4

DEVELOPING ADMINISTRATIVE LAW ISSUES/CONCEPTS IN BANGLADESH: PROSPECTS

It has already been manifested in the previous chapters that there has been tremendous development of administrative law as well as administration in Bangladesh during the last hundred years. The concept of Administrative Law has assumed great importance in the last five decades and it has witnessed remarkable advances in recent times. It is a branch of law which is being increasingly developed to control abuse or misuse of governmental power and keep the executives and its various instrumentalities and agencies within the limits of their powers. There are several concepts/doctrines in Administrative Law which have been evolved by the courts for the purpose of controlling the exercise of power so that it does not lead to arbitrariness or despotic use of powers. These concepts and doctrines are intended to provide safeguard to the citizens against abuse or misuse of power by the instrumentalities or agencies of the State.

Administrative Law in Bangladesh is a fast growing discipline and has many new emerging and developing areas which make the administration more responsive and responsible to the real needs of the people. In such perspectives, the developing concepts of administrative law in Bangladesh are indeed an important issue for analysis and evaluation. Hereafter, the prospects of administrative law in Bangladesh especially in the light of the following developing legal concepts / issues are discussed with analysis and evaluation:

(I) Concept of Rule of Law

(II) Concept of Natural Justice

(III) Doctrine of *Ultra Vires*

(IV) Availability of Legal Aid

(V) Independence in Administrative Adjudication

(VI) Right to Information

(VII) Ombudsman

(VIII) Concept of Public Interest Litigation

(IX) Local Government

(X) Doctrine of Legitimate Expectations

In the following chapters, attempts have been made with reference to appropriate laws/documents, where necessary and expedient, to discuss and evaluate how the foregoing developing concepts/issues are now acting for the growth and development of administrative law in Bangladesh.

4(1)

CONCEPT OF RULE OF LAW

Though the Traditional i.e. Dicean Concept of Rule of Law is still active as an important conceptual impediment against the growth of administrative law in Bangladesh[1] but in spite of this fact the modern concept of Rule of Law, which has been developed considerably in the present administrative age, has clearly gained remarkable advances with the growth of administrative law in the country.

Actually Dicey misconceived about administrative law. And to evaluate Dicey's thesis on the concept of 'Rule of Law', one will have to understand the time when he developed the contents of his thesis. Dicey developed the contents to his thesis by peeping from a foggy England into a sunny France. Dicey observed that in France the government officials exercise wide discretionary powers and if there is any dispute between a government official and a private individual, it is tried not by an ordinary court but by a special administrative court. From this Dicey concluded that this spells the negation of the concept of 'Rule of Law' which is a secret of Englishmen's liberty.

Therefore, Dicey concluded that there is no administrative law in England. And he thought that the French system is administrative law when administrative law is more than that. Dicey was not concerned with the whole body of law relating to administration. He was concerned with a single aspect of administrative law, namely, administrative adjudication.

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1 The role of Traditional i.e. Dicean Concept of Rule of Law as a conceptual impediment against the growth of Administrative Law in Bangladesh has been elaborately pointed out in the subsequent Chapter 5.

On the other hand, Dicey was not also right when he thought that there is no administrative law in England. Even during his period, the crown and his servants enjoyed special privileges in England. Moreover, at that time in England, there were special tribunals having legislative and adjudicating powers. The government officials enjoyed wide discretionary powers under the Public Health Acts to enter upon private properties. However, inspired by the decisions of the House of Lords in Local Government Board Vs. Arlidge[2] and Board of Education Vs. Rice[3] wherein the administrative agency was authorised to decide even a question of law, Dicey himself recognised his mistake and observed that there exists in England a vast body of administrative law. Even towards the end of his life he doubted whether official law, i. e., administrative law could be as effectively enforced by the courts as by 'a body of men who combine official experience with legal knowledge', provided that they are entirely independent of the government.[4]

However, in his thesis, Dicey did not support administrative courts administered under special laws. Dicey relied upon one organ, the ordinary courts administered under ordinary law. Actually Dicey was doubtful whether the administrative courts, administered under special laws, could give protection to the individual against the administration. In this count, it is needful to say that in actual practice, the difference between administrative and judicial agencies is not fundamental. Both apply the law to individual cases and thereby exercise discretion. And if the safeguards which protect the exercise of judicial

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2 1915 AC 120.

3 1911 AC 179.

4 Dicey : The Development of Administrative Law in England, 31 LQR 148 (1915). Though in the final analysis, Dicey asserted that it is not a true administrative law because the supremacy of ordinary courts prevails. Wade, Introduction to Dicey: An Introduction to the Study of Constitutional Law, 9th edn., p. xix.

functions are applied to administrative bodies, the quality of adjudication will be the same.[5]

It is seen that in the sense in which Dicey used his thesis on the concept of 'Rule of Law', there is no essential contradiction between administrative law and 'Rule of Law'. If the main theme of Dicey's thesis are-

(i) absence of discretion in the sense of arbitrariness; and

(ii) equality before law;

Then in these senses, there is no contradiction with administrative law. Because 'Administrative Law' and 'Rule of Law' are not discrete series. Both aimed at the "progressive diminution of arbitrariness and fostering a discipline of fairness and openness in the exercise of public power."[6]

However, the modern concept of the 'Rule of Law' is fairly wide and, therefore, sets an ideal for any government to achieve. This concept was developed by the International Commission of Jurists known as Delhi Declaration,[7] 1959, which was later on confirmed at Lagos in 1961. This declaration in short puts three ideals of 'Rule of Law' as under:

1. The function of the legislature in a free society under the rule of law is to establish and maintain conditions which will uphold the dignity of man as an individual. This dignity requires, apart from recognition of civil and political rights, creation of social, economical, educational and cultural conditions for full development of individual personality.

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5 Lautcrpacht : Function of Law in the International Community, (1933), Ch. XIX, Section 2.

6 Dr. I.P. Massey: Administrative Law, 2nd edn., p. 37.

7 Journal of the International Commission of Jurist, Spring-Summer 1959 and the Rule of Law in Free Society published by the Commission in 1960.

2. The rule of law depends not only on the provision of adequate safeguards against abuse of power by the Executive but also on the existence of effective government capable of maintaining law and order and of ensuring economic and social conditions of life for society. These conditions include national health scheme, and social security, access to law courts and right to living wage.

3. Independent judiciary and a free legal profession are indispensable requisites of a free society under the Rule of Law.[8]

In 1957, the University of Chicago held a conference on the Rule of Law as understood in the West. It was attended by eleven countries including two communist countries. The secretary of the colloquium described the broad areas of agreement as follows:

(1) The Rule of Law is an expression of an endeavour to give reality to something which is not readily expressible; this difficulty is due primarily to identification of the rule of law with concept of rights of man – all countries of the West recognise that the rule of law has a positive content, though that content is different in different countries; it is real and must be secured principally, but not exclusively, by the ordinary courts.

(2) The Rule of Law is based upon the liberty of the individual and has as its object the harmonising of the opposing notions of individual liberty and public order. The notion of justice maintains a balance between these notions. Justice has a variable content and cannot be strictly defined, but at a given time and place there is an appropriate standard by which the balance between private interest and the common good can be maintained.

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8 Garner: Administrative Law, p. 20 (3rd edn.).

(3) There is an important difference between the concept of Rule of Law as the supremacy of law over the government and the concept of Rule of Law as the supremacy of law in society generally. The first concept is the only feature common to the West, connoting as it does the protection of the individual against arbitrary government – different techniques can be adopted to achieve the same and the Rule of Law must not be conceived of as being linked to any particular technique. But it is fundamental that there must have some techniques for forcing the government to submit to the law; if such a technique does not exist, the government itself becomes the means whereby the law is achieved. This is the antithesis of the Rule of Law.

(4) Although much emphasis is placed upon the supremacy of the legislature in some countries of the West, the Rule of Law does not depend upon contemporary positive law it may be expressed in positive law but essentially it consists of values and not institution; it connotes a climate of legality and legal order in which the nations of the West live and in which they wish to continue to live.[9]

Anyhow, the 'Rule of Law' is a viable concept. It changes with the change in social values. The basic theme, however, remains the fullest development of individual personality keeping in view the interests of large number of individuals collectively called society. Without being exhaustive, the 'Rule of Law' concept broadly includes the following principles-

(1) All laws should be prospective. They should be accessible and clear.

(2) Law should be reasonably stable.

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9 Goodhart : The Rule of Law and Absolute Sovereignty, Pennsylvania Law Review, Vol. 106, 946-963. Countries which attended the Conference were: U. K., Germany, Italy, Canada, Sweden, Turkey, Brazil, Mexico, Israel, U. S. S. R. and Poland.

(3) The making of particular law should be guided by open stable, clear and general rule. It should be utilitarian in approach and contents.

(4) The independence of the Judiciary and of the legal profession should be ensured.[10]

(5) The principles of natural justice must be followed. This will ensure objectivity and impartiality.[11]

(6) The court must possess power of judicial review of administrative actions both legislative and executive.

(7) The courts should ordinarily be easily accessible. Procedural technicalities and cost of litigation must be checked.

(8) The discretion of the crime prevention authorities should not be allowed to prevent the law.

(9) The freedom of the press must be guaranteed.[12]

Rule of Law, therefore, includes those principles, procedures and institutions which have generally tended to be important in protecting the individual from arbitrary government and which have enabled him the enjoyment of human dignity.[13] Rule of Law in modern times has expanded to ensure the fair exercise of power. The most unruly horse of administrative discretion has been saddled in this expanded net of the Rule of Law. In fact, the entire cluster of administrative law revolves round the Sum of the Rule of Law. It is as valuable a principle today as it has ever been.[14]

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10 Independence of the Judiciary and independence in administrative adjudication have been elaborated in the subsequent Chapter 4(V).

11 Application of principles of natural justice in our administrative life has been discussed in the Chapter 4 (II).

12 Joseph Raz : The Rule of Law and Its Virtue, 93 L. Q. R. 195 (1977).

13 Cf., International Commission of Jurists, Geneva, 1959. Report on the International Congress of Jurists, New Delhi, page 197.

14 W. S. Holdsworth, 55 L. Q. R. 586.

However, now if we examine the aspects of our law and legal system under the 'Rule of Law' concept, we find as follows:

Equality before Law

As regards 'Equality before Law' Article 27 of the Constitution of Bangladesh, like Article 5 of the 1956 Constitution of Pakistan and Article 14 of the Constitution of India, declares that all citizens are equal before law and are entitled to equal protection of law. Here this right embraces two rules: first, the provision does not mean that all laws will apply to all the subjects or that all subjects may have the same rights and liabilities; secondly, that a citizen's right as a human being are not effected by reason of his descent, religion, social or official status, economic condition or place of birth; and further that all citizens equally subject to the general rule.

From the above, it appears that equality clause permits classification,[15] and all classifications proceed on inequality. For whatever also equal protection of law may mean, it certainly does not mean, under Article 27 of the Constitution, equality of operation upon all the citizens of the State who by nature, attainment or circumstances differs from one another.[16] Thus, the result of equal protection of the laws is inequality before the law.[17]

In spite of this inequality, the Constitution of Bangladesh declares that there will be no discrimination against any citizen on the ground only of race, religion, caste, sex or place of birth in

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15 Aklaq Hussain, In the matter of, PLD 1955 Lahore 147; Naseem Mahmood Vs. Principal, King Edward Medical College, PLD 1965 Lahore 272; Zain Noorani Vs. Secretary of National Assembly, PLD 1957 Kar. 1.

16 Naseem Mahmood Vs. Principal, King Edward Medical College, PLD 1965 Lahore 272.

17 Chiranjit Lal Vs. Union of India, AIR 1951 S. C. 41.

respect of access to places of public entertainment or resort.[18] Equal protection of law recognises that any citizen otherwise qualified for appointment in the service of Bangladesh, shall not be discriminated on the grounds of race, religion, caste, sex, place of birth.[19] There are some qualifications to this rule : (a) posts may be reserved for any backward section of citizens, (b) posts relating to any religious or denominational institution may be reserved for appointments to persons of that religion or denomination, (c) in the interest of any service, specific posts or services may be reserved for members of either sex.[20]

From the above, it is evident that the concept of equality under the provisions of the Bangladesh Constitution does not imply mechanical equality or 'mathematical nicety'. Discrimination or classification, as discussed above, is permitted provided it is not arbitrary. If a law provides any discrimination in favour of or against a class, the classification is to be made on a real difference having a reasonable basis on its subject -matter.

Right to Protection of Law

As regards right to protection of law, the Constitution of Bangladesh provides -

"To enjoy the protection of the law, and to be treated in accordance with law, and only in accordance with law, is the inalienable right of every citizen, wherever, he may be, and of every other person for the time being within Bangladesh, and in particular no action detrimental to the life, liberty, body, reputation or property of any person shall be taken except in accordance with law."[21]

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18 Article 28, the Constitution of Bangladesh.

19 Article 29, ibid.

20 Ibid.

21 Article 31, ibid.

Protection of Right to Life and Personal Liberty

Like Article 5(2) of the 1956 Constitution of Pakistan, the Constitution of Bangladesh declares that no person shall be deprived of life or personal liberty, save in accordance with law.[22] This provision amounts to a proposition that no person is to take the life or liberty of another person except under a law authorising him to do so. There must be a provision in a statute or statutory instrument justifying any sentence of death or imprisonment or arrest of any person.[23]

Safeguards as to Arrest and Detention

In this context, Article 33(1) says-

"No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult and be defended by a legal practitioner of his choice."

Again Article 33(2) says -

"Every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of twenty four hours of such arrest, excluding the time necessary for the journey from the place of arrest to the court of the magistrate, and no such person shall be detained in custody beyond the said period without the authority of a magistrate."

