administer oath and affirmations, (2) issue subpoenas. . . (3) rule upon offers of proof and receive relevant evidence, (4) take and cause dispositions to be taken wherever the ends of justice would be served thereby, (5) regulate the course of the hearing, (6) hold conferences for simplification of the issues by consent of the parties, (7) dispose of procedural requests or similar matters, (8) make decisions or recommend decisions, (9) take any other action authorised by agency rule consistent with this Act.

(c) Evidence.- Except as statutes otherwise provide, the proponent of a rule or order shall have the burden of proof. Any oral of documentary evidence may be received, but every agency shall as a matter of policy provide for the exclusion of irrelevant, immaterial, or unduly repetitive evidence and no sanction shall be imposed or rule or order be issued except upon consideration of the whole record or such portions thereof as may be cited by any party and as supported by and in accordance with the

reliable, probative and substantial evidence. Every party shall have the right to present his case or defence by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. ...

(d) Record.- The transcript of testimony and exhibits, together with all papers and requests file in the proceeding, shall constitute the exclusive record for decision ... and, upon payment of lawfully prescribed costs, shall be made available to the parties.

DECISIONS

Section 8.- (a) In cases in which the agency has not presided at the reception of the evidence, the officer who presided ... shall initially decide the case or the agency shall require ... the entire record to be certified to it for decision. Whenever such officers make the initial decision and in the absence of either an appeal to the agency or review upon motion of the agency within time provided by rule, such decision shall without further proceedings then become the decision of the agency. On appeal from or review of the initial decisions of such officers the agency shall, except as it may limit the issues upon notice or by rule, have all the powers which it would have in making the initial decision. Whenever the agency makes the initial decision without having presided to the reception of the evidence, such officers shall first recommend a decision except that in rule making or determining applications for initial licences (1) in lieu thereof the agency may issue a tentative decision or any of its responsible officers may recommend a decision or (2) any such procedure may be omitted in any case in which the agency finds upon the record that due and timely execution of its functions imperatively and unavoidably so requires.

(b) Submittals and Decisions.- Prior to each recommended, initial, or tentative decision, or decision upon agency review of the decision of subordinate officers the parties shall be afforded a reasonable opportunity to submit for the consideration of the officers participating in such decisions (1) proposed findings and conclusions, or (2) exceptions to the decisions or recommended decisions of subordinate officers or to tentative agency decisions, and (3) supporting reasons for such exceptions or proposed findings, or conclusions. The record shall show the ruling upon each such finding, conclusion, or exception presented. All decisions ... shall become part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or direction presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof.

SANCTIONS AND POWERS

Section 9.- *(a) In general.-* No sanction shall be imposed or substantive rule or order be issued except within jurisdiction delegated to the agency and as authorised by law.

JUDICIAL REVIEW

Section 10.- *(a) Right of Review.-* Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

(c) Reviewable Acts.- Every agency action made reviewable by statutes and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review ... .

(e) Scope of Review.- So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and

determine the meaning or applicability of the terms of any agency action. It shall (a) compel agency action unlawfully withhold or unreasonably delayed; and (b) hold unlawful and set aside agency action, findings and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence or otherwise on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts and subject to trial *de novo* by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portion thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

APPENDIX II

THE ADMINISTRATIVE TRIBUNALS ACT, 1980

(Act No. VII of 1981)

An act to provide for the establishment of Administrative Tribunals 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 any statutory public authority),

WHEREAS article 117 of the Constitution provides, inter alia, that Parliament may by law establish one or more Administrative Tribunals 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);

AND WHEREAS it is expedient to provide for the establishment of Administrative Tribunals to exercise such jurisdiction and for matters connected therewith;

It is hereby enacted as follows: -

1. Short title and commencement.- (1) This Act may be called the Administrative Tribunals Act, 1980.

(2) It shall come into force on such date as the Government may, by notification in the official Gazette, appoint.

2. Definitions.- In this Act, unless there is anything repugnant in the subject or context—

(a) "Prescribed" means prescribed by rules made under this Act;

(aa) "Statutory Public Authority" means an authority, corporation or body specified in the Schedule to this Act; and

(b) "Tribunal" means an Administrative Tribunal or the Administrative Appellate Tribunal established under this Act.

