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INTRODUCTORY

'Administrative Law' – Meaning of

For a research student 'Administrative Law' defies definition. The reason seems to be that in almost every country irrespective of its political philosophy, the administrative process has increased so tremendously that today we are living not in its shade but shadow. Therefore, it is impossible to attempt any precise definition of administrative law which can cover the entire range of administrative process. Perhaps this was the reason why Dr. F.J. Port who published the first book bearing the title "Administrative Law" in England in 1929 did not venture to define the term. He simply attempted to describe administrative law as follows:

Administrative Law is made up of all these legal rules-either formally expressed by statutes or implied in the prerogative-which have as their ultimate object the fulfillment of public law. It touches first the legislature, in that the formally expressed rules are usually laid down by that body; it touches judiciary, in that (a) there are rules which govern the judicial action that may be brought by or against administrative persons, (b) administrative bodies are sometimes permitted to exercise judicial powers; thirdly, it is of course essentially concerned with the practical application of the Law.

Even this attempt to describe administrative law rather than to define it is not without difficulty. Administrative law besides touching all branches of government touches administrative and quasi-administrative agencies, i.e. Corporations, Commissions, Universities and sometimes even private organizations. Furthermore, administrative law is made up not only of legislative and executive rules and a large body of precedent but also of functional formulations, for every exercise of discretion forms a rule for future action.

However, in spite of the fact aforesaid, to understand administrative law in defined form, the following definitions of vital importance given by renowned experts may be taken into consideration.

Sir Ivor Jennings defines administrative law as the law relating to administration. It determines the organization, powers and the duties of administrative authorities.[1] But we see, this formulation of Jennings, in actual practice, does not make any attempt to distinguish administrative law from constitutional law. It lays entire emphasis on the organization, power and duties to the exclusion of the manner of their exercise.

On the other hand, Professor Wade takes this aforesaid objection into account while formulating his definition of administrative law. According to Wade, administrative law is concerned with the operation and control of powers of administrative authorities with emphasis on function rather than structure. He says that "Administrative Law is the law relating to the control of governmental power. It may be said to be a body of general principles which govern the exercise of powers and duties by public authorities."[2]

According to Holland, the constitutional law describes the various organs of the government at rest, while administrative law describes them in motion.[3] Therefore, according to this view, the structure of the legislature and the executive come within the purview of the constitutional law but their functioning comes within the sphere of administrative law. Maitland, however, does not agree with this classification for, in that case powers and prerogatives of the Crown would be relegated to the arena of administrative law.[4]

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1 Jennings : Law and the Constitution, p. 217.

2 H. W. R. Wade : Administrative Law, 2nd edn., p. 1.

3 Holland : Jurisprudence, 10th edn., p. 506.

4 Maitland : Constitutional History of England (1908), p. 526.

Robson, on the other hand, points out that whilst constitutional law emphasizes individual rights, administrative law lays equal stress on public needs.[5] According to Garner, the distinction between the two, constitutional and the administrative law, is of convenience and custom than logic. These both form the public law of a State.[6]

According to Massey, administrative law is that branch of public law which deals with the organization and powers of administrative and quasi-administrative agencies and prescribes principles and rules by which an official action is reached and reviewed in relation to individual liberty and freedom.[7]

Between individual liberty and government, there is an age-old conflict which, indeed, resulted in the need for constantly adjusting the relationship between the government and the governed so that a proper balance may be evolved between private interest and public interest. And administrative law is the best designation for the system of legal principles which settle the conflicting claims of executive and administrative authority on the one side and of individual or private right on the other.[8]

Dicey, like Ivor Jennings, belongs to that group of English writers who did not recognise the independent existence of administrative law. Dicey[9] has defined administrative law as denoting that portion of a nation's legal system which determines the legal status and liabilities of' all state officials, which defines the rights and liabilities of private individuals in their dealings with public officials, and which specifies the

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5 Robson : Justice and Administrative Law, 3rd edn., p. 429.

6 J. F. Garner : Administrative Law, 3rd edn., p.2.

7 I. P. Massey : Administrative Law, 2nd edn., p. 5.

8 Jain and Jain : Principles of Administrative Law, 4th edn., p. 7.

9 Dicey : Law of the Constitution, 8th edn., pp. 329-333.

procedure by which those rights and liabilities are enforced. This definition is narrow and restrictive in so far as it leaves out of consideration many aspects of administrative law, e.g., it excludes many administrative authorities which, in strict sense, are not officials of the state such as public corporations; it also excludes procedures of administrative authorities, or their various powers and functions, or their control by Parliament, or in other ways. Dicey's formulation refers primarily to one aspect of administrative law, i.e., control of public officials. Dicey formulated his definition with the droit administratif in view.[10]

The American approach is significantly different from the early English approach in that it recognised administrative law as an independent branch of the legal discipline. According to Kenneth Gulp Davis, the administrative law is a law that concerns the powers and procedure of administrative agencies, including especially the law governing judicial review of administrative action. Within his formulation, Davis includes the study of administrative rule-making and rule-adjudication but excludes rule-application which according to him belongs to the domain of public administration.[11]

However, even this classification by Davis cannot be considered complete because he excludes from his control mechanism the control exercised by the legislature, higher administrative authorities and the mass media representing public opinion and also the vast area of administrative action which is neither quasi-legislative nor quasi-judicative.[12]

Whatever may be the argument and counter-argument, the fact remains that today administrative law is recognised as a separate, independent branch of legal discipline though at times the disciplines of constitutional law and administrative law may

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10 Jain and Jain : Principles of Administrative Law, 4th edn., p. 4.

11 Davis : Administrative Law Text (1959), p. 2.

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

overlap. Professor James Hart has noted that 'administrative and constitutional laws bear to each other relation of overlapping but non-concentric circles'.[13]

However, it is, indeed, difficult to evolve a satisfactory definition of administrative law so as to demarcate articulately its nature, scope and content. The unenviable diversity in definitions of the term 'administrative law' is also due to the fact that every administrative law specialist tries to lay more emphasis on any one particular aspect of the whole administrative process, which according to his own evaluation deserves singular attention.

Professor Upendra Baxi, a leading scholar, thus lays special stress on the protection of 'little man' from the arbitrary exercise of public power. According to him, administrative law is a study of the pathology of power in a developing society. Accountability of the holders of public power for the ruled is thus the focal point of this formulation.[14]

According to Griffith and Street, administrative law seeks to adjust the relationship between public power and personal rights.[15]

According to Schwartz, in an administrative law case, the private party is confronted by an agency of government endowed by all the power, prestige and resources enjoyed by the possessor of sovereignty. "The starting point is the basic inequality of the parties. The goal of administrative law is to redress this inequality to ensure that, so far as possible, the individual and the state are placed on a plane of equality before the bar of justice."[16]

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13 Hart : An Introduction to Administrative Law (1950), p. 13.

14 Massey : Administrative Law (With an Introduction by Upendra Baxi), 2nd edn., p. 4.

15 Griffith and Street : Principles of Administrative Law, p. 2 (1973).

16 Schwartz : Administrative Law, p. 26 (1976).

From the facts aforesaid, it is now convincing that there is a divergence of opinion regarding definition/concept of administrative law. And there are many formulations in the field though none of them is completely satisfactory; either they are too broad or too narrow; either they include much more than what properly should be included within the scope of the subject, or else, they leave out some essential aspect of element of administrative law.

However, to understand the meaning of the term 'Administrative Law' besides what have been pointed out in the foregoing, Jain's formulation as referred to hereunder may also be taken into account. According to this formulation,[17] "Administrative law deals with the structure, powers and functions of the organs of administration; the limits of their powers; the methods and procedures followed by them in exercising their powers and functions; the methods by which their powers are controlled including the legal remedies available to a person against them when his rights are infringed by their operation." This statement has four limbs. The first limb deals with the composition and powers of organs of administration. This proposition is subject to the qualification that the topics falling under public administration are to be excluded. The term organ of administration includes all kinds of public or administrative authorities. The second limb refers to the limits on the powers of administrative authorities. These limits may either be expressed or implied. The third limb refers to the procedures used in exercising those powers. The study of administrative law of today seeks to emphasize not only the extraneous control but also the processes and procedures which the administrative authorities themselves follow in the exercise of their powers. Evolving of fair procedure is a way of minimising the abuse of vast discretionary powers conferred on the administration. For example, natural justice forms a

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17 Jain and Jain : Principles of Administrative Law, pp. 12-13 (4th edn., 1986).

significant component of administrative process today and in many situations courts apply the concept of 'fairness'. The fourth limb refers to the control of the administration through judicial and other means, e. g., tribunals, ombudsman, etc. This is a very important aspect of administrative law.

Now, before concluding this topic, we, for our purpose, may define the term 'Administrative Law' as under:

"Administrative Law is that branch of public law which deals with the powers and procedures of administrative organs and is particularly related to regulate the executive, quasi-judicial and quasi-legislative powers conferred by the Legislature on the Administration or the executive and to the effect of the exercise of those powers on the individuals".[18]

An analysis of this formulation would not only give us a proper and satisfactory definition of administrative law but would also identify its nature and scope:

(1) Administrative law is a law but it is not a law in the lawyer's sense of the term like property law or contract law. It is a law in the realist's sense of the term which includes statute law, administrative rule-making, precedents, customs, administrative directions, etc. It also includes the study of something which may not be termed 'law' in the true sense of the term such as administrative circulars, policy statements, memoranda and resolutions, etc. Besides this, it includes within its study 'higher law' as well, like the principles of natural justice.

