# An Introduction to The Constitution of Bangladesh

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**Mahbubul Islam**

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## Dedicated to

My beloved Mother- Firoza,
everything I achieved in my life I owe her.

**CONTENTS**

# Preface

I read our Constitution, the basic document of our country, for the first time when I got admission in the department of law, University of Dhaka. Since then, I got some feelings that every citizen of our country should have a basic idea on the Constitution of our Country. But, a compact and crystal clear book on the Constitution of Bangladesh is required to accomplish this purpose. In view of this purpose and also the paucity of knowledge on the Constitution of Bangladesh I have felt the necessity to write this book, "An Introduction to the Constitution of Bangladesh". It is a reasonably short book, which leaves out much detail. I have also done my best to write it in plain language. It aspires both to inform and to challenge non-lawyers who are interested to know about the Constitution of Bangladesh, as well as Law students seeking an introduction to the Constitutional law of Bangladesh and lawyers who would like a refresher. This book basically sketches the basic outlines of the existing Constitution of Bangladesh. However, if there is any lapse in my effort, any good suggestion for its melioration will be received gratefully.

Before concluding this Preface, I would like to acknowledge my debts to the authors whose works I had the privileges to consult and quote. Discredit for insufficiencies and imperfections, if any, in this book must lie upon me alone.

Mahbubul Islam
Dhaka

Chapter One

# Introducing the Constitution of Bangladesh

A State-constitution is a bunch of some principles, provisions, and legal norms based on which major national institutions have been ordained and established. It is the basic legal framework of a nation or state, which may be written or unwritten, establishes the character and conception of its government laying the basic principles to which its internal life is to be conformed, it organizes the government and regulates, distributes, and limits the functions of its different departments and prescribes the extent and manner of the exercise of sovereign powers. So, Constitution implies a legal framework upon which the government and laws of a society are built and which determines the relations between the people and the Government.

## Definition of Constitution

The constitution is a living, dynamic organism which reflects the moral and political values of the people it governs[1]. A Constitution is the plan for a government[2]. The Articles of the Constitution normally talk about the duties of the three main parts of government: the Executive Branch, the Legislative Branch, and the Judicial Branch. The philosopher Aristotle in his work *Politics* defined constitution as an organization of offices in a state, by which the method of their distribution is fixed, the sovereign authority is determined, and the nature of the end to be pursued by the association and all its members is prescribed. The constitution is colloquially referred to as the "law of the land"; to which all of government, citizens, corporate persons and other laws must defer in the event of any conflict.

A modern state cannot be thought without constitution. Professor KC Wheare defines the constitution of a state as the whole system of a country, the collection of rules which establish and regulate or govern the government[3].

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[1] Barnett, H. (2002), Constitutional and Administrative Law, 4th Ed. London, Cavendish Publishing Limited Law (p. 3, Chapter 1).

[2] For details, Phillips, O. H., (1787) O. Hood Phillips' Constitutional and Administrative Law, 7th Ed., Sweet & Maxwell Ltd., Chapter 1

[3] K.C Wheare (1966), Modern Constitutions, p.1

Aristotle defines Constitution as the way of life, the state has chosen for itself. Lord Bryce said that Constitution is aggregate of law and custom under which the life of state goes on. A great observation of C.F Strong is that a constitution may be said to be a collection of principles according to which power of government, the right of the governed and the relation between two are adjusted.

Thomas Paine and Dc Tocqueville defined Constitution as the aggregate of only those written principles which regulate the administration of the state. In this sense, if the Constitution is produced in an invisible document, it cannot be said to be a Constitution at all. It is a written document which defines the basic rights of the Governed and the limitation of the government. It is a document which contains (those) rules which provide the framework for government.

Sir Ivor Jennings, author of The Law and the Constitution, observed that if a constitution means a written document then obviously Great Britain has no constitution. In countries where such a document exists, the word has that meaning. But the document itself merely sets out rules determining the creation and operation of governmental institutions, and obviously Great Britain has such institutions and such rules. The phrase 'British constitution' is used to describe those rules.

From the above definitions, it can be discerned that Constitution is the fundamental law of the state which defines and limits the power of the legislature, the executive, and the judiciary along with the relations among them and with the citizens of the country, thus sets the basis of the government.

## Sources of the Constitution[4]

### a. The People

The constitution is the embodiment of the will of the people on how they want to live and to govern themselves, i.e. People's will/people's power/sovereignty. This argument is exemplified by the preamble to the Constitution; Magna Carta (1215), Petition of Rights (1648), American Revolution (1775–83), French Revolution (1789), Bolshevik/October Revolution (1917), and Perestroika and Glasnost which sparked the 2nd Bourgeois revolution in 1989.

### b. Statutory Instruments/Acts of Parliament

Normally, laws made by the parliament derive their legitimacy from the Constitution. However, there are moments where the parliament

[4] For details, Alder, J. (2002) General Principles of Constitutional and Administrative Law, 4th Ed., New York, Palgrave Macmillan (pp.39-59).

makes law that have constitutional significance, e.g. the Irish Constitution of 1922, the Treaty of Union between Tanganyika and Zanzibar (1964), Acts of Union (1964), the Bill of Rights (Act No. 15 of 1984) and etc.

c. **Conventions and Customs**

These are normally made up of unwritten practices of the parliament, the judiciary and the executive that are of constitutional nature. (e.g. UK Constitution).

**d. International Conventions/Treaties**

Agreements between states within the international community usually form part and parcel of superior laws of the land, in respective states[5]. (Article 63(3)(e) of the Tanzania Constitution, 1977).

**e. Academic works of eminent Jurists and political scientists**

The works of eminent constitutional writers of scholarly nature may have persuasive value to a constitutional court's decision. Such works may be used in framing new constitutional rules or provisions or in assisting interpretation of certain provisions of the constitution.

**Methods of Establishing Constitution**

History shows following four methods by which modern states have acquired their Constitution. These are:

1. Constitution by revolution
2. Constitution by deliberate creation.
3. Constitution by grant
4. Constitution by gradual evolution.

**1. Constitution by revolution**

A Constitution which is adopted by the revolutionary force after a successful revolution is called Constitution by revolution. This occurs when the existent system of governance is overthrown by a revolutionary group professing a completely opposite political philosophy and the revolutionary group establishes a government and creates a new Constitution. For example, Constitution was created by such revolutionary method in French after the French Revolution in 1799 and in Russia after the Russian Revolution in 1917.

**2. Constitution by grant**

Many of the Contemporary states began with autocratic governments in which all political authority and power was vested in the absolute hand of one ruler. Later, either because the ruler believed that the

[5] Monism and Dualism practices in relation to international and regional instruments on Human rights can be referred.

powers of the government and the manner of their exercise should be defined in a more formal way or due to the demands of his people and the fear of revolution, the absolute rulers agreed to promulgate a formal document in the form of charter or Constitution in which he agreed to exercise his power in accordance with principles and rules laid down in it. Such charters or Constitutions are known as Constitution by grant[6]. Charters granted by Louis xviii in France, by Napoleon, by the emperor Meiji of Japan etc are considered under this type of Constitution.

### 3. Constitution by deliberate creation

A Constitution which has been adopted either by Constituent Assembly or by Legislative Assembly is called Constitution by deliberate creation. The Constitution of Bangladesh and the Constitution of USA had been adopted by Constituent Assembly. And the government of India Act, 1919 and that of 1935 which acted as the constitution in British India was adopted by Legislative Assembly. Basically these types of Constitution come through a long debate and discussion or by an Act of Parliament; therefore, they are termed as Constitution by deliberate creation.

### 4. Constitution by gradual evolution

A Constitution which is the product of an "evolution" of laws and conventions over centuries is called Constitution by gradual evolution. It is a result of an evolutionary growth. In this type of Constitution, a particular constitutional rule comes into existence so gradually that no one comprehends how much is added at any one moment of time. This type of Constitution is not codified in a single document rather it is appeared in a series of documents. The British Constitution is the most perfect example of this type of Constitution since Constitution efforts as well as needs of time shaped its spontaneous growth in it.

## Classifications of the Constitution[7]

Traditionally, constitutions are classified into written and unwritten and into flexible and rigid.

### Written Constitution

Written constitution is one which is found in one or more than one legal document duly enacted in the form of laws. It is precise, definite and systematic. It is the result of the conscious and deliberate efforts of

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[6] For details, Abdul Halim, Constitution, Constitutional Law and Politics: Bangladesh Perspective. p31

[7] For details, K.C Wheare (1966), Modern Constitutions, Chapter1, *See also*, Barnett, H. (2002) Constitutional and Administrative. 4th Ed. London, Cavendish Publishing Limited Law (pp. 3-15, Chapter 1). Retrieved http://jabashadrack.blogspot.com/2012/11/meanings-and-classification-of.html

the people. It is framed by a representative body duly elected by the people at a particular period in history. It is a formal document defining the nature of the constitutional settlement, the rules that govern the political system and the rights of citizens and governments in a codified form. It is set out in a document which may possibly be amended.

**Unwritten Constitution**

An unwritten constitution is one in which most of the principles of the government have never been enacted in the form of laws. It consists of customs, conventions, traditions, and some written laws bearing different dates. It is unsystematic, indefinite and un-precise. It is generally the result of historical development. The British Constitution is unwritten in nature but it does not imply that all of its parts are unwritten. It means that it has not been reduced to writing in a single document. Some of the components are found in written form.

**Flexible Constitution**

A flexible constitution is defined as one which may be amended by the ordinary process of legislation and is therefore relatively easy to amend. In this sense, British Constitution is a flexible Constitution as parliament can amend it like alterations in the statutory laws by a simple majority.

**Characteristics**

- It is not in any way superior to any other law of the country.
- There cannot be any distinction between fundamental law and ordinary law.
- Parliament can amend any constitutional law by ordinary law making procedure and hence constitutional law exists on the same footing with other laws of an ordinary nature.

**Rigid Constitution**

This type of Constitution cannot be easily amended (usually, a Written Constitution). Moreover, a procedure separate from that of enacting ordinary law is provided for its amendment or revision. That is to say, if the constitution itself provides that particular amendment procedure, then it could be possible to amend the Constitution. In this way, the constitution is safeguarded against rash alteration.

**Characteristics**

- The constitution is considered as the supreme or fundamental law of the land i.e. on point of status it is placed above all other laws of the country;
- A Grundnorm (Hans Kelsey's "Grundnorm*"* theory);

- Mother Law;
- The governing wheel of the state;
- No law is above the constitution and all ordinary laws get their validity and force from the constitution i.e. no law can be inconsistent with the constitutional law;
- No other law or government action can supersede the provisions of the Constitution;
- Constitutional law is considered the corner stone or touch-stone or yard-stick to test the validity of all other laws, be it public or private, substantive or procedural.
- Parliament cannot amend any constitutional law by ordinary law making procedure.

### *Classification of the Constitution based on the nature and form of the state and its governance*[8]

#### Federal constitution

Under a federal constitution, there exists a division of powers between central government and the individual states or provinces which make up the federation. The powers divided between the federal government and states or provinces will be clearly set down in the constituent document. Some powers will be reserved exclusively to the federal government (most notably, such matters as defense and state security); some powers will be allocated exclusively to the regional government (such as planning and the raising of local taxation); and others will be held on the basis of partnership, powers being given to each level of government with overriding power, perhaps, reserved for central government. The common feature of all federal states is the sharing of power between centre and region – each having an area of exclusive power, other powers being shared on some defined basis. E.g. the USA, Canada, Australia, Nigeria, Malaysia, Germany, Switzerland and etc.

#### Unitary Constitution

Constitution of this nature exists in a state where a government is formed after a union of two or more sovereign states. A state is

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[8] For details, Barnett, H. (2002), Constitutional and Administrative Law, 4th Ed. London, Cavendish Publishing Limited Law (Chapter 1).*See also,* Phillips, O. H., (1787) O. Hood Phillips' Constitutional and Administrative Law. 7th Ed., Sweet & Maxwell Ltd, Retrieved http://jabashadrack.blogspot.com/2012/11/meanings-and-classification-of.html

governed as a one single unit in which the central government is supreme and any administrative division exercises only powers which their government chooses to delegate, e.g. Tanzania (Zanzibar and Mainland Tanzania), U.K (Scotland, Wales, N. Ireland and England) and etc.

**Republican Constitution**

A republic constitution exists in a state which has its figurehead a (usually) democratically elected President, answerable to the electorate and to the constitution. Presidential office is both a symbol of statehood and the repository of many powers. E.g. Tanzania, Kenya, Malawi Constitutions.

**Presidential Constitution**

Under this model, the head of the executive branch is also head of state, and is not a member of or directly responsible to the legislature, e.g. Kenya, Uganda, and etc.

**Parliamentary Constitution (Westminster model):**

It is a form of a Constitution of a state in which the chief executive is a Prime Minister who is a member of and is responsible to the legislature, e.g. U.K.

**Aristocratic (monarchical) Constitution**

Such constitution exists where the government is headed by a monarch and hereditary in nature. Usually, the office of head of state is held until death or abdication and is often hereditary and includes a royal house (King or Queen), e.g. U.K. [the Queen or King is the head of the state (not necessary the government, i.e. he/she plays a ceremonial role in the administration of the government)].

**Democratic state constitution**

It is a Constitution which allows all adult citizens an equal say (whether directly or indirectly) in the decisions that affect their lives or state governance, e.g. US, UK, Bangladesh, and etc.

**Dictatorial (undemocratic/autocratic) constitution**

It is a type of a Constitution which vests state power in one person or group of persons or organs, with the exclusion of others, e.g. Constitution of Libya during Gaddafy regime.

**Nonparty (Socialistic) Constitution**

Under this type, a constitution of a state is characterized by single-party rule or dominant-party rule of a communist party and a professed

allegiance to a Leninist or Marxist-Leninist or communist ideology as the guiding principle of the state. E.g. China, former Soviet Union, Cuba and etc

**Multiparty (Liberal) Constitution:**

Here, the constitution does not restrict freedom of political association, e.g. Russia Constitution, Bangladesh, Kenya, and etc.

**Separated powers' Constitution**

Where Constitution vests powers in the principal institutions of the state – legislature, executive and judiciary (i.e. state powers are not concentrated in a single institution). This arrangement is most readily achievable under a written constitution. E.g. US Constitution

**Fused powers' Constitution**

These are kind of Constitutions found in totalitarian states or purely monarchical states. Under such a constitution, a single figure, or single body, possessed with the sole power proposes and enacts law to administer the state and both to apply and to adjudicate upon the law.[9]

**Historical Background of Bangladesh Constitution**

The inception of the present constitution of Bangladesh can be traced back as early as 1947. After being partitioned by the British Sovereign in 1947, the constituency of Pakistan faced ongoing dilemma to constitute a favorable constitution for both of its parts. Ayub Khan during his tenure set up a Constitution Commission to make recommendations for the future constitution and the constitution framed by him came into operation on 7 June 1962. This constitution introduced a system which was euphemistically called a presidential form of government where the normal checks and balances to prevent one-man rule were not incorporated in the constitution.[10]

Two elections were held under the constitution of 1962 which clearly demonstrated that the people could not get persons of their choice elected as their representatives. In 1965 Ayub khan got himself re-elected as the President. The general impression in the country was that the election was rigged. In 1966, Bangabandhu Sheikh Mujibur Rahman started a movement in East Pakistan with his 6-Points programme which reflected the genuine grievances of the people of East Pakistan. Towards the end of 1968, an agitation in political parties gradually gathered momentum and was accompanied by wide-spread

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[9] For details, see, KC Wheare, Modern Constitutions, (1966, Chapter 1)

[10] Islam, Mahmudul, Constitutional Law of Bangladesh, 3rd Ed, Mullik Brothers, P-15

disturbances throughout the country. The Agartala Conspiracy case started against Bangabandhu Sheikh Mujibur Rahman and others aborted because of massive movement in East Pakistan.[11]

Ayub Khan called a round table conference of political leaders to resolve the political issues which led to the crisis. A solution was near sight, when all on a sudden Ayub Khan by relinquishing his office asked the Defence Forces on 24 March 1969 to step in as, according to him, it was beyond the capacity of the civil government to deal with the then prevailing situation.

Yahya Khan, the Commander-in-Chief, by a Proclamation issued on 26 March 1969, abrogated the constitution of 1962, dissolved the National and Provincial Assemblies and imposed Martial Law throughout the country. On 31 March 1969 he promulgated the Provisional Constitution Order which substantially followed the pattern of the Laws (Continuance in Force) Order, 1958.

On 30 March 1970 Yahya Khan promulgated the Legal Framework Order and under its provisions election was held in December, 1970 to the National and Provincial Assemblies on the basis of adult franchise.

Awami League won a stunning victory winning 160 out of 162 seats in East Pakistan. Awami League won a similar landslide victory in the Provincial Assembly elections also. It won 288 seats out of 300 and bagged 89% of total votes cast. The net result was, Awami League emerged as the single majority party in the Pakistan National Assembly with 167 seats out of a total of 313. On the other side, Zulfiqar Ali Bhutto's Pakistan People's Party won 88 seats (all from the western wing) and emerged as the second largest Parliamentary party[12].

After a good deal of political maneuvering, a session of the National Assembly was summoned by Yahya Khan on 3 March 1971 in Dhaka. But the Peoples Party led by Z.A. Bhutto refused to attend the session in Dhaka and Yahya Khan postponed the session indefinitely.

The Awami League led by Bangabandhu Sheikh Mujibur Rahman reacted sharply and in protest of the action taken by Yahya Khan virtually took over the administration in East Pakistan. To meet the situation, Yahya Khan had talked with the important political leaders in Dhaka which subsequent events clearly indicated was a ruse. Yahya Khan started his military action with unprecedented brutality, gunning down hundreds of innocent people in Dhaka and other places in East Pakistan in the night of 25 March 1971 which was taken by the East

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[11] Ibid, p16

[12] For details, Understanding Constitutionalism: Bangladesh Perspective , Retrieved http://www.asaub.edu.bd/asaubreview/data/v8n1sl17.pdf

Pakistan as an act of betrayal. Thousands took up arms to fight against the Pakistani Armed Forces to liberate the country, Bangladesh[13].

The members of the National and Provincial Assemblies elected in the 1970 election from East Pakistan proclaimed independence on 17 April 1971 forming the Government on 10 April, 1971 with Bangabandhu Sheikh Mujibur Rahman, then in custody in Pakistan, as the President and Syed Nazrul Islam as the Acting President till the release of Bangabandhu. On 16 December 1971 the Pakistan Armed Forces surrendered and Bangladesh became an independent country.

## Interim Constitution in Bangladesh

Before making the present Constitution i.e. Constitution of 1972, there was one interim Constitution in Bangladesh. It was initially the Proclamation of Independence and later, the Proclamation of Independence along with the Provisional Constitution of Bangladesh Order, 1972.

### *The Proclamation of Independence (10th April, 1971)*

### The Proclamation of Independence

Mujibnagar, Bangladesh

Dated 10th day of April, 1971

Whereas free elections were held in Bangladesh from 7th December, 1970 to 17th January, 1971, to elect representatives for the purpose of framing a constitution,

AND

Whereas at these elections the people of Bangladesh elected 167 out of 169 representatives belonging to the Awaini League,

AND

Whereas General Yahya Khan summoned the elected representatives of the people to meet on the 3rd March, 1971, for the purpose of framing a Constitution,

AND

Whereas the Assembly so summoned was arbitrarily and illegally postponed for indefinite period,

AND

Whereas instead of fulfilling their promise and while still conferring with the representatives of the people of Bangladesh, Pakistan authorities declared an unjust and treacherous war,

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[13] Ibid

AND

Whereas in the facts and circumstances of such treacherous conduct Bangabandhu Sheikh Mujibur Rahrnan, the undisputed leader of the 75 million people of Bangladesh, in due fulfillment of the legitimate right of self-determination of the people of Bangladesh, duly made a declaration of independence at Dacca on March 26, 1971, and urged the people of Bangladesh to defend the honour and integrity of Bangladesh,

AND

Whereas in the conduct of a ruthless and savage war the Pakistani authorities committed and are still continuously committing numerous acts of genocide and unprecedented tortures, amongst others on the civilian and unarmed people of Bangladesh,

AND

Whereas the Pakistan Government by levying an unjust war and committing genocide and by other repressive measures made it impossible for the elected representatives of the people of Bangladesh to meet and frame a Constitution, and give to themselves a Government,

AND

Whereas the people of Bangladesh by their heroism, bravery and revolutionary fervour have established effective control over the territories of Bangladesh,

We the elected representatives of the people of Bangladesh, as honour bound by the mandate given to us by the people of Bangladesh whose will is supreme duly constituted ourselves into a Constituent Assembly, and having held mutual consultations, and in order to ensure for the people of Bangladesh equality, human dignity and social justice, declare and constitute Bangladesh to be sovereign Peoples' Republic and thereby confirm the declaration of independence already made by Bangabandhu Sheikh Mujibur Rahman, and do hereby affirm and resolve that till such time as a Constitution is framed, Bangabandhu Sheikh Mujibur Rahman shall be the President of the Republic and that Syed Na-zrul Islam shall be the Vice-President of the Re- public, and that the President shall be the Supreme Commander of all the Armed Forces of the Republic, shall exercise all the Executive and Legislative powers of the Republic including the power to grant pardon, shall have the power to appoint a Prime Minister and such other Ministers as he considers necessary, shall have the power to levy

taxes and expend monies, shall have the power to summon and adjourn the Constituent Assembly, and do all other things that may be necessary to give to the People of Bangladesh an orderly and just Government,

We the elected representatives of the People of Bangladesh do further resolve that in the event of there being no President or the President being unable to enter upon his office or being unable to exercise his powers due to any reason whatsoever, the Vice-President shall have and exercise all the powers, duties and responsibilities herein conferred on the President,

We further resolve that we undertake to observe and give effect to all duties and obligations that devolve upon us as a member of the family of nations and under the Charter of United Nations.

We further resolve that this proclamation of independence shall be deemed to have come into effect from 26th day of March, 1971.

We further resolve that in order to give effect to this instrument we appoint Prof. Yusuf Ali our duly Constituted potentiary and to give to the President and the Vice-President oaths of office.

**Main Features of the Proclamation of Independence**

1. The Proclamation of Independence was adopted with retrospective effect from the 26$^{th}$ March, 1971, albeit it was drafted on 10$^{th}$ April, 1971.
2. This Proclamation served as a Provisional Constitution providing for a Presidential system of Government.
3. This Proclamation recognized the Constituent Assembly for Bangladesh constituted by the elected representatives (MNAs and MPAs).
4. This Proclamation recognized the Independence of Bangladesh with effect from 26$^{th}$ March, 1971.
5. It was the source of all authorities in the Republic as it declared Bangladesh as the People's Republic of Bangladesh.
6. This Proclamation invested the President with all the Executive and Legislative powers of the Republic including the power to grant pardon.
7. Under this Proclamation, the government of Bangladesh was obliged to observe and give effect to all duties and obligations that devolved upon the government as a member of the family of nations and to abide by the Charter of the United Nations.

## The Proclamation of Independence along with the Provisional Constitution of Bangladesh Order, 1972

Our beloved Country, Bangladesh, got its full independence on 16th December, 1971. The then President of our country Bangabondhu Sheikh Mujibur Rahman was released from Pakistani jail on January, 1972 and returned to his homeland on 10th January, 1972. After return, he expressed his intention not to act the President but chose to be the Prime Minister of Bangladesh in line with a Westminister type of Parliamentary system. Accordingly Bangabondhu as the President of Bangladesh issued The Provisional Constitution of Bangladesh Order, 1972 on the 11th January, 1972.

## Main Features of the Provisional Constitution of Bangladesh Order, 1972

1. By virtue of this Order, the entire character of the Government was changed. The Presidential form of government was substituted by a form aiming at a Westminister type Parliamentary system.
2. This Order made the Prime Minister as head of the government and the President was assigned to exercise all his functions in accordance with the advice of the Prime Minister.
3. According to this Order, there shall be a Constituent Assembly comprising of the elected representatives of the people of Bangladesh returned to the National Assembly and Provincial Assembly seats in the elections held in December 1970, January 1971, and March 1971, who are not otherwise disqualified by or under any law.
4. According to this Order, there shall be a Cabinet of Ministers, with the Prime Minister as the head.
5. This Provisional Order provided for the first time a High Court of Bangladesh consisting of a Chief Justice and so many other Judges as may be appointed from time to time.
6. Under this Order, the President was required to appoint as Prime Minister a Member of the Constituent Assembly who enjoys the confidence of the majority members of the Constituent Assembly.

## Making of the Constitution of Bangladesh

On March 22, 1972 the Constituent Assembly of Bangladesh Order as envisaged in the Provisional Constitution of Bangladesh Order, 1972 was promulgated. This Constituent Assembly of Bangladesh Order defined the Constituent Assembly and its functions in details. This Order stated that the Constituent Assembly of Bangladesh shall consist of the elected representatives of the people of Bangladesh returned to the National Assembly and Provincial Assembly seats in the elections

held in December 1970, January 1971, and March 1971, who are not otherwise disqualified by or under any law. And this Assembly shall frame a Constitution for the Republic. This Order also stated that a decision in the Assembly shall be taken by a majority of the members present and voting, but the decision relating to the making of the Constitution shall be taken by a majority of the total number of members of the Assembly. And the validity of any proceedings in the Constituent Assembly shall not be questioned in any Court[14].

## Members of the Assembly

The Constituent Assembly was constituted with representatives of the people elected to the Pakistan National Assembly from the East Pakistan and the East Pakistan legislative assembly through elections held in December 1970 and January 1971. The constituent assembly was constituted under the provision of the provincial constitution of Bangladesh order, 1972 consists of 469 Members. Among them 12 members were died in the meantime before the Constituent Assembly was formed, two members became the citizen of Pakistan, five were arrested under Collaborator's Order, 46 were declared disqualified under the Constituent Assembly (Disqualification of Membership) Order and one went to a foreign service. As a result 403 members remained and out of them 400 belonged to Awami League, , one (Surenjit Sen Gupta) belonged to the National Awami Party (NAP) and two [Manbendra Narayan Larma commonly known as Santu Larma was one of them] were Independents[15].

## The first session of the Constituent assembly

The first session of the Constituent assembly was held in the Parliament house, tejgaon, Dhaka on 10th april, 1972. Shah Abdul Hamid was elected as first Speaker of the constituent Assembly while Mr. Muhammadullah was elected as the Deputy Speaker. Due to demise of the Speaker, Mr. Muhammadullah was later elected as the Speaker and Mr. Md. Baitullah as the Deputy Speaker. In this session a Constitution Drafting Committee consisting of 34 members (including Syed Nazrul Islam, Tajuddin Ahmed and AHM Kamruzzaman) was formed under the Chairmanship of Dr Kamal Hossain (the then Law Minister). The only woman member of the Constitution Drafting Committee was Razia Banu, whereas the only opposition member was

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[14] See for details, Rokanuddin Mahmud, Bangladesh and its Constitution, Retrieved, ndc.gov.**bd**/lib_mgmt/webroot/1-**Bangladesh_and_its_constitution**_-_Final.doc

[15] For details, Brief history of Parliament (1937-2009), Retrieved http://bdaffairs.com/parliament-member-of-bangladesh/

Mr Surenjit Sen Gupta. The Drafting Committee had its first meeting on 17 April 1972. In that meeting a resolution was adopted inviting proposals and suggestions from all sections of the people. In response to this invitation, 98 memoranda were received. However the final report of the Drafting Committee did not mention at all whether any of those memoranda was accepted. The Drafting Committee had 74 meetings to draft the Constitution and on 10 June 1972 it approved the Draft Constitution. With a purpose of observing practical working of the parliamentary constitutional system, the Chair of the Committee Dr Kamal Hossain went to the UK and Indian. A foreign expert on drafting Constitution was reported to have brought to Dhaka and his assistance was taken in drafting the Constitution. In fact, the Constitution of Bangladesh was drafted in the light of [impliedly] British and [heavily relied on] Indian Constitution. On 11 October 1972 the last meeting of the Committee was held where the full Draft Constitution was finally approved[16].

**Second session of the Constituent assembly**

The Draft Constitution of 72 pages containing 103 Articles was presented to the Constituent Assembly on 12 October 1972, in its second session. On this day Dr Kamal Hossain introduced the Draft Constitution as a Bill. The Constituent Assembly did general discussion for seven days, from 19 October 1972 to 3 November 1972. At the first phase of general discussion Cabinet Members Syed Nazrul Islam, Tajuddin Ahmed, Khodker Mushtaq Ahmed, Monsur Ali, Professor Yousuf Ali, AHM Kamruzzaman, Abdul Malik Ukil, Mizanur Rahman Choudhury took part. The only opposition Member Surenjit Sen Gupta and independent Member Manbendra Narayan Larma also took part in the discussion. During this discussion 163 amendments were proposed. Among those, 84 amendments were adopted of which 83 were moved by Awami League Members and one was by Surenjit Sen Gupta. Interestingly most of the amendments were relating to linguistic and grammatical errors of the Bill. The Third Reading on the Bill was held on 4 November 1972 and on the same day the Assembly adopted the Constitution of Bangladesh. To commemorate this historic day, 4 November is observed as the 'Constitution Day.' It was given effect from 16 December 1972, on the first anniversary of the 'victory day' of Bangladesh[17].

**Salient Features of the Constitution of Bangladesh**

The original Constitution of Bangladesh was made in 1972 and it amended 16 times. It embodied some fundamental and basic features or characteristics. These features are as follows:

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[16] For details, Nazir Ahmed, Origin and history of the Constitution of Bangladesh, Retrieved http://www.parisvisionnews.com/articles/3600

[17] Ibid

### 1. Written Constitution

First prominent feature of the Bangladesh constitution is that unlike the British Constitution, it is written or documentary. It was formally adopted by a Constituent Assembly on 4th November 1972.

### 2. Rigid Constitution

Another feature of the Bangladesh Constitution is that it is rigid, which means that it cannot be amended by Parliament by the ordinary procedure. In reality, an amendment can be passed only by votes of not less than two thirds of the total number of members of parliament.

### 3. Preamble

The Constitution of Bangladesh has a preamble attached to it. It contains the basic philosophy of the Constitution. It lays down the most important national goals such as Democracy, Socialism, Nationalism and Secularism.

### 4. Supremacy of the Constitution

The constitution of Bangladesh is considered as the supreme or fundamental law of the land. Article (7) provides that, this constitution is as the solemn expression of the will of the people, the supreme law of the Republic, and if any other law is inconsistence with this Constitution that other law shell, to the extent of the inconsistency, be void.

### 5. Unitary Government System

Article 1 of the Constitution provides that “Bangladesh is a unitary, independent, sovereign Republic to be known as the People's Republic of Bangladesh”. Therefore, the Governmental system of Bangladesh is a unitary one and all power under this constitution has been centralized to a unitary government.

### 6. Unicameral Legislature

According to Article 65 of Bangladesh constitution, legislative assembly is unicameral. That means there is only one house parliament which is 'House of the nation' commonly known as 'Jatiya Sangshad'.

### 7. Fundamental Principles of State Policy

Part II, Articles 8 to 25 of the constitution provides the fundamental principles of state policy. The main principles are: - Nationalism, Socialism, Democracy and secularism. Government must ensure these principles on their governing policy.

### 8. Fundamental Rights

Fundamental rights are absolute rights for the citizens of a country. Part III and Articles 27 to 44 of the constitution provide 18 fundamental rights such as equality before law, equality of opportunity

in public employment, right to protection of law, protection of right to life and personal liberty, freedom of movement, freedom of thought etc. Fundamental rights are protected by the constitutional guarantee. If executive violates these rights the aggrieved can go to the Supreme Court for remedy under Articles 44 and 102 of this constitution.

**9. Parliamentary Form of government**

Bangladeshi Parliament is a Westminster type of parliament. Here, the government is run by the cabinet and leaded by the prime minister.

**10. Ombudsman**

Part V, Article 77 of the constitution provides for an ombudsman system to overview the activities of civil bureaucracy, to eradicate corruption in the administration and to ensure the responsibility of the government. But till now this office has not yet been implemented in Bangladesh.

**11. Responsible Government**

The Constitution of Bangladesh provided for the Westminster type of parliamentary form of government but it could not be ensured. There is no provision to ensure the individual responsibility of ministers in the Constitution of Bangladesh. Though Article 55(3) specifically states that the Cabinet shall be collectively responsible to Parliament, this responsibility cannot be ensured in practice due to the barricade created by Article 70 of the Constitution which is considered as a restriction on MPs' freedom of expression.

**12. Establishment of Local Government Institutions**

The existence of local Government in Bangladesh Constitution is another comprehensive feature of the Constitution. Local Government institutions are symbols of the civil liberties and freedom of the people.

In summary, it can be said that Bangladesh Constitution:

a. Is largely written in character;

b. Is rigid in nature;

c. Is supreme;

d. Is unitary in structure,

e. Exhibits mainly but not completely separated powers; and

f. Provides a Westminster type of parliamentary system.

Chapter Two

# Supremacy of the Constitution

Supremacy literally means the state or condition of being superior to all others in authority, power, or status. Generally, we can find two types of supremacy in the constitutional systems in this modern world. One is constitutional supremacy otherwise called ‘judicial supremacy’ and the other is parliamentary supremacy.

## Parliamentary Supremacy

Parliamentary Supremacy by definition means Parliament is the supreme legal authority, which can create or end any law. The courts cannot overrule its legislation and no Parliament can pass laws that future Parliaments cannot change. There is no legal authority who can declare the law passed by parliament unconstitutional or illegal. In this system, the Parliament is supreme over the Constitution and no other governmental institution has the power to nullify its laws. There are no legal limits on the power of Parliament to make law; Parliament has unlimited legislative competence. There is nothing a citizen can do against a law that is believed to have violated his rights other than push for political change. Parliamentary Supremacy is also known as legislative Supremacy. It is the most important part of the UK constitution. Some essential features of parliamentary supremacy are given below:

1. Parliament can create or end any law, and is supreme over all other government institutions, including executive or judicial bodies.
2. There is no person or body having a right to override or set aside the legislation of Parliament.
3. Empirically there is no distinction between ordinary law and constitutional law.

## Constitutional Supremacy

Constitutional Supremacy by definition means the constitution is the highest authority in a legal system. All persons and authorities, including parliament, are subject to the provisions of the constitution. Parliament is not omnipotent. Its powers are constrained by the Constitution. In this system the powers and functions of government and legislature are limited in nature. Constitution is the fundamental law of the state which defines and limits the power of the legislature,

executive and judiciary along with the relations among them and with the citizens of the country thus sets the basis of the government. If a citizen believes that a certain law violates a certain provision in the Constitution; he can file an action in a court of law. Courts have the power of judicial review on the constitutionality of legislation. If the court finds that the law does indeed violate the Constitution, it can strike the law down. Constitutional supremacy is viewed as a check on governmental power. No matter who is elected, the constitution's principles must be enforced. Constitutions can be amended, but the requirements for amending constitutions tend make doing so rigid. A procedure separate from that of enacting ordinary law is provided for its amendment or revision. That is to say, if the constitution itself provides that particular amendment procedure, then it could be possible to amend the Constitution. In this way, the constitution is safeguarded against rash alteration.

Constitutional Supremacy is also termed as judicial supremacy in the sense that the Judiciary i.e. the highest court of the state may strike down laws they believe are unconstitutional, and the executive and legislative branches must follow the courts' judgments. The judiciary is invested with the power to assess and examine the validity and constitutionality of any legislation made by the parliament and can declare any law void on the ground of inconsistency with any provision of the Constitution. Some intrinsic features of Constitutional supremacy are following:

1. The procedure to amend the Constitution is rigid so that the parliament cannot amend the Constitution frequently.
2. The Constitution is written. It is a formal document defining the nature of the constitutional settlement, the rules that govern the political system and the rights of citizens and governments in a codified form. There has a distinction between constitutional law and ordinary law. Ordinary law must comply with the provisions of the Constitution.
3. Parliament is created by the constitution itself. It can exercise its function being only within the bounds of the constitution.
4. If any contradiction is found between constitutional law and ordinary law of the republic, the constitution shall get prevail and get priority.
5. Either expressly or impliedly, a declaration is made in the Constitution that this Constitution is the supreme and fundamental

law of the land and no other law can be inconsistent with its any provision.

6. The judiciary is the guardian of the Constitution, and is invested with the power to assess and examine the validity and constitutionality of any legislation made by the parliament and can declare any law void on the ground of inconsistency with any provision of the Constitution.

**Constitutional Supremacy and Judicial Review**

Thomas Jefferson said "The Constitution is a mere thing of wax in the hands of the Judiciary, which they may twist and shape into any form they please".

The power of courts of law to review the actions of the executive and legislative branches is called judicial review. Under this doctrine, the judiciary has the authority to annul any law which violates the Constitution or repugnant with the constitution. In a government system with Constitutional Supremacy, the Constitution itself confers on the judiciary expressly or impliedly the judicial review power to protect and support the constitution as supreme or superior law. The judiciary is invested with the power to assess and examine the validity and constitutionality of any legislation made by the parliament and can declare any law void on the ground of inconsistency with any provision of the Constitution[1]. The judiciary maintains the constitutional supremacy by its power of judicial review. That is why the judiciary is treated as the guardian of the Constitution. This concept is of American invention. The Supreme Court of America invalidated an Act of Congress as unconstitutional for the first time in *Marbury v Madison*[2] case. It was held in this case that "*the particular phraseology of the constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitution, that a law repugnant to the constitution is void; and that courts, as well as other departments, are bound by that instruments*." It was also held in *Marbury V Madison* case that "*certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently, the theory of every such government must be that an act of the legislature, repugnant to the constitution is void*." Chief Justice Marshall said in this case "since the constitution is the supreme law of the land, where a rule of

[1] For details, Richard Albert, The Theory and Doctrine of Unconstitutional Constitutional Amendment in Canada, p1-5

[2] 1 Crunch 137;2L. Ed.60(1803)

statutory law conflicts with a rule of constitutional law, then the law of the constitution must prevail".[3]

A court with judicial review power may invalidate laws and decisions that are incompatible with any provision of the constitution. Under this idea, the actions of the executive and legislative branches of government are subject to review and possible invalidation by the judicial branch[4]. Judicial review allows, in most cases, the Supreme Court to exercise this power, and to take an active role in ensuring that the other branches of government abide by the constitution. But this is not the case in everywhere. In some other constitutions, the constitution grants such authority to bodies other than Judiciary. For example in France, the Supreme Court of France has no power of judicial review. The power to determine unconstitutionality has to be exercised by the constitutional council formed under Article 56 of France Constitution. In Germany, the Federal Constitutional court which is not an essential part of ordinary court is invested with the power of judicial review.

**Constitutional Supremacy and Judicial Review in Bangladesh**

The Constitution of Bangladesh is a written one. It specifically prescribes the manner how the power and functions of the organs of the government will be exercised. It is a rigid Constitution because it can be amended only by two-thirds majority (Art.142). The rigidity therefore imposes restriction on the power of the parliament on the one hand and ensures distinction between ordinary law and fundamental law on the other hand. It is the constitution and not the parliament which is supreme in Bangladesh. This is because,

- Firstly, it is stated in the preamble that "it is our sacred duty to safeguard, protect and defend its constitution and to maintain its supremacy as the embodiment of the will of the people of Bangladesh.
- Secondly Article 7 states "All powers in the republic belong to the people, and their exercise on behalf of the will of, this Constitution. The constitution s, as the solemn expression of the will of the people, the supreme law of the Republic, and if the people, the supreme law shall, to the extent of the inconsistency is void."

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[3] Ibid

[4] For details, Richard Albert, How unwritten constitutional norms change written Constitutions, p1-6

- Thirdly, Article 26 states that "All existing law inconsistent with the provisions of this part (i.e. fundamental rights) shall, to the extent of such inconsistency be void.
- Fourthly, Article 65 states that the legislative powers of the republic shall, subject to the provisions of this Constitution declares itself to be supreme over the parliament.
- Fifthly, Under Article 102 (1) the High Court Division of the Supreme Court can issue direction and orders for the enforcement of fundamental rights guaranteed under Part III of the Constitution. Article 102 (2) of the Constitution empowers the Supreme Court to assess and examine the validity of actions performed by any public bodies or authorities.

Thus the Constitutional Supremacy has been ensured in Bangladesh. This declaration of Constitution supremacy in the Constitution implicitly presupposes the existence of an independent authority to examine the constitutionality of actions taken by the legislative and the executive. To that end the constitution of Bangladesh has ensured in Articles 94 and 95 an independent organ i.e. the Supreme Court of Bangladesh. Under article 102 the Supreme Court empowered to scrutinize the government actions done on violation of fundamental rights. Again, under Articles 7 and 26 the Supreme Court exercises the power of judicial review i.e. to examine the constitutionality of any law passed by the parliament. A court with judicial review power may invalidate any amendment of the constitution that is incompatible either with any provision of the constitution or with any unwritten constitutional norm[5]. And a glaring example to this is the historic Eight Amendment case. In that case the Supreme Court held the Eight Amendment to the Constitution unconstitutional and invalid. And recently, in response to the Writ petition, the High Court has declared the Constitutional 16th amendment as illegal. The special bench of justices Moyeenul Islam Chowdhury, Quazi Reza-Ul Hoque and Md Ashraful Kamal gave the order by majority on 5th May, 2016. The High Court said the 'parliamentary mechanism' to remove judges is 'an accident of history'.The judges gave examples from other countries and said, "...we have no hesitation in holding that the Sixteenth Amendment is a colourable legislation and is violative of the principle of separation of powers among the three organs of the State, namely, the Executive, the Legislature and the Judiciary and the Independence of the Judiciary as

[5] See, Richard Albert, How unwritten constitutional norms change written Constitutions, p1-6

guaranteed by Articles 94 (4) and 147 (2), two basic structures of the Constitution and the same is also hit by Article 7B of the Constitution. So we find merit in the Rule. The Rule, therefore, succeeds. Accordingly, by majority view, the Rule is made absolute without any order as to costs. It is hereby declared that the Constitution (Sixteenth Amendment) Act, 2014 (Act No. 13 of 2014) (Annexure-'A' to the Writ Petition) is colourable, void and ultra vires the Constitution of the People's Republic of Bangladesh,"[6] they said. Justice Chowdhury and Justice Hoque agreed that the amendment was illegal. They said "Keeping Article 70 of Bangladesh constitution as it is, the members of parliament must toe the party line in case of removal of any judge of the Supreme Court. Consequently, the Judge will be left at the mercy of the party high command. As regards Article 70 of the constitution of Bangladesh, we must say that this article has fettered the members of parliament. It has imposed a tight rein on them. Members of parliament cannot go against their party line or position on any issue in the parliament. They have no freedom to question their party's stance in the parliament, even if it is incorrect. They cannot vote against their party's decision. They are, indeed, hostages in the hands of their party high command."[7]

Attorney General Mahbubey Alam said that they would move an appeal before the Appellate Division of the Supreme Court challenging the verdict.

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[6] See details, A. Sarkar and S. Liton, "Bangladesh High Court scraps 16th amendment to constitution", *The Daily Star*, May 06, 2016

[7] See details, Ibid

Chapter Three

# Preamble to the Constitution

The Constitution of Bangladesh has a preamble attached to it. Actually, no reading of any Constitution can be complete without reading Preamble from the beginning to the end. Professor K. C. Wheare said that the preamble to the Constitution is not only permissible but also desirable. Most Constitutions have a preamble[1].

**What is Preamble?**

Preamble is an introductory speech and it contains generally the objectives which the legislation is intended to achieve. Usually every statute starts with Preamble. Suba Rao, C.J said:[2] "The Preamble to an Act sets out the main objectives which the legislation is intended to achieve. It continues in a nutshell its ideals and aspirations". It was also observed:[3] "The preamble is a key to the statute and affords a clue to the scope of the statute where the words construed in them without the aid of the Preamble are capable of more than one meaning. There is, however, another rule or warning which cannot be too often repeated, that you must not create or imagine an ambiguity in order to bring in the aid of the preamble".

The Preamble to the Constitution is an introductory, succinct statement of the principles at work in the whole Constitution. Preambles of the written constitutions are intended primarily to reflect the hopes and aspirations of the people. Shahabuddin, J. commented rightly that

"Preamble of a constitution is something different from that of an ordinary statute. A constitution is not merely the outline of the governmental structure; it is the embodiment of the hopes and aspirations of the people cherished all the years and include the nation's high and lofty principles and people's life philosophy"[4]

It was held in Kesavananda Bharati's case that "The Preamble to a Constitution serves the following important purposes:

1. It indicates the source of constitution.

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1 Wheare K.C., Modern Constitution, p.71.

2 Golak nath Vs State of Punbjab, AIR 1967 (SC)

3 Quoted from the Constitution 8th Amendment Case, 1989 BLD(Sp1) 1 para 445.

4 Anwar Hossain Chowdhury V. Bangladesh, 1989 BLD (Spl) 1, at p. 147 para 354

2. It contains the enacting clause.
3. It declares the great rights and freedoms which the people intended to serve to all citizens.
4. It also declares the basic type of government and policy which was to be established."[5]

**Is preamble a part of the Constitution?**

In USA it was held by the Supreme Court in Jacobson V. Massachusetts that a preamble is not an operative part of the Constitution. It indicates only the general purposes for which the people ordained and established the Constitution[6]. Similarly, in India it was held in In re Berubari Union and Exchange of Enclaves that 'The preamble is not a part of the Constitution'. H.M. Seervai commented about it that 'it is obvious that the history of the preamble had not been brought to the attention of the court; otherwise it would not have said that the preamble was not a part of our Constitution'[7]. But subsequently, the Supreme Court of India changed its position and the preamble was held in Kesavananda's case[8] as a part of the Constitution and several judges also opined that the Berubari opinion was wrong on this point.

So, the modern view is that Preamble is a part of the Constitution. **Seervai** mentioned in his book of 4rth edition that 'It was stated in the first edition of this book that the statement that the preamble was not a part of the Constitution was not in accordance with modern authorities and was not correct'[9]

**Is preamble a part of the Constitution of Bangladesh?**

It is proved both by the Constitutional provision and the history of the passing of the Constitution in the Constituent Assembly that the preamble is the part of the Constitution of Bangladesh. On the 4th November 1972, the speaker of the Assembly just before passing the Constitution asked the House after passing necessary changes in the draft preamble to vote on the issue that the amended 'preamble' is to be made a part of the Constitution Bill and the House accepted it[10] .

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5 Kesavananda Bharati's case, AIR 1973 (SC) Shelat and Grover, JJ.
6 (1905) 197 US 11.
7 Seervai H.M. , Constitutional Law of India, 4rth ed. Universal Book Traders, Delhi,2002, vol. 1 p.278.
8 Kesavananda Bharati V. State of Kerala (1973) 4SCC 255.
9 Seervai H.M., Constitutional Law of India, 4rth ed. Universal Book Traders, Delhi,2002, vol. 1 p.25.
10 See Bangladesh Gono Parishader Bitarka, Sarkari Biboroni, vol.2, 1972, at p.690.

Even, the last proposal in the Constituent Assembly after passing the Constitution Bill was in fact a clarification of the Constitution Bill, that contained different parts of the Constitution , which was to include the preamble of the Bill, short title, contents, schedule, all Articles, clauses, sections and subjects as parts of the Constitution Bill and the proposal was passed unanimously.

Again Article 7B[11] has recognized preamble as one of the basic part of the Constitution which is not amendable. Article 7B says that "Notwithstanding anything contained in article 142 of the Constitution, the preamble, all articles of Part I, all articles of part II, subject to the provisions of part IXA all articles of part III, and the provisions of articles relating to the basic structures of the Constitution including article 150 of Part XI shall not be amendable by way of insertion, modification, substitution, repeal or by any other means"[12].

Thus it has been explicitly recognized by the Constitution itself that the preamble to it is obviously a part of this Constitution. Justice Rahman said in Anwar Hossain Chowdhury V. Bangladesh[13]"The preamble is not only a part of the Constitution; it now stands as an entrenched provision that cannot be amended by the Parliament alone. It has not been spun out of gossamer matters nor it is a little star twinkling in the sky above. If any provision can be called the pole star of the Constitution then it is the preamble".So, according to Justice Rahman the preamble is not only a part of the Constitution of Bangladesh rather it is the 'Pole Star' of the Constitution.

It is evident from the previous discussion that in the context of the Constitution of Bangladesh, Preamble is considered as a part of the Constitution and no contrary opinion is found against it.

**Significance of The preamble**

Actually the spirit of the Constitution of Bangladesh is embodied in its preamble.

**It embodies the glorious pride of this nation which achieved its independence by its blood**

The first paragraph of the preamble says that "We, the people of Bangladesh, having proclaimed our independence on the 26th day of

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[11] Article 7B was inserted by the Constitution (Fifteenth Amendment) Act, 2011 (Act XIV of 2011).

[12] Article 7B, The Constitution of The People's Republic of Bangladesh.

[13] 1989 BLD (Spl) 1, p.59 para 48.

March, 1971 and through a historic struggle for national liberation, established the independent, sovereign People's Republic of Bangladesh;"

So, the first paragraph precisely describes the history of creation of this state which mentions that Bangladesh has been created through a historic struggle. Thus it embodies the glorious pride of this nation which achieved its independence by its blood. It also indicates the source of the Constitution, viz. the people of Bangladesh from which the constitution comes.

**It contains fundamental principles of the Constitution**

The second paragraph of the preamble says that "The high ideals of nationalism, socialism, democracy and secularism, which inspired our heroic people to dedicate themselves to, and our brave martyrs to sacrifice their lives in, the national liberation struggle, shall be the fundamental principles of the Constitution;"

So, the preamble of the Constitution of Bangladesh contains fundamental principles of the Constitution and the basic objectives of the state. M.H. Rahman, J., has focused this particular aspect of the preamble[14] in the following words:

"After referring to the Proclamation of Independence on 26th March of 1971, the war of national independence and the principles of nationalism, democracy and socialism for which our brave martyrs sacrificed their lives the makers of the constitution in the name of "We, the people" declared the fundamental principles of the Constitution and the fundamental aims of the state.

It gives the idea of establishment of a state where the seed of democracy is ripened. The Third paragraph of the preamble says tha "It shall be a fundamental aim of the State to realize through the democratic process a socialist society, free from exploitation a society in which the rule of law, fundamental human rights and freedom, equality and justice, political, economic and social, will be secured for all citizens;"

This paragraph gives the idea of establishment of a state where the seed of democracy is ripen and it also declares the fundamental human rights and freedom, equality and justice which the people of Bangladesh intended to secure to all citizens.

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[14] The Constitution 8th Amendment Case, 1989 BLD (Spl) 1 para 456.

**It imposes the duty upon the people of Bangladesh to maintain the supremacy of the Constitution**

The fourth paragraph of the preamble says that "It is our sacred duty to safeguard, protect and defend this Constitution and to maintain its supremacy as the embodiment of the will of the people of Bangladesh so that we may prosper in freedom and may make our full contribution towards international peace and co operation in keeping with the progressive aspirations of mankind;"

**This paragraph speaks of at least two things:**

1. It imposes the duty upon the people of Bangladesh to safeguard, protect and defend this Constitution and to maintain its supremacy as the embodiment of the will of the people of Bangladesh, and consequently
2. It will make the people able to make their full contribution towards international peace and co-operation in keeping with the progressive aspirations of mankind.

**It contains enacting clause of the constitution of Bangladesh which brings into force the Constitution**

The last paragraph of the preamble of the Constitution of Bangladesh says that "In our Constituent Assembly, this eighteenth day of Kartick, 1379 B.S., corresponding to the fourth day of November, 1972 A.D. do hereby adopt, enact and give to ourselves this Constitution."

This paragraph of the preamble appears to be the enacting clause of the constitution of Bangladesh which brings into force the Constitution.

Basically, the significance of the Preamble lies in its components. It embodies the source of the Constitution i.e., the people of Bangladesh. The terms sovereign, socialist, secular, democratic, republic in the Preamble suggests the nature of the state. The ideals of justice, freedom, equality, reflects the objectives of the Constitution. The independence of Bangladesh earned through struggle for independence is sought to be emphasized by the use of the word 'Sovereign' in the Preamble.

The term 'sovereign' implies that Bangladesh is internally supreme and externally free. State authority of Bangladesh is supreme over all men and all associations within Bangladesh's territorial boundary. This is Bangladesh's internal sovereignty. Externally Bangladesh is free from all external controls. Bangladesh's membership of the commonwealth or of the United Nations does not impose any external

limit on her sovereignty. The Commonwealth is a free association of sovereign Nations. It is no longer British Commonwealth. Bangladesh does not accept the British Queen as the head of state. Bangladesh joined the commonwealth by her "free will." As for the U.N. it is not a super state but club of free nations. Membership of the U.N. in no way limits the authority of sovereign states. On the other hand, this membership is a mark of sovereignty of state, for only sovereign states are admitted to the membership of the United Nations.

The ideal of justice implies a system where individuals can realize their full potentialities. Political and legal justice is a myth unless accompanied by social and economic justice. Social justice implies that all social discriminations like caste or untouchability must be ended. Economic justice implies that economic exploitations should be ended. However, social and economic justice still remains unrealized dreams.

The ideal of Freedom aims at ensuring these freedoms which make men really free. Freedom to be meaningful must mean freedom of thought, expression, belief, faith and worship.

The ideal of equality is aimed at removing discriminations between citizens. The word 'Secular' is inserted to reflect the secular nature of the society of Bangladesh. The word 'Republic' in the Preamble indicates that Bangladesh has an elected head. A system is republican where no office of the state is held on the basis of hereditary prescriptive rights. Every office of the state from the highest to the lowest is open to every citizen. Any citizen may occupy any office on the basis of merit. Thus, headship of the state is not hereditary as in England, nor is it based on military power as in dictatorial regimes. These values are further strengthened by the word 'Democratic' in the Preamble.

The use of these words in the Preamble shows, it embodies the basic philosophy and fundamental values on which the Constitution is based. It very well reflects the dreams and aspirations of the People of Bangladesh. In this connection the observation made by Justice Mustafa kamal in the famous case of **Dr Mohiuddin Farooque V. Bangladesh**[15] is worth mentioning here which focuses on the unique nature of the preamble of the Constitution of Bangladesh which is as follows:

"The preamble of our Constitution stands on a different footing from that of other Constitutions by the very fact of the essence of its

[15] 49 DLR (AD) 1, PARA 42

birth which is different from others. It is in our constitution a real and positive declaration of pledges, adopted, enacted and given to themselves by the people not by way of presentation from skilful draftsmen, but as reflecting the echoes of their historic war of independence".