But these rights of clauses 1 and 2 have been limited by clauses 3, 4, 5 and 6 of the said Article, which are related to preventive detention. And enemy aliens and persons detained under law of preventive detention, however, would not be entitled to the benefits as mentioned in clauses 1 and 2 of the said Article 33.

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22 Article 32, the Constitution of Bangladesh.

23 Alan Gledhill, Pakistan: The Development of Its Law and the Constitution, 1967, at p. 129.

When a person has been arrested under a law of preventive detention, the Government is entitled to detain a person in custody only for six months. If they want to detain the arrested person for more than 6 months, they must obtain a report from an Advisory Board, who will examine the papers submitted by the Government and by the accused, to the effect that detention beyond six months is justified. The Advisory Board will be composed of three persons of whom two shall be persons who are, or have been, or are qualified to be appointed as Judges of the Supreme Court and the other shall be a person who is a senior officer in the service of the Republic.

Protection in respect of Trial and Punishment

In this context, the Constitution of Bangladesh provides-

"(1) No person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than, or different from, that which might have been inflicted under the law in force at the time of the commission of the offence.[24]

(2) No one shall be prosecuted and punished for the same offence more than once."[25]

Here it is seen that this Article provides protection against retrospective offences or punishment.

As regards freedom of press, we find from Article 39 (2) of the Constitution of Bangladesh as follows:

"Subject to any reasonable restrictions imposed by law in the interests of the security of the state, friendly relations with

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24 Article 35(1), the Constitution of Bangladesh.

25 Article 35 (2), ibid.

foreign states, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence -

(a) the right of every citizen to freedom of speech and expression; and

(b) freedom of the press, are guaranteed."

On the other hand, Article 44 of the Bangladesh Constitution guarantees for the enforcement of fundamental rights, the right to move the High Court Division of the Supreme Court of Bangladesh.

From the previous discussion, it is now convincing that the provisions of our existing Constitution are more or less satisfactory in upholding the "Rule of Law' concept in our administrative life.

Moreover, the Supreme Court of Bangladesh, under Article 102 of the Constitution,[26] possesses the power of judicial review[27] of administrative actions both legislative and executive. For example, the following decisions held by the Appellate Division of the Supreme Court of Bangladesh may be pointed out:

Bangladesh Biman Corporation Employees Service Regulations, 1979:

Regulations 19 & 20: Read with Seniority of Freedom Fighter Rules, 1979:

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[26] Under Article 102 of the Constitution of Bangladesh, the High Court Division of the Supreme Court of Bangladesh can issue directions, orders, in the nature of writs of certiorari, quo warranto, mandamus, prohibition and habeas corpus without using their technical names.

[27] The doctrine of judicial review originated in United States of America in connection with the case Murbury Vs. Madison, 1 Crunch 137. However, judicial review means power of the court to judge validity of any action taken or initiated by any public or private authority on the ground of doctrine of *Ultra Vires* or violation of the rules of natural justice and to take necessary steps as may be appropriate.

Ante dated Seniority to Freedom Fighter Officials of Bangladesh Biman - Regulation 19 deals with seniority of existing employees - Regulation 20 deals with seniority on inter-departmental transfer- no regulation has been framed empowering the preparation of Revised Seniority List by Biman - Seniority of Freedom Fighter Rules, 1979, are applicable to government only - Any revised seniority list is prepared by Biman for giving two years ante dated seniority would be without backing of lawful authority — mere circular by an executive fiat is not enough.[28]

The Constitution of Bangladesh, 1972

Article 102 : - Writ petition - Government authorised to enter into demised premises (land) upon termination or determination of lease following legal procedure — Government not complying with the provision of Law — Writ petition challenging Governments entry into demised land, maintainable.[29]

Criminal Trial

Law— application of — A criminal court has to see what was the prevailing law in respect of the subject matter before a new law was promulgated on the same subject.[30]

Constitution of Bangladesh

Articles 31 & 35 : (Per Shahabuddin Ahmed, J) : Every action effecting a citizen's right must be taken according to law or under the authority of law and not according to whim of the person in authority or under any executive fiat. If an action is

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28 Abdul Quddus Vs. Secretary, Cabinet Secretariat & Establishment Division, Bangladesh, I BCR 1981 AD 31.

29 Mrs Husna Mansur & others Vs. Secretary, M/O P. U & W. D. Bangladesh & others, 2 BCR 1982 AD 171.

30 Abdul Halim Mollah & another Vs. The Member, Appellate Tribunal Dhaka & others, (1982) 34 DLR (AD) 309.

invalid because it was not taken according to any law, it can be validated by making a law retrospectively and the requirement of Article 31 may be satisfied by such retrospective law unless there is any constitutional provision preventing retrospective operation. Such constitutional prohibition appears to be contained in Article 35 of the Constitution.[31]

Acquisition

Land acquired with structure thereon -- owners claimed compensation @Tk. 8000/- per decimal -- Government calculated compensation @Tk. 190/- per decimal - arbitrator considering the land's location, prepared award @ Tk. 3000/- per decimal.-- arbitrator's awarded, not arbitrary or without basis - High Court found that since the owner produced certain documents in support of their claim of compensation but the government did not produce any such document, the owner's claim remain unchallenged and held that "ends of justice will be best served if the half of the total claim of the owner of the land is accepted" - High Court Division thus increased the compensation by raising the amount to half of the sum of compensation claimed by the appellants which is to the advantage of the appellants — no interference called for particularly when compensation awarded by the arbitrator was further raised by the High Court - adequate compensation is an important aspect of the principles of 'Rule of Law' concept.[32]

The foregoing discussion about the present position of the 'Rule of Law' concept in our State activities shows that it has gained

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31 Mofizur Rahman Khan Vs. Bangladesh & others, (1983) 12 BLR (AD) 149.

32 Md. Majibur Rahman Sarkar Vs. Bangladesh, BCR 1984 AD 353.

remarkable advances in the administrative fields so as to strike the balance between the authority of the State and the fundamental human rights of the citizen by proper and prompt application and enforcement of the law on which the peaceful and civilized existence of the society rests. Not only this, this Concept in our administrative fields also occupied an unique position to respond the aspiration and needs of the common people keeping in view the promotional role of the welfare-oriented administration and administrative law.

4 (II)

CONCEPT OF NATURAL JUSTICE

In Bangladesh there is no statute laying down the minimum procedure which administrative authorities must follow while exercising decision making power.[1] There is, therefore, a bewildering variety of administrative procedure. Sometimes the statute under which the administrative authority exercises power lays down the procedure which the administrative authority must follow but at times the administrative authority is left free to devise its own procedure. However, the courts have always insisted that the administrative agencies must follow a minimum of fair procedure. This minimum fair procedure refers to the concept of natural justice. The concept of Natural Justice is an important concept in administrative law.

In fact, natural justice is a concept of common law and it is the common law world counterpart of the American 'procedural due process'. Natural justice represents higher procedural rules developed by judges which every administrative authority must follow in taking any decision adversely affecting the rights of a private individual.[2]

Natural justice has meant many things to many writers, lawyers and systems of law. Professor H. W. R. Wade defines natural justice as "the name given to certain fundamental rules which are so necessary to the proper exercise of power that they are projected from the judicial to the administrative sphere."[3] Natural justice is the price of the rule of law.[4]

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1 Here the term administrative decision-making has been used synonymously with administrative adjudication.

2 Dr. I. P. Massey. Administrative Law, p. 170 (2nd edn.).

3 H. W. R. Wade, Administrative Law, p. 154 (2nd edn.)

4 S. M. Sikri. J, in Board of H. S. & I. E., U. P. Vs. Chitra, A. I. R. 1970 S. C. 1039, 1040.

It is used interchangeably with Divine Law, jus gentium and the common law of the nations. It is a concept of changing content. However, this does not mean that at a given time no fixed rules of natural justice can be identified. The rules of natural justice through various decisions of courts can be easily ascertained, though their application in a given situation may depend on multifarious factors. In Bangladesh, though natural justice enjoys no express constitutional status but the Appellate Division of the Supreme Court of Bangladesh in Abdul Latif Mirza Vs. Government of Bangladesh[5] observed:

"It is now well-recognised that the principle of natural justice is a part of the law of the country".

Hence, natural justice is a concept of procedural law developed by courts which administrative authorities in absence of any legally prescribed procedure, must follow at the time of adjudication.

In legal sphere, the concept of natural justice generally covers two rules. These are:

1. **Nemo judex in causa sua**.- No one should be made a judge in his own cause, or the rule against bias.

2. **Audi alteram partem**.- Hear the other party, or the rule of fair hearing, or the rule that no one should be condemned unheard.

Rule against Bias

'Bias' means an operative prejudice whether conscious or unconscious in relation to a party or issue. Therefore, the rule against bias strikes those factors which may improperly influence a judge in arriving at a decision in any particular case. The requirement of this rule is that the judge must be impartial and must decide the case objectively on the basis of the evidence or record. A person cannot take an objective decision in a case in

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5 (1982) 34 DLR (AD) 173.

which he has an interest for, as human psychology tells us, very rarely can people take decisions against their own interests. Therefore, the maxim is that a person cannot be made a judge in his own cause. The rule of disqualification is applied not only to avoid the possibility of a partial decision but also to ensure public confidence in the impartiality of the administrative adjudicating process because not only must "no man be judge in his own cause" but also "justice should not only be done but should manifestly and undoubtedly be seen to be done."[6]

In practice, bias may be manifested variously such as personal bias, preconceived notion bias, subject-matter bias, departmental bias, pecuniary bias, etc. and may affect the decision in a variety of ways.

Rule of Fair Hearing

This is the second long arm of natural justice which protects the 'little man' from arbitrary administrative actions whenever his right to person or property is jeopardised. The expression "audi alteram partem" simply implies that a person must be given an opportunity to defend himself.

Right to fair hearing is a code of procedure and covers the following stages through which an administrative adjudication is properly performed:

(i) Right to notice;

(ii) Right to present case and evidence;

(iii) Right to rebut adverse evidence;

(iv) No evidence should be taken at the back of other party;

(v) Reasoned decision;

(vi) Institutional decision or one who decides must hear; and

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6 Dr. I. P. Massey Administrative Law, p. 172 (2nd edn.).

(vii) Rule against dictation i.e., the decision must be actually his who decides.

Legal Effects

According to W.H.W. Wade, any decision rendered in violation of the rules of Natural Justice is void. But according to D. M. Gordon, procedural breaches can never render a decision void as jurisdictional error. In judicial sphere, the Courts are also divided on this question of legal effect. The Supreme Court of India in Maneka Gandhi Vs. Union of India[7] held that an order, which infringes fundamental freedom, taken in violation of the rule of fair hearing is a nullity, which may, however, be validated through a post-decisional hearing. In Dhakeswari Cotton Mills Ltd. vs. C.I.T.[8] the Supreme Court of India quashed the decision of the administrative authority on the ground that not allowing the assessee to produce material evidence violates the rule of fair hearing. In Nawab Khan Vs. State of Gujarat,[9] the Supreme Court of India ruled that 'perhaps not all violations of the rules of Natural Justice knock down the order with nullity.'

In Abdul Latif Mirza Vs. Government of Bangladesh[10] the Appellate Division of the Bangladesh Supreme Court observed that "the principle of Natural Justice is a part of the law of the country." However, to understand the scope and importance of the foregoing rules of natural justice in Bangladesh, the following relevant cases decided by the Appellate Division of the Bangladesh Supreme Court may be examined and evaluated:

The Bangladesh Bank (Nationalisation) Order, 1972 (P. O. 26 of 1972)

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7 (1978) 1 SCC 248.

8 AIR 1955 SC 65.

9 (1974) 2 SC 121.

10 (1982) 34 DLR (AD) 173.

Article 23 : Service in nationalised Bank -- Establishment of bye-laws containing service rules framed by Bank prior to promulgation of the Presidential Order of nationalisation have no statutory force—Employees of Bank cannot be deprived of rules of natural justice.[11]

Audi Alteram Partem

Disciplinary action— Natural justice— personal hearing— Statute namely, statute no. 7(C) of the Bangladesh Agricultural University Employees (Efficiency & Discipline) Statutes providing that personal hearing is to be given when the delinquent asks for it—Delinquent concerned not asking personal hearing— Failure to give personal hearing does not violate this principle of natural justice.[12]

The Constitution of Bangladesh, 1972

Article 102: Judgement was passed in a writ petition in the absence of the respondent— On review application for hearing the writ petition in the absence of the appellant, the judgment passed earlier was set aside — The High Court in writ jurisdiction whether can restore a writ petition to the file on setting aside the judgement already pronounced and signed.

While setting aside the judgment of July 12, 1979, the High Court passed the order without hearing both sides and without giving an opportunity to the appellant to make out his case against the prayer for rehearing of the writ petition setting aside the judgment. In setting aside the order, hearing was given to the advocate for one of the respondents. No opportunity of hearing was given to the appellant. The minimum requirement was to see whether the respondents to the writ petition did receive the

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11 A. T. M. Zahirul Haque Vs. Secretary M/O Finance, Bangladesh & other 1981 (BLD) AD 236.

12 Bangladesh Agricultural University Vs. Md. Abdul Hye Bhuiyan, (1982) 34 DLR (AD) 24.

notices in time and if so, had they sufficient cause in failing to appear at the time of hearing and present their case and had they succeeded in making out a case for review, so that the ends of justice demanded re-hearing of the writ petition and in so doing the earlier judgment and order could be reviewed if at all. The order containing reason for allowing the review, therefore, cannot be sustained.[13]

Natural Justice

Cancellation of lease on the allegation of undue influence— Neither the plaintiff was heard nor his appeal was disposed of on giving any hearing— The plaintiff examined witnesses but the Government did not— Hence the very basis that he obtained settlement by exercising undue influence appears to be lacking.[14]

The Code of Civil Procedure, 1908

Contents of the Code- The Civil Procedure Code deals with procedural matters and not substantive rights. The procedural laws are grounded on rules of natural justice.[15]

If summons are not duly served on the defendant, that is a good ground for setting aside an exparte decree under Order 9, Rule 13 of the C.P.C. In such a case, question of knowledge is not at all relevant and exparte decree will be set aside even if the defendant had knowledge of institution of suit.[16]

On the other hand, if we analyse the Public Servants (Inquiries) Act, 1950, and the Government Servants (Discipline and Appeal) Rules of 1985, we find the following important contents:

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13 Khademul Islam Chowdhury Vs. Bangladesh & others, (1981) 33 DLR (AD) III.