(2) Administrative law is a branch of public law virtually in contradistinction with private law which deals with the relationships of individual inter se. Hence, administrative law primarily deals with the relationship of individuals with

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18 I. P. Massey : Administrative Law, 2nd edn., p. 5.

the organised power. It is concerned with reconciliation of administrative power with individual liberty and freedom.

(3) The administrative organs are variously designated as departments, directorates, commissions, officers, boards, universities, authorities, bureaus, tribunals, corporations, government companies and the like.

(4) Administrative law virtually concerns itself with the official action which may be:

(i) Quasi-legislative action or rule-making action.

(ii) Quasi-judicial action or adjudicating action.

(iii) Rule-application action or administrative action,

(iv) Ministerial action.

Besides these main actions, administrative law also concerns incidental actions such as investigatory, supervisory, advisory, declaratory and prosecutory.

(5) Principles of administrative law emerge and develop whenever and wherever any person becomes the victim of the arbitrary exercise of public power. Administrative law deals with the principles of natural justice, principle of striking down malafide action, etc.

(6) Administrative law deals with the procedure of administrative organs. There is a bewildering variety in the procedure which the administrative organs follow in reaching an action. Such procedure may be laid down;

(i) in the statute itself under which the administrative organ has been created;

(ii) in the separate code of procedure which every administrative agency is bound to follow, i. e., the Administrative Procedure Act, 1946 in USA and Tribunals and Enquiries Act, 1958 in England.

However, in many more cases either the administrative organ is left free to develop its own procedure or it is required to render its actions according to the minimum procedure of the principles of natural justice.

(7) Administrative law also deals with the control mechanism by which the administrative organs are kept within bounds and made effective in the service of the individuals. An administrative action may be controlled by different factors. These are as follows:

(i) courts exercising writ jurisdiction through the writs of Habeas Corpus, Mandamus, Certiorari, Prohibition and Quo Warranto;

(ii) courts exercising ordinary judicial powers through suits, injunctions and declaratory actions;

(iii) higher administrative authorities;

(iv) public opinion and mass media in the twentieth century is also an important control on any administration. In America, opinion polls and mass media exercise much more effective control on the administration than any other single control inasmuch as this control mechanism has the potentiality of pre-empting any adverse administrative decision.

(v) 'Easy Access to Justice' also provides an effective check on bureaucratic adventurism in the exercise of public power. If the access to justice is easy and quick it may deter administrative instrumentalities from developing an attitude which has been termed as "fly-now-pay-later".[19]

(vi) The institution of ombudsman and other investigative agencies may also exercise control on administrative

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19 Massey : Administrative Law (with an Introduction by Upendra Baxi), 2nd edn., p. xxiv.

action. Role of public enquiries in this regard is also significant.

(vii) Right to Know, Right of Reply, and Discretion to Disobey also have inherent potentialities of proving effective, though indirect, in providing check on administrative behavior.

(viii) Consumer organization and interest representations also play an important role in controlling the arbitrary exercise of public power both at the pre-natal and post-natal stages.

(ix) The Legislature.

Though Administrative Law has been characterised as the most outstanding legal development of the twentieth century, it does not mean, however, that there was no administrative law in any country before the twentieth century. Being related to public administration, administrative law should be deemed to have been in having some form of government. According to Parker, "Since administrative law is the law that governs, and is applied by, the executive branch of government, it must be as old as that branch."[20] And from this cause, administrative law is as ancient as the administration itself. In Bangladesh itself, administrative law can be traced to the administration of Guptas under Ancient Period which begins towards the ending of the 3rd century.[21] Substantially, administrative law in Bangladesh has grown and developed tremendously, in quantity, quality and relative significance, in the twentieth century. And it has assumed a more recognisable form only by the middle of the 20th century so much so that it has come to be identified as a branch of public law by itself, distinct and separate from constitutional law, a fit subject-matter of independent study. Chiefly, in legal sphere of

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20 Parker : The Historic Basis of Administrative Law, 1 Rutg. L. R. 449 (1958).

21 M. A. Rahim, A. Mornin, A. B. M. Mahmod and S. Islam : Bangladesher Itihas (1977), pp. 13, 16.

Bangladesh, the concept of Administrative Law has taken the possession of vital importance in the last five decades and it has witnessed remarkable advances in recent times.

In Bangladesh, Administrative Law first touches the legislature in that the formally expressed rules are usually laid down by that body; secondly, it touches the judiciary, in that (a) there are rules which govern the judicial action that may be brought by or against administrative persons; (b) administrative bodies are sometimes permitted to exercise judicial powers; thirdly, it is of course essentially concerned with the practical application of the law.

Administrative Law in Bangladesh, besides dealing with all branches of the government, also deals with the powers, procedure and duties of administrative and quasi-administrative agencies. It includes the study of-

(i) the principles of Natural Justice;

(ii) the concept of Rule of Law;

(iii) the doctrine of *Ultra Vires*;

(iv) the doctrine of Locus Standi and Public Interest Litigation;

(v) the concept of striking down 'Mala fide Action'; and etc.

Moreover, Administrative Law in Bangladesh also deals with-

(i) the finality of administrative actions;

(ii) the control mechanism of administrative actions;

(iii) the rule-making, decision-making and adjudicating functions of the administration ;

(iv) the liabilities of the administration in tort and contract; and

(v) the concept of 'Right to Information', etc.

Pertinent to point out here that the phenomenal growth of administrative power as a by-product of an intensive form of

government though necessary for development and growth yet at times spells negation of people's rights and values. Profligate as well as pachydermic administration emboldened by the anesthesised public conscience does not hesitate to trample upon the civil liberties of the people. Thus, administrative adventurists impatient of democratic process may slip into authoritarianism, making all material growth pretence for tyranny. Here comes the real need, scope and importance of administrative law. Administrative law thus becomes dharma which conduces to the stability and growth of the society and the maintenance of a just social order and welfare of mankind by reconciling power with liberty. It seeks to channelise administrative powers to achieve the basic aim of any civilized society that is "growth with liberty".[22] Thus, administrative law becomes an all-pervasive legal discipline.

Against this backdrop, administrative law has a tremendous social function to perform. Without a good system of administrative law any society would die because of its own administrative weight like a Black-Hole which is a dying neutron star that collapses due to its own gravity. Administrative law, therefore, becomes that body of reasonable limitations and affirmative action parameters which are developed and operationalized by the legislature and the courts to maintain and sustain a rule of law society.

Today, in Bangladesh, there is a demand by the people that government must solve their problems rather than merely define their rights. It is felt that the right of equality in the American Constitution will be a sterile right if the black is the first to lose his job and the last to be re-employed. In the same manner the equality clause in the Bangladesh Constitution would become meaningless unless the government comes forward to actively help the weaker sections of the society to bring about equality in

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22 Massey : Administrative Law, 2nd edn., p. 1.

fact. This implies the scope and importance of administrative law in Bangladesh.

Today, in Bangladesh, the people recognise all problems as solvable rather than political controversies. There was time, before industrial revolution in England during the heydays of laissez fair doctrine, when it was considered that the employer-employee conflict was a political controversy and the government would do well by keeping away. But today it is the duty of the government to resolve this conflict and maintain industrial harmony. And the State is required to play a major role in promoting socio-economic welfare of labour by regulating the employer-employee relationship and by other means.[23] This again has extended the scope and importance of administrative law and process in Bangladesh.

Phenomenal growth in science and technology in Bangladesh has placed a counter-balancing responsibility on the government to control the forces which science and technology have unleashed. In our country, modernization and technological development have produced great structural changes and created crucial problems such as haphazard urbanisation, ruthless exploitation of natural resources, environmental pollution, rapid transport and traffic automation and concentration of economic power, dismal health, education, employment and training conditions, incessant labour strikes and lock-outs, staggering inflation, accelerated smuggling, pervasive corruption, adulteration, tax evasion, commercial malpractices, violence, and many others which a man generally confronts. These multi - dimensional problems with varied social, economic and political ramifications cannot be solved without an effective system of administrative law regulating administration.

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23 Important enactment in this area is 'The Bangladesh Labour Act, 2006'.

In Bangladesh, the traditional type of courts and law-making organ are not in a position to give that quality and quantity of performance which is required for the functioning of the welfare and functional government. And this is also one of the vitally important reasons which has of course essentially led to the growth and development of administrative law in Bangladesh. Like medicine, in law also there is a shift from punitive to preventive justice. Today, in Bangladesh, litigation is not considered a battle to be won but a disease to be cured. Inadequacy of the traditional courts to respond to this new challenge has led to the growth of administrative adjudicatory process. Furthermore, the traditional administration of justice is technical, expensive and dilatory. It is unworkable where the subject-matter is dynamic and requires not only adjudication but development also, as in the case of industrial disputes. Therefore, in cases where the need is fair disposition and not merely disposition on file, administrative adjudicatory process as well as administrative law seems to be the only answer.