Justice **Latifur Rahman**[16] observed that "The preamble of our constitution really contemplates a society where there will be unflinching respect for the Rule of Law and the welfare of the citizens."

**Preamble and interpretation of the Constitution**

**Khanna, J**., set out two utilities of the Preamble from the point of views of interpretation of the Constitution:-

1. Reference can be made to the Preamble for the purpose of construing when the words of any provision of the Constitution are ambiguous; and
2. The Preamble can also be used to shed light on and clarify obscurity in the language of a constitutional provision. When, however, the language of an article is plain and suffers from no ambiguity or obscurity, no gloss can be put on the words of the section or article by invoking the Preamble.[17]

The Legal significance of preamble is that it is used by court in interpretation of any Constitutional provision if any vagueness or ambiguity exists therein. In this connection the observation of Shelat and Grover,JJ. In Kesavanada case[18] which has been quoted by M.H. Rahaman,J. in the Constitution 8th Amendment case[19] is worth mentioning here which is as follows:

"From all these, if any provision in the Constitution had to be interpreted and if the expression used therein was ambiguous, the Preamble would certainly furnish valuable guidance in this matter".

Indian Chief **Justice Sikri** rightly observed that

"It seems to me that the Preamble of our Constitution is of extreme importance and the Constitution should be read and interpreted in the light of the grand and noble vision expressed in the Preamble"[20]

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[16] Ibid, para 79.
[17] Aparajita Baruah , Preamble of the Constitution of India , An insight and comparison with other constitution,Deep&Deep Publication pvt. Ltd., 2007.p27
[18] AIR 1973 SC 1461
[19] 1989 BLD (Spl) 1 para 454.
[20] Kesavananda Bharati V. State of Kerala (1973) 4SCC 255 : AIR 1973 SC 1461.

It was held in In re Berubari Union and Exchange of Enclaves[21] that "the preamble by itself is not a source of power and it can be used to discover the meaning of any ambiguous provision of the Constitution or may assist to determine a single meaning in case of more than one interpretation of any Constitutional provision".

But if any constitutional provision has a clear meaning then the court will not accept any wider meaning to the plain words of that Article using the preamble as a tool of interpretation[22]. Lord Halsbury rightly observed[23]:

"Two propositions are quite clear, one that a preamble may afford useful light as to what the statute intends to reach and another if an enactment is itself clear and unambiguous, no preamble can qualify or cut down the enactment".

Blackstone noted that whenever the statute is dubious the preamble is often called in to help the construction of the statute and in a case of conflict between the preamble and the body of the statute; the body of the statute prevails[24]

From the whole discussion, it is evident to us that

1. The preamble of our Constitution indicates the source from which the Constitution comes, viz. the people of Bangladesh.
2. It contains the basic philosophy of the Constitution.
3. It expresses the desire and aim of our Constitution.
4. It contains indication for establishing Republic Government in Bangladesh.
5. It declares the four basic principles of the Constitution: (a) Nationalism (b) Socialism (c) Democracy and (d) Secularism.
6. It declares the supremacy of the Constitution and it also says about the People's duty to safeguard, protect and secure the supremacy of this Constitution.
7. It has a legal significance and that is "it is used by court in interpretation of any provision of the Constitution if any vagueness or ambiguity exists therein".

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[21] AIR 1960 SC 845: (1960) 3 SCR 250.

[22] Kesavananda Bharati V. State of Kerala (1973) 4SCC 255 : AIR 1973 SC 1461.

[23] In Powell V. Kempton Park Race Course Co., (1899) AC 143 (153).

[24] William Blackstone, Commentaries on the laws of England 59-60 (1765) (1979)

So, at last we can sum up that the dream and spirit of Bangladesh has significantly been reflected in the 'preamble' of The Constitution of the People's Republic of Bangladesh. What is the source of our democratic spirit of our country along with establishing the principles of welfare (ideal) state, reason behind our sacrifices in liberation, source of power etc are set out in the preamble where states as such, "We the people of Bangladesh... a fundamental aim of the state is to realize through the democratic process a social society, free from exploitation –a society in which the rule of law, fundamental human rights and freedom, equality and justice, political, economic and social, will be secured for all citizens."

This brings us to the expressions 'socialism' and 'socialist society' used in the preamble. Apparently these expressions are vague, but the vagueness disappears when we pay attention to the fact that the farmers not only used these expressions but also stated the mode of achieving it by using the expression 'through democratic processes'[25]. Reading the proper perspective, there remains no doubt that the framers did not allude to the communist philosophy of State organization, but conceived of a democratically run welfare State to eliminate inequality of income and status and standards of life, and to provide a decent standard of living to the working masses of the country.[26] The preamble speaks of 'equality and justice, political, economic and social'. It pledges attainment of a substantial degree of economic, political, and social equality and expresses a constitutional concern for providing facilities and opportunities to the people to reach at least minimum standard of health, economic security and civilized living.[27]

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[25] For details, http://bdlaws24.blogspot.com/2014/04/constitutional-safeguard-of-right-to.html

[26] *D.S. Nakara v. India,* AIR 1983 SC 130, Para 33-34.

[27] *Consumer Education & Research Centre v. India*. AIR 1995 SC 922.

Chapter Four

# Fundamental Principles of State Policy

The Fundamental Principles, also known as Directive Principles, of State Policy constitute another important feature of the Constitution of Bangladesh. It is an idealistic and philosophical chapter in the Bangladesh Constitution, which contains various aims and aspirations to be fulfilled by the State in distant future. They provide the much-desired philosophy of the Constitution and give 'an Instrument of Instructions' to the Government to follow the specific policies. Underlying idea behind the Directive Principles is that whichever party may possess the rein of administration should implement these constitutional ideals[1]. Although they are not enforceable in the Courts, the Constitution solemnly proclaims them to be 'fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws'[2]. These principles are to serve as a sign post and guide the State in its entire works. L.M. Singhvi said that the Directive Principles are the life giving provisions of the constitution. They constitute the stuff off the constitution and its philosophy of social justice.

## Meaning of Fundamental Principles of State Policy

The Fundamental Principles are some affirmative instructions to the State authorities to secure to all citizens justice- social, economic and cultural; adequate means of livelihood for all citizen irrespective of men and women equally; equality of status and opportunity; just and humane conditions of work, a decent standard of living , full employment, leisure and social and cultural opportunities; to protect and improve environment and safeguard the forests and wild life of the country ; to protect, preserve and maintain places of national historical importance ; to separate the judiciary from the executive; to foster respect for international law and treaty obligation; to encourage settlement of international disputes by arbitration. These principles underline the philosophy of Democratic Socialism to secure the high ideals set forth in the Preamble of our Constitution. It is the duty of the State to follow these principles both in the matter of administration as well as in the making of laws because the basic aim of the

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[1] See, more, Directive principles of state policy of India Retrieved http://nplucknow.webs.com/documents/Directive_principles_of_state_policy_of_India.pdf

[2] Article 8, The Constitution of The People's Republic of Bangladesh

Fundamental Principles is to establish a welfare state where economic and social justice might flourish.

Significantly, these principles are not enforceable to the courts of law. But it is the duty of the State to follow them in the making of laws, in the interpretation of the Constitution and of the other laws of the country. These principles shall form the basis of the work of the State and of its citizens. They are incorporated in the Constitution to meet economic and social aspirations of the people of our country. The makers of our Constitution incorporated the Fundamental Principles as supplementary to the Fundamental Rights. The Fundamental Principles provide some economic principles to secure economic justice and security.

**Justiciable Vs. Non-Justiciable**

The most important point of difference between the fundamental rights and fundamental principles is that while the former are justiciable, the latter are not. The fundamental rights are mandatory and every state is under an obligation to enforce them: the fundamental principles are declaratory and the state is not under an obligation to enforce them.

Actually the rights and freedoms set forth in the Universal Declaration were expressed more specifically in two separate international covenants adopted in 1966: the ICCPR and the ICESCR. Basically ICCPR embodies civil and political rights and ICESCR consists of socio-economic rights. The ICCPR imposes an immediate and unqualified obligation[3] whereas in ICESCR the obligation has been made subject to available resources and realization of the rights contained therein has been made progressive[4].

Similarly, under Bangladesh Constitution, The fundamental rights embodies civil and political rights and on the other hand, the fundamental principles consists of Economic, social and cultural rights.

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[3] Article 2 of the ICCP clearly states that Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

[4] Article 2 of the ICESCR clearly says that Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

Many of the provisions of fundamental principles correspond to the provisions of the ICESCR. For instance, Article 15 of our Constitution provides that "It shall be a fundamental responsibility of the State to attain, through planned economic growth, a constant increase of productive forces and a steady improvement in the material and cultural standard of living of the people, with a view to securing to its citizens

a. the provision of the basic necessities of life, including food, clothing, shelter, education and medical care;
b. the right to work, that is the right to guaranteed employment at a reasonable wage having regard to the quantity and quality of work;
c. the right to reasonable rest, recreation and leisure; and
d. the right to social security, that is to say, to public assistance in cases of undeserved want arising from unemployment, illness or disablement, or suffered by widows or orphans or in old age, or in other such cases"

.This Article of our Constitution corresponds more or less to articles 7[5], 11[6] and 15[7] of the ICESCR.

The rights incorporated under Fundamental principles of state policy are rights of economic, social and cultural rights related to financial solvency. The country needs sufficient resources to enforce these

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[5] Article 7 of ICESCR clearly states that The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular: (a) Remuneration which provides all workers, as a minimum, with: (i) Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work; (ii) A decent living for themselves and their families in accordance with the provisions of the present Covenant; (b) Safe and healthy working conditions; (c) Equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence; (d ) Rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays.

[6] Article 11 of ICESCR clearly says that The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.

[7] Article 15 of ICESCR clearly says that The States Parties to the present Covenant recognize the right of everyone: (a) To take part in cultural life; (b) To enjoy the benefits of scientific progress and its applications;

rights. Since our country is not a solvent country so according to Article 8(2) Fundamental principles are not judicially enforceable[8]. If these would be enforceable, there would be violation of Constitution a lot of time and the Constitution would be frustrated. Shahabuddin CJ in Kudrat E-Elahi V. Bangladesh[9] explained the reason for not making fundamental principles as judicially enforceable. In his words "The reason for not making these principles judicially enforceable is obvious. They are in the nature of People's programme for socio-economic development of the country in peaceful manner, not overnight, but gradually. Implementation of these Programmes requires resources, technical know-how and many other things including mass education. Whether all these prerequisites for a peaceful socio-economic revolution exist is for the State to decide".

On the other hand, fundamental rights encompassing mainly civil and political rights (articles 26 to 47) are judicially enforceable. Citizens have the right to approach the High Court Division to redress any infringement of these rights[10]. Again the Constitution provides that laws inconsistent with the fundamental rights shall be void to the extent of such inconsistency[11]. There being no such provision regarding the fundamental principles in part II of our Constitution. No legal action can be brought against them in a court of law. But if any law of the state violates the fundamental rights, a legal action can be maintained. In other words, the fundamental rights are enforceable, while the fundamental principles are not or it may be said that the fundamental principles represent no more than General directions or instructions or recommendations to the legislative and executive authorities.

They are in the nature of moral precepts and economic maxims, unenforceable in content and having no legal force. They confer no legal rights and create no legal obligations.

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[8] Article 8(2) of our Constitution explicitly states that The principles set out in this Part shall be fundamental to the governance of Bangladesh, shall be applied by the State in the making of laws, shall be a guide to the interpretation of the Constitution and of the other laws of Bangladesh, and shall form the basis of the work of the State and of its citizens, but shall not be judicially enforceable.

[9] 44 DLR (AD) 319

[10] Article 44 (1) says that The right to move the High Court Division in accordance with clause (1) of article 102, for the enforcement of the rights conferred by this Part is guaranteed.

[11] Article 26 of our Constitution explicitly states that (1) all existing law inconsistent with the provisions of this Part shall, to the extent of such inconsistency, become void on the commencement of this Constitution. (2) The State shall not make any law inconsistent with any provisions of this Part, and any law so made shall, to the extent of such inconsistency, be void

**Feature of Fundamental Principles of State Policy**

The Fundamental Principles of State Policy incorporated under Chapter-II from Article 08 to Article 25 possesses the following features:

- Fundamental Principles of State Policy are some instructions to the State for achieving socio-economic development.
- Fundamental Principles of State Policy are not enforceable in the courts and no one can go to the court for its proper implementation.
- Fundamental Principles of State Policy are positive in nature. These principles increase power and functions of the State.
- Fundamental Principles of State Policy aims at establishment of a welfare state by securing social and economic justice. These principles are based on socialist thinking.
- These principles are indispensable for socio-economic development of our country .Because welfare and justice is the twin objectives of our Constitution.
- These principles have great moral value also. It constitutes the conscience of our Constitution. No responsible govt. can dare to go against these principles.
- Fundamental Principles of State Policy constitute the mirror of public opinion .These principles always reflect the will of the people .These are embodied in the Constitution to meet the aspirations of the people.

These are fundamental in the governance of the country. The State should follow these principles for the progress of the country.

**Significance of fundamental Principles**

Article 8 declares fundamental Principles as fundamental in the Governance of the Country. The fundamental Principles of State Policy (FPSPs) since they lack the legal sanction were described as moral precepts lacking teeth.

They were not given legal sanction not because they are less important than other parts of the constitution but because their implementation needs resource and time at the disposal of the State.

Further they may be lacking legal sanction but they enjoy political sanction. Government shall be answerable to the people in next election if they do not implement Directive Principles by incorporating

them in its policy. They may not be enforceable in court of law but they are enforceable in the court of people.

**Their significance can be summarized as follows:**

a. Since the Government is answerable to the people, the fundamental Principles act as a sign post to all succeeding Governments.

b. The fundamental Principles provide the yardstick for assessing the successes or failures of the Government.

c. Help in deciding constitutional validity of some of the enactments made by legislature.

As Dr. B. R. Ambedkar pointed out that the fundamental Principles do not merely represent temporary will of a majority in the constituent assembly but they represent deliberate wisdom of country expressed through constituent assembly.

**Following are some of the fundamental principles of the state policy that are included in our Constitution**

**A. Fundamental Principles related to the establishment of a welfare state (Economic Equality):**

1. The State shall provide adequate means of livelihood, both to men and women; (Article 15(b))
2. Distribution of the ownership of material resources should be done in such a way that it is not concentrated in the hands of only a few people but used in such a way that is in the best interests of the masses; (Article 15(b))
3. The state shall ensure equal pay for equal work for both men and women; (Article 15(b))
4. It shall secure suitable employment, which shall not undermine the health of men, women and children; (Articles 15, 18 & 20)
5. Moral and material exploitation of women and children should be stopped; (Article 18)
6. The state shall improve the working conditions and secure for all workers reasonable wages to help them lead decent lives; (Article 15 b,c,d) and
7. It should do its best to raise the standard of living and to improve public health. (Articles 15& 18)

**B. Fundamental Principles related to social and educational upliftment:**

1. The State makes arrangements to provide free and compulsory education to children; (Article 17)

2. The State shall put an end to the exploitation of the peasants and workers and the socially and economically backward classes; (Article 14)
3. The State shall consider its primary duty to stop the use of intoxicating drinks; (Article 18 (1))) and
4. The State shall, as far as possible, devise a uniform code of conduct for all sections of the society. (Articles 19 & 10)

**C. Fundamental Principles pertaining to administrative matters:**

1. The State shall take steps to separate the judiciary from the executive. (Article 22)
2. The State shall take steps to remove the disparity in the standards of living between the urban and the rural areas; (Article 16) and
3. The State shall protect historical monuments from destruction and disfigurement. (Articles 23A, 24 & 23)

**D. Fundamental Principles for international Peace:**

1. Secure international peace and security; (Article 25)
2. Maintain good relations between nations;
3. Respect international laws and treaties; and
4. Solve disputes through peaceful means.

Thus, we see that the directive principles of the state policy are important for the establishment of a welfare state. Although they are not binding on any government, they have a moral value. With the help of these principles, the government can bring about more improvements in the condition of the people.

**Provisions of Fundamental Principles of State Policy**

Fundamental Principles of State Policy enshrined in Articles 8 to 25 of Part II of The Constitution of the People's Republic of Bangladesh. These cover a wide range of State activity embracing economic, social, legal, educational and international problems.

According to Article 8 the principles of nationalism, democracy, secularism and socialism meaning economic and social justice, together with the principles derived from them, shall constitute the fundamental principles of state policy. This Article also says that the principles set out in Part II shall be fundamental to the governance of Bangladesh, shall be applied by the state in the making of laws, shall be a guide to the interpretation of the Constitution and of the other laws of Bangladesh, and shall form the basis of work of the state and of its citizens, but shall not be judicially enforceable.

Article 9 of the Constitution speaks of the basis of Bangalee nationalism, it states the unity and solidarity of the Bangalee nation,

which, deriving its identity from its language and culture, attained sovereign and independent Bangladesh through a united and determined struggle in the war of independence, shall be the basis of Bangalee nationalism.

Article 10 proclaims that a socialist economic system shall be established with a view to ensuring the attainment of a just and egalitarian society, free from the exploitation of man by man.

Article 11, amended by the Constitution (Fourth Amendment) Act, 1975 and the Constitution (Twelfth Amendment) Act, 1991, says that the country shall be a democracy in which fundamental human rights and freedom, and respect for the dignity and worth of the human person shall be guaranteed, and in which effective participation by the people through their elected representatives in administration at all levels shall be ensured.

Article 12 speaks of secularism and freedom of religion and asserts that the principle of secularism shall be realized by the elimination of communalism in all its forms.

Article 13 says that the people shall own or control instruments and means of production and distribution through state ownership, cooperative ownership and private ownership.

Article 14 enjoins upon the state to emancipate the toiling masses of peasants and workers and the backward sections of the people from all forms of exploitation.

Article 15 makes it a fundamental responsibility of the state to secure for its citizens the provision of the basic necessities of life, the right to work, the right to reasonable rest, recreation and leisure, and the right to social security.

Article 16 says that the state shall take effective measures to ensure balanced development of the rural areas so as to remove the disparity in the standards of living between the urban and the rural people.

Article 17 asks the state to take effective measures to provide free and compulsory education to all children, and remove illiteracy as fast as possible.

Article 18 asks the state to take effective measures to improve the level of nutrition and public health, and to prevent alcoholism, addiction to drugs, prostitution and gambling.

Article 18A proclaims that The State shall endeavor to protect and improve the environment and to preserve and safeguard the natural resources, bio-diversity, wetlands, forests and wild life for the present and future citizens.

Article 19 asks the state to take effective measures to ensure equality of opportunity for all citizens, and uniform level of economic development throughout the country.

Article 20 says that work is a right, a duty and a matter of honor for every capable citizen, and everyone shall be paid according to his work, and that the state shall endeavor to create conditions in which human labor, whether intellectual or physical, shall become a fuller expression of creativity and of the human personality.

Article 21 says that it is the duty of every citizen to observe the Constitution and the laws to maintain discipline, to perform public duties and to protect public property, and that every public servant has a duty to strive at all times to serve the people.

Article 22 asks the state to ensure the separation of the judiciary from the executive organs of the state.

Article 23 asks the state to adopt measures to conserve the cultural traditions and heritage of the people and to foster and improve the national language, literature and the arts.

Article 23A asks the state to protect and develop the unique local culture and tradition of the tribes, minor races, ethnic sects and communities.

Article 24 enjoins upon the state to take measures to protect monuments of national importance.

Article 25 directs the state to base its international relations on the principles of respect for national sovereignty and equality, non-interference in the internal affairs of other countries, peaceful settlement of international disputes, and respect for international law and the principles enunciated in the UN charter.

## Fundamental Principles V. Fundamental Rights: Determining the Superiority

### Earlier view

The earlier view was that in case of conflict between fundamental rights and fundamental principles of state policy, fundamental rights shall prevail. It was held in Madras V. Champakam Dorairajan[12]

[12] AIR, 1951 SC 226

"fundamental rights have the primacy over fundamental principles. So, in case of conflict between these two, fundamental rights shall prevail". It was also held in MH Quareshi V. State of Bihar[13] that fundamental principles have to conform to and run subsidiary to fundamental rights.

**Modern view**

The modern view is that fundamental rights and fundamental principles of state policy are supplementary and complementary to each other. It was held in Unni Krisnan V. A.P.[14] Fundamental rights are but means to achieve the goals indicated in the principles of State policy. Fundamental rights and principles of state policy are supplementary to each other and fundamental rights must be construed in the light of the principles of State policy. In another case, the court held that what is fundamental in the governance of the country cannot be less significant than what is significant in the life individual and so fundamental rights and principles of state policy are supplementary to each other[15] .

In the context of Bangladesh Constitution, Fundamental Rights are enforceable in the courts. Individual can move to the court seeking legal assistance if Fundamental Rights are usurped by force. On the other hand Fundamental Principles of State Policy are not enforceable and no one can go to the courts to compel the State for their proper implementation. So, primarily it seems that fundamental rights have the primacy over fundamental principles. But Article 47(1) significantly states that "No law shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges, any of the fundamental rights, if Parliament in such law (including, in the case of existing law, by amendment) expressly declares that such provision is made to give effect to any of the fundamental principles of state policy set out in Part II of this Constitution".

Justice Naimuddin Ahmed observed[16] that though the fundamental principles are not enforceable by any court, the principles therein laid down are nevertheless fundamental in the Governance of the country and it shall be the duty of the State to apply these principles in making laws. It is a protected Article in our Constitution and the legislature cannot amend this Article without referendum. This alone shows that fundamental principles cannot be flouted by the executive. The

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[13] AIR 1958 SC 731
[14] AIR 1993 SC 2178, para 141
[15] Kesavananda Bharati V. State of Kerala, AIR 1973 SC 1461
[16] Kudrat E-Elahi V. Bangladesh, 44 DLR (AD) 319, para 66.

endeavor of the government must be to realize these aims and not to whittle them down".

The court also held that one fundamental right of person may have to co-exist in harmony with the exercise of another fundamental right by others and also with reasonable and valid exercise of power by the state in the light of Fundamental Principles in the interest of social welfare as a whole. The court's duty is to strike a balance between competing claims of different interests[17].

So, it will not be wise to consider fundamental Rights as superior to fundamental principles, because, the Constitution has maintained a balanced between these two. The court held that it did not see any conflict on the whole between fundamental rights and fundamental principles of State policy. One should adopt the principle of harmonious construction and attempt to give effect to both as much as possible[18].

Thus it is evident that fundamental rights and fundamental principles of state policy are supplementary and complementary to each other and fundamental rights must be construed in the light of the principles of State policy.

## Constitutional Significance of Fundamental Principles

The Fundamental Principles have great constitutional significance. They have been declared to be fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws (Art-8). Though these principles are not enforceable in the courts, yet no government would dare to ignore them. Every government should take steps for implementing Directive Principles of State Policy as far as possible or else it would be criticized on the ground of non-fulfillment of the directives. These principles represent the deliberate wisdom of the nation and will act as a constant reminder to the State for its implementation. Inclusion of Fundamental Principles in the constitution always gives a constitutional recognition of the responsibility of the State to promote the social and economic welfare of the people.

## Fundamental Principles as a guide to the interpretation

From Article 8(2)[19] it is evident that Fundamental Principles have special value as a guide to the interpretation of the Constitution and the

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[17] Ibid

[18] In Re Kerala Education Bill, AIR 1958 SC 995.

[19] Article 8(2) clearly says "The principles set out in this Part shall be fundamental to the governance of Bangladesh, shall be applied by the State in

laws of Bangladesh. The courts shall have to construe the provisions of the Constitution and other laws in conformity with these principles. It was held in **W.P.S.E. Board V. Hari Shankar**[20] that courts are not free to direct the making of legislation but courts are bound to evolve, affirm and adopt Principles of interpretation which will further and not hinder the goals set out in the Fundamental Principles of state policy.

In Bhim V. India[21] the court held that if any provision of the Constitution or any statute is susceptible of more than one meaning, the courts should adopt that meaning which is in conformity with the fundamental principles.

So, when a provision of the Constitution seems to be repugnant to the principles of state policy, an effort should be made to construe the provision in conformity with the principles of state policy. Because these principles of State policy having been treated as fundamental to the governance of Bangladesh, it has to be assumed that the other provisions of the Constitution have been made to facilitate and not to hinder, realization of the aims and objectives stated in Fundamental Principles of State policy under part II of Bangladesh Constitution[22]. Thus in the case of Kudrat-E-Elahi V. Bangladesh[23] in construing the provision of Article 59 the Appellate Division took note of the principles of popular representation as stated in Articles 9 and 11 and held that there was no scope for forming a local government body outside the ambit of Article 59 or composed of non-elected persons. Similarly, In Winifred V. Bangladesh[24] the High Court Division construed the meaning of 'public purpose' by reference to the principles of state policy and held the requisition of a property for a private school is void.

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the making of laws, shall be a guide to the interpretation of the Constitution and of the other laws of Bangladesh, and shall form the basis of the work of the State and of its citizens, but shall not be judicially enforceable".

[20] AIR 1979 SC 648.

[21] AIR 1981 SC 234

[22] Mahmudul Islam, Constitutional law of Bangladesh, 3rd edition,p.76

[23] 44 DLR (AD) 1992

[24] 1981 BLD 30

Chapter Five

# Fundamental Rights

The concept of human rights is deep-rooted in the history of mankind. Every man has certain natural and inalienable rights necessary for the development of his mental faculties and personality. Laski said "Rights in fact are those conditions of social life without which no man can seek in general to be himself at his best". The citizen of every country has rights upon the State and the State must therefore observe his rights by creating conditions which would develop his personality and enable him to be at his best so that he may also contribute whatever he can do for the social welfare.

## Human Rights

Human rights are those rights which a person has simply because he or she is a human being. Human rights are inalienable, indivisible and interdependent. Sridath Ramphal said about human rights ""They have their origin in the fact of the human condition, and because they have, they are fundamental and inalienable. More specifically, they were born not of man but with man"[1]. The Constitution of Liberia of 1847, opined with a Bill of Rights, the first Article whereof proclaimed that 'all men are born equally free and independent and have certain natural, inherent and inalienable rights'.

Human rights are inalienable in the sense that you cannot lose these rights any more than you can cease being a human being. Human rights are indivisible in the sense that you cannot be denied a right because it is 'less important' or 'non-essential'. Human rights are interdependent because all human rights are part of a complementary framework. The improvement of one right facilitates advancement of the others. Likewise, the deprivation of one right adversely affects the others. For example, your ability to participate in your government is directly affected by your right to express yourself, to get an education, and even to obtain the necessities of life[2].

Basically human rights are inherent in human being; these are not subject of any State recognition. They existed before the State came into being and these are rights to which everyone is entitled—no matter

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[1] Quoted by Hamid, Dr. kaji Akter , Human Rights, Self –determination and the Right to Resistence, (Dhaka: Bhuiyan Academy, 1994). P.25

[2] http://hrlibrary.umn.edu/edumat/hreduseries/hereandnow/Part-1/whatare.htm

who they are or where they live—simply because they are alive. It is pertinent to mention here The American Declaration of Independence of 1776 "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights that among these are Life, Liberty and the pursuit of Happiness.

That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed, That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to affect their Safety and Happiness*".*

Generally speaking proponents of human rights begin with abstract assumptions, which aspire to universal validity. Even when they renounce an absolute foundation, they nonetheless consider human rights to be an essential prerequisite of coexistence, irrespective of the way in which it subsequently orientates its goals[3]. Human rights are applicable to all human beings throughout the world irrespective of their sex, colour, race etc. The comment of Jaques Maritain is worth mentioning here, "The human person possesses rights because of the very fact that it is a person, a whole, a master of itself and its acts and which consequently is not merely a means to an end but an end which must be treated as such … … these are things which are owed to man because of the very fact that he is man"[4].

Human rights also include those basic standards without which people cannot live in dignity. To advocate human rights is to believe that the human dignity of all people be respected. In demanding these human rights, everyone also accepts the responsibility not to infringe on the rights of others and to support those whose rights are abused or denied.

So, human rights are those rights that humans have by the fact of being human. These include cultural, economic, social and political rights, such as right to life, food, work, liberty, education, shelter, health and equality before law, and right of association, belief, free speech, information, religion, movement, and nationality. Promulgation of these rights is not binding on any country, but they

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[3] For details, Gianluigi Palombella, From Human Rights to Fundamental Rights: Consequences of a conceptual distinction, EUI Working Paper LAW No. 2006/34

[4] Ibid, P.25

serve as a standard of concern for people and form the basis of many modern national constitutions.

## Fundamental Rights

Fundamental rights are those of the human rights which have been recognized by the Constitution or some other basic document as requiring a high degree of protection from government encroachment. Actually every man has certain natural and inalienable rights essential to the development of his personality which receive the highest level of Constitutional protection against government interference are called fundamental rights. Generally these rights are written down in the Constitution and are protected by constitutional guarantees. The Indian Supreme Court in Golak Nath V. State of Punjab held-"The declaration of the fundamental rights of the citizens is inalienable rights of the people. The Constitution enables an individual to oppose successfully the whole community and the state to claim his right"[5].

If Fundamental Rights are not guaranteed, the citizens have no chance of ascertaining their rights which would develop their personalities. Therefore, these rights are embodied in the Constitution or some other basic document as requiring a high degree of protection from government encroachment. According to Professor Gledhill "A fundamental right is a restriction on sovereignty for the benefit of the individual"[6]

In Jibendra Kishor V. The Province of East Pakistan[7] the Supreme Court of Pakistan held- "The very conception of a fundamental right is that it being a right guaranteed by the Constitution cannot be taken away by the law, and it is not only technically inartistic but a fraud on the citizens for the makers of a constitution to say that a right is fundamental but that is may be taken away by the law".

In the Virginia Declaration of Rights of 1776, considered the first document to become a part of the history of democratic constitutionalism as a model of the declaration of Fundamental Rights, there was a declaration to the effect that all men are created equal ; that they are endowed by their creator with certain rights ; that among these are rights to life, liberty, and the pursuit of happiness ; that, to secure their rights, Governments are instituted among men, deriving their just power from the consent of the governed. American Bill of Rights

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[5] AIR 1967 SC 1643

[6] Gledhill, Changing law in Developing Countries", p. 81

[7] PLD 1957 SC (PAK) 9.

consists of ten .amendments and these amendments are with regard to the Fundamental Rights. After this we have the French Declaration of the rights of man and of the Citizen in 1789.

In the nineteenth and twentieth century the recognition or incorporation of the fundamental rights in the Constitutions of States became a general practice. Sweden adopted it in 1809; Spain in 1812; Denmark in 1849; and Switzerland in 1874[8]. Germany after the revolution of 1848, the Fundamental Rights of citizens had been proclaimed. The first imperial Constitution of 1871, which lasted up to 1918, did not include articles concerning the Fundamental Rights.

Since World War 1, Fundamental Rights and duties have been accepted as an indispensable condition of the peaceful progress of the world and during the Second World War, this faith has become stronger. In January 1941 President Roosevelt appealed to Congress for support of Four Freedoms; Freedom of speech, freedom of religion, freedom from want and freedom from fear. In August 1941 the Atlantic Charter was signed, the major purpose was, in the words of Mr. Churchill to ensure that the war ended 'with the enthronement of human rights'.

After the Second World War, incorporation of the Fundamental Rights in most of the written Constitution has been more prominent. France, in the preamble to the Constitution of 1946, solemnly reaffirmed, 'the rights and freedom of man and of the citizen consecrated by the Declaration of Rights of 1789'. The Constitution of Japan of 1946 lay down that 'the people shall not be prevented from enjoying any of the fundamental rights'. The Italian Constitution of 1947 recognized and guaranteed 'the inviolable rights of man'.[9]

**Features of Fundamental Rights**

Necessary features of Fundamental Rights are as follows:

- Fundamental Rights are an indispensable part of our Constitution. Twenty-three articles are enjoined with this chapter.
- Fundamental Rights are only for Bangladeshi citizens. No alien is permitted to enjoy these rights except right to life, liberty and personal property.

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[8] Pirzada, Sharifuddin, Fundamental Rights and Constitutional Remedies in Pakistan. P.10

[9] For details, see more, Ibid, p.11

- Fundamental Rights are not absolute. Therefore within some reasonable restrictions citizens can enjoy them.
- Fundamental Rights remain suspended during the time of emergency and rights of the citizen are curtailed temporarily except right to life and personal liberty.
- Fundamental Rights are justifiable. A citizen can go to the court for enforcement of his Fundamental Rights if someone violates them. Under Article 44 and Article 102 of our Constitution, a citizen can approach the Supreme Court and High Court respectively in this regard.
- Some Fundamental Rights are positive while some others are negative in nature.
- Fundamental Rights aim at restoring collective interest along with individual interest.
- Fundamental Rights are superior to ordinary law of the land. They are conferred a special sanctity.
- Some Fundamental Rights are limited to citizens only, such as freedom of speech, assembly, but other rights like equality before the law, religious freedom etc are available to both citizens and aliens.
- Some provisions of Chapter-III of the Bangladesh Constitution are of the nature of prohibitions and place Constitutional limitations on the authority of the state. For instance, no authority of the state can deny to any person equality before the law or the equal protection of the laws.

**Distinction between Fundamental Rights and Human Rights**

Firstly, human rights are inherent in human being; these are not subject of any State recognition. But fundamental rights need state recognition and these are protected by Constitutional guarantees.

Secondly, all human rights are not fundamental rights but all fundamental rights are human rights. Fundamental rights are those of human rights which are written down in the Constitution and are enforceable in a court of law.

Thirdly, human rights are universal right which the entire mankind can enjoy freely irrespective of race, colour, sex, language, religion,

political or other opinion, national or social origin, property, birth or other status. But fundamental rights are country specified.

Fourthly, Fundamental rights have legal obligations and are enforceable in a court of law but all human rights do not have such legal obligations and are not enforceable in courts.

Fifthly, Human rights are more basic in nature than fundamental rights.

Sixthly, human rights are those rights that humans have by the fact of being human. But fundamental rights are those of human rights which are protected by the Constitution or by some other basic documents.

**Characteristics of Fundamental rights**

1. Out of 18 fundamental rights, there are six fundamental rights which are guaranteed to all persons- citizens and non citizens alike. These are
    1. Right to life and liberty (Article 32)
    2. Safeguards as to arrest and detention (Article 33)
    3. Prohibition of forced labour (Article 34)
    4. Protection in respect of trial and punishment (Article 35)
    5. Freedom of religion (Article 41)
    6. Enforcement of fundamental rights (Article 44)
2. Remaining 12 fundamental rights are guaranteed to citizens of Bangladesh only. These are from Article 27 to Article 31, Article 36 to Article 40, Articles 42 and 43; these twelve Articles are applicable exclusively for the citizens of Bangladesh.
3. There are certain fundamental rights out of which parliament can impose reasonable restrictions on any ground as it thinks fit. They are;
    1. Right to protection of law (Article 31)
    2. Right to life and liberty (Article 32)
    3. Freedom of profession or occupation (Article 40)
    4. Rights to property (Article 42)
4. There are certain fundamental rights upon which parliament can impose restriction only on the grounds specifically mentioned in those concerned Articles. They are:
    1. Freedom of movement (Article 36)

2. Freedom of Assembly (Article 37)
3. Freedom of Association (Article 38)
4. Freedom of speech and expression (Article 39(2) )
5. Freedom of religion (Article 41)

5. Despite the facts stated above, there are certain fundamental rights which are absolute and parliament cannot impose any restriction except as provided in the Constitution. They are:
   1. Equality before law (Article 27)
   2. Prohibition of forced labour (Article 34 )
   3. Protection in respect of trial and punishment (Article 35)
   4. Discrimination on grounds of religion, sex etc (Article 28)
   5. Equality of opportunity in public employment (Article 29)
   6. Prohibition of foreign titles, etc. (Article 30)
   7. Safeguards as to arrest and detention (Article 33)
   8. Enforcement of fundamental rights (Article 44)

**Types of Fundamental Rights**

There are five types of Fundamental Rights in our Constitution

I. Right to Equality (Articles 27 – Article 29)

II. Right to Freedom (Articles 36 – Article 41)

III. Right to Life, Liberty and protection of law (Articles 31–Article 35)

IV. Right to property and Privacy (Articles 42 and 43)

V. Right to Constitutional Remedies (Article 44)

**The five categories of Fundamental Rights are discussed below:**

1. **Right to Equality (Articles 27 – Article 29)**:

It implies equality before the law and equal protection of the laws within the territory of Bangladesh. No man is above the law of the land. Every person is subject to the ordinary law and amendable to the jurisdiction of the ordinary tribunals. Any discrimination is prohibited and equality of opportunity in matters of public employment under the state is ensured. There is no distinction between officials and private citizen and no discrimination on the basis of caste, creed, religion, sex etc. But right to equality does not mean absolute equality or universal application. Some exceptions are allowed by the by the Bangladesh Constitution and these limitations are as follows:

·the President shall not be answerable to any court for the power exercised or act done by him. No criminal proceeding shall be instituted against the President during term of office

·making special provisions for women and child

·making special provisions for advancement of any socially, economically and educationally backward classes including special employment opportunities, which is called positive discrimination.

**II. Right to Freedom (Articles 36 – Article 41):**

This right is the most significant and important for the citizens. This right confers some positive rights to promote the ideal of liberty.

Constitution has guaranteed six freedoms to all citizens.

These are – All citizens shall have the right-

a. to freedom of movement (Article 36) ;

b. to freedom of assembly (Article 37) ;

c. to freedom of association(Article 38) ;

d. to freedom of thought and conscience and of speech (Article 39);

e. to freedom of profession or occupation(Article 40) ;

f. to freedom of religion (Article 41)

Like the Right to Equality, Right to Freedom is not absolute. The state can impose reasonable restrictions upon these rights to maintain a balance between individual liberty and social control. When a proclamation of emergency is made under Part IXA, provisions of Right to freedom remain restricted.

**III. Right to Life, Liberty and protection of law (Articles 31 – 35)**

Like others Constitution of the world, Bangladesh Constitution recognizes right to life and personal liberty and states to enjoy the protection of the law is the inalienable right. Article 32 guarantees the right to life and personal liberty. Under Article 31, no action detrimental to the life, liberty, body, reputation or property of any person shall be taken except according to the procedure established by law.

Article 33 provides some safeguards against arbitrary arrest and detention. Similarly, under Article 35, No person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than, or different from, that which might have been inflicted under the law in force at the time of the commission of the

offence and no person accused of any offence shall be compelled to be a witness against himself.

## IV. Right to property and Privacy (Articles 42 and 43)

The Constitution guarantees the right to property and privacy under Articles 42 and 43. Article 42 guaranteed to all citizens the right to acquire, hold and dispose of property[10]. It states that "Subject to any restrictions imposed by law, every citizen shall have the right to acquire, hold, transfer or otherwise dispose of property and no property shall be compulsorily acquired, nationalised or requisitioned save by authority of law."[11] It also provides that compensation would be paid to a person whose property has been taken for public purposes.

Article 43 (a) gives guarantee that every citizen shall have the right to be secured in his home against entry, search and seizure. Thus this Article has made privacy to home inviolable. Article 43 (b) envisages that everyone's right to the privacy of his correspondence and other means of communication is protected. But the rights given under this Article are subject to reasonable restrictions imposed by law in the interests of the security of the State, public order, public morality or public health.

## V. Right to Constitutional Remedies (Article 44)

A right without remedy is a meaningless formality. Bangladesh Constitution enumerates various rights to its citizen and in order to make these rights effective, it includes some means or remedies in the form of the Right to Constitutional Remedies under Article 44. Article 44 guarantees to every citizen the right to move the High Court for enforcement of Fundamental Rights by Constitutional means. When a citizen feels that his Fundamental Rights have been violated, he can move to the High court for redresses. The High Court under Article 102 may issue to safeguard the Fundamental Rights in the nature of habeas corpus, mandamus, prohibition, quo-warranto and certiorari. These are some instruments and means to make Fundamental Rights more effective. The courts have the power to enforce Fundamental Rights by issuing these writs against any authority of the State. The Bangladesh Constitution lies down that any act of the executive or of the legislature which violates Fundamental Rights shall be void and the

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[10] Property extends to every species of valuable right and interest including real and personal property, easements, franchises and other incorporeal hereditaments.

[11] Article 42 extends to every species of property, tangible or intangible , moveable or immoveable and to all interests in property.

courts are empowered to declare it as void .Thus, the Constitution of Bangladesh has made the judiciary as "the protector and guarantor of Fundamental Rights".

On the other hand, this Constitutional right is the "heart and soul" of the Constitution as it can only make Fundamental Rights effective. However the right to move to the High court for protection of Fundamental Rights may be suspended during an emergency except right to life and personal liberty.

**Reasonable Restrictions on Fundamental Rights**

Civil liberties as guaranteed by the constitution imply the existence of an organized society maintaining public order without which liberty itself would be lost in the excess of unrestrained abuses[12]. Unrestricted individual liberty jeopardizes the liberty of others. Therefore, the enjoyment of one's right in the society should be subject to the enjoyment of other's right. Article 29(2) of the Universal Declaration of Human Rights, 1948 rightly says – 'In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society'.

Justice Mukharjee in **Gopalan v. State of Madras** said more clearly that "There cannot be any such thing as absolute or uncontrolled liberty wholly free from restraint; for that would lead to anarchy and disorder. The possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed by the governing authority of the country essential to the safety, healthy, peace, general order and morals of the community"[13].

Similarly, some Articles of the Fundamental Rights guaranteed by the Constitution of Bangladesh are not absolute. There are certain restrictions which can be imposed by the state according to the procedure established by law. However, these restrictions must be reasonable and not arbitrary. The debate has always been on as to what exactly is the definition of 'reasonable restriction'. The phrase 'reasonable restriction connotes that the limitation imposed upon a

[12] Fox V. New Hampshire, (1941) 321 US 569 at p. 574
[13] AIR 1950 SC 27

person in enjoyment of the right should not be arbitrary or of an excessive nature, beyond what is required in the interest of the public.

The word reasonable implies intelligent care and deliberation that is the choice of a course which reason dictates. A legislation arbitrarily invading the right of a person cannot be regarded as reasonable. A restriction to be valid must have a direct and proximate nexus with the object which the legislation seeks to achieve and the restriction must not be in excess of that object. The reasonableness of the restraint would have to be judged by the magnitude of the evil which it is the purpose of the restraint to curb or to eliminate[14]. The determination by the Legislature of what constitutes a reasonable restriction is not final or conclusive; it is subject to supervision by the court[15]. It is the courts and not the Legislature which has to judge finally whether a restriction is reasonable or not[16]. To determine the reasonableness of the restriction, the Court should consider the nature of the restriction and procedure prescribed by the Statute for enforcing the restriction on the individual freedom. Not only substantive, but 'procedural provisions of a statute also enter into the verdict of its reasonableness'[17]. No abstract standard of reasonableness can be laid down as applicable to all cases. Each case is to be judged on its own merit. The standard varies with the nature of the right infringed, the underlying purpose of the restrictions imposed, the extent and the urgency of the evil sought to be remedied, the disproportion, of the imposition, the prevailing condition at the time. These factors have to be taken into consideration for any judicial verdict.[18] In Oali Ahad V. Bangladesh the courts opined that "no fixed standard of reasonableness can be laid down for general application and it will vary depending on the varying circumstances of each case"[19]. So, reasonableness is itself a relative term. What is unreasonable in one given set of circumstances may well be reasonable in another different set of circumstances and there is no general standard of reasonableness applicable to all cases.

**Reasonable restriction on Freedom of Assembly**

Article 37 guarantees to all citizens of Bangladesh right "to assemble peaceably and without arms." The right of assembly includes the right

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[14] *Collector of Customs* v. *Sampathu Chettty,* AIR 1963 SC 316 (para 35).
[15] *Chintaman Rao* v. *State of M.P.,* AIR 1951 SC 118.
[16] Ibid
[17] *Golak Nath* v. *State of Punjab,* AIR 1967 SC 1643.
[18] *Harakchand* v. *Union of India,* AIR 1970 SC 1453 (para 15).
[19] 26 DLR (1974) 376.

to hold meetings and to take out processions. This right is however subject to the following restrictions:

1. The assembly must be peaceable;
2. It must be unarmed;
3. Reasonable restrictions can be imposed in the interest of public order or public health.

The right of assembly is implied in the very idea of the democratic Government. The right of assembly thus includes right to hold meetings and to take out processions. This right, like other individual rights is not absolute but restrictive. The assembly must be non-violent and must not cause any breach of public peace. If the assembly is disorderly or riotous then it is not protected under Article 37 and reasonable restrictions may be imposed in the interests of 'public order' or 'public health'.

In the case of Oli Ahad V. Govt. of Bangldesh[20] The court justified the reasonable restriction imposed by Government against Sarbadaliya Oikya Front to hold a meeting on 30 June in Paltan Maidan in the interest of public order.

The court held that "Having regard to the fact that the object of prevention of the apprehended danger to human life, disturbance of the public tranquility, riot or an affray is closely allied to the interests of public order, we are of opinion that the restriction on the individual right as contemplated in section 144 (1) of CrPC[21] cannot be said to be unreasonable and as such the aforesaid provision of the Code cannot be held to unconstitutional"

It is hereby mentionable that a restriction can be said to be in the interest of public order only if the connection between the restriction and the public order as direct and proximate. Indirect and unreal connection between the public order and restriction would not fall within the purview of the expression "in the interest of public order".[22]

**Reasonable restriction on Freedom of Speech and Expression**

Article 39(2) (a) says that all citizens shall have the right to freedom of speech and expression. But this right is subject to limitations imposed

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[20] 26 DLR (1974) 376.

[21] Section 144, CrPC, empowers the Magistrate to restrain an assembly, meeting or procession if there is a risk of obstruction, annoyance or injury to any person lawfully employed or danger to human life, health or safety or a disturbance of the public tranquility or a riot or any affray

[22] *Rex* v. *Basudev,* AIR 1950 SC 67.

under Article 39(2) which empowers the state to put 'reasonable' restrictions on the following grounds, e.g., security of the state, friendly relations with foreign states, public order, decency and morality, contempt of court, defamation and incitement to offence.

The freedom of speech and expression does not confer an absolute right to speak and publish, without responsibility, whatever one may choose or an unrestricted or unbridled license that gives immunity for every possible use of language and does not prevent punishments for those who abuse this freedom.[23] Clause (2) of Article 39 specifies the grounds on which the freedom of speech and expression may be restricted. It enables the legislature to impose reasonable restrictions on the right to free speech "in the interests of" or "in relation to" the following:

1. Security of the state.
2. Friendly relations with foreign states.
3. Public Order.
4. Decency and Morality.
5. Contempt of court.
6. Defamation.
7. Incitement to an offence.

In the case of Bangladesh Anjumane Ahmed V. Bangladesh[24] The Government of Bangladesh confiscated a book named Islam e Nabuat published by Ahmadia Muslim Jamat contained the statement that Prophet Hazrat Muhammad (sm) was not the last Prophet of Islam. The government prohibited the marketing of this book as well. The petitioner challenged the decision of government and argued that they had freedom of speech and expression under Article 39 of the Constitution. The court held that "the book being outrageous and offensive to the feelings of Muslims devoted to their firm faith that Prophet Hazrat Muhammad (sm) is the last Prophet of Islam, the government was justified in putting restriction over the freedom of expression of the petitioner".[25]

**Sanctity of Fundamental Rights**

Fundamental rights are considered as heart of the Constitution. These rights are protected by the Constitution itself, even, if any law is made

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[23] *Romesh Thappar v. State of Madras,* AIR 1950 SC 124
[24] 45 DLR (HCD) 185
[25] Bid, para 12.

by the legislature or by the executive or by any other authority in contravention of the fundamental rights, that law shall be void to the extent of inconsistency. Article 26 with which Part III of the Constitution starts says:

1. All existing law inconsistent with the provisions of this Part shall, to the extent of such inconsistency, become void on the commencement of this Constitution.
2. The State shall not make any law inconsistent with any provisions of this Part, and any law so made shall, to the extent of such inconsistency, be void.
3. Nothing in this article shall apply to any amendment of this Constitution made under article 142.

Article 26(1) declares all existing laws inconsistent with the provisions of the fundamental rights chapter as void. So, no law existing in Bangladesh shall be allowed to remain in force on and from the day of commencement of the Constitution if it contravenes or abridges the Fundamental Rights. The object of Article 26(1) is to invalidate those existing laws which continue in force by virtue of Article 149 and which are inconsistent with any provision of fundamental rights.

Article 26(2) also provides that any law made by the state after commencement of the Constitution which contravenes any of the fundamental rights shall, to the extent of the contravention or inconsistency be void. In this Article the use of the term 'State' instead of 'Parliament' is significant as State[26] includes Parliament, Government (executive) and statutory public authorities. So, Article 26(2) clearly restricts future law making power and declares if any law is made by the Parliament or by the executive or by any other statutory public authorities which contravenes any provision of fundamental rights shall, to the extent of the contravention or inconsistency be void.

Justice Monir rightly observed in Jibendra Kishor V. The Province of East Pakistan "The very conception of a fundamental right is that it being a right guaranteed by the Constitution cannot be taken away by the law, and it is not only technically inartistic but a fraud on the citizens for the makers of a constitution to say that a right is fundamental but that is may be taken away by the law".[27]

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[26] Article 152 says "the State includes Parliament, the Government and statutory public authorities; statutory public authority means any authority, corporation or body the activities or the principal activities of which are authorised by any Act, ordinance, order or instrument having the force of law in Bangladesh"

[27] PLD 1957 SC (PAK) 9.

In the case of Dr Nurul Islam Vs Bangladesh**,** we can find an example how the fundamental rights are invoked by the court to invalidate a law on the ground of inconsistency with fundamental rights, The Appellate Division held that "Notification based on section 9(2) of the Public Servants (Retirement) Act1974 issued in discriminatory manner injuring a Government servant's right to public employment stand vitiated by malice in law being in violation of the equality provision under Articles 27 and 29 of the Constitution"[28].

[28] 1981 BLD (AD) 140.

Chapter Six

# Expanding Dimensions of "Right to Life"

We can understand that food, clothing, healthy environment, shelter, education is the core of our existence. But what is the status of these rights in our Constitution? Being the core of our existence or life, whether these basic necessities of life do cover by the expression 'right to life' as guaranteed under Article 32 of the Constitution of the People's Republic of Bangladesh? Does these are judicially enforceable? If not, then why? If yes, then how? What is theory? What is the practical going on? What is the expression of us?

The judicial observation observed by Justice Bhagwati in Francis Coralia Mullin v. Administrator Union Territory of India1 is that "The fundamental right to life which is the most precious human right & which is the arc of all other rights must be interrupted in a broad and expansive spirit so as to invest it with significance and vitality which may endure for years to come and enhance the dignity of the individual and the worth of the human person". Basically Right to life is the most cherished and pivotal fundamental human rights around which other rights of the individual revolve. The study of right to life is indeed a study of the Supreme Court as a guardian of fundamental human rights. Article 32 is the celebrity provision of the Bangladesh Constitution and occupies a unique place as a fundamental right. It guarantees right to life and personal liberty to citizens and aliens and is enforceable against the State. The new interpretation of 'Right to life', in the case of *BELA v. Bangladesh and others*,[2] has ushered a new era of expansion of the horizons of right to life. The wide dimension given to this right now covers various aspects which the framers of the Constitution might or might not have visualized. In the above mentioned case, the High Court Division of the Supreme Court of Bangladesh observed "the expression 'life' does not mean merely an elementary life or sub human life." This case further went on saying: "The expression 'life' enriched in Article 32 includes everything which is necessary to make it meaningful and a 'life' worth living not only a right to life but a meaningful is an inalienable fundamental right."

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[1] (1981) 1 SCC 608

[2] 55 DLR (HCD) 69. ABM Khairul Haque J., para 23

Thus, new dimensions from time to time have been added to the scope of Article32. A person deprived of right to life would be against the provisions of Article 32 of the Constitution[3].

**Right to life includes 'Right to health and longevity'**

A healthy body is the very foundation of all human activities. The right to health and longevity has been recognized by the Supreme Court as 'right to life' under Article 32. According to the High Court Division of the Supreme Court of Bangladesh: "The expression of 'life' occurring in Article 32 of the Constitution of Bangladesh does not mean merely an elementary life or sub-human life but connotes in this expression the life of the greatest creation of the Lord who has at least a right to decent and healthy way of life in a hygienic condition."[4]

The HCD in the case of ***Professor Nurul Islam v. Govt. of Bangladesh & others****5* has dealt with hazards and effects of smoking and its advertisement in the background of constitutional provision regarding fundamental right to life and that advertisement of cigarette or tobacco related products in media is definitely designed to the detriment of right to life i.e. right to health of the citizens & accordingly issued several directions.

The Court held that "Though the obligation under Article 18(1) of the Constitution cannot be enforced, the state is bound to protect the health and longevity of the people living in the country, as the right to life guaranteed under Articles 31 and 32 of the Constitution includes protection of health and normal health hazards unless the threat is justified by law. Right to life under the aforesaid Articles of the Constitution being a fundamental right, can be enforced by this court to remove any unjustified threat to the health and longevity of the people."[6]

The High Court, in interpreting Articles 31 and 32 observed in Saleemullah V Bangladesh[7] that the State is bound to protect the health and longevity of the people free from threats of man-made hazards.

From the decisions of the Supreme Court it is evident that 'Right to life' includes 'Right to health and longevity' under Articles 31 and 32 of our Constitution.

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[3] See, more, http://bdlaws24.blogspot.com/
[4] *BELA v. Bangladesh & others*, 7(2002) MLR, HC, p.147
[5] 52 DLR 413, Para 6
[6] Ibid, para 18
[7] (2003) 55DLR 1.

In India, in the case of **Murali Deora V. State**, the Supreme Court banned smoking in public smoking is injurious to health and that the Constitution recognizes the right to life under Article 21 which necessarily includes right to health.