14 Bangladesh Vs. Syeduddin Ahmed, BCR 1984 AD 201.

15 Abdur Rahman & others Vs. Sultan & others, 1983 BLD (AD) 129.

16 Md. Abdur Rashid & another Vs. Abdul Barik and others, 1984 BLD (AD) 83.

(1) Notice to accused

(2) Copy of charge and list to be furnished to accused

(3) Evidence of prosecution and examination of witnesses

(4) Evidence for defence and examination of witnesses

(5) Report of the officer with reasons

Moreover, the Constitution of Bangladesh provides that no person who holds any civil post in the service of the Republic shall be dismissed or removed or reduced in rank until he has been given a reasonable opportunity of showing cause why action should not be taken.[17]

From the foregoing discussion, it is clearly convincing that violation of any of the rules of natural justice is not sustainable in the fields of Administrative Law in Bangladesh. And with the changes and growth of Administrative Law in the country, the rules of natural justice have thus gained considerable advances to ensure free and fair administrative justice[18] in this administrative era of 21st century.

Exceptions to the Rules of Natural Justice

In the following grounds, there may be exclusion to the rules of Natural Justice:

Exclusion in exceptional cases of Emergency: Where a company has to be wound up to save the depositors or a trade dangerous to society is to be prohibited or a dangerous building is to be demolished or in such other exceptional cases of emergency, where urgent/prompt action, preventive or remedial, is needed

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17 Article 135(2), the Constitution of Bangladesh.

18 One thing may be pointed out here that though, because of inevitable reasons, there are some practices in the fields of Administrative Law in Bangladesh to avoid the rules of natural justice but such practices are exceptions to the rules of natural justice.

application of the rule of fair hearing may be excluded (Joseph Vs. Reserve Bank of India).[19]

Exclusion in cases of Dire Public Interest: In Mohinder Sing Gill Vs. Chief Election Commissioner,[20] the Supreme Court of India held that the 'Rule of Fair Hearing' can be obviated in administrative adjudication or in a decision-making process to save greater public interest.

Exclusion in cases of Confidentiality: If application of the rule of fair hearing breaks any confidentiality which is detrimental to national interest or public order, in that case this rule may be excluded (Malak Singh Vs. State of Punjab).[21]

Exclusion in case of Academic Adjudication: A student of the University was removed from the rolls for unsatisfactory academic performance without giving any pre-decisional hearing. The Supreme Court of India held that where the competent academic authorities examine and assess the work of a student over a period of time and declare his performance unsatisfactory, application of the rule of fair hearing is not needed (Jawaharlal Nehru University Vs. B.S. Narwal).[22]

Exclusion based on Impracticability: In R. Radakrishnan Vs. Osmania University[23] it is found that the entire M. B. A. entrance examination was cancelled by the University authority because of mass copying. The court held that notice and fair hearing to all candidates is impossible, which has assumed national proportions.

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19 AIR 1962 SC 1371.

20 (1978) SCC 405, 432.

21 (1981) 1 SCC 420.

22 (1980) 4 SCC 480.

23 AIR 1974 AP 283.

Exclusion in cases of Interim Preventive Action: If any order taken by an administrative authority is a suspension order being preventive in nature and not a final order, in that case application of the rules of Natural Justice may be excluded (Abhay Kumar Vs. S. Srinivasan).[24]

Exclusion in cases of Legislative Action: Exclusion is justified if the nature of administrative action is legislative. If any administrative action, taken in violation of Natural Justice, does not apply to a single individual or a few specified persons and is of general nature, it may be called legislative (Saraswati Industrial Syndicate Vs. Union of India).[25]

Due Process of Law and the Rules of Natural Justice

In U.S.A. the concept of the rules of Natural Justice is not frequently heard. Because it is not necessary for them to rely on this concept as the concept of due process of law has been guaranteed by the U.S.A. Constitution by its 5th and 14th constitutional amendments, the gist of which stands as "no person shall be deprived of life, liberty or property without due process of law". In the hands of the Supreme Court, the phrase 'due process of law' early came to evolve a twofold meaning – Substantive and Procedural and the rules of natural justice were considered to be implied in the procedural aspect of due process.

Thus, in Hagar Vs. Reclamation District,[26] the court held that "whenever it is necessary for the protection of the parties, it must give them an opportunity to be heard respecting the justness of the judgment sought."

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24 AIR 1981 Del 381.

25 (1975) 2 SCC 630.

26 (1884) 111 US 701.

It is, thus, to be seen that the ingredients of procedural due process basically correspond to the English Common Law rules of natural justice. Indeed, Natural Justice is a concept of common law world counterpart of the American procedural due process.

Equity and the Rules of Natural Justice

"Equity" may be defined to be natural right or justice, as addressed to the conscience, independent of express or positive law; a system of jurisprudence, the object of which is to render the administration of justice more competent, either by the application of rule to cases not provided for by positive law, or by adopting remedies more exactly to the exigencies of particular cases (Burril Law Diet. tit. "Equity"). Equity is based on good conscience, fair dealing and justice. It dos not interfere when law provides adequate remedy. It only denotes the spirit and the habit of fairness and justness. It desires to give to each man his dues according to natural law.

Now, it is observed from the foregoing discussion that the concept of 'Equity' is wider than the concept of rules of Natural Justice. The concept of 'Equity' actually covers the doctrine of reasonableness, the concept of striking down malafide action and also the concept of rules of Natural Justice. Indeed, the concept of Natural Justice comes within the ambit of the concept of Equity. The exclusions to the rules of Natural Justice are also based on the concept of 'Equity'. In fact, both these concepts are not contrary to each other rather conducive and complementary.

4 (III)
DOCTRINE OF ULTRA VIRES

The term *'Ultra Vires'* is a Latin term. *'Ultra'* means excess, beyond or outside. And *'Vires'* denotes competence or power. Hence, the term *'Ultra Vires'* means 'outside the competence of or 'beyond the power of. The term is used in relation to corporations, local bodies, and to other government authorities and even to inferior judicial bodies, when exceeding the authority or power imported to them by the law.[1]

Literally, *Ultra Vires* means beyond ones power or authority. This doctrine which lays down that a public authority may not act outside its powers is called the 'central principle of administrative law'.[2] In judicial sphere, the general theory of judicial control is correspondingly simple. It is commonly called the doctrine of *Ultra Vires*, which generally strikes down all illegal acts which contravene statute or rules of Natural Justice. The source of this doctrine is the common law as laid down in decided cases by the Judges. Here the notion of unlimited power has no place. Even the validity of any Act/Rule can be challenged even in the face of such phrase as "shall not be called in question in any court" in the enabling Act.[3]

However, Doctrine of *Ultra Vires* is that which strikes down an act when it violates statute, principles of Natural Justice. It strikes down a provision when it is in conflict with its parent law or the Constitution, as the case may be. An act is said to be *Ultra Vires* when it is in excess of the power of the person or authority doing it. When it is said that a legislative enactment or any of its provisions is *Ultra Vires* the Constitution, it means that the legislature which purported to enact it, exceeded the power conferred on it (the legislature) under the Constitution. When it

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1 Azizul Hoque. The Legal System of Bangladesh (1980) p. 23.

2 Dr. K. C. Joshi, Administrative Law, (3rd edn.), p. 60.

3 State of Kerala Vs. K. M. C. Abdulla & Co. (AIR 1965 SC 1585).

is said that a rule is *Ultra Vires* the Act, it means that the authority which purported to make the rule, exceeded the power conferred on it under the Act.[4]

'*Ultra Vires*' points out the capacity or power of the person to do that act. It is not necessary that an act to be *Ultra Vires* must also be illegal. It may be but it may as well not be ... . The essence of the doctrine of *Ultra Vires* is that the act is done in excess of the powers possessed by the person in law. This doctrine proceeds on the basis that the person has limited powers.[5]

Excess of power or abuse of power attracts the doctrine of *Ultra Vires* in court actions. Abuse of power may be on the ground of utterly wrong reasons and wrong procedures. Thus, the doctrine of *Ultra Vires* has two aspects: Substantive *Ultra Vires* and Procedural *Ultra Vires*.[6]

SUBSTANTIVE *ULTRA VIRES*

When a rule or order is declared invalid either because it goes beyond the scope of the authority given by the Act or is in conflict with the delegating statute, it is a case of Substantive *Ultra Vires*.[7] In other words when any act or any provision is in conflict with its substantive parent law or Constitutional law, it is Substantive *Ultra Vires*. The legal effect of substantive *Ultra Vires* is null and void. Substantially, grounds of Substantive *Ultra Vires* in administrative law may arise on the following counts;

1. *That the enabling Act violates the Constitution*

If the enabling Act is *Ultra Vires* the Constitution which prescribes the boundaries within 'which the legislature can act,

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4 P. J. Shetty Vs. Union of India, AIR 1970 Mys 171 (176).

5 Anand Prokash Vs. Assistant Registrar of Co-operative Societies, AIR 1968 All 22.

6 Dr. K. C. Joshi, Administrative Law, (3rd edn.) p. 60.

7 Ibid.

the rules and regulations framed thereunder would also be void. The enabling Act may violate either the implied or express limits of the Constitution.

PRECEDENT: Since the Government owned (Management Act XLI of 1975) Act is *Ultra Vires* the Constitution i. e. inconsistent with Article 27 of the Constitution of Bangladesh, the rules framed thereunder would also be void.[8]

2. ***That the delegated legislation or administrative rule-making violates the Constitution***

It may happen that the enabling Act may not be *Ultra Vires* the Constitution yet the rules and regulations framed thereunder may violate any provision of the Constitution.

PRECEDENT: Government Servants (Seniority of Freedom Fighters) Rules, 1979, is unreasonable and inconsistent with Articles 27 and 29 of the Constitution of Bangladesh. Hence, it is *Ultra Vires* the Constitution and is of no legal effect.[9]

3. ***That the delegated legislation or administrative rule-making violates the enabling Act***

The challenge to the constitutionality of delegated legislation on the ground that it is *Ultra Vires* the enabling Act can be sustained in the following counts:

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

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

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

(iv) That it is mala fide.- Delegated legislation can be challenged on the ground of bad faith or ulterior purpose.

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8 34 DLR 190.

9 34 DLR 77.

PRECEDENT: Mala fide act is not protected from challenge before the Court.[10] No legislature while granting power contemplates a mala fide exercise of power.[11]

(v) That it is unreasonable - Delegated legislation can be invalidated on the ground of unreasonableness. In Kruse Vs. Johnson[12] Lord Russell laid down the test of unreasonableness of delegated legislation as:

(a) Partial or unequal operation between different classes.

(b) Manifestly unjust.

(c) Bad faith.

(d) Oppressiveness.

(e) Gross interference with the rights of the people that no justification can be found in the mind of a reasonable man.

PRECEDENT : Rule no. 51 of the Chittagong Hill tract Regulation 1900 was declared by the Dhaka High Court as *Ultra Vires* the Constitution, because, this rule gave the Deputy Commissioner much more power. And by virtue of this Rule, the Deputy Commissioner could expel any person from Chittagong Hill tract for unlimited period without giving him the right to notice, which was manifestly unjust and unreasonable.[13]

PROCEDURAL *ULTRA VIRES*

If a statute requires certain forms to be observed, or certain preliminaries to be completed, before delegated powers are exercised, failure to comply with these conditions constitutes the action illegal being *Ultra Vires*. This is known as Procedural *Ultra*

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10 (1980)32 DLR(AD)266.

11 (1981)33 DLR(AD) 154.

12 Dr. I. P. Massey. Administrative Law (2nd edn.) p. 133.

13 PLD 1965 DNC 576.

Vires. In recent times, procedural fairness has emerged as a unique check on the executive, and courts may read such procedural fairness in delegated legislation.

However, when any act is done or any provision is made in violation of certain procedural requirements prescribed by the parent law or by the general law, it is procedural *Ultra Vires*. It may happen in two cases as follows:

1) In case of violation of directory procedural provision;

2) In case of violation of mandatory procedural provision.

Any violation of directory procedural provision is not void.[14] But violation of mandatory procedural provision is void.[15] In truth, the doctrine of *Ultra Vires* now enables the courts to examine the scope and reasonableness of the powers of the administration and is regarded as useful, inevitable and indispensable in the field of Administrative Law specially to keep the administration within legal ambit.

To understand which is mandatory provision or directory provision, we generally take help of 'shall' or 'may'. But it is not correct way because many times 'may' indicates mandatory and many times 'shall' indicates directory. In this regard the following case laws may be relevant for better understanding.

Meaning of 'May' and 'Shall '

Where in a provision the word 'shall' is substituted by the word 'may', the word 'may' confers a discretion.[16] Normally, the word 'may' implies what is optional, but in the context in which it

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14 Srinivasan Vs. Union of India, A 1958 SC419 (430); Hazari Mal Vs. I.T.O., A 1961 SC 200.

15 Municipal Council Vs. Kamal, A. 1965 SC 1321; Dharangadhara Chemical Works Vs. State of Gujarat, (1973) 2 SCC 345 para 13.