For the same reason, because of limitation of time, the technical nature of legislation, the need for flexibility, experimentation and quick action, our traditional legislative organ cannot pass that quality and quantity of laws which are required for the functioning of the government in the present welfare-oriented administrative context. It is said, not perhaps rightly, that if our Parliament sits all the twenty - four hours and all the 365 days in a year, it cannot possibly pass all the laws needed by our government today. This implies the scope and importance of administrative law in Bangladesh.

Now an analysis and evaluation of what have been pointed out in the foregoing delineates the scope and importance of administrative law in Bangladesh as under:

(1) Administrative law protects the legal entitlements of the common people.

(2) Principles of administrative law emerge and develop whenever and wherever any person becomes the victim of the arbitrary exercise of public power.

(3) Administrative law ensures impartial determination of dispute by the administration.

(4) Administrative law controls the government machinery properly.

(5) Administrative law makes those who exercise public powers accountable to the people.

(6) Administrative law develops essential principles and rules which make the administration more responsive and responsible to the real needs of the people.

Over all, it may be said that administrative law in Bangladesh has ample scope and great importance because of its tremendous socio-economic, legal, administrative and judicial functions to perform.

Before 1971, Bangladesh was a police state.[24] The ruling foreign powers were primarily interested in strengthening their own positions of vested interest; the administrative organs were used mainly with that object in view and civil service came to be designed as the "steel frame". The State did not concern itself much with the welfare of the people. But all this changed with the advent of independence in 1971. A conscious effort began to be made to transform the country into a welfare State. The philosophy of welfare state has been expressly ingrained in the

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24 From 1757 to 1947, Bangladesh as a part of India was under British rule. After becoming free from the British dependency in 1947, Bangladesh (Former East Pakistan) was again a dependency of Pakistan which continued up to 1971. Thus, this part of the world was under two foreign powers for over two hundred years.

Bangladesh Constitution. The Constitution aims at establishing socialism and democracy in Bangladesh.[25] And from the Constitution of Bangladesh, it is convincing that:

(i) the State is to provide for free and compulsory education for all children;[26]

(ii) the State is put under an obligation to ensure equality of opportunity to all citizens;[27]

(iii) the State is required to direct its policy towards securing to all citizens the basic necessities;[28] and

(iv) the State is obligated to emancipate the toiling masses- the peasants and workers- and backward sections of the people from all forms of exploitation.[29]

The emergence of the social welfare concept has affected the democracies very profoundly. It has led to State activism. There has occurred a phenomenal increase in the area of State operation; it has taken over a number of functions which were previously left to private enterprise. The State today pervades every aspect of human life, it runs buses, railways and postal services, it undertakes planning of social and economic life of the community with a view to raise the living standards of the people and reduce concentration of wealth; it improves slums, plans urban and rural life, looks after health, morals and education of the people; it generates electricity, operates key and important industries. It acts as an active instrument of socio-

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25 Preamble to the Constitution of Bangladesh.

26 Article 17, Bangladesh Constitution.

27 Article 19, ibid.

28 Article 15, ibid.

29 Article 14, ibid.

economic policy to regulate individual life and freedom to a large extent[30] and provides many benefits to its citizens,[31] and imposes social control and regulation over private enterprise.

This State activism has led to one inevitable result. In its quest to improve physical, moral and economic welfare of the people, the State has assumed more and more powers to regulate society. A State consists of three organs- legislature, judiciary, and executive. While increase in State activities has meant increased work for all the organs, yet the largest extension in depth and range of functions and powers has taken place at the level of executive-cum-administrative organ. We have come to live in an administrative age; administrative organ has become predominant and it is on the ascendancy; its functions and powers have grown vastly over time. Administration is the all-pervading feature of life today. It makes policies, provides leadership to the legislature, executes and administers the law and takes manifold decisions. It exercises today not only the traditional function of administration, but other varied types of functions as well. It exercises legislative power and issues a plethora of rules, bye-laws, and orders of a general nature. This is designated as delegated or subordinate legislation. The administration has acquired powers of adjudication over disputes between itself and private individuals inter se, and thus have emerged a plethora of tribunals (apart from innumerable quasi-judicial bodies), diversified in structure, jurisdiction, procedures and powers, connected with the administration in varying degrees and pronouncing binding decisions like the courts whose powers have been diluted or excluded in several areas.[32] The administration has sections and takes action of

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30 Schwartz : Crucial Areas in Administrative Law, 34 George Washington L.R. 401 (1966).

31 Charles A. Reich : Individual Rights and Social Welfare : The Emerging Legal Issues, 74 Yale L. J. 1245 (1965).

32 Jain and Jain : Principles of Administrative Law, p. 7, 4th edn. (1986).

various kinds in its discretion or subjective satisfaction. To enable the administration to discharge effectively its rule-making, adjudication and other discretionary and regulatory functions, it has been given vast powers of inquiry, inspection, investigation, search and seizure, and supervision. The truth is that the administration has acquired an immense accession of power and has come to discharge functions which are varied and multifarious in scope, nature and ambit. In the words of Robson, the hegemony of the executive is now an accomplished fact.[33]

But at the same time, this increase in administrative functions has created a vast new complex of relations between the administration and the citizen. The administration impinges more and more on the individual; it has assumed a tremendous capacity to affect the rights and liberties of the people. There is not a moment of a person's existence when he is not in contact with the administration in one way or the other. This circumstance has posed certain basic and critical questions. Does arming the administration with more and more powers keep in view the interests of the individual? Are adequate precautions being taken to ensure that the administration does not misuse or abuse its powers? Do the administrative agencies follow in discharging their functions such procedures as are reasonable, consistent with the rule of law, democratic values and natural justice? Has adequate control-mechanism been developed so as to ensure that the administrative powers are kept within the bounds of law, and that it would not act as a power-drunk creature, but would act only after informing its own mind, weighing carefully the various issues involved and balancing the individual's interest against the needs of social control? It has increasingly become important to control the administration, consistent with efficiency, in such a way that it does not interfere with impunity with the rights of the individual. There is an old

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33 Robson : Justice and Administrative Law, p. 34 (1951).

adage containing a lot of truth that power corrupts and absolute power corrupts absolutely. Between individual liberty and government, there is an age-old conflict. There arises the actual need for constantly adjusting the relationship between the government and the governed so that a proper balance may be evolved between private interest and public interest.[34] This makes the study and research on administrative law inevitable in Bangladesh.

In addition, administration has become a highly complicated job needing a good deal of technical knowledge, expertise and know-how. Continuous experimentation and adjustment of detail has become an essential requisite of administration. If a certain rule is found to be unsuitable in practice, a new rule incorporating the lessons learned from experience has to be supplied. Even a well-tested rule may have to be changed because of the rapidly changing situation in a developing or a developed society. The administration can change an unsuitable rule without much delay. Even if it deals with problem case by case (as does a court), then it could change its approach according to the exigency of the situation and the demands of justice. But all these tasks are not so easy and, in practice, necessitate experimentation and research.

In such perspectives, like other welfare States, the issue of administrative law in Bangladesh is indeed an important issue for research, analysis and evaluation, the outcomes of which will clearly help all concerned to get answers of the following questions of vital importance:

(1) What kind of power does the administration exercise?

(2) What procedure do the administrative authorities follow in

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[34] Administrative law is the best designation for the system of legal principles which settle the conflicting claims of executive and administrative authority on the one side and of individual or private right on the other. Freund, Cases on Administrative Law (1911).

exercise of the powers of the administration?

(3) What are the limits of the powers of the administration?

(4) What are the ways in which the administration is kept within those limitations?

(5) What remedies are available to the individual against the illegal action of the administration?

(6) What are the prospects of the concepts/issues which are still in the process of growth of administrative law like Public Interest Litigation, Right to Information, etc.?

(7) What are the prospects of the concepts/issues which have already gained considerable advances in the process of growth of administrative law like 'Concept of Rule of Law', 'Concept of Natural Justice', 'Doctrine of *Ultra Vires*', etc.?

2
DEVELOPMENT OF ADMINISTRATIVE LAW IN PRE-INDEPENDENCE BANGLADESH

It has already been pointed out that in Bangladesh itself, administrative law can be traced to the well-organised and centralised administration under Guptas, several centuries before the Christ, and it has grown and developed tremendously, in quantity and quality and relative significance in the twentieth century. And for conveniences of understanding, analysis and evaluation, a study of the development of Administrative Law in Bangladesh can properly be divided into two parts as under:

1. Development of Administrative Law in Pre-Independence[1] Bangladesh
2. Development of Administrative Law in Bangladesh[2]

Further, the development of Administrative Law in Pre-Independence Bangladesh can conveniently be studied under four important Periods, namely, Ancient Period, Medieval Period, British Period and Pakistan Period.

Now, the important highlights of the development of Administrative Law in Bangladesh under aforesaid Periods are given hereafter with analysis and evaluation where necessary.

A. ANCIENT PERIOD

The origin of administrative legal system of Bangladesh, which has been developed in British India and United Pakistan, can be

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1 Pre-Independence indicates the period before the 26th March, 1971.