**VAT on Health Services violates Right to Life**

Under 2nd Schedule of the VAT Act 1991, services provided by the private doctors, fitness centers, private clinics, dental care centre, beauty parlours, and pathological labs were made subject to VAT. The Appellate Division held in this regards that "The imposition of VAT on the impugned medical services is not warranted by and is contrary to the Fundamental Principles of State Policy. Moreover Article 32 of the Constitution commands not to deprive a citizen of his life and personal liberty except in accordance with law. It thereby provides that a citizen must be allowed to maintain a smooth health care and peaceful life and to that affect all the amenities including health and medical services must be available."[8]

**Right to Life includes 'Right to Shelter'**

Several cases, the Supreme Court of its ambit, including the right to housing under the Constitution of 32 means life has been enormous. Some of the court cases upholding the right to shelter, thereby bringing out the need for an honorable life like a mere animal existence, and looking at the difference between a decent human existence. The meaning of the word life includes the right to live in fair and reasonable conditions. In the case of *BELA v. Bangladesh and others*,9 the High Court Division of the Supreme Court of Bangladesh observed: "the expression 'life' does not mean merely an elementary life or sub human life." This case further went on saying: "The expression 'life' enriched in Art. 32 include everything which is necessary to make it meaningful and a 'life' worth living not only a right to life but a meaningful is an inalienable fundamental right."

The right to life means right to a complete and meaningful life. Does not mean it is restricted. It is something more than being alive or animal. It was held in ***Munn v People of Illinois*** that 'Life' within the meaning of Art.32 means something more than mere animal existence.

In Chameli Singh v. State of India[10], The Indian Supreme Court held that right to life encompasses within its ambit, the right to shelter.

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[8] Chairman, NBR V. Adv Zulhas Uddin Ahmed 15 MLR (AD) 457. Para 5.
[9] 7 (2002) MLR, HC, 157
[10] (1996) SCC pp. 555-56

The expanded scope of right to life and liberty has been explained by the Apex Court in the case of Unni Krishnan v. State of A.P. and the Apex Court itself provided the list of some of the rights covered under right to life and liberty, some of them are listed below:

1. The right to go abroad.
2. The right to privacy.
3. The right against solitary confinement.
4. The right against hand cuffing.
5. The right against delayed execution.
6. The right to shelter.
7. The right against custodial death.
8. Doctors assistance.

**Slum Dwellers' Right to Shelter under Right to life**

In the case of Ain o Salish Kendra (ASK) and others v. Govt. of Bangladesh and others11 the HCD laid down guidelines for the rehabilitation of the slum dwellers and stated that forced without any alternative accommodation and rehabilitation was unlawful. To quote the Division Bench delivering the said judgment: "Our constitutional law in the directive state policy and in the preservation of the fundamental rights provided that the state shall direct its policy towards securing that the citizens have the right to life, living livelihood."

Guidelines in the rehabilitation of the slum dwellers were also fundamental in the case of **Modhumala v. Govt. of Bangladesh**12 as if preservation of their right to accommodation were not a concept foreign to their right to life. In another case *Kalam & others v. Bangladesh & others*, 13 filed on behalf of the slum dwellers, the said Division refrained from giving any direction or guideline to the Government and accepted the assurance given on behalf of that the petitioner will not be evicted without rehabilitation.

**Right to life includes 'Right to a healthy environment'**

The existence of life depends on the harmonious relationship of earth, ecology and environment. Especially – Homo interaction with nature is very close. People at the center of concerns for sustainable

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[11] 4 (1999) MLR, HC, 358 p.152
[12] WP No. 59 of 1994 (unreported) ,*ibid* p.153.
[13] 21 (2001) BLD, 446.

development and a healthy and productive life in harmony with nature, you are entitled to be sure.

In Bangladesh, no specific provision has been made anywhere in the constitution for protection of the environment.14 Nevertheless, the Appellate Division of the Supreme Court of Bangladesh has held: "Although we do not have any provision like Article 48A of the Indian Constitution for protection and improvement of environment.

Articles 31 & 32 of our constitution protect right to life as a fundamental right. It encompasses within its ambit the projection and preservation of environment, ecological balance free from pollution of air and water, sanitation without which life can hardly be enjoyed. Any act or omission contrary thereto will be violation of the said right to life.15

In **Dr. Mohiuddin Farooque v. Bangladesh** [16] B.B. Roy Chowdhury J. declared that right to life encompasses within its ambit the protection and preservation of environment and ecological balance.

Environmental degradation can endanger the lives of current and future generations. Therefore, the right to life should be used in a diverse manner. It is the right amount of inter alia, the right to survive as a species, quality of life, the right to live with dignity, and the right to a healthy environment.

**Right to life includes 'Right to livelihood'**

No one can live without means of living that is the means of livelihood. Therefore, right to life should include right to livelihood. The HCD in ***Bangladesh Society for the Enforcement of Human Rights (BSEHR) & others v. Govt. of Bangladesh & others***[17] addressed a broad spectrum of issues including the fundamental right to life of sex workers. In this case, the right of sex workers to an occupation to a residence compatible with the worth and dignity of a human being and their rehabilitation was viewed from a sensitive perspective. In this case, legality of the wholesome eviction by the govt. of the sex workers of Nimtoli & Tanbazar brothels in Narayangang was challenged. The Court emphasized that the sex workers have a fundamental right to life and livelihood and as such wholesale eviction of sex workers had deprived them of their

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[14] *Dr. Mohiuddin Farooque v. Bangladesh*, 1 (1996) BLD, AD, 189.

[15] Justice Naimuddin Ahmed, "Public Interest Environmental Litigation in Bangladesh", *JATI Journal*, vol- II, May 2003, p-18,

[16] 49 DLR 1997 (AD) 1

[17] 53 (2001) DLR, 1

livelihood which amounts to deprivation of their right to life making the act unconstitutional and illegal.

The Indian Supreme Court held in **Olga Tellis V. Bombay Muncipal Corporation** [18] that "An equally important facet of the right to life is the right to livelihood because; no person can live without means of living that is the means of livelihood. If the right to livelihood is not treated as part of Right to life, the easier way of depriving person his right to life would be to deprive him of his means of livelihood to the point of abrogation."

**'Right to life' includes 'Right to necessary condition of life'**

The right to life enshrined in Article 32 cannot be restricted to mere animal existence. Every limb or faculty through which life is enjoyed is protected by 'Right to life'. In the case of *BELA v. Bangladesh and others*,[19] the High Court Division of the Supreme Court of Bangladesh observed: "The expression 'life' enriched in Art. 32 include everything which is necessary to make it meaningful". It includes the right to live consistently with human dignity and decency,[20] right to the bare necessities of life such as adequate nutrition, clothing and shelter and the right to security of life[21] and the facilities for reading, writing and expressing oneself its diverse forms, freely moving and mixing with fellow human beings[22] and all that which gives meaning and content to a man's life[23] including tradition, culture and heritage.[24]Right to life includes right to livelihood because no person can live without means of living. It includes a right to protection of health and normal longevity[25] and right to protection and improvement of environment.[26] A person cannot claim that the state should provide him with a livelihood, but the state cannot by arbitrary or unreasonable law or action cause detriment to the livelihood the individual already has.[27] When rootless people have taken shelter in slums and somehow eking a livelihood, their wholesale eviction without any scheme of their

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[18] AIR 1981 SC 180.
[19] 55 DLR (HCD) 69, ABM Khairul Haque J., para 23
[20] *Vikram v. Bihar,* AIR 1988 SC 1782.
[21] Bangladesh Jatiya Mahila Ainjibi Samity v. Ministry of Home Affairs. 2008 BLD 580.
[22] *Francis Caralie v Union Territory* , AIR 1981.
[23] *H.P v. Uned Ram,* AIR 1987.
[24] *Ramsharan v. India,* AIR 1989.
[25] *Mehta v. India* (1998), 9 sec 589.
[26] *World Saviours v. India* (1998) 9 Sec 247
[27] *Giasuddin v. Dhaka Municipal* Corp, 49 DLR, 1999.

rehabilitation has been found to offend the provisions of art.31 and art.32.[28] Custodial violence, torture, rape or death in police custody or rock-up infringes the right guaranteed by 'right to life'.[29]

Actually, there are several reported and unreported cases where court of Bangladesh is gradually developing the wider area and scope of 'right to life'. Especially the interpretation of Indian court has highly and significantly influenced the case law jurisprudence of Bangladesh.

## Approach of India and Pakistan regarding "Right to Life'

### India

Article 21of The Indian Constitution deals with 'Right to life'. The meaning of 'right to life' has become wider through the gradual development of its judicial practice and sometime judicial organ binds legislative authority to accept such extended meaning.

In the case of Francis C. Mullin v. Administrator Union Territory of Delhi30 the Indian Supreme Court observed "the question which arises in whether the right to life is limited only to protection of limb or faculty or does it go further and embrace something more. We think that the right to life includes right to lives with human dignity and all that goes along with it viz, the bare necessities of life such as adequate nutrition, clothing and shelter and facilities for reading, writing and expressing oneself in divers forms, freely moving about the mixing of commingling with below human beings. Of course, the magnitude and content of the components of this right would depend upon the extent of the economic development of the country, but it must in any view of the matter, include a right to the basic necessities of life and also right to carry on such functions and activities as constitute the bare minimum expression of the human self."

According to Kerala High Court "A wide meaning should be given to the expression 'life' to enable a man not to sustain life but to enjoy it in a full measure."31 In the case of *State of Himanchal Pradesh & others v. Umed Ram Sharma & others*32 the Indian Supreme Court has extended the definition of the term 'life' to include the quality of life. In another case it was observed that Art.21 guarantees a person to lead a meaningful life.33 In the case of *Vicram Deo Singh Jomar v. State of*

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[28] *Kalam v Bangladesh*, 2001 BLD, 446.
[29] *D.K Basu v W.B.*, AIR 1997 SC 504, 652.
[30] 1981 (2) SRC. 516.
[31] *Ramkrishna v Sstate of Kerala & others*, 1992 (2) KLT 725.
[32] AIR 1986, SC, 847
[33] *Lallan Rai v. State of UP*, 2002(2) crimes 545 (all).

*Bihar*34 the Indian Supreme Court emphasized that right to life includes the right to human dignity.

**Pakistan**

The case of the Employees of the Pakistan Law Commission v. Ministry of workers 35 dealt with the meaning of Article 9 of the Constitution of Pakistan. The Supreme Court of Pakistan held that: "Art. 9 of the constitution which guarantees life and liberty according to law is not to be construed in a restricted and pedantic manner. Life has a larger concept which includes the right of enjoyment of life, maintaining adequate level of living for full enjoyment of freedom and rights." In the case of *Ms. Shehla & others v. WAQPDA* 36 the Supreme Court of Pakistan held that the word 'life' does not mean nor can be it be restricted only to the vegetative or animal life or mere existence from conception to death and life includes all such amenities and facilities which a person born in a free country is entitled to enjoy.

From the above discussion it is evident that Right to life which is the most precious human right and which forms the ark of all other rights must therefore be interpreted in a broad and expansive spirit so as to invest it with significance and vitality which may endure for years to come and enhance the dignity of the individual and the worth of the human person.

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[34] AIR 1988 SC 1782.
[35] 1994 SCMR 1548.
[36] PLD 1994, SC, 693.

Chapter Seven

# Preventive Detention under the Constitution of Bangladesh

Preventive Detention is the most contentious part of the scheme fundamental rights in the constitution of Bangladesh. Inherited from colonial days, preventive detention presently enjoys Constitutional protection under Article 33(3-6). The Special Powers Act, 1974 has been enacted to serve this purpose. Though, this law was enacted to prevent massive smuggling, hoarding, black marketing, killing etc, but, in fact this law has been used widely over the last forty years by all successive Governments to oppress the political opponents of the ruling party.

**Definition of Preventive detention**

Preventive detention means such a detention by which a person is detained without any charge or trial and without any conviction by a court, but on the reasonable apprehension in the mind of the executive authority that the detained person may commit act or acts detrimental to the public interest. But in real sense, Preventive detention is an abnormal measure whereby the executive is authorized to impose restraints upon the liberty of a man who may not have committed a crime but who, it is apprehended, is about to commit acts that are prejudicial to public safety.

In A.K. Gopalan vs. State of Madras[1]it was held that there is no authoritative definition of Preventive Detention. The word "Preventive" means that restrain, whose object is to prevent probable or possible activity, which is apprehended from a detenu on ground of his past activities;[2]

"Detention" means keeping back[3]. Preventive detention means detention of a person only on suspicion in the mind of the executive authority without trail, without conviction by the court.[4]

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[1] AIR 1950 SC 27

[2] Sunil Kumar Sammaddar vs. Superintendentof Hoagly Jail 75 Cal WN 151.

[3] Alamgir vs. The State AIR 1957 at p-285.

[4] Patel, T; "Personal liberty under the constitution of India" Delhi (1993) at p-48.

So, it is the detention, the aim of which is to prevent a person from doing something which is likely to endanger the public peace or safety or causing public disorder.[5]

Preventive detention is an abnormal measure whereby the executive is authorized to impose restrain upon the liberally of a man who may not have committed a crime but who it is apprehended, is about to commit acts that are prejudicial to the public safety etc.[6] As David H. Bayley said "A law of Preventive detention sanctions the confinement of individuals in order to prevent them from engaging in forms of activity considered injurious to the community and the like hood of which is indicated by their past action"[7]

According to Banglapedia "Preventive Detention Laws are legal instruments applied by the executive primarily to detain any person without any charge and trial. Seemingly, these instruments run parallel to the penal laws that include all the grounds for which the detention law in general is enforced. Preventive detention has three specific features, first, it is detention and not imprisonment; second, it is a detention by the executive without trial or inquiry by a court; and third, its object is preventive and not punitive."

**Constitutional Provisions regarding Preventive detention**

The Article 33 (3) of the Bangladesh constitution provides that, if a person is arrested or detained under a law providing for preventive detention, then the protection against arrest and detention under Article 33 (1) and 33 (2) shall not be available.[8]

Clauses (4) to (6) of Article 33 contain safeguards relating to preventive detention matter. Article 33 (5) has two parts. One, the detaining authority is to communicate to the detenu grounds of his detention as soon as may be. Two, the detenu is to be afforded the earliest opportunity of making a representation against the order of detention. There is rational connection between these two parts; viz. grounds are to be communicated to the detenu so as to enable him to defend himself. The Supreme Court has drawn several propositions to ensure that the detaining authority effectively communicates grounds

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[5] Chowdhury Badrul Haider; "The long Echocs," Dhaka (1990) at p-3
[6] Brohi, A.K.;"Fundamental law of Pakistan," Karachi (1958) at p-424.
[7] Balyley, David H, "Public liberties in the New states" Chicago (1964) at p-23.
[8] Article 33(3) says: Nothing in clauses (1) and (2) shall apply to any person
(a) who for the time being is an enemy alien; or
(b) who is arrested or detained under any law providing for preventive detention.

to the detenu in such manner that his constitutional right to make a representation against his detention is exercised properly.

**To prevent reckless use of Preventive Detention, certain safeguards are provided under Article 33(4-6) in the Constitution**:

- Firstly, a person may be taken to preventive custody only for 6 months at the first instance. If the period of detention is extended beyond 6 months, the case must be referred to an Advisory Board consisting of persons with qualifications for appointment as judges of Supreme Court. It is implicit, that the period of detention may be extended beyond 6 months, only on approval by the Advisory Board.[9]
- Secondly, the detainee is entitled to know the grounds of his detention. The state however may refuse to divulge the grounds of detention if it is in the public interest to do so. Needless to say, this power conferred on the state leaves scope for arbitrary action on the part of the authorities.[10]
- Thirdly, the detaining authorities must give the detainee earliest opportunities for making representation against the detention. These safeguards are designed to minimize the misuse of preventive detention. It is because of these safeguards that preventive detention, basically a denial of liberty, finds a place on the chapter on fundamental rights. These safeguards are not available to enemy aliens.

## Nature and Justification of Preventive Detention

The nature of Preventive detention is different from the nature of punitive detention. The word Preventive detention is used in contradiction to the word punitive detention[11]. Punitive detention is the

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[9] Article 33(4) says : ) No law providing for preventive detention shall authorize the detention of a person for a period exceeding six months unless an Advisory Board consisting of three persons, of whom two shall be persons who are, or have been, or are qualified to be appointed as, Judges of the Supreme Court and the other shall be a person who is a senior officer in the service of the Republic, has, after affording him an opportunity of being heard in person, reported before the expiration of the said period of six months that there is, in its opinion, sufficient cause for such detention.

[10] Article 33(5) says: Provided that the authority making any such order may refuse to disclose facts which such authority considers to be against the public interest to disclose.

[11] For details, Md. Ashraful Arafat Sufian, Preventive Detention in Bangladesh: A General Discussion, Bangladesh Research Publications Journal.

detention as a punishment for the crime committed by an individual. It takes place after the actual commission of an offence or at least after an attempt has been made. The time taken from actual offence to detention can vary in length. It is a punishment imparted to the wrongdoer and involves strict measures. The duration of such a detention depends on what the law stipulates for the particular offence. On the other hand, Preventive detention is the detention made as a precautionary measure. This kind of detention can be made by the authorities even on a slight apprehension that the person can commit a crime. It is generally made for protecting the society from any future happening. It is not a punishment but a precaution. This detention comes to an end the moment the apprehension of danger ends.

So, there is a clear distinction between preventive and punitive detention. While the former is aimed at preventing a person from doing anything that may be detrimental to public order or national security, the latter comes into picture when a person is alleged to have committed an act in due disregard of law. Though preventive detention is an anathema to rule to law, it is a necessary evil. Few people have described both actions as restraint of individual's freedom and Personal liberty

The Preventive detention laws allow many false and unlimited powers to the government authorities to detain a person[12]. When a person comes within the satisfaction of the government authority that a person is going to commit prejudicial acts, he may be detained by Preventive detention to defend him from doing that act. The court presumed that many times detaining authority violate fundamental rights to satisfy the government. In Sasti vs. State of West Bengal[13] Indian Supreme Court elucidated the nature of Preventive detention as a detention of a person without trial in such circumstances that the evidence in possession of the authority is not sufficient to make a legal charge or to secure the conviction of the detenu by legal proof but may still be sufficient to justify his detention.

The philosophy lying behind the Preventive detention is the greater interest and security of the state and nation. National Security is more important than the personal liberty of citizen. Justifying the measure Lord Atkinson in R. vs. Halliday said,

"Where preventive justice is put in force some sufferings and inconveniences may be caused to the suspected persons. This is

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[12] Ibid

[13] (1973) ISCR p-468

inevitable. But the suffering is inflicted for something much more important than his liberty or convenience, namely for securing the public safety and the defense of the realm"[14] In the same case Lord Finlay has said,

"Any preventive measure even if they involve some restraint or hardship upon individuals, do not partake in any way of the nature of punishment, but are taken by way of precaution to prevent mischief to the state"[15]

Similar view also expressed by Lord Alfred Denning. He said, "If there are traitor in our midst, we cannot afford to wait until we catch then in the act of blowing up our bridges or giving our military secrets to the enemy, we cannot run the risk of living then at large, we must detention then suspicion"[16]

Regarding preventive detention the Indian Supreme Court observed, "That appears to have been done because the constitutions recognize the necessity of preventive detention on extraordinary occasion when control over public order, security of the country, etc., are in danger of breakdown. But while recognizing the need of preventive detention without recourse to the normal procedure according to law, it provided at the same time certain restrictions on the power of detention, both legislative and executive, which it considers as minimum safeguards to ensure that the power of such detention is not illegitimately or arbitrary used"[17]

## Scope of Abuse of Power under the Provision of Preventive detention

The provision of preventive detention contains enough scope for abuse of power by the Executive.

### 1. Long initial detention period

In our country, under Article 33(4), the initial period of detention under preventive detention is six months. After completion of that period, a person is entitled to face Advisory board.[18]

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[14] Quoted by Brohi A. K. Ibid p-424. [(1917) AC 260]

[15] Quoted by Munim-FKMA p-107

[16] Denning, Lord Atfred, "Freedom under the law," London (1949) at p-11.

[17] Pankaj Kumar vs. State of West Bengal, AIR (1970) SC 97

[18] Article 33(4) says: No law providing for preventive detention shall authorize the detention of a person for a period exceeding six months unless an Advisory Board consisting of three persons, of whom two shall be persons who are, or have been, or are qualified to be appointed as, Judges of the Supreme Court and the other shall be a person who is a senior officer in the service of the Republic,

So, if the government causes with bad intention in detaining a person, He (government) is able to detain that person for long six months in the name of preventive detention without approval of court or any other authority.

It is pertinent to mention here that both in India and Pakistan the initial period of preventive detention is three months. In America, under the Internal Security Act 1950, every detention order is subject to review, within 48 hours of arrest the person is to be adduced before a hearing officer.

**2. No maximum period of detention**

If the advisory board under Article 33(iv) permits the detention given by the executive then the person detained can be kept under detention as long as the government desires. In Article 33 or under Special Powers Act1974, there is no maximum period of preventive detention. In such a situation the government by any how managing the advisory board can keep any person under detention for unlimited period. In practice most of the time advisory board gives decision according to the desire of Government.

But in India, the maximum time for preventive detention is one year. According to Article 22(7) of Indian Constitution "the law must clarify the maximum limit of detention". And under the Indian Maintenance and Internal Security Act 1971, the maximum period for preventive detention is one year. Even in Pakistan, the maximum period detention is eight months. Under Article 10(7) of the Constitution of Pakistan "a person cannot be detained more than eight months for acting in a manner prejudicial to public order". But in our Country, in the name of preventive detention, a person could be detained without trial or approval of court for indefinite period.[19]

**3. No specific grounds are mentioned**

There are no specific grounds for preventive detention under Article 33 of our Constitution or under section 3 of the Special powers Act 1974. Section 3 of Special Powers Act says "preventive detention can be given with a view to preventing any person from doing any prejudicial act" But this section did not explain which acts are prejudicial. Under Section 2 of this Act, a vast and vague list of prejudicial acts is given, where lays the scope of abuse of power. But in Singapore, under the

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has, after affording him an opportunity of being heard in person, reported before the expiration of the said period of six months that there is, in its opinion, sufficient cause for such detention.

[19] Latif Mirza V. State 31 DLR (AD)1979

Internal Security Act of Singapore, the government can detain a person in certain defined circumstances. In New Zealand, preventive detention is mainly given to sexual offenders.

Thus it is evident that the provision of preventive detention contains enough scope for abuse of power by the Executive. So, provisions relating to preventive detention under Our Constitution and under Special Powers Act 1974 should be amended.

**Report by the Law Commission on the Provisions Relating to Preventive Detention under the Special Powers Act 1974**

Law Commission received a reference from the Ministry of Law, Justice and Parliamentary Affairs by on 01/01/2002 seeking its opinion on the provisions relating to preventive detention. The summary of that report is given below:

Section 3 of the Special Powers Act 1974 lays down the substantive power and conditions of an order of detention. Sub-section (1) of section 3 of the Act empowers the Government to order detention of a person. It runs as follows:-

"The Government may, if satisfied with respect to any person that with a view to preventing him from doing any prejudicial act it is necessary so to do, make an order-

a. Directing that such person be detained;

b. Directing him to remove himself from Bangladesh in such manner, before such time and by such route as may be specified in the order; Provided that no order of removal shall be made in respect of any citizen of Bangladesh."

Sub-section (2) of the same section empowers a District Magistrate or an Additional District Magistrate to order detention of a person after arriving at similar satisfaction to that of the Government with a view to preventing such person from doing such prejudicial acts only as are described in sub-clauses (iii), (iv), (v), (vi) or (vii) of clause (f) Of section 2 of the Act. Sub-section (3) provides that an order of detention passed by a District Magistrate or an Additional District Magistrate, as the case may be, shall not remain in force for more than thirty days after the order has been made unless in the meantime it has been approved by the Government. Clause (1) of section 2 of the Act defines that any act which is intended or is likely to cause any of the eight types of acts specified in clauses (i) to (ii) thereof would be "prejudicial act". Section 8 of the Act requires the detaining authority to communicate the grounds of detention to the within 15 days from

the date of detention informing him at the same time that he has a right to submit a representation in writing against the order of detention and also affording him an opportunity of submitting the representation at the earliest possible opportunity.

Section 9 of the Act requires the Government to constitute an Advisory Board consisting of three persons of whom two persons are or have been or are qualified to be judges of the Supreme Court and the other person should be a senior officer in the service of the Republic. This section also requires the Government to appoint one of the two members who are or have been or are qualified to be judges of the Supreme Court as Chairman of the Advisory Board.

Section 10 of the Act requires the Government to place the grounds of detention and the representation, if any, submitted by the detenu before the Advisory Board within one hundred and twenty days from the date of detention.

Section 11 requires the Advisory Board to consider the grounds of detention, the representation submitted by the detenu, any other information which it may deem necessary and after allowing the detenu an opportunity of being heard to submit a report to the Government as to the propriety or otherwise of the detention within one hundred and seventy days from the date of detention of the detenu.

Section 12 of the Act provides that if the Advisory Board reports that there is no sufficient cause for detaining the detenu, the Government shall revoke the order of detention and release the detenu. It also provides that if the Advisory Board reports that there is sufficient cause for detention of the detenu, the Government may continue the detention. This section also enjoins the Advisory Board to review an order of detention once in every six months and give its opinion after affording the detenu an opportunity of being heard. Section 13 of the Act empowers the Government to revoke an order of detention at any time.

Now, section 3 of the Act requires the detaining authority to be "satisfied", before making an order of detention of a person, that the person concerned is likely to commit a "prejudicial act" as defined in section 2 (f) of the Act and that such act cannot be prevented unless the person concerned is detained. What constitute "satisfaction" of the detaining authority have been the subject-matter of debates and decisions in courts around the world for more than half a century and the law is now almost settled in Bangladesh as a consequence of judicial decisions. The long-standing century old principle that the

"satisfaction" of the detaining authority as to the necessity of detention being entirely subjective the detaining authority was not bound to arrive at such satisfaction on the basis of any objective material and was not bound to disclose the grounds of his satisfaction was for the first time dissented from in England in the lone judgment of Lord Atkin in Liversidge vs. Anderson. In England, enactments for preventive detention were made during the First and the Second World Wars and these were known as the Defense of the Realm Act and the Emergency Powers (Defence) Act. These enactments provided for preventive detention during times of war. Regulations were framed in 1939 under the Emergency Powers (Defence) Act and Regulation 1813 of these Regulations empowered the Secretary of State to order detention if he had: "reasonable cause to believe any person to be of hostile origin or association or to have been recently concerned in acts prejudicial to the public safety or the defence of the realm or in the preparation or instigation of such acts and by reason thereof it is necessary to exercise control over him. Liversidge, a clergyman, raised suspicious of being pro-Nazi, having expressed some pro-Nazi views, and was detained by orders of Anderson, the Home Secretary, passed under Regulation 1813. Liversidge challenged the order of detention. The Home Secretary stated in reply that although "there was no case against him, no proof at all", he was detained under Regulation 1813 as the Home Secretary had reasonable cause to believe him to be a person of hostile associations and it was necessary to exercise control over him. The case ultimately went to the House of Lords and the judgments were delivered in 1941. Four of the Law Lords took the view that the belief of the Home Secretary was subjective and could not be scrutinized by the courts and it was enough if the detaining authority had thought that there was reasonable cause to believe the existence of certain matters as enumerated in Regulation 1813 and had acted in good faith. Lord Atkin dissented and said: [20]

"It is surely incapable of dispute that the words, if A has 'X' constituted a condition the essence of which is the existence of 'X' and having of it by A, if it is condition to a right (including a power) granted to A, whenever the right comes into dispute the tribunal whatever it may be is charged with determining the dispute, must ascertain whether the condition is fulfilled. In some cases, the issue is one of fact, in others both fact and law, but in all cases the words indicate an existing something, having of which can be ascertained. And the words do not mean and cannot mean 'if A thinks that he has'.

[20] Liversidge vs. Anderson, 1949A.C. 206

If 'A has a broken ankle; and if 'A has a right of way' does not mean and cannot mean 'if A thinks that he has a right of way.' 'Reasonable cause' of an action or a belief is just as much a positive fact capable of determination by a third party as is a broken ankle or a legal right".

In Bangladesh, the successive decisions of the superior courts handed down since Liversidge vs. Anderson upheld the minority view expressed therein by Lord Atkin. Before referring to these decisions a few cases decided during Pakistan time should be very briefly referred to in order to trace the gradual development of the law of detention as it prevails today. In Tamijudin Ahmed Vs. The Province of East Bengal[21], Dabirul Islam, a political activist, was detained by an order dated 15the March, 1949, under section 18 of the Bengal Special Powers Ordinance, 1946, on the ground that he was organizing a movement among students, peasants and laborers. A petition under section 491 of the Code of Criminal Procedure, 1898, was filed before the High Court challenging his detention as no constitution had yet been adopted in Pakistan guaranteeing the right of habeas corpus and it was the only provision under which the right of habeas corpus was available. The order of detention was found to be illegal but the detnu was not released on the ground that a fresh order of detention had been passed during the pendency of the proceeding.

In Nirmal Kumar Sen vs. The Crown[22], Nirmal Kumar Sen and two others challenged their detention. In this case, the detenu admitted that he belonged to the Revolutionary Socialist Party of Pakistan and the court held that the grounds of detention served on the detenu could not be questioned and the court could not scrutinize whether the detention was justified on the objective determination of the subjective satisfaction of the detaining authority.

In 1956, the first Constitution of Pakistan was adopted. Article 22 of this Constitution empowered the Supreme Court of Pakistan and Article 170 thereof empowered the High Courts of the Provinces to issue appropriate writs to any person or authority including the Government in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari. Before any case of habeas corpus of any significance came up before the courts for decision under it the Constitution of 1956 was abrogated on 7th October, 1958, and martial law was proclaimed. In 1962, another Constitution was promulgated by the President of Pakistan. But, before the Constitution of 1962 came

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[21] 1 DIR (1949)29; PLD (1949) Dacca,1.

[22] Nirmal Kumar Sen vs. The Crown, 55 CWN 25

into force another case Mahbub Anam vs. the Government of East Pakistan[23] came up before the High Court of East Pakistan for decision. In this case, the detention of Abul Mansur Ahmed, a former provincial Minister, under the East Pakistan Prevention of Prejudicial Acts Ordinance, 1958, "with a view to preventing him from committing any act intended or likely to endanger public safely and maintenance of public order," was challenged. Several grounds of detention were served on the detenu and some of grounds were six facie beyond the scope and ambit of the Ordinance. It may be noted that the prejudicial act with a view to preventing the commission of which the order of detention was made was almost exactly similar to the 'prejudicial act' as defined in sub-clause (iii) of clause (f) of section 2 of the Special Powers Act, 1974. So, the decision in this case is very relevant to interpreting the present law of detention. The Division Bench referred the case to a larger bench for a decision on the following issue.

"Is the detention illegal when a detaining authority gives several grounds for detaining a man and out of the said grounds one or more, but not all, are beyond the scope and ambit of the Act of Ordinance conferring the power of detain?"

The Full Bench, to which the matter was referred, decided the issue as follows:

"When a detaining authority gives several grounds for a detaining a man and out of the said grounds of or more, but not all grounds are beyond the scope and ambit of the Act or Ordinance conferring the power to detain, the detention will be illegal, unless the said ground or grounds are of insignificant or unessential nature."

The above decision laid the foundation of the principle that if some of the grounds of detention are unsustainable, the detention as a whole is vitiated although the court qualified the principle with the condition that those grounds must not be "of insignificant or unessential nature." The Division Bench which ultimately heard the case found the detention illegal as the extraneous grounds were found to be not of insignificant and unessential nature but the detenue was not released and the rule was discharged as a fresh order of detention had in the mean time been passed and the court was of opinion that: "the fact that the detenu is now detained under a fresh order is not disputed before us. Further, we are not in a position to say now that the said order is not a valid one."

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[23] PLD (1959) Dacca 774.

The Constitution of 1962 clearly and broadly defined the powers of the High

Court in matters of habeas corpus in Article 98 (2) (b) (i) thereof as follows:-

"(2) Subject to this Constitution, a High Court of a Province may, if it is satisfied that no other adequate remedy is provided by law-

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

(i) directing that a person in custody in the Province be brought before the High Court so that the Court may satisfy itself that he is not being held in custody without lawful authority or in an unlawful manner."

After the promulgation of the Pakistan Constitution of 1962, various aspects of law of preventive detention as laid down in the East Pakistan Public Safety Ordinance, 1958, a law similar in many respects to the Special Powers Act, 1974, relating to detention, came up of interpretation in Rowshan Bijaya Shawkat Ali Khan vs. Government of East Pakistan[24], Shawkat Ali Khan, a practicing barrister and an active politician, was arrested and detained on 20thSeptember, 1964, under section 41 of the East Pakistan Public Safety Ordinance, 1958. The detention was challenged by his wife before the High Court of East Pakistan. Subsequently, another order of detention was passed on 26thSeptember, 1964. Both orders, which gave rise to two cases, came before the High Court for hearing. The court held that- set aside by the superior courts because the authorities applying the law never cared to be aware of the judicial pronouncements laying down the 'dos' and 'don'ts' for them. In this connection, we are tempted to quote an observation made by the Supreme Court in Abdul Latif Mirza's case:"... I have been sadly disappointed to find that the change that has occurred in the judicial view as to the duty of the detaining authority in a proceeding in which the legality of detention of a certain person is challenged and also as regards the Court's power to investigate the question of such legality, has not made much impression on them. It seems, there has not been adequate appreciation of their duty, not only to show that the grounds of detention communicated to the prisoner are relevant and not vague, uncertain or illusory, but also to show that there were in fact some materials having some probative values as the basis of the satisfaction of the detaining authority that the detenu was likely to do a prejudicial act, if not detained".

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[24] 17 DLR (Dacca) (1965).

In fact, during the workshops held in the six divisional headquarters in which various sectors of society including the law enforcing agencies participated, more than one detaining authority frankly disclosed before the Law Commission that they had passed detention orders mechanically and without application of mind on the basis of recommendations made by the police although they had no convincing materials before them as they were under various types of pressure including political pressure to do so. During these workshops it was patent before us that the abuse and misuse of the provisions in the Special Powers Act, 1974, relating to preventive detention occur from improper application of the law and not because of any defect or infirmity in the law itself. If the law is properly applied by the authorities concerned and the application of the law is properly applied by the authorities concerned and the application of law is in conformity with sections 2 (f) to 14 of the Specials Powers Act, 1974, and the interpretation thereof by the Supreme Court, there will hardly be any occasion for its abuse or misuse. Although the law of preventive detention and the principles underlying therein are now settled by judicial decisions some of which we have already referred to above and although there is no doubt that there is very little possibility of any abuse of the power of detention if the detaining authorities concerned meticulously observe these principles flowing from judicial decisions, we would like to suggest a further statutory safeguard by proposing an amendment to sub-section (3) of section 3 of the Act by adding a proviso thereto as follows:-

"Provided that an order made under sub-section (2) shall not be approved by the Government unless the Government is satisfied that the District Magistrate or the Additional District Magistrate, as the case may be, making the order had before him reasonable materials to satisfy himself that the detenu was likely to do a prejudicial act and that it was necessary to detain him with a view to preventing him from doing such prejudicial act." We are, therefore, of the opinion that except the above amendment, there is no necessity of any amendment, alteration, modification or replacement of section 2 (f) to 14 of the Special Powers Act, 1974, and our recommendations will follow accordingly.

In the next place, we do not find any legal or jurisprudential or even practical necessity to replace the Special Powers Act, 1974 by a new enactment keeping the provisions of the former relating to detention in tact in the latter as proposed by the Government in their reference. As no jurisprudential purpose will be served by putting the same wine in a

new bottle, we do not recommend replacement of the existing enactment by another enactment. What is really required is not a new law or any major change in the existing law but a new mindset which must reflect all that we have said hereinbefore to ensure "effective and careful" application of the law.

In the light of the above observations, we make the following recommendations regarding the points of reference made by the Government:-

1. There is no legal or jurisprudential necessity of enacting any new law embodying the provisions relating to the law of preventive detention as they are in the Special Powers Act, 1974 by repealing the said Act as the provisions in the existing Act relating to preventive detention are adequate and comprehensive enough to ensure effective and careful enforcement.
2. We propose the following amendments

   In section 2 sub-section (2) the full stop (.) shall be substituted by a colon (:) and the following proviso shall be inserted:-

   "Provided that an order made under sub-section (2) shall not be approved by the Government unless the Government is satisfied that the District Magistrate or the Additional District Magistrate, as the case may be, making the order had before him reasonable materials to satisfy himself that the detenu was likely to do a prejudicial act and that it was necessary to detain him with a view to preventing him from doing such prejudicial act."
3. The offences covered by the Special Powers Act, 1974, need not be included in any existing law or embodied in any new law.
4. There is no legal defect in the procedures for trial of the offences under the Special Powers Act, 1974, so as to hamper expeditious disposal of the cases under the Act at the shortest possible time.

**Additional Recommendations**

In addition to the above recommendations made by us on the specific points of reference made by the Government, we would also like to make the following additional recommendations:-

5. For effective and careful enforcement of the law of preventive detention the detaining authority is required to comply with the provisions of sections 3 to 14 read with section 2 (f) of the Special Powers Act, 1974, strictly in letter and spirit.

6. For speedy disposal of trials of offences under the Special Powers Act, 1974, the Special Tribunals constituted under the Act are required to follow the procedures of trial laid down in section 27 of the Special Powers Act, 1974, both in letter and spirit and the superintending authorities of these tribunals the Supreme Court and the Special Tribunal consisting of the Sessions Judges in a district in the respect of the other Special Tribunal in the district) may monitor the work of the Special Tribunals.
7. In the areas where there is heavy load of cases under the Act, some tribunals may be earmarked exclusively for trying the cases under the Act.

**Legal Remedies against Preventive Detention**

1. **Remedy from Advisory Board:**

1st remedy comes from Advisory board. Article 33(4) says "No law providing for preventive detention shall authorize the detention of a person for a period exceeding six months unless an Advisory Board consisting of three persons, of whom two shall be persons who are, or have been, or are qualified to be appointed as, Judges of the Supreme Court and the other shall be a person who is a senior officer in the service of the Republic, has, after affording him an opportunity of being heard in person, reported before the expiration of the said period of six months that there is, in its opinion, sufficient cause for such detention."

So, No person can be detained more than 6 months without authority of the Advisory Board, if the board gives their opinion that, there is sufficient grounds for such detention only than the authority can detain the suspect more than 6 months. If the grounds of detention are not placed before the Advisory Board within 120 days from the date of detention, the detention will be illegal.[25] The opinion of the majority of the Advisory Board shall be deemed as an opinion of the board if there is a difference opinion among the members.

**2. Judicial remedies against preventive detention**

Though the Government generally used this preventive detention against the opposition but there are so many steps to get justice against preventive detention in Bangladesh. They are-

**A. Writ of Habeas Corpus:**

If any person is detained illegally then any person in favor of him can file a writ of Habeas Corpus under article 102(b) (1) of our

[25] Sayedur Rahman Khalifa vs. Secretary Home Affairs, 6 BLD (1986) DB 272.

constitution. The detenu can apply for this as well. Most of the cases the court found the weak grounds, vague & not any specific grounds. As a result the high court can relax the detenu for following grounds[26]-

- Detaining by Government's unlawful authority.
- Failure to state the grounds within time.
- Failure to give chance to defend himself.
- Lack of nexus with the reason of detention.
- Not to produce the detenu before advisory board within specific time.
- Mixing good grounds with bad grounds.
- Retrospective issuance of orders. And
- Failure to submit essential documents before court or not in proper time.

For such grounds when high court is satisfied that the detenu has been detained arbitrarily or malafidely then court can declare the detention illegal and order to release him immediately[27].

In the case of **Habibullah Khan vs. S.A. Ahmed** the Appellate Division held that it is not only that the government is satisfied that the detention is necessary, but it is also for the court to be satisfied that the detention is necessary in the public interest[28]. In **Krisna Gopal vs. Govt. of Bangladesh**, the Appellate Division held that an order which is going to deprive a man of personal liberty cannot be allowed to be dealt with in a careless manner, and if it is done so, the court will be justified in interfering with such order. The court held the detention order unlawful.[29]

Another argument is that the Special Powers Act is a general law but Article 44 & 102 gives the power to High Court Division to exercise Habeas Corpus writ which is a constitutional law as it is a constitutional law, it will prevail over general law.

### 3. Suo Motu rule

The Suo Motu rule is now not very new to us. It is exercised by the judges of the High Court Division if any illegal or inhuman matters

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[26] For details, Md. Ashraful Arafat Sufian, Preventive Detention in Bangladesh: A General Discussion, Bangladesh Research Publications Journal.

[27] Ibid

[28] 35 DLR (AD) (1983) p-78.

[29] 31 DLR (AD) (1979) p-149.

happen even it may come to knowledge of the court through newspaper or any other means.

### 4. Compensation for wrongful arrest

There is no provision for payment of compensation for illegal detention under the preventive detention law. So the detaining authority may exercise arbitrary and malicious discretion.

Bangladesh Supreme Court gave directions of compensation in "Bilkis Akter Hossain vs.Government"[30], the court directed one lakh to the each detenu as compensation for illegal detention. Section 9(5) of the International Covenant on Civil and Political Rights 1966 lays down "Anyone who has been victim of unlawful arrest or detention shall have an enforceable right to get compensation." The Indian Supreme court ordered for compensation in Rudul Sah vs.State of Bihar case.[31]

## Conclusion

The provisions relating to preventive detention under Constitution and Special Powers Act 1974 contain enough scope of misuse of power by the government. So, the Supreme Court and The National Human Rights Commissions need to play a pivotal role whenever cases of abuse and misuse of such powers are brought to their notice either by the aggrieved party or through their suo motu cognizance. It is pertinent to mention here that that in many democratic countries preventive detention is usually a method resorted to in emergencies like war. For instance, in America, the law relating to preventive detention is the Internal Security Act, 1950, which provides that the powers of preventive detention can be exercised only in times of an emergency like war. Similarly, provisions for preventive detention cannot be found in England, except only during an emergency like war. But in Bangladesh, laws regarding preventive detention can be resorted to in times of both peace and emergency which is really disappointing.

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30 (MLR) Mainstream Law Reports vol.2(1997)p-123

31 AIR 1983 SC 1083

Chapter Eight

# The President of Bangladesh

Under parliamentary system of government in our country, although the position of President holds *de jure* importance, its de facto powers are largely ceremonial. Conceptually, the president has the power to appoint the Prime Minister and the Chief Justice under the Constitution of our country. But such power is formal than actual. Practically the President of our country, like the Crown of Britain, holds dignity and grace, not power.

## Status of the President

As head of state, the President takes precedence over all other persons in the state. Article 48(2) clearly says: "The President shall, as Head of State, take precedence over all other persons in the State". He is also the head of the executive. Article 55(4) clearly says that "All executive actions of the Government shall be expressed to be taken in the name of the President." But in reality, under parliamentary system of government, The President is now a largely ceremonial post elected by the parliament. Because the real executive power of the state is exercised by the Prime Minister and her Cabinet. Article 48(3) says "In the exercise of all his functions, save only that of appointing the Prime Minister pursuant to clause (3) of article 56 and the Chief Justice pursuant to clause (1) of article 95, the President shall act in accordance with the advice of the Prime Minister: Provided that the question whether any, and if so what, advice has been tendered by the Prime Minister to the President shall not be enquired into in any court." Thus The Constitution allows the President to act only upon the advice of the Prime Minister. Article 55(2) also states "The executive power of the Republic shall, in accordance with this Constitution, be exercised by or on the authority of the Prime Minister." So, in reality, Prime Minister is the executive head of our country.

## Oath or affirmation

The President is required to make and subscribe in the presence of the Chief Justice of Bangladesh (or in his absence, the senior-most Judge of the Supreme Court), an oath or affirmation that he/she shall protect, preserve and defend the Constitution as follows:[1]

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[1] Third Schedule, the Constitution of The People's Republic of Bangladesh.

I, (name), do solemnly swear (or affirm) that I will faithfully discharge the duties of the office of President of Bangladesh according to law:

That I will bear true faith and allegiance to Bangladesh:

That I will preserve, protect and defend the Constitution:

And that I will do right to all manner of people according to law, without fear or favour, affection or ill-will".

**Immunity of the President**

The President is granted immunity for all his actions. Article 51(1) says: "Without prejudice to the provisions of article 52, the President shall not be answerable in any court for anything done or omitted by him in the exercise or purported exercise of the functions of his office, but this clause shall not prejudice the right of any person to take proceedings against the Government." Article 51(2) says: "During his term of office no criminal proceedings whatsoever shall be instituted or continued against the President in, and no process for his arrest or imprisonment shall issue from, any court." Thus, the President is granted immunity for all his actions by Article 51 of the Constitution and is not answerable to anybody for his actions, and no criminal charges can be brought to the Court against him. It is pertinent to mention that, the only exception to this immunity is if the Parliament seeks to impeach the President.

**Prerogative of mercy**

The President has the prerogative of mercy. Article 49 clearly says: "The President shall have power to grant pardons, reprieves and respites and to remit, suspend or commute any sentence passed by any court, tribunal or other authority." Thus, Article 49 allows the President to grant pardon to anybody, overriding any verdict given by any Court in Bangladesh.

**Eligibility**

The Constitution of Bangladesh under Article 48(4) sets the principle qualifications one must meet to be eligible to the office of the President. A person shall not be qualified for election as President if he-

- is less than thirty-five years of age; or
- is not qualified for election as a member of Parliament; or
- has been removed from the office of President by impeachment under this Constitution.

## Conditions for Presidency

Certain conditions, as per Article 50 of the Constitution, debar any eligible citizen from contesting the presidential elections. The conditions are:

- No person shall hold office as President for more than two terms, whether or not the terms are consecutive. Article 50(2) says: "No person shall hold office as President for more than two terms, whether or not the terms are consecutive."
- The President shall not be a Member of Parliament, and if a Member of Parliament is elected as President he shall vacate his seat in Parliament on the day on which he enters upon his office as President. Article 50(4) clearly says "The President during his term of office shall not be qualified for election as a Member of Parliament, and if a Member of Parliament is elected as President he shall vacate his seat in Parliament on the day on which he enters upon his office as President."

## Tenure of the President

Article 50(1) says: "Subject to the provisions of this Constitution, the President shall hold office for a term of five years from the date on which he enters upon his office: Provided that notwithstanding the expiration of his term the President shall continue to hold office until his successor enters upon office."So, The President shall hold office for a term of five years from the date on which he enters upon his office: even after the expiry of his term the President shall continue to hold office until his successor enters upon his office.

## Resignation and Vacancy

The President is able to resign his office by writing under his hand addressed to the Speaker. Article 50(3) says "The President may resign his office by writing under his hand addressed to the Speaker". If a vacancy occurs in the office of President or if the President is unable to discharge the functions of his office on account of absence, illness or any other cause the Speaker shall discharge his functions. Article 54 says clearly "If a vacancy occurs in the office of President or if the President is unable to discharge the functions of his office on account of absence, illness or any other cause the Speaker shall discharge those functions until a President is elected or until the President resumes the functions of his office, as the case may be." This Article was used during the ascension of Speaker Jamiruddin Sircar as the Acting President of the State following the resignation of former President A.

Q. M. Badruddoza Chowdhury, and when President Zillur Rahman could not discharge his duties due to his illness, and later, death.

Since Bangladesh is a parliamentary system, it does not have a Vice President. However, during the presidential system of governance, Bangladesh had a Vice President who would assume the President's role in his absence; the post was abolished by the twelfth amendment to the Constitution in 1991.

**Appointments by President**

The President can appoint the following offices:

- By Article 56 (2), the Prime Minister and his/her Cabinet, with the limitation that the Prime Minister must be a parliamentarian who holds the confidence of the majority of the House. The President can also dismiss a member of Cabinet upon the request of the Prime Minister.
- By Article 95, the Chief Justice and other Judges of the Court[2].
- By Article 118, the Bangladesh Election Commission, including the Chief Election Commissioner[3].

**Election of the President**

The system of election of President in Bangladesh underwent modifications from time to time as Bangladesh has experienced both the presidential and parliamentary forms of government since independence. As per the 1972 Constitution, the President was to be elected by members of the JATIYA SANGSAD in a poll by secret ballot as provided for in the second schedule of the Constitution. Later, the Fourth Amendment to the Constitution provided that the President would be elected in accordance with the law by direct election. The system of electing the President was made indirect by the Constitution (12th Amendment) Act 1991 under the parliamentary system. At present, the President is elected by the members of the Parliament in an open ballot for five years.[4]

**Impeachment of the President**

Impeachment of the President is a formal process in which the President is accused under Article 52 of the Constitution, the

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[2] Article 95(1) clearly says: The Chief Justice shall be appointed by the President, and the other Judges shall be appointed by the President after consultation with the Chief Justice.

[3] Article 118(1) clearly says: the appointment of the Chief Election Commissioner and other Election Commissioners (if any) shall, subject to the provisions of any law made in that behalf, be made by the President.

[4] For details, See, Banglapedia

consequence of which may include the removal of President from his office.

**Impeachable offenses**

Under Article 52 of the Constitution of Bangladesh, the President may be impeached only for 'violating the Constitution or grave misconduct'. Article 52 (1) clearly says "The President may be impeached on a charge of violating this Constitution or of grave misconduct".

**Process of Impeachment of the President**

i. The impeachment charge for violating the Constitution or grave misconduct against President must be preferred by a notice of motion containing the particulars of the charge signed by a majority of the total number of members of Parliament and delivered to the Speaker.

ii. The motion shall be debated between the 14th and 30th day after delivery of the notice to the Speaker, if parliament is not in session, the Speaker shall summon Parliament.[5]

iii. The conduct of the President may be referred by Parliament to any court, tribunal or body appointed or designated by Parliament for the investigation of charge under this article.[6]

iv. The President has the right to appear and to be represented during the consideration of the charge.[7]

v. If after the consideration of the charge a resolution is passed by Parliament by the votes of not less than two thirds of the total number of members declaring that the charge has been substantiated, the President shall vacate his office on the date on which the resolution is passed.[8]

vi. Where the Speaker is exercising the functions of the President under article 54 the provisions of this article shall apply subject to the modifications that the reference to the Speaker in clause (1) of Article 52 shall be construed as a reference to the Deputy Speaker, and that the reference in clause (4) of Article 52 to the vacation by the President of his office shall be construed as a reference to the vacation by the Speaker of his office as Speaker; and on the passing

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[5] Article 52(1), The Constitution of The People's Republic of Bangladesh
[6] Article 52(2), Ibid
[7] Article 52(3), Ibid
[8] Article 52(4), Ibid

of a resolution such as is referred to in clause (4) of Article 52 the Speaker shall cease to exercise the functions of President.[9]

**Removal of President on ground of incapacity**

Under Article 53 of the Constitution, the President of Bangladesh may be removed on the ground of physical or mental incapacity.

**Procedure:**

1. In this case, first of all, a notice signed by a majority of the total number of members of Parliament, is delivered to the Speaker setting out particulars of the alleged incapacity. Article 53 (1) clearly says: "The President may be removed from office on the ground of physical or mental incapacity on a motion of which notice, signed by a majority of the total number of members of Parliament, is delivered to the Speaker, setting out particulars of the alleged incapacity."
2. On receipt of the notice the Speaker shall forthwith to summon the Parliament if it is not in session and shall call for a resolution constituting a medical board. As soon as the medical board is constituted, the Speaker transmit a copy of the notice together with a letter of request signed by the Speaker that the President submit himself within a period of ten days from the date of the request to an examination by the medical board.[10]
3. The motion for removal shall not be put to the vote earlier than fourteen not later than thirty days after notice of the motion is delivered to the Speaker, and if it is again necessary to summon Parliament in order to enable the motion to be made within that period the Speaker shall summon Parliament.[11]
4. The President shall have the right to appear and to be represented during the consideration of the motion.[12]
5. If the President has not submitted himself to an examination by the Medical Board before the motion is made in Parliament, the motion may be put to the vote, and if it is passed by the votes of not less than two thirds of the total number of members of Parliament, the President shall vacate his office on the date on which the motion is passed.[13]

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[9] Article 52(5), Ibid
[10] Article 53 , Ibid
[11] Article 53 (3), Ibid
[12] Article 53 (4), Ibid
[13] Article 53 (5), Ibid

6. If before the motion for removal is made in Parliament, the President has submitted himself to an examination by the Board, the motion shall not be put to the vote until the Board has been given an opportunity of reporting its opinion to Parliament.[14]
7. If after consideration by Parliament of the motion and of the report of the Medical Board which has to submit its report within seven days of the examination held, the motion is passed by votes of not less than two thirds of the total number of members of Parliament, the President has to vacate his office on the date on which the resolution is passed.[15]

**Power and Function of the President**

As Head of State, the President takes precedence over all other persons in the State, and shall exercise the powers and perform the duties conferred and imposed on him by this Constitution and by any other law.

The powers and functions exercised and performed by the President may be classified as executive, legislative, judicial, military, diplomatic and emergency powers.

**Executive Power of the President**

All executive actions of the government are to be expressed and taken in the name of the President.[16] The President by rules specifies the manner in which orders and other instruments made in his name shall be attested or authenticated, and the validity of any order or instrument so attested or authenticated cannot be questioned in any court on the ground that it was not duly made or executed.[17] All contracts and deeds made in exercise of the executive authority of the Republic shall be expressed to be made by the President, and shall be executed on behalf of the President by such person and in such manner as he may direct or authorize.[18] He makes rules for the allocation and transaction of the business of the Government.[19]

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[14] Article 53 (6), Ibid

[15] Article 53 (7) says "If after consideration by Parliament of the motion and of the report of the Board (which shall be submitted within seven days of the examination held pursuant to clause (2) and if not so submitted shall be dispensed with) the motion is passed by the votes of not less than two thirds of the total number of members of Parliament, the President shall vacate his office on the date on which the resolution is passed."