3. Establishment of Administrative Tribunals.- (1) The Government may, by notification in the official Gazette, establish one or more Administrative Tribunals for the purpose of this Act.

(2) When more than one Administrative Tribunal is established, the Government shall, by notification in the official Gazette, specify the area within which each Tribunal shall exercise jurisdiction.

(3) An Administrative Tribunal shall consist of one member who shall be appointed by the Government from among persons, who are or have been District Judges.

(4) A member of an Administrative Tribunal shall hold office on such terms and conditions as the Government may determine.

4. Jurisdiction of Administrative Tribunals.- (1) An Administrative Tribunal shall have exclusive jurisdiction to hear and determine applications made by any person in the service of the Republic (or of any statutory public authority) in respect of any action taken in relation to him as a person in the service of Republic (or of any statutory public authority).

(2) A person in the service of the Republic (or of any statutory public authority) may make an application to an Administrative Tribunal under sub-section (1), if he is aggrieved by any order or decision in respect of the

terms and conditions of his service including pension rights or by any action taken in relation to him as a person in the service of the Republic (or of any statutory public authority).

Provided that no application in respect of an order, decision or action which can be set aside, varied or modified by a higher administrative authority under any law for the time being in force relating to the terms and conditions of the service of the Republic (or of any statutory public authority), or the discipline of that service can be made to the Administrative Tribunal until such higher authority has taken a decision on the matter.

Provided further that no such application shall be entertained by the Administrative Tribunal unless it is made within six months from the date of making or taking of the order, decision or action concerned or making of the decision on the matter by the higher administrative authority, as the case may be.

(3) In this section "person in the service of the Republic (or of any statutory public authority) includes a person who is or has retired or is dismissed, removed or discharged from such service, but does not include a person in the defence services of Bangladesh (or of the Bangladesh Rifles).

5. Administrative Appellate Tribunal.- (1) The Government shall, by notification in the official Gazette, establish an Administrative Appellate Tribunal for the purpose of this Act.

(2) The Administrative Appellate Tribunal shall consist of one Chairman and two other members who shall be appointed by the Government.

(3) The Chairman shall be a person who is, or has been, qualified to be a judge of the Supreme Court, and of the two other member, 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.

(4) The Chairman or any other member of the Administrative Appellate Tribunal shall hold office on such terms and conditions as the Government may determine.

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

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

(3) The Administrative Appellate Tribunal may, on appeal, confirm, set aside, vary or modify any order or decision of an Administrative Tribunal, and the decision of the Administrative Appellate Tribunal in an appeal shall, subject to section 6A, be final.

6A. Application of article 103 of the Constitution.- It is hereby declared that the provisions of article 103 of the Constitution shall apply in relation to the Administrative Appellate Tribunal as they apply in relation to the High Court Division.

7. Powers and procedure of Tribunals.- (1) For the purposes of hearing an application or appeal, as the case may be, a tribunal shall have all the powers of civil court, while trying a suit under

the Code of Civil Procedure, 1908 (V of 1908), in respect of the following matters, namely : -

(a) summoning and enforcing the attendance of any person and examining him on oath;

(b) requiring the discovery and production of any document;

(c) requiring evidence on affidavit;

(d) requisitioning any public record or a copy thereof from any office;

(e) issuing commissions for the examination of witnesses or documents;

(f) such other matters as may be prescribed.

(2) Any proceedings before a Tribunal shall be deemed to be a judicial proceeding within the meaning of section 193 of the Penal Code (XLV of 1860).

(3) A Tribunal shall hold its sittings at such place or places as the Government may fix.

(3A) In the event of any difference of opinion among the members of the Administrative Appellate Tribunal, the opinion of the majority shall prevail.

(3B) If, in the course of a hearing, the Chairman or any other member of the Administrative Appellate Tribunal is, for any reason, unable to attend any sitting thereof, the hearing may continue before the other two members.

{(4) Omitted}

{(5) Omitted)}

(6) The member of an Administrative Tribunal (or the Chairman) of the Administrative Appellate Tribunal

may make such Administrative arrangements as he considers necessary for the performance of the functions of the Tribunal.