2 Bangladesh indicates the period from the 26th March, 1971, to date.

traced further back to the pre-British era, particularly the Ancient Period and Medieval Period. And, indeed, the ancient administrative legal system in Bangladesh can be truly pointed out from the ending of the third century[3] which continued up to the beginning of the Medieval Period.

In fact, the history and growth of administrative law in Bangladesh is intimately linked with that of the rest of the Indian subcontinent. Until the arrival of Jhon Company, this Indian subcontinent was ruled by dynasties of different denominational groups, especially Hindu and Muslim. Powerful regimes that established strong centralised rule encompassing almost the entire subcontinent were the Mauryun dynasty, the Gupta dynasty and the Mughal Empire.[4] Innovative statesmanship of some of the great rulers of these and other dynasties, namely, Chandragupta and Asoka (Mauryan dynasty), Sher Shah (Sur dynasty) and Akbar (Mughal Empire), left lasting imprints on the administrative legal system in the new States of the subcontinent.

However, during Ancient Period in Bangladesh, there existed a system of both administrative legislation and adjudication. The art of the government was well known to the Hindus and the duties of the king and other organs of the State were laid down in ancient Hindu literature with minute details.[5]

The ancient Dharmasastras declared that Dharma which included the 'law' was binding on the king. According to Rajadharma, the king was given the power only to enforce the

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3 Bangladesher Itihas by M. A. Rahim, A. Momin, A. B. M. Mahmod and S. Islam (1977), pp. 13-16.

4 Syed Giasuddin Ahmed, Public Personnel Administration in Bangladesh (1980), p. 1.

5 Dr. K. C. Joshi, Administrative Law (3rd edn., 1984), p. 10.

law. Dharmasastras did not confer on or recognize any legislative power in the king.[6] But under the kingship as recognised and established under the Dharmasastras the laws were those laid down by the Dharmasastras themselves. They did not authorise the king to lay down new laws or amend the provisions of Dharmasastras. On the other hand, Dharmasastras also laid down the laws governing the conduct of the king himself (Rajadharma).

In cases where no principle of law was found in the Shruti, Smritis or custom, the king was required to decide according to his conscience.[7] But the power to decide complicated questions of law by resolving the conflicts or to lay down a new legal provision, was recognised in an assembly of persons with prescribed qualifications,[8] called the Parisad, vide Manu VIII 110-114.[9] Even in such a situation no legislative power was vested in the king. Kings, however, were empowered to issue Raja Shasana (Royal Edict) subject to the law declared in the Shruti and Smritis. This matter was dealt with in greater detail under Rajadharma.

Pertinent to mention here that, the Shruti or the Vedas represented that which was heard and handed down from generation to generation verbally. The source of the shruti was believed to be divine. And during Ancient Period, laws and treatises regulating the rights and liabilities of individuals inter se as also between the king and his subjects were written, which came to be known as Dharma Sutras and Smritis. Some of them

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6 M. Rama Jois, Legal and Constitutional History of India, Vol. 1 (1983), p. 13.

7 Ibid., p. 17.

8 For the composition of Assembly etc., see 'Rajadharma' under the topic Legislative Power of the King.

9 Classical Law of India – Robert Lingat, pp. 15-16.

were in the form of Sutras (aphorisms) and, therefore, came to be called Dharma Sutras, and others were in the form of slokas (verses). The works entitled the Smritis were all in slokas form. All this literature was collectively called Dharmasastra.[10] The important Dharma Sutras which were considered as of high authority were of Gautama, Baudhayana, Apastamba, Vasista and Vishnu. And the important Suritis were Manu Smriti, Yajnavalkya Smriti, Narada Smriti, Parashara Smriti, Brihaspati Smriti and Katyayana Smriti.

Apart from Smritis and Dharma Sastras, there were also some other works which form equally important sources of the ancient administrative legal system. And in this connection, Kautilya's Arthasastra[11] which dealt with, among others, on the following topics may specially be referred to:

(1) Education, training and discipline to be imparted to equip him to discharge his onerous responsibilities ably and efficiently, such as appointment of ministers and other matters relating to its administration. Duties of various executive officers of the State.

(2) Law and its administration.

(3) Miscellaneous matters - such as steps to be taken in emergencies, pay scales for State officers, duty of Chief Minister for ensuring continuity of the rule on the demise of King, etc.[12]

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10 M. Rama Jois, Legal and Constitutional History of India, Vol. 1 (1983) p. 22.

11 It is a masterly treatise on State-craft and legal system for guidance of all concerned. The author of this great work is Chanakya. For those who are interested in making detailed study of the Arthasastra, the translation made by Dr. R. Shama Sastry entitled 'Artha Sastra of Kautilya' would be of great help.

12 M. Rama Jois, Legal and Constitutional History of India, Vol. 1 (1983) p. 18.

However, as regards administrative law in Bangladesh under Ancient Period, we may get a very convincing and vivid picture from the following:

DUTIES OF A KING

The king should support all his subjects without any discrimination, in the same manner as the earth supports all living beings.[13] The king, conducting himself always in conformity with Rajadharma, should command all his servants to work for the welfare of his people.[14] The king should not leave an offender unpunished, whatever may be his relationship with him. Neither father, nor a teacher, nor a friend, nor mother, nor wife, nor a son, nor a domestic priest should go unpunished for the offence committed.[15] Neither the king nor any of his servants should himself cause a law suit to be initiated, or hush up one that has been brought before him by any other person.[16] On the other hand, Kautilya stressed the necessity for exercising the power of the State to punish wrong doers, but at the same time cautioned that punishments must be reasonable and not cruel and that in awarding punishments collateral considerations must be excluded.[17]

ROYAL EDICT[18]

If the king declared that any usage was opposed to the sacred laws, such usage stood overruled by the force of the royal command. The king, as the highest executive, could issue royal

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13 Manu IX 311.

14 Manu IX324.

15 Manu IX 335.

16 Manu VII 43.

17 Kaut, p. 8.

18 What a king establishes as Dharma which is not in conflict with the Smrities and the usage of the country is a royal edict (Rajashasana).

edicts without violating any of the sources of law and as the highest court could declare a custom or usage as invalid if it was opposed to the written texts, but he could not go beyond that.[19] As regards law-making activity of the king, Robert Lingat observes:

"Because of the large sphere reserved for Dharma, the legislative activity of the king was limited very seriously, but there did remain a vast field in which it might operate. The majority of the topics which come within what we would call administrative law fell under royal authority."[20]

Sukra also gives illustrations of the following types of Rajashasana that a king was competent to issue:

(i) No bribe should be taken by or given to the king's servants.

(ii) No one should harbour enemies of the king or other offenders.

(iii) No discussions should be shown between master and servants.

(iv) A watchman must take a round in the city during night times once in every one and a half hours to prevent theft.[21]

Hence, we get a vivid picture of the wide scope and nature of the king's legislative power. This could be compared with the subordinate or delegated powers conferred on designated authority under modern laws to make rules, regulations and orders.

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19 M. Rama Jois, Legal and Constitutional History of India, Vol. 1 (1983), p.628.

20 Classical Law, p. 230.

21 M. Rama Jois, Legal and Constitutional History of India, Vol. 1 (1983), p. 629.

COUNCIL OF MINISTERS

A native (citizen) born of a high family, pure in character, endowed with excellent conduct, influential, well trained in the arts, possessed of foresight, wise, of strong memory, bold, eloquent, skilful, intelligent, full of enthusiasm, possessing dignity and endurance, affable, firm in loyalty and devotion, endowed with strength, health and bravery, free from procrastination and fickle mindedness, unexcited, affectionate and free from hatred and enmity, was the person who was qualified to be appointed as minister (Amalya)[22] The king was required to be consulted with council of ministers on all important affairs of the State. Every kind of administrative measure should be preceded by deliberation in the council of ministers, which should be kept absolutely secret. Until the decision was given effect to none else should know about it.[23] Any minister committing breach of secrecy was liable to be sentenced to death.[24]

The above provisions indicate that apart from tendering advice to the king whenever consulted, the execution and supervision of all works undertaken by the State was the responsibility of the concerned ministers.

ADMINISTRATIVE DIVISIONS AND DEPARTMENTS

For the purposes of proper and efficient administration, a kingdom was required to be divided into several divisions, the lowest unit being a grama (Village). The appointment of administrators for the various departments of the government was also provided for. The king was required to appoint a head for each village, a group of ten villages, a group of twenty villages, a group of hundred villages and then for a group of one

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22 Kaut, p. 14.

23 Kaut, p. 26.

24 Kaut, p. 26.

thousand villages.[25] And a separate minister was required to be appointed to have control over officers appointed as heads of villages or groups of villages and to inspect the affairs connected therewith.[26]

Provisions were incorporated in the Smritis to appoint for each town one superintendent, elevated in rank, formidable, and resplendent to look after all governmental affairs.[27] It was provided in the provision that the king should confiscate the property of evil minded officers who take money from the parties.[28]

However, the duties of the head of a department were, among others, as follows:

(a) To manage the department efficiently without allowing any room for idle talk among his subordinates or allowing them to conspire, because when government servants conspire they eat up the revenue and when they indulge in idle talk, work suffers.

(b) To take appropriate action in an emergency without seeking or waiting for the king's orders.