16 Hem Chand Vs. D.C.M. AIR 1977 SC 1986.

appears in Explanation to Section 17(2), Prevention of Food Adulteration Act, 1954, it means 'must'.[17] In Section 83(1) of the Registration Act, 1908, the word 'may' does not have mandatory character.[18] In Section 6-B of U. P. Industrial Disputes Act, 1947, the word 'may' in sub-section (2) should be read as 'shall' in the context of sub-section (3).[19]

It is well settled that the use of the word 'shall' does not always mean that the enactment is obligatory or mandatory. It depends upon the context in which the word 'Shall' occurs and the other circumstances.[20] The word 'Shall' in Order XLI, Rule 27, sub-rule (2), C.P.C. does not make the Rule mandatory.[21] In Land Acquisition Act, the word 'Shall' used in sub-section (2) of Section 6 should be considered to be only directory but not mandatory.[22] The word 'shall' in its ordinary signification is imperative, but much would depend upon the real intention of the Legislature. Behind the expression 'shall declare' in Order V, Rule 19-A, C.P.C. the intention of the legislature appears to be that there should be substantial compliance of this provision.[23] Where the legislature has used the words 'shall' and 'may' in the same provision, that itself is an indication that the word 'shall' has been used in a mandatory sense.[24]

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17 State (Delhi) Administration Vs. I.K. Nangia, AIR 1979 SC 1977.

18 Dharmadeo Rai Vs. Ramnagina Rai, AIR 1972 SC 928.

19 Western India Match Co. Vs. Workmen, AIR 1973 SC 2650.

20 State of MP. Vs. Azad Bharat Finance Co., AIR 1967 SC 276.

21 Ramangouda Vs. F. G. Basantgonda, AIR 1969 Mys 111.

22 State of Haryana Vs. Raghubir Dayal, 1955 I SCJ 332 at 336.

23 Prokash Chander Vs. Sundar Bai, 1979 WLN 61.

24 Jamatraj Vs. State of Maharashta, AIR 1986 SC 178.

4(IV)

AVAILABILITY OF LEGAL AID

A society that requires its citizens to live within law must ensure that they have access to the remedies of legal system regardless of their economic conditions. In unequal society equality before law implies rendering of legal aid to the poor litigants. Equal access to law for the rich and the poor alike is essential to the maintenance of Rule of Law.[1] And the concept of 'Rule of Law' will crumble down unless legal aid is made available to the poor in criminal and civil proceedings.[2] But in a poor country like Bangladesh common man can ill afford to pay the high costs on getting justice beyond their reach. However, the problem is not irremediable though formidable. The remedy lies in legal aid by the State, N.G.Os, Lawyers' Associations and individual lawyers.

The reasons behind the idea of legal aid are that judicial machinery for redress or defence should not be denied because of financial need. Achievement of justice, social, economic and political and of equality of status and opportunity are the aims enshrined in our Constitution but financial inability of a poor person to obtain access to a court either for redress of wrongs or for defending himself makes justice unequal as he is denied equality of opportunity to seek justice. Legal aid to the poor litigant is, therefore, not a minor problem of procedural law but a question of fundamental character. The solution of this problem lies in legal aid by the State, N.G.Os, Lawyers' Association and individual lawyers. It is, therefore, essential to provide adequate legal advice and representation to all those

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1 It was declared in the conference of the International Commission of Jurists held in New Delhi (known as Delhi Declaration) in 1957.

2 Annual Law Journal of 1990 published by Mymensingh District Bar Association, p. 49.

threatened as to their life, liberty, property and reputation who are unable to pay for it.[3]

It is found that legal aid or more correctly legal services movement in the U. K. is mostly supervised and controlled by the State itself which confirms it by enacting and implementing statutes. On the other hand, in the case of the U.S.A. though statute and regulations assure legal aid, the activities in this respect are mainly conducted and controlled by non-governmental institutions and forums.[4] In case of Bangladesh, the existing legal aid, material or non-material, and its availability to those who suffer from financial inability either to obtain access to a court of law for having legal relief or for defending himself in a proceeding, may conveniently be grouped and pointed out as under:

(i) Aid in Civil Proceedings

(ii) Aid in Criminal Proceedings

(iii) Aid provided by Legal Aid Societies

In this connection, the Law Committee's view, which was submitted on October 31, 1976, suggesting some amendments of laws relating to Court-fees, etc may also be pointed out here.

Aid in Civil Proceedings

The Civil Procedural Law helps persons who are too poor to pay the required court-fee to institute suits without payment of such fee.[5] In law, a person is a pauper when he suffers from financial inability to pay the court- fee for the plaint in a suit, or when he is not entitled to property worth taka one hundred other than his necessary wearing apparel and the subject -

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3 Dr. Hamiduddin Khan, Law and Life of Society, Bangladesh Perspective, p. 20.

4 The Dhaka University Studies Part – F, Vol. III, No. 1 (published in June 1992), p. 130.

5 The Code of Civil Procedure, 1908, Orders XXXIII and XLLV.

matter of the suit. To sue as a pauper, a person must seek permission from the court to that effect. An application for permission to sue as a pauper contains the particulars required in a plaint and a schedule of properties with value thereof signed and verified in the manner prescribed for the signing and verification of pleadings. Besides, it is accompanied by the plaint on which the plaintiff wants to sue which is to be presented in person unless exempted from appearance in court. On presentation of the application, the court may examine the applicant or his agent. Notice of such a pauper suit has to be served on all the opposite parties and since the Government remains interested in the matter of court-fee, a notice of the pauper suit is also sent to the Government-lawyer who, on receipt, sends the same to the Collector or Revenue Officer concerned. An inquiry is made by him and a report is submitted to the court stating as to whether applicant is a pauper or not. The report is taken into consideration and is of great value in deciding the question as to pauperism. Besides, the applicant and the opposite parties are given opportunities to adduce evidence in proof and disproof of pauperism. Arguments of the parties are also heard. The court then either allows or refuses the applicant to sue as a pauper. But a defendant is never allowed to defend as a pauper. In pauper appeals,[6] the provisions relating to pauper suits are followed. Many persons, including minors are benefited by these provisions in the field of Civil Law.[7]

Aid in Criminal Proceedings

Undefended accused persons in capital-punishment trials are provided with a defence lawyer by the State. But there is no other provision for State assistance in criminal trial. The law

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6 The Code of Civil Procedure, 1980, Order XLIV.

7 Azizul Hoque, The Legal System of Bangladesh, (1980) pp. 100-101.

provides for presentation of an appeal by a prisoner in jail.[8] It is available to him both in the appellate Court and the Supreme Court. As a rule, every facility such as pen, paper and even a writer are to be allowed to the prisoner in jail so as to enable him to prepare the petition of appeal. He may present his petition of appeal to the officer in-charge of the jail, which is required to forward such petition with requisitions to the proper appellate Court. Generally, notice is served on appellant in jail unrepresented by an Advocate. The convict from jail can explain a difficulty in his case. If he is not represented by a lawyer is entitled to appear in person to argue his case but generally the appeals are disposed of in chambers without the presence of the prisoner. In death sentence appeal, the prisoner is represented by an Advocate provided by the State.[9] Undoubtedly, this is conducive to dispense free and fair justice in the country.

Aid Provided by Legal Aid Societies

Besides the statutory provisions, poor people in Bangladesh have another scope of having legal aid which is offered by some non-governmental organizations. But in view of the percentage of poor people of Bangladesh, the activities of these N. G. Os. are not enough. However, a number of Bar Associations have already taken resolutions, initiatives to form legal aid societies to provide for legal aid to the poor litigants. Now-a-days, the members of .the legal profession are increasingly coming forward to form legal aid societies on voluntary basis for rendering their services to those who suffer from financial inability either to obtain access to a court of law for having legal relief or for defending himself in a proceeding.

Besides what have been stated above, some voluntary organizations, namely, Institute of Democratic Rights, Humanist

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8 The Code of Criminal Procedure, 1898, s. 420.

9 Azizul Hoque, The Legal System of Bangladesh, (1980) Chapter IX, p. 101.

and Ethical Association of Bangladesh, Bangladesh Society for the Enforcement of Human Rights, Oddekar Trust, etc. are also playing vital role in this count. These are steps towards rendering legal aid to the deserving and needy litigant public in the spirit of humanitarian social services.

The Law Committee's View

After the emergence of Bangladesh as an independent State, the Government set up a Law Committee to suggest remedies in the light of the circumstances prevailing in Bangladesh so as to meet the judicial needs. The Committee submitted its report on October 31, 1976, suggesting amendments of the civil and criminal procedural laws, laws relating to court-fees, etc. Apart from these suggestions, the Law Committee has also given certain other suggestions on voluntary legal aid.

However, some of the suggestions of the Law Committee were accepted by the Government and a law giving effect to those recommendations known as the Law Reform Ordinance, 1978, was promulgated.[10] The ordinance mainly amended the civil and criminal procedural laws, laws relating to court-fees, etc.

In conclusion, it should be clear that excesses and abuses of power by the administration against large masses of people who live below or even slightly above the poverty line are not ever likely to be rectified by the prevalent judicial techniques of control over administrative action. These people cannot reach courts with their grievances. They have no lawyers or legal services. We have to realise that the great utterances of courts on fairness, freedom from arbitrariness and natural justice have little or no relevance for untouchables, adivasis, landless labourers, bonded labour, casual and contract labour, under trials and prisoners, beggars and vagrant, mentally sick and many other allied groups of underprivileged and deprived.[11]

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10 Promulgated on December 5, 1978.

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

How the vital and seminal principles and techniques of judicial control of administrative action can be extended to more than half of our country's down - trodden and exploited humanity is a burning question in our administrative law arena of Bangladesh. However, one of the vital answers in this count is 'providing legal aid to the poor litigant public'. And from the previous discussion, it is now convincing that despite limitations, the issue of legal aid has gained considerable progress in Bangladesh, which is increasingly continuing at present.

The Legal Aid Act, 2000

The Constitution of Bangladesh has in clear terms recognized the basic fundamental human rights. One of the basic fundamental rights is that all citizens are equal before law and are entitled to equal protection of law. Majority people are improvised. They cannot access themselves to justice to protect and vindicate their legal rights & lawful causes. To address this problem legal aid services have been activated under the Legal Aid Act, 2000. The law provides for giving financial support to poor people to institute or defend cases in courts. Legal Aid Committees headed by the respective District Judges have been constituted with panel of lawyers in each district. A statutory body called National Legal Aid Organization has been established and there is a National Legal Aid Board consisting of 19 members. The members represent government officials as well as civil societies.

The National Legal Aid Committee is looking into the hitherto neglected jail appeal matter. There are many poor convicts whose jail appeals are not properly cared and conducted in the courts. Under the Legal Aid Programme, private lawyers are being engaged to press and conduct the jail appeals in courts. Under this law programmes have been taken to motivate and sensitize people about human rights.[12]

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12 Halim and Siddiki, The Legal System of Bangladesh (2008), p. 348.

4(V)

INDEPENDENCE IN ADMINISTRATIVE ADJUDICATION

Today the bulk of the decisions relating to personal or property rights of the people come not from the administrative agencies exercising judicial power. From the very early times the administrative and judicial functions were inextricably blended in the organs of the government. It was a later development that these powers were separated. Today, there is a revivalism of the past when administration has again come to acquire judicial powers.[1]

Now in Bangladesh, there are many administrative adjudicating bodies. Some of them are autonomous; their members are required to have prescribed qualifications and exercise only judicial functions. In legal sphere, these adjudicating bodies obviously come within the ambit of tribunals, for example, the Income Tax Appellate Tribunal. But in some cases, the adjudicating function is given to an authority which is an integral part of the administration. These types of administrative adjudicating bodies strictly do not come within the ambit of tribunals. For example, custom authorities under the Sea Customs Act have the power to confiscate the goods and impose tax. Such power is quasi-judicial but collector of customs, an authority under the Act, is an administrative authority.

However, in the context of changed circumstances, purpose and need, this may be regarded as a new development which possesses both merits and demerits. In the preceding Chapter[2] the merits/advantages especially of tribunals have been discussed. Therefore, we shall discuss in this Chapter, firstly, a

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1 Dr. I. P. Massey, Administrative Law (1985), p. 139.

2 Vide Chapter 3A (1).

few common problems/criticisms with which the whole administrative adjudicating process suffers:

(1) Complexity and Bewildering variety of Procedures.- A number of parallel bodies adjudicating on the same kind of disputes and giving diverse decisions are not exceptions in Bangladesh. These administrative agencies do not follow any uniform procedure. Even the best lawyer cannot say with certainty how he will proceed before a particular agency. Sometimes the procedure is laid down in the Act under which the agency is constituted. Sometimes the agency is left free to develop its own procedure.

(2) Unsystematic System of Appeal.- An appeal is a definite safeguard against an accident in the administration of justice. However, no uniform system of appeal has been followed in administrative adjudications. Sometimes the administrative decisions are made appealable before an independent tribunal as in tax cases and sometimes appeal is provided before a higher administrative agency. In the King Vs. Fulham Rent Tribunal,[3] 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".

(3) Invisibility of the Decisions.- Unlike courts, not all the administrative agencies exercising judicial power publish their decisions; their decisions, therefore, go beyond the pale of public criticism. In the absence of this necessary safeguard, the quality of administrative justice suffers.

(4) Unpredictability of Decisions.- In judicial decision there is a certain amount of predictability. On similar facts the decision will be the same because of the doctrine of precedent which courts in Bangladesh follow. Predictability of decisions is an essential ingredient of the Rule of Law which insists that justice

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3 1950 2 AER 211.

must be done through known principles. In administrative adjudication this essential element of predictability is frequently absent. Administrative agencies exercising adjudicating powers do not follow the doctrine of precedent; hence they are not bound to follow their own decisions.