(7) The Administrative Appellate Tribunal may, by order in writing transfer, at any stage of the proceedings, any case from one Administrative Tribunal to another Administrative Tribunal.

(8) Subject to the other provisions of this Act, a Tribunal shall, for the purpose of hearing an application or appeal, as the case may be, follow such procedure as may be prescribed.

Provided that where, in respect of any matter no procedure has been prescribed by this Act or by rules made thereunder, a Tribunal shall follow such procedure in respect thereof as may be laid down by the Administrative Appellate Tribunal.

8. Binding effect of Tribunal's decisions and orders.- (1) All decisions and orders of the Administrative Appellate Tribunal shall subject to the decisions and orders of the Appellate Division, be binding upon the Administrative Tribunals and the parties concerned.

(2) All decisions and orders of an Administrative Tribunal shall, subject to the decisions and orders of the Appellate Division or of the Administrative Appellate Tribunal as the case may be, be binding on the parties concerned.

9. Penalty for obstruction.- A Tribunal shall have power to punish any person who, without lawful excuse, obstructs it in the performance of its functions, with simple imprisonment which may extend to one month, or with fine which may extend to five hundred taka or with both.

10. Bar on jurisdiction of Courts.- Subject to this Act, no proceedings, order or decision of a Tribunal shall be liable to be challenged, reviewed, quashed or called in question in any Court.

10A. Contempt of Tribunals.- (1) The Administrative Appellate Tribunal shall have power to punish for contempt of its authority or that of any Administrative Tribunal, as if it were the High Court Division of the Supreme Court.

11. Act to override other laws.- The provisions of this Act shall have effect notwithstanding anything contained in any other law for the time being in force.

12. Power to make rules.- (1) The Government may, by notification in the official Gazette, make rules for carrying out the purposes of this Act.

(2) In particular, and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely: -

(a) form and manner in which and the fee on payment of which an application or appeal may be made;

(b) registration of application or appeal;

(c) procedure to be followed by a Tribunal in hearing an application or appeal as the case may be;

(d) form and service of notices, summonses and requisitions ;

(e) prescription of records and reports to be maintained or prepared by a Tribunal;

(f) execution of decisions and orders of a Tribunal;

(g) any other matter which is to be or may be prescribed.

13. Savings.- All suits, cases, applications and appeals relating to any matter in respect of which a Tribunal has jurisdiction pending, immediately before the commencement of this Act, before any Court shall be tried, heard and disposed of by such Court, as if this Act had not come into force.

APPENDIX III

THE OMBUDSMAN ACT, 1980

(Act No. XV of 1980)

[9th April, 1980]

An Act to provide for the establishment of the office of Ombudsman and to define his powers and functions,

Whereas it is expedient to provide for the establishment of the office of Ombudsman and to define his powers and functions and to provide for matters connected therewith;

It is hereby enacted as follows:-

1. Short title and commencement: (1) This Act may be called the Ombudsman Act, 1980.

(2) It shall come into force on such date as the Government may, by notification in the *official Gazette*, appoint.

2. Definitions: In this Act, unless there is anything repugnant in the subject or context,-

(a) "action" means action taken by way of decision, recommendation or approval or in any other manner and includes failure to act;

(b) "competent authority" means-

(i) in relation to a Ministry, the Minister,

(ii) in relation to a statutory public authority, the Government,

(iii) in relation to a public officer, the appointing authority or, where there is no such authority, the Government;

(c) "public officer" means a public officer as defined in Article 152 of the Constitution and includes a chairman, mayor, director, member, trustee, officer or other employee of a statutory public authority or of any other authority, corporation, body or organization established, owned, managed or controlled by the Government;

(d) "prescribed" means prescribed by rules made under this Act.

3. Establishment of office of Ombudsman: (1) There shall be an Ombudsman who shall be appointed by the President on the recommendation of Parliament.

(2) Parliament shall recommend for appointment as Ombudsman a person of known legal or administrative ability and conspicuous integrity.