(c) To revert subordinate government officials to a lower post as a measure of punishment.

(d) To take disciplinary action against them for misconduct.

(e) To make permanent the services of such of them who are not corrupt, who increase the revenue by lawful methods and are loyal to the king (State).[29]

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25 Manu VII 115.

26 Manu VII 120.

27 Manu VII 121.

28 Manu VII 123-124.

29 Kaut, pp. 69-72.

Historical records prove that during Ancient Period in Bangladesh, officers were occasionally transferred from place to place. The sons and wives of those who died while on duty were entitled to subsistence. Infants, diseased persons, aged relatives of the deceased employees were to be shown favour. Demotion and, in some cases, dismissal were punishments for incompetent administrative officers.[30]

On the other hand, the king, in practice, was not governed by any legislature and was not answerable before a court of law as is the case under a written Constitution of a parliamentary system of government with an independent judiciary which will have the power of judicial review over legislative and executive actions. Indeed the king himself constituted the highest judiciary. The question that naturally arises is, whether the king was free from any control during Ancient Period. The answer to this is in the negative. The king was required to rule in accordance with Dharma. Dharma was considered supreme and binding on the king. The firm faith in Dharma ingrained in the society, of which the king was a part, acted as a great check on the rulers and administrators.[31]

However, in view of the foregoing, it may now be said in the conclusion that the germs of administrative law were in a way present in the Rule of Dharma in ancient Hindu polity, where the case of Bangladesh was no exception. But here we do not profess to say that administrative law as we understand today had made impact then. Not even during British Period was such a phenomenon heard of.

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30 M. Rama Jois, Legal and Constitutional History of India, Vol. 1 (1983), p. 666.

31 Ibid, p. 667.

B. MEDIEVAL PERIOD

Medieval Period in Bangladesh counts the Period from the thirteenth century[32] to the middle of the eighteenth century. And the changes and growth of administrative law in Bangladesh under Medieval Period may conveniently be divided and studied under two separate Periods– the Ante-Mughal Period and the Mughal Period. The Ante-Mughal Period in Bangladesh continued up to 1529[33] and since then the foundation of Mughal Empire was laid in Bangladesh and it continued up to the middle of the eighteenth century. Here it is pertinent to point out that during the reign of Sur Dynasty from 1540[34] to 1563[35], when Sher Shah and others ruled over Bangladesh, the Mughal Empire remained abeyance in Bangladesh.

A. The Ante-Mughal Period

During the Ante-Mughal Period, Bangladesh, at different phases, was ruled by Khilji Dynasty, Sultans of Delhi and independent Sultans of Bengal. As regards changes and growth of administrative law in Bangladesh during Ante-Mughal Period, it may briefly be said that when the foundation of Muslim dominion was established in Bangladesh towards the beginning

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32 Medieval Period in Bangladesh was first started at the beginning of the thirteenth century when Ikteer-uddin Md. Bakteer Khilji, who died in 1206, conquered Bengal.

33 The ruler of Bengal Sultan Nasiruddin Nosrot Shah admitted the subordination of Mughal Emperor Babor in 1529 and thereby Mughal period was established in Bangladesh since then.

34 Bangladesh was gone under the rule of Sher Shah in 1540.

35 The last ruler of Sur Dynasty, son of Jalal Shah Sur, was killed in 1563 by Giasuddin who ruled over Bengal since then. But subsequently Giasuddin was killed and was defeated by Taj Khan Korrani in 1564, who also died in the same year. After the death of Taj Khan his brother Sulaiman Khan Korrani took over the government and he, however, admitted the subordination of Mughal Emperor Akbar. Thus, Bangladesh was gone again under Mughal Empire from 1564.

of the thirteenth century, the earlier administrative legal system usually remained operative in the country with some modifications here and there until the advent of the Mughals.[36] Both the Hindu and Muslim systems never regarded the king as the fountain of law. The king always abided by the law.[37] However, apart from the moral duty to the king to abide by law, there was no other remedy except rebellion to get rid of misgovernment both under Hindu and Muslim rule in ancient and medieval Bangladesh.[38]

During this (Ante-Mughal) Period, Muslim social order, political theory and religion were established in the society. Muslim religion places every man on equality before God, overriding distinctions of class, nationality, race and colour. Graded or sanctified inequality of caste system was avoided. And the Muslim rule, however, adopted many habits, ways and manners of Hindus and vice versa.[39] The Muslim polity was based on the conception of the legal sovereignty of the Shara or Islamic law. The political theory was governed by religion, Islam. It was based on the teachings of the holy Quran, the traditions of prophet and precedent. The Quran being the absolute authority, all controversy centred round its interpretation, from which arose the Muslim or Islamic law.[40] Indeed, Islamic law was the guidance of most of the administrative law activities.

B. The Period of Sher Shah

Sultan Sher Shah was famous not only for his heroic deeds in the battle field but also for his administrative and judicial abilities. It

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36 Azizul Hoque, The Legal System of Bangladesh (1980), p. 2.

37 V. G. Ramachandran, Administrative Law (2nd edn., 1984), p. 68.

38 Dr. K. C. Joshi, Administrative Law (3rd edn., 1984), pp. 10-11.

39 V. D. Kulshreshtha, Landmarks in Indian Legal and Constitutional History (5th edn., 1981), p. 18.

40 Ibid, p. 19.

was said by Sultan Sher Shah that "Stability of the Government depends on justice and that it would be his greatest care not to violate it either by oppressing the weak or permitting the strong to infringe the laws with impunity."[41] In spite of the fact that Sultan Sher Shah ruled the country only for five years, he introduced various remarkable reforms in the administrative and judicial system of his kingdom. His vital reforms were, among others, as follow[42]:

(i) Sher Shah divided his whole empire into 47 provinces and sub-divided each of the provinces into several parganahs. Further, he appointed Shiqahdar for each parganah with the ordinary powers of maintaining law and order. Subsequently, the Shiqahdar was empowered with magisterial capacities.

(ii) Police regulation was drawn up for the first time during his reign, which played a vital role to keep law and order situation peaceful and also to keep the police department well disciplined.

(iii) Moqoddams or heads of Village Councils were recognised and were ordered to prevent theft and robberies. In cases of robberies, they were made to pay for the loss sustained by the victim. This measure incredibly improved the strength of the administration specially relating to law and order situation.

(iv) When a Shiqahdar was appointed, his duties were specifically enumerated. And the duties of Governors and their deputies regarding the preservation of law and order were emphasised.[43]

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41 Stewart, History of Bengal, p. 128.

42 M. B. Ahmad, the Administration of Justice in Medieval India, p. 129.

43 Henry Elliot and Dowson, History of India, Vol. IV, p. 420.

(v) The judicial officers below the Chief Provincial Qazi were transferred after every two or three years. This practice is till being followed in our country.

(vi) The Chief Qazi of the Province or the Quazi-ul-Quzat was in some cases authorised to report directly to the Emperor on the conduct of the Governor, especially if the latter made any attempt to override the law. This is an important aspect of the 'Rule of Law' concept.

(vii) Sher Shah issued various 'Formans' containing instructions written into documents for the guidance of the civil and executive officers which constituted the Qanun-i-Shahi resembling the jus-gentium of Roman law. The officials were bound to act in accordance with those instructions.

C. The Mughal Period

The Mughals established their rule in this part of the Indian Subcontinent in the sixteenth century. During this Period, a well-organised administrative legal system was introduced in the country. For the purpose of overall administration, the areas now constituting Bangladesh, like other provinces[44] of the Mughal Empire, was divided into districts, and districts into parganahs, etc.

Records reveal that the Mughal Empire was administered on the basis of the same political divisions as existed during the reign of Sher Shah. And for the purposes of civil administration, the whole empire was divided into the Imperial Capital, Provinces (Subahs), Districts (Sarkars), Parganahs and Villages. Just like the Sultans of Delhi, the Mughal Emperors were also absolute

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[44] The Province was comparable to a modern division.

monarchs. The Mughal Emperor was the supreme authority and in him the entire executive, legislative, judicial and military powers resided.[45]

The Mughal Emperor at the imperial capital was the legislator on those occasions when the nature of the case necessitated the creation of law or the modification of the old. Royal pronouncements overrode everything else, provided they did not go to counter to any express injunction of the holy law. These pronouncements were based on the emperor's good sense and power of judgment rather than on any treatise of law. All ordinary rules and regulations depended upon the Royal will for their existence.[46]

Actually under the Muslim law, there were no specific provisions regulating the constitution and organization of the State. The fundamental concept underlying Muslim law, like the Hindu law, was that the authority of the king was subordinate to that of law. In view of this basic principle, every Muslim ruler was required to rule in conformity with the tenets of their sacred law, the Quran, which laid down only the broad principles governing the social life of the Muslims.[47] Thus, with the assumption of sovereign power by Muslim rulers, the Muslim system of Government came to be established in several parts of India.

During Mughal Period, the Governor (Subhedar), under whom a number of departmental heads were appointed, was responsible for maintaining law and order and also to collect revenue in each province. In each District (Sarkar), the Fauzdar was the principal

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45 V. D. Kulshreshtha, Landmarks in Indian Legal and Constitutional History (5th edn.), p. 27.