(5) Official Perspective.- In administrative justice, official perspective is inherent. In any disciplinary proceeding, the presumption is not of guilt rather than innocence.[4]

(6) Political Interference.- Instrumentalities of administrative justice are, by their very nature, subject to some manner of political interference, though this cannot be said with certainty about every tribunal. No statistics are available to prove the quantum of political interference, but a strong conviction persists among the people that administrative justice is polluted by political interference.

(7) Off-the-Record Consultation.- Section 5(c) of the Administrative Procedure Act, 1946 (U.S.A.) provides that no administrative authority exercising adjudicating powers is to consult any person or party upon any fact in issue except upon notice and opportunity for all parties to participate. This is done to avoid off-the-record consultation by the authority in a manner that may prejudice the case of the other party. In Bangladesh, there is no law to eliminate the dangers inherent in off-the-record consultation by an administrative authority. But the rules of Natural Justice only demand that the authority must not base its decision on any evidence which is not brought to the notice of the other party.

(8) Reasoned Decisions.- In most cases, administrative agencies do not give reasoned decision and do not follow the rule against

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4 Dr. I. P. Massey, Administrative Law (1985), p. 152.

dictation which requires that the decision must be actually his who decides.[5]

(9) Legal Representation and Cross-examination.- In discharging judicial functions, all administrative adjudicating bodies do not strictly follow the rules of Natural Justice. For examples—

(i) some tribunals or adjudicating bodies allow unrestricted legal representation, others allow none;

(ii) some tribunals allow full examination and cross-examination of witnesses, others allow witnesses to be questioned only through the chairman.[6]

(10) Official Bias and Executive Influence.- In administrative justice, official or departmental bias is one of the most baffling problems. Moreover, in many cases, adjudicating body is a part of the machinery of administration and not free from executive influence due to its very nature.

However, in spite of what have been pointed out in the foregoing it is also true that the tendency in administrative law in recent years has been to provide effective measures to remove the problems and ensure real independence in administrative adjudication. And in this connection, the following measures may, among others, be referred to:

Though the technical rules of the Evidence Act do not apply to administrative adjudications as compared with ordinary court of law but this gap is now filled by the judge - made rule of 'No Evidence'.

In Abdul Latif Mirza Vs. Government of Bangladesh, the Appellate Division of the Bangladesh Supreme Court observed

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5 S. M. Hassan Talukder, Independence of Judiciary in Bangladesh: Law and Practice (1994), p. 133.

6 Ibid.

that "It is now well-recognised that the principle of natural justice is a part of the law of the country".[7]

Indeed, pursuance to the principles of Natural Justice by administrative adjudicating agencies enables the parties to know their rights, to present their case fully and to know the case which they have to meet. It is pertinent to mention here that the Supreme Court while reviewing the decision of any adjudicating body may apply the test of Natural Justice. For example, the following decisions held by the Appellate Division of the Bangladesh Supreme Court may be referred to:

It has already been stated that the common label of tribunals cannot be appended to all administrative adjudicating bodies. And in many cases, these adjudicating authorities are government employees and notwithstanding the purported independence they are bound to be influenced by the executive. However, in the recent days, for the free working of administrative adjudicating authorities, this problem of executive influence is being minimized to a great measure by internal separation wherein hearing officers are inducted to give hearing.[8]

An appeal is a definite safeguard against an accident in the administration of justice. And a desirable balance between demands for expertise and uniformity at the appellate level can be secured by providing for an appellate tribunal to deal with generality of cases so as to have a uniform system of appeals, and the appeals to such a tribunal can be allowed not only on law but also on merits. There may be further appeal to the Supreme Court on a question of law. However, our Government is not oblivious about the existing problem of unsystematic

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7 (1982) 34 DLR (AD) 173.

8 Rule 10 of the Government Servants (Discipline and Appeal) Rules 1976.

system of appeal. Now in case of administrative tribunal[9] dealing with service matters, appeal is allowed to the Administrative Appellate Tribunal. And all decisions and orders of the Administrative Appellate Tribunal is binding upon the Administrative Tribunal and parties concerned.[10] And only Appellate Division of the Supreme Court of Bangladesh can modify, vary or set aside the decisions and orders of the Administrative Appellate Tribunal.

In view of the foregoing, it is now convincing that though the process of establishing administrative adjudicating agencies in Bangladesh has not developed as a system to maintain independence in adjudication nonetheless the concept of judicial independence in administrative adjudicating process has now gained remarkable advances to ensure judicial fairness and impartiality.[11]

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9 An Administrative Tribunal hears and determines applications made by any person in the service of the Republic or of any statutory public authority in respect of the terms and conditions of his service including pension right or in respect of any action taken in relation to him as a person in the service of the Republic or of any statutory public authority (Vide Administrative Tribunals Act of 1980).

10 Administrative Tribunals Act of 1980 (Act No. VII of 1981), Section 5.

11 Here fairness appears to us to require the adoption of a clear procedure which enables parties to know their rights, to present their case fully and to know the case which they have to meet; and impartiality to require the freedom of adjudicating bodies from the influence, real or apparent, of departments concerned with the subject-matter of their decisions.

4(VI)

RIGHT TO INFORMATION

Now government openness is a sure technique to minimize administrative faults. As light is a guarantee against theft similarly governmental openness is a guarantee against administrative misconduct. Therefore, 'Right to Information' is a topic of growing importance in Administrative Law of our country. But this topic has already gained significant progress in U.S.A., Australia and New Zealand. The Freedom of Information Act, 2000, passed by the American Congress gives every citizen a legally enforceable right to access to government files and documents which the administration may be tempted to keep confidential. If any person is denied this right he can seek injunctive relief from the Court.[1]

However, this right also recognises the following well-defined exceptions:

1. Information specially required by executive order to be kept secret in the interests of national defence or foreign policy.
2. Information related solely to internal personal use of the agency.
3. Information specifically exempted from disclosure by statute.
4. Information relating to trade, commercial or financial secrets.
5. Information relating to inter-agency or intra-agency letters or memorandums.
6. Information relating to personal medical files.
7. Information complied for law enforcement agencies except to the extent available by law to a party other than the agency.

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1 National Labour Relation Board Vs. Robbins Tyre and Robber Co. 437 U.S. 251 (1977).

8. Information relating to agency regulation or supervision.
9. Information relating to geological and geophysical maps.

The Judiciary in U.S.A. shares the same concern of the Congress which is reflected in the Freedom of Information Act, 2000. In New York Times Vs. U.S.,[2] Justice Douglas observed: "Secrecy in government is fundamentally anti-democratic, perpetuating bureaucratic errors. Open discussion based on full information and debate on public issue is vital to our national health."

In England the trust of the legislation is not 'information' but 'secrecy'. The present law is contained in the Official Secrets Acts, 1911, 1920, and 1939. Under section 2 of the Act of 1911 it is an offence punishable with up to two years' imprisonment to retain without permission, or failure to take reasonable care of information obtained as a result of one's present or future employment; or to communicate information so obtained, or entrusted to one in confidence by a person holding office under Her Majesty, or obtained in contravention of the Act, to anybody other than a person to whom one is authorised to convey it or to whom it is one's duty to import it in the interests of State; or to receive such information knowing or having reasonable cause to believe that it has been given in contravention of the Act. Under these wide ranging prohibitions it may be an offence for a civil servant to pass on, or for a research worker to acquire from him, information even if such information has no bearing on security or is not classified as confidential.[3]

Referring to the right to obtain information and to publish it in U.S. A. and England, Mr. Howard Simpson, Managing Editor of the Washington Post, observed:

"In U.S.A. the publishers have a right to print anything. If you get hold of a State secret it is the editor who has the determining

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2 48 U S 403.

3 See S. A. de Smith: Constitutional and Administrative Law, (3rd edn.), 472.

authority whether to hold it or print it. The government has the right to keep secrets, but if we come by it, nobody can stop us. Whereas in Britain, the press believes in national security, which means they can be told to hold a story back, they have Official Secrets, etc."[4]

In Bangladesh, like India, the normal rule in Government is secrecy, and openness is an exception. Section 123 of the Evidence Act, 1872, as applicable in Bangladesh in common with India, says about evidence as to affairs of State. The section provides as under:

"No one shall be permitted to give any evidence derived from unpublished official record relating to any affairs of State, except with the permission of the officer at the head of the department concerned, who shall give or withhold such permission as he thinks fit."

Similarly, on the other hand, Section 124 of the Evidence Act, 1872, says about official communications. This section provides as follows:

"124 Official Communications.- No public officer shall be compelled to disclose communications made to him in official confidence, when he considers that the public interest would suffer by disclosure."

However, the harshness of this law is mitigated to a limited extent by the courts. Our courts, like Indian Courts, have rejected the concept of conclusive right of the government to withhold a document. Indeed, the courts of law are playing an important role towards a more open system of government though right to information is not a fundamental right.

Dr. I. P. Massey, Administrative Law (2nd edn.), p. 415.

In S.P. Gupta Vs. Union of India,[5] the Indian Supreme Court rejected the governments claim for privilege and ordered disclosure of correspondence and documents pertaining to non-confirmation of Justice Kumar. In the case, Justice P.N. Bagwati observed that no democratic government can survive without accountability and the basic postulate of accountability is that the people should have information about the functioning of the government ... that an open society is the new democratic culture towards which every liberal democracy is moving and our society should be no exception. The concept of open government directly emanates from the right to know which seems to be implicit in the right of free speech and expression ... disclosure of information in regard to functioning of the government must be a right, and secrecy and exception justified only where the strictest requirement of public interest so demands.

Thus, it was also held by the court that the diary of a foot constable shadowing the movements of a suspect is not a document relating to affairs of State.[6] The record kept at the police station about the activities of a particular person and the reports about him made by the Sub-Inspector to the Inspector from time to time or by the Inspector to the Superintendent of Police cannot be regarded as privileged under this section.[7] But statements made by the witness in an investigation made by a Police Inspector under the Code of Criminal Procedure cannot be considered to be statements made in official confidence. Statements recorded by the Police under the Police Regulations of Bengal are not privileged and the accused is entitled to get their copies.[8]

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5 1982 SC 149.

6 Mohan Singh Vs. E., 1940 L 217.

7 Muhammad Hayat Vs. Crown, PLD 1950 L 429.

8 Abdul Majid Vs. King, 1950, C 156.

It is for the court to decide whether the claim to privilege should be allowed or not. But once the court holds that the document is an unpublished official record relating to affairs of State which it would not be in the public interest to disclose, the question whether privilege should be claimed for it or not is entirely within the discretion of the head of the department.[9]

In spite of all above, it is still fact that there is too much secrecy in our country which is one of the main causes of administrative faults. Though because of the enactment of the Right to Information Act in 2009, the Official Secrets Act, 1923, which was in force in Bangladesh for long period, is not valid but the uniqueness of the Act of 1923 was that ministers were, in effect, self-authorising. They could decide for themselves what to reveal. Senior civil servants were allowed to exercise a considerable degree of personal judgment in deciding what disclosures of official information they might properly make, and to whom. Such communication was indeed regarded as "authorised". The result was that official leaks, a fertile source of disinformation, were protected but their exposure by unraveling the whole truth was forbidden.[10]

Actually, there is need for administrative secrecy in certain cases. But the claims of secrecy, generally by the government and public bodies, may play havoc with the survival of democracy in Bangladesh. Because of the constraints of the Official Secrets Act, 1923, which was drafted to suit the needs of a foreign rule in Bangladesh, the claims of informing the public were ignored.

However, the Right to Information Act, 2009 and the Right to Information Rules, 2009 which are now prevalent in Bangladesh are better than the Secrets Act in many respects. These two laws

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9 Governor-General in Council Vs. Peer Mohd. Khuda Bux, 1950 Punj 228 (FB).

10 A. G. Noorani : Secrets Act : An Anachroism, Indian Express, July 31, 1981.

have made the right of the citizen to information stronger. Now the authorities, public and private, are duty bound to give all information (except few specified information) if asked for by any citizen. If the authority fails to do so, aggrieved person can go to the Information Commission for necessary remedial action. It is hoped that this will not only strengthen the concept of open government, but also introduce accountability in the system of government.

4 (VII)

OMBUDSMAN

Any good system of administration, in the ultimate analysis, has to be responsible and responsive to the people. But history bears witness to the fact that more often, the impersonal bureaucratic system advertently or inadvertently tries to overwhelm the 'little man'. With the proliferation of administrative agencies affecting the life of a citizen in every conceivable aspect, the chances of administrative faults touching the rights of a person, personal or property, have tremendously increased. This has led to the never-ending search for an efficacious mechanism that can protect a person from administrative faults. This search has produced the idea of 'Ombudsman' which in terms of utility means a 'watchdog of the administration' or 'the protector of the little man.'[1]

According to Garner 'Ombudsman is an officer of parliament, having as his primary function, the duty of acting as an agent for parliament, for the purpose of safeguarding citizens against abuse or misuse of administrative power by the executive.[2] Professor Rowat[3] in his famous book 'The Ombudsman : Citizen's Defender' tried to define the term as "The Ombudsman is an independent and politically neutral person who's job is to look into the complaints of the citizens and who has the authority to criticize and publicize the work of the administration but not the reverse"

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1 Dr. I. P. Massey, Administrative Law (2nd edn.) p. 392.

2 Garner, Administrative Law(7th edn., Butterworths, London, 1989) p. 92.

3 R. C. Rowat, The Ombudsman: Citizen's Defender, London (George Allen and Unwin, 1968) p. IX.

Sweden was the first country to adopt this institution as early as in 1809; Finland adopted it in 1919; Denmark in 1953; and Norway in 1963. Amongst the common law countries, with a parliamentary form of government, New Zealand was the first country to opt for the Ombudsman system in 1962; next was England which established the system in 1966. Recently, Australia has established the Ombudsman system both at the Centre as well as the States. The institution has been adopted in all these countries with the basic idea to control effectively the activities of, and prevent abuses by, public officials after it came to be realised that the existing procedures and mechanism for the purpose were hardly adequate and efficacious. Ombudsman is in a very strong position to redress individual grievances arising out of bad administration.