[16] Article 55(4) says "All executive actions of the Government shall be expressed to be taken in the name of the President"

[17] Article 55(5), The Constitution of The People's Republic of Bangladesh

[18] Article 145, Ibid

[19] Article 55(6) says "The President shall make rules for the allocation and transaction of the business of the Government"

**Appointment power**

The President appoints Prime Minister, the person most likely to command the support of the majority in the Parliament. The President then appoints the other Ministers and Ministers of state and Deputy Ministers. (Article 56(2))

The President is responsible for making a wide variety of appointments. These include:

- The Chief Justice, other judges of the Supreme Court (Article 95)
- The Attorney General
- The Comptroller and Auditor General
- The Chief Election Commissioner and other Election Commissioners
- The Chairman and other Members of the Public Service Commission.

**Financial Power**

No Money Bill, or any Bill which involves expenditure from public moneys, can be introduced into Parliament except on the recommendation of the President.[20] Similarly, No demand for a grant shall be made except on the recommendation of the President.[21] The President contains power to authorize expenditure from the Consolidated Fund for supplementary or excess grants.[22] If Parliament in any financial year fails to make any grant the President may, upon the advice of the Prime Minister, by order, authorize the withdrawal from the Consolidated Fund moneys necessary to meet expenditure mentioned in the financial statement for that year for a period not exceeding sixty days in that year.[23]

**Legislative Power**

Article 79 of the Constitution of India clearly says "There shall be a Parliament for the Union which shall consist of the President and two Houses to be known respectively as the Council of States and the House of the People." There is no such provision regarding President in our Constitution. Nevertheless some legislative powers are vested in the President which are as under:

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[20] Article 82, The Constitution of The People's Republic of Bangladesh
[21] Article 89(3), Ibid
[22] Article 91, Ibid
[23] Article 92(3), Ibid

i. Parliament shall be summoned, prorogued and dissolved by the President by public notification, and when summoning Parliament the President shall specify the time and place of the first meeting. (Article 72)

ii. The President may address Parliament and may send message thereto. (Article 73)

iii. The President has the right of opening address. (Article 73(2))

iv. The President has the power to assent to bill or may return a bill to the Parliament without assent and with a message for reconsideration of the Bill (Article 80).

v. Under Article 93 the President has the power to legislate by ordinance during recess of Parliament. It is also called the law making power of the president. According to this Article, at any time when Parliament stands dissolved or is not in session, if the President is satisfied that circumstances exist which render immediate action necessary, he may make and promulgate such Ordinances as the circumstances appear to him to require, and any Ordinance so made shall, as from its promulgation have the like force of law as an Act of Parliament; but such ordinance cannot be made, which could not lawfully be made under this Constitution by Act of Parliament; or for altering or repealing any provision of this Constitution; or continuing in force any provision of an Ordinance previously made. An Ordinance shall be laid before Parliament at its first meeting following the promulgation of the Ordinance and shall, unless it is earlier repealed, cease to have effect at the expiration of thirty days after it is so laid or, if a resolution disapproving of the Ordinance is passed by Parliament before such expiration, upon the passing of the resolution.

**Judicial Power**

Article 49 empowers the President of our country to grant pardons, reprieves and respites and to remit, suspend or commute any sentence passed by any court, tribunal or other authority.

**Military Power**

The constitution vests the supreme command of the Defense Forces in the President, but he is required to exercise that power in accordance with law. Article 61 (1) clearly says “The supreme command of the defense services of Bangladesh shall vest in the President and the exercise thereof shall be regulated by law”. Parliament has exclusive Legislative Power relating to defense forces. It means that though the

President may have the power to take action as to the matters relating to defense forces. It is Parliament that is to regulate or control the exercise of such powers. Article 62(1) clearly says: "(1) Parliament shall by law provide for regulating –

a. the raising and maintaining of the defence services of Bangladesh and of their reserves;

b. the grant of commissions therein;

c. the appointment of chiefs of staff of the defence services, and their salaries and allowances ; and

d. the discipline and other matters relating to those services and reserves."

**Diplomatic Power**

All treaties with foreign countries are submitted to the President and he causes them to be laid before Parliament.[24] The Prime Minister must keep the President informed on matters of domestic and foreign policy, and submit for the consideration of the Cabinet any matter which the President may request him to refer to it.[25] The President receives the diplomatic representatives from other countries and sends such representatives from our country to them.

**Emergency Power**

The President may issue a Proclamation of Emergency on any of the following grounds:

1. War, or
2. External aggression, or
3. Internal disturbance.

Article 141A clearly says "If the President is satisfied that a grave emergency exists in which the security or economic life of Bangladesh, or any part thereof, is threatened by war or external aggression or internal disturbance, he may issue a Proclamation of Emergency for one hundred twenty days Provided that such Proclamation shall require for its validity the prior counter signature of the Prime Minister."

**Duties of the President**

The primary duty of the President is to preserve, protect and defend the constitution of Bangladesh and do right to all manner of people according to law, without fear or favour, affection or ill-will as made

[24] Article 145A, Ibid
[25] Article 48(5), Ibid

part of his oath (Third Schedule). He is liable for impeachment for violation of the constitution or grave misconduct (Article 52).

**Is the President bound by Prime Minister's Advice?**

Article 48(3) says: "In the exercise of all his functions, save only that of appointing the Prime Minister pursuant to clause (3) of article 56 and the Chief Justice pursuant to clause (1) of article 95, the President shall act in accordance with the advice of the Prime Minister: Provided that the question whether any, and if so what, advice has been tendered by the Prime Minister to the President shall not be enquired into in any court."

From the above Article it is clear that the President is constitutionally bound, in the exercise of all his functions[26], to act in accordance with the advice of the Prime Minister.

Along with this, under Article 52(1), the President may be impeached on a charge of violating the Constitution[27].

So, if the President violates Article 48(3) then a charge of violating the Constitution may come against him and he may be impeached by Parliament. Therefore the President must obey, in the exercise of all his functions, the advice of the Prime Minister otherwise he may be impeached by Parliament under Article 52(1) on a charge of violating Article 48(3) of our Constitution.

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[26] Since the power of the President to appoint the Prime Minister and the Chief Justice is formal than actual, which are in reality recognition of fait accompli.

[27] Article 52(1) clearly says "The President may be impeached on a charge of violating this Constitution or of grave misconduct, preferred by a notice of motion signed by a majority of the total number of members of Parliament and delivered to the Speaker"

Chapter Nine

# Prime Minister and the Cabinet

In the Parliamentary form of government of our country, the Prime Minister occupies the central position. He can be called the ruler-of the state. He is the head of the Cabinet[1] and all the powers of the President are actually exercised by him. He can rule the country in a way which he thinks the best. He is the architect of the fate of state. In the words of Nehru "The Prime Minister is the king pin of the Government". According to Laski "The Prime Minister is central to the formation of the Cabinet, central to its life, central to its death."

**Prime Minister and the Cabinet**

According to the Constitution the Prime Minister is appointed by the President based upon the result of the electorates choice in parliamentary general election held by the Election Commission. Article 56 (2) clearly says "The appointments of the Prime Minister and other Ministers and of the Ministers of State and Deputy Ministers, shall be made by the President".

Theoretically, the Prime Minister is appointed by the President but practically, while doing so the President is not having a free hand. Only that person can be appointed to the office of the Prime-Minister who appears to command the support of the majority of the members of Parliament. Article 56(3) clearly says: "The President shall appoint as Prime Minister the member of Parliament who appears to him to command the support of the majority of the members of Parliament." Usually, political parties go to the parliamentary polls with a clear choice of their leaders. For the most part, the voters know, if and when a particular party wins a majority in the parliament, who is likely to be-the Prime Minister.

Therefore, after the General Election the President invites the leader of the party which has gained majority in the Parliament to form the Government. If no political party gets an absolute majority in the Parliament even then the President is not free to appoint anybody the Prime-Minister. Under such circumstances only that person will be invited to form the Government who can seek the co-operation of the

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[1] Cabinet is the ultimate policy and decision making organ of the executive government of our country.

majority of members in the Parliament & can prove his majority on the floor of Parliament within the stipulated period.

## Composition of the Cabinet

According to Our Constitution, There shall be a Cabinet for Bangladesh having the Prime Minister at its head and comprising also such other Ministers as the Prime Minister may from time to time designate.[2] The cabinet is composed of ministers selected by the prime minister and appointed by the president[3]. At least 90% of the ministers must be MPs. The other 10% may be non-MP experts or "technocrats" who are not otherwise disqualified from being elected MPs. Article 56(2) clearly says: "not less than nine tenths of their number shall be appointed from among members of Parliament and not more than one tenth of their number may be chosen from among persons qualified for election as members of Parliament."

## Status of the Prime Minister in the Cabinet

The Prime Minister is the maker of the Cabinet. The Cabinet has no existence without the Prime Minister. He can make or unmake a Cabinet. The Cabinet performs all its functions under the control & guidance of the Prime Minister, therefore he is called the keystone of the Cabinet arch.

i. The Prime Minister is the leader of the parliamentary party where the party commands an absolute majority in the Parliament.

ii. He has the power of selecting other ministers and also of advising the President to dismiss any one of them individually or require any one of them to resign. Virtually the Ministers hold office at the pleasure of the Prime Minister.

iii. The Prime Minister takes decisions with regard to assignment of various ministries to individual ministers. He may transfer a Minister from one Department to another.

iv. As Chairperson of the Cabinet, he summons its meetings and presides over them.

v. The resignation or death of the Prime minister dissolves the Cabinet. In case of a Minister such happening only creates a vacancy.

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[2] The Constitution of The People's Republic of Bangladesh, Article 55(1)

[3] Article 56(1) clearly says "There shall be a Prime Minister, and such other Ministers, Ministers of State and Deputy Ministers as may be determined by the Prime Minister.

vi. The Prime Minister stands between the President and the Cabinet. Communications relating to policy are made only through the Prime Minister.

vii. The Prime Minister is responsible for ensuring supervision and coordination over all other departments of the Government.

viii. In a word, Under the Constitution of Bangladesh, The Prime minister is the key stone of the cabinet arch. If he or she resigns, the entire Cabinet goes with him or her.

**Power and Function of the Prime Minister**

**i) Formation of the Council of Ministers-**

After assuming office, Prime Minister forms the Cabinet. He prepares a list of ministers according to his sweet will. He has a free hand in the selection of ministers. Article 56(1) says "There shall be a Prime Minister, and such other Ministers, Ministers of State and Deputy Ministers as may be determined by the Prime Minister."

**ii) Removal of the Ministers**

Article 58(2) clearly says "The Prime Minister may at any time request a Minister to resign, and if such Minister fails to comply with the request, may advise the President to terminate the appointment of such Minister." So, the ministers remain in office during the pleasure of the Prime Minister. If the Prime Minister is not satisfied with the working of a minister or the minister does not run the department in accordance with the wishes of the Prime Minister, he can ask him to quit the office & can appoint someone else in his place.

**iii)Leadership of the Cabinet**

The Prime Minister is the leader of the Cabinet. Article 55(1) says "There shall be a Cabinet for Bangladesh having the Prime Minister at its head and comprising also such other Ministers as the Prime Minister may from time to time designate."The Cabinet functions under the control of the Prime Minister. He can call the meetings of Cabinet whenever he likes. The Prime Minister prepares the agenda for the meeting as well as controls it. He presides over the Cabinet meetings. All the decisions in Cabinet meeting are taken according to the wishes of the Prime of Minister.

iv)**Link between the President & the Cabinet** –

Article 48(5) clearly says "The Prime Minister shall keep the President informed on matters of domestic and foreign policy, and submit for the consideration of the Cabinet any matter which the President may

request him to refer to it." Therefore, the Prime Minister is the link between the President and the Cabinet. It is the duty of the Prime Minister to convey the decisions of the Cabinet to the President. No minister can discuss a particular problem with the President without the permission of the Prime Minister. The President can demand information from the Prime Minister regarding the working of administration.

**Executive Power**

The real Executive Powers of the government of the Republic of Bangladesh are in the hands of the Prime Minister and his Council of Ministers. The appointment of the ministers, high officials of the government, and all the functions of judicial and foreign affairs are guided by the advice and decision of the Prime Minister. In fact all the executive functions are performed by him/her.[4]

**Legislative function**

Under his/her leadership the parliament creates laws of the country. The activities of the Assembly are guided centering round the Prime Minister.

**Financial function**

At the instance and advice of the Prime Minister the finance Minister prepares and places the yearly budget of income and expenditure.

**Leadership of the Cabinet**

The Prime Minister leads the Cabinet in the Parliament. The ministers answer the question while the Prime Minister explains the policy & decision of the Cabinet to the Parliament. All important statements on behalf of the Cabinet are made by the Prime Minister in the Parliament.

**Sole adviser of the President**

Article 48(3) says "In the exercise of all his functions, save only that of appointing the Prime Minister pursuant to clause (3) of article 56 and the Chief Justice pursuant to clause (1) of article 95, the President shall act in accordance with the advice of the Prime Minister."The Prime Minister is the chief adviser of the President. The President seeks the advice of the Prime Minister in all matters of the state. The Prime Minister informs the President regarding all the decisions taken by the Cabinet.

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[4] Article 55 (2) says "The executive power of the Republic shall, in accordance with this Constitution, be exercised by or on the authority of the Prime Minister".

## Leader of the Parliament

The Prime-Minister is the leader of the Parliament. He derives this position from his position as the leader of the majority of the members of Parliament. The Parliament always depends upon the policy & guidance of the Prime Minister for facing any problem. All the important decisions in the Parliament are taken according to the wishes of the Parliament.

## Leader of the Nation

A general election in our country means the election of the Prime Minister. The Prime Minister is the leader of the nation. The President is the head of the state & the Prime Minister is the head of Government. Article 55(2) clearly says "The executive power of the Republic shall, in accordance with this Constitution, be exercised by or on the authority of the Prime Minister."

## Collective Responsibility of Ministers

According to Individual Ministerial Responsibility:

- Ministers are individually responsible for the work of their departments and are answerable to Parliament for all their departments' activities.
- They are expected to accept responsibility for any failure in administration, any injustice to an individual or any aspect of policy which may be criticized in parliament, whether personally or not.

Cabinet collective responsibility is not the same as individual ministerial responsibility. Article 55(3) specifically lays down that the Cabinet shall be collectively responsible to Parliament. It means that the Cabinet is responsible to Parliament for the general conduct of the affairs of the government. All Ministers shall stand or fall together and the government is carried on as a unity. The Ministers work as a team, the decision of the Cabinet is the joint decision of all Ministers and the Cabinet commands confidence of Parliament as a body. Inside the cabinet, the Ministers may express their individual views freely, but once the decision is taken, all the Ministers are to support it and it is absurd for a Minister even to give an impression that he did not agree to it. He cannot disown responsibility for any cabinet decision so long as he remains a Minister. If a Minister is morally convinced that a decision taken is absolutely wrong and he cannot support it, he has only the option of tendering resignation. If Parliament passes a vote of no-confidence, the Prime Minister has to resign and with him the entire Council of Ministers falls.[5]

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[5] Mahmudul Islam, Constitutional Law of Bangladesh, 3rd Ed, Mullik Brothers, Pp-411-412

## The Cabinet

The Cabinet of Bangladesh is the chief executive body of the People's Republic of Bangladesh. This is the collective decision-making body of the government under the Office of the Prime Minister, composed of the Prime Minister and some Cabinet Ministers, and State Ministers.

## Functions of the Cabinet

Basically, the Cabinet has administrative functions. But it also performs some functions in the legislative field. The general policy of administration is enunciated by the Cabinet through discussions in the meeting held every week. The Cabinet reviews the success and failure of the implementation of the policy adopted by it. The Cabinet has supreme control over all executive matters and guides the national executive and administrative agencies. The Cabinet is to formulate the legislative programs for each session of the Parliament. The various items of the Programs are then introduced in the parliament as government measures. These are advocated, explained and defended on the floor of the parliament by members of the cabinet. The preparation of the national budget is the function of the Finance Minister. He consults the Prime Minister and the Cabinet in preparing the budget. In fact, the cabinet is responsible for the national budget. The members of the cabinet have to answer the questions put to them by members of parliament on various issues of administration and general welfare of the people. Thus the cabinet is "the steering wheel of the ship of the state" may be treated as the keystone of the political and administrative arch.[6]

## Tenure of office of Prime Minister

The office of the Prime Minister becomes vacant

a. if he resigns from office at any time by placing his resignation in the hands of the President; or

b. if he ceases to be a member of Parliament.[7]

Under Article 57 (2-3)[8] it has been also said that If the Prime Minister ceases to retain the support of a majority of the members of Parliament, he shall either resign his office or advise the President in writing to dissolve Parliament, and if he so advises the President shall, if he is satisfied that no other member of Parliament commands the support of

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[6] For details, see, Ahmed, Ah, Theory and Practice of Bangladesh Constitution. Pp124-126

[7] The Constitution of The People's Republic of Bangladesh, Article 57

[8] Ibid

the majority of the members of Parliament, dissolve Parliament accordingly. Provided that nothing in this article shall disqualify Prime Minister for holding office until his successor has entered upon office.

**Tenure of office of Ministers**

According to Article 58[9] the office of a Minister other than the Prime Minister becomes vacant

a. if he resigns from office by placing his resignation in the hands of the Prime Minister for submission to the President;

b. if he ceases to be a member of Parliament, but this shall not be applicable to a Minister chosen under the proviso to article 56(2);

c. if the President, pursuant to the provisions of clause (2), so directs; or

d. as provided in clause (4).

2. The Prime Minister may at any time request a Minister to resign, and if such Minister fails to comply with the request, may advise the President to terminate the appointment of such Minister.

3. Nothing in sub clauses (a), (b) and (d) of clause (1) shall disqualify a Minister for holding office during any period in which Parliament stands dissolved.

4. If the Prime Minister resigns from or ceases to hold office each of the other Ministers shall be deemed also to have resigned from office but shall, subject to the provisions of this Chapter, continue to hold office until his successor has entered upon office.

5. In this article Minister includes Minister of State and Deputy Minister.

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[9] Ibid

Chapter Ten

# The Legislature

The legislature is one of the three organs of government. This organ creates necessary laws for the country. According to our Constitution, the Legislature is introduced for the functions of the legislative organ of Bangladesh. There is one house parliament in our state which is 'House of the nation' commonly known as 'Jatiya Sangshad'.

**Composition of the Parliament**

Article 65 (2) clearly states that "Parliament shall consist of three hundred members to be elected in accordance with law from single territorial constituencies by direct election and, for so long as clause (3) is effective, the members provided for in that clause; the members shall be designated as Members of Parliament" . Thus the constitution of Bangladesh envisages a unicameral legislature comprising of 300 directly elected members from single territorial constituencies.

In addition to 300 general members there is a provision of women's reserved seats in parliament. These women are to be 'elected' by the 300 general MPs.

Initially there was a quota of 15 women's reserved seats for a period of 10 years. The quota was later increased to 30 seats through the tenth amendment of the constitution in 1990, and 45 through the fourteenth amendment of the constitution in 2004.

Changing the practice of the majority party electing all the women's reserved seats from its own members, the fourteenth amendment provided for proportional distribution of women's reserved seats among the parties represented in parliament.[1] The recently passed fifteenth amendment of the constitution has increased the number of women's reserved seats to 50. This provision for 50 reserved women seats will continue for ten years from the beginning of the 9th Parliament.

**Art. 65(3) states t**hat

"Until the dissolution of Parliament occurring next after the expiration of the period of ten years beginning from the date of the first meeting

[1] For details, Rounaq Jahan, The Parliament of Bangladesh Representation and Accountability, CPDCMI Working Paper 2

of the Parliament next after the Parliament in existence at the time of the commencement of the Constitution (Fourteenth Amendment) Act, 2004, there shall be reserved fifty seats exclusively for women members and they will be elected by the aforesaid members in accordance with law on the basis of procedure of proportional representation in the Parliament through single transferable vote: Provided that nothing in this clause shall be deemed to prevent a woman from being elected to any of the seats provided for in clause (2) of this Article."

**Qualifications and Disqualifications for election to Parliament**

There are some conditions which qualify and disqualify a person from taking part in the parliamentary elections. To qualify, candidates must be citizens of Bangladesh and at least 25 years of age. Article 66(1) clearly says

"A person shall subject to the provisions of clause (2), be qualified to be elected as, and to be, a Member of Parliament if he is a citizen of Bangladesh and has attained the age of twenty five years."

Article 66(2-6) clearly says (2) A person is disqualified for being an MP if he/she

a. is declared by a competent court to be of unsound mind;
b. is an undischarged solvent;
c. acquires the citizenship of, or affirms or acknowledges allegiance to a foreign state;
d. has been, on conviction for a criminal offence involving moral turpitude, sentenced to imprisonment for a term of not less than two years, unless a period of five years has elapsed since his release;
e. has been convicted of any offence under the Bangladesh Collaborators (Special Tribunals) Order, 1972; and,
f. holds any office of profit in the service of the Republic other than an office which is declared by law not to have disqualified its holder; or
g. is disqualified for such election by or under any law.

(2A) notwithstanding anything contained in sub-clause (c) of clause (2) of this article, if any person being a citizen of Bangladesh by birth acquires the citizenship of a foreign State and thereafter such person-

h. in the case of dual citizenship, gives up the foreign citizenship ; or
(ii) in other cases, again accepts the citizenship of Bangladesh-

for the purposes of this article, he shall not be deemed to acquire the citizenship of a foreign State.

3. For the purposes of this article, a person shall not be deemed to hold an office of profit in the service of the Republic by reason only that he is the President, the Prime Minister, the Speaker, the Deputy Speaker, a Minister, Minister of State or Deputy Minister.
4. If any dispute arises as to whether a member of Parliament has, after his election, become subject to any of the disqualifications mentioned in clause (2) or as to whether a member of Parliament should vacate his seat pursuant to article 70, the dispute shall be referred to the Election Commission to hear and determine it and the decision of the Commission on such reference shall be final.
5. Parliament may, by law, make such provision as it deems necessary for empowering the Election Commission to give full effect to the provisions of clause (4).

**Conditions for Vacating Seats**

Article 67 clearly says "(1) A member of Parliament shall vacate his seat

a. if fails, within the period of ninety days from the date of the first meeting of Parliament after his election, to make and subscribe the oath or affirmation prescribed for a member of Parliament in the Third Schedule:
Provided that the Speaker may, before the expiration of that period, for good cause extend it;

b. if he is absent from Parliament, without the leave of Parliament, for ninety consecutive sitting days;

c. upon a dissolution of Parliament;

d. if he has incurred a disqualification under clause (2) of article 66; or

e. in the circumstances specified in article 70."

(2) A Member of Parliament may resign his seat by writing under his hand addressed to the Speaker, and the seat shall become vacant when the writing is received by the Speaker or, if the office of Speaker is vacant or the Speaker is for any reason unable to perform his functions, by the Deputy Speaker.

Thus, the constitution elaborates situations when a seat may be vacated (Article 67). These include among others: (a) failure to take oath within 90 days; (b) being absent from parliamentary sittings for 90 consecutive days without getting prior approval; (c) upon dissolution

of parliament; (d) resignation; and, (e) in the circumstances specified in Article 70.

**Bar against Double Membership**

Article 71 clearly says:

1. No person shall at the same time be a Member of Parliament in respect of two or more constituencies.
2. Nothing in clause (1) shall prevent a person from being at the same time a candidate for two or more constituencies, but in the event of his being elected for more than one.
    a. within thirty days after his last election the person elected shall deliver to the Chief Election Commissioner a signed declaration specifying the constituency which he wishes to represent, and the seats of the other constituencies for which he was elected shall thereupon fall vacant;
    b. if the person elected fails to comply with sub clause (a) all the seats for which he was elected shall fall vacant; and
    c. the person elected shall not make or subscribe the oath or affirmation of a member of Parliament until the foregoing provisions of this clause, so far as applicable, have been complied with.

Thus, the constitution bars members from representing more than one constituency. It, nevertheless, allows candidates to run for elections in two or more constituencies but once elected, the candidate has to indicate within 30 days which constituency he/she wants to represent. All other winning seats then fall vacant, and the elected person can appoint a member to represent the constituencies where he/she may have been elected from.

**Sessions and Quorum**

Article 72 specifies that a period exceeding 60 days will not intervene between two sessions of parliament. After the declaration of the results of general elections, the parliament is to be summoned within 30 days and unless it is dissolved by the President, its tenure is set for five years from the date of its first meeting. In case the country is engaged in war, the period may be extended by an act of parliament for not more than one year. All decisions in the parliament are to be taken by a majority of the votes of the members present and voting, but the person presiding will not cast his/her vote except if there is an equality of votes. The constitution requires presence of at least 60 members to constitute a quorum for parliament.

## Privileges and Immunities

The constitution grants certain privileges and immunities to the parliament and its members. The proceedings of the parliament cannot be questioned in any court. MPs are not liable to any court in respect to statement or vote in the parliament or in any committee. An officer of the parliament, who has been given authority for the regulation of procedure, the conduct of business or the maintenance of order in the Jatiya Sangsad, cannot be questioned by any court in relation to the exercise of such powers.

Article 78 clearly says:

1. The validity of the proceedings in Parliament shall not be questioned in any court.
2. A member or officer of Parliament in whom powers are vested for the regulation of procedure, the conduct of business or the maintenance of order in Parliament, shall not in relation to the exercise by him of any such powers be subject to the jurisdiction of any court.
3. A Member of Parliament shall not be liable to proceedings in any court in respect of anything said, or any vote given, by him in Parliament or in any committee thereof.
4. A person shall not be liable to proceedings in any court in respect of the publication by or under the authority of Parliament of any report, paper, vote or proceeding.
5. Subject to this article, the privileges of Parliament and of its committees and member may be determined by Act of Parliament.

## Speaker and Deputy Speaker

Speaker is the most powerful institution of the parliament who is not only important for ensuring the orderly conduct of the Parliament, but also for maintaining its public image as a representative institution.

## Election

Parliament at the first sitting after any general election elects from among its members a Speaker and a Deputy Speaker, and if either office becomes vacant shall within seven days or, if Parliament is not then sitting, at its first meeting thereafter, elect one of its members to fill the vacancy.(Article 74)

## Vacation of Office of the Speaker or Deputy Speaker

According to Article74 (2), The Speaker or Deputy Speaker shall vacate his office

a. if he ceases to be a Member of Parliament;

b. if he becomes a Minister;

c. if Parliament passes a resolution (after not less than fourteen days' notice has been given of the intention to move the resolution) supported by the votes of a majority of all the members thereof, requiring his removal from office;

d. if he resigns his office by writing under his hand delivered to the President;

e. if after a general election another member enters upon that office; or

f. in the case of the Deputy Speaker, if he enters upon the office of Speaker.

While the office of the Speaker is vacant or the Speaker is acting as President, or if it is determined by Parliament that the Speaker is otherwise unable to perform the functions of his office, those functions shall be performed by the Deputy Speaker or, if the office of the Deputy Speaker is vacant, by such member of Parliament as may be determined by or under the rules of procedure of Parliament; and during the absence of the Speaker from any sitting of Parliament the Deputy Speaker or, if he also is absent, such person as may be determined by or under the rules of procedure, shall act as Speaker.

**Right to self defense**

The Speaker or the Deputy Speaker, as the case may be, shall have the right to speak in, and otherwise to take part in, the proceedings of Parliament while any resolution for his removal from office is under consideration in Parliament, and shall be entitled to vote but only as a member.

**Right to Continue Office until Successor comes**

Article 74(6) clearly says that Notwithstanding the provisions of clause (2) of Article 74 the Speaker or, as the case may be, the Deputy Speaker, shall be deemed to continue to hold office until his successor has entered upon office.

**Standing committees of Parliament**

Article 76 has said about standing committees of Parliament. It says "Parliament shall appoint from among its members the following standing committees, that is to say

a. a public accounts committee;

b. committee of privileges; and

c. such other standing committees as the rules of procedure of Parliament require.

2. In addition to the committees referred to in clause (1), Parliament shall appoint other standing committees, and a committee so appointed may, subject to this Constitution and to any other law
   a. examine draft Bills and other legislative proposals;
   b. review the enforcement of laws and propose measures for such enforcement;
   c. in relation to any matter referred to it by Parliament as a matter of public importance, investigate or inquire into the activities or administration of a Ministry and may require it to furnish, through an authorised representative, relevant information and to answer questions, orally or in writing;
   d. perform any other function assigned to it by Parliament."

Thus, Article 76 of the constitution calls for establishing three standing committees that is to say- (a) a public accounts committee (PAC); (b) committee of privileges (CP); and (c) such other standing committees as the rules of procedure of Parliament require.

The constitution describes the power of the standing committees to:

a. examine draft Bills and other legislative proposals;

b. review the enforcement of laws;

c. investigate or inquire into the activities or administration of a minist ry;

and;

d. perform any other function assigned to it by Parliament.

**Debate on Article 70**

Article 70 says "A person elected as a Member of Parliament at an election at which he was nominated as a candidate by a political party shall vacate his seat if he

a. resigns from that party; or

b. votes in Parliament against that party;

but shall not thereby be disqualified for subsequent election as a member of Parliament.

This Article stipulates that a member will vacate seat if he resigns or votes against the party that nominated him.

It further explains that if a member abstains from voting or remains absent from parliament ignoring the direction of the party, he shall be

deemed to have voted against that party. It is pertinent to mention here that Article 70 had been inserted by way of amendment to the draft Constitution. This amendment was proposed by Mr. Nurul Haque. In support of his argument, he argued that such kind of provision will facilitate the functioning of democracy. But Mr. Sengupta strongly argued against this Provision for automatic vacancy of member's seat for voting against his political party. Thus, Article 70 has been a contested issue for many years. Some observers have advocated for removing this provision since they consider it as a restriction on MPs' freedom of expression, but others have cautioned that its complete removal may lead to government instability. The majority of key informants interviewed for this study by the CPD-CMI team were in favour of relaxing the stringent conditions of Article 70. They argued that an MP should be allowed to speak and vote against his party except in a no-confidence voting[2]. However, no amendment of the constitution was made to relax the party control on MPs provided by Article 70.

## Article 70 and the freedom of expression of the Members of Parliament: An appraisal

Democracies, human rights, freedom of expression and conscience have been guaranteed in our Constitution. If we look at the Article 11 of our Constitution, it clearly states that: "The Republic shall be a democracy in which fundamental human rights and freedoms and respect for the dignity and worth of the human person shall be guaranteed, and in which effective participation by the people through their elected representatives in administration at all levels shall be ensured."Article 39(1) of our Constitution talks of a fundamental right by which freedom of thought and conscience is guaranteed.

However, there are few Articles in our constitution which are very controversial in nature, and are inconsistent with the basic fabric of democracy. For example, when we look at the Article 70 of our constitution, it says that a member of parliament will lose his membership if he votes in Parliament against his party.

Article 70 says: "a person elected as a Member of Parliament at an election at which he was nominated as a candidate by a political party

[2] For details, 4422-the-parliament-of-bangladesh - Course Hero, Retrieved https://www.coursehero.com/file/11854436/4422-the-parliament-of-bangladesh/

shall vacate his seat if he resigns from that party or votes in Parliament against the party." The statutory explanation of this Article says that a parliament member shall be deemed to have voted against that party if he/she, being present in parliament, abstains from voting, or absents himself from any sitting of parliament, ignoring the direction of the party that nominated him[3].

We know in the parliamentary democracy, parliament is the repository of the state and of course the place where open debate takes place so that different opinions come from the members of parliament. They have right to oppose any bill which may not serve the peoples' interest. They have the right to abstain from voting if they desire. But in our country, if Members of Parliament fail to comply with the requirement of Article 70(1) of the constitution, their memberships will be vacant. Where is the freedom of expression of Members of parliament in our country? It is worthwhile to mention here that, Article 7(2) and 26 of the Constitution of Bangladesh impose certain limitations on parliament in making laws. According to these Articles, no law which is inconsistent with any provision of the constitution can be enacted. Article 7(2) confirms that if any other law is inconsistent with the constitution that other law shall, to the extent of the consistency, be void. As a matter of fact, we have observed that within the constitutions, Article 70 is inconsistent with the two basic principles of the constitution, ie freedom of expression and democracy. As far as the constitutional experts are concerned, this Article has been inserted in the constitution in 1972 because of some bad experiences in this subcontinent. But the way it has been used since 1972 which is certainly not the goal of our original constitution. To maintain and establish the basic democratic fabric and of course freedom of thought and conscience, this Article should be amended in such a way that the members of parliament have the right to oppose/support or abstain from voting any bill brought before the parliament.[4]

Moreover, Article 55 of the constitution enshrined that the cabinet shall be collectively responsible to the parliament. This provision of

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[3] For details, Islam, Ariful, Article 70: Contradiction with the spirit of the Constitution, Dhaka Tribune.

[4] In our parliament, we have been experienced that every government bill has been passed somewhat hurriedly no matter how much democratic or unfair it was for the reason that Article 70 does not allow dissenting voice against any bill placed in the parliament to pass or amend.

collective responsibility has been meaningless because of Article 70 as the cabinet knows that it is not going to be defeated by motion of no-confidence, for no member of the majority party has the right to vote against the party line.

The rationale behind the provision for floor-crossing[5] is that to sustain the stability of government and strengthen the smooth functioning of the government and for effective government which can be maintained by making laws in this regard. When a vote of censure or no-confidence is brought against particular government, the concerned Member of Parliament shall invariably vote for the party on whose ticket he was elected. By this practice in Parliament, the stability of the government may be maintained. But no way the Member of Parliament should be freed to cross the floor to join another or ruling party to gratify his immoral lust. It is further argued that some parliamentary democracies having no such thing as Article 70 of our Constitution have not suffered from political instability.

So, explanation to Article 70 should be amended inserting the provisions that Member of Parliament should be free to vote in accordance with their conscience except on three fundamental and vital issues, a. when a vote of censure or no-confidence is brought against a particular government, the concerned MP shall invariably vote for the party on whose ticket he was elected; b. he shall not vote against the Finance Bill or against the smooth passage of the Annual Budget so that the financial activities of the government should not be harassed; c. on sensitive defense matters which may be debated in camera, if needed. These are not the concern only of a political party but the concern of all people of Bangladesh. In other cases Member of Parliament should be allowed to speak and vote freely maintaining the decorum of the House. As a result of these amendments, democracy as well as stability of government can be maintained[6].

## The powers and functions of the Parliament

The powers and functions of the parliament can be divided mainly in 3 divisions; such as-

1. Law making function
2. Financial function
3. Function of control over the executive department.

[5] The term floor-crossing otherwise called ‘side swapping’ in the constitutional and political terminology generally means to cross one member’s own party floor to another floor at the time of voting in the House.

[6] See, more, Rahman, Ziaur, Democracy, Freedom of Speech & Floor-crossing interface. Volume 1, 2010

**1. The Law making function:**

Article 65(1) of Our Constitution clearly says that "There shall be a Parliament for Bangladesh (to be known as the House of the Nation) in which, subject to the provisions of this Constitution, shall be vested the legislative powers of the Republic."

The power of making laws of the country is vested in the parliament. The parliament can make new laws and change or amend the prevalent laws. The laws are created through bills. The bills accepted by the Assembly are placed to the president for his consent. A Bill passed in Jatiyo Shangshad becomes a statute only after the President has assented, or is deemed to have assented, to it.

**2. Financial Function**

Without the consent of the parliament no tax can be imposed or collected. The important responsibility of the parliament is to pass the budget. A new Bill, in addition to the yearly Finance Bill, may be introduced to give effect to tax proposals not falling within the scope of an existing law. A statement of the estimated receipts and expenditure of the Government for a financial year is laid before Parliament around three weeks before the commencement of that year. This statement has been termed as annual financial statement in the Constitution and as budget in the Rules of Procedure. The Finance Minister lays the statement in Parliament after his yearly budget speech in which, among other things, he outlines the taxes proposed in the Finance Bill and also highlights proposed allocations under some, if not all, demands for grants.[7]

Remuneration payable to the President, Speaker and Deputy Speaker, Judges of the Supreme Court, Comptroller and Auditor General, as well as a few other items of expenditure, has been termed as charged expenditure in the Constitution. Charged expenditure to the Consolidated Fund may be discussed in Parliament but is not subject to its vote. All other expenditure from the Consolidated Fund is subject to the vote of Parliament.[8]

**Parliament Secretariat**

The Constitution of Bangladesh has a unique provision regarding the secretariat of the parliament. The Constitution has emphasized that the parliament should have its 'own' secretariat. The Article 79 of the Constitution has stipulated:

1. Parliament shall have its own secretariat.

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[7] See, Functions and Procedures of Parliament, Retrieved http://www.parliament.gov.bd/index.php/en/medias/images/pdf/Committee-Notice/committee-order/45.pdf

[8] Ibid

2. Parliament may, by law, regulate the recruitment and conditions of service of persons appointed to the secretariat of Parliament.
3. Until provisions are made by Parliament the President may, after consultation with the Speaker, make rules regulating the recruitment and conditions of service of persons appointed by to the secretariat of Parliament, and rules so made shall have effect subject to the provisions of any law.

The Constitution has envisaged a secretariat independent of government control and supervision. Despite constitutional mandate no law has been framed to make the parliament secretariat independent. Till 1994 the parliament secretariat was run under the Rules of Business of the Government. After reintroduction of the parliamentary system in 1991, the government side conceded that a comprehensive law would be enacted to make the secretariat independent.[9]To cover the issue comprehensively the government placed the 'The Parliament Secretariat Bill' on 28 February 1994. The bill proposed a 'Jatiya Sangsad Secretariat Commission' comprising the Speaker as chairman and Leader of the House, Leader of the Opposition, the minister in charge of Law, Justice and Parliamentary Affairs and Finance Ministry or their nominees as members'.[10] The Parliament Secretariat Bill was passed on 11 May 1994. It could not be denied that the Parliament Secretariat Act, 1994 is a major advancement to ensure sovereignty of the parliament, in a situation, where the parliament was traditionally considered just an extension of the government machinery and run by the Rules of Business of the Government.[11]

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[9] See, *The Daily Star*, Dhaka, 1 March 1994.
[10] Ibid
[11] Ibid

Chapter Eleven

# The Supreme Court of Bangladesh

The Judiciary of our country basically consists of the superior court and the subordinate courts. The superior court is popularly and constitutionally known as the Supreme Court of Bangladesh. And the subordinate courts are mainly consisted of two sets of courts, namely, civil courts and criminal courts.

## The Supreme Court of Bangladesh

At the apex of the judicial pyramid stands the Supreme Court of Bangladesh. Bangladesh has only one system of state courts with the High Court at the top. In the Bangladesh sphere, there is only one Supreme Court of Bangladesh. Article 94(1) clearly says:

"There shall be a Supreme Court for Bangladesh (to be known as the Supreme Court of Bangladesh) comprising the Appellate Division and the High Court Division."

So, in the integrated Court system of our country, the Supreme Court stands out as the highest and the final judicial tribunal.

## Composition of the Supreme Court

The Supreme Court comprises the High Court Division and the Appellate Division.

Article 94(1) of our Constitution clearly states that "There shall be a Supreme Court for Bangladesh (to be known as the Supreme Court of Bangladesh) comprising the Appellate Division and the High Court Division."

## Number of Judges

The Supreme Court shall always have a Chief Justice who is known as the Chief Justice of Bangladesh. But the number of other judges of both the Appellate and High Court Divisions is not fixed. The number of the judges of these two Divisions is fixed by the President upon advice of the Prime Minister.

Article 94(2) clearly states in this regard

"The Supreme Court shall consist of the Chief Justice, to be known as the Chief Justice of Bangladesh, and such number of other Judges as the President may deem it necessary to appoint to each division."

**Appointment of the Judges**

The Chief Justice shall be appointed by the President, and the other Judges shall be appointed by the President after consultation with the Chief Justice.[1]

**Qualifications to be appointed as a judge of the Supreme Court:**

A person shall not be qualified for appointment as a Judge unless he is a citizen of Bangladesh and

a. has, for not less than ten years, been an advocate of the Supreme Court; or
b. has, for not less than ten years, held judicial office in the territory of Bangladesh; or
c. has such qualifications as may be prescribed by law for appointment as a Judge of the Supreme Court.[2]

**Tenure of office of Judges**

The 16th Amendment of the Constitution mainly amended empowering parliament to impeach Supreme Court Judges. Part VI chapter one Article 96 of our Constitution which includes provision on the tenure of office of the Supreme Court Judges states:

1. Subject to the other provision of this Article, a Judge shall hold office until he attains the age of sixty-seven years.
2. A judge shall not be removed from his office except by an order of the president passed pursuant to a resolution of parliament supported by a majority of not less than two-third of the total number of members of parliament on the ground of proved misbehavior or incapacity.
3. Parliament may by law regulate the procedure in relation to a resolution under clause (2) and proof the misbehavior or incapacity.
4. A judge may resign his office by writing under his hand addressed to the president.

According to this Amendment, parliament would impeach judges for "proven misconducts and inabilities" with a two-thirds majority in the assembly and the legislature would enact a law governing investigation of the charges against the judges.

In line with the law, the report on the investigation into the allegations would go to parliament in the form of a motion of

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[1] Article 95(1) of the Constitution of the People's Republic of Bangladesh
[2] Article 95 (2), Ibid

impeachment. The House would hold discussions on it, giving the judges scope to defend themselves, and remove them if the charges are proved.

The Amendment does not bring any changes to the provision of judges' current retirement age, which is 67.

**The Jurisdiction of High Court Division**

Article 101 states that:

"The High Court Division shall have such original, appellate and other jurisdictions and powers as are conferred on it by this Constitution or any other law."

Generally the jurisdiction of the High Court may be divided into four major heads:

1. Civil Jurisdiction
2. Constitutional or Writ Jurisdiction
3. Special Statutory Jurisdiction
4. Criminal Jurisdiction.

**1. Civil Jurisdiction**

The powers of the High Court Division under Civil Jurisdiction have three broad heads, namely:

1. Appellate Power
2. Revision Power
3. Power in the matter of reference made to it.

These powers have been conferred upon this High Court Division by the Constitution and other laws in force amongst which procedural law is predominant.

**2. Writ Jurisdiction**

Under Article 102 of the Constitution, the High Court Division has been empowered to issue certain directions and orders in the nature of writs of habeas corpus, mandamus, prohibition, certiorari, and quo warranto without using their technical names.

**Article 102 clearly states that**:

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

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

a. on the application of any person aggrieved, make an order

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

ii. declaring that any act done or proceeding taken by a person performing functions in connection with the affairs of the Republic or of a local authority, has been done or taken without lawful authority and is of no legal effect ; or

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

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

ii. requiring a person holding or purporting to hold a public office to show under what authority he claims to hold that office."

**3. Special Statutory Jurisdiction**

The High Court Division has some special and statutory jurisdictions. For example:

a. Admiralty jurisdiction under the Admiralty Act, 1891

b. Statutory Jurisdiction under the Company Law, Banking Law

c. Reference under the law relating to Income Tax and other Tax Statutes.

**4. Criminal Jurisdiction**

As regards Criminal Jurisdiction, the High Court Division has Appellate, Revision, and Inherent powers.

**The Jurisdiction of Appellate Division**

Generally the jurisdiction of the Appellate Division may be divided into four major heads:

1. Appellate Jurisdiction
2. Constitutional advisory Jurisdiction
3. Review Jurisdiction
4. Jurisdiction to issue any direction, order or decree to complete justice.

**1. Appellate Jurisdiction**

The Appellate Division has jurisdiction to hear and determine appeals from judgments, decrees, orders or sentences of the High Court Division. And an appeal to the Appellate Division from a judgment, decree, order or sentence of the High Court Division shall lie as of right where the High Court Division

a. certifies that the case involves a substantial question of law as to the interpretation of this Constitution ; or

b. has confirmed a sentence of death or sentenced a person to death or to imprisonment for life ; or

c. has imposed punishment on a person for contempt of that division ; and in such other cases as may be provided for by Act of Parliament.

3. An appeal to the Appellate Division from a judgment, decree, order or sentence of the High Court Division in a case to which clause (2) does not apply shall lie only if the Appellate Division grants leave to appeal.

4. Parliament may by law declare that the provisions of this article shall apply in relation to any other court or tribunal as they apply in relation to the High Court Division.

**2. Constitutional advisory Jurisdiction**

Article 106 states that

"If at any time it appears to the President that a question of law has arisen, or is likely to arise, which is of such a nature and of such public importance that it is expedient to obtain the opinion of the Supreme Court upon it, he may refer the question to the Appellate Division for consideration and the division may, after such hearing as it thinks fit, report its opinion thereon to the President."

So, the Appellate Division has advisory jurisdiction if at any time it appears to the President that a question of law has arisen, or is likely to arise, which is of such a nature and of such public importance that it is expedient to obtain the opinion of the Supreme Court upon it.

3**. Review Jurisdiction**

The Appellate Division has review jurisdiction on any judgment pronounced or order made by it. Article 105 says:

"The Appellate Division shall have power, subject to the provisions of any Act of Parliament and of any rules made by that division to review any judgment pronounced or order made by it."

**4. Jurisdiction to issue any direction, order or decree to complete justice**

Under Article 104, It has been clearly said that The Appellate Division shall have power to issue such directions, orders, decrees or writs as may be necessary for doing complete justice in any cause or matter pending before it, including orders for the purpose of securing the attendance of any person or the discovery or production of any document.

**Some Functions of the Supreme Court under Constitution**

The Constitution of the People's Republic of Bangladesh has assigned some functions on the Supreme Court which are given below

**1. Rule-making power of the Supreme Court**

Article 107 says in this regard that(1) Subject to any law made by Parliament the Supreme Court may, with the approval of the President, make rules for regulating the practice and procedure of each division of the Supreme Court and of any court subordinate to it.

2. The Supreme Court may delegate any of its functions under clause (1) and article 113 and 116 to a division of that Court or to one or more judges.
3. Subject to any rules made under this article the Chief Justice shall determine which judges are to constitute any Bench of a division of the Supreme Court and which judges are to sit for any purpose.
4. The Chief Justice may authorize the next most senior judge of either division of the Supreme Court to exercise in that division any of the powers conferred by clause (3) or by rules made under this article.

**2. Supreme Court as court of record**

Article 108 says that The Supreme Court shall be a court of record and shall have all the powers of such a court including the power subject to law to make an order for the investigation of or punishment for any contempt of itself.

**3. Transfer of cases from subordinate courts to High Court Division**

Article 110 says in this regard that If the High Court Division is satisfied that a case pending in a court subordinate to it involves a substantial question of law as to the interpretation of this Constitution, or on a point of general public importance, the determination of which is necessary for the disposal of the case, it shall withdraw the case from that court and may

a. either dispose of the case itself; or
b. determine the question of law and return the case to the court from which it has been so withdrawn (or transfer it to another subordinate

court) together with a copy of the judgment of the division on such question, and the court to which the case is so returned or transferred shall, on receipt thereof, proceed to dispose of the case in conformity with such judgment.

**4. Superintendence and control over courts**

Article 107 says that the High Court Division shall have superintendence and control over all courts and tribunals subordinate to it.

**The subordinate Courts**

As per Article 114 of the Constitution, in addition to the Supreme Court, there will be such other subordinate courts as may be established by law. Article 114 says that "There shall be in addition to the Supreme Court such courts subordinate thereto as may be established by law".

**Appointments to subordinate courts**

Appointments of persons to offices in the judicial service or as magistrates exercising judicial functions will be made by the President in accordance with rules made by him in that behalf. Article 115 states that

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

**Control and discipline of subordinate courts**

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

Article 116 says that

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

Chapter Twelve

# Writ

The term writ means the declared rule or order of the court or other appropriate authority. In other words writ means a written document by which one is summoned or required to do or refrain from doing something. Literally a writ means a written order. Writ is a judicial process by which any one is summoned as an offender, a legal instrument to enforce obedience to the orders and sentences of the court.[1]

## Definition of Writ

Writ means a written document by which one is summoned or required to do or refrain from doing something.[2] A writ is remedial right for the enforcement of substantive law. A writ literally means a written order.[3] "Writ means" a written command, precept, or formal order issued by a court, directing or enjoying the person or persons to whom it is addressed to do or refrain from doing some act specified therein.[4]

## How Writs are issued in our Country under Constitution

Writs are issued by the Supreme Court to enforce the fundamental rights of Bangladeshi citizens, guaranteed by the constitution. The power to issue writs is a provision under "Right to Constitutional Remedies". The names of various writs have not been used in Article 102, albeit we can presume their existence in it.

**Article 102** of our Constitution clearly states:

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

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[1] Whardon's law lexicon, 1976, page 1078

[2] Md.Abdul Halim, *Constitution, Constitutional Law and Politics: Bangladesh Perspective* (Dhaka: CCB Foundation, 2006), p.363.

[3] Siddiqur Rahman Miah, *Law of Writs in Bangladesh* (Dhaka: New Warsi Book Corporation, 2007), p.2.

[4] *Concise law Dictionary*, 3rd ed. (London, LexisNexis Publication, 2005), p.899.

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

   a. on the application of any person aggrieved, make an order

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

      ii. declaring that any act done or proceeding taken by a person performing functions in connection with the affairs of the Republic or of a local authority, has been done or taken without lawful authority and is of no legal effect ; or

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

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

   ii. requiring a person holding or purporting to hold a public office to show under what authority he claims to hold that office."

**Various types of Writs**

We find generally five types of Writs

1. Writ of Habeas Corpus
2. Writ of Mandamus
3. Writ of Prohibition
4. Writ of Certiorari
5. Writ of Quo Warranto

**Writ of Habeas Corpus**

Habeas Corpus means 'have his body' which implies to have the body before the court. It is a kind of order of the court to release a person who has been detained unlawfully, whether in prison or in private custody. It is a writ issued to a detaining authority to produce the detained person in court to know cause for detention. If the detention is found to be illegal, the court issues an order to set the person free. Thus the writ of 'Habeas Corpus' is a process for securing the personal liberty of the subjects by affording an effective means of immediate release from unlawful or unjustifiable detention, whether in prison or private custody."[5]

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[5] Zabrivsky V General Officer 1947 All C 246 Quoted by Pirzada, Fundamental Rights and Constitutional Remedies in Pakistan, p. 435

Article 102 (2) (b) (i) is concerned with the writ of Habeas Corpus which states as follows:

"The High Court Division may, if satisfied that no other equally efficacious remedy is provided by law on the application of any person, make an order- directing that a person in custody be brought before it so that it may satisfy itself that he is not being held in custody without lawful authority or in an unlawful manner."

**When the writ of Habeas corpus is issued?**

- When the person is arrested without any violation of a law.
- When the person is detained and not produced before the magistrate within 24 hours.
- When a person is arrested under a law which is unconstitutional.
- When detention is done to harm the person.

**Writ of Mandamus**

Mandamus means 'we command'. By writ of *mandamus,* the superior court directs any person, corporation, lower court or government to do something, specified therein, which pertains to his or their office and is in the nature of a public duty.[6]This writ is issued when the lower tribunal has declined to exercise jurisdiction vested in it or any public authority declined to do what he is required by law to do. Sub-clause (i) of clause (a) of sub-article (2) of article 102 of the Constitution authorizes the High Court Division to direct a person performing functions in connection with the affairs of the Republic or a local authority to do what he is required by law to do.

Article 102(2) (a)(i) deals with the functions relating to the Writ of Mandamus which states as follows:

"The High Court Division may, if satisfied that no other equally efficacious remedy is provided by law, on the application of any person aggrieved, make an order- directing a person performing any functions in connection with the affairs of the Republic or of a local authority, to refrain from doing that which he is not permitted by law to do or to do that which he is required by law to do."

In Halsbury Laws of England**,** [7]*mandamus* is described as follows:- "The order of *mandamus* is an order of a most extensive remedial nature, and is in form, a command issuing from the High Court of Justice directed to any person, corporation or inferior tribunal,

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[6] Siddiqur Rahman Miah, *Ibid.,*, p.154.

[7] vol.11, 3rd, Para 159, p.84.

requiring him or them to do some particular thing therein specified which appertaining to his or their office and is in the nature of public duty".

Thus it is clear that when a court or tribunal or an authority or a person has refused or failed to perform his statutory obligation, it is the writ of *mandamus* by which the higher court can compel the authority or court or person to do his statutory obligation. So mandamus is a positive remedy.[8]

The essential conditions to request the court to issue Mandamas writ are given below

- The person must have a real or special interest in the subject matter.
- The person must have specific legal right
- No other equally effective remedy is there.
- The third condition can be understood by the example:

A person fulfills all the conditions of an appointment and the authority has completed the selection procedure then he must be issued an appointment letter. But when the authority refuses to do this duty, the person is eligible to file a writ petition under Mandamus.

**Writ of prohibition**

*Prohibition* means 'to forbid' from doing something. In other words, it is a writ issued by the superior court to a lower court, tribunal or administrative authority prohibiting it from doing something which it is not authorized by law to do.[9] Writ of *Prohibition* is a judicial order issued by the High Court to any constitutional, statutory or non-statutory agency to prevent these agencies from continuing their proceeding in excess or abuse of their jurisdiction or in violation of the principles of natural justice or in contravention of the law of the land.[10] Therefore, when a court, or a tribunal or an authority or a person is about to violate the principles of natural justice or is about to abuse the power or is about to act in excess of its jurisdiction, the higher court by issuing a writ of prohibition can prohibit the tribunal, court or authority from doing such act. So, prohibition is a preventive remedy.[11]

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[8] Md.Abdul Halim, Ibid, p363

[9] Kamruzzaman Bhuiyan, *Article 102 (*Dhaka: Kamruzzaman Bhuiyan, 2008), p.36.

[10] *Concise law Dictionary, Ibid.,* p.899.

[11] Md.Abdul Halim, Ibid, p385

Article 102(2) (a)(i) deals with the functions relating to the Writ of *Mandamus* as well as Writ of Prohibition which states as follows:

"The High Court Division may, if satisfied that no other equally efficacious remedy is provided by law, on the application of any person aggrieved, make an order- directing a person performing any functions in connection with the affairs of the Republic or of a local authority, to refrain from doing that which he is not permitted by law to do or to do that which he is required by law to do."