46 Azizul Hoque, The Legal System of Bangladesh (1980), p. 6.

47 M. Rama Jois, Legal and Constitutional History of India, Vol. II (1983), p. 4.

executive and police officer, who represented the Governor. The Kotwal was the immediate commanding officer in the cities and Shiqahdar was in the Parganahs. The village was the smallest unit of administration. It was administered by three officials- the village headman, the accountant (Patwari) and the registrar (Chaudhari). The Village Assemblies or Panchayats managed local administration.

In provincial capitals, large markets were also established. Cities were divided into sectors and each of those sectors was in the charge of two officials who were responsible to the chief city administrator.[48]

And, on the other hand, owing to administrative exigencies, a set up of ministers was evolved and their designation and portfolios were also specified. The ministers were considered as the pillars of the Muslim government. They were the servants of the ruler and were responsible to him. The will of the ruler was final in all matters.[49] The ministers were not in a position to resist the views of the ruler. Regarding the part played by the ministers of Mughal Emperor, Jadunath Sarkar observes—

> "His Ministers were mere secretaries who carried out the royal will in matters of detail; but they could never influence his policy except by the arts of gentle persuasion and veiled warning; they never resigned if he rejected their counsels."[50]

Thus, the Mughal Emperor was all powerful as he contained in himself the status of religious and political sovereignty.

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48 V. D. Kulshreshtha, Landmarks in Indian Legal and Constitutional History (5th edn,, 1981), pp. 21-22.

49 M. Rama Jois, Legal and Constitutional History of India, Vol. II (1983), p.6.

50 Jadunath Sarkar, Moghal Administration (5th edn., 1963), pp. 15-16.

C. BRITISH PERIOD

In Bangladesh, British Period began with the consolidation of the British power in Bengal from 1757[51] and continued up to 1947. But although British Period in Bangladesh began from 1757 nevertheless to understand properly the changes and growth of administrative law in Bangladesh under British Period, besides considering the administrative legal system from 1757 to 1947, it is also necessary to consider, under different Charters, the early administration and its laws and development of authority of the East India Company since very beginning.

Charter of 1600

The British came to India in 1601 as a "body of trading merchants" in the name of East India Company.[52] The fabulous wealth of India attracted them to this country for trading purpose. On the 22nd December, 1599, a number of British merchants resolved to form a trading company. On the day of December, 1600, Queen Elizabeth I issued a Royal Charter to the said Company, which cause to be known as the British East India Company, "to trade into and from the East Indies, in the countries and parts of Asia and Africa .... For a Period of fifteen years ... subject to a power of determination on two years' notice if trade was found unprofitable". Thus, the Company became a

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51 With the battle of Plassey in 1757, the real authority of the Nawabs of Bengal passed to the English East India Company. In the battle of Plassey in 1757, Lord Clive smashed Nawab Siraj-ud-daula's army and put an end to his power in Bengal. The British appointed a new Subedar of Bengal, Nawab Mir Jafar and obtained all privileges they needed. In fact, the reality of power had now gravitated into the hands of Clive, and Bengal had become virtually a British protectorate as well as a base for the further extension of British power towards the interior of India.

52 The first Englishman to set foot on Indian soil was Thomas Stephens. He set sail to India from Lisbon on 4th April, 1579, and reached Goa in October, 1579.

juristic person with the exclusive privilege to trade in India and other Far-East Countries.

Queen Elizabeth I, by the aforesaid Charter, also granted legislative power to the company "to make bye-laws, ordinances, etc. for the good government of the Company and its servants and punish offences against them by fine or imprisonment according to laws, statutes and customs of the realm". Subsequently, many Charters were also granted from time to time to enable the Company to develop its authority to deal with new circumstances.[53]

Charter of 1615

In order to enable the Company to punish its servants for capital offences of long voyages, the Company secured the first Royal Commission in 1601. Later on, by granting this Charter on the 14th December, 1615, the king authorised the Company to issue such Commissions to its Captains subject to one condition that in case of grosser offences, e.g., willful murder and mutiny, a jury of twelve servants of the Company would give the verdict. The Company was given this power in order to maintain discipline on board during the voyages.

Charter of 1623

This Charter, granted by James I in 1623,[54] extended the power of the East India Company by authorising it to punish its servants for offences committed by them on land. This Charter together with the earlier grant virtually placed the Company to the advantage of governing all its servants both on land and high sea.

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

54 Granted on February 19, 1623.

Charter of 1661

The East India Company entered into a new era in 1660 when the Company regained its prosperity and changed its character from a purely trading concern to a territorial power. Thereafter, on the 3rd April, 1661, Charles II granted this Charter to the Company. Besides extending the privileges of the Company on new territorial lines, this Charter reorganized its structure. This Charter empowered the Company to appoint a Governor and Council in each of its settlements at Madras, Bombay and Kolkata of India. The Governor and Council were authorised to judge all persons belonging to the Company or living under them in all cases, civil and criminal, according to the laws of England and to execute judgment in the respective settlements. In other words, even the Indian inhabitants who were residing in the Company's settlements were also included in the jurisdiction of the Governor and Council.

Thus, the Charter expressly provided for the application of English law and empowered the Governor and Council to exercise control over both Judiciary and Executive.

Charter of 1686

This Charter was granted to the Company by James II on April 12, 1686. By this Charter, James II renewed and added to the various powers and privileges earlier granted to the East India Company. Further, the Charter authorised the Company to appoint admirals and other sea-officers in any of their ships, with power for these naval officers to raise naval forces and exercise martial law over them in times of war, to coin money in their Forts and to establish Admiralty Courts.[55]

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55 S. M. Hassan Talukder, History of Constitutional Development: Bangladesh Perspective (1993), p. 8.

Charter of 1698

On the 13th April, 1698, William II granted this Charter to the Company whereby certain changes were made in the existing rules to improve the administration of the Company. This Charter created a Court of Directors, and the authority and control over the affairs of the Company were entrusted to the Court of Proprietors. This constitution of the Company continued till the passing of the famous Regulation Act in 1773 which completely overhauled the constitution of the Company.

Charter of 1726

King George I issued this Charter to the Company on the 24th September, 1726. This Charter became an important landmark in the history of subsequent constitutional development due to its various vital provisions having far reaching consequences. This Charter of 1726 provided for the establishment of a Corporation in each presidency town i. e., Bombay, Kolkata and Madras. The Governor-in-Council of each presidency town was entrusted with the power to make by-laws, rules, ordinances to regulate the working of the Corporations and also for the better administration of inhabitants of the settlements. The Governor and Council was required to obtain in writing prior approval and confirmation of such rules, by-laws, etc from the Court of Directors of the Company. It is, therefore, said that the Charter of 1726 for the first time created a subordinate legislative authority in each of the three presidency towns of India.[56]

Besides, this Charter also mixed the Executive with the Judiciary by granting original criminal jurisdiction and appellate civil jurisdiction to the Governor and the Council who were already entrusted with all executive powers in each presidency town.

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56 V. D. Kulshreshtha, Landmarks in Indian Legal and Constitutional History (5th edn.) p. 63.

Actually the object of early British administration was to maximize profit and for this, efficiency in the administration was the chief necessity. Therefore, during the Company days, the courts were tools in the Company's hands. The executive had overriding powers in matters of administration of justice. However, the establishment of the Supreme Court at Kolkata in 1774 under the provisions of the Regulating Act, 1773, inaugurated an era in independent judicial administration. But with the passage of the Act of Settlement, 1781, the era came to an end and all the later developments in the judicial system during the Company's time worked to the detriment of the native population.[57]

From the battle of Plassey in 1757 until Independence, one significant advantage that the Indian administration (which also includes the administration of today's Bangladesh) had from a centralised but undemocratic form of government was the facility to make laws. During that Period the executive was invested with such wide powers to make rules as a modern democratic legislature cannot even imagine. Even prior to the famous Code of Civil and Criminal Procedures known as Cornwallis Code of 1793, Elphinstone Code of 1827, and many other regulations were in operation. These regulation laws aimed mainly at the regulation of the powers of the administration and their control. Thus, expansion of the administrative powers and provisions of some kind of control went hand in hand. For instance, Regulation 10 of 1822 which codified the law regarding the excise on salt, opium and general custom dealt mainly with the powers of administrative agencies (salt chowkees) and also the control of these agencies. It made provisions regarding power of confiscation, procedure in the proceeding of confiscation and the control to be exercised by the courts. Section 108 of the Regulation of 1822 reminds one of the

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57 Dr. I. P. Massey, Administrative Law (2nd edn., 1985), p. 13.

provisions of the Administrative Procedure Act, 1946, when administrative agencies were required to record facts, evidence and the decision. Judicial relief was made available only after the exhaustion of administrative remedies. The courts, though had ample powers to set aside an administrative action, yet paid great respect and attention to their decisions.[58]

Till the end of the British rule in India, the government was concerned with the most primary duties only, and the functions of a welfare State were not discharged. However, with increasing and rapid strides in the fields of communication and transport, the growing bodies and tribunals like the Inter-State Commerce Commission in U. S. A. and Railways and Canal Commission in England were felt. Finally, the two World Wars brought in a plethora of administrative agencies exercising control over almost every aspect of individual life.[59] A brief account of the growth of administrative process during the British rule may be given as follows:

I. 1834 to 1939

Between the years 1834 - 1939 there were some sporadic efforts by the government in regulating (a) public safety, health and morality; (b) transport; (c) labour; and (d) trade and business. Under the head of public safety, health and morality, the statutory output may be instanced by -

A. PUBLIC SAFETY

(i) The Sarais Act, 1867, enjoined registration of sarais with the District Magistrate who had power to refuse registration if no proper character certificate was produced.