A major difficulty in the present dispensation for getting relief against the administration through the courts is the difficulty of obtaining sufficient evidence of the impropriety committed by it. The strong point of Ombudsman is that he has access to departmental files. On a complaint being made to him against the administration, the Ombudsman satisfies himself by looking into the relevant papers whether there was any fault or lapse on the part of the administration. The complainant is not required to lead any evidence or to prove his case before the Ombudsman. It is for the Ombudsman to find out whether the complaint is justified or unjustified. No court fees are payable for filing a complaint with the Ombudsman; no lawyer need to be engaged because the Ombudsman himself is the complainant's lawyer. A probe by him into administrative functioning does not involve much publicity; he works silently and discreetly and the administration gets a chance of rectifying its mistake without much loss of face. The Ombudsman can give relief to an individual on many such grounds on which the courts are not

able to give relief. The proceedings of the Ombudsman are not formalised or routinised and do not take long time to be completed. The work of the Ombudsman is complementary to the work of the courts.[4]

The Ombudsman takes cognizance of complaints made to him by individuals or even suo motu except in England where complaints reach him not directly but through members of House of Commons.[5] The main sanction behind the Ombudsman is the backing he receives in his work from the legislature. He enjoys power to report to the legislature on the result of his investigations into individual grievances. This is a power of consequence, for no department wants to get adverse publicity in the press or be discussed in Parliament. Because of this, the recommendations made by him are invariably accepted by the departments concerned and individual grievances redressed.

The Ombudsman acts as an external agency, outside the administrative hierarchy, to probe into administrative faults. In theory, Ombudsman is the projection of the legislative function of supervising the administration. He is an appointee of the legislature; he acts as its eyes and reports to it.

However, a few basic differences between the courts and the Ombudsman may be noted: unlike the courts, Ombudsman does not have power to quash or reverse an administrative decision. He can however, suggest various types of remedies to the aggrieved individual which the court may not be able to provide. The Ombudsman does not follow any elaborate court procedure. Action by him is fast and inexpensive. Courts do

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4 Jain & Jain, Principles of Administrative Law (4th edn.), p. 917.

5 Ibid.

have advantage over the Ombudsman in one respect, viz., courts are able to intervene very swiftly to prevent the recurrence or continuance of wrongful acts, as they can grant declarations, injunctions, writs and stay orders. But the Ombudsman has no such power. He makes a report after the event has taken place.

However, on many administrative matters, Ombudsman's inquisitorial procedure is a much more efficient way to establish the truth than the adversary system followed by the courts. On the other hand, there are disputes between citizens and the administration which may be better resolved by an authoritative application of law to the facts as established by an adversary procedure. Both institutions are complementary to each other as both are seeking to evolve and elaborate in their own ways principles of good administration and trying to enforce them.[6]

Needless to say that the need to establish an Ombudsman system is no less intense in Bangladesh than other countries having the same system for the considerations which led to the creation of Ombudsman in those countries exist in ample measure in Bangladesh as well. Administrative delay and discourtesy are proverbial. The mechanism and procedure to redress the grievance of the individual against the administration are inadequate. Indeed, the administration in Bangladesh has been acquiring vast powers in the name of socio-economic development and, thus, chances for administrative excesses and abuse of powers abound. Therefore, close supervision over the administration, and a mechanism for redressal of grievances become essential. If in countries like New Zealand, England or Australia which have high standard of administration, case of maladministration can be found there is no gainsaying the fact that many more such cases will be

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6 Jain & Jain, Principles of Administrative Law (4th edn.), p. 917.

revealed here if there were a proper mechanism for investigation. The procedures to redress individual complaints through the courts or the legislature or the administration are as inadequate as in other common law countries.

There is a peculiar element present in Bangladesh which is not so much manifest elsewhere, viz, widespread public suspicion of administrative corruption which has very much undermined public confidence in the administration and has very much corroded its moral authority and image. Conferment of large administrative and discretionary powers breeds corruption and, therefore, if the administrator knows that his decisions are subject to scrutiny by an independent authority, he will be more careful in arriving at his decisions and be less tempted to misuse his powers and show undue favours to any one. Impelled by these considerations, the framers of the Constitution of Bangladesh made in Article 77 of the Constitution the provision to establish the office of Ombudsman in the country. This Article provides-

"(1) Parliament may by law, provide for the establishment of the office of Ombudsman.

(2) The Ombudsman shall exercise such powers and perform such functions as parliament may, by law, determine, including the power to investigate any action taken by a Ministry, a public officer or a statutory public authority.

(3) The Ombudsman shall prepare an annual report concerning the discharge of his functions, and such report shall be laid before parliament."

Legal history reveals that in pursuance of Article 77 of the Bangladesh Constitution, a Bill was passed in the parliament in 1980. The Bill known as 'The Ombudsman Act, 1980' (Act XV of

1980), contains, among others, the provisions relating to the establishment of the office of Ombudsman in the country. But the reality is that the law establishing the office of Ombudsman in the country is yet to be implemented by the Government.

4 (VIII)

PUBLIC INTEREST LITIGATION

Meaning of:

When there is an abuse or misuse of power, who can bring a case before the Court? Can any member of the public come? Or must he have some private rights of his own? In many statutes or constitutional enactments it is enacted that in case of non-compliance, a 'person aggrieved' may complain to the courts or to a tribunal. During the 19th century, those words were construed very restrictively. It was said that a man was not a 'person aggrieved' unless he himself has suffered particular loss in that he had been injuriously affected in his money or property rights. He was not 'aggrieved' simply because he had a grievance. It was not enough that he was one of the public who was complaining in company with hundreds or thousands of others. That was laid down in 1880 by a distinguished Judge, Lord Justice James, in the Sidebotham case.[1] But subsequently in R Vs. Thames Magistrates' Court,[2] Lord Justice Parker and Denning departed from that old test. Thus, the usual and traditional concept of locus standi as evolved from the Anglo-Saxon Jurisprudence is vitiated in cases of Public Interest Litigation. And in recent years the old position has been much altered. There have been a remarkable series of cases in which private persons have come to the Court and have been heard. There is now a much wider concept of locus standi when complaint is made against a public authority. It extends to anyone who is not a mere busybody but is coming to the court on behalf of the public at large.[3]

The liberal theory in Public Interest Litigation is that the judge would not ask the petitioner how he was affected and what was

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1 (1880) 14 Ch D 458 at 465.

2 (1957) 5 LGR 129.

3 Lord Denning, The Discipline of Law (1979), p. 117.

his personal injury or loss.[4] In the field of Public Interest Litigation, we also find that where a legal wrong or injury is caused to a person or persons due to violation of any constitutional or otherwise guaranteed rights and the aggrieved are not in a position to challenge the illegality due to poverty, helplessness or financial inability and can not go before the court, such matters and cause of action can be brought before the court by any such individual who feels that justice must be brought to these aggrieved acting pro bono publico.[5] Even in some situations the court may take reasonable steps suo moto, as it deems appropriate for the end of justice, although the court itself is not an aggrieved party.[6]

In Atwood Vs. Merry Weather[7] it was decided that where a person has suffered a legal wrong or injury and is unable to approach the court due to disability, due to economic or social disadvantaged position, a friend may bring a suit in his favour to enable him to get the redress of justice.

From legal history it is found that the Full Bench of Pakistan Supreme Court in Miss Benazir Bhutto Case[8] paved the way for future PIL in Pakistan. The Court provided that in cases of violation of fundamental rights of a class or a group of persons who are unable to seek redress from a court the 'traditional rule of locus standi can be dispensed with and procedure available in Public Interest Litigation can be made use of, if it is brought to the Court by the person acting bona fide'. In the case, the Supreme Court held that Public Interest Litigation/Class Action seeks to achieve the relaxation of the rule on locus standi in order to include a person who in a bonafide manner makes an application for the enforcement of the human rights of a detrimental class of persons whose grievances go unnoticed and unredressed.

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4 Dr. I. P. Massey, Administrative Law (1985), p. 287.

5 S. P. Gupta Vs. Union of India, AIR 1982 SC(149).

6 FOCUS (a journal of legal studies), volume 1, 1993, p. 45, edited by Qazi Reza-ul-Hoque.

7 (1867)5 Ed. 464:37 LJ Ch 35.

8 PLD 1988 SC416.

According to Justice P. N. Bhagwati, Public Interest Litigation is a litigation which is intended not for the benefit of one individual but for the benefit of a class or group of persons, those who are either victims of exploitation or oppression or who are denied their constitutional rights but cannot come to the court because of their ignorance, poverty and destitution.[9] He illustrates his point with the example of construction workers. "Suppose those workers are not being paid the minimum wage and some ingenious devices are adopted by which the minimum wage is systematically reduced and they get less. You cannot expect these construction workers, who are just making two ends meet with the greatest difficulty and who are steeped in poverty and destitution, to go to court and to enforce their rights. If someone else does not espouse their cause, they will have to go without redress and their grievance will remain unremedied. Therefore, we are not evolving a new strategy of public interest litigation so that the problems of the poor can be brought before the court, either by the poor themselves - by any one of them acting for himself and others - or by any other person who is interested in the welfare of those people". He further cited the example of the inmates of the Agra Protective Home who were living in conditions not consistent with human dignity. Two law professors of Delhi University were allowed to espouse their cause as it was just not possible for them to come to the court.

Hence, Public Interest Litigation may be defined as which recognises maintainability of legal actions by a third party (not the aggrieved) in unique situation. for the violation of any constitutional or otherwise guaranteed rights.

The Council for Public Interest Law set up by the Ford Foundation in U.S.A. defined the Public Interest Litigation as follows:[10]

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9 See Indian Express, Sunday Magazine, January 31, 1982, p. 1.

10 A Report by the Council for Public Interest Law, U.S.A. 1976 - Quoted in V.G. Ramachandran's Law of Writs (4th edn.) p. 301.

"Public Interest Law is the name that has recently been given to efforts to provide legal representation to previously unrepresented groups and interests. Such efforts have been undertaken in the recognition that the ordinary market place for legal services fails to provide such services to significant segments of the population and to significant interests. Such groups and interests include the poor, environmentalists, consumers, racial and ethnic minorities, and others."

Causes of Growth:

Actually, right without remedy is fish without water. Right and remedy must, therefore, be looked as an integral part of each other. Attention, therefore, need to be focused not only on the recognition of the right but also as to the nature of the rights and their enforceability.

It is fact that most of the people of Bangladesh as well as of the third world countries live below subsistence level. And only because of the prohibitive cost of litigation, they cannot even think of going before the court of law for justice denied to them by someone or by the government itself. So the lawyers, magnanimous individuals and social service organizations (NGOs) are the only one who can come forward for the cause of justice to these poor and disadvantaged people. And indeed to enable those lawyers, magnanimous individuals and the NGOs to initiate litigation in favour of the aggrieved, the concept of public interest litigation has been originated and developed by the courts.

The main and foremost duty of the government and the judiciary is to guarantee equal right and protection to its citizens and thus strict follow up of the rule of locus standi stands as an impediment, rather than serving the purpose enumerated in the International Human Rights Instruments as well as in the Constitutions-- 'equality before law'.

Indeed to avoid this impediment so as to ensure equality before law in practice, the concept of public interest litigation has been originated and developed by the court.[11]

If due to strict follow up of the locus standi any aggrieved is deprived of his or her legal and constitutional rights that would amount to denial not only of legal or fundamental constitutional rights but also of justice. If public duties are to be enforced and social-collective or diffused rights and interests are to be protected, then people acting pro bono public should be allowed to move the court, may be they are not directly injured, or their individual legal or fundamental right is not infringed.[12] If no one can have standing to maintain an action for judicial redress in case of public wrong or public injury, the rule of law will be substantially impaired. It is absolutely essential that the rule of law must wean people away from lawlessness on streets and win them for the court of law. If the breach of public duties was allowed to go unredressed by courts on the ground of standing, it would promote disrespect for rule of law. It will also lead to corruption and encourage inefficiency. It might also create possibilities of the political machinery itself becoming a participant in the misuse or abuse of power.[13] And in legal sphere, these are also the causes responsible for the growth of public interest litigation in practice. Now the concept of 'Locus Standi' has undergone many changes all over the world.

While writing his judgment in Miss Benazir Bhutto Case, the Chief Justice Muhammad Haleem held that the rationale behind the traditional litigation, which was essentially of adversarial character in which only the person who was wronged could initiate proceedings, was 'to limit it to the parties concerned and

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11 Reference: R. D. Shetty Vs. International Airport Authority (1979) 3 SCC 489.

12 FOCUS (a journal of legal studies), vol. 1, 1993, edited by Qazi Reza-ul-Hoque, pp. 49-51.

13 Opined by Justice Bhagwati, vide Administrative Law by Dr. I. P. Massey (1985), p. 289.

to make the rule of law selective to give protection to the affluent or to serve in aid of maintaining the status quo of the vested interests'. The Supreme Court declared that the relaxation of the rule of standing requirement provides, "access to justice to all", and also gives a broad-based remedy against the violations of human rights. It was emphasised that while interpreting the Constitution, interpretation must be derived from the provisions of the Constitution which 'saturate' and 'invigorate' it like the Objective Resolution, fundamental rights and directive principles. This, "it was declared, would amount in socio-economic justice and would lead to the establishment of an egalitarian society through a new legal order.

From International Human Rights Instruments, it is seen that equality before law and equal protection of law is an important human right norm. Article 7 of the Universal Declaration of Human Rights, 1948, provides-

"All are equal before law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination."

Article 4 of the African Charter on Human and Peoples' Rights provides—

"(1) Every individual shall be equal before law.