4. Term of office of Ombudsman: (1) The Ombudsman shall, subject to this section, hold office for a term of three years from the date on which he enters upon his office, and shall be eligible for reappointment for one further term.

(2) The Ombudsman shall not be removed from his office except by an order of the President passed pursuant to a resolution of Parliament supported by a majority of not less than two-thirds of the total number of members of Parliament on the ground of proved misconduct or physical incapacity:

Provided that no such resolution shall be passed until the Ombudsman has been given a reasonable opportunity of being heard in person.

(3) The Ombudsman may resign his office by writing under his hand addressed to the President.

5. Remuneration, etc. of Ombudsman: Subject to this Act, the remuneration, privileges and other conditions of service of the Ombudsman shall be the same as are admissible or applicable to a Judge of the Appellate Division.

6. Functions of Ombudsman: (1) The Ombudsman may investigate any action taken by a Ministry, a statutory public authority, or a public officer in any case where-

(a) a complaint in respect of such action is made to him by a person-

(i) who claims to have sustained injustice in consequence of such action; or

(ii) who affirms that such action has resulted in favour being unduly shown to any person or in accrual of undue personal benefit or gain to any person; or

(b) information has been received by him from any person or source, otherwise than on a complaint, that such action is of the nature mentioned in clause (a).

(2) Nothing in this section shall authorize the Ombudsman to investigate any civil or criminal proceedings before any Court, or the function performed by, or the conduct of, a person acting as a member of a Court.

7. Procedure in respect of investigations: (1) Where the Ombudsman proposes to conduct an investigation under this Act, he shall-

(a) forward a copy of the complaint or, in the case where he proposes to conduct the investigation on his own motion, a statement setting out the grounds therefore, to the Ministry, statutory public authority, or the public officer concerned;

(b) afford to the Ministry, the statutory public authority, or the public officer concerned an opportunity to offer its or his comments on such complaint or statement.

(2) Except as aforesaid the procedure for conducting any such investigation shall be such as the Ombudsman considers appropriate in the circumstances of the case.

(3) The Ombudsman may obtain information from such persons and in such manner, and make such inquiries and in such manner, as he thinks fit.

(4) Where any action is under investigation by any other person under any other law, the Ombudsman shall not investigate such action unless, for reasons to be recorded in writing, he is of opinion that an investigation by him is necessary.

8. Evidence: (1) Subject to the provisions of this section, for the purposes of an investigation under this Act, the Ombudsman may require any public officer or any other person who, in his opinion, is able to furnish information or produce documents relevant to the investigation to furnish any such information or produce any such document.

(2) For the purposes of any such investigation the Ombudsman shall have all the powers of a civil Court, while trying a suit under the Code of Civil Procedure, 1908 (V of 1908), in respect of the following matters, namely:-

(a) summoning and enforcing the attendance of any person and examining him on oath;

(b) requiring the discovery and production of any document;

(c) requiring evidence on affidavit;

(d) requisitioning any public record or a copy thereof from any Court or office;

(e) issuing commissions for the examination of witnesses or documents;

(f) such other matters as may be prescribed.

(3) Any proceeding before the Ombudsman shall be deemed to be a judicial proceeding within the meaning of section 193 of the Penal Code (XLV of 1860).

(4) Subject to the provisions of sub-section (5), no obligation to maintain secrecy or other restriction upon the disclosure of information obtained by or furnished to Government or persons in Government service, imposed by any law, shall apply to the disclosure of information for the purposes of any investigation under this Act.

(5) No person shall be required or authorized by virtue of this Act to furnish any such information or answer any such question or produce so such of any document-

(a) as might prejudice the security or defence or international relations of Bangladesh, or the investigation or detection of crime; or

(b) as might involve the disclosure of proceedings of the Council of Ministers or any committee thereof;

and for the purposes of this sub-section a certificate issued by a Secretary to the Government certifying that any information, answer or portion of a document is of the nature specified in clause (a) or clause (b) shall be conclusive and binding.

(6) Without prejudice to the provisions of sub-section (4), no person shall be compelled for the purposes of an investigation under this Act to give any evidence or produce any document which he could not be compelled to give or produce in any proceedings before a Court.