**Writ of Certiorari**

Certiorari means 'to be certified'. Therefore, Writ of certiorari is a judicial order operating in personam and made in original legal proceedings, directed by the High Court to any Constitutional, statutory or non- statutory body or person ,requiring the records of any action to be certified by court or dealt with according to law.[12] It is one of the writs issued by the High Court or the Supreme Court to quash an order already passed by a lower court, tribunal or quasi-judicial authority. Unlike a writ of prohibition, superior courts issue writs of certiorari to review decisions which inferior courts have already made. The writ of prohibition is the counterpart of the writ to certiorari which too is issued against the action of an inferior court. The difference between the two was explained by Justice Venkatarama Ayyar of the Supreme Court in the following terms:

"When an inferior court takes up for hearing a matter over which it has no jurisdiction, the person against whom the proceedings are taken can move the superior court for a writ of prohibition and on that an order will issue forbidding the inferior court from continuing the proceedings. On the other hand, if the court hears the cause or matter and gives a decision, the party aggrieved would have to move the superior court for a writ of certiorari and on that an order will be made quashing the decision on the ground of want of jurisdiction."

Therefore, when a court, or a tribunal or an authority or a person has already violated the principles of natural justice or misused the power or acted in excess of its jurisdiction, the higher court by issuing a writ of certiorari can quash that act i.e. can declare that act illegal. This is certiorari.[13]

Article 102(2) (a)(ii) is the provision relating to the Writ of Certiorari which states as follows:

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[12] *Concise law Dictionary*, *Ibid.* p.899.

[13] Md.Abdul Halim, Ibid, p385

"The High Court Division may, if satisfied that no other equally efficacious remedy is provided by law on the application of any person aggrieved, make an order declaring that any act done or proceeding taken by a person performing functions in connection with the affairs of the Republic or of a local authority, has been done or taken without lawful authority and is of no legal effect."

**The writ of quo warranto**

Quo Warranto means 'by what warrant or authority'. Writ of *quo warranto* provides remedy against illegal occupation or usurpation of any public office or franchise or liberty. This writ requires the concerned person to explain to the Court by what authority he holds the office. If a person has usurped a public office, the Court may direct him not to carry out any activities in the office or may announce the office to be vacant. The writ is issued by the Court after reviewing the circumstances of the case. There are a few conditions which must be fulfilled for the grant of the writ of quo warranto:

- The concerned office must be a government unit or public office which performs public duties. Examples of such office members are university officials, members of a municipal board etc.
- The public office must have a real existence.
- A person against whom the writ of quo warranto is issued must have the real possession of the public office.
- The writ shall be issued only when the public office is held by a particular person in an illegal manner

Therefore, when a person illegally holds a public office created by law, the higher court may, on the application of any person, by issuing quo-warranto, ask the person to show on what authority he holds the office and can make him not to hold such office further.[14]

The provision of 102(2) (b) (ii) of our Constitution is concerned with the Writ of *Quo-Warranto* which reads as follows:

"The High Court Division may, if satisfied that no other equally efficacious remedy is provided by law on the application of any person, make an order requiring a person holding or purporting to hold a public office to show under what authority he claims to hold that office."

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[14] Ibid

Actually, this writ of *Quo warranto* is issued to show by what authority a person is holding or purporting to hold a public office. The High Court Division can enquire into the legality of the claim of a party to an office. A writ of *quo-warranto* may be applied at the instance of any person even who has no personal or special interest. A stranger can also file such writ petition. It is discretionary relief which the Supreme Court may grant or refuse according to the facts and circumstances of each case. Thus, the Supreme Court may refuse it where the application was actuated by ill-will, or malice or ulterior motive. It is a settled practice not to interfere with the discretion of the High Court Division, if the discretion has not been exercised reasonably or perversely.[15]

[15] Latifur Rahman, *The Constitution of the People's Republic of Bangladesh with Comments &Case-Laws* (Dhaka: Mullick Brothers, 2005), pp.134-5.

Chapter Thirteen

# Public Interest Litigation

Public interest litigation today has great significance and drew the attention of all concerned. The traditional rule of "Locus Standi" that a person, whose right is infringed alone can file a petition, has been considerably relaxed. Now, the court permits public interest litigation at the instance of public spirited citizens for the enforcement of constitutional-legal rights[1]. Now, any public spirited citizen can move/approach the court for the public cause (in the interests of the public or public welfare) by filing a petition in the High Court under Article 102 of the Constitution.

**What is Public Interest Litigation?**

The words `Public Interest' mean "the common well being and also public welfare" and the word 'Litigation' means "a legal action including all proceedings therein, initiated in a court of law with the purpose of enforcing a right or seeking a remedy." Thus, the expression `Public Interest Litigation' means "some litigation conducted for the benefit of public or for removal of some public grievance**.**" In Legal Sense, PIL means litigation for the protection of public interest.

It is litigation introduced in a court of law, not by the aggrieved party but by the court itself or by any other private party. It is not necessary, for the exercise of the court's jurisdiction, that the person who is the victim of the violation of his or her right should personally approach the court. Public Interest Litigation is the power given to the public by courts through judicial activism.[2]

Such cases may occur when the victim does not have the necessary resources to commence litigation or his freedom to move court has been suppressed or encroached upon. The court can itself take cognizance of the matter and proceed suo motu or cases can commence on the petition of any public-spirited individual.[3]

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[1] For details, Pritam Kumar Ghosh, Judicial Activism and Public Interest Litigation in India, Galgotias Journal of Legal Studies, 2013 GJLS Vol.1, No.1

[2] For details, http://www.legalserviceindia.com/article/l273-Public-Interest-Litigation.html

[3] For details, Kalpana V. Jawale, Social Justice through Public Interest Litigation and Judicial Activism in India.

According to Black's Law Dictionary: "Public Interest Litigation means a legal action initiated in a court of law for the enforcement of public interest or general interest in which the public or class of the community have pecuniary interest or some interest by which their legal rights or liabilities are affected."

It was held in **State V. Md Zillur Rahman**[4] and others that

"Public interest litigation means litigation for the protection of public interest. It is litigation introduced in a court of law, not by the aggrieved party but by the court itself or by any other private party".

Basically, PIL was started to protect the fundamental rights of people who are poor, ignorant or in socially/economically disadvantaged position. It was held in **Peoples Union for Democratic Rights v. Union of India**[5] **that**

**"**The court now permits Public Interest Litigation at the instance of "Public spirited citizens" for the enforcement of constitutional & legal rights of any person or group of persons who because of their socially or economically disadvantaged position are unable to approach court for relief. Public interest litigation is a part of the process of participate justice and standing in civil litigation of that pattern must have liberal reception at the judicial door steps."

Actually, the concept of Public Interest Litigation is not defined in any statute or in any act. It has been interpreted by judges to consider the intent of public at large. Although, the main focus of such litigation is only "Public Interest" there are various areas where a Public Interest Litigation can be filed. e.g.

Violation of basic human rights of the poor or the vulnerable groups;

Content or conduct of government policy;

Compel public authorities to perform a public duty; and

Violation of basic fundamental rights.

So, public interest litigation is a concept which recognizes maintainability of legal action by a 3rd party[6] (not the aggrieved) in

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[4] 19 BLD (HCD) (1999) 303

[5] A.I.R.. 1982, S C 1473

[6] 3rd party (not the aggrieved) means that is not directly injured in money and property. He is not the actual victim but a party (Plaintiff) to the case/ litigation.

unique situation[7]. It is different from ordinary litigation, in that it is not filed by one private person against another for the enforcement of a personal right. The presence of 'public interest' is important to file a PIL.

**Liberalising the Locus Standi: Evolution of PIL**

The concept of public interest litigation has been originated in case of R vs. Thames Magistraties Court[8], where Lord Justice Parker and Denning departed[9], from the usual and traditional concept of Locus standi[10] as evolved from the Anglo-Saxon Jurisprudence.

The old concept of Locus standi is that only an aggrieved person can bring a case before the court and only that person is aggrieved who is directly injured in money or property. It is not enough that he has a grievance or his one of the public who is complying in company with hundreds or thousands of others. This old concept of Locus standi was laid down in 1880 by a distinguished judge, Loard Justice James, in the **Sidebotham** case[11], when he held that

"To be a person aggrieved, the applicant must be a man against whom a decision has been wrongfully pronounced and has deprived him of something or wrongfully refused him something or wrongfully affected his title to something".

Now, this old possession has much been altered. There is at present, a much wider concept of Locus standi and there has been a remarkable series of cases in which private person (3rd parties) have come to the court and have been heard.

**Lord Denning said about locus standi in Blackburn case**

"The Court will not listen to a busybody who is interfering in things which do not concern him, but it will listen to an ordinary citizen who comes asking that the law should be declared and enforced, even though he is only one of a hundred, or one of a thousand or one of a million who are affected by it."

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7 Unique situation means that situation where 3rd party acts as friend in good faith without any mala fide intention Pro-Bono-Publico, not for his own vested interest.

8 (1957) 5 DLR 129.

9 The departed shifted their position from economic injury concept to non-economic injury concept of aggrieved person.

10 Ordinarily Locus standi means Rights to sue.

11 (1880) 14 C h d 458 at 465.

In fact Lord Denning had been the leading proponent of liberisation of the rules of standing by widening the scope of the words 'person aggrieved.

**Development of PIL in India**

PIL had begun in India towards the end of 1970s and came into full bloom in the 80s. Justice V.R. Krishna Iyer and Justice PM. Bhagwati, honourable Judges of the Supreme Court of India delivered some landmark judgements which opened up new vistas in PIL[12].

Prior to 1980s, only the aggrieved party could personally knock the doors of justice and seek remedy for his grievance in India and any other person who was not personally affected could not knock the doors of justice as a proxy for the victim or the aggrieved party. In other words, only the affected parties had the locus standi (standing required in law) to file a case and continue the litigation and the non affected persons had no locus standi to do so. However, this entire scenario gradually changed when the Supreme Court tackled the problem of access to justice by people through radical changes and alterations made in the requirements of locus standi and of party aggrieved. The splendid efforts of Justice P N Bhagwati and Justice V R Krishna Iyer were instrumental of this juristic revolution of eighties to convert the Apex Court of India into a Supreme Court for all Indians. Justice V. R. Krishna Iyer and P. N. Bhagwati recognised the possibility of providing access to justice to the poor and the exploited people by relaxing the rules of standing[13].

The first reported case of PIL in 1979 focused on the inhuman conditions of prisons and under trial prisoners. In **Hussainara Khatoon v. State of Bihar**, the PIL was filed by an advocate on the basis of the news item published in the Indian Express, highlighting the plight of thousands of under trial prisoners languishing in various jails in Bihar. These proceeding led to the release of more than 40,000 under trial prisoners. Right to speedy justice emerged as a basic fundamental right which had been denied to these prisoners[14].

A new era of the PIL movement was heralded by Justice P.N. Bhagawati in the case of **S.P. Gupta v. Union of India[15]** in this case it was held that "any member of the public or social action group acting bonafide" can invoke the Writ Jurisdiction of the High Courts or the

[12]http://www.lawyersclubindia.com/articles/print_this_page.asp?article_id=3111
[13] For details, http://jklaws.in/details.aspx?id=49
[14] See, Peu Gosh (2012), Indian Government and Politics,p243
[15] AIR 1982 SC 149

Supreme Court seeking redressal against violation of a legal or constitutional rights of persons who due to social or economic or any other disability cannot approach the Court. By this judgment PIL became a potent weapon for the enforcement of "public duties" where executed in action or misdeed resulted in public injury. And as a result any citizen of India or any consumer groups or social action groups can now approach the apex court of the country seeking legal remedies in all cases where the interests of general public or a section of public are at stake. Some cases are given below:

1. **In the case of M.C Mehta V. Union of India**[16]

Public Interest Litigation brought against Ganga water pollution so as to prevent any further pollution of Ganga water. Supreme court held that petitioner although not a riparian owner is entitled to move the court for the enforcement of statutory provisions, as he is the person interested in protecting the lives of the people who make use of Ganga water.

2. **In Parmanand Katara V. Union of India**[17]

Supreme Court held in the Public Interest Litigation filed by a human right activist fighting for general public interest that it is a paramount obligation of every member of medical profession to give medical aid to every injured citizen as soon as possible without waiting for any procedural formalities.

3. In **Council for Environment Legal Action V. Union of India**[18]

Public Interest Litigation was filed by registered voluntary organization regarding economic degradation in coastal area. Supreme Court issued appropriate orders and directions for enforcing the laws to protect ecology.

A report entitled "Treat Prisoners Equally HC" published in THE TRIBUNE, Aug 23 Punjab & Haryana High Court quashed the provisions of jail manual dividing prisoners into A , B & C classes after holding that there cannot be any classification of convicts on the basis of their social status, education or habit of living .This is a remarkable ruling given by High Court by declaring 576-A paragraph of the manual to be " Unconstitutional".

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[16] (1988) 1 SCC 471
[17] AIR 1989, SC 2039
[18] (1996)5 SCC 281

4. **In the Judges Transfer Case** [19]

Court held Public Interest Litigation can be filed by any member of public having sufficient interest for public injury arising from violation of legal rights so as to get judicial redress. This is absolutely necessary for maintaining Rule of law and accelerating the balance between law and justice.

It is a settled law that when a person approaches the court of equity in exercise of extraordinary jurisdiction, he should approach the court not only with clean hands but with clean mind, heart and with clean objectives.

5. In **Shiram Food & Fertilizer case**[20]

through Public Interest Litigation directed the Co. Manufacturing hazardous & lethal chemical and gases posing danger to life and health of workmen & to take all necessary safety measures before re-opening the plant.

**PIL in Bangladesh**

The Berubari case is often considered as the starting point of PIL in Bangladesh where the Court went very close to the doctrine of public interest litigation.

On 16 May 1974, the Prime Minister of Bangladesh and India signed a treaty in Delhi providing inter alia that India will retain the southern half of South Berubari Union No. 12 and the adjacent enclaves and in exchange Bangladesh will retain the Dahagram and Angarpota enclaves[21].This treaty was challenged on the ground that the agreement involved cession of territory and was entered into without lawful authority by the executive head of government. The petitioner Kazi Mukhlesur Rahman was an advocate and came to the Court as a citizen and as such his standing was in question. Locus standi was granted by Sayeem CJ on the ground that Mr Rahman agitated a question affecting a constitutional issue of grave importance posing a threat to his fundamental rights that pervade and extend to the entire territory of Bangladesh. The Court decided that the question is not whether the Court has jurisdiction but whether the petitioner is competent to claim a hearing. So the question is one of discretion which the Court is to exercise upon due consideration in each case. The application, however, was rejected on the ground of being pre-mature. But since the Court observed that a cession of territory needs parliamentary approval and enactment, the government soon initiated

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[19] AIR 1982, SC 149

[20] AIR (1986) 2 SCC 176 SC

[21] For details, Volume Xvii, Bangladesh Legal Decisions, Appellate Division

the Third Amendment of the Constitution[22]. The effect and influence of the Berubari case is enormous. It has often been considered as the starting point of PIL in Bangladesh where the Court went very close to the doctrine of public interest litigation. Mustafa Kamal ,J. observed in Dr .Mohiuddin Farooque v. Bangladesh and others[23] that

"The Berubari Case is an unnoticed, but quite revolution on the question of 'locus standi' in our constitutional jurisprudence."

The first successful PIL in Bangladesh is **Dr .Mohiuddin Farooque v. Bangladesh and others[24]**. Question of locus standi has finally been settled by the Appellate Division in the Flood Action Plan case brought by Dr. Mohiuddin Faruk, founder secretary of BELA in 1996 holding that any member of the public suffering a common wrong, common injury or common invasion of fundamental rights of an indeterminate number of people or any citizen or an indigenous association espousing such cause has locus standi. Before and after that decision BELA, ain o shalish kendra, Bangladesh Legal Aid Services Trust, Bangladesh National Women Lawyers' Association, Bangladesh Nari Progati Sangha, Bangladesh Mahila Ainjibi Samiti, bangladesh mahila parishad and many public spirited persons brought public interest litigations before the High Court Division for redress of the grievances of the deprived sections of the people. Since locus standi has been liberalised in 1996, some of the public interest litigations has been disposed of by the High Court Division in 1997. In Flood Action Plan Case the government was directed to protect the environment and ecology and to observe relevant provisions of law in executing the flood protection scheme. In 1999, High Court Division directed Rajdhani Unnayan Kartripaksha (rajuk) not to reduce the area of park and other common facilities by covering the same into residential or commercial plots in Uttara model town. Earlier in a case, High Court Division declared that park in Gulshan residential area should be maintained free from nuisance for the protection of health and hygiene of the residents of that area. That Division also directed removal of bar fetters of a prison detainee, and also released a woman in handcuffs from safe custody. That Court also stayed construction of a market building on the site earmarked for car parks, filling up of a lake, and eviction of slum dwellers in the Dhaka City. With the liberalization of locus standi public interest litigation has great prospect in ameliorating

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[22] See, http://bdknowledgeoflaw.blogspot.com/2011/11/bangladesh-enters-into-new-era-of.html

[23] 17 BLD (1997) (AD) 1= 49 DLR (1997) (AD)1

[24] Ibid

the conditions of the downtrodden and deprived sections of the people, and bringing succor to their sufferings making the assurances of fundamental rights in the Constitution a reality in their lives[25]. But there is also the danger of flooding the court with unnecessary litigations at the instance of busybodies posing as public spirited persons, and thereby unnecessarily burdening the High Court Division which is already overburdened with cases which take years together for disposal, and thus causing undue hardship on the litigant public. This crisis can be averted if the court remains vigilant at the inception, and meticulously examines the bonafide of the petitioner to seek redress through public interest litigation.[26]

**Legal basis of PIL in Bangladesh**

Public Interest Litigation is grounded around section 102 of the Constitution. Section 102(1) allows the court to pass an order where there has been a breach of fundamental rights. These are rights set out in Part III of the constitution. Section 102(1) (a) allows the court to pass an order requiring the government to do what is required by law, and not to do what is forbidden by law to do so. The application to the court can be made by "an aggrieved person." It is the wide interpretation by the courts of the term "an aggrieved person" - to include legal aid, human rights, or development organizations - that has opened up public interest litigation. These groups can as a result petition the court on behalf of workers, or other affected groups of people[27]. Article 102 empowers High Court Division to issue certain orders and directions, etc. (1) The High Court Division on the application of any person aggrieved, may give such directions or orders to any person or authority, including any person performing any function in connection with the affairs of the Republic, as may be appropriate for the enforcement of any the fundamental rights conferred by Part III of this Constitution. The High Court Division may, if satisfied that no other equally efficacious remedy is provided by law- on the application of any person aggrieved, make an order- (i) directing a person performing any functions in connection with the affairs of the Republic or of a local authority to refrain from doing that which he is not permitted by law to do or to do that which he is required by law to do.

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[25] See, http://bdknowledgeoflaw.blogspot.com/2011/11/bangladesh-enters-into-new-era-of.html

[26] See, more, http://banglapedia.search.com.bd/HT/P_0307.htm

[27] See, Mahbubul Islam, Defending Human Rights through Public Interest Litigation: Role of Human Rights Activists in Bangladesh.

Actually, it was not easy to convince the judges giving relief through PIL, as it was a new phenomenon in our legal system. But, the legal and social activists were relentless in their efforts and finally enabled the progressive minded judges to interpret the Constitution in line with the public intent. And it was 1996, when the Supreme Court discovered that our Constitution not only validates but also mandates a PIL approach. As a consequence, about 250 number of PIL have been filed over the last few years. These PILs include cases involving environmental and consumers' matters, poverty and health related problems, rights of children and women, rights of minority and indigenous people etc[28]. Some cases are given below:

1. **Bangladesh Environmental Lawyers Association (BELA) and Thengamara Mohila Sabuj Sangha (TMSS) v. Bangladesh and others Writ Petition No. 4244/04**

The High Court in August, 2004 issued a rule nisi on the Government and the concerned individuals to show cause why they should not be directed to prevent the illegal sand extraction from the river Korota of Mouzas Thengamara, Shakharia, Bonomalipara and the surrounding areas of Bogra. The rule nisi was issued on a writ petition filed by BELA and Thengaramara Mohila Sabuj Sangha (TMSS). The petitioners sought judicial intervention to prevent illegal sand extraction from the river Korotoa at the Thengamara, Shakharia and Bonomalipara Mouzas and the surrounding areas of Bogra and also to compensate the affected villagers. The Court further stayed illegal sand extraction for a period of six months. A division bench of HC comprising the Justice Mohammad Abdul Wahab Mia and Justice Zinat Ara issued the orders upon the secretaries, Ministries of Land, Environment & Forest, Water Resources, DG of Department of Environment (DoE), Deputy Director of DoE at Rajshahi and Deputy Commissioner of Bogra.

2. **Bangladesh Environmental Lawyers Association (BELA) v. Bangladesh and others Writ Petition No. 9089/05 (Construction of Jetty in Cox's Bazar)**

In a public interest litigation filed by BELA challenging the decision of the Cox's Bazar Sea Beach Management Committee to construct a jetty in the Ecological Critical Area (ECA) of the Cox's Bazar Sea Beach, a division bench of the High Court comprising Mr. Justice Abdul Matin and Mr. Justice Md. Rezaul Haque has stayed all activities in connection with the construction of the Jetty. The petition

[28] Ibid

has been filed against, amongst others, the Secretaries, Ministries of Environment and Forest, Communication, Civil Aviation and Tourism, Deputy Commissioner, Cox's Bazar. The petition was filed by BELA on request from Cox's Bazar Unnayan O Paribesh Shangrakkhan Parishad and Cox's Bazar Environmental Journalists Forum. The grievance of the petitioner was that the Sea Beach Management Committee was not authorized to introduce commercial activities in the beach area or undertake/authorize construction in the beach area in the name of development. Further the decision of the Committee to go for such unplanned construction and introduction of commercial activities have been taken without any environmental clearance from the government. Such decisions also reflect the insensitiveness of the Committee to protect the ecologically fragile beach that has already been declared ECA by the government for its critical condition. The local people apprehend that the claim of the Committee that the jetty is needed to facilitate rescue and security operations and also to protect the fish trawlers from sea-pirates and enable the Coast Guard, Bangladesh Rifles and Police to prevent the pirates is not tenable as these objectives have no relevance to the construction of a Jetty. Instead the hurried construction of the Jetty, non-disclosure of the source of fund and the proposition to collect toll from it clearly reveal that the actual agenda behind the construction of the Jetty is hidden and as such the same in contrary to public interest. Upon hearing the petitioner, the Hon'ble High Court has further issued a rule nisi upon the respondents to show cause as to why the decision for construction of the Jetty and the construction of the Jetty for commercial purposes in the ECA of the Cox's Bazar Sea Beach without having the authority to do so shall not be declared unlawful, unauthorized and of no legal effect and why the Jetty shall not be directed to be removed and dismantled and also why the respondents shall not be directed to refrain from authorizing any commercial activity in the ECA of the sea beach.

3. **Sramik Nirapatta Forum and others v. Bangladesh and others Writ Petition No. 3566 of 2005 (Collapse of Spectrum Sweater Factory Building)**

A writ petition was moved on 24 May, 2005 seeking judicial intervention to redress the grievances of the victims of the collapse of the building of Spectrum Sweater Industries Ltd. at Palashbari, Savar that took place on the early hours of 11 April, 2005. Filed at the instance of 4 injured workers and 9 rights based organizations working under the umbrella of Sramik Nirapatta Forum, the petition further

sought direction to prevent further disasters in future. The petition was filed against the Secretaries, Ministries of Home, Labour and Employment, Industries, Food and Disaster, Land, Ministry of Environment and Forest, DC, Dhaka, Chief Inspector of Factories, RAJUK, Chief Executive Officer of Savar Cantonment Board, DG, Fire Service, President, BGMEA and three owners of the Spectrum Sweator Industries Ltd., amongst others. Upon hearing the petitioner, a division bench of the High Court Division comprising Mr. Justice M. A. Matin and Mr. Justice A.F.M. Abdur Rahman issued a Rule Nisi to be returnmable within two weeks, calling upon all the Respondents to show cause as to why they should not be directed to take necessary measures and legal actions –

i. to carry out and conduct an effective and thorough public inquiry, by a Commission to be constituted by this Hon'ble Court chaired by a sitting or retired judge of the Supreme Court, and relevant expert members to identify the reasons for the collapse and persons and agencies responsible, and to make recommendations to prevent any such disaster in future;

ii. to secure payments of adequate compensation and arrange for rehabilitation in favour of the victims of the said collapsed factory as prescribed in the Fatal Accident Act, 1885, the Workmen's Compensation Act, 1923 and other applicable laws and rules; (iii)against the garments factories operating in Dhaka, Narayanganj and Chittagong in unauthorised buildings and without adequate safety measures as directed by the judgment dated 31 May, 2001 in Writ Petition No. 6070 of 1997; (iv) to ensure appropriate protective measures to prevent such disasters in future and also to protect the families of the victims of such incidents.

The Court further passed interim orders directing the Deputy Commissioner of Dhaka, RAJUK and the BGMEA to produce their investigation reports before the Court. The Deputy Commissioner, Dhaka, Chief Inspector of Factories, RAJUK and Savar Cantonment Board have also been directed to submit reports before the Court on legality of the construction of the building, ownership of land and safety conditions of the buildings. The reports are to be submitted within one week from the reopening of the court after the vacation. Meanwhile, the Chairman, Managing Director and Director of the Spectrum Sweater Industries Ltd. have been restrained from disposing of any of their assets and properties. The four injured worker who filed the petition include Md. Kamal Hossain, Monjurul Islam, Mozaffar, Md. Motalib. The petitioner organizations include Ain o Salish Kendra

(ASK), Bangladesh Environmental Lawyers Association (BELA), Bangladesh Legal Aid and Services Trust (BLAST), Bangladesh Society for the Enforcement of Human Rights (BSEHR), Bangladesh National Women Lawyers' Association (BNWLA), Centre for Sustainable Development, Karmojibi Nari, Nijera Kori, and ODHIKAR.

4. **Bangladesh Environmental Lawyers Association (BELA) v. Bangladesh and others**. (Brick fields in agricultural land in Barisal)

Challenging the establishment and operation of the listed brick manufacturing fields/kilns in Barisal, BELA filed a writ petition where the Hon'ble Court issued a rule nisi calling upon the respondents to show cause as to why the establishment and operation of the listed brick manufacturing fields/kilns should not be declared to have been done unauthorized and illegal as the same violate the provisions of the Local Government (Union Parishads) Ordinance, 1983, the Bangladesh Environment Conservation Act, 1995 and the Environment Conservation Rules of 1997 made thereunder, the Brick Burning (Control) Act, 1989, the Smoke Nuisance Act, 1905, Penal Code, 1860 and why the respondents should not be directed to take effective and appropriate measures to prevent the operation of the brick manufacturing fields/kilns and to remove the same from the prohibited proximity of the villages of Uttar Rahamatpur, Khudrakatthi, Mohishadi, Doharika and Mirgonj under Babuganj Police Station, District Barisal as the same is against public interest and in violation of the fundamental rights of the villagers guarantee under Articles 27, 31, 32, 40 and 42.

**Causes of growth of public interest litigation:**

i. To ensure justice for poor aggrieved person;

ii. To ensure justice for aggrieved person who is not enable to go to court for reason other than poverty; (other reasons are ignorance, social or other relative cases);

iii. To establish rule of law for all;

iv. To ensure equality before law and equal protection of law for all.

**Who can file a PIL**

Any public-spirited person can file a Public Interest Litigation case (PIL) on behalf of a group of persons, whose rights are affected. It is not necessary**,** that person filing a case should have a direct interest in this Public Interest Litigation. For example: A person in Dhaka can

file a Public Interest Litigation for malnutrition deaths in Sylhet. Someone can file a PIL in the Supreme Court for taking action against a cracker factory that's employing child labour. Any person can file a PIL on behalf of a group of affected people. However, it will depend on the ***facts of the case,*** whether it should be allowed or not.

The Supreme Court (SC), through its successive judgments has relaxed the strict rule of `locus standi' applicable to private litigation. So, anyone may maintain an action or petition by way of PIL provided:

- There is an injury to a disadvantaged section of the population, for whom access to legal justice system is difficult,
- The person bringing the action has sufficient interest to maintain an action of public injury,
- The injury must have arisen because of breach of public duty or violation of the Constitution or of the law,
- It must seek enforcement of such public duty and observance of the constitutional law or legal provisions.

**A PIL can be filed when the following conditions are fulfilled:**

There must be a public injury and public wrong caused by the wrongful act or omission of the state or public authority.

It is for the enforcement of basic human rights of weaker sections of the community who are downtrodden, ignorant and whose fundamental and constitutional rights have been infringed.

It must not be frivolous litigation by persons having vested interests.

**Where a PIL can be filed**

A Public Interest Litigation (PIL) can be filed in the High Court under Article 102 of our Constitution. It is not necessary that the petitioner has suffered some injury of his own or has had personal grievance to litigate. PIL is a right given to the socially conscious member or a public spirited NGO to espouse a public cause by seeking judicial for redress of public injury. Such injury may arise from breach of public duty or due to a violation of some provision of the Constitution. Public interest litigation is the device by which public participation in judicial review of administrative action is assured.

**Subjects of Public Interest Litigation**

Public Interest Litigation is meant for enforcement of fundamental and other legal rights of the people who are poor, weak, ignorant of legal redress system or otherwise in a disadvantageous position, due to their

social or economic background. Such litigation can be initiated only for redress of a public injury, enforcement of a public duty or vindicating interest of public nature. It is necessary that the petition is not filed for personal gain or private motive or for other extraneous consideration and is filed bona fide in public interest. The following are the subjects which may be litigated under the head of Public Interest Litigation.

**The matters of public interest: Generally they include**

a. Violation of basic human rights of the poor.
b. Content or conduct of government policy
c. bonded labour matters
d. matters of neglected children
e. Exploitation of casual labourers and non-payment of wages to them (except in individual cases)
f. matters of harassment or torture of persons belonging to Scheduled Castes, Scheduled Tribes and Economically Backward Classes, either by co-villagers or by police
g. matters relating to environmental pollution, disturbance of ecological balance, drugs, food adulteration, maintenance of heritage and culture, antiques, forests and wild life,
h. petitions from riot victims and
i. Other matters of public importance.

But this traditional rule may be considerably relaxed by the Supreme Court.

**Abuse of PIL**

The public interest litigation jurisdiction was innovated essentially to safeguard and protect the fundamental rights of poor, ignorant, or socially or economically disadvantaged persons. The misuse of public interest litigation jurisdiction by the people resulted in flood of bogus, evasive and vexatious litigations in the Courts. It follows in waste of valuable time of High Courts which are already burdened with huge number of pending cases. The suppression and separation of such litigations from genuine litigations became the great task for the High Courts. It is necessary to find some parameters to restrict the free flow of bogus, evasive and vexatious cases in the guise of public interest litigation[29]. The Supreme Court of India has laid down some guidelines

[29] See,https://www.academia.edu/3349357/Public_Interest_Litigation_PIL_in_India

to prevent misuse of public interest litigation jurisdiction. The Guidelines provide that ordinarily letter/petitions falling under one of the following 10 categories will be entertained as PIL:

1. bonded labour matters;
2. neglected children;
3. non-payment of minimum wages;
4. petitions from jails complaining of harassment, death in jail, speedy trial as a fundamental right, etc.;
5. petitions against police for refusing to register a case, harassment by police and death in police custody;
6. petitions against atrocities on women, in particular harassment of bride, bride-burning, rape, murder, kidnapping, etc.;
7. petitions complaining harassment or torture of persons belonging to scheduled caste and scheduled tribes;
8. petitions pertaining to environmental pollution, disturbance of ecological balance, drugs, food adulteration, maintenance of heritage and culture, antiques, forest and wildlife and other matters of public importance;
9. petitions from riot-victims; and
10. family pensions.

The Guidelines also prescribe that petitions related to certain matters—such as related to landlord-tenant matters, service matters and admission to educational institutions—will ‘‘not’’ be admitted as PIL[30].

**Steps should be taken to regulate the abuse of PIL:-**

The following steps may be taken by the High Court to prevent abuse of Public Interest Litigation in our country[31].

a. The public interest litigation should be converted into an adversarial litigation. It should not venture to take over the functions of the Magistrate or pass any order, which would interfere with its judicial functions.
b. The petitioner, who was not party in the earlier proceeding, cannot file a public interest litigation to review the earlier decision of the Supreme Court.

[30] See, https://www.scribd.com/document/252788414/PIL-in-India
[31] For details, https://www.academia.edu/3349357/Public_Interest_Litigation_PIL_in_India

c. A third party who is a total stranger to the prosecution, by making a public interest litigation, cannot be permitted to question the correctness of the conviction and sentence imposed by the Court after a regular trial

d. The public interest litigation cannot be filed in service matters.

e. The public interest litigation should not be a mere cloak. The court must be satisfied that there is some element of public interest involved in entertaining such a petition.

f. The public interest litigation cannot be invoked by a person or body of persons to satisfy his or its personal grudge and enmity.

**Conclusion**

PIL is an innovative strategy which has been evolved by the Supreme Court for the purpose of providing easy access to justice to the weaker sections of humanity and it is a powerful tool in the hands of public-spirited individuals and social action groups for combating exploitation and injustice and securing for the underprivileged segments of society their social and economic entitlements. It is a highly effective weapon in the armory of the law for reaching social justice to the common man. To save it from abuse, the cases in the name of public interest litigations should be maintained by the Court only when

a. There is a gross invasion of fundamental rights

b. The invaded fundamental right must be of the persons, who are unable to move to the Court due to poverty, illiteracy, social or economic backwardness, or due to any such other cause,

c. The act invading the fundamental rights must shock the judicial conscience of the Court, and

d. The matter must be strictly of public interest though the direct victim of the act of invasion may be some determinate class of individuals.

These parameters will surely help to restrict the free flow of bogus, evasive and vexatious cases in the guise of public interest litigation.

Chapter Fourteen

# Independence of Judiciary

Since the Supremacy of the Constitution is existed, the judiciary is treated as the guardian of our Constitution. Therefore, Independence of judiciary is vital to defend the status of our Constitution, and to redress the grievances of the people, and to resolve disputes properly, and to ensure the rule of law in our country.

**Independence of Judiciary**

Independence of judiciary means a fair and neutral judicial system which can afford to take its decision without any interference of executive or legislative organ of the state[1].It implies that the judges are in a position to render justice in accordance with their oath of office and only in accordance with their own sense of justice without submitting to any kind of pressure or influence be it from executive or legislative or from the parties themselves or from the superiors and colleagues[2].

The idea of independence of judiciary was first worked out by Montesquieu, the noted political philosopher of France, who is regarded as the chief architect of the principles of Separation of powers. Montesquieu, a great advocate of human dignity, developed the theory of separation of powers as a weapon to uphold the liberty of the people. He believed that the application of this theory would prevent the overgrowth of a particular organ which spells danger for political liberty. According to him every man entrusted with some power is bound to misuse it. When the executive and the legislative powers are given to the same person there can be no liberty[3].

The separation of powers is a model for the governance of a state. The model was first developed in ancient Greece and Rome. Under this model, the state is divided into branches, each with separate and independent powers and areas of responsibility so that the powers of

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[1] Md. Nazir Ahmed, Independence of Judiciary: Challenges and Possibility

[2] For details, Md. Awal Hossain Mollah, Separation of Judiciary and Judicial Independence in Bangladesh

[3] See, ROHINI DAS GUPTA , Notes on the Montesquieu Theory of separation of powers, Retrieved http://www.preservearticles.com/201104235909/notes-on-the-montesquieu-theory-of-separation-of-powers.html

one branch are not in conflict with the powers associated with the other branches. The normal division of branches is into a legislature, an executive, and a judiciary[4].

**Independence of Judiciary in Bangladesh**

After independence of Bangladesh the Constitution of the Peoples' Republic of Bangladesh was adopted in 1972. Provision was made in Article 22 in the fundamental principles of state policy that the state shall ensure the separation of judiciary from the executive organs of the state. According to Article 95(1), the president shall appoint The Chief Justice and other Judges. The appointment and control of judges in the subordinate judiciary (judicial service) are described in Articles 115 and 116 stating respectively: Appointment of persons to offices in the judicial service or as magistrates exercising judicial be made by the President with the rules made by him in that behalf. The control (including the power of posting, promotion and grant of leave) and discipline of persons employed in the judicial service and magistrates exercising judicial functions shall vest in the President and shall be exercised by him in consultation with the Supreme Court[5]. It is principally through the above articles that the executive branch has been able to gradually intrude upon and influence the judiciary in Bangladesh, creating enormous problems regarding the quality of jurisdiction and the extent of judicial independence[6].

Recently, the 16th Amendment of the Constitution mainly amended empowering parliament to impeach Supreme Court Judges. According to this Amendment, parliament would impeach judges for "proven misconducts and inabilities" with a two-thirds majority in the assembly and the legislature would enact a law governing investigation of the charges against the judges. Thus, judiciary is going under control of legislature which is contrary to Independence of Judiciary. So, separation of the judiciary from the executive has been argued as a necessity based on the unconstitutionality of the present organization and while this may well be true, it appears to be the consequential improved functional independence of the judiciary that is the fundamental reason for separation with unconstitutionality being only an argument to ensure its enactment.

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[4] Philips C. Galanis, the Separation of Powers. Retrieved http://www.thenassauguardian.com/opinion/op-ed/55018-the-separation-of-powers

[5] For details, Md. Awal Hossain Mollah, Separation of Judiciary and Judicial Independence in Bangladesh

[6] Ibid

## Recent Steps for Separation of judiciary in Bangladesh

The High Court Division (HCD) in May 1999 issued a directive to the government to separate the judiciary, both higher and lower, from the executive within eight weeks. This ruling prevailed on appeal in November 2000 and reaffirmed in the revision case in June 2001 in the Appellate Division (AD). The SC ruling worked out 12 directives for the government to implement the separation without any constitutional amendment, which went unheeded. Despite Articles 102 and 112 of the Constitution making all SC rulings binding for all citizens and authorities, the then government sought 26 extensions of time to implement the ruling and eventually left the office in October 2006 without separating the judiciary. The interim caretaker government that assumed office after October 2006 declared the separation in January 2007 and enacted four sets of rules to effect this separation. These rules, implemented by 1 July 2007, rendered the SC independent and brought the magistrates exercising judicial functions under the control of the SC, free of executive influence. This reform is yet to be implemented in the lower judiciary, which remains largely under the control of the executive.[7]

## The historic Masdar Hossain Case and the Independence of Judiciary of Bangladsh: a Compilation

Independence of the judiciary (also judicial independence) is the principle that the judiciary should be politically insulated from the legislative and the executive power is subsumed under the Article 14 of the International Covenant on Civil and Political Rights. The constitutional provision of a judicial branch of government, and the formal assurance that it is separate and independent of the other branches, represents the main way by which most states seek to comply with the principles contained in the Constitution[8].

The landmark decision of Secretary, **Ministry of Finance v MasdarHossain**[9] was determined on the issue that to what extent the Constitution of the Republic of Bangladesh has actually ensured the separation of judiciary from the executive organs of the State. In essence, the case was decided on the issue of how far the independence of judiciary is guaranteed by our Constitution and whether the provisions of the Constitution have been followed in practice.

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[7] For details, M Rafiqul Islam, Independence of the Judiciary- the Masdar Case, *The Daily Star*, March 08, 2015.

[8] For details, http://www.bangladeshsupremecourtbar.com/Masdar_Hossain_Case.php

[9] (1999) 52 DLR (AD) 82

In 1995 by a writ petition number 2424 MasderHossain along with 441 judicial officers who were judges in different civil court, Alleged inter alia that:

i. Inclusion of judicial service in the name of BCS (Judicial) under the Bangladesh Civil Services (Re-organization) Order, 1980 is ultra vires the Constitution;

ii. Subordinate Judiciary forms chapter II of the PART VI (THE JUDICIARY) of Constitution and thereby the Subordinate Judiciary has already been separated by the Constitution. Only the rules under Article 115 of the Constitution and/or enactments, if necessary, are required to be made for giving full effect to this separation of the judiciary.

iii. Judges of the subordinate Judiciary being the presiding judges of the courts cannot be subordinate to any tribunal and as such. The judicial officers are not subject to the jurisdiction of the Administrative Tribunal.

The court delivered its historic judgment with 12 directive points on 7th May 1997 (reported in 18 BLD 558). The Government preferred an appeal by leave (Civil Appeal No. 79/1999) and the Appellate Division partly reversed the decision of the High Court Division by its judgment delivered on 2nd December 1999 (reported in 52 DLR 82). In the said land mark ruling in 1999 what is popularly known as the MasdarHossain case, the Appellate Division directed the Government to implement its 12 point directives, including for formation of separate Judicial Service Commission (JSC) to serve the appointment, promotion and transfer of members of the judiciary in consultation with the Supreme Court. A further 12-point directive called for a separate Judicial Service Pay Commission, amendment of the criminal procedure and the new rules for the selection and discipline of members of the Judiciary.

On an extensive examination of constitutional provisions relating to subordinate courts (article 114-116A) and services of Bangladesh (article 133-136), the Appellate Division held that "judicial service is fundamentally and structurally distinct and separate service from the civil executive and administrative services of the Republic with which the judicial service cannot be placed on par on any account and that it cannot be amalgamated, abolished, replaced, mixed up and tied together with the civil executive and administrative services." (Para 76). It also directed the government for making separate rules relating to posting, promotion, grant of leave, discipline, pay, allowance,

pension and other terms and condition of the service consistent with article 116 and 116A of the constitution.

However, in delivering judgment, the court made an attempt to differentiate between the terms 'independence' and 'impartiality' and said obiter that they would subscribe to the view of a leading decision of Supreme Court of Canada in Walter Valente v Her Majesty the Queen (1985) 2 SCR 673, on protection of judicial independence under section ii (a) of the Canadian Charter of Rights and Freedoms.

Walter Valente held that "the concepts of 'independence' and 'impartiality', although obviously related, are separate distinct values or requirements. 'Impartiality' refers to a state of mind or attitude of the tribunal in relation to the issues and the parties in a particular case. 'Independence' reflects or embodies the traditional constitutional value of judicial independence and connotes not only a state of mind but also a status or relationship to others... particularly to the executive branch of government."

As a matter of fact, the independence of judiciary and the impartial judicial practice are related concepts, one cannot sustain without the other. What is the point of having a judiciary, which is though independent but fails to appreciate the notion of impartiality or vice versa, can judiciary practice impartiality if it is dependent on other bodies of the government? In both the situation, the end-result is bound to be the same - miscarriage of justice.

**Bangladesh Supreme Court Bar Association played a significant role to implement this landmark judgment**

The last Caretaker Government taking a positive stance to separate the judiciary from the executive based on the constitutional directive principles and Appellate Division's judgment in the MasderHossain's Case. Accordingly 4 service rules namely

a. Bangladesh Judicial Service Commission Rules, 2007,

b. Bangladesh Judicial Service (Pay Commission) Rules 2007,

c. Bangladesh Judicial Service Commission (Construction of Service, Appointments in the Service and Suspension, Removal & Dismissal from the Service) Rules, 2007 and

d. Bangladesh Judicial Service (Posting, Promotion, Grant of Leave, Control, Discipline and other Condition of Service) Rules, 2007 have been enacted and changes were bought in the existing Code of Criminal Procedure 1898 by Ordinance No. II and No.IV of 2007.

This is considered to be a major change paving the way for dispensation of Criminal Justice at the level of magistracy by the officers belonging to Bangladesh Judicial Service and thereby removing all impediments in the separation of Judiciary from the executive control. Finally the throughout a virtual journey the judiciary is separated from the executive and started functioning independently from November 01, 2007[10].

**The 'Twelve Directions' of Masdar Hossain case:**

The 'Twelve Directions' given in this land mark judgment were declared as the operative part of the judgment by the Appellate Division. The directive points are as follows:

1. It is declared that the judicial service is a 'service of the Republic' within the meaning of Article 152(1) of the Constitution, but is a functionally and structurally distinct and separate service from the civil executive and administrative services of the Republic with which the judicial service cannot be placed on par on any account and that it cannot be amalgamated, abolished, replaced, mixed up and tied together with the civil executive and administrative services.
2. It is declared that the word "appointments" in Article 115 means that it is the President who under Article 115 can create and establish a judicial service and also a magistracy exercising judicial functions, make recruitment rules and all pre appointment rules in that behalf, make rules regulating their suspension and dismissal but Article 115 does not contain any rule-making authority with regard to other terms and conditions of service and that Article 133 and Article 136 of the Constitution and the Services (Reorganisation and Conditions) Act, 1975 have no application in the above matters in respect of judicial functions. 3) It is declared that the creation of BCS (Judicial) cadre along with other BCS executive and administrative cadres by the Bangladesh Civil Service (Reorganisation) Order, 1980 with amendment of 198 is ultra vires the Constitution. It is also declared that Bangladesh Civil Service Recruitment Rules, 1981 are inapplicable to the judicial service.
4. The appellant and other respondents to the writ petition are directed that necessary steps be taken forthwith for the President to make Rules under Article 115 to implement its provisions which is a

[10]http://www.bangladeshsupremecourtbar.com/Masdar_Hossain_Case.php

constitutional mandate and not a mere enabling power. It is directed that the nomenclature of the judicial service shall follow the language of the Constitution and shall be designated as the Judicial Service of Bangladesh or Bangladesh Judicial Service. They are further directed that either by legislation or by framing Rules under Article 115 or by executive order having the force of Rules, a Judicial Services Commission be established forthwith with majority of members from the Senior Judiciary of the Supreme Court and the subordinate courts for recruitment to the Judicial Service on merit with the objective of achieving equality between men and women in the recruitment.

5. It is directed that under Article 133 law or rules or executive orders having the force of Rules relating to posting, promotion, grant of leave, discipline (except suspension and removal),allowances, pension (as a matter of right, not favour) and other terms and conditions of service, consistent with Article 116 and 116A, as interpreted by us, be enacted or framed or made separately for the judicial service and magistrates exercising judicial functions keeping in view of the constitutional status of the said service.
6. The impugned orders in the writ petition dated 28.2.94 and 2.11.95 are declared to be ultra vires the Constitution for the reasons [stated in] the judgment. The appellant and the other respondents to the writ petition are directed to establish a separate Judicial Pay Commission forthwith as a part of the Rules to be framed under Article 115 to review the pay, allowances and other privileges of the judicial service which shall convene at stated intervals to keep the process of review a continued one. The pay etc. of the judicial service shall follow the recommendations of the Commission.
7. It is declared that in exercising control and discipline of persons employed in the judicial service and magistrates exercising judicial functions under Article 116 the views and opinion of the Supreme Court shall have primacy over those of the Executive.
8. The essential conditions of judicial independence in Article 116A, elaborated in the judgment, namely, (1) security of tenure, (2) security of salary and other benefits and pension and (3)institutional independence from the Parliament and the Executive shall be secured in the law or rules made under Article 133 or in the executive orders having the force of Rules.
9. It is declared that the executive Government shall not require the Supreme Court of Bangladesh to seek their approval to incur any

expenditure on any item from the funds allocated to the Supreme Court in the annual budgets, provided the expenditure incurred falls within the limit of the sanctioned budgets, as more fully explained in the body of the judgment. Necessary administrative instructions and financial delegations to ensure compliance with this direction shall be issued by the Government to all concerned including the appellant and other respondents to the writ petition by 31.05.2000.

10. It is declared that the members of the judicial service are within the jurisdiction of the administrative tribunal. The declaration of the High Court Division to the opposite effect is set aside.
11. The declaration by the High Court Division that for separation of the subordinate judiciary from the executive no further constitutional amendment is necessary is set aside. If the Parliament so wishes it can amend the Constitution to make the separation more meaningful, pronounced, effective and complete.
12. It is declared that until the Judicial Pay Commission gives its first recommendation the salary of Judges in the judicial service will continue to be governed by status quo [ante] as on 8.1. 94 vide paragraph 3 of the order of the same date and also by the further directions of the High Court Division in respect of Assistant Judges and Senior Assistant Judges. If pay increases are affected in respect of other services of the Republic before the Judicial Pay Commission gives its first recommendation the members of the judicial service will get increases in pay etc commensurate with their special status in the Constitution and in conformity with the pay etc that they are presently receiving.

**Concluding remarks**

The concept of independence of judiciary includes numerous aspects like – appointment, posting, promotion, tenure, discipline and other forms of informal scrutiny of judges, however; attempts were made in appointment, tenure and discipline of judicial independence in Bangladesh. In this study, it has been found that several constitutional provisions are very favorable for the independence of judiciary in Bangladesh. However, the provisions which contradict to the concept of judicial independence should be amended.

Chapter Fifteen

# Ordinance Making Power of the President

Usually the power to make the law rests with the Parliament. However Article 94 confers special power on the President empowering him to promulgate ordinances when the Parliament is not in session and the circumstances are such which require immediate action. In justification of the inception of the Ordinance Making power in the Constitution Dr Ambedkar said that there might be a situation of emergency when the Houses of the parliament are not in session. It is important that this situation should be dealt with and it seems to me that the only solution is to confer upon the President the power to promulgate the law which will enable the executive to deal with that particular situation because it cannot resort to the ordinary process of law because the legislature is not in session.

However, an ordinance cannot be promulgated when the Parliament is in session. This power granted to the President in the Bangladesh Constitution is unique and no such power has been conferred upon the executive in Britain or the USA.

**Historical Background**

The historical genesis of the provision of making Ordinance lies in the Government of India Act, 1935 which provided with two different sections regarding the ordinance making power of the Governor General.

**First, article 72 of the 9th Schedule stated that-**

"The Governor-General may, in cases of emergency, make and promulgate ordinances for the peace and good government of British India and any part thereof."

Second, section 42 of the Government of India Act, 1935 stated that "If at any time when the legislature is not in session the Governor-General is satisfied that circumstance exist which render it necessary for him to take immediate action, he may promulgate such ordinance as the circumstances appear to require."

So, under section 42 of the Government of India Act, 1935 the Governor General had the power to promulgate ordinances only when

the legislature was in recess and on the advice of the ministers and also according to his own judgment.

However under certain circumstances he can override the suggestion of the ministers, but he had to consult them. Section 43 of the Act gives the Governor General the power to issue ordinances for the purpose of enabling him satisfactorily to discharge his functions imposed upon him by or under the Act which required to act in his discretion or to exercise his individual judgment. This almost gives the Governor General a parallel legislative power to enact a bill;

However such act has a lifetime of only six months and can be extended on the previous consent of the Crown.

Actually, the British did it deliberately to safe guard their colonial interests. It is for the Act was called by Winston Churchill,

"A gigantic quilt of jumbled crochet work, a monstrous monument of shame built by pigmies.[1]"

During Pakistan period till the Constitution of 1956 was adopted the county was run on the basis of the Act 1935 where the ordinance Making instruments were freely used. Like the constitution of India the Constitution of Pakistan of 1956 also retained the ordinance making power. After the imposition of Martial law in 1958 legislation by ordinances became the rule rather than the exception. The slogan 'Ayub Khan ruled by ordinance, not by law' was widely used to highlight the democratic struggle of the time, particularly in East Pakistan. This movement to attain democratic and economic emancipation ultimately led to the birth of Bangladesh. But unfortunately the Constitution of Bangladesh has also retained this colonial provision.[2]

## Ordinance in different Countries

### Franch

Article 38 of the Constitution the French Republic provides for provisions concerning making of laws by the executive. According to this article, Ordinances shall be enacted in the meeting of the Council of Ministers after consultation with the Council d'état.

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[1] Hodson, H.V, *The Great divide: Britain-India-Pakistan*, (Karachi: Oxford University Press, 1985), p.48

[2] MD Abdul Halim, Constitution, Constitutional Law and Politics, 4th ed. P 265

**Italy**

Article 76 of The Constitution of Italy, adopted on 22nd December, 1947states, "The exercise of legislative functions may not be delegated by the government save by the laying down of principles and criteria and only for a limited period of time and for definite justice."

**Norway**

According to Article 17 of the Norway Constitution, ordinances may be made by the King, relating to commerce, customs, tariffs, all economic sectors and the police. But these must not be in conflict with a law made by the parliament, and shall remain in force till the next session of Parliament.

**Argentina**

The Constitution of Argentina, adopted in 1853, in its article 99, provides for provisions concerning making of laws by the executive. According to this article 99 clause 3 only when due to exceptional circumstances the ordinary procedure foreseen by this constitution for the enactment of laws are impossible to be followed and when rules are not referrer to criminal issues, taxation, electoral matters or the system of the political parties, the President shall issue decrees on grounds of necessity and urgency. But this decree must be, within a term of ten days, by the chief of ministerial cabinet, who shall personally submit the decision to the consideration of the Joint Standing Committee of Congress.

**Naepal**

Clause 1 of Article 72 of the Constitution of the Kingdom of Nepal states that when the Parliament shall not be in session and when the King shall be satisfied that circumstances exist to take immediate action; he may promulgate any ordinance which must not prejudice the provisions of the constitution.

But it is said in sub-clause (b) of clause 2 in Article 72 that, this ordinance may be repealed at any time by the King.

**Pakistan**

According to Article 89 sub-clause (1) of the Constitution of Federation of Pakistan, when the National Assembly is not in session, the President may promulgate ordinances after satisfying himself that circumstances exist which render it necessary to take immediate action. The ordinance shall stand repealed after the expiry of four months if it was not withdrawn by the President or introduced in the Parliament as a bill. Article 128 conferred the power of promulgating ordinances in

the province by the subject to the same limitation and conditions. But the time limit was 3 months which in the case of President was 4 months.

**India**

According to Article 123 of the Constitution of India, when both of the Houses are not in session and the President is satisfied that immediate action is necessary he can promulgate ordinances. But all ordinances must be laid before Parliament within 6weeks from reassembly of Parliament. Otherwise it shall cease to operate and an ordinance may, at any time, be withdrawn by the President. Article 213 provides for the same power to the governors to promulgate ordinances.

**Ordinance Making Provisions in Bangladesh Constitution**

**What is an ordinance and who makes it?**

Under the Constitution of Bangladesh, the power to make law rests with the legislature. However, in cases while the Parliament is not in session, and immediate action is needed, the President can issue an ordinance. An ordinance is a law, and could introduce legislative changes.

The most important power of the president is perhaps to promulgate ordinances under Art 93. The promulgation of an ordinance is not necessarily connected with an 'emergency' but issued by the president in case he is convinced that it is not possible to have the parliament enacts on same subject immediately and the circumstances render it necessary for him to take "immediate action" [Art 93(1)].

However such an ordinance must receive parliamentary approval within 30 days of the next session of the parliament, otherwise it shall become invalid.