(2) Every individual shall be entitled to equal protection of the law."

Further, Article 24 of the American Convention on Human Rights, 1962, provides—

"All persons are equal before law. Consequently, they are entitled, without discrimination, to equal protection of the law."

It is also fact that the above-mentioned human rights norms have also found expression in Constitutions and legal systems

throughout the world. And from the above, it is convincing that the concept of Public Interest Litigation plays an important role in advancing human rights norms— 'equality before law and equal protection of law.' But this concept in legal sphere is not free from problems and complexities.

Problems and Complexities:

Because of its developing state, the whole process of public interest litigation is beset with numerous problems. One such problem is that of fluctuating bench structure which admits and hears a writ petition. Since all the judges of the superior court are not equally convinced of the desirability of this new extension of court's jurisdiction, the fate of the writ fluctuates with the bench fluctuation.

Public Interest Litigation presents many other organisational complexities. It creates not only factionalism but also makes docket management among the judges difficult. Inability of the court to forge proper compensation patterns is yet another problem of public interest litigation.[14]

There are other procedural complexities also. Most of the public interest litigation cases involve disputed question of fact, which have been either read by the petitioner in a newspaper or with which he has remote acquaintance because he is not the actual victim. Such disputed facts cannot be properly decided and evaluated on affidavits. Moreover, if the paper report is not correct, it will lead to unnecessary wastage of time, money and energy of the court as well as of the government. Further the consistent administrative behaviour in denying every fact makes the situation still more difficult.

Public Interest Litigation jurisdiction further involves the problem of priority and docket congestion. Lawyers have started complaining in many countries that most of the court's time is

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14 Dr. I P. Massey, Administrative Law (1985), pp. 294-295.

now being consumed by public interest litigation and, therefore, their cases are not being taken up expeditiously. Further, public interest litigation, unless taken in its proper perspective, irritates the administration and, therefore, increases the chances of confrontation between the judiciary and the executive which will be most unfortunate for any country.

It is true that no one would waste his time and money in challenging an administrative action in which he has no interest. However, it is equally true that in any developed legal system, the professional litigants and meddlesome interlopers who invoke the jurisdiction of the court in matters that do not concern them need discouragement.[15]

Workable Solution:

All the problems and complexities as referred to above may be valid but then no one would suggest a brake on the ongoing efforts of the courts to reach justice to the departed section of the society. Anything contrary to this would be like suggesting the abolition of the institution of marriage in order to solve the problems of divorce. However, in this respect, one has to be both adventurous and cautious and the Judiciary has to keep on learning mostly by practice. The Court may go beyond procedural matters and to examine substantive issues such as the scope of locus standi. It is hoped that the Constitution bench which hears the matter will reassert the validity and necessity of public interest litigation. The problems in this area may be colossal but only a more active concern on the part of the enlightened citizens and the higher judiciary can solve these problems.

PUBLIC INTEREST LITIGATION IN BANGLADESH:

We know, Bangladesh is a poor country. It is in serious socio-politico-economic crisis. More than 80% people of the country live below poverty level and more than 55% people are landless.

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15 Dr. I. P. Massey, Administrative Law (1985), p. 308.

In the country, day-labourers, garment workers as well as construction workers work for more than 72 hours a week but they are not even being paid the minimum wage. Some ingenious devices are adopted by which the minimum wage is systematically reduced and they get less. We cannot expect these people to go to court and to enforce their rights. Hence, the court may evolve a new strategy for the protection of the weaker sections of the society through the relaxation of the existing rule of locus standi, since the general rule governing the writs of mandamus, certiorari and prohibition in Bangladesh is that it is only the person whose rights have been infringed can apply for the writ.[16]

In our courts though a citizen sharing his fundamental right with the rest of the population of Bangladesh was allowed to maintain his writ petition challenging international treaty as an aggrieved party known as Berubari Case,[17] a trade union could not maintain a writ petition challenging notification fixing benefit of the workers on the ground of discrimination as the Hon'ble High Court Division held that the Union who is a collective bargaining agent is not an aggrieved party. It is only the worker who is an aggrieved person.[18] Association of owners of Newspapers could not maintain their writ petition challenging the Vires of Newspaper Employees (conditions of service) Act, 1974, and constitution of 4th Wage Board and the interim award as their Lordships held that "in our Constitution the petitioner seeking enforcement of a fundamental right or constitutional remedies must be a "person aggrieved". Our Constitution is not at para materia with the Indian Constitution on this point. The Indian Constitution either in Article 32 or in Article 226 has not mentioned who can apply for enforcement of Fundamental Rights and constitutional remedies. The Indian courts only honored a tradition in requiring that the petitioner

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16 S. M. Hassan Talukder, Independence of Judiciary in Bangladesh: Law and Practice, pp. 112-114.

17 Kazi Mukhlesur Rahman Vs. Bangladesh & others, 26 DLR SC 44.

18 (1978) DLR 468.

must be an aggrieved person. The emergence in India of pro bono public litigation that is the litigation at the instance of a public spirited citizen espousing causes of others has been facilitated by the absence of any constitutional provision as to who can apply for a writ. Their Lordships in the case reported in 1991 DLR (AD) p. 126 also took notice of the statutory "certainty" as introduced in England by New Rules of the Supreme Court Order 53, Rule 3 and the provision of Supreme Court Act, 1981, whereunder any person can apply for judicial review in England having "sufficient interest".

In some later decisions, the court has recognised Public Interest Litigation in certain restricted circumstances which appear to be partial recognition of Public Interest Litigation.[19] The case in which, for the first time, the Appellate Division of the Bangladesh Supreme Court has decided in favour of Public Interest Litigation is Mohiuddin Farooque Vs. Government of Bangladesh[20] (July 1996). Mr. Farooque, Secretary General of Bangladesh Environmental Lawyers Association, filed a writ petition challenging Flood Action Plan No. 20. The High Court Division rejected the petition on the ground that the petitioner is not a 'person aggrieved'. The Appellate Division has allowed the appeal holding that the petitioner is an 'aggrieved person'. This decision is expected to establish legal recognition of Public Interest Litigation in Bangladesh.

It is now convincing that a change is taking place in our judicial process and the process is going through various cases.[21] The theater of the law is fast changing and the problems of the poor are coming on the forefront. The court has to introduce new methods and devise new strategies for the purpose of providing

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19 See : 46 DLR (1994) 235, 426.

20 49 DLR (AD) 1997.

21 These are, among others, - BSER Vs. Bangladesh, 3 DLR 2001; BLAST Vs. Bangladesh, 4 BLC 600; ASK Vs. Bangladesh, 19 BLD 488; ETV Ltd. Vs. Dr. Chowdhury Mahmood Hasan, 54 DLR (AD) 130; Engineer Mahmudul Islam & others Vs. Govt. of Bangladesh & others, 23 BLD 2003 (HCD) 80.

access to justice to large mass of people who have derived their basic human rights and to whom freedom and liberty have no meaning.

The only way in which it can be done is by entertaining writ petitions and even letters from public spirited individuals seeking judicial redress for the benefit of persons who have suffered legal wrongs or a legal injury or whose constitutional or legal right has been violated.

The question may however be raised that while exercising writ jurisdiction under Article 102 of the Constitution of Bangladesh how a relief can be granted on an application made by person other than the one aggrieved. The reply to this question may be given in the following manner; firstly, though a letter is addressed by a public - spirited person or by an association or organization there is no difficulty in treating such letter or petition as having been made for the benefit of the aggrieved person who is otherwise disadvantaged. If all transactions such as contract, sale, purchase, and even marriage can be solemnised through representation what jurisprudence and rule can so prevent the court from applying the rule of pro bono public or the law of agency or treating such petition as being an application of 'any person aggrieved'.

Secondly, there are situations in which it is not the individual alone who is languishing in prison suffers but the entire family, friends, colleagues all may have sufficient interest to feel aggrieved. In a civil society, violation of one's fundamental rights may be of such societal or public concern that it may be the cause for many people to feel aggrieved. Our Constitution also uses the expression "Any person aggrieved" it does not use the expression such as aggrieved party, or any person personally aggrieved.

However, last of all, it may be concluded that the salvation of under privileged section of the society in Bangladesh lies only in

the development of public interest litigation. But public interest litigation in Bangladesh is still in the process of development.

Here it would be no exaggeration to state that human rights would remain safe in a society governed by a written Constitution so long as its judges are strong and independent, do not care to pressures, influences, centres of powers and are committed to the cause of human rights. In conclusion, it would be worthwhile to quote a passage from Mr. Justice Krishna Iyer from his book 'Law and the Urban Poor' in India:

"Please remember that procedure is not an alibi to strangle the right to life, nor a priestly ceremonial for a decent burial of a fundamental liberty. Considerations of a routine kind cannot hold good where human disasters are the price."

Thus, it is a must that the Public Interest Litigation should be allowed to grow and develop further so that it would bring the succour to the needy. The experience shows that it might be the case of defying of human rights and Rule of Law by any public authority, or negligent and indifferent behaviour of the law enforcing agencies, the atrocities committed by protectors of law, innocent people rottening in prison without trial, since the court allowed the members of general public to bring such matters to the notice of the court that a further catastrophe was prevented. The public interest litigation thus under the present conditions is a strategic arm of human rights as well as legal aid movement in Bangladesh. And it is intended to bring justice within the reach of the poor masses. It is brought before the court with the objective of promoting and vindicating public interest which demands that violation of constitutional or legal rights of large numbers of people who are poor, ignorant or in a socially or economically disadvantageous position should not go unnoticed and unredressed and if so, that would be destructive of the Rule of Law and human rights.

4 (IX)

LOCAL GOVERNMENT

Introduction

Local Government concept is the internationally and universally recognised concept in the socio-political administrative affairs and this plays a vital role to the implementation of democratic values in the grass root level and this lies at the bottom of the pyramid of governmental structure. It is now a universal component in every country for smooth functioning state transaction. Modern world is unthinkable without devolution of power. With the increase of population and greater expansion of governmental functions, certain matters of policy and administration concerning national and international interests are reserved for the central government but the rest bulk of administrative functions are invested with local authorities.

Meaning of Local Government

In a simple meaning 'Local Government' means such authority which is comprised the elected representative of an area and which is engaging in work for the purpose of local development. Local government is loosely defined without making any reference to the financial and legal status and characteristics of local government as "a public organisation which is authorised to decide and administer policies in a relatively local subdivision of a region or nation."[1]

United Nations has defined local government in the way that it is a political subdivision of a state or nation which is established

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1 Encyclopedia of Social Sciences, New York.

by law and vested with powers to impose taxes in local area and invest labour for their prescribed necessities. According to William Valent, Local Government is subject to the authority of the State and composed of by the elected person for the purpose of imposing taxes and raising funds.[2] Justice Mustafa Kamal observed in the case of Kudrat-E-Elahi Panir Vs. Bangladesh[3] that local government is for the management of local affairs by locally elected people. It is the core of a democratic polity of every country.

Features of Local Government

As a tier, local government is at the bottom of a pyramid of governmental institutions with the national government at the top to which it is ultimately accountable and subordinate for exercising the powers of administration and taxation delegated to it by relevant laws. The essential features of a local government are: (a) it is established by law; (b) it is generally an elective body composed of people's representative of an area or locality; (c) it has the power of administration over a designated locality and the authority to manage the specified subjects; (d) it has the power to raise substantial fund through taxation within its area; (e) it has the authority to prepare its budget; and (f) it is ultimately accountable and subordinate to the national government.[4]

Merits of Local Government

1. **Reduces the burden of central government:** Local government reduces the duties and functions of central government.

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2 William Valent, Administrative Law (2nd edn).

3 44 DLR (AD) 319.

4 Dr. M. Ershadul Bari, Local Government Institution at the Thana/Upazila Level in Bangladesh, The Dhaka University Studies Part-F, Vol. 7, No. 1, P. 1, June 1996.

2. **Relieves the burden of the Parliament members:** It relieves the burden of the parliament members where people expect much from them.
3. **Decentralization of functions:** It decentralises the functions of the State and thus reduces bureaucratic control and red tapism.
4. **Institutionalisation of democratic leadership:** It creates a new and strong leadership from the grass root level and institutionalises in that way.
5. **Small size of central government:** It keeps the size of the central government small and effective.

Evolution of Local Government in Bangladesh

The story of the evolution of the local government system in Bangladesh is in many ways similar to that of India and Pakistan as all three countries share a common history. Local governments in one form or another have been in existence in the Indian subcontinent for centuries.

Pre-colonial period

Panchayat system: From the earliest times self-governing village communities characterized by agrarian economies had existed in India. Not only are they mentioned in Rig Veda, which dates from approximately 1200 BC, there is also definite evidence available of the existence of village 'sabahas' (councils or assemblies) and 'gramins' (senior person of the village) until about 600 BC. These village bodies, which were called "the little republics" by Sir Charles Metcalfe (Governor General 1835-36), were the sources of contact with higher authorities on matter affecting the villages. They were caste-ridden feudal structures.

British Colonial period

During almost two hundred years of British rule (1765-1947) over the Indian subcontinent, a number of experiments were made with the local government system. All the experiments were intended to devise a system that would serve their imperial interest. The major objective of the British in India was twofold: maximization of land revenue collection and maintenance of law and order. Naturally, the British as an imperial power had little understanding of and interest in indigenous local self-governing institutions. The Bengal Village Chowkidai Act of 1870 established panhayats with individuals nominated by district collectors with the sole purpose of levying and collecting chowkidari tax for the maintenance of village watchmen. The Bengal Municipal Act, 1884 passed for urban local government of Bengal, Orissa and Assam.