9. Reports of Ombudsman: (1) If, after investigation of any action under this Act, it appears to the Ombudsman that

injustice has been caused to the complainant or to any other persons in consequence of maladministration in connection with such action, the Ombudsman shall, by a report in writing, recommend to the competent authority concerned that such injustice should be remedied in such manner and within such time as may be specified in the report.

(2) The competent authority to which a report is sent under sub-section (1) or a person authorized by it in this behalf shall, within one month of the expiry of the time specified in the report, intimate to the Ombudsman of the action taken for compliance with the report.

(3) If, after investigation of any action under this Act, it appears to the Ombudsman that such action has resulted in favour being unduly shown to any person or in accrual of undue personal benefit or gain to any person and that this may be substantiated, he shall, by a report in writing, communicate his findings, together with the relevant documents, materials and other evidence, to the competent authority concerned and recommend such legal, department or disciplinary action as he deems fit.

(4) The competent authority or a person authorized by it in this behalf shall examine the report forwarded to it under sub-section (3) and, within one month of the date of receipt of the report intimate to the Ombudsman the action taken or proposed to be taken on the basis of his report.

(5) If the Ombudsman is satisfied with the action taken or proposed to be taken on the basis of his report referred to in sub-sections (1) and (3), he shall close the case but where he is not so satisfied and if he considers that the case so deserves, he may make a special report upon the case to the President.

(6) The Ombudsman shall prepare an annual report concerning the discharge of his functions under this Act and submit it to the President who shall cause it, together

with an explanatory memorandum, to be laid before Parliament.

(7) If, during any investigation under this Act, the Ombudsman finds any defect in any law, he may report such defect to the Government and recommend such reform of the law as, in his opinion, will remove such defect.

10. Staff of Ombudsman: (1) The Ombudsman may appoint officers and other employees to assist him in the discharge of his functions.

(2) The categories of officers and other employees who may be appointed by the Ombudsman and their terms and conditions of service shall be such as may be prescribed after consultation with the Ombudsman.

(3) Without prejudice to the provisions of sub-section (1), the Ombudsman may, with the previous consent of the Government, utilize the services of any officer, employee or agency of the Government if such services are required by him for the purpose of discharging his functions.

11. Power of entry: For the purposes of an investigation under this Act, the Ombudsman may enter upon and inspect any premises and search and seize such books or documents as he deems necessary; and the provisions of sections 102 and 103 of the Code of Criminal Procedure, 1898 (V of 1898), shall, so far as may be apply to such entry, inspection, search and seizure.

12. Restriction of publication of proceedings: (1) No person shall publish any proceedings relating to an investigation which is pending before the Ombudsman unless prior permission for the publication is obtained from the Ombudsman.

(2) Whoever contravenes the provision of sub-section (1) shall be punishable with simple imprisonment for a term which may extend to three months, or with fine which may extend to two thousand Taka, or with both.

13. Power of Ombudsman to punish any person for obstruction: The Ombudsman shall have power to punish any person who, without lawful excuse, obstructs him in the performance of his functions with simple imprisonment which may extend to three months, or with fine which may extend to two thousand Taka, or with both.

14. Delegation of powers: The Ombudsman may, by general or special order in writing, direct that any power conferred or any duty imposed on him by or under this Act may also be exercised or discharged by such of the officers, employees or agencies referred to in section 10 as may be specified in the Order.

15. Exemption: The Government may, by notification in the *official Gazette*, exempt any public officer or class of public officers from the operation of all or any of the provisions of this Act.

16. Immunities: (1) No suit, prosecution or other legal proceeding shall lie against the Ombudsman or any member of his staff in respect of anything which is in good faith done or intended to be done under this Act.

(2) No proceedings, decision or report of the Ombudsman shall be liable to be challenged, reviewed, quashed or called in question in any Court.

17. Power to make rules: The Government may, by notification in the *official Gazette*, make rules for carrying out the purposes of this Act.

18. Savings: The provisions of this Act shall be in addition to the provisions of any other law under which any remedy by way of appeal, revision, review or in any other manner is available to a person making a complaint under this Act in respect of any action, and nothing in this Act shall limit or affect the right of such person to avail of such remedy.

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