**Under Article 93:** Power of President to promulgate Ordinances during recess of Parliament

93. (1) At any time when Parliament stands dissolved or is not in session], if the President is satisfied that circumstances exist which render immediate action necessary, he may make and promulgate such Ordinances as the circumstances appear to him to require, and any Ordinance so made shall, as from its promulgation have the like force of law as an Act of Parliament:

Provided that no Ordinance under this clause shall make any provision

i. which could not lawfully be made under this Constitution by Act of Parliament;

ii. for altering or repealing any provision of this Constitution; or

iii. continuing in force any provision of an Ordinance previously made.

2. An Ordinance made under clause (1) shall be laid before Parliament at its first meeting following the promulgation of the Ordinance and shall, unless it is earlier repealed, cease to have effect at the expiration of thirty days after it is so laid or, if a resolution disapproving of the Ordinance is passed by Parliament before such expiration, upon the passing of the resolution.

3. At any time when Parliament stands dissolved, the President may, if he is satisfied that circumstances exist which render such action necessary, make and promulgate an Ordinance authorizing expenditure from the Consolidated Fund, whether the expenditure is charged by the Constitution upon that fund or not, and any Ordinance so made shall, as from its promulgation, have the like force of law as an Act of Parliament.

4. Every Ordinance promulgated under clause (3) shall be laid before Parliament as soon as may be, and the provisions of articles 87, 89 and 90 shall, with necessary adaptations, be complied with in respect thereof within thirty days of the reconstitution of Parliament.

**Ordinance making power of the President: Legal basis**

Article 93(1) clearly says that, the President may, if he is satisfied, which satisfaction is of *Subjective* in nature, that, circumstances exist which render immediate action necessary; he may make or promulgate ordinances. He must not exercise this power when the parliament is in session. President may exercise this power only when the Parliament stands dissolved or is not in session. An ordinance made or promulgated under this article has the same effect as an Act made by the Parliament.

**Limitations on Ordinance making**

The President may make ordinances on any matter, subject to some limitations, which are given in the proviso of clause 1 of Article 93. Those conditions are given below:

Any law which could not lawfully be made under the constitution by an Act of Parliament.

An Ordinance cannot be made for altering or repealing any provision of the constitution.

An Ordinance cannot provide for provision for continuing in force any provision of an Ordinance previously made.

An Ordinance promulgated by the President must be laid before the parliament at its first meeting. Or unless it is earlier repealed, cease to have effect at the expiration of thirty days after it is so laid for.[3]

When the parliament stands dissolved the president may by ordinance authorising expenditure from the Consolidated Fund, Which shall have the same effect as a law made by parliament.[4]An ordinance authorising expenditure from consolidated fund must be laid before parliament on its next meeting.[5]

So it is clear that our constitution provides for provision for promulgating ordinance in case of necessity.

One point which is very important to mention here is that whether the law made by ordinance is a democratic one or not is not the real question; the question is that such laws are made bypassing or without parliament. It, therefore, negates all the safeguards of law-making on the one hand, and it reduces the role of parliament into a minimum on the other hand and it institutionalised only backdoor democracy.

**Conclusion**

From the above discussion it is evident that, the main aim of making ordinances can easily be found in Article 93. It is to meet the emergency, and necessity of the country. Another point is that the whole procedure should be done in the prescribed manner fulfilling all of the conditions mentioned in Article 93 of the Constitution.

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[3] Clause (2) of Article 93 of the Constitution of The People's Republic of Bangladesh.

[4] Clause (3) of Article 93 of the Constitution of The People's Republic of Bangladesh.

[5] Clause (4) of Article 93 of the Constitution of the People's Republic of Bangladesh.

Chapter Sixteen

# Emergency Provisions

Emergency is a unique feature of Bangladesh Constitution that allows the President to assume wide powers so as to handle special situations. In emergency, the government can take full legislative and executive control of the state. It also allows the government to curtail or suspend freedom of the citizens. Emergency can be of three types - Due to war, external aggression or internal disturbances. It is pertinent to mention here that, no emergency provisions were incorporated in the original text of the Constitution of Bangladesh in 1972. In 1973 under the second amendment of the Constitution, emergency provisions were inserted and came into effect on 22nd September 1973.

**Definition of emergency**

Like the written constitution of most countries, the Constitution of the People Republic of Bangladesh also contains the provision for proclamation of emergency, but nowhere it is exactly defined that what a state of emergency means.

Lord Dunedin in the case of Balgal singh vs king Emperor[1], expressed his opinion thus,

"A state of emergency is something that does not permit of any exact definition. It connotes a state of matters calling for drastic action."

Stiphen p. marks says that

"Emergency is a situation which results from temporary condition, which place the institution of the state in a precarious position which leads the authorities to feel, justified in suspending the application of certain principles."[2]

The European Court of Human Rights (ECtHR) in Lawless v. Ireland**,** qualified the time of emergency as 'an exceptional situation of crisis or emergency which afflicts the whole population and constitutes

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[1] Brendan Mangan: Protecting Human Rights in National Emergencies; Shortcomings in the European system and a proposal for reform, pub in the Human Rights Quarterly 10 (1988), by the John Hopkins University Press, P.373.

[2] Quoted by Shahnaz Huda "Human rights under emergency situations" DhakaUniversity studies part –F,Vol:III

a threat to the organized life of the community of which the community is composed'. This definition was further developed in the Greek case, in which the European Commission on Human Rights pronounced that 'state of emergency'

1. must be actual or imminent,
2. the effects of emergency must involve the whole nation,
3. the continuance of the organised life of the community must be threatened and
4. The crisis or danger must be exceptional, in that the normal measures or restrictions for the maintenance of public safety, health and order, are plainly inadequate.[3]

In general sense, the expression 'state of emergency' means an exceptional situation of crisis or public danger, actual or imminent, which affects the whole population or the whole population of the area to which the declaration applies and constitutes a threat to the organized life of the community of which the state is composed[4].

From the view points of **constitutional law**, "the concept of emergency means the suspension of and restriction over certain fundament rights of citizens in order to deal with a situation when the security of the state is threatened or the national interest is in peril."

**Justification of inserting Emergency Provision**

Constitution is for the protection of human rights and the country. Constitution can protect human rights only when the country exists. There are some times when country can fall in danger, and to face this type of situation some Constitutions have emergency provisions.

Lord Atkinson has said in R.V Halliday case- "However precious the personal liberty of the subject be there is something for which it may be, to some extent, sacrificed by legal enactment, on account of national success in the war, or escape from national plunder or enslavement"

V.N. Shukla also says in this regard- "Events may take place threatening the very existence of the state and if there are no safeguards, against such eventualities, the state together with all that is desired to remain basic and immutable, will be swept away"

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[3] The Greek case 1969,12 Yearbook of the European Convention on Human Rights ,paras 152,153,at71,72.

[4] For details, http://www.assignmentpoint.com/arts/law/proclamation-of-provisions-concerning-emergency-in-bangladesh.html

Any time unexpected situation may arise in any country. Since, the security of state as a whole is of greater important than the liberty of any individual, some Constitutions have emergency provisions. The term state of emergency generally means an unforeseen combination of circumstances or the resulting state that calls for immediate action or urgent need for assistance or relief to handle the situation. One of the primary reasons for the incorporation of emergency power in constitution is to affect, the operation of constitution during an emergency. The thrust of the argument in this regard has been that the existence of fundamental rights ought not to be permitted to imperial the safety of the state. A second reason for defined provisions on emergency powers is a concern to restrict judicial creativity in the determination of the extent to which such power can be exercised. The general objective of the constitutional emergency power is to bring about a re-allocation of state power in a manner inconsistent with the constitutional limitations which ordinary prevail.

So, the reasons of incorporating Emergency Provisions are:

1. To meet any exceptional or threat full situation
2. To protect the sovereignty, unity, integrity and security of the country.
3. Experts have considered emergency provisions as the “life-breath” of the constitution
4. It is the most effective measure against any dangerous threat that comes in front of Bangladesh.
5. It acts as a safety valve & actually helps in the maintenance of the constitution.

But sometimes the governments declare the state of emergency to abuse their power. For instance, the 3rd and 4$^{th}$ emergencies were declared in our Country for political purposes to suppress the anti-government movement and to perpetuate the un-democratic rule, during the regime of the autocratic President Ershad. Similarly, in India in 1975, Prime Minister Indira Gandhi declared a state of internal emergency after she was indicted in a corruption scandal and ordered to vacate her seat in the Indian Parliament, allowing herself to rule by decree until 1977. Political opposition was heavily suppressed during this emergency.

So, it is proved that providing the provision of emergency is democratic, but its abuse is an undemocratic one.

## Classification of Emergencies

On the basis of its nature, emergency may be of three types, they are:

a. Emergency of War,

b. Emergency of Subversion: and

c. Economic Emergency.

### A. Emergency of War

When emergency is declared due to War or external aggression, it is called emergency of war. For instance, India declared emergency of war first in October 1962 when China launched a massive attack on India's North Eastern border and, for the second time in December 1971 when Pakistan attacked India, under article 352 on the plea of external aggression[5].

### B. Emergency of Subversion:

If any state declares emergency for internal disturbances within the state to suppress civil war, or anti-government movement, or riot, or to face natural disaster like storm, earthquake, volcanic eruption, is called Emergency of Subversion. For example, in our country, the 2nd emergency was declared for facing an unexpected situation after President Ziaur Rahman's murder in 1981.And the 5th emergency was created by the two big political parties and their alliances in connection with national election scheduled to be held on 22 January 2007[6].

### c. Economic or Financial Emergency:

The emergency declared with a view to overcoming a situation in which the economy of the state is about to breakdown is called economic emergency. For example, the 1st emergency was declared in our Country on the ground that economic life of Bangladesh was threatened by internal disturbance[7]. In USA economic emergency was declared by President Roosevelt under the authority of the National Industrial Recovery Act. 1930. By declaring emergency Roosevelt

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[5] See, MAA Sufian, the Genesis and Review of Emergency in Bangladesh, Retrieved http://www.bdresearchpublications.com/admin/journal/upload/08018/08018.pdf

[6] Ibid

[7] Before declaring Emergency, business leaders met the President and urged him to declare the emergency for economic security. The port of Chittagong was closed during siege ("oborodh") and imports and exports came to a halt. Huge congestion of container ships reportedly led to Tk.22 lakh loss to shipping agents per day. Consumer prices rose sharply because movement of goods virtually stopped due to lack of transportation from countryside to urban areas.

adopted New Duel Policy to overcome worldwide financial depression. For another example, article 360 of Indian constitution and article 235 of Pakistan constitution specifically provided the provision of Economic or financial emergency. Tsunami affected Indonesia and other neighboring countries declared economic emergency at that time.

**From the view point of territorial extent emergency may be of two types:**

a. National Emergency; and

b. Partial or State Emergency.

In the first case emergency is declared throughout the whole territory of the state.

On the other hand the second one is declared in a particular area of a unitary state. Article 141C (2) clearly says "An order made under this article may extend to the whole of Bangladesh or any part thereof".

Similarly, in India, under article 352 Emergency can be declared in whole India and under article 356 partial emergency can be declared. The Pakistan constitution also provides for the National and Partial emergency.

**Who can declare the proclamation of emergency?**

The Constitution of the Peoples' Republic of Bangladesh empowered the president to declare a proclamation of emergency to tackle an unwanted occurrence. Article 141A of the constitution says that-

"If the president is satisfied that a grave emergency exist in which the security of economic life of Bangladesh or any part thereof is threatened by war or external aggression or internal disturbance, he may issue a proclamation of emergency."

Thus the president can declare the proclamation of emergency on three grounds namely-

1. War
2. External Aggression
3. Internal Disturbance

In Bangladesh the president of different periods, declared the proclamation of emergency in five times due to internal disturbance.

The first emergency was declared by the president Muhammadullah on 28th December 1974.

The second proclamation of emergency was declared by the president Abdus Sattar on 30th May, 1981.

The third proclamation of emergency was declared by the president Hossain Muhammad Ershad on 26th November, 1987.

The fourth proclamation of emergency was declared by the president Hossain Muhammad Ershad on 27 November, 1990 and,

The last and fifth proclamation of emergency was declared by President Iazuddin Ahmed on 11th January, 2007.

So, in Bangladesh the president can declare the proclamation of emergency. But the proviso of article 141A of the constitutions of Bangladesh says that "the proclamation Emergency shall require for its validity the prior counter signature of the prime minister." Thus virtually the declaration of emergency depends on the wish of the prime minister. Whenever the prime minister advices the president to declare the emergency, the president is bound to do so. The declaration of emergency therefore depends on the subjective satisfaction of the Prime Minister and the court cannot question the justifiability of such satisfactions.

**When the president can declare the proclamation of emergency**

The President of Bangladesh can issue a proclamation of Emergency under article 141 (1) of the Constitution of the People's Republic of Bangladesh; Whereas it is expedient to take special measures for the purpose of ensuring the security and the interests of the state and the population, and for the purpose of maintaining public order and protecting the economic life, and for the purpose of ensuring the maintenance of supplies and services essential to the life of the community.

Whereas the Parliament is not in session and the President is satisfied that circumstances exist which render immediate actions necessary not only to handle a situation of war or external aggression but also to combat internal disturbance with the power to suspend the fundamental rights then he can issue a proclamation of emergency.

Article 141A (1) of the Constitution of the peoples' republic of Bangladesh says that

" If the President is satisfied that a grave emergency exists in which the security or economic life of Bangladesh, or any part thereof, is threatened by war or external aggression or internal disturbance, he may issue a Proclamation of Emergency."

Article 141A (3) of the Constitution of peoples' republic of Bangladesh says that

"A Proclamation of Emergency declaring that the security of Bangladesh, or any part thereof, is threatened by war or external aggression or by internal disturbance may be made before the actual occurrence of war or any such aggression or disturbance if the President is satisfied that there is imminent danger thereof."

So when the existing circumstance satisfies the mind of the president to take urgent measure to tackle the threat of war or external aggression or internal disturbance, he may issue a proclamation of emergency.

**Difference between Article 141A (I) and 141A (3):**

Though both the Article 141 (1) and 141A (3) leaves the power to the president to declare the proclamation of emergency to prevent an unwanted occurrence, but there is a difference between them.

Under Article 141 A (1) if president is satisfied that a grave emergency exists in which the economic life of Bangladesh or any part thereof is threatened by war, or external aggression internal disturbance then he can declare a proclamation of emergency.

But, under Articles 141A (3), If economic life of Bangladesh or any part thereof threatening by war external aggression or internal disturbance is imagined by president he cannot declare the proclamation of emergency before the actual occurrence of threat of war or any of such aggression or disturbance. If he declare so, that would be unconstitutional.

**When a proclamation of emergency is no more valid**

Under the Constitution of the People's Republic of Bangladesh the proclamation of emergency, declared by the president of Bangladesh shall cease to operate in the following situations.

Firstly**,** the proclamation of emergency shall cease to operate under article 141A (2) (a) of the Constitution of Bangladesh, if the proclamation of emergency shall be revoked by a subsequent proclamation.

**Secondly, under article 141A (2) (c)**

"A proclamation of emergency shall cease to operate at the expiration of one hundred and twenty days, unless before the expiration of that period it has been approved by a resolution of Parliament:

Provided that if any such Proclamation is issued at a time when Parliament stands dissolved or the dissolution of Parliament takes place during the period of one hundred and twenty days referred to in sub-

clause (c), the Proclamation shall cease to operate at the expiration of thirty days from the date on which Parliament first meets after its re-constitution, unless before that expiration of the meets after its re-constitution, unless before that expiration of the said period of thirty days a resolution approving the Proclamation has been passed by Parliament."

**Thirdly**, the proclamation of emergency shall cease to operate under the proviso of article 141A (1) if the proclamation of emergency shall fail to fulfill the condition of acquiring the prior counter signature of the prime minister.

When these three conditions are established the proclamation of emergency shall leave its force to operate and to suspend the provision of certain articles of the constitution and the enforcement of fundamental rights as contained in part III of the constitution.

**Position of Fundamental Rights during Emergency**

1. Suspension of provisions of certain Articles of Fundamental Rights:

If the president declares Emergency, certain Articles under Fundamental Rights of the Constitution of Bangladesh will be suspended automatically. And this suspension will continue till the proclamation of emergency is in force. In this regard, Article 141 B of the constitution says that

"While a Proclamation of Emergency is in operation, nothing in articles 36, 37, 38, 39, 40 and 42 shall restrict the power of the state to make any law or to take any executive action which the state would, but for the provisions contained in Part III of the constitution, be competent to make or to take, but any law so made shall, to the extent of the incompetence, cease to have effect as soon as the proclamation ceases to operate, except as respects things done or omitted to be done before the law so ceases to have effect."

The above mentioned article deals with the following Fundamental Rights -

**Article-36: Freedom of movement**

Subject to any reasonable restrictions imposed by law in the public interest, every citizen shall have the right to move freely throughout Bangladesh, to reside and settle in any place therein and to leave and re-enter Bangladesh.

**Article 37, Freedom of assembly:**

Every citizen shall have the right to assemble and to participate in public meetings and processions peacefully and without arms, subject

to any reasonable restrictions imposed by law in the interests of public order health.

**Article-38. Freedom of association:**

Every citizen shall have the right to form associations or unions, subject to any reasonable restrictions imposed by law in the interests of morality or public order;

**Article-39: Freedom of thought and conscience, and of speech**

(1) Freedom of thought and conscience is guaranteed. (2) Subject to any reasonable restrictions imposed by law in the interests of the security of the State, friendly relations with foreign states, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence- (a) the right of every citizen of freedom of speech and expression; and freedom of the press, are guaranteed

**Article -40 Freedom of profession or occupation:**

Subject to any restrictions imposed by law, every citizen possessing such qualifications, if any, as may be prescribed by law in relation to his profession, occupation, trade or business shall have the right to enter upon any lawful profession or occupation, and to conduct any lawful trade or business.

**Article -42: Rights to property**

1. Subject to any restrictions imposed by law, every citizen shall have the right to acquire, hold, transfer or otherwise dispose of property, and no property shall be compulsorily acquired, nationalized or requisitioned save by authority of law. A law made under clause (1) shall provide for the acquisition, nationalization or requisition with compensation and shall either fix the amount of compensation or
2. Specify the principles on which, and the manner in which, the compensation is to be assessed and paid; but no such law shall be called in question in any court on the ground that any provision in respect of such compensation is not adequate. Nothing in this article shall affect the operation of any law made before the commencement of the Proclamations (Amendment) Order, 1977 (Proclamations Order No. I of 1977), in so far as it relates to the acquisition, nationalization or acquisition of any property without compensation.

As the Article 141B empowered the executive to take any action, they utilize their power in taking action even in violating the fundamental right as contained in the constitution and without out showing any humanity to the citizens of the country. The emergency Government mostly take any action to oppress the opposite party and to control the anti government movement.

At the same time the parliament can make any law which is inconsistent with the Fundamental right as contained in part III of the constitution thus the Article 26 which limits the state power to make any law inconsistent with fundamental rights is violated. The parliament makes such law only to enable their government to perpetuate the rule and to protest the opposite party.

The power of the Executive and parliament given by Article 141B will continue until the proclamation of emergency cease to operate.

**2. Suspension of enforcement of fundamental rights during emergency**

As soon as emergency is declared, the president in consultation of prime minister by order can declare the suspension of enforcement of any of the fundamental rights conferred by part III of the constitution. In this regard Article 141C of the constitution says that.

1. "While a Proclamation of Emergency is in operation, the president may, [on the written advice of the prime minister, by order], declare that the right to move any court for the enforcement of such of the rights conferred by Part III of the constitution as may be specified in the order, and all proceedings pending in any court for the enforcement of the right so specified, shall remain suspended for the period during which the proclamation is in force or for such shorter period as may be specified in the order.
2. An order made under this article may extend to the whole of Bangladesh or any part thereof.
3. Every order made under this article shall, as soon as may be, be laid before the parliament."

Thus the Article 141c violates the Articles 44 of the constitution which deals with the enforcement of fundamental rights. So if any person's rights are violated by any of those articles, (Article 141B and 141c) he, on an application to the high count Division, gets no remedy under Article 102 (I) of the constitution. It the case of Kripa Shindu Hazrav V The state[8] C J Badrul Haider chowdhury says that

"During emergency when the fundamental rights are suspended and the right to move any court for the enforcement of the same has been taken away, neither article 102 of the constitution nor section 491 of the CrPC is available to seek the enforcement of these rights."

As soon as, proclamation of emergency is withdrawn, all the fundamental rights which were suspended during emergency situation get their full constitutional status.

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[8] 1978 ,30 DLR 103 ,114.

Chapter Seventeen

# Amendments in Bangladesh Constitution

The word 'amendment' when used in connection with the Constitution may refer to the addition of a provision on a new and independent subject, complete in itself and wholly disconnected from other provision or to some particular article or clause, and is then used to indicate an addition to striking out, or some change in that particular article or clause[1]. Therefore, constitutional amendment means any addition, alteration, substitution, correction or repeal in any provision of the Constitution by Act of Parliament. Article 142 (a) of Our Constitution says "any provision thereof may be amended by way of addition, alteration, substitution or repeal by Act of Parliament".

**Thomas Jefferson said**

"No work of man is perfect. It is inevitable that, in the course of time, the imperfections of a written Constitution will become apparent. Moreover, the passage of time will bring changes in society which a Constitution must accommodate if it is to remain suitable for the nation. It was imperative, therefore, that a practicable means of amending the Constitution be provided".

**Necessity of Constitutional Amendment**

A modern democratic state cannot run without Constitution and amendment is a continuous process to fulfill the demand of the age. Constitutional amendments are a kind of running commentary of state policies, if they truly reflect the demands, hopes, and aspirations of the people for changes. If there is no scope for amendment in the Constitution, it may lead to change by violent and unconstitutional means like revolution.[2] Since Constitution makers don't know what will happen after 30 or 50 years, every modern Constitution contains provision for its amendment.[3] The observation of C.J. Friedrich is worth mentioning here

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[1] Kesavanda Bharati V State of Kerala, (1973) 4 SCC 225 at 537

[2] History records that wherever the Constitution was regarded as more sacrosanct than the demands of people and was not amended to fulfill their aspirations, the people sought remedy through extra-constitutional measures.

[3] For details, see, Talukder,Hassan, Amendments of The Bangladesh Constitution: An Analysis and Evaluation. Pp 5-6.

"A well-drawn Constitution will provide for its own amendment in such a way as to forestall, as far as is humanly possible, revolutionary upheavals."[4]

Thomas Jefferson wrote that every generation has "a right to choose for itself the form of government it believes most promotive of its own happiness." Most of the time new laws or policies are sufficient to meet changing priorities, but when that's not the case, there's talk about amending the Constitution.

Therefore, Our Constitution contains provision relating to amendment in Article 142 and states "Notwithstanding anything contained in this Constitution- any provision thereof may be amended by way of addition, alteration, substitution or repeal by Act of Parliament".

**Provision Concerning Amendment of Bangladesh Constitution**

As regards amendment of Our Constitution, Article 142 says "Notwithstanding anything contained in this Constitution-

(a) any provision thereof may be amended by way of addition, alteration, substitution or repeal by Act of Parliament :

**Provided that-**

(i) no Bill for such amendment shall be allowed to proceed unless the long title thereof expressly states that it will amend a provision of the Constitution;

(ii) no such Bill shall be presented to the President for assent unless it is passed by the votes of not less than two thirds of the total number of members of Parliament ;

(b) when a Bill passed as aforesaid is presented to the President for his assent he shall, within the period of seven days after the Bill is presented to him assent to the Bill, and if he fails so to do he shall be deemed to have assented to it on the expiration of that period."

Thus, it is clear that, Article 142 confers power on the Parliament to amend our Constitution. This Article also contains the procedure of amending the Constitution. For such amendment, A Bill for amendment must be passed by the votes of not less than two-thirds of the total number of members of Parliament. The Bill must contain a long title expressly stating that it will amend a provision of the Constitution. The majority decision of the Appellate Division is that the specific provision need not be mentioned in the Bill and the

[4] Friedrich, C. J., Constitutional Government and Democracy, p.13

requirement will be fulfilled if the long title states that certain provision or provisions is or are sought to be amended.[5]

## Amendments of the Bangladesh Constitution

As of 2016 the Constitution of the People's Republic of Bangladesh has been amended 16 times.

## First Amendment

The Constitution (First Amendment) Act 1973[6] was passed on 15 July 1973. It amended Article 47 of the constitution by inserting an additional clause which allowed prosecution and punishment of any person accused of 'genocide, crimes against humanity or war crimes and other crimes under international law'. The inserted new clause i.e. clause (3) of Article 47 reads as follows:

"Notwithstanding anything contained in this Constitution, no law nor any provision thereof providing for detention, prosecution or punishment of any person, who is a member of any armed or defence or auxiliary forces or any individual, group of individuals or organisation or who is a prisoner of war, for genocide, crimes against humanity or war crimes and other crimes under international law shall be deemed void or unlawful, or ever to have become void or unlawful, on the ground that such law or provision of any such law is inconsistent with, or repugnant to, any of the provisions of this Constitution."

This first amendment inserted after Article 47 a new Article 47A specifying inapplicability of certain fundamental rights in those cases. The inserted new Article 47A states as follows:

"47A. (1) The rights guaranteed under article 31, clauses (1) and (3) of article 35 and article 44 shall not apply to any person to whom a law specified in clause (3) of article 47 applies.

(2) Notwithstanding anything contained in this Constitution, no person to whom a law specified in clause (3) of article 47 applies shall have the right to move the Supreme Court for any of the remedies under this Constitution."

By inserting this new Article certain fundamental rights are made incapable for a person, who is a member of any armed or defence or auxiliary forces or any individual, group of individuals or organization

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[5] Anwar Hossain Chowdhury Vs Bangladesh, 1989 BLD (Spl) 1, para 411,415,608 and 615.

[6] Act XV of 1973.

or who is a prisoner of war, for genocide, crimes against humanity or war crimes and other crimes under international law.

The rights which were made incapable to war criminals are as follows:

**(1) Right to protection of law under Article 31**

Article 31 of our Constitution says about right to protection of law. It states as follows:

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

By the first amendment, this fundamental right has been made incapable to war criminals.

**(2) Protection against trial under expost facto law:**

Article 35(1) has given all citizens of Bangladesh right to protection against trial under expost facto law. The Article reads as follows:

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

This fundamental right is not guaranteed for persons accused under clause 3 of Article 47.

**(3) Right to a speedy and public trial by an independent and impartial Court or tribunal established by law under Article 35(3):**

Article 35(3) reads as follows: "Every person accused of a criminal offence shall have the right to a speedy and public trial by an independent and impartial Court or tribunal established by law."

After first amendment this fundamental right is not guaranteed for persons accused under clause 3 of Article 47.

**(4) Right to enforce fundamental rights under Article 44**

Article 44 says

"(1) The right to move the High Court Division in accordance with clause (1) of article 102, for the enforcement of the rights conferred by this Part is guaranteed.

(2) Without prejudice to the powers of the High Court Division under article 102, Parliament may by law empower any other court, within the local limits of its jurisdiction, to exercise all or any of those powers."

After insertion of Article 47A, this fundamental right is no more existed for persons accused under Article 47(3).

**Second Amendment**

There were no provisions of Emergency and preventive detention in the original Constitution of our Country. By the Constitution (Second Amendment) Act, 1973[7], the provisions relating to Emergency and Preventive detention were inserted in our Constitution. Basically this Second Amendment brought four types of fundamental changes in our Constitution which is given below:

(1) A new part IXA was added to the Constitution which states as follows:

**Part IXA**
**Emergency Provisions**

141A. (1) If the President is satisfied that a grave emergency exists in which the security or economic life of Bangladesh, or any part thereof, is threatened by war or external aggression or internal disturbance, he may issue a Proclamation of Emergency for one hundred twenty days:

Provided that such Proclamation shall require for its validity the prior counter signature of the Prime Minister.

2. A Proclamation of Emergency

a. may be revoked by a subsequent Proclamation;
b. shall be laid before Parliament;
c. shall cease to operate at the expiration of one hundred and twenty days, unless before the expiration of that period it has been approved by a resolution of Parliament:

Provided that if any such Proclamation is issued at a time when Parliament stands dissolved or the dissolution of Parliament takes place during the period of one hundred and twenty days referred to in sub clause (c), the Proclamation shall cease to operate at the expiration of thirty days from the date on which Parliament first meets after its re constitution, unless before that expiration of the said period of thirty

[7] Act XXIV of 1973.

days a resolution approving the Proclamation has been passed by Parliament or at the expiration of one hundred and twenty days, whichever occurs first.

3. A Proclamation of Emergency declaring that the security of Bangladesh, or any part thereof, is threatened by war or external aggression or by internal disturbance may be made before the actual occurrence of war or any such aggression or disturbance if the President is satisfied that there is imminent danger thereof.

141B. While a Proclamation of Emergency is in operation, nothing in articles 36, 37, 38, 39, 40 and 42 shall restrict the power of the State to make any law or to take any executive action which the State would, but for the provisions contained in Part III of this Constitution, be competent to make or to take, but any law so made shall, to the extent of the incompetency, cease to have effect as soon as the Proclamation ceases to operate, except as respects things done or omitted to be done before the law so ceases to have effect.

141C.

(1) While a Proclamation of Emergency is in operation, the President may, on the written advice of the Prime Minister, by order], declare that the right to move any court for the enforcement of such of the rights conferred by Part III of this Constitution as may be specified in the order, and all proceedings pending in any court for the enforcement of the right so specified, shall remain suspended for the period during which the Proclamation is in force or for such shorter period as may be specified in the order.

(2) An order made under this article may extend to the whole of Bangladesh or any part thereof.

(3) Every order made under this article shall, as soon as may be, be laid before Parliament.

By virtue of this second amendment, the President can issue the Proclamation of Emergency if he is satisfied that a grave emergency exists in which the security or economic life of Bangladesh, or any part thereof, is threatened by war or external aggression or internal disturbance.

(2) The provision relating to preventive detention was inserted in Article 33 which reads as follows:

33. (1) No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest, nor

shall he be denied the right to consult and be defended by a legal practitioner of his choice.

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

(3) Nothing in clauses (1) and (2) shall apply to any person

(a) Who for the time being is an enemy alien; or

(b) Who is arrested or detained under any law providing for preventive detention.

(4) No law providing for preventive detention shall authorize the detention of a person for a period exceeding six months unless an Advisory Board consisting of three persons, of whom two shall be persons who are, or have been, or are qualified to be appointed as, Judges of the Supreme Court and the other shall be a person who is a senior officer in the service of the Republic, has, after affording him an opportunity of being heard in person, reported before the expiration of the said period of six months that there is, in its opinion, sufficient cause for such detention.

(5) When any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, as soon as may be, communicate to such person the grounds on which the order has been made, and shall afford him the earliest opportunity of making a representation against the order:

Provided that the authority making any such order may refuse to disclose facts which such authority considers to be against the public interest to disclose.

(6) Parliament may by law prescribe the procedure to be followed by an Advisory Board in an inquiry under clause (4).

By virtue of the above Article the Special Powers Act 1974 was enacted.

(3) Provision for enacting laws inconsistent with fundamental rights was incorporated by adding a new clause 26(3) which states as follows: “Nothing in this article (Article 26) shall apply to any amendment of this Constitution made under article 142.”

(4) The interval between two sessions of the Parliament was extended from 60 days to 120 days.

**Third Amendment**

The Constitution (Third Amendment) Act 1974[8] was enacted on 28 November 1974. This amendment altered Article 2 of the Constitution to give effect to an agreement between Bangladesh and India for the exchange of certain enclaves, and the fixing of boundary lines between the two countries. The background of this amendment is that in the case of MUKHLESUR RAHMAN V. BANGLADESH[9] The agreement between Bangladesh and India in respect of retaining Dhahgram and Angorpota and giving up Berobari was challenged. This amendment enabled the Government of Bangladesh to transfer the Southern half of the South Berubari Union No.12 measuring an area of 2.64 square miles approximately to India in exchange of Dahagram and Angarpota enclaves.

**Fourth Amendment**

The Constitution (Fourth Amendment) Act 1975[10] was passed on 25 January 1975. This Act-

- amended Articles 11, 66, 67, 72, 74, 76, 80, 88, 95, 98, 109, 116, 117, 119, 122, 123, 141A, 147 and 148 of the Constitution;
- replaced Articles 44, 70, 102, 115 and 124;
- repealed Part III of the Constitution;
- altered the Third and Fourth Schedules;
- inserted a new part (Part VIA); and
- inserted Articles 73A and 116A;

**Fifth Amendment**

The Fifth Amendment Act was passed by the Parliament on 6 April 1979[11]. This Act amended the Fourth Schedule to the Constitution by inserting a new paragraph 18 thereto under which all amendments, additions, modifications, substitutions and omissions made in the Constitution during the period between the 15th August, 1975 and the 9th April, 1979 by any Proclamation Order of the Martial law authorities were ratified and confirmed and were declared to have been

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[8] Act LXXIV of 1974.
[9] 26 DLR (SC) 44
[10] Act II of 1975.
[11] Act I of 1979

validly made and would not be called in question in or before any court or tribunal or authority on any ground whatsoever.

Therefore, by virtue of this Amendment, all amendments or repeals made in the Constitution from 15 August 1975 to 9 April 1979 (inclusive) by Proclamation Order of the Martial Law Authorities[12] were deemed to have been validly made, and could not be called into question before any court or tribunal or other authority.

**Changes made by this 5th Amendment:**

The 5th Amendment brought about the following changes in our Constitution

(1) Article 8 of the original constitution, which speaks of the four fundamental principles of state policy--nationalism, socialism, democracy and secularism -- was amended to omit secularism and insert the words "absolute trust and faith in Almighty Allah".

(2) The principle of socialism was also given a new explanation, saying, "socialism would mean economic and social justice."

(3) Socialism and freedom from exploitation in articles 9 and 10 were substituted by the concepts of promotion of local government institutions and participation of women in national life.

(4) The amendment omitted article 12, which contained secularism.

(5) The preamble to the constitution was preceded by "Bismillah-ar-Rahman-ar-Rahim" (in the name of Allah, the Beneficent, the Merciful).

(6) The preamble also underwent two changes--the words "a historic struggle for national liberation" were replaced with "a historic war for national independence", and "nationalism, socialism, democracy and secularism" were replaced with "absolute trust and faith in Almighty Allah, nationalism, democracy and socialism meaning economic and social justice".

(7) Provisions of referendum in respect of amendment of certain provisions of the Constitution were inserted and to that end; a new clause was created in Article 142.

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[12] The Fifth Amendment was enacted by a military government in the aftermath of a series of murderous coups, counter-coups and regime change. The period was very painful, uncertain and critical for the 'sovereign existence' of Bangladesh as it faced hosts of political, economic and security challenges from both within and outside. One may have reservations about some aspects of this or any other Amendment but it is important also to consider the overall situation prevailing at the time.

(8) A new Article 92A was created whereby the President was given power to expend public moneys in certain cases.

**Sixth Amendment**

After death of President Ziaur Rahman, the then vice President Abdus sattar was nominated by BNP as a Presidential candidate in the election. But under Article 66(dd), it stated that a person would be disqualified for election as a member of parliament if he was holding any office of profit in the service of the Republic other than an office which is declared by law not to be disqualified its holder. On the other hand Article 66(2A) mentioned some persons, who were exempted from holding an office of profit- such as Prime Minister, Deputy Prime Minister, Minister, Minister of State and Deputy Minister. So, there was no law stating that the office of vice-president was not an office of profit. To overcome this situation, The CONSTITUTION (Sixth Amendment) Act[13] was enacted by the Jatiya Sangsad; it amended Articles 51 and 66 of the Constitution excluding, inter alia, the office of President and Vice President free from being office of profit. Thus, Abdus Sattar was able to contest in the election without resignation from his office.

**Seventh Amendment**

The Seventh Amendment Act was passed on 11 November 1986[14]. It amended Article 96 of the Constitution; it also amended the Fourth Schedule to the Constitution by inserting a new paragraph 19, which amongst other things provided that all proclamations, proclamation orders, Chief Martial Law Administrator's Orders, Martial Law Regulations, Martial Law Orders, Martial Law Instructions, ordinances and other laws made from 24 March 1982 to 11 November 1986 (inclusive) had been validly made, and could not be called into question before any court or tribunal or other authority.

**7th Amendment Illegal**

In Siddique Ahmed V. Bangladesh[15] The High Court Division in its judgment declared The Constitutional (Seventh Amendment) Act, 1986 illegal, without lawful authority and void ab initio.

The Appellate Division of the Supreme Court in 2011 upheld the judgment of the High Court Division declaring The Constitutional

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[13] Act XIV of 1981.
[14] Act I of 1986.
[15] 63 DLR (HCD)564, 2011

(Seventh Amendment) Act illegal that had legitimized the military rule of H.M. Ershad.

**Eighth Amendment**

The Eighth Amendment Act was passed on 7 June 1988[16]. This Amendment brought the following changes:

(1) In Article 3, the word 'Bengali' was substituted for the word 'Bangla'.

(2) In Article 5, the word 'Dacca' was substituted for the word 'Dhaka'.

(3) A new Article 2A was inserted where it was provided that the state religion of the Republic is Islam, but other religions may be practiced in peace and harmony in the Republic.

(4) Two sub clauses of Article 30 were omitted. The amended Article 30 stated as follows "No citizen shall, without the prior approval of the President, accept any title, honour, award or decoration from any foreign state".

(5) In Article 68, the word 'salaries' was substituted for the word 'remuneration'.

(6) In Article 103(2)(b), the word 'transportation' was substituted for the word 'imprisonment'.

(7) Article 100 was amended by this amendment by setting up six permanent benches of the High Court Division outside Dhaka.

Article 100 as amended by the said Act was as under:

"100. Seat of Supreme Court

(l) Subject to this article, the permanent seat of the Supreme Court shall be in the capital.

(2) The High Court Division and the Judges thereof shall sit at the permanent seat of the Supreme Court and at the seals of its permanent Bench.

(3) The High Court Division shall have a permanent Bench each at Barisal, Chittagong, Comilla, Jessore, Rangpur and Sylhet and each permanent Bench shall have such Benches as the Chief Justice may determine from time to time.

(4) A permanent Bench shall consist of such number of Judges of the High Court Division as the Chief Justice may deem it necessary to

[16] Act XXX of 1988.

nominate to that Bench from time to time and on such nomination the Judges shall be deemed to have been transferred to that Bench.

(5) The President shall, in consultation with the Chief Justice, assign the area in relation to which each permanent Bench shall have Jurisdictions, powers and functions conferred or that may be conferred on the High Court Division by this Constitution or any other law; and the area not so assigned shall be the area in relation to which the High Court Division sitting at the permanent seat of the Supreme Court shall have such jurisdictions, powers and functions.

(6) The Chief Justice shall make rules to provide for al incidental, supplemental or consequential matters relating to the permanent Benches."

**The amended Article 100 Illegal**

In Anwar Hussain Chowdhury Vs Bangladesh[17], popularly known as the Constitution 8th Amendment Case, the Appellate Division declared the amended Article 100 null and void as it is Ultra Virus the basic feature of the Constitution. The Court held that, in the name of amendment the Parliament cannot change the basic structure of the Constitution and hence it cannot decentralize a unitary supreme court under the garb of amendment.

The Constitution stands on certain fundamental principles which are its structural pillars which the parliament cannot amend by its amending power for, if these pillars are demolished or damaged then "the whole constitutional edifice will fall down". Some of the basic structures are:

i) Sovereignty belongs to the people.

ii) Supremacy of the Constitution,

iii) Democracy.

iv) Republican government.

v) Independence of judiciary.

vi) Unitary state.

vii) Separation of powers.

viii) Fundamental rights.

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[17] 41 DLR (1989) AD, 165.

The amended Article 100 is *ultra vires* because it has destroyed the essential limb of the judiciary namely, of the Supreme Court of Bangladesh by setting up rival courts to the High Court Division in the name of permanent Benches conferring full jurisdictions, powers and functions of the High Court Division.

**Ninth Amendment**

The Constitution (Ninth Amendment) Act 1989 was passed in July 1989[18]. This amendment provided for the direct election of the Vice-President; it restricted a person in holding the office of the President for two consecutive terms of five years each; and it provided that a Vice-President might be appointed in case of a vacancy in the office of President, but that such an appointment must be approved by the Jatiya Sangsad.

**Subject matters of the Amendment**

1. In Article 49, the words "appointed by President" shall be substituted by the words "elected in accordance with law by direct election".
2. In Article 50, the words "appointed as" shall be omitted.
3. Article 51 was substituted which reads as follows:

"51. (1) Subject to the provisions of this Constitution, the President shall hold office for a term of five years from the date on which he enters upon his office. Provided that, notwithstanding the expiration of his term the President shall continue to hold office until his successor enters upon his office.

(2) No person shall hold office as President for more than two terms consecutively: Provided that nothing in this clause shall apply to a person who has acted as President under Article 55.
(3) The President may resign his office by writing under his hand addressed to the Vice-President.

(4) If the President is elected as a Member of Parliament, he shall not be qualified to be such member until he ceases to hold office as President.

(5) If a Member of Parliament is elected as President, he shall be deemed to have vacated his seat in Parliament on the day on which he enters upon his office as President.

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[18] Act XXXVIII of 1989.

**51A.Term of office of Vice-President**

(1) Subject to the provisions of this Constitution, the Vice-President shall hold office for a term of five years from the date on which he enters upon his office.

Provided that if the President and Vice-President have not entered office on the same date for any reason, the term of office of the Vice-President shall expire on the date on which the term of office of the President expires. Provided further that, notwithstanding the expiration of his term, the President shall continue to hold office until his successor enters upon his office.

(2) No person shall hold office as Vice-President for more than two terms consecutively: provided that nothing in this clause shall apply to a person who has acted as President under Article 55A.
(3) The Vice-President may resign his office by writing under his hand addressed to the President.

(4) If the Vice- President is elected as a Member of Parliament, he shall not be qualified to be such member until he ceases to hold office as Vice-President.

4. If a Member of Parliament is elected as Vice-President, he shall be deemed to have vacated his seat in Parliament on the day on which he enters upon his office as Vice-President."

5. In Articles 53 and 54, in the marginal heading, after the word "President", the words "and Vice-President" shall be inserted.

6. After Article 55, a new Article 55A was inserted which reads as follows:

**"55A: Vacancy During Term of Vlce-President.**

1) If a vacancy occurs in the office of Vice-President by reason of his death, resignation, impeachment or removal, the President shall appoint a person qualified for election as Vice-President to be Vice-President who shall take office upon confirmation by the votes of a majority of the total number of members of Parliament and shall hold the office of Vice-President until a Vice-President elected to fill such vacancy enters upon his office.

2) If the appointment of the Vice-President is neither confirmed nor refused confirmation by Parliament within ninety days of the submission of the appointment before Parliament, the person appointed shall take office as if his appointment had been confirmed by Parliament."

(7) In article 72, after clause (4), the following new clause shall be inserted namely:-

"(4A) If any contingency as mentioned in clause (3) of article 55 arises at any time when Parliament stands dissolved or is not in session, it shall, notwithstanding anything contained in this Constitution, stand summoned lo meet at the Parliament House at noon on the day following the day on which such contingency arises, and the Parliament so summoned to meet shall stand prorogued or dissolved as before, as the case may be, after it has made necessary provisions for the discharge of the functions of the President.".

(8) In Article 123 for clauses (1) and (2) the following shall be substituted, namely:-

"1) The elections to the offices of President and Vice-President shall be held simultaneously and at the same time.

2) An election to fill a vacancy in the office of President occurring by reason of the expiration of his term or by reason of his death, resignation, impeachment or removal shall be held within the period of one hundred and eighty days prior to the date on which his term shall expire or his term would have expired if there were no such death, resignation, impeachment or removal.

2A) An election to fill a vacancy in the office of Vice-President occurring by reason of the expiration of his term or by reason of his death, resignation, 'impeachment or removal shall be held on the date on which the election to fill the vacancy in the office of President shall be held under clause (2).

2B) If both the offices of President and Vice-President have fallen vacant by reason of their death, resignation, impeachment or removal, the elections, to fill the vacancies shall be held within the Period of one hundred and eighty days after the occurrence of the last of the two vacancies."

(9) In Article 148, after clause (1), the following new clause shall be inserted, namely:-

"1A) A person elected to the office of President and a person elected to the office of Vice-President shall make the oath on the same date, the person elected to the office of President making the oath first:

Provided that if for any reason both the persons cannot make-the oath on the same date, the person elected to the office of President shall make the oath on the first date and the person elected to the office of Vice-President on the next date".

(10) In the Fourth Schedule, after paragraph 19, the following new paragraph 20 shall be added, namely.-

20: **Provisions Relating to Vice-Presidnt.—**

1) The person holding office as Vice-President immediately before the commencement of the Constitution (Ninth Amendment) Act, 1989 shall continue to hold such office and the term of office of such Vice-President shall expire on the date on which the term of office of the person holding office as President immediately before such commencement expires holding office as President Immediately before such commencement expires.

2) If there is a vacancy in the office of Vice-President at the time of commencement of the Constitution (Ninth Amendment) Act, 1989. a Vice-President shall be appointed by the President under article 55A and the term of office of such Vice-President shall expire.".

(11) In article 119, for the words "office of President", Where occurring, the words "offices of President and Vice-President" shall be substituted.

(12) In article 122, for the words "office of President", where occurring, the word "offices of President and Vice-President" shall be substituted.

**Executive under the Ninth Amendment:**

The type of executive, with an all powerful presidency and a rubber-stamp legislature established under the Fifth Amendment was retained by General HM Ershad. In order to make it look more like the American Presidential system he brought about the Ninth Amendment to the Constitution to democratize the system. Article 52 (2) was amended to limit the President's tenure to two-terms; whereas according to the amended Article 49, instead of the President nominating the Vice President, the Vice President was to be directly elected as a running mate of the President. The executive now bore more resemblance to that of the US, but in the absence of a powerful and independent legislature there were virtually no checks on the authority of the executive.

## Tenth Amendment

This Amendment was passed in the 4th parliament on 12th June, 1990[19]. It mainly related to the reserved women seats in the parliament as provided for in Article 65.

The original Constitution provided for 15 reserved seats for women members and this provision was to remain in force for 10 years. But in 1979 through the 5th Amendment the number of reserved seats was increased from 15 to 30 and the period this provision was to remain in force was extended from 10 to 15 years. This period expired on 10th December 1987 and as such the 4th parliament did not have any reserved women seats. There were, therefore, debates and discussions within Ershad's ruling party whether such a reservation was necessary or desirable. The mode of election for the women's reserved seats and their role in the parliament had prompted a weekly to term these 30 ladies as "30 sets ornaments in parliament." However Ershad and his ruling party decided to keep such reservation for another period of 10 years. To that end the Constitution (Tenth Amendment) Bill was introduced on 10th June and passed on 12th June, 1990.

### Amendment of article 65 of the Constitution

In the Constitution of the People's Republic of Bangladesh, in article 65, for clause (3) the following shall be substituted,

"(3) Until this dissolution of Parliament occurring next after the expiration of the period of ten years beginning from the date of the first meeting of the Parliament next after the Parliament in existence at the time of commencement of the Constitution (Tenth Amendment Act, 1990 there shall be reserved thirty seats exclusively for women members, who shall be elected according to law by the members aforesaid:

Provided that nothing in this clause shall prevent a woman from being elected to any of the seats provided for in clause (2)."

## Eleventh Amendment

After taking over the power from an elected President Justice Abdus Sattar by a bloodless coup Lieutenant General (Retired) Hussain Mohammed Ershad run the country continuously for nearly nine years through martial law as well as so called democratic rule elected by voter less elections. There were various attempts of mass movement taken by the political parties against the Ershad regime in the 1980s,

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[19] Act XXXVIII of 1990.

but these movements could not take any momentum. Gradually and finally the movement against the Ershad regime intensified in 1990. Mass people started coming out to the streets of the major cities of the country as we have recently observed in the Middle East.

In or around October 1990 the movement took a serious turn and the Alliances of political parties demanded transfer of power to a caretaker government headed by a neutral person. The Alliances reached a consensus and made a public declaration setting out the mode and manner of transfer of power.

Ershad had no alternative but to surrender to the demands of the Alliances and hand over power to Justice Sahabuddin Ahmed after appointing him as the Vice President. Justice Sahabuddin Ahmed then formed the caretaker government in line with Joint Declaration of the Three Alliances and conducted the election of the Members of Parliament (commonly known as 'General Election'). The new Parliament passed the Constitution (Eleventh Amendment) Act 1991 and Constitution (Twelfth Amendment) Act 1991 respectively.

The Constitution (Eleventh Amendment) Act was passed on 6 August 1991[20]. It amended the Fourth Schedule to the Constitution by adding a new paragraph 21, validating the appointment and oath as Vice President of Shahabuddin Ahmed (Chief Justice of Bangladesh), and the resignation tendered to him on 6 December 1990 by the then President Hussain M Ershad. This Act ratified, confirmed and validated all powers exercised, all laws and ordinances promulgated, all orders made and acts and things done, and actions and proceedings taken by the Vice President as acting President from 6 December 1990 to 9 October 1991 (when Abdur Rahman Biswas became President following his election). The Act also confirmed and made possible the return of Vice President Shahabuddin Ahmed to his previous office as Chief Justice of Bangladesh.

### Twelfth Amendment

The Constitution (Twelfth Amendment) Act 1991[21], known as the most important landmark in the history of constitutional development in Bangladesh, was passed on 6 August 1991. It amended Articles 48, 55, 56, 57, 58, 59, 60, 70, 72, 109, 119, 124, 141A and 142. Through this amendment the parliamentary form of government was re-introduced in Bangladesh as provided in the original Constitution; the President

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[20] Act XXXIV of 1991.
[21] Act XXVIII of 1991.

became the constitutional Head of the State; the Prime Minister became the Executive Head; the cabinet headed by the Prime Minister became responsible to the Jatiya Sangsad; the post of the Vice President was abolished; the President was required to be elected by the Members of the Jatiya Sangsad.

**1. Position of the President:**

The President became titular head of the state while the Prime Minister became the Chief executive by the provisions of Art 48 & 55 of the amended Constitution. The post of the Vice-President was abolished. In the original Construction the President was to be elected by members of the parliament in poll by secret ballot as provide by second schedule of the constitution. But 12 amendments did not restore that second schedule.

Under original constitution President could exercise only one function independently, after 12 amendments President can exercise two (2) functions. These are appointment of Prime Minister and appointment of the Chief Justice.

Article 141A has been amended to the effect that before declaration of emergency counter signature of Prime Minister is need for its validity.

In case of impeachment and removal of the President the provisions of the original constitution have been revived.

**(2) Position of the Prime Minister and the Cabinet**

It has been categorically provided in Art 55 that the executive power of the Republic shall be exercised by or on the authority of the Prime Minister and cabinet shall be collectively responsible to the Parliament. The President shall appoint the Prime Minister, who enjoys the support of the majority members of the Parliament and other Ministers shall be appointed by him Art 56.

In the original constitution under Art 56 ministers could be appointed from outside the parliament but such minister would have to be elected as a Member of Parliament within six (6) months. But after 12amendments one-tenth of the total number of minister can be appointed from outside the parliament and need not be elected as members but they must be qualified for election as a member of parliament.

In question of tenure of the office of Prime Minster the original provision was that if the Prime Minister ceases to retain the support of a majority of the members of parliament, he shall either resign his office or advise the President to dissolve the parliament. But after 12amendment if the President is satisfied that no other member is able to retain the support of a majority of the members only then President can dissolve the Parliament.

**(3).The Issue of Floor Crossing**

12amendment has introduced more tough procedures. Two clauses have been added to Art 70. Article 70(2) prevents forming any rebel group within the party.

Article 70(3) provides that if any independent member joins any political party he will come under the preview of anti-defection provisions.

(4).The provision as to the intervening period between two sessions of parliament as provided for in Article 72 was reverted to that of the original Constitution.

(5). Moreover, through Article 59 of the Constitution, this Act ensured the participation of the people's representatives in local government bodies, thus stabilizing the base of democracy in the country.

**Results of this Amendment**

The Twelfth Amendment amended Articles 48, 55, 56, 57, 58, 59, 60, 70, 72, 109, 119, 124, 141A, and 142 of the Constitution with the following results:

- the parliamentary form of government was re-introduced;
- the President became the constitutional head of the state;
- the Prime Minister became the head of the executive;
- the Cabinet headed by the Prime Minister became responsible to the Jatiya Sangsad;
- the position of Vice President was abolished;
- the office of President now became elected by the members of the Jatiya Sangsad;

Through the amendment of Article 59 this amendment also ensured the participation of the people's representatives in local government bodies, thus stabilizing the base of democracy in the country.

**Thirteenth Amendment**

The Constitution (Thirteenth Amendment) Act 1996 was passed on 26 March 1996[22]. It provided for a non-party caretaker government which, acting as an interim government, would give all possible aid and assistance to the Election Commission for holding the general election of members of the Jatiya Sangsad peacefully, fairly and impartially. The non-party caretaker government, comprising the Chief Adviser and not more than 10 other advisers, would be collectively responsible to the president and would stand dissolved on the date on which the Prime Minister entered upon his office after the constitution of the new Sangsad.

The new Chapter added by this Amendment concerning Caretaker Government i.e. Chapter IIA reads as follows:

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[22] Act I of 1996.

## "Chapter IIA
## Non-Party Caretaker Government

### 58B. Non-Party Care-taker Government

(1) There shall be a Non-Party Care-taker Government during the period from the date on which the Chief Adviser of such government enters upon office after Parliament is dissolved or stands dissolved by reason of expiration of its term till the date on which a new Prime Minister enters upon his office after the constitution of Parliament.

(2) The Non-Party Care-taker Government shall be collectively responsible to the President.

(3) The executive power of the Republic shall, during the period mentioned in clause (1), be exercised, subject to the provisions of article 58D(1), in accordance with this Constitution, by or on the authority of the Chief Adviser and shall be exercised by him in accordance with the advice of the Non-Party Care-taker Government.

(4) The provisions of article 55(4), (5) and (6) shall (with the necessary adaptations) apply to similar matters during the period mentioned in clause (1).

58C. Composition of the Non-Party Care-taker Government, appointment of Advisers, etc.

(1) Non-Party Care-taker Government shall consist of the Chief Adviser at its head and not more than ten other Advisors, all of whom shall be appointed by the President.

(2) The Chief Adviser and other Advisers shall be appointed within fifteen days after Parliament is dissolved or stands dissolved, and during the period between the date on which Parliament is dissolved or stands dissolved and the date on which the Chief Adviser is appointed, the Prime Minister and his cabinet who were in office immediately before Parliament was dissolved or stood dissolved shall continue to hold office as such.

(3) The President shall appoint as Chief Adviser the person who among the retired Chief Justices of Bangladesh retired last and who is qualified to be appointed as an Adviser under this article:

Provided that if such retired Chief Justice is not available or is not willing to hold the office of Chief Adviser, the President shall appoint as Chief Adviser the person who among the retired Chief

Justices of Bangladesh retired next before the last retired Chief Justice.

(4) If no retired Chief Justice is available or willing to hold the office of Chief Advise, the President shall appoint as Chief Adviser the person who among the retired Judges of the Appellate Division retired last and who is qualified to be appointed as an Adviser under this article:

Provided that if such retired Judge is not available or is not willing to hold the office of Chief Adviser, the President shall appoint as Chief Adviser the person who among the retired Judges of the Appellate Division retired next before the last such retired Judge.

(5) If no retired judge of the Appellate Division is available or willing to hold the office of Chief Adviser, the President shall, after consultation, as far as practicable, with the major political parties, appoint the Chief Adviser from among citizens of Bangladesh who are qualified to be appointed as Advisers under this article.

(6) Notwithstanding anything contained in this Chapter, if the provisions of clauses (3), (4) and (5) cannot be given effect to, the President shall assume the functions of the Chief Adviser of the Non-Party Care-taker Government in addition to his own functions under this Constitution.

(7) The President shall appoint Advisers from among the persons who are-

1. qualified for election as members of parliament;
2. not members of any political party or of any organisation associated with or affiliated to any political party;
3. not, and have agreed in writing not to be, candidates for the ensuing election of members of parliament;
4. not over seventy-two years of age.

8. The Advisers shall be appointed by the President on the advice of the Chief Adviser.

9. The Chief Adviser or an Adviser may resign his office by writing under his hand addressed to the President.

10. The Chief Adviser or an Adviser shall cease to be Chief Adviser or Adviser if he is disqualified to be appointed as such under this article.

11. The Chief Adviser shall have the status, and shall be entitled to the remuneration and privileges, of a Prime Minister and an Adviser

shall have the status, and shall be entitled to the remuneration and privileges, of a Minister.

12. The Non-Party Care-taker Government shall stand dissolved on the date on which the prime Minister enters upon his office after the constitution of new parliament.

**58D. Functions of Non-Party Care-taker Government**

(1) The Non-Party Care-taker Government shall discharge its functions as an interim government and shall carry on the routine functions of such government with the aid and assistance of persons in the services of the Republic; and, except in the case of necessity for the discharge of such functions its shall not make any policy decision.

(2) The Non-Party Care-taker Government shall give to the Election Commission all possible aid and assistance that may be required for bolding the general election of members of parliament peacefully, fairly and impartially.

**58E. Certain provisions of the Constitution to remain ineffective**

Notwithstanding anything contained in articles 48(3), 141A(1) and 141C(1) of the Constitution, during the period the Non-Party Care-taker government is functioning, provisions in the constitution requiring the President to act on the advice of the Prime Minister or upon his prior counter-signature shall be ineffective."

It also amended Articles 61, 99, 123, 147, 152, and The Third Schedule to the Constitution mainly to make the positions of Advisors and Chief Adviser consistent with other provisions of the Constitution.

**Caretaker Government system declared illegal**

In Abdul Mannan Khan V. Bangladesh[23], popularly known as the Constitution (13th Amendment) Case, the Appellate Division of the Bangladesh Supreme Court declared the provisions concerning Non-Party Caretaker Government introduced by The Constitution (Thirteenth Amendment) Act, 1996 (Act 1 of 1996) is void and ultra vires the Constitution, as the same was inconsistent with one of the basic features of the Bangladesh Constitution- democracy and representative government.

**Fourteenth Amendment**

The Constitution (Fourteenth Amendment) Act, 2004 was passed on 16 May 2004[24]. This amendment amended several articles of the Constitution:

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[23] Civil Appeal No.139 of 2005. Judgment on 10th May,2011.

[24] Act XIV OF 2004

- a new Article 4A was inserted, for the preservation and display of the portraits of the President and the Prime Minister;
- clause (3) of Article 65 was amended enhancing number of reserved seats to 45 exclusively for women members in the Parliament;
- Articles 96 (1), 129, and 139 were amended to raise the retirement age of the Judges of the Supreme Court, the Auditor General, and the Chairman and other members of the Public Service Commission (PSC); Judge's retirement age was enhanced from 65 to 67. In cases of the Auditor General and the Chairman and other members of the Public Service Commission (PSC), it was 65 from 62.
- Article 148 was amended, to provide for the administration of the oath to newly elected members of Parliament by the Chief Election Commissioner.

**Fifteen Amendments**

The Constitution (Fifteenth Amendment) Act, 2011[25], was passed by the Parliament and it became law on the 3rd July, 2011.

**The following changes were brought by this Amendment:**

(1) Articles 7A and 7B were inserted in the Constitution after Article 7, which read as follows:

"7A. (1) If any person, by show of force or use of force or by any other un-constitutional means-

(a) abrogates, repeals or suspends or attempts or conspires to abrogate, repeal or suspend this Constitution or any of its article ; or

(b) subverts or attempts or conspires to subvert the confidence, belief or reliance of the citizens to this Constitution or any of its article,

his such act shall be sedition and such person shall be guilty of sedition.

(2) If any person-

(a) abets or instigates any act mentioned in clause (1) ; or

(b) approves, condones, supports or ratifies such act, his such act shall also be the same offence.

(3) Any person alleged to have committed the offence mentioned in this article shall be sentenced with the highest punishment prescribed for other offences by the existing laws.

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[25] Act XIV of 2011.

7B. Notwithstanding anything contained in article 142 of the Constitution, the preamble, all articles of Part I, all articles of Part II, subject to the provisions of Part IXA all articles of Part III, and the provisions of articles relating to the basic structures of the Constitution including article 150 of Part XI shall not be amendable by way of insertion, modification, substitution, repeal or by any other means."

(2).The provision of caretaker government system, introduced by the Thirteenth Amendment, was abolished.

(3). It amended the Preamble restoring it to its original position of 1972. It replaces Article 2A by a new one that says, "The state religion of the Republic is Islam, but the State shall ensure equal status and equal right in the practice of the Hindu, Buddhist, Christian and other religions."

**4. The Act replaces Article 4A which reads as follows:**

"The Portrait of the Father of the Nation, Bangabandhu Sheikh Mujibur Rahman shall be preserved and displayed at the offices of the President, the Prime Minister, the Speaker and the Chief Justice and in head and branch offices of all government and semi-government offices, autonomous bodies, statutory public authorities, government and non-government educational institutions, embassies and missions of Bangladesh abroad."

**(5). The Act replaces Article 6 which states that**

"(1) The citizenship of Bangladesh shall be determined and regulated by law.

(2) The people of Bangladesh shall be known as Bangalees as a nation and the citizens of Bangladesh shall be known as Bangladeshies."

(6). This Amendment revives the original Article 12, which was omitted by the Fifth Amendment. The Article says "The principle of secularism shall be realised by the elimination of –

(a) communalism in all its forms ;

(b) the granting by the State of political status in favour of any religion;

(c) the abuse of religion for political purposes ;

(d) any discrimination against, or persecution of, persons practicing a particular religion."

(7). It inserted Article 18A which reads as follows "The State shall endeavor to protect and improve the environment and to preserve and safeguard the natural resources, bio-diversity, wetlands, forests and wild life for the present and future citizens."

(8). It inserted a new Article 23A which reads as follows "The State shall take steps to protect and develop the unique local culture and tradition of the tribes, minor races, ethnic sects and communities."

(9). It replaces the existing Article 38 which states "Every citizen shall have the right to form associations or unions, subject to any reasonable restrictions imposed by law in the interests of morality or public order :

Provided that no person shall have the right to form, or be a member of the said association or union, if-

(a) it is formed for the purposes of destroying the religious, social and communal harmony among the citizens ;

(b) it is formed for the purposes of creating discrimination among the citizens, on the ground of religion, race, caste, sex, place of birth or language ;

(c) it is formed for the purposes of organizing terrorist acts or militant activities against the State or the citizens or any other country ;

(d) its formation and objects are inconsistent with the Constitution."

(10). It inserted a new clause in Article 125 which reads as follows " (c) A court shall not pass any order or direction, ad interim or otherwise, in relation to an election for which schedule has been announced, unless the Election Commission has been given reasonable notice and an opportunity of being heard."

(11). It replaces Article 123(3) which reads as follows "A general election of the members of Parliament shall be held-

(a) in the case of a dissolution by reason of the expiration of its term, within the period of ninety days preceding such dissolution; and

(b) in the case of a dissolution otherwise than by reason of such expiration, within ninety days after such dissolution :

**Provided that the persons elected at a general election under sub-clause**

(a) shall not assume office as members of Parliament except after the expiration of the term referred to therein."

(12). The numbers of women reserve seats were increased to 50 from the existing 45.

(13). The 15th amendment has repealed the rights of the citizen's to constitution-making by deleting the provisions of referendum on constitutional amendment. It is pertinent to mention here that, The necessity of referendum is getting increasingly recognised in Europe (including in the UK, a country traditionally reluctant to referendum) and also in America. On the contrary, the 15th amendment has snatched the right of participation of people and curtailed such right of their elected representative in amending constitution. It has thus undermined the spirit of democracy.

(14). This Act has inserted fifth, sixth and seventh schedules after the fourth schedule.

(15). The original Article 70 of the 1972 Constitution was restored allowing Members of Parliament (MPs) to remain absent from the House if she or he does not want to cast vote on any issue in line with her or his party's decision. The substituted Article 70 reads as follows:

"A person elected as a member of Parliament at an election at which he was nominated as a candidate by a political party shall vacate his seat if he

(a) resigns from that party; or

(b) votes in Parliament against that party;

but shall not thereby be disqualified for subsequent election as a member of Parliament."

(16). This 15th amendment has replaced 'Absolute Trust and Faith in Almighty Allah' with 'Secularism' in the fundamental principles of state policy. Substituted Article 8(1) states "The principles of nationalism, socialism, democracy and secularism, together with the principles derived from those as set out in this Part, shall constitute the fundamental principles of state policy."

(17). The speech of Bangabandhu Sheikh Mujibur Rahman on March 7, 1971, declaration of Independence by Bangabandhu after midnight of March 25, 1971 and the proclamation of Independence declared at Mujibnagar on April 10, 1971 were incorporated in the Constitution.

**Sixteenth Amendment**

The 'Constitution (16th Amendment) Bill-2014' was passed unanimously on 17th September, 2014 amid objection from the BNP,

which had stayed off the general election and was then out of Parliament.

Both Prime Minister Sheikh Hasina and Opposition Leader Raushon Ershad were present while the bill was passed by both voice and division votes. Results of division votes announced by the speaker showed that 327 votes, including those from the ruling Awami League and its allies and opposition Jatiya Party, were in favour of passing the bill and there was no vote against it.

After a gazette is published following the president's approval, the amendment will come into effect.

Now, Parliament will be able to remove judges if allegations of incapability or misconduct against them are proved, a power lawmakers had enjoyed only for four years after independence.

In line with the 16th Amendment, a new law will be introduced to guide the investigation and gathering of evidence over the allegations against a judge.

The 16th Amendment of the Constitution mainly amended empowering parliament to impeach Supreme Court Judges. Part VI chapter one Article 96 of our Constitution which includes provision on the tenure of office of the Supreme Court Judges now states:

(1) Subject to the other provisions of this article, a Judge shall hold office until he attains the age of sixty-seven years.

(2) A Judge shall not be removed from his office except by an order of the President passed pursuant to a resolution of Parliament supported by a majority of not less than two-thirds of the total number of members of Parliament, on the ground of proved misbehaviour or incapacity.

(3) Parliament may by law regulate the procedure in relation to a resolution under clause (2) and for investigation and proof of the misbehaviour or incapacity of a Judge.

(4) A Judge may resign his office by writing under his hand addressed to the President.

According to this Amendment, parliament would impeach judges for "proven misconducts and inabilities" with a two-thirds majority in the assembly and the legislature would enact a law governing investigation of the charges against the judges.

In line with the law, the report on the investigation into the allegations would go to parliament in the form of a motion of

impeachment. The House would hold discussions on it, giving the judges scope to defend themselves, and remove them if the charges are proved.

The Amendment does not bring any changes to the provision of judges' previous retirement age which is 67.

**Impeachment of SC judges: Cabinet Okays draft law in principle**[26]

Cabinet on April 25, 2016, approves principal draft of a new law with provision of investigation against Supreme Court (SC) judges for allegation of misconduct or incapacity and Act is well known as the *Bangladesh Supreme Court Judges (investigation) Act 2016.*

The law will specify the procedure for the Jatiya Sangsad to impeach a judge of the highest court if allegation of misconduct or incapacity is proved. The approval was made under a constitutional obligation as parliament on September 17, 2014 unanimously passed the 16th constitutional amendment bill, empowering itself to remove SC judges for misbehavior and incapacity.

The 1972 constitution empowered parliament with this authority. The House was unable to exercise the power as the then government did not formulate any law.

Then military ruler Gen Ziaur Rahman introduced the Supreme Judicial Council (SJC), amending the constitution through a martial law order which was ratified by the Fifth Amendment to the constitution in 1979.

The draft of *Bangladesh Supreme Court Judges (investigation) Act 2001* has been approved by the cabinet on 25th April 2016. It says that any citizen with evidence will be able to submit allegations of misconduct or incapacity against an SC judge to the Speaker of the House. The speaker will constitute a three-member independent investigation committee with a former chief justice being its head along with an ex-attorney General and an eminent citizen of the country or a jurist as its members to probe into the allegation.[27]

The committee's recommendations will be placed before Parliament which will forward its recommendations to the President for necessary

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[26] For details, Star Online Report, April 25, 2016,Retrieved http://www.thedailystar.net/politics/impeachment-sc-judges-cabinet-okays-draft-law-1214398,

[27] Kiran Rapaka, Bangladesh Cabinet approved draft of Supreme Court Judge (Investigation Act) 2016, 25 April 2016. available at http://www.jagranjosh.com/

action. About false and baseless allegation of misconduct against any judge of the Supreme Court, the person concerned will be jailed for two years and fine of maximum up to 5 lakh taka.[28]

The draft law was approved and aimed at reverting to the main law of the original constitution of 1972 to ensure a legislative process regarding removal of the Supreme Court judges like all other democratic nations around the world.

**Writ Petition challenging the legality of the 16th amendment**

Nine Supreme Court lawyers filed the writ petition with the High Court on November 5, 2014, praying to consider the 16th Constitution amendment as illegal and unconstitutional. In the petition, Supreme Court lawyers also sought directives upon the government for the cancellation of the 16th amendment to the constitution. In the petition, the Supreme Court lawyers said the judiciary is independent and it cannot be controlled by any organ of the state as per the Supreme Court judgment in separation of the judiciary case. If the power to impeach a SC judge is given to the parliament, the independence of the judiciary will be damaged. After primary hearing, the bench of Justice Moyeenul Islam Chowdhury and Justice Md Ashraful Kamal issued a rule asking the government to explain why the amendment should not be declared illegal and contrary to the constitution, and cancelled. The hearing on the rule began on May 21, 2015.

Meanwhile, four jurists — Kamal Hossain, M Amir-Ul Islam, Rokon Uddin Mahmud and Ajmalul Hossain QC — made their depositions as amici curiae.

**The High Court scraped the 16th amendment to the constitution terming it illegal**

In response to the Writ petition, the High Court has declared the Constitutional 16th amendment as illegal. The special bench of justices Moyeenul Islam Chowdhury, Quazi Reza-Ul Hoque and Md Ashraful Kamal gave the order by majority on 5th May, 2016.

The High Court said the ‘parliamentary mechanism’ to remove judges is ‘an accident of history’. The judges gave examples from other countries and said, “...we have no hesitation in holding that the Sixteenth Amendment is a colourable legislation and is violative of the principle of separation of powers among the three organs of the State, namely, the Executive, the Legislature and the Judiciary and the Independence of the Judiciary as guaranteed by Articles 94 (4) and 147

[28] Ibid

(2), two basic structures of the Constitution and the same is also hit by Article 7B of the Constitution. So we find merit in the Rule. The Rule, therefore, succeeds. Accordingly, by majority view, the Rule is made absolute without any order as to costs. It is hereby declared that the Constitution (Sixteenth Amendment) Act, 2014 (Act No. 13 of 2014) (Annexure-'A' to the Writ Petition) is colourable, void and ultra vires the Constitution of the People's Republic of Bangladesh,"[29] they said.

Justice Chowdhury and Justice Hoque agreed that the amendment was illegal, while Justice Kamal was for dismissing the writ petition.

In his opinion, Attorney General Mahbubey Alam said that the State will file an appeal against the order. He said "We will move the Supreme Court's chamber judge against this verdict", while Law Minister Anisul Huq has termed the verdict 'unconstitutional'.

However, the HC bench issued a certificate to the government so that it can directly file an appeal with the Appellate Division, challenging the HC verdict. Considering the significance of the matter, there is no logical view that the Appellate Division would go against the decision of the High Court Division which has given enough strong reasons and judicial acumen to establish that for the benefit of the republic's growth and prosperity we should not try to put the judiciary at the loggerheads with the executive or legislative organs of the state.

***Observation of Justice Justice Moyeenul Islam Chowdhury and Justice Quazi Reza-Ul Hoque :[30]***

Keeping Article 70 of Bangladesh constitution as it is, the members of parliament must toe the party line in case of removal of any judge of the Supreme Court. Consequently, the Judge will be left at the mercy of the party high command.

As regards Article 70 of the constitution of Bangladesh, we must say that this article has fettered the members of parliament. It has imposed a tight rein on them. Members of parliament cannot go against their party line or position on any issue in the parliament.

They have no freedom to question their party's stance in the parliament, even if it is incorrect. They cannot vote against their party's decision. They are, indeed, hostages in the hands of their party high command.

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[29] See details, A. Sarkar and S. Liton, "Bangladesh High Court scraps 16th amendment to constitution", *The Daily Star*, May 06, 2016

[30] Ibid

It is easily comprehensible that in 63% Commonwealth jurisdictions, judges are removed from office for their misconduct/ misbehaviour or incapacity without the intervention of the legislature. In examining the constitutionality of the sixteenth amendment, we cannot shut our eyes to the peculiar political culture prevalent in this country. It is common knowledge that there is no consensus about pressing national issues between the major political parties of the country.

As a matter of fact, the major political parties are poles apart in this regard. Secondly, our society is sharply polarised. Thirdly, there may not be two-thirds majority of the party-in-power at all times.

Taking these factors into consideration, "we are of the opinion that the parliamentary removal mechanism may fizzle out in many instances. So, the allegedly corrupt or incapacitated judges of the Supreme Court will continue to be in office to the great detriment of public interest. We cannot lose sight of this aspect in any view of the matter".[31]

They further said a billion-dollar question has arisen: whether the 16th amendment has infringed upon the independence of the judiciary in public perception?

The answer is obviously in the affirmative. In public perception, independence of the judiciary has been curbed by the sixteenth amendment. In any event, we must attach great importance to public perception when it comes to the independence of the judiciary. If according to public perception, the judiciary is not independent, then it cannot be sustained at all.

Attorney General Mahbubey Alam said that they would move an appeal before the Appellate Division of the Supreme Court challenging the verdict.

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[31] Ibid

Chapter Eighteen

# Doctrine of Basic Structure

The framers of our constitution had left no stone unturned in order to deliver a perfect and precise constitution. In order to retain the values of our country as well as ascertain development of human personality, certain provisions of the constitution are kept on high pedestal. These provisions, rights vested in the people, values, ideas, etc and which constituted the basic structure of the constitution. Whatever the debate but the chief advantage of such a doctrine probably is to secure the constitution, the solemn expression of the will of the people. If we look at the perspective of Bangladesh after its independence the concept of basic structure has been established only in 1989 in the famous milestone case of **Anwar Hossain vs.Bangladesh** 1989. Now the basic structure of our constitution is set beyond the preview of the amending power and a new interpretation of Article 142 has also been given.

Now with the seemingly absolute power of amendments with the intention of preserving the original ideals envisioned by the constitution makers, the apex court pronounced that parliament could not distort damage or alter the basic features of the constitution under the pretext of amending it.

## Basic Structure Doctrine

The basic structure doctrine is the judge-made rule that some features of the Constitution are beyond the limit of the influence of amendment of the parliament. According to this doctrine, there are certain basic features of the Constitution that cannot be altered or destroyed through amendments by the parliament. Key among these "basic features", are the fundamental rights granted to individuals by the constitution. The doctrine was first expressed in '**Kesavananda Bharati v. The State of Kerala**' where it was asserted that the amendments cannot modify the constitution's "basic structure"[1].

## Anwar Hussain .Vs. Bangladesh or 8th Amendment Case

The case of Anwar Hussain .Vs. Bangladesh widely known as 8th Amendment case is a famous judgment in the constitutional record of independent Bangladesh. This is the earliest judgment whereby the

[1] See, Kevin Y. L. Tan, An Introduction to Singapore's Constitution (Talisman, Singapore, Revised Edition, 20011) 11.

Supreme Court of Bangladesh assailant down an amendment to the constitution ready by the parliament. By two court order appeal the amended Art 100 & the notification of the Chief Justice were confronted as mega vires. A division bench of the HCD discharged the appeal instantly. Leave was established by the Appellate Division by a majority of 3 to 1 striking down the amendment.

The court held that the power of amendment of the Constitution of the Republic of Bangladesh under Article 142 is not an unlimited power and that power conflicts with the concept of supremacy of the constitution provided by Article 7 of the Constitution. Article 7 of the Constitution has put an implied limitation on the power of amendment and therefore Article 7 is basic and unalterable. The counter argument was independence of judiciary and separations of powers are basic features of the constitution but the impugned amendment has not affected either of the two. And the power of amendment under article 142 is a constituent power not any ordinary legislative power.

B.H. Chowdhury, J. has listed 21 ‘unique features’ which are basic features of the constitution and they are not amendable. He finally held the impugned amendment violated the Articles 102 and 44 of the constitution.

Shabuddin Ahmed, J. further held that ‘constituent power’ in the sense of power to make a Constitution, belongs to the people alone and to vest the power to the parliament is a ‘derivative’ one and that derivative constituent power will not automatically make the amendment immune from challenge. And he further held that the impugned amendment has broken the ‘oneness’ of the High Court Division which is irreconcilable conflict with other Articles of the constitution relating to High Court Division. He listed sovereignty belongs to people, supremacy of the constitution , democracy , unitary state, separation of powers , independence of the Judiciary are the structural pillars of the constitution and they are beyond any alteration or change by amendatory process, and the impugned amendment rendering the High Court Division virtually unworkable in its original form and shape.

M.H.Rahman,J.
Dissenting Judgment

Judgment of A.T. M. Afzal J. rejected the doctrine of basic structures on two grounds that it is unthinkable the makers of the constitution did not leave any option to the future generation but decided on all matters for all people. And secondly the makers of the constitution envisaged the so-called 'basic features' to be 'permanent features' of the constitution. He stressed on saying that sub Article (1A) in article 142 provided the procedure of referendum which is more difficult to amend some provisions of the constitution which manifests that no other provision of the constitution is basic that a referendum is required to be incorporated in the constitution. He feared that majority judgment in the eighth amendment case may be a 'roadblock' for the future.

Despite that A.T.M. Afzal ,J by restricting the basic features holds that the word "amendment" has a built –in limitation in that it does not authorize the abrogation or destruction of the constitution or any of its three structural pillars- executive, legislative and judiciary which will render the constitution unworkable. He also rejects the doctrine of implied limitation to the power of amendment and pursues to say that the limitation in Article 142 relates 'only to procedure for amendment and not substantive' in the sense that no article is beyond the ambit of amendment.

Finally A.T.M. Afzal holds that the impugned amendment has not destroyed the High Court Division and the impugned amendment and notification not to be ultra vires on any grounds alleged.[2]

The standard argument of the judgment is that, the constitution rests on some fundamental main beliefs which are its structural supports which the parliament cannot amend by its amending power for; if these supports are discharged or damaged then the entire constitutional configuration will lose its validity.

Some crucial parts of the constitution only belongs to the people of the state like, Supremacy of the Constitution Democracy, Republican government, Independence of Judiciary, Unitary state, Separation of powers and Fundamental rights.

These structural pillars of the constitution are placed beyond any change by amendatory procedure. If by implementing the amending

[2] See in details 41 DLR (AD) 165. 1989 BLD ( SPL) 1

power these principles are shortened more than one stable seat of the Supreme Court thus destroying the unitary quality of the Judiciary. The amended Art 100 is ultra vires for the reason that it has destroyed the vital limb of the judiciary by setting up adversary courts to the HCD in the name of permanent Benches presenting full jurisdiction, power and role of the HCD.[3]

This amended Art 100 is conflicting with Art 44, 94. 101 & 102 and also compacts Art 108, 109, 110 & 111 of the constitution. It directly sullied Art 114 this amendment is illegitimate since there is no provision of transfer which is essential obligation for relaxation of the rules of justice.[4]

**Identification of Basic Structure**

It has been decided in the 8th Amendment case that the Constitution of Bangladesh has the basic structure which is beyond the purview of the amending power of the Constitution, yet there is no unanimous opinion regarding opinion regarding the number of basic features. The judges differ on the point of identification of the basic structures of the Constitution of Bangladesh.

**Shahabuddin Ahmed, J** identified the following eight features as the basic structures of the Constitution:

1. Supremacy of the Constitution as the solemn expression of the will of the people.
2. Democracy.
3. Republican Government.
4. Unitary State
5. Separation of the power.
6. Independence of Judiciary.
7. Fundamental Rights.
8. One integrated Supreme Court in conformity with the unitary nature of the state.

**Impact of the application of Basic Structure Theory**

Basic structure is a concept which has been emerged in Bangladesh from the Indian cases. Basic structure as we see today is thus a

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[3] For details, Bangladesh Constitution and Basic Structure Doctrine, Retrieved http://www.lawteacher.net/free-law-essays/administrative-law/bangladesh-constitution-and-basic-structure-doctrine-administrative-law-essay.php

[4] http://www.thedailystar.net/newDesign/news-details.php?nid=124640

combination of years of judicial supervision of fundamental rights and related Constitutional structure. The application of Basic Structure is mostly based on Fundamental Rights and which should operate within Socio-economic Structure or a widen continuum envisaged by the Fundamental Rights become exercisable by all and a proper balance and harmony between Fundamental Rights and Fundamental principles. The freedom of few has then to be abridged in order to ensure the freedom of all.[5]It has two types of effect one is positive and the other is negative.

**Positive Impact**

The doctrine of Basic Structure is highly useful at least for a country like Bangladesh where many laws are passed purely for political purposes. So there remain no chances of amending the basic features of the Constitution if we look at the previous ways we will see in most of the cases the misuse of amendment power by the government for their own interest. So the process of the basic structure will be helpful for smooth running of the country mandated by the constitution of the Peoples Republic of Bangladesh.

The doctrine of basic structure theory just gives an extended power in the hands of the judiciary to give special protection to constitutional basic features. This concept is not new in the sense of totally new idea; rather it has been emerged as a new extended interpretation from an existing principle.[6]

Basic Structures are the pillars of a Constitution, so it must be maintained in time of the amendment to protect the Constitution of the country[7].So the identification and implementation of Basic Structure Theory protect the Constitution from being destroyed or abolished.

**Negative Impact**

Some scholars think that, like U.K. Parliament, the amending power of parliament should be unrestricted. The power to amend the Constitution is absolute and it is capable of receiving any article of the Constitution.

Amendment of any provision of the constitution is the power to bring about changes to make the constitution more complete, more perfect and more effective. However if restriction is imposed in case of the amendments in the name of basic structure then that will be

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[5] 50- by Navajyoti Samana and Sumita Basu.

[6] ibid.para-439.

[7] Shahabuddin Ahmed in the case of Anwar Hossain Vs.Bangladesh 1989.

contradictory to the enjoyment of unlimited amendment power of parliament

Times are not static, it's changing. And to cope up with the time, amendment of the constitution is vital. So there should not be anything in the constitution which is fixed and permanent.

**Conclusion**

The doctrine of basic structure is the result of feelings among the judges that certain values and ideals embedded in the constitution should be preserved and not to be destroyed by any process of constitutional amendment. This doctrine places an embargo on the erosion of basic features of the constitution. This doctrine actually seeks to preserve the basic core and the spirit of the constitution.

Chapter Nineteen

# Rule of Law

The term 'Rule of Law' is derived from the French phrase 'La Principe de Legality' (the principle of legality) which refers to a government based on principles of law and not of men. In this sense the concept of 'La Principe de Legality' was opposed to arbitrary powers.[1] The rule of law is old origin. In thirteenth century **Bracton**, a judge in the reign of Henry III wrote- "The king himself ought to be subject to God and the law, because law makes him king."[2]

Professor **Wade** gave three ideas- i) it expresses a preference for law and order within a community rather than anarchy, warfare and constant strife, ii ) it expresses a legal doctrine of fundamental importance, namely, that government must be conducted according to law and that in disputed cases what the law requires is declared by judicial decisions and iii) it refers to a body of political opinion about what the declared rules of law should provide in matters both of substance and of procedure. Nowadays the rule of law means the rule by a democratic law which is passed by a democratically elected parliament after adequate debate and discussion.

**Elements of the Rule of Law**

In his book The Morality of Law, American legal scholar Lon Fuller identified eight elements of law which have been recognized as necessary for a society aspiring to institute the rule of law. Fuller stated the followings:

1. Laws must exist and those laws should be obeyed by all, including government officials.
2. Laws must be published.
3. Laws must be prospective in nature so that the effect of the law may only take place after the law has been passed. For example, the

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[1] Massey, I.P. Conceptual objections against the Growth of Administrative Law. *Administrative Law*, 5th Ed; Eastern Book Company: 34, Lalbagh, Lucknow-226001, India, 2001;21.

[2] Halim, M. A. Rule of Law. *Constitution, Constitutional Law and Politics: Bangladesh Perspective,* Khan, M. Yousuf Ali, Eds; Rico Printers: 9 Nilkhet, Babupara, Dhaka-1205, 1998; 345.

court cannot convict a person of a crime committed before a criminal statute prohibiting the conduct was passed.

4. Laws should be written with reasonable clarity to avoid unfair enforcement.
5. Law must avoid contradictions.
6. Law must not command the impossible.
7. Law must stay constant through time to allow the formalization of rules; however, law also must allow for timely revision when the underlying social and political circumstances have changed.
8. Official action should be consistent with the declared rule.

**The Rule of Law according to Joseph Raz:**

In "The Rule of Law and its Virtue" (OSCOLA citation [1997]93 LQR 195), the constitutional theorist Joseph Raz identified the constituent principles of his conception of the rule of law. Raz's conception encompasses the additional requirements of guiding the individual's behaviour and minimising the danger that results from the exercise of discretionary power in an arbitrary fashion, and in this last respect he shares common ground with the great constitutional theorists A. V. Dicey, Friedrich Hayek and E. P. Thompson. From this general conception he stated that some of the most important principles were:

1. That laws should be prospective rather than retroactive.
2. Laws should be stable and not changed too frequently, as lack of awareness of the law prevents one from being guided by it.
3. There should be clear rules and procedures for making laws.
4. The independence of the judiciary has to be guaranteed.
5. The principles of natural justice should be observed, particularly those concerning the right to a fair hearing.
6. The courts should have the power to review the way in which the other principles are implemented.
7. The courts should be accessible; no man may be denied justice.
8. The discretion of law enforcement and crime prevention agencies should not be allowed to pervert the law.

**Development of the concept of Rule of Law**

The concept of rule of law can, for better understanding, be discussed under three different phases developed time to time.

(1). Traditional or Old Concept of rule of law.

(2). Dicey's concept of rule of law.

(3). Modern concept of rule of law.

**(1). Traditional or Old Concept of rule of law**

The Concept of rule of law is of old origin, Sir Edward Coke is said to be the originator of this Concept, where he said that the king must be under the God and Law. He used this concept to vindicate the idea of rule according to law and opposed the idea of rule according to man. It may be mentioned that this idea was very much acceptable during the period of Edward Coke. Sir Edward Coke said "The King cannot be above the law as the law made him the King."

He also said in 1600 AD that the king must be subjected to law. In consequence, Edward Coke had to struggle against the king and he was dismissed from the post of the Chief Justice in 1616.

This old or traditional concept of Edward Coke was not free from faults and therefore, required improvements. As a result Deycian Concept was developed.

**(2). Deycian Concept of Rule of Law**

The old or traditional Concept of rule of law was not acceptable for many reasons. Since, if a country is administered by law which is discriminatory, it cannot be said that rule of law exists there or it cannot be treated as rule of law. As a result, a dictatorial form of government which is virtually the rule of man, albeit established by law, cannot be said or treated as rule of law. The rule of the dictator cannot be treated as rule of law from the ideal point of view. Therefore, Professor A.V. Dicey developed the concept of rule of law in the course of his lectures at the Oxford University, according to him

"Rule of law means that a person cannot be punished or be subjected to suffering lawfully in body or goods unless there is a breach of law established in ordinary legal manner before the ordinary courts of the land"[3]

Professor **A.V. Dicey** later developed on this concept in his classic book 'The Law of the Constitution 'published in the year 1885.[4]The Deycian concept of rule of law may be said to be consisting of the following three ingredients, these are:

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[3] Dicey, A.V. The Rule of Law: Its Nature and General Applications. *Introduction To The Study Of The Law Of The Constitution,* 8th Ed; Macmellan and Co. Limited: St. Martin's Street,London, 1915; 202

[4] Ibid

(1) Absence of any special privilege to the government officials or any other person. Basically this principle reflects the idea of equality before law.

(2) Every person shall be governed by law developed by the ordinary legislative organ of the state.

(3) Everyone irrespective of status must be subjected to the ordinary Courts of the land.

From the above discussion the Deycian concept of rule of law appears to be better than the traditional or old concept of rule of law However, Decian concept of rule of law complete and sound in all respects.

**(3). the Modern Concept of Rule of Law**

It is much wider and better than the Deycian concept of rule of law. This concept was developed by the international Commission of Jurists also known as the Delhi Declaration 1959. This Declaration was subsequently confirmed at Logos. The modern concept consists of the following three ideas concerning rule of law:

(1). Rule of law means rule according to law where the law must be enacted by the Parliament through People's Representatives. The law must uphold the dignity of a man as individual i.e. human rights. The dignity requires the recognition of civil and political rights along with the establishment of economics, social and cultural conditions for complete development of individual personality.

(2).The rule of law means rule according to law where everyone is equal before that law. The equality before law can be established practically by an independent judiciary. So, independence of judiciary is required for rule of law.

(3). Rule of law requires an effective government capable of maintaining law and order along with ensuring access to the court.

From the above discussion involving various aspects of rule of law along with the origin and development, it may well be argued that the idea of rule of law does not mean rule only according to law, it includes fulfillment of certain civil, political, economic, social and cultural conditions as well. According to this

**Delhi Declaration**

"The rule of law implies that the functions of the government in a free society should be so exercised as to create conditions in which the dignity of man as an individual is upheld. This dignity requires not

only the recognition of certain civil or political rights but also creation of certain political, social, economical, educational and cultural conditions which are essential to the full development of his personality".[5]

According to Davis, there are seven principal meanings of the term 'Rule of law:

(1) law and order;

(2) fixed rules;

(3) elimination of discretion;

(4) due process of law or fairness;

(5) natural law or observance of the principles of natural justice;

(6) preference for judges and ordinary courts of law to executive authorities and administrative tribunals; and

(7) Judicial review of administrative actions[6]

So finally it may correctly be said that rule of law does not mean and cannot mean any government under any law. It means the rule by a democratic law which is passed in a democratically elected parliament after adequate debate and discussion. Likewise, Sir Ivor Jennings says

"In proper sense rule of law implies a democratic system, a constitutional government where criticism of the government is not only permissible but also a positive merit and where parties based on competing politics or interests are not only allowed but encouraged. Where this exist the other consequences of rule of law must follow".[7]

**Rule of law in the International Documents**

Today, the concept of the rule of law is embedded in the Charter of the United Nations. In its Preamble, one of the aims of the UN is "to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained". A primary purpose of the Organization is "to maintain international peace and security… and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace."

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[5] Massey, *Op. Cit.* 30

[6] Thakker, C.K. Basic Constitutional principles. *Administrative Law,* 1st ed; Eastern Book Company: 34 Lalbagh, Lacknow-226001, India, 1992; 26.

[7] Halim, M.A. *Ibid* 351.

The Universal Declaration of Human Rights of 1948, the historic international recognition that all human beings have fundamental rights and freedoms, recognizes that *"... it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law..."*

For the UN, the Secretary-General defines the rule of law as "a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency."[8] At the international level, the principle of the rule of law embedded in the Charter of the United Nations encompasses elements relevant to the conduct of State to State relations. The Declaration of Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations recognizes the inherent link between the UN and the international rule of law. Its preamble emphasizes "the paramount importance of the Charter of the United Nations in the promotion of the rule of law among nations." Drawn from existing commitments in international law, the core values and principles of the UN include respect for the Charter and international law; respect for the sovereign equality of States and the principle of non-use or threat of use of force; the fulfillment in good faith of international obligations; the need to resolve disputes by peaceful means; respect for and protection of human rights and fundamental freedoms; recognition that protection from genocide, crimes against humanity, ethnic cleansing and war crimes is not only a responsibility owed by a State to its population, but a responsibility of the international community, the equal rights and self-determination of peoples; and the recognition that peace and security, development, human rights, the rule of law and democracy are interlinked and mutually reinforcing. Appropriate rules of international law apply to the Organization as they do to States.[9]

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[8] Report of the Secretary-General: The rule of law and transitional justice in conflict and post-conflict societies" (2004)

[9] For details, Nicolas K. Laos, Foundations of Cultural Diplomacy: Politics among Cultures and the Moral Autonomy of Man, p191-192

## Necessary Recommendations to ensure rule of law in Bangladesh

Though our constitution provides for 18 fundamentals rights for citizens, these remain meaningless version to the masses because, due to poverty and absence of proper legal aid, the poor people cannot realize them[10]. It is also clear that the application of the principle of the rule of law is merely a farce in our country. However, prospects for establishing society purely based on the democratic principle of the rule of law are not totally absent from the polity. We have a constitutional government. But what is needed for the very cause of the principle of democratic rule of law is-

- To separate the judiciary immediately from the executive;
- To appoint an ombudsman for the sake of transparency and democratic accountability;
- To make the parliament effective and to let the law making body to do its due business in cooperation with each other government and opposition;
- To reform the law enforcing agencies and police force to rid them out of corruption and to free them from political influence so that they could truly maintain the rule of law;
- To forge national unity and politics of consensus built around the basic values of the constitution, namely democracy, respect for each other's human rights, tolerance, communal harmony etc[11].

## Conclusion

To ensure rule of law in our country, the Government must be committed to ensure the security of life and property of the people, protection of individual rights and the dissention of justice on the basis of the equality and fairness. On the other extreme, the opposition, civil society and social groups and organizations also have the moral obligations to help and cooperate with the government in this juncture.

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[10] Halim, M. A. Rule of Law. Constitution, Constitutional Law and Politics: Bangladesh Perspective, 357.

[11] Md. Awal Hossain Mollah, Rule of Law In Bangladesh: An Overview

Chapter Twenty

# Election Commission

Election Commission of Bangladesh is a permanent Constitutional Body. The Constitution of Bangladesh has vested in the Election Commission of Bangladesh the superintendence, direction and control of the entire process for conduct of elections to Parliament and to the office of President of Bangladesh.

**Establishment of Election Commission**

Article 118 of the Constitution of Bangladesh gives the provision for setting up an EC for the superintendence, direction and control of the preparation of electoral rolls for election to the office of the president and to the parliament, and the conduct of such elections in accordance with the Constitution.

Article 119 states in this regard "The superintendence, direction and control of the preparation of the electoral rolls for elections to the office of President and to Parliament and the conduct of such elections shall vest in the Election Commission"

**Composition of election commission**

Article 118 of the constitution notes that the president is empowered to appoint the chief election commissioner, and not more than four election commissioners for five years, following the provisions of our constitution and the provisions of any law made in regards. Article 118(1) clearly says that "There shall be an Election Commission for Bangladesh consisting of the Chief Election Commissioner and not more than four Election Commissioners and the appointment of the Chief Election Commissioner and other Election Commissioners (if any) shall, subject to the provisions of any law made in that behalf, be made by the President."

In addition to that, the EC has its own secretariat, as per the Election Commission Secretariat Act, 2009, headed by a Secretary. The secretariat is in Dhaka and has an electoral training institute, field offices at the regional, district and upazilla /thana level. There are 10 regional election offices and 83 district election offices in the 64 districts.

**Powers and Functions of election commission**

Article 119 of the constitution mentions that the superintendence, direction and control of the preparation of the electoral rolls for elections to the office of president and to parliament, and the conduct of such elections shall vest in the Election Commission which shall, in accordance with this Constitution and any other law to:

(a) hold elections to the office of president

(b) hold elections of members of parliament

(c) delimit the constituencies for the purpose of elections to parliament and

(d) prepare electoral rolls for the purpose of elections to the office of president and to parliament

According to the Constitution, the EC is independent in the exercise of its functions, and subject only to the Constitution and applicable laws. Article 118 (4-5) clearly states that "(4) The Election Commission shall be independent in the exercise of its functions and subject only to this Constitution and any other law. (5) Subject to the provisions of any law made by Parliament, the conditions of service of Election Commissioners shall be such as the President may, by order, determine."

Bangladesh EC is constitutionally responsible for the conduct of elections in a free and fair manner. To ensure such elections, transparency and accountability are required at all stages of the electoral process.

The second most important law with regard to the functions of the EC is the Representation of the People Order (RPO), 1972. A number of laws, rules and regulations have also been enacted and/or provided. These laws discuss, in detail, procedures of different functions such as preparation of electoral rolls, delimitation of constituencies, election of the president and women members of parliament, and conduct of the elections. Another set of laws and rules provide for administrative functions with regard to salary and privileges of election commissioners, and appointment, promotion and transfer of the officials and staff of the EC Secretariat. Moreover, EC prepares code of conduct of candidates for different elections.

**Staff of Election Commission**

The President must, when so requested by the Election Commission, make available to it such staff as may be necessary for the discharge of its functions under the Constitution. Article 120 states as follows:

"The President shall, when so requested by the Election Commission, make available to it such staff as may be necessary for the discharge of its functions under this Part (Part VII)."

**Single electoral roll for each constituency**

Article 121 provides that there shall be one electoral roll for each constituency for the purposes of elections to Parliament, and no special electoral roll shall be prepared so as to classify electors according to religion, race, caste or sex.

This Article expressly expostulates the important decision which had been taken by the framers of the Constitution that there shall be joint electorates and no separate electorates.

**Qualifications for registration as voter**

Article 122 (1) declares that the elections to Parliament shall be on the basis of adult franchise. And Article 122 (2) has stated the qualifications for registration as voter which states as follows:

"A person shall be entitled to be enrolled on the electoral roll for a constituency delimited for the purpose of election to the Parliament, if he-

(a) is a citizen of Bangladesh;

(b) is not less than eighteen years of age;

(c) does not stand declared by a competent court to be of unsound mind;

(d) is or is deemed by law to be a resident of that constituency ; and

(e) has not been convicted of any offence under the Bangladesh Collaborators (Special Tribunals) Order, 1972."

So, every person who is a citizen of Bangladesh, who is not less than 18 years of age, who is not otherwise disqualified under the Constitution or under any law made by the Parliament on the ground of non-residence, crime, corruption or illegal practice, unsoundness of mind, shall be entitled to be registered as voter.

**Time for holding elections**

1). In the case of a vacancy in the office of President occurring by reason of the expiration of his term of office an election to fill the vacancy shall be held within the period of ninety to sixty days prior to the date of expiration of the term: Provided that if the term expires before the dissolution of the Parliament by members of which he was elected the election to fill the vacancy shall not be

held until after the next general election of members of Parliament, but shall be held within thirty days after the first sitting of Parliament following such general election.[1]

2). In the case of a vacancy in the office of President occurring by reason of the death, resignation or removal of the President, an election to fill the vacancy shall be held within the period of ninety days after the occurrence of the vacancy.[2]

3). A general election of the members of Parliament shall be held-

(a) in the case of a dissolution by reason of the expiration of its term, within the period of ninety days preceding such dissolution ; and

(b) in the case of a dissolution otherwise than by reason of such expiration, within ninety days after such dissolution :

Provided that the persons elected at a general election under sub-clause

(a) shall not assume office as members of Parliament except after the expiration of the term referred to therein.[3]

4). An election to fill the seat of a member of Parliament which falls vacant otherwise than by reason of the dissolution of Parliament shall be held within ninety days of the occurrence of the vacancy :

Provided that in a case where, in the opinion of the Chief Election Commissioner, it is not possible, for reasons of an act of God, to hold such election within the period specified in this clause, such election shall be held within ninety days following next after the last day of such period.[4]

**Validity of election law and elections**

Article 125 clearly states that "Notwithstanding anything in this Constitution

(a) the validity of any law relating to the delimitation of constituencies, or the allotment of seats to such constituencies, made or purporting to be made under article 124, shall not be called in question in any court;

(b) no election to the office of President or to Parliament shall be called in question except by an election petition presented to such

[1] Article 123(1), The Constitution of The People's Republic of Bangladesh
[2] Article 123(2), Ibid
[3] Article 123(3), Ibid
[4] Article 123(4), Ibid

authority and in such manner as may be provided for by or under any law made by Parliament.

(c) A court shall not pass any order or direction, ad interim or otherwise, in relation to an election for which schedule has been announced, unless the Election Commission has been given reasonable notice and an opportunity of being heard."

Therefore, this Article deals with the validity of election law and elections. Clause (a) of this Article expostulates the validity of any law relating to the delimitation of constituencies or the allotment of seats to such constituencies. Clause (b) deals with election dispute. This Provision assumes that the Act of Parliament will provide for an election tribunal and the manner in which it has to be proceeded in order to determine the dispute.

**Executive authorities to assist Election Commission**

Article 126 of the Constitution and Articles 4 and 5 of the Representation of the People Order, 1972 provide that it shall be the duty of all executive authorities to assist the Election Commission in the discharge of its functions. The Commission has the power to require any person or authority to perform such functions or render such assistance for the purpose of electron as it may direct. Article 126 clearly states that "It shall be the duty of all executive authorities to assist the Election Commission in the discharge of its functions."

Chapter Twenty One

# Administrative Tribunal

The resolution of disputes is of course a task which our courts perform on a daily basis. However, courts are not the only forum for dispute resolution. Outside the ordinary courts of law there is a host of Tribunals with jurisdiction to decide legal disputes in Bangladesh.

**The advantage of a tribunal is that it is**

(a) quick with no long waits for the case to be heard and it is dealt with speedily;

(b) cheap, as no fees are charged;

(c) staffed by experts who specialize in particular areas;

(d) characterized by an informal atmosphere and procedure;

(e) allowed not to follow its own precedents, although tribunals do have to follow court precedents.

**Administrative Tribunal and Bangladesh Constitution**

Article 117(1) of Bangladesh Constitution empowers the Parliament to establish one or more Administrative Tribunals in Bangladesh. Article 117(1) clearly states that

"Notwithstanding anything hereinbefore contained, Parliament may by law establish one or more administrative tribunals to exercise jurisdiction in respect of matters relating to or arising out of

(a) the terms and conditions of persons in the service of the Republic, including the matters provided for in Part IX and the award of penalties or punishments;

(b) the acquisition, administration, management and disposal of any property vested in or managed by the Government by or under any law, including the operation and management of, and service in any nationalised enterprise or statutory public authority;

(c) any law to which clause (3) of article 102 applies.

Therefore, it is evident that Administrative Tribunal will deal with matters relating to-

(a) the terms and conditions of persons in the service of the Republic including matters provided for in Part IX and award of penalties or punishment;

(b) the acquisition, administration, management and disposal of any property vested in or managed by the govt. by any law, including the operation and management of, and services in any nationalized enterprise or statutory public authority;

(c) any law to which article 102 (3) applies.

Here Article 102(3) states that notwithstanding anything contained in article 102 (1) and article 102 (2), the High Court Division shall have no power under this article to pass any interim or other order in relation to any law to which article 47 applies.

In Article 47(1) it has been stated that no law providing for any of the following matters shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridge, any of the rights guaranteed by this Part-

(a) the compulsory acquisition, nationalisation or requisition of any property, or the control or management thereof whether temporarily or permanently;

(b) the compulsory amalgamation of bodies carrying on commercial or other undertakings;

(c) the extinction, modification, restriction or regulation of rights of directors, managers, agents and officers of any such bodies, or of the voting rights of persons owning shares or stock (in whatever form) therein;

(d) the extinction, modification, restriction or regulation of rights of search for or win minerals or mineral oil;

(e) the carrying on by the Government or by a corporation owned, controlled or managed by the Government, of any trade, business, industry or service to the exclusion, complete or partial, or other persons; or

(f) the extinction, modification, restriction or regulation of any right to property, any right in respect of a profession, occupation, trade or business or the rights of employers or employees in any statutory public authority or in any commercial or industrial undertaking; if Parliament in such law (including, in the case of existing law, by amendment) expressly declares that such provision is made to give effect to any of the fundamental principles of state policy set out in Part II of this Constitution.

Article 47(2) provides that notwithstanding anything contained in this Constitution the laws specified in the First Schedule (including any amendment of any such law) shall continue to have full force and

effect, and no provision of any such law, nor anything done or omitted to be done under the authority of such law, shall be deemed void or unlawful on the ground of inconsistency with, or repugnance to, any provision of this Constitution; Provided that nothing in this Article shall prevent amendment, modification or repeal of any such law.

Article 47(2) provides that notwithstanding anything contained in this Constitution, no law nor any provision thereof providing for detention, prosecution or punishment of any person, who is a member of any armed or defence or auxiliary forces or who is a prisoner of war, for genocide, crimes against humanity or war crimes and other crimes under international law shall be deemed void or unlawful, or ever to have become void or unlawful, on the ground that such law or provision of any such law is inconsistent with, or repugnant to any of the provisions of this Constitution. 'Court' as defined in Article 152 includes Supreme Court and hence the HCD cannot entertain any writ petition in respect of any matter falling within the jurisdiction of an Administrative Tribunal. So, it is clear that the Supreme Court shall not entertain any proceedings or make any matter falling within the jurisdiction of an Administrative Tribunal.

It is also pertinent to mention here that against the decisions of Administrative Tribunals no writ will lie in view of the provision of Article 102(5). Article 102(5) clearly states that

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

Even no proceedings, order or decision of a tribunal shall be liable to be challenged, reviewed, quashed and called in question in any Court. The decision of the Appellate Tribunal like that of the Tribunal is immune from any review under Article 102 because Article 117 also applies to the Appellate Tribunal.

In case of **Mujibur Rahman vs. Bangladesh**, the question arose whether a writ petition would be maintainable against the decision of the Administrative Appellate Tribunal. The court held that the combined effect of art.102 (5) and art.117 (2)[1] is that no writ petition is maintainable against the decision of Administrative Tribunal.

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[1] Article 117(2) says that "Where any administrative tribunal is established under this article, no court shall entertain any proceedings or make any order in respect of any matter falling within the jurisdiction of such tribunal"

**Characteristics of Administrative Tribunal**

The Administrative Tribunals have some distinctive features which are given below:

(a) The administrative tribunal is the creation of a statute and thus, it has a statutory origin;

(b) It has some of the trappings of a Court but not all;

(c) An Administrative Tribunal is entrusted with the judicial powers of the state and thus, performs judicial and quasi- judicial functions;

(d) Even with regard to procedural matters, an Administrative Tribunal possesses powers of a Court e.g. to summons witnesses,' to administer oath, to compel production of document etc.

(e) An Administrative Tribunal is not strictly bound by rules of evidence and procedure.

(f) Administrative Tribunals are independent and they are not subject to any administrative interference in the discharge of their judicial or quasi- judicial functions.

**The Distinctions between Administrative Tribunal and Court**

1. A Court of law is a part of the traditional judicial system. A Tribunal is a body created by a statute and invested with judicial powers. Primarily and essentially it is a part and parcel of the Executive Branch of the state, exercising executive and judicial functions. As Lord Greene states Administrative Tribunal perform "hybrid functions".
2. Judges of the ordinary Courts of law are independent of the executive in respect of their tenure, terms and conditions of their services. On the other hand, members of administrative tribunal are entirely in the hands of the Government in respect of same.
3. A Court of law is bound by all the rules of evidence and procedure but not Administrative Tribunal unless the statute imposes such an obligation.
4. While the court of law is bound by precedents, principles of resjudicata and estopple, an administrative tribunal is not strictly bound by them.
5. A Court must decide all the questions objectively on the basis of evidence and materials produced before it. But an Administrative Tribunal may decide the questions taking into account the

departmental policy or expediency and in that sense, the decision may be subjective rather than objective.

**The Functions of Administrative Tribunals in Bangladesh**

The functions of the Administrative tribunals is to exercise jurisdiction in respect of matters relating to or arising out of the terms and conditions of persons in the services of the Republic or of any statutory public authority. The Schedule to the Administrative Tribunals Act, 1980 (Act No. VII of 1981) includes the following bodies as the statutory public authority-

(a) Sonali Bank, Agrani Bank and Janata Bank constituted under the Bangladesh Banks (Nationalisation) Order, 1972.

(b) Bangladesh Bank established under the Bangladesh Bank Order, 1972.

(c) Bangladesh Shilpa Rin Sangstha established under the Bangladesh Shilpa Ritz Sangstha Order, 1972.

(d) Bangladesh Shilpa Bank established under the Bangladesh Shilpa Bank Order, 1972.

(e) Bangladesh House Building Finance Corporation established under the Bangladesh House Building Finance Corporation Order, 1973.

(f) Bangladesh Krishi Bank established under the Bangladesh Krishi Bank Order, 1973.

(g) Investment Corporation of Bangladesh established under the Investment Corporation of Bangladesh Ordinance, 1976.

(h) Grameen Bank established under the Grameen Bank Ordinance, 1983.

Administrative Tribunals are creation of the Constitution. For deciding any dispute arising out of the terms and conditions of their service, the judicial officers shall be amenable to the jurisdiction of the Administrative Tribunal.

**Establishment of Administrative Tribunal**

Article 117 of the Constitution of Bangladesh sanctions the setting up of administrative tribunals. Administrative tribunals in Bangladesh owe their existence to the Administrative Tribunals Act, 1980 (Act VII of 1981). Section 3 of the Administrative Tribunals Act, 1980 clearly states the establishment and composition of Administrative Tribunal which states as follows:

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

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

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

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

**Jurisdiction of the Administrative Tribunal**

An Administrative Tribunal has exclusive jurisdiction to hear and determine applications made by any person in the service of the Republic or of any statutory public authority] in respect of the terms and conditions of his service including pension rights, or in respect of any action taken in relation to him as a person in the service of the Republic or of any statutory public authority. Section 4 of the Administrative Tribunals Act, 1980 clearly states that

"An Administrative Tribunal shall have exclusive jurisdiction to hear and determine applications made by any person in the service of the Republic or of any statutory public authority in respect of the terms and conditions of his service including pension rights, or in respect of any action taken in relation to him as a person in the service of the Republic or of any statutory public authority."

Basically, the specific purpose of the Administrative Tribunals Act, 1980 is to establish tribunals to exercise jurisdiction in respect of matters relating to the terms and conditions of persons in the service of the republic. So, the Administrative Tribunal has no jurisdiction to entertain any application filed by a person who is or who has not been in the service of the Republic or of any statutory authority specified in the schedule to the Act.

**Establishment of Administrative Appellate Tribunal**

In August 1983, by SRO No. 329/L/83/502-1/IV Administrative Appellate Tribunal was established. The Appellate Tribunal shall consist of three members of whom be one who is or has been the Judge of the Supreme Court. One shall be a person who is or has been a Joint Secretary or a District Judge. Section 5 of the Administrative Tribunals Act, 1980 clearly states that

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

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

(3) The Chairman shall be a person who is, or has been, or is qualified to be a Judge of the Supreme Court, and of the two other members, one shall be a person who is or has been an officer in the service of the Republic not below the rank of Joint Secretary to the Government and the other a person who is or has been a District Judge.

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

**Jurisdiction and Power of the Administrative Appellate Tribunal**

The Administrative Appellate Tribunal does not have any original jurisdiction except in the case of contempt of it. In brief, the Administrative Appellate Tribunal has the following powers and authority-

(a) It shall hear the appeal arising from any order or decision of the Administrative Tribunal.

(b) An application for an appeal must be made to the Administrative Appellate Tribunal within 90 days from the date of making of the order by the Administrative Tribunal. The time may be extended for another 90 days on the satisfaction of the Court on reasonable grounds.

(c) The Administrative Appellate Tribunal may confirm, set aside, or modify the decision of the Administrative Tribunal.

(d) The Administrative Appellate Tribunal may transfer cases from one Administrative Tribunal to another.

The decision of the Administrative Appellate Tribunal shall be final. But by the insertion of section 6A by the Administrative Tribunal (Amendment) Act, 1991, it has been incorporated that the decision of the Administrative Appellate Tribunal shall be final subject to the judicial review of the Appellate Division of the Supreme Court.

Chapter Twenty Two

# The Concept of Natural Justice

In modern times opinions have sometimes been expressed to the effect that natural justice is as vague as to be practically meaningless. But I would regard these as tainted by the perennial fallacy that because something cannot be cut and dried or nicely weighed or measured therefore it does not exist[1].The principles of natural justice have been developed and followed by the judiciary to protect the right of the public against the arbitrariness of the administrative authorities. Natural Justice implies fairness, reasonableness, equity and equality. It is the concept of the Common Law, which stands on the same footing as the concept of "procedural due process" of America. According to HEGDE J., the aim of natural justice is to secure justice; to prevent miscarriage of justice and to give protection to the public against the arbitrariness.

**What is meant by Natural Justice?**

Natural justice is a term of art that denotes specific procedural rights in the English legal system[2] and the systems of other nations based on it. It is similar to the American concepts of fair procedure and procedural due process, the latter having roots that to some degree parallel the origins of natural justice.[3] Aristotle observed that natural justice is recognized everywhere by civilized men and that conventional justice is binding only because some law-givers have laid them down. However it must now be accepted that natural justice entails the adjudication of disputes with a detached and dispassionate mind. Oyewo[4] quotes De Smith as submitting as follows:[5]

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1 Ridge v Baldwin, 1964 AC 40 :(1963) 2 All ER 66: (1963) 2 WLR 935. at pp64-65 (AC):P. 74 (All ER). (Observed by Lord Reid)

2 Frederick F. Shauer (1976), "English Natural Justice and American Due Process: An Analytical Comparison" *William and Mary Law Review* **18** (1): 47–72 at 47.

3 See generally Bernard Schwartz (1953), "Administrative Procedure and Natural Law", *Notre Dame Lawyer* **28** (2): 169, cited in Shauer, "English Natural Justice and American Due Process", p. 51, n. 24.

4 Oyewo, AT, *Cases and Materials on the Principles of Natural Justice in Nigeria* (Ibadan: Jator Publishing Co, 1987) at p. 2.

5 Evans, JM, *De Smith's Judicial Review of Administrative Action* (London: Stevens & Sons, 4th ed, 1980) at p. 158.

"No proposition can be more clearly established than that a man cannot incur the loss of liberty or property until he has had a fair opportunity of answering the case against him."

Natural justice is a legal philosophy used in some jurisdictions in the determination of just, or fair, processes in legal proceedings. Natural justice operates on the principles that man is basically good and therefore a person of good intent should not be harmed, and one should treat others as one would like to be treated. „Natural Justice" imposes a code of fair procedure.

The question is asked – is fair hearing synonymous with natural justice or is it merely a rule of natural justice? This seeming contradiction may have been brought about due to the following pronouncements of none other than two Justices of the Supreme Court:

Fair hearing is also a rule of natural justice.

Onu, JSC[6]

There can be no doubt that fair hearing is in most cases synonymous with natural justice.

Iguh, JSC[7]

There is no doubt that fair hearing is a rule of natural justice for the concept of natural justice is definitely wider in scope than the doctrine of fair hearing.

Iluyomade and Eka have offered that it "connotes an inherent right in man to have a fair and just treatment at the hands of the rulers or their agents".8[8]

The rules of natural justice, according to a justifiably effusive Obaseki, JSC9[9] are common law rules "which are of universal application in the civilized world" and have "provided refuge from oppressive laws and actions over the ages".

Although natural law is often conflated with common law, the two are distinct in that natural law is a view that certain rights or values are inherent in or universally cognizable by virtue of human reason or human nature, while common law is the legal tradition whereby certain rights or values are legally cognizable by virtue of judicial recognition

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6 *Ogundoyin & Ors. V. Adeyemi* (2001) 7 NSCQR 378 at p. 391.
7 *Ojengbede V. Esan* (2001) 8 NSCQR 461 at p. 470.
8 Iluyomade, BO and Eka, BU, *Cases and Materials on Administrative Law in Nigeria* (Ile-Ife, Nigeria: University of Ife Press, 1980) at p. 131.
9 *Aiyetan V. Nigerian Institute for Oil Palm Research* (1987) 6 SCNJ 36, p. 55.

or articulation.[10]Natural justice is a legal requirement that applies to government decision-making. It can be enforced by courts, administrative tribunals and ombudsmen .If there has been a breach of natural justice in reaching a decision, the court can declare that to be invalid. So the purpose of natural justice is to ensure that decision making fair and reasonable. Although natural justice has an impressive ancestry and is said to express the close relationship between the common law and moral principles, the use of the term today is not to be confused with the "natural law" of the Canonists, the mediaeval philosophers' visions of an "ideal pattern of society" or the "natural rights" philosophy of the 18th century. Whilst the term *natural justice* is often retained as a general concept, in jurisdictions such as Australia and the United Kingdom[11] it has largely been replaced and extended by the more general "duty to act fairly". The requirements of natural justice or a duty to act fairly depend on the context[12]. In *Baker v. Canada (Minister of Citizenship and Immigration)* (1999),[13] the Supreme Court of Canada set out a list of non-exhaustive factors that would influence the content of the duty of fairness, including the nature of the decision being made and the process followed in making it, the statutory scheme under which the decision-maker operates, the importance of the decision to the person challenging it, the person's legitimate expectations, and the choice of procedure made by the decision-maker.[14] Earlier, in *Knight v. Indian Head School Division No. 19* (1990),[15] the Supreme Court held that public authorities which make decisions of a legislative and general nature do not have a duty to act fairly, while those that carry out acts of a more administrative and specific nature do. Furthermore, preliminary decisions will generally not trigger the duty to act fairly, but decisions of a more final nature may have such an effect. In addition, whether a duty to act fairly applies depends on the relationship between the public authority and

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[10] Douglas E. Edlin (Jul., 2006), "Judicial Review without a Constitution", *Polity* (Palgrave Macmillan Journals) **38** (3): 345–368.

[11] *De Smith's Judicial Review*, p. 320.

[12] *Kioa*, pp. 584–585: "What is appropriate in terms of natural justice depends on the circumstances of the case and they will include, inter alia, the nature of the inquiry, the subject-matter, and the rules under which the decision-maker is acting".

[13] *Baker v. Canada (Minister of Citizenship and Immigration)* 1999 CANLII 699, [1999] 2 S.C.R. 817, Supreme Court(Canada)

[14] *Baker*, paras . 23–28.

[15] *Knight v. Indian Head School Division No.19* 1990 CANLII 138, [1990] 1 S.C.R. 653, S.C. (Canada).

the individual. No duty exists where the relationship is one of master and servant, or where the individual holds office at the pleasure of the authority. On the other hand, a duty to act fairly exists where the individual cannot be removed from office except for cause. Finally, a right to procedural fairness only exists when an authority's decision is significant and has an important impact on the individual. The rules of natural justice, according to a justifiably effusive Obaseki, JSC[16] are common law rules "which are of universal application in the civilized world" and have "provided refuge from oppressive laws and actions over the ages".

**History of the growth of the Concept of Natural Justice**

- Oyewo[17] recounts De Smith[18] as illustrating the tradition of natural justice by reference to scriptural history:

  "Even God did not pass sentence upon Adam before he was called upon to make his defense. Adam, says God, „Where art thou? Has thou not eaten out of the tree whereof I commanded thee that thou should not eat?"

  This reasoning, one might add also formed the basis of the decision in the English case of R V. Cambridge University[19] where the court also ascribed natural justice to the events leading to the expulsion of Adam from the Garden of Eden.

  The story of Cain in the book of Genesis is instructive. God asked Cain, after Cain had killed his brother, "Where is Abel thy brother?"[20] Cain's retort was rather direct, "I do not know; am I my brother's keeper?" The opportunity of a hearing for Cain had clearly been availed him prior to "sentencing".

- According to Roman law certain basic legal principles were required by Nature, or so obvious that they should be applied universally without needing to be enacted into law by a legislator. This was a seedbed for the growth of natural justice. The rules or principles of natural justice are now regularly applied by the courts in both common law and Roman law jurisdictions.

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[16] *Aiyetan V. Nigerian Institute for Oil Palm Research* (1987) 6 SCNJ 36, p. 55.

[17] Oyewo, AT, *Cases and Materials on the Principles of Natural Justice in Nigeria* (Ibadan: Jator Publishing Co, 1987) at p. 2.

[18] Evans, JM, *De Smith's Judicial Review of Administrative Action* (London: Stevens & Sons, 4th ed, 1980) at p. 158.

[19] (1723) 1 Str 557.

[20] Genesis 4: 8 – 12 in *The Holy Bible, Revised Standard Version* (New York and Glasgow: Collins Clear-Type Press, 1971) at p. 4.

► Aristotle, before the era of Christ, spoke of such principles calling it as universal law. Justinian in the fifth and sixth Centuries A.D. called it "'jura naturalia" i.e. Natural law. Different jurists have

described the principle in different ways. Some called it as the unwritten law (jus non scriptum) or the law of reason. It has, however not been found to be capable of being defined, but some jurists have described the principle as a great humanizing principle intended to invest law with fairness to secure justice and to prevent miscarriage of justice. With the passage of time, some principles have evolved and crystallized which are well recognized principles of natural justice.

So, the concept and doctrine of Principles of Natural Justice and its application in Justice delivery system is not new. It seems to be as old as the system of dispensation of justice itself.

**Development of the concept of natural justice in modern legal sphere**

In the early part of 20th century, in U.K, the Judicial Committee observed that the principle of natural justice should apply to every tribunal having authority to adjudicate upon matters involving civil consequences[21].In another English decisions, Viscount Haldane observed, "...those whose duty it Is to decide must act Judicially. They must deal with the question referred to them without bias and they must give to each of the parties the opportunity of adequately presenting the case made. The decision must come to the spirit and with the sense of responsibility of a tribunal whose duty it is to meet out justice."[22]

In the United States of America, the expression 'natural justice' as such, is not so frequently heard of since due process of law is guaranteed by the Constitution whenever an individual's life, liberty or property is affected by State action.[23] Though 'due process' is a vague and undefined expression, the Implications of which are not finally settled even today, but observance of principles of natural Justice is secured by taking advantage of the phrase 'due process'. In Snyder v. Massachusetts, the Supreme Court of the United States observed that there was a violation of due process whenever there was a breach of a "principle of natural Justice so rooted In the traditions and conscience

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[21] Lapointe v. L'Association, (1906) AC 535 (539).
[22] Local Government Board v. Arlidge, (1915) AC 120 (138) HL.
[23] Benjafield & Whitmore: *Australian Administrative Law* (3rd Ed.) p. 145.

of our people as to be ranked as fundamental."[24] Hearing before decision was one of such fundamental principles as was observed in Hagar v. Reclamation District.[25] The United States went further to enact the Administrative Procedure Act in 19461 which lays down rules for fair administrative proceedings.[26]

In Nigeria, section 22 (1)[27] of the 1963 constitution provides that in the determination of civil rights and obligations of a citizen, "he shall be entitled to a fair hearing within a reasonable time by a court or other tribunal established by law". Like all provisions on fundamental human rights this, too, has its limitations. The right has been given with the right hand and a lot taken away with the left hand.

In India the principle of natural justice is prevalent from the ancient times. We find it Invoked in Kautllya's Arthashastra. In this context, Para 43 of the judgment of the Hon'ble Supreme Court may be usefully quoted:

"Indeed, natural justice is a pervasive facet of secular law where a spiritual touch enlivens legislation, administration and adjudication, to make fairness a creed of life. It has many colors and shades, many forms and shapes and, save where valid law excludes, it applies when people are affected by acts of authority."[28]

In Bangladesh, though natural justice enjoys no express constitutional status but the Appellate Division of the Supreme Court of Bangladesh in Abdul Latif Mirza v Government of Bangladesh[29] observed

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

## The Twin Pillars of the rules of natural justice

There are two widely acclaimed principles of natural justice which have been hailed as "the twin pillars of the rules of natural justice and indeed the bastion of the rule of law in a civilized and organized society":[30]

a. the Audi Alteram Partem Rule (Hear The Other Side); and

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[24] (1934) 291 US 97(105).
[25] (1884), 111 US 701.
[26] 10 The Act, unfortunately, is restricted to agencies of the Federal Government.
[27] 15 Chapter III of the Constitution is saved by Decree No. 1, 1966.
[28] Mohinder Singh Gill v. Chief Election Commissioner, AIR 1978 SC 851.
[29] (1982) 34 DLR (AD) 173.
[30] *Aiyetan V. Nigerian Institute for Oil Palm Research* (1987) 6 SCNJ 36, p. 55.

b. the Nemo Judex In Causa Sua (No One Shall Be A Judge In His Own Cause) Rule.

"These two rules are the essential characteristics of what is often called natural justice. They are the twin pillars supporting it."[31]

Within each of these rules are specific duties that have been recognized by the courts.

### *A. The Audi Alteram Partem Rule*

This is the doctrine that in coming to a decision the deciding authority must hear all the parties. This doctrine was formulated with precision in the case of *Ridge v. Baldwin*[32] where Lord Hudson said:

No one, I think, disputes that three features of natural justice stand out: (1) the right to be heard by an unbiased tribunal; (2) the right to have notice of the charge of misconduct; and (3) the right to be heard in answer to those charges.

The rule now seems to have been summarized as follows:

a. that a person knows what the allegations against him are;
b. that he knows what evidence has been given in support of such allegations;
c. that he knows what statements have been made concerning these allegations;
d. that he has a fair opportunity to correct and contradict such evidence; and
e. that the body investigating the charge against such person must not receive evidence behind his back.

The expression audi alteram partem implies that a person must be given opportunity to defend himself. This rule covers various stages through which administrative adjudication passes starting from notice to final determination.

1. Notice of the Hearing
2. Preparation for the Hearing
3. The Hearing
4. Hearing in Person

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[31] *Kanda* v. *Government of the Federation of Malaya*, [1962] A.C. 322, 337, as quoted by the Alberta Court of Appeal in *R.* v. *Law Society of Alberta*, (1967) 64 D.L.R. (2d) 140, 151 (Alta C.A.).

[32] (1963) 2 ALL ER 63

5. Hearing *in camera*
6. Presentation of Relevant Evidence
7. Hearing of Witnesses
8. Cross-Examination of Witnesses
9. Adjournment of the Hearing
10. Representation by Counsel
11. Re-opening of the Inquiry or Hearing.
12. The Decision
13. Reasons for the decision.
14. The right to a hearing and decision within a reasonable period of time.

**1. Notice of the Hearing**

The right of a person to defend him/herself in the face of a decision potentially affecting his/her rights or interests necessarily implies that the person must receive prior notice of the facts on which the decision will be based. Failure to give proper notice is itself a denial of natural justice and of fairness.

The notice must be communicated to the interested party, preferably in writing.[33] In addition to specifying the date and place of the hearing, the notice must be sent in a timely manner (i.e., sufficiently in advance of the hearing), adequately describing the relevant facts and allegations so that a party may respond to them and outlining who will be present at the hearing, what the hearing will entail and the possible effects the decision may have on the rights and interests of the person.[34] What constitutes adequate notice will depend upon the complexity of the matter and whether an urgent decision is essential. In *R.* V. *Ontario Racing Commissioners,*[35] Mr. Justice Haines emphasized that a notice that complies with the principles of natural justice means "a written notice setting out the date and subject-matter of the hearing, grounds of the complaint, the basic facts in issue and the potential seriousness of the possible result of such hearing". In the event that the procedure or

[33] *Ridge* v. *Baldwin* [1964] A.C. 40
[34] *Wong* v. *University of Saskachewan*, 2006 SKQB 405
[35] *R.* v. *Ontario Racing Commissioners* (1969) 8 D.L.R. (3d) 624 at 628 (Ont. H.C.)

purpose of the inquiry is changed, the body may be required to send a new notice to the parties.[36]

Failure to give proper notice does not respect the rules of natural justice[37] and will result in the invalidation of the decision.[38]

## 2. Preparation for the Hearing

The audi alteram partem rule requires not only that the party concerned be given prior notice of the precise purpose of the inquiry or hearing but also that the person be given sufficient information to prepare his/her case.

As to the disclosure of information, this implies that the party concerned be apprised of reports and documents in the body's possession that may be prejudicial to his/her case. While this does not mean that the party must be given access to all information held by the body, he/she should at least have access to all the information the tribunal relied upon when it made its decision.[39] That information should also be disclosed in due time since the party must have sufficient time to prepare for the hearing.

There are, however, restrictions on this right to information.[40] These restrictions concern questions of confidentiality[41] and access to information laws. Furthermore, a body is not required to communicate information that is already in the possession of the parties or information that they are presumed to know.[42] As well, a body is not required to disclose facts that are in the public domain.[43]

## 3. The Hearing

Of all the procedural requirements forming part of the obligation to observe the principles of natural justice or of fairness, those related to the hearing are the most important. The abundance of case-law makes

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[36] *Confederation Broadcasting Limited* v. *Canadian Radio-Television and Telecommunications Commission* [1971] S.C.R. 906 at 922).

[37] *Supermarchés Labrecque* v. *Flamand*, [1987] 2 S.C.R. 219

[38] *Cardinal* c. *Kent*, [1985] 2 R.C.S. 643; *Wong* v. *University of Saskachewan*, 2006 SKQB 405

[39] *S.E.P.Q.A.* v. *Canada (C.C.D.P.)*, [1989] 2 S.C.C. 897.

[40] In Québec, the majority of these limits placed on public bodies, like Concordia University, are delineated in *An Act respecting access to documents held by public bodies and the Protection of personal information*, R.S.Q. c. A-2.1

[41] *Cadieux* v. *Établissement Mountain*, [1985] 1 F.C. 378.

[42] *Confederation Broadcasting* v. *Canadian Radio-Television and Telecommunications Commission* [1971] S.C.R. 906

[43] *North Coast Air Services Ltd.* v. *C.C.T.*, [1972] C.F. 390, 408 (C.A.)

it clear that the minimal requirement is that everybody affected by an administrative decision has a right to a hearing.

There is a broad spectrum of possible forms that the hearing can take, ranging from court-like oral hearings to the purely administrative paper-only process commonly referred to as a "paper hearing". Whatever the form of the hearing, it has to be fair, impartial and appropriate in the specific circumstances of the case (depending of the statute and the rights affected).[44]

**4. Hearing in Person**

In certain circumstances, it may suffice for an individual to submit observations in writing provided, of course, that he/she is aware of all the facts. The duty to act fairly does not imply an oral hearing and written submissions have been found to be sufficient where the body is concerned with purely technical matters that may easily be dealt with through written communication only.[45] A structured hearing is not always required.[46] Of course, each party to a hearing must be subject to the same rules such that a hearing must either be oral or in writing and cannot be oral for certain litigants and written for others (in the same case). All interested persons must be treated equally.

In other circumstances, the principles of natural justice require a hearing in person, to permit, among other things, the concerned person to cross-examine witnesses. These circumstances generally imply serious matters such as disciplinary matters or occur where a decision turns on credibility.

**5. Hearing in camera**

The "right of a person... to a public hearing" set out in section 23 of the Quebec Charter of Human Rights and Freedoms is available only to the parties themselves and not to the general public. In the absence of a legal obligation or a rule enacted by the body, the decision-making authority has a margin of discretion. It should be noted that no university committee has been held to be a "tribunal" pursuant to the Quebec Charter and therefore section 23 would not apply to a university, in any case. Accordingly, decision-making bodies of the University are not required to hold public hearings but can do so if they so chose**.** In deciding whether to hold a public hearing, a body should take into consideration the interests involved, including the protection

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[44] *Baker* v. *Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (S.C.C.)

[45] *Komo Construction inc.* v. *CRT du Québec*, [1968] S.C.C. 172.

[46] *Knight* v. *Indian Head School Division No. 19*, 1990 CanLII 138 (S.C.C.)

of one party's reputation and the protection of any declarations made in confidence.

### 6. Presentation of Relevant Evidence

Allowing a person to submit any relevant evidence relating to the matters set out in the notice of hearing is an essential component of a person's right to a hearing.[47] That said, an administrative tribunal is entitled to weigh the probative value of evidence and can refuse to consider certain evidence in appropriate circumstances.

### 7. Hearing of Witnesses

The right to call witnesses and cross-examine the other party's witnesses applies only in the context of oral hearings and often entails lengthy hearings and delays. It is another essential component of the right to be heard but it can be limited due to the informality of the administrative process. Whether a person has the right to call witnesses will depend on the context and circumstances of each situation.

### 8. Cross-Examination of Witnesses

Generally, in the context of simple administrative procedures, the right to cross-examine witnesses must be specifically set out by statute since courts tend to interpret legislative silence on that matter as not conferring a litigant the right to cross-examine witnesses. [48]Moreover, since cross-examination is a component of the adversarial process, it is not appropriate in every context. Some situations do call for cross-examination: when section 35 of the Quebec Charter of Human Rights and Freedoms applies (for example, if a person is accused in front of a quasi-judicial tribunal or a commission of inquiry) or in disciplinary matters.[49] For the courts to intervene there must be a refusal by a body to allow cross-examination and that refusal must operate to thwart the person in his/her attempt to present a full defense.

### 9. Adjournment of the Hearing

A party may request an adjournment of the hearing and obtain a reasonable delay in order to take cognizance of new facts and to respond adequately to them. However, the body possesses the discretionary authority to deny or to accept a request for adjournment as long as in making its decision it takes into account the reasons being advanced in support of the postponement, the rights of the other interested parties as well as the consequences of the adjournment and

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[47] *Roberval Express* v. *Transport Drivers Union*, [1982] 2 S.C.R. 888
[48] *Irvine* v. *Canada (Pratique restrictive de commerce)*, [1987] 1 S.C.R. 181
[49] *Hajee* v. *York University*, 11 OAC 72, 1985

ensures that it is not abusive, unjust or arbitrary. Refusal of a request for adjournment may be considered an infringement of the rules of natural justice if it results in irreparable prejudice to the person requesting it, provided the prejudice does not flow from his/her own neglect.[50]

## 10. Representation by Counsel

Observance of the audi alteram partem rule does not necessarily imply a right to be represented by legal counsel. Section 7 of the Canadian Charter of Rights and Freedoms does not provide for a right to counsel in every given situation. For example, the Supreme Court found, in Dehghani v. Canada (Minister of Employment and Immigration*)*,[51] that a party does not have the right to counsel in circumstances of routine information gathering.

The Québec Charter of Human Rights and Freedoms provides, at section 34, that "every person has a right to be represented by an advocate or to be assisted by one before any tribunal". As noted previously, to date, university bodies have not been found to be "tribunals" within the meaning of the Quebec Charter and therefore do not have a legal entitlement to be represented by legal counsel. Furthermore, the Quebec Court of Appeal has held that students do not have a right to counsel before university hearings.[52]

## 11. Re-opening of the Inquiry or Hearing

A body has the authority to re-open an investigation or hearing upon the request of an interested party in order to take into account new facts. A refusal to re-open an investigation may be justified by the fact that the request is purely dilatory, that a deadline must be adhered to, or that the proof would not be pertinent. Once again, an evaluation must be made as to whether the refusal of the request would lead to serious prejudice for the party making the request, assuming that he/she is not at fault. The body should at least hear the party seeking to re-open the hearing since a plain refusal to even hear what the party has to say could be deemed a denial of the principles of natural justice.

## 12. The Decision

Depending upon the case, that observance of audi alteram partem implies that the person affected has the right to a decision (a) handed

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[50] *Spiegel* v. *Seneca College*, [2003] O.J. No. 652 (Div. Ct.)

[51] *Dehghani* v. *Canada (Minister of Employment and Immigration)*, 1993 CanLII 128 (S.C.C.)

[52] *Ahvazi* v. *Concordia University*, 1992 CanLII 3119 (QC C.A.)

down by persons who have heard all the evidence; (b) based substantially on the evidence submitted at the hearing; (c) setting out the reasons therefore; and (d) that is reviewable by the persons making it, should they later become aware that natural justice or fairness was not observed.

**Decisions by persons who have heard all the evidence**

Members of the body must have heard the evidence and taken into consideration the arguments of the interested parties in order to be able to validly participate in the decision-making. In Québec (Commission des affaires ocials) c. Tremblay,[53] the Supreme Court stated as follows: "It is the quorum, and only the quorum, which has the responsibility of rendering a decision".

Decision based substantially on the evidence submitted at the hearing. It is a commonly accepted principle of natural justice that the administrative body, in its decision-making process, must solely rely on the evidence submitted at the hearing. The leading case on this point is that of *Giroux* v. *Maheux,*[54] decided by the Quebec Court of Appeal.

## 13. Reasons for the decision

In the past, there did not exist any general requirement for members of administrative bodies, nor for judges, to give reasons for their decisions. This has changed since the Supreme Court rendered its judgment in the case of *Baker*.[55] *Baker* does not create a requirement that reasons be provided for all decisions emanating from bodies but rather holds that written reasons may be required depending on the circumstances of a given case .The more important the nature and content of a decision, the more likely that it must be reasoned in writing. Where a decision is written and reasoned, they must be sufficient to allow the reader to identify how the body reached its conclusion.

## 14. The right to a hearing and decision within a reasonable period of time

Interested parties are entitled to a hearing and decision within a reasonable delay. However, what constitutes a reasonable period of time remains undefined and variable. Where a person has not waived

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[53] *Tremblay* v. *Quebec (Commission des affaires sociales)*, 1992 CanLII 1135 (S.C.C.)

[54] *Giroux* v. *Maheux* [1947] B.R. 163

[55] *Baker* v. *Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (S.C.C.)

their right to a hearing within a reasonable time by virtue of an agreement or their conduct, the following is examined to ascertain whether a delay is reasonable: the inherent time requirements of the case; the actions of the party invoking unreasonable delays that may have exacerbated said delays; the limits on institutional resources; and the total degree of the prejudice to the person invoking the delays.[56] Notwithstanding the foregoing, in an administrative context, the delay should be relatively short due to the underlying objective that administrative conflicts be resolved quickly.[57]

**B. The Nemo Judex in Causa Sua Rule**

The Latin maxim nemo judex in causa sua is the short expression for the rule against bias and interest. Bias means an operative prejudice, whether conscious or unconscious in relation to a party or issue. The rule against bias flows from following two principles:

a) No one should be a judge in his own cause.

b) Justice should not only be done but manifestly and undoubtedly be seen to be done

Thus a judge should not only be impartial but should be in a position to apply his mind objectively to the dispute before him.

**The rule against bias thus has two main aspects: -**

1. The administrator exercising adjudicatory powers must not have any proprietary interest in the outcome of the proceedings.
2. There must be real likelihood of bias. Real likelihood of bias is a subjective term, which means either actual bias or a reasonable suspicion of bias. It is difficult to prove the state of mind of a person. Therefore, what the courts see is whether there is reasonable ground for believing that the deciding factor was likely to have been biased.

**There are two main categories of bias: bias in law and institutional bias.**

**Bias in Law**

**Interests and Relationships**

A reasonable apprehension of bias can be presumed where a judge or member of an administrative body has an interest in the matter he/she is called upon to decide. Most often, the interest is pecuniary but it may also arise from a personal friendship or from a family or professional

[56] *R.* v. *Morin*, [1992] 1 S.C.R. 771

[57] *Sumner Sports inc. (Syndic de)*, J.E. 99-1918 (C.A.)

relationship with the person likely to be affected by the decision. If a member of a body believes that his/her interests or relationships would lead to a reasonable apprehension of bias, he/she should declare the situation and, if necessary, step down. Nonetheless, a party's failure to raise an allegation of bias in a timely fashion where he/she is aware that bias might exist may constitute a waiver of his/her right to object at a later time.

**Pecuniary interest**

The guiding principle set down by the courts is that direct pecuniary interest, however small, disqualifies a person from acting. This was demonstrated in *Mosakalyk-Walker* v. *Ontario College of Pharmacy*,[58] where it was held that a member of a disciplinary committee of a self-governing profession who was engaged in negotiations to purchase pharmacies owned by a person then before the committee in a matter of discipline had a direct pecuniary interest likely to raise a reasonable apprehension of bias.

**Family relationship and personal friendship**

An interest stemming from a family relationship or a personal friendship suffices to raise a reasonable apprehension of bias. In *R.* V. *Sussex Justices*,[59] the judges were to render a decision with respect to a person summoned to appear before them for reckless driving. It was decided that the presence of the assistant clerk of the court who, as was customary, retired with the judges, could raise a reasonable apprehension of bias because the clerk's brother and associate were counsel for the victim of the accident and had, on the victim's behalf, filed for civil damages.

**Professional relationship**

A previous professional relationship between a member of the body and a person applying to the body may, in some instances, be a cause for a reasonable apprehension of bias.[60]

**Attitudinal bias**

A member of a body may raise a reasonable apprehension of bias by the way he/she acts towards the person that his/her decision is to affect either prior to, during a hearing or at the time a decision is made. A

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[58] *Mosakalyk-Walker* v. *Ontario College of Pharmacy* [1975] 58 D.L.R. (3d) 665 (Ont. Div. Ct.)

[59] *R.* v. *Sussex Justices* [1924] 1 K.B. 256

[60] *Committee for Justice and Liberty* v. *National Energy Board* [1978] 1 S.C.R. 369

reasonable apprehension of bias may exist even if bias is not real but only reasonably perceived.

A member of a body may familiarize himself/herself with a file prior to the hearing and form an opinion as to the subject matter but he/she may not, at that stage, express an opinion in public. In *Castonguay* v. *Boudrias*,[61] it was found unacceptable for a coroner to have held a news conference before opening his public inquiry. In *Save Richmond Farmland Society* v. *Richmond (Township)* ,[62] the Supreme Court said: "A member of a municipal council is not disqualified by reason of his bias unless he has prejudged the matter to be decided to the extent that he is no longer capable of being persuaded."

During the hearing, animosity shown towards one of the parties or towards counsel may raise a reasonable apprehension of bias. The same holds true for hostility towards a friend or witness of one of the parties. The courts will not hesitate in sanctioning any hostile behaviour by a member of the body during a hearing. In the end, it is a question of manner.[63]

As well, the courts have often found that private communications taking place during the hearing between the judge or chairperson of the administrative body and one of the parties, without the other party's knowledge, are likely to give rise to a reasonable apprehension of bias. In *Kane,* cited earlier, the Board of Governors, sitting in appeal from a decision by a university president ordering the suspension of a faculty member had, while the decision was under advisement, called in the president to answer additional questions in the absence of the professor or of his counsel. The Supreme Court of Canada held that this was improper. Certain behaviour occurring at the time the decision is made is susceptible of leading to a suspicion of reasonable apprehension of bias. For example, a reasonable apprehension of bias has been found in the following circumstances: where the representative of a party participates in deliberations following the hearing, where the reasons for the decision are written by prosecuting counsel even though he played no part in the decision-making process, or where the record reveals an accumulation of irregularities touching upon the merits.[64]

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[61] *Castonguay* v. *Boudrias* [1984] C.S. 33

[62] *Save Richmond Farmland Society* v. *Richmond (Township)*, 1990 CanLII 1132 (S.C.C.) see also *Old St. Boniface Residents Assn. Inc. v. Winnipeg (City),* [1990] 3 S.C.R.000

[63] *Brouillard dit Chatel* v. *R.* [1985] 1 S.C.R. 39 at 48

[64] *Fooks* v. *Alberta Association of Architects* [1982] 21 Alta. L.R. (2d) 306(Alta. Q.B.); *Sawyer* v. *Ontario Racing Commission* [1979] 99 D.L.R. (3d) 561 (Ont.

That being said, there is little doubt that the university setting is unique. Many decisions are made in a collegial fashion and many members have relationships with one another. It would seem logical to assume that some of the more strict constraints regarding bias would be relaxed in a university setting.

## Institutional Bias

### *Exercise of functions of a prosecutor and judge*

Unless expressly provided for by statute, any exercise by a person of the functions of both prosecutor and judge is likely to raise a reasonable apprehension of bias. Such is the case, for example, where a person sits on a body deciding on a complaint or charge that he/she brought personally or that was filed on his/her recommendation. In *Conseil de section du Barreau du Québec* v. *E* ,[65] the syndic brought a complaint against a lawyer but also sat on the disciplinary board that was to dispose of it. The Court of Appeal held that it was reasonable under the circumstances to believe that the syndic had a preconceived opinion against the accused.

### *Appeal from one's own decision*

A reasonable apprehension of bias may be raised where a member of an administrative body sits in appeal of his/her own decision. In *R.* V. *Alberta Securities Commission*,[66] a person had been refused registration as a securities broker by the Chairman of the Securities Commission, who later sat as one of the members hearing the appeal from that decision. The Alberta Supreme Court quashed the order of the Securities Commission on the ground of bias. The Superior Court of Quebec, in Fitzgerald c. Université Concordia,[67] ruled that the participation of the same person in two grade reviews of the same case gave rise to an apprehension of bias.

## The concept of natural justice and Bangladesh Constitution

We can observe the application of The Audi Alteram Partem Rule i.e. the right to fair hearing of Natural Justice in Article 33 (1-2) of Bangladesh Constitution which states as follows"33.

(1) No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest,

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C.A.); *Bombardier, Inc.* v. *Métallurgistes Unis d'Amérique, Local 4588*, D.T.E. 83T-761 (Que. S.C.)

[65] *Conseil de section du Barreau du Québec* v. *E.* [1953] R.L. 257

[66] *R.* v. *Alberta Securities Commission* [1962] 36 D.L.R. (2d) 199 (Alta. S.C.)

[67] *Fitzgerald* v. *Université Concordia*, SOQUIJ AZ-95021452 (S.C.)

nor shall he be denied the right to consult and be defended by a legal practitioner of his choice.

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

We can also observe the application of The Nemo Judex in Causa Sua Rule i.e. the rule against bias of Natural Justice in Article 35 (1-3) of Bangladesh Constitution which states as follows:

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

(2) No person shall be prosecuted and punished for the same offence more than once.

(3) Every person accused of a criminal offence shall have the right to a speedy and public trial by an independent and impartial Court or tribunal established by law."

**Concept of Natural Justice to diminish arbitrary Exercise of Discretionary power**

**What is meant by Arbitrary Exercise of Discretionary power?**

Arbitrary exercise of power means using the ability to act or decide subject to individual will or judgment without restriction.

Discretionary means having or using the ability to act or decide according to one's own discretion or judgment. Many academics have given various definitions as to what a discretionary power entails. One of the more succinct was given in Baker v Canada, where it was described as a power which referred:

"To decisions where the law does not dictate a specific outcome, or where the decision maker is given a choice of options within the statutorily imposed boundaries".

So, arbitrary exercise of discretionary power means power to act or decide according to one's own discretion or judgment without restriction**.**

Concept of Natural Justice is an effective mechanism to diminish arbitrary Exercise of Discretionary power

The rules of natural justice have diminished arbitrary exercise of discretionary power. In Sadhu Singh v. Delhi Administration, [68] The Supreme court held that

"Discretionary powers are subject to control and fair hearing before the decision-making bodies and rules of natural justice act as a control mechanism on the decision-making powers."

The Supreme Court also held that

"The principles of natural justice must be observed when the government suspends bodies, such as panchayats [69], or when it appoints an administrator for a registered society in public interest. [70]"

In his article "Judicial Review of the Private Decision Maker: The DomesticTribunal," Robert E. Forbes stated that:

"It has been long recognized that whenever a decision maker purports to exercise a given decision-making power, it must comply with the rules of natural justice."[71]

It was also held that

"For dismissing and terminating the service of an employee who is employed under a public authority, a hearing must be given to the affected person18[72]. In specific cases where service conditions of employees are governed by statutory provisions, the natural justice provisions must be read into the statute in the case of termination of the employment. If there are no statutory provisions to govern the service conditions of employees, still natural justice should be observed while taking disciplinary action against them."[73]

It was held by The Supreme Court that "A civil servant of the government cannot be dismissed or removed in rank unless an inquiry is held and in which he is informed of the charges against him.He is also entitled to a reasonable opportunity to being heard according to the natural justice provisions.[74] It should also be mentioned that any

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[68] AIR 1966 SC 91,
[69] T V R V Radhakrishnan Chettiar v. State of Tamil Nadu, AIR 1974 SC 1862.
[70] Jathedar Jagdev Singh v. State of Punjab, AIR 1982 P & H 16.
[71] [1977] 15 U.W.O. L. Rev. 123 [*Forbes*].
[72] Jagdish Pandey v. Chancellor, University of Bihar, AIR 1968 SC 353.
[73] Managing Director, Uttar Pradesh Warehousing Corporation v. Vijay Narayan Vajpayee, AIR 1980 SC 840.
[74] Arjun Chaubey v. Union of India, AIR 1984 SC 1356.

government action, other than dismissal, removal or reduction in rank, affecting the government employee is also subject to natural justice principles."[75]

The Honorable Supreme Court In the case of Mohinder Singh Gill v. Chief Election Commissioner may be usefully quoted:

"Indeed, natural justice is a pervasive facet of secular law where a spiritual touch enlivens legislation, administration and adjudication, to make fairness a creed of life. It has many colours and shades, many forms and shapes and, save where valid law excludes, it applies when people are affected by acts of authority."[76]

David Phillip JONES observed

"Generally, however, it is imperative that individuals who are affected by administrative decisions be given the opportunity to present their case in some fashion. They are entitled to have decisions affecting their rights, interests, or privileges made using a fair, impartial, and open process which is appropriate to the statutory, institutional, and social context of the decision being made." [77] It was held by The Supreme Court that

"When a civil servant retires from service, he is entitled to receive pension. The government cannot reduce or withhold the pension of the person without giving the pensioner an opportunity to make his defense. [78] Similarly, the gratuity payable to a person upon retirement cannot be reduced without giving the employee a reasonable opportunity to be heard."[79]

In Old St. Boniface Residents Assn. Inc. v. Winnipeg (City),[80]*It was held that*

"A tribunal must maintain an open mind and must be free of bias, actual or perceived, which are part of the *natural justice* principle which applies to decision-makers."

In one of the cases of early part of this Century, Lapointe v. L'Association [81]it has been observed, "The rule of natural justice is not confined to the conduct of strictly legal tribunals, but is applicable to

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[75] Gajanan L. Pernekar v. State of Goa, AIR 1999 SC 3262.
[76] AIR 1978 SC 851,
[77] David Phillip JONES and Anne S. de VILLARS, *Principles of Administrative Law (4th edition)*, Thomson Carswell, 2004, p. 251.
[78] State of Punjab v. K R Erry, AIR 1973 SC 834.
[79] Union of India v. G. Gangayutham, AIR 1997 SC 3387
[80] *Old St. Boniface Residents Assn. Inc. v. Winnipeg (City),* [1990] 3 S.C.R. 1170.
[81] (1906) AC 535(539),

every tribunal or body of persons invested with authority to adjudicate upon matters involving civil consequences to individuals."

Similarly, in the *Lee* case, Lord Denning went so far as to say that an organization cannot contract out of the duties of fairness: [82]Although the jurisdiction of a domestic tribunal is founded on contract, express or implied, nevertheless the parties are not free to make any contract they like. There are important limitations imposed by public policy. The tribunal must, for instance, observe the principles of natural justice. They must give the man notice of the charge and a reasonable opportunity of meeting it. Any stipulation to the contrary would be invalid. They cannot stipulate for a power to condemn a man unheard. The *Lee* case has been often cited for the proposition that if the by-laws or constitution are drafted with an exclusionary clause, the clause would be unenforceable as being contrary to public policy.[83] According to Lord Denning, any stipulation in a constitution which would result in the tribunal not being required to observe natural justice rules would be invalid.[84] Examples of Cases Where Rules OF Natural Justice have Diminished Arbitrary Exercise OF Discretionary Power.

1) ***Maneka Gandhi Vs. UOI***[85]

***Facts***

In this case the passport dated 01.06.1976 of the petitioner, a journalist, was impounded in the public interest' by an order dated 02.07.1977. The Govt. declined to furnish her the reasons for its decision. She filed a petition before the SC under article 32 challenging the validity of the impoundment order. She was also not given any pre-decisional notice and hearing.

***Argument by the Government***

The Govt. argued that the rule of audi alteram partem must be held to be excluded because otherwise it would have frustrated the very purpose of impounding the passport.

Held

The SC held that though the impoundment of the passport was an administrative action yet the rule of fair hearing is attracted by the

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[82] *Lee v. Showmen's Guild of Great Britain*, [1952] 1 All E.R. 1175 (C.A.) [*Lee*].
[83] See, e.g., *Kennedy v. Gillis et al.* 30 D.L.R. (2d) 82, [1961] O.J. No. 601.
[84] *Lee v. Showmen's Guild of Great Britain*, [1952] 1 All E.R. 1175 (C.A.) [*Lee*]. at 5.
[85] (1978) 1 SCC 248.

necessary implication and it would not be fair to exclude the application of this cardinal rule on the ground of administrative convenience**.**

2) In K.I.Shephard Vs. UOI certain employees of the amalgamated banks were excluded from employment. The Court allowing the writs held that post-decisional hearing in this case would not do justice. The court pointed out that there is no justification to throw a person out of employment and then give him an opportunity of representation when the requirement is that he should be given an opportunity as a condition precedent to action. ***86***

3) A.K.Kraipak Vs. UOI***87***

   The SC held that, The concept of natural justice is to prevent miscarriage of justice and it entails -

   (i) No one shall be a judge of his own cause.

   (ii) No decision shall be given against a party without affording him a reasonable hearing.

   (iii) The quasi-judicial enquiries should be held in good faith and not arbitrarily or unreasonably.

4) In the 1963 decision of the House of Lords in *Ridge v. Baldwin*[88] the House of Lords held that a chief of police, dismissed for cause, was entitled to prior notice of the reasons for his proposed dismissal as well as an opportunity to be heard.

5) In 1978, the Supreme Court of Canada followed the lead of the House of Lords when it decided Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police.[89] In that case, the Court held that a Police Board's decision to eliminate the services of a particular constable was invalid. The Court found that the duty to act fairly required that the constable be given at least prior notice and an opportunity to reply to the allegations either orally or in writing as the board determined.

6) There are several grounds upon which a court may invalidate the decision of a body or tribunal vested with the duty to take decisions that affect the rights of a citizen as was highlighted in the case of *Head of the Federal Military Government v. Public*

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[86] (1987) 4 SCC 431.
[87] (1969) 2 SCC 262.
[88] *Ridge v. Baldwin*, [1964] A.C. 40 (H.L.).
[89] Nicholson and *Knight v. Indian Head School Division No. 19* (Saskatchewan Board of Education), [1990] 1 S.C.R. 653 [Knight].

*Service Commission & Anor., Ex Parte Maclean Okoro Kubeinje*:[90]

We think it necessary to state the correct position at law to be that where it is established before the high court that a statutory body (or may be an inferior court) with limited powers has abused (those) powers and that such abuse does and continues to affect prejudicially the rights of the citizen, certiorari will issue at the instance of that citizen. Such abuse may take the form of non-compliance with the rule or rules of procedure prescribed for that body; it may be exemplified in the denial of the right to be heard in one's defence; it may consist of irregularities which are tantamount to a denial or breach of the rules of natural justice; indeed, it may take the form of an assumption of jurisdiction to perform an act unauthorized by law or a refusal of jurisdiction where it should be exercised.[91]

Of the five grounds for invalidating the acts of administrative bodies highlighted in that dictum the above three italicized grounds clearly relate to the infringement of the rules of natural justice. That is unarguably substantial. It is easy to see from the foregoing why Oretuyi[92] has observed that "the most frequent cause for judicial interference with the exercise of judicial and quasi-judicial powers is a disregard of the rules of natural justice".

7) In the case of Smt. Maneka Gandhi v. Union of India and another,[93], it has been observed that even where there is no specific provision for showing cause, yet in a proposed action which affects the rights of an individual it is the duty of the authority to give reasonable opportunity to be heard. This duty is said to be implied by nature of function to be performed by the authority having power to take punitive or damaging action.

8) In the case of MD Nazrul Islam Chowdhury v Abdul Halim Master,94[94] it was held that "Discretion should be exercised arbitrarily and must be exercised on sound principles ."

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[90] ( 1974) 11 SC 79.
[91] Ibid, At 125.
[92] Oretuyi, SA, "Discipline of Students: A Vice-Chancellor Must Observe the Rules of Natural Justice" (1981) 12(1) *Nig. LJ* 82.
[93] AIR 1978 SC 597.
[94] (1983) BLD (AD) 136

## Conclusion

The notion of natural justice has developed as a common law concept: an obligation to provide a minimum level of fairness when an individual's rights are affected in any of a broad range of factual scenarios including employment, club membership and migration. In recent years, the common law relating to judicial review of administrative action on the basis of procedural impropriety has undergone a rather remarkable transformation. The courts, using the language of "natural justice" and, more recently and more dramatically, "fairness", have brought about a situation in which a broad range of statutory authorities are subject to the observance of at least a modicum of procedural decency. It is no longer necessary for the implication of such a duty that the function in question be classified as judicial or quasi-judicial[95].'Nevertheless, there has been some disquiet, about this evolution [96],rather natural justice is a concept that represents higher procedural rules developed by judges which every administrative authority must follow in taking any decision adversely affecting the affecting the rights of a private individual.[97]As Max Weber said "Natural justice is the sum total of all those norms which are valid independently of, and superior to, any positive law and which owe their dignity not to arbitrary enactment but, on the contrary, provide the very legitimating for binding force of positive law"[98].Thus, Natural justice cannot be proved by employing the methods of scientific realism. By its definition it reflects the true dignity of individual man and is the very foundation of human justice.

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[95] The leading Canadian authority is *Nicholson v. Haldimand-Norfolk Regional Board of* Commissioners of Police [1979] **1** S.C.R. **311.**

[96] See, in particular, Loughlin, Procedural Fairness: A Study of the Crisis in Administrative Law Theory (1978) 28 U.T.L.J. 215; Macdonald, Judicial Review and Procedural Fairness in Administrative Law (1980) 25 McGill L.J. 520 and (1981) 26 McGill L.J. 1; Clark, Natural Justice: Substance and Shadow [1975] Public Law 27.

[97] Dr.I.P. Massey,Administrative Law,p. 170 (2nd end.)

[98] Max Weber, LAW IN ECONOMY AND SOCIETY, 1969, pp. 287-88.

Chapter Twenty Three

# Local Government

Central government is normally ill equipped to deal with many local matters which require special local knowledge and regulation on the basis of local needs. Local government ensures the essence of democracy through participation and engagement. As local government institutions are nearer to the community these can ensure participation of them in the planning and implementation of development programs and projects; supervision of various local institutions like, schools and colleges, hospitals and other publicly funded institutions and organizations, mobilization of support for various initiatives like campaign against dowry, child labour, human trafficking etc.; mobilization of local resources[1]. Capable local institution is deemed as one of the fundamental pre-requisites for sustainable development of the country, which can share and promote people's urge, aspiration and wisdom[2].

**Definition of Local Government**

According to the United Nations, local government refers to a political sub-division of a nation or state which is constituted by law and has substantial control of local affairs, including the power to impose taxes or exact labour for prescribed purposes. The governing body of such an entity is elected or otherwise locally elected[3].

According to encyclopedia of Social Science, 'Local government is the government which has a territorial non-sovereign community, having or possessing the legal right to impose taxes and use of it and the necessary organization to regulate its own affairs.'

According to Graham, a good local government possesses five qualities:

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[1] Akhter Hussain, Local Governance in Gangladesh: The Emerging role of the Development Partners, Asian Affairs, Vol. 25, No. 4 :5-22, October-December, 2003.

[2] Hye, H.A., (1998), 'Good Governance: An International Conference', Local Government Division, Ministry of LGRD and Cooperatives, Dhaka.

[3] For details, Akaeze, A. (2012): "How the Local Governments are Robbed of Funds" Newswatch Magazine, April 2, 2012, p.15.

1. Participation
2. Transparency
3. Contestation
4. Accountability
5. Innovation

Summarizing the merits of local government, the Widdeicombe Committee on the *Conduct of Local Authority Business* says: "The value of local government stems from its three attributes of:

(a) Pluralism, through which it contributes to the national political system,

(b) Participation, through which it contributes to local democracy,

(c) Responsiveness, through which it contributes to the provision of local needs through the delivery of services.

Justice Mustafa Kamal observed in the case of Kudrat-E-Elahi V Bangladesh[4] that local government is for the management of local affairs by locally elected people. It is the core of a democratic polity of every country.

One of the world's leading academics Ms Hilaire Barnett, in her famous book 'Constitutional & Administrative Law[5],' said "Local Government also represents the citizen's closest contact with a democratic institution and enables individuals to play a role in the administration of their geographical area."

So, it can be said that Local Government is a public organization which is comprised the elected representative of an area and which is engaging in work for the purpose of local development.

**Evolution of local Government in Bangladesh**

Local institutions existed in Bangladesh from ancient time. Only its forms differed from age to age. Therefore, the institution of village-self government is as old as villages themselves in our country.

**Pre-colonial period**

It is recorded in history that the villages were self reliant before the colonial rule. Every village had its own community based organization known as Panchayet. The ancient and medieval governments of Bengal were heavily dependent on Panchayet, which made the structure of the local government[6].

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[4] 44 DLR (AD) 319.
[5] Page 458
[6] See,www.lgd.gov.bd/index.php?option=com_content&view=article&id=2&Itemid=13&lang=n

During ancient age, Panchayets were competent bodies. Practically, all government tasks were performed within their jurisdiction. The control exercised by the central government over them was marginal. They had adequate financial resources to perform their multifarious functions. These included civic, police and judicial functions, such as maintenance of law and order, punishment of crimes, settlement of disputes, maintenance of management of communal lands and public utilities, construction of roads, collection of revenue, and other public works.

During medieval age, the panchayets were generally entrusted with the task of looking after education, irrigation, religious practices and moral conduct of the villagers. Holding fairs and festivals, and maintenance of law and order were also their functions.

During Mughal period there was four tiers of administrative body to collect revenue.

1. Sudhas- Province
2. Sarker- District
3. Maragana- Thana/Mohkoma
4. Mahallas.

**British Colonial period**

The early period of the British rule did not much touch upon the structure of the then existing local government system. With the inception of the Permanent Settlement System, the British colonial rulers replaced the indigenous system with the British model of local governance. Both the Pargana and the Panchayat system were abolished. The civil and criminal laws and courts became the basis of local administration and landlords became the local rulers.

The zamindari institution, however, lost its potency in the later part of the nineteenth century. The end of East India Company rule in 1858 and parliamentary commitment to take the people of the country in partnership in phases led to many reforms leading to increasing participation of people in the local governance. Thus, government passed the Bengal Chowkidari Act of 1870. The Act tried to revive the traditional Panchayet System. It authorized the District Magistrate to appoint a panchayet at the village level consisting of five members. The primary function of the panchayet was