(ii) The Arms Act of 1878 penalised persons who indulged in manufacture, trade and keeping of arms without a licence.

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58 Dr. I. P. Massey, Administrative Law (2nd edn., 1985), pp. 13-14.

59 Ibid., p. 14.

(iii) The Indian Explosives Act, 1884, authorised the government to regulate or prohibit by licensing all aspects of trade and traffic in explosives.

(iv) The Indian Petroleum Act. 1899, forbade without a licence, the keeping or transportation of dangerous petroleum beyond a certain quantity.[60]

(v) The Indian Boilers Act, 1923, regulated the user of boilers and prohibited their use without registration. This Act also provided for a hierarchy of authorities with regular appeals from one to another. The jurisdiction of ordinary courts of law was excluded from reviewing the orders of these authorities.[61]

B. PUBLIC HEALTH

(i) The Opium Act, 1887, forbade trade and traffic in opium without the permission of the local government.

(ii) The Dangerous Drugs Act, 1930, regulated the cultivation, production, import and export of certain drugs like coca leaf, hemp, opium, etc.

(iii) The Epidemic Diseases Act, 1897, authorised government to take such measures as may be necessary to prevent the outbreak of dangerous and epidemic diseases.

(iv) The Indian Medical Council Act, 1933, ushered in a Medical Council of India for recognising medical qualifications in degrees issued by medical institutions. This was with a view to bring about a uniform standard of higher qualifications in the field of medicine.[62]

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60 V.G. Ramachandran, Administrative Law (2nd edn., 1984), p. 69.

61 Dr. K. C. Joshi, Administrative Law (3rd edn., 1984), p. 11.

62 V, G. Ramachandran, Administrative Law (2nd edn., 1984), pp. 69-70.

C. PUBLIC MORALITY

(i) The Dramatic Public Performances Act, 1876, empowered the local government to forbid dramatic performances in an area without a licence.

(ii) The Cinematograph Act, 1918, had provisions for licensing of cinema and the exhibitions of Films duly certified by the prescribed authority.[63]

D. TRANSPORT

(i) The Stage Carriages Act, 1861, forbade the plying of stage carriages without a licence from a magistrate or the Commissioner of Police. No licence would be granted if that authority was of the opinion that the "stage carriage is unserviceable or is unsafe or unfit for public accommodation or use."

(ii) The Indian Motor Vehicles Act, 1914, was the first all-India statute on motor transport. This Act was a short enactment of 18 sections regulating the licensing of drivers and empowering registration of vehicles. The local government derived power to make rules for regulating the construction and equipment of motor vehicles. The Motor Vehicles Act, 1939, was more comprehensive in its sweep.

(iii) The Railways Acts of 1854, 1879 and 1890 governed the running and maintenance of railways. Railways were first conceived to meet the needs of English trading firms and to facilitate troop's movements. The Act of 1890 also regulated the regulation of railway rates.[64]

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63 V, G. Ramachandran, Administrative Law (2nd edn., 1984), p. 70.

64 Dr. K. C. Joshi, Administrative Law (3rd edn. 1984), p. 11.

E. LABOUR

In the field of labour, the Workmen's Compensation Act, 1923, the Indian Mines Act, 1923, the Factories Act, 1934, and Payment of Wages Act, 1936, can be listed as important enactments. These enactments made provision for administrative adjudication.[65]

F. ECONOMIC REGULATIONS

The economic development of the Indians was not the policy of the British government. Whatever was done was primarily to protect and foster the British interest. The Company registration starting from 1850 did not lean towards governmental interference in company affairs. The Registrar was the main authority under the Acts of 1850 and 1913. The Indian Tea Control Act, 1933, and Indian Rubber Control Act, 1934, were passed to regulate the over production in tea and rubber.[66]

II. 1939 to 1947

The Period 1939 to 1947 saw the increase of executive powers as only could be expected being the Second World War Period. This World War, however, changed the position of the government. The Defence of India Act, 1939, conferred wide powers on the Central Government to make rules for the defence, public safety, maintenance of public order, prosecution of war, or for maintaining supplies and services essential for the life of the community.[67] Under this skeleton legislation, the Defence of India Rules was framed. These rules conferred very wide powers on the government to interfere with life, liberty and property of the subjects. In addition, many Acts such as Essential Commodities Act, 1945, Import and Export Control Act, 1947,

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65 Dr. K. C. Joshi, Administrative Law (3rd edn. 1984), p. 11.

66 Ibid., pp. 11-12.

67 Section 2 of the Defence of India Act, 1939.

and Foreign Exchange Regulation Act, 1947, were passed to cover several matters.

On the other hand, the subject of administrative law also received the attention of writers during this Period. In 1903, S. R. Das published a book[68] containing interesting materials on Indian administrative law. A standard work[69] was published in 1919, which formed the material for Tagore Law Lecture in 1918.

PAKISTAN PERIOD

During Pakistan Period, administrative law in Bangladesh did not agitate public minds until 70's. The Report of the Law Reform Commission (1958-9) did not deal with the question of administrative bodies. But the term administrative law received an extra-judicial recognition. Thus, Mr. Justice A. R. Cornelius, Chief Justice of the Supreme Court of Pakistan, said in the course of an address to civil servants, referring to the power of the superior courts to interfere with arbitrary decisions, so there you have in our country a fine example of the development and operation of administrative law according to the very highest standards.[70]

The specific issue of the writ jurisdiction of the superior courts to interfere with the exercise of arbitrary power was, however, agitated before the courts of law time and again. Many constitutional battles were fought over the issue.[71] At times

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68 S. R. Das, The Law of *Ultra Vires* in India (1903).

69 Narendranath Ghose, Comparative Administrative Law (1919).

70 A. R. Cornelius, 'Development and Administration of Evacuee and Refugee Laws in Pakistan', P.L.D. J. (1966), 47.

71 Thus the famous constitutional law case Fed. of Pak. Vs. Tamizuddin Khan (1956) P. L. R. (W.P.) 306 was concerned with the question of validity of S. 223-A of the Government of India (Amendment) Act, 1954, which conferred writ jurisdiction on the High Courts. It was held invalid, having never received the assent of the Governor-General; See A. R. Cornelius, 'Writ Jurisdiction of Superior Courts', P.L.D. J. (1964), 77.

sharp conflict occurred between the judiciary and the executive over this question. The writ jurisdiction was conferred on the High Courts in October 1955 by S. 223-A of the Government of India (Amendment) Act, 1954.[72] The Constitution of 1956, which came into force on 23 March 1956, superseding the above provision, conferred this jurisdiction on the Supreme Court and the High Courts by virtue of Articles 22 and 170 respectively.

In 1958, the Constitution of 1956 was abrogated and martial law proclaimed. The writ jurisdiction of the Supreme Court and the High Courts were, however, maintained.[73] Article 98 of the Constitution of 1962 empowered the High Courts to exercise writ jurisdiction. The Supreme Court had no power under the 1962-Constitution to issue writs (except on an appeal from the High Courts).

Substantially, the constitutional documents of 1956 and 1962 incorporated several provisions regarding the services. First and foremost, the relevant provisions in both documents defined the status of the higher civil servants by lying down that the members of the All - Pakistan and Central Services would hold office during the pleasure of the President.[74] Second, it was clearly provided that the terms and conditions of service of civil servants should not be varied to their disadvantage. Every civil servant was to be given due right to appeal against any action contemplated against him and any existing rules should not be so altered or interpreted as to affect his service to his

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72 See the Validation of Laws Act, 1955, s. 3; prior to this date the East Bengal High Court at Dhaka possessed the writ jurisdiction as successor of the Kolkata High Court; See s. 5 of the Governor-General's High Court (Bengal) Order, 1947.

73 Art. 2 of the Laws (Continuance in Force) Order, 1958.

74 The Constitution of the Islamic Republic of Pakistan, Karachi, Manager of Publications, 1956, Art. 180 (hereinafter cited as the 1956 Constitution of Pakistan); The Constitution of the Islamic Republic of Pakistan (as modified up to 10 April 1968), Karachi, Manager of Publications, 1968, Articles 176, 178 (hereinafter cited as the 1962 Constitution of Pakistan).

disadvantages.[75] Third, the Constitution of 1956 provided for the continuance of the All Pakistan Services (CSP and PSP) common to both the Centre and Provinces, to be recruited and controlled at the centre. The 1962 Constitution also maintained this arrangement in it's entirely.[76] Fourth, both the Constitutions provided for two important safeguards to protect civil servants against any arbitrary actions, no civil servant (All-Pakistan, Central or Provincial) should be dismissed, removed or reduced in rank (i) by any authority subordinate to that by which he was appointed, or (ii) by a procedure not giving him a reasonable opportunity for self-defence.[77] Fifth, the Constitution of 1956 included special provisions guaranteeing the I C S officers the same rights and conditions of service as they enjoyed before partition.[78] Sixth, both the Constitutions contained elaborate provisions regarding the organization and functions of the Public Service Commissions.[79]

It was not, of course, practically possible to include provisions relating to every aspect of the service. Thus, the Constitutions contained appropriate saving clauses, thereby leaving many mailers of the services (e.g., detailed recruitment rules and terms and conditions of service) to be regulated by Acts of the legislature.[80] Pending such legislature, many of these mailers were to be regulated by rules made by the President.[81]

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75 The 1956 Constitution of Pakistan, Article 182; The 1962 Constitution of Pakistan, Article 178.

76 The 1956 Constitution of Pakistan, Article 183; The 1962 Constitution of Pakistan, Article 242.

77 The 1956 Constitution of Pakistan, Article 181; The 1962 Constitution of Pakistan, Article 177.

78 The 1956 Constitution of Pakistan, Article 31(2).

79 The 1956 Constitution of Pakistan, Articles 184-190; The 1962 Constitution of Pakistan, Articles 180-184.

80 The 1956 Constitution of Pakistan, Article 179 (2); The 1962 Constitution of Pakistan, Article 174.

81 The 1956 Constitution of Pakistan, Article 182; The 1962 Constitution of Pakistan, Article 178 (2).

So far as the All-Pakistan and Central Services were concerned, it was constitutionally the President who held the ultimate authority to appoint and dismiss members of these services, including powers to determine, by separate rules, their terms and conditions of service.

In truth, a study of administrative law involves an inquiry into certain 'basic issues'. They are: What is the appropriate machinery for the exercise of the administrative process? What powers are given to the adjudicating bodies by the statutes creating them and the regulations made thereunder? What should be the process through which the administrative decisions are reached? What procedure has been laid down for the exercise of powers? What safeguards are available to those whose interests are affected by an administrative action? What further safeguards are necessary - safeguards that are consistent with the administrative exigencies, fairness of administrative proceedings, the rights of individuals, and the democratic values? With these issues are linked the central issues: What ought to be the scope of judicial review?[82] Here we will examine some important ingredients of these issues.

The Right to a Hearing

In Pakistan, although the courts had followed the traditional meaning attributed to the rules of natural justice by the English courts, the trend was evident that the courts would further judicialise the hearing procedures. Thus, the High Court of West Pakistan at Lahore held that the principles of Natural Justice and fair play confer a very valuable right on a party to cross-examine his adversary and his witness.[83] In Pakistan, however, the requirement of hearing was binding on all the tribunals (unless

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82 M. A. Fazal : Judicial Control of Administrative Action in India and Pakistan (1969), p. 26.

83 Abdul Hamid Vs. Karan Dad P.L.D. 1966 Lah. 16 at p. 31.

expressly excluded by a statute) irrespective of the nature of the procedure.[84]

Again the courts in Pakistan asserted their right to examine the factual basis of administrative actions on the authority of the principles of Natural Justice. In a case,[85] the Supreme Court of Pakistan set aside the ban imposed on a political party - the ban being imposed in breach of the principle of audi alteram partem.

Mala Fide

A typical case was that of Muhammad Aboo Vs. Province of East Pakistan where the Government of East Pakistan promoted two officials to a certain rank who were juniors to the official in question, in supersession to the latter's claim 'on the grounds of merit and suitability'. The Supreme Court held that 'So far as suitability or promotion to a particular post is concerned, the sole judge is the Government and the Courts are unable to interfere except possibly in a case of proved malafide'.

Again, where the Government issued notifications for land acquisition declaring that the land was needed for a 'public purpose' but in fact it was required for a commercial firm. The acquisition was held malafide and, therefore, invalid.[86]

Discretion must not be fettered by policy

In Province of East Pakistan Vs. Mohd. Yaseen[87] the Government announced a policy, in order to encourage construction of houses by private enterprise that no house built after 1950 would be requisitioned. The petitioner's house was erected in 1952 but it was, nevertheless, requisitioned by the Government. It was

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84 M. A. Fazal : Judicial Control of Administrative Action in India and Pakistan (1969), p. 33.

85 Abul Ala Maudoodi Vs. Govt. of West Pakistan P.L.D. 1964 S.C. 673.

86 Safar Ali Vs. Province of East Pakistan P.L.D. 1964 DAC 467.

87 P.L.D. 1964 S.C. 438.

held that a mere statement of policy could not fetter the statutory authority of requisition of properties.

Suits against Governments

Under Section 176 of the Government of India Act, 1935, as adopted in Pakistan, the liability of the State was the same as it was in British India. Article 136 of the Constitution of Pakistan, 1956, provided: 'The Federal Government may sue and be sued by the name of Pakistan and the Government of a Province may sue and be sued by the name of the Province'. Subsequently, Article 136 was reproduced in Article 213 of the 1962 Constitution. But indeed there was no legislation in Pakistan, corresponding to the Crown Proceedings Act in England, defining the area of liability of the State. Therefore, the courts had to depend upon the case law as it developed from time to time.

In Muhammadi Steamship Co. Ltd. Vs. Federation of Pakistan,[88] where the Shipping Authority acted under order of the Government which resulted in the delayed sailing of the plaintiff's ship and thereby caused loss to him, the Government was held liable. The Government of Pakistan Vs. Mohd. Ali,[89] which was a case of false imprisonment where the Government was held liable for damages, is an authority for the proposition that the Government is liable for the tortuous acts of its servants if it either authorises or ratifies these acts.

Remedies in Administrative Law

Injunctions: The injunction, as a remedy in administrative law in Pakistan, was dependable on a variety of sources. Its effectiveness was also dependable on the source of authority as well as the body against which it was directed. However, permanent injunctions and temporary injunctions in Pakistan

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88 P. L.D. 1959 Kar. 232.

89 P.L.D. 1965 Kar. 1.

were required to be regulated by the Specific Relief Act, 1877, and the Civil Procedure Code, 1908, respectively.

Declarations: In Pakistan, any civil court could entertain a declaratory action under the provisions of the Specific Relief Act. As regards declaration it was provided in Section 42 of the Specific Relief Act, 1877, that-

"Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to such character or right and the Court may in its discretion make therein a declaration that he is so entitled and the plaintiff need not in such suit ask, for any further relief;

Provided that no court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so."

It is pertinent to mention here that a declaration could also be issued outside Section 42 of the Specific Relief Act, 1877.[90] By virtue of Section 42 of the Specific Relief Act, 1877, the scope of declarations in Pakistan was indeed wider. Section 42 of the Specific Relief Act empowered the courts to declare acts of public authorities null and void when they act outside their jurisdiction. In Pakistan it was also viewed by the courts that a declaration was not an appropriate remedy where the master dismissed his servant in breach of contract, unless the servant was protected by any statutory provision.[91]

PREROGATIVE REMEDIES: Articles 22 and 170 of the Pakistan Constitution of 1956 were required to deal with the provisions for directions, order or writs. After the proclamation of martial

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90 Kumudini Welfare Trust of Bengal Ltd. Vs. Pakistan, P.L.R. (1959) Dhaka 477.

91 Malila and Haq Vs. Muhammad Shamsul Islam P.L.D. 1961 S. C. 531 at 534; Gulf Steamship Co. Ltd. Vs. Dilwash Balooch P.L.D 1962 Kar. 899.

law and abrogation of the Constitution in 1958, the Laws (Continuance in Force) Order, 1958,[92] was issued.[93] Clause 4 of Article 2 of the Order provided for the powers of the Supreme Court and High Courts to issue writs but dropped the provisions for 'directions or order'. This was held to have curtailed the wider powers of the courts under the writ provisions of the Constitution of 1956.[94] Article 98 of the 1962 Constitution of Pakistan, under which the High Courts exercised the writ jurisdiction, empowered the High Courts to make an order directing the public authorities to refrain from doing that which they were not permitted by law to do or to do that which they were required by law to do. The High Courts were also empowered to make an order declaring that acts done or proceedings taken by the public functionaries were without lawful authority and were of no legal effect. The First Amendment to the Constitution[95] added a new paragraph (C) to Article 98(2) with the provision for directions for the enforcement of fundamental rights.

The Courts in Pakistan in some cases granted relief in the nature of declarations and injunctions in writ petitions before[96] and after the promulgation of the Constitution of 1962. In Abdul Ala Maudoodi Vs. Government of West Pakistan,[97] the Court declared a ban imposed by the Government on a political party to be illegal and void on the grounds that it violated the fundamental right of freedom of association guaranteed by the Constitution. The Government was directed to cancel and withdraw the notification imposing the ban. The latter part of the judgment resembles to an injunction.

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92 Post - Proclamation No. 1.

93 Legitimacy of martial law was recognised in State Vs. Dosso P.L.D. 1958 S.C. 533.

94 Islamic Republic of Pakistan Vs. Muhammad Saeed P.L.D. 1961 S.C. 192.

95 Constitution (First Amendment) Act, 1964.

96 Muhammad Afzal Khan Vs. Supt. of Police P.L.D. 1961 Lah.

97 P.L.D. 1964 S.C. 673.