Through the Local Self-Government Act of 1885, the British colonial administration established local governments with a view to maximize land revenue collection and maintain law and order. The Bengal Self-Government Act, 1885 provided for three-tier structures for rural Bengal – the district board, the local board (for sub-division) and the union committee. Members of the union committee and local board were elected by a restricted electorate and the district board members were indirectly elected. The district board was made the principal unit of local self-government and the collector was the chair, exercising the real authority. Local board was abolished in 1936. Numbers of union committees were very limited. Elected chairman on an experimental basis introduced in 1916.

The Bengal Village Self-Government Act, 1919 provided for the creation of elected union boards with restricted electorates.

Women were allowed to vote in 1950. The union board was given three types of functions: normal municipal functions such as sanitation, conservancy, water supply, maintenance of roads and drains; regulatory functions such as control over the construction of buildings; and development functions such as promotion of cottage industries, and establishment of primary schools or libraries. The board also exercised control over local police.

Pakistan Period

During the formative years of Pakistan's existence as an independent nation until 1971, the provincial government of East Pakistan initiated some important changes. General Ayub Khan, who seized power in 1958, introduced a system of local government known as Basic Democracy by the Basic Democracies Order, 1959 which covered both urban and rural local government. It provided for four tiers: Union Council, Thana Council, District Council and Divisional Council. Breakthrough changes have been made from time to time in terms of the nomenclature of tiers of local government, but almost nothing was done to strengthen local governments. Therefore, the structure of the local government system has remained more or less unchanged.

Bangladesh Period

Bangladesh emerged as an independent nation state in 1971. The followings are the various developments in the local government system after 1971:

Sheikh Mujib Regime (1972 to 1975)

After the independence in 1971, the Awami League government, headed by Sheikh Mujibur Rahman, brought the reforms in the local government. As part of reforms, the name of the Union Council was changed to Union Panchayat and an administrator

was appointed to manage the affairs of the Panchayat. The name of Thana Council was changed to Thana Development Committee under the control of the Sub-divisional Officer while the District Council was named Zila Board or District Board under the control of Deputy Commissioner. Again in 1973, the name of Union Panchayat was reverted to Union Parishad. Union councils were elected but could not function effectively due to the change of Mujib government in August, 1975.

General Ziaur Rahman (1975 to 1981)

In August 1975, Major General Ziaur Rahman virtually seized all powers as the Chief Martial Law Administrator. Nevertheless, Gen. Zia played a critical role in reviving the local government institutions in the country. The Local Government Ordinance 1976, promulgated by Zia, created Gram Sbaha (village councils) in an attempt to decentralize government down to the village level. A more significant change in the local government system was brought about in 1976 through the Local Government Ordinance. This ordinance provided for a Union Parishad for a union, a Thana Parishad for a Thana and a Zila Parishad for a district. The Union Parishad comprised one elected Chairman and 9 elected members, two nominated women members and two peasant representative members. The Thana Parishad consisted of the Sub-Divisional Officer being the ex-officio Chairman, the Circle Officer and a Union Parishad Chairman. The Zila (District) Parishad was to consist of elected members, official members and women members whose numbers were determined by the government. However, no elections were held and government officials ran the Parishad.

General Ershad Regime (1982 to 1990)

In 1980, as a result of an amendment of the Local Government Ordinance, the Swanirvar Gram Sarker (Self-reliant village government) was introduced at the village level; the Gram

Sarkar was abolished by a Martial Law Order in July 1982. A major change was initiated in the local government system through the introduction of the Local Government (Upazila Parishad and Upazila Administration Reorganization) Ordinance in 1982. This Ordinance was followed by the Local Government (Union Parishad) Ordinance in 1983, the Local Government (Zila Parishad) Act in 1988 and the three Hill Districts Acts and Palli Act in 1989. The Upazila Parishad Ordinance (1982) was particularly significant as this was supposed to help the implementation of the decentralization programme of the government. In the Upazila System (as it came to be known), the (directly) elected Chairman would have the principal authority in running the affairs of the Upazila, his tenure being five years. The Upazila Nirbahi Officer would be subservient to the Chairman.

Khaleda Zia Regime (1991 to 1996)

After nine years of reasonably effective implementation, the Government of the Bangladesh Nationalist Party, who came to power through a fair election, abolished the Upazila system in 1991. In 1992 two-tier system of local government was introduced in Bangladesh. One is Zila Parishad at the districts and another is Union Parishad at the Union level. During its five-year rule, the government could not provide an alternative democratic form of local government.

Sheikh Hasina Regime (1996 to 2001)

When after another free and fair election in 1996 the Bangladesh Awami League came to power, they constituted a Local Government Commission and came up with a Report on Local Government Institutions Strengthening in May 1997. The Commission has recommended a four-tier local government structures including Gram/Palli (Village) Parishad, Union

Parishad, Thana/Upazila Parishad and Zila (District) Parishad. There is no major change which has been happened in the Hasina Regime. But the government is forwarding the Upazila Parishad to be established in the Upazila or Thana Level.

Khaleda Zia Regime (2001 to 2006)

The government, after assuming power in 2001, initiated a change in the local government structure, Gram Sarkar in place of Gram Parishad has been introduced. There has been recent legislation creating Gram Sarkars. These bodies will be created at the Ward levels. Each Gram Sarkar will represent one or two villages comprising about 3,000 people at an average. The UP member elected from the Ward will be the Chairman of the GS, which will have other members – both male and female – elected in a general meeting of the voters of the Ward under the supervision of a prescribed/directing authority.

Sheikh Hasina Regime (since 2009)

Gram Sarkar system is abolished and the Present Government re-introduced Upazila system and for that purpose the Government also conducted Upazila election.

Existing Classification of Local Government in Bangladesh

There are two distinct kinds of local government institution in Bangladesh – one for the rural areas and another for urban areas. The local government in the rural areas represents a hierarchical system comprising three tiers: Union Parishad, Upazilla Parishad and Zila Parishad while the urban local government consists of Pourshavas and Municipal Corporation. The following figure shows the existing local government structure in Bangladesh:

Local Government in Bangladesh

Rural Local Government	Urban Local Government
Zila (District) Parishads (64)	City Corporations (6)
Thana/Upazila Parishads (483)	Paurashavas (298)
Unions Parishads (4,484)	

Existing Constitutional and Legal Basis of Local Government in Bangladesh

There are certain provisions in the Bangladesh Constitution which deal with local government. In this regard the following articles are of vital importance.

Article 11: Article 11 is also an article related to Fundamental Principle of State Policy of the government. It is said in Article 11 that state will be the democracy where the participation of the people will be ensured through their elected representatives. That means Article 11 also encourages for the establishment of local government for the direct participation of the people in the local development through their elected representatives.

Article 59: Article 59 of the Bangladesh Constitution is directly concerned with the provisions of local government and its compositions. It is said in Article 59 of Constitution that local government of an area will be comprised of elected representatives of the area concerned. Side by side it speaks about the working plan of the local government. It is said that local government will be engaged with the administrative works relating to public affairs in the concerned locality.

Article 60: Article 60 of the Constitution says about the powers and functions of the local government. It is said in Article 60 that local government shall have the power-

- to raise tax;
- to monitor funds; and
- to maintain budget in the local area for the development of the local areas.

Being empowered by the Constitution the Parliament has enacted some laws having the force of law, relating to Local Government.

For the City Corporations,

- The Chittagong City Corporation Ordinance, 1982
- The Dhaka City Corporation Ordinance, 1983
- The Khulna City Corporation Ordinance, 1984
- The Rajshahi City Corporation Act, 1987
- The Sylhet City Corporation Act, 2001
- The Barishal City Corporation Act, 2001

For the Paurashavas,

- The Local Government (Paurashava) Ordinance, 2008

For Zila (District) Parishads,

- The Zila Parishad Act, 2000

For Upazila Parishads,

- The Local Government (Upazila Parishad) Ordinance, 2008

For Union Parishads,

- Bangladesh President's Order No. 7 of 1972 changed the name of union parishad to union panchayat. President's Order No. 22 of 1973 renamed it as union Parishad.
- The Local Government (Union Parishads) Act, 2009.

Local Government in Bangladesh: Problems

Problems concerning local government in Bangladesh are mainly as follows:

- Undue Bureaucratic Control and Blatant Interference of Members of Parliament (MPs)
- Lack of Mobilization of Local Resources
- Lack of Public Participation
- Lack of Accountability
- Lack of Institutional Capacity
- Lack of Skills and Competence
- Widespread Corruption

Control over Local Government

Central Government controls local government in the following ways:

1. Institutional Control:
   a) Territorial jurisdiction;
   b) Functional jurisdiction;
   c) Composition Council;
   d) Local Elections;
   e) Personnel; and
   f) Inter Institutions.

2. Financial Control

3. Administrative Control:
   a) Review of Resolution;
   b) Inspection;
   c) Removal of officers;
   d) Supervision and Dissolution.[5]

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5 Md. Shahidul Islam, Administrative Law in Bangladesh (2009) p. 324.

It is important to mention that when the Upazilla Parishad was abolished then a writ petition was filed by an individual to challenge its validity. In the case called Kudrat-E-Elahi Panir Vs. Government of Bangladesh,[6] it was confirmed that the "local government" is an important administrative unit of the central government.

6 44 DLR (AD) 319.

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DOCTRINE OF LEGITIMATE EXPECTATIONS

There are many concepts/doctrines, such as the concept of Natural Justice, doctrine of *Ultra Vires*, doctrine of Supreme Necessity, doctrine of Proportionality, etc. in Administrative Law world which the courts of law use as means to control administrative actions. Amongst so many such concepts and doctrines, the doctrine of Legitimate Expectations is noteworthy. In the leading case of Attorney General of Hong Kong Vs. Ng Yuen Shiu,[1] Lord Fraser stated:

> "When a public authority has promised to follow a certain procedure, it is in the interest of good administration that it should act fairly and should implement its promise, so long as the implementation does not interfere with its statutory duty."

A person may have a legitimate expectation of being treated in a certain way by an administrative authority even though he has no legal right in private law to receive such treatment. Where a decision of an administrative authority adversely affects legal rights of an individual, duty to act judicially is implicit. But even in cases where there is no legal right, he may still have legitimate expectation of receiving the benefit or privilege. Such expectation may arise either from express promise or from existence of regular practice which the applicant can reasonably expect to continue.[2]

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1 (1983) 2 All ER 346: (1983) 2 AC 629.

2 C. K. Takwani, Lectures on Administrative Law (3rd edn.) p. 278.

The doctrine of Legitimate Expectations means citizens may legitimately expect to be treated fairly. This doctrine has been developed by courts both in the contexts of reasonableness and natural justice. This doctrine made its first appearance in Schmidt v. Secy of State,[3] wherein it was held that an alien, who was granted leave to enter the U.K. for a limited period had legitimate expectation of being allowed to stay for the permitted period.

According to this doctrine, a past practice of consulting before a decision is taken may give rise to an expectation of consultation before any future decision is taken. The past practice of a hearing before a decision is taken may give rise to a legitimate expectation that a hearing will be given. And any decision affecting such legitimate expectations is subject to judicial review.[4] Indeed, legitimate expectation affords the applicant standing to apply for judicial review. A person, who bases his claim on the doctrine of legitimate expectation in the first instance, must satisfy that there is a foundation for such claim.[5] When a case of legitimate expectation is made out by the applicant, the Court will consider the prayer of the applicant for grant of relief.

Consequences

The existence of legitimate expectation may have a number of consequences. It may give locus standi to a claimant to seek leave to apply for judicial review; it may mean that the authority ought not to act so as to defeat that expectation without justifiable cause. It may also mean that before defeating a person's legitimate expectation, the authority should afford him an opportunity of making representation on the matter. The claim based on the principle of legitimate expectation can be sustained and the

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3 (1969) 1 All ER 904 : (1969) 2 Ch D 149.

4 Clive Lewis: Judicial Remedies in Public Law, p. 97, cited in Madras City Wine Merchants' Assn. Vs. State of T.N., (1994) 5 SCC 509, 526(544).

5 Union of India Vs. Hindustan Dev. Corpn., AIR 1994 SC 980.

decision resulting in denial of such expectation can be questioned provided the same is found to be unfair, unreasonable, arbitrary or violation of principles of natural justice.[6]

Limitations

The doctrine of 'legitimate expectation' has its own limitations. These are-

- The doctrine of legitimate expectation is only procedural and has no substantive impact.[7]
- The doctrine does not apply to legislative activities. It cannot preclude legislation.[8]
- The doctrine does not apply if it is contrary to public policy[9] or against the security of State.[10]

From the above discussion, it is clear that the doctrine of legitimate expectations in essence imposes a duty to act fairly. Legitimate expectations may come in various forms and owe their existence to different kinds of circumstances. It is not possible to give an exhaustive list in the context of vast and fast expansion of governmental activities.

Although there is some similarity between the doctrine of Estoppel and doctrine of Legitimate Expectations, and arguments under the label of 'estoppel' and 'legitimate expectation' are

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6 Halsbury's Laws of England, 4th edn., Vol. 1 (I), p. 151, see also Union of India v. Hindustan Dev. Corpn., (1993) 3 SCC 499 AIR 1994 SC 980.

7 Attorney General for New South Wales Vs. Quin, (1990) 64 Aust LJR 327: (1990) 93 ALRI.

8 State of M.P. Vs. Kailash Chand, AIR 1992 SC 1277.

9 Union of India Vs. Hindustan Development Corporation, AIR 1994 SC 980.

10 Council of Civil Service Unions Vs. Minister for Civil Service, (1991) 1 All ER 41.

substantially the same, both the doctrines are distinct and separate. The element of acting to applicant's detriment which is a *sine qua non* for invoking estoppel is not a necessary ingredient of legitimate expectation.[11]

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11 Wade, H. W. R. : Administrative Law (1994), p. 419-20; Madras City Wine Merchants' Assn. Vs. State of T. N., (1994) 5 SCC 509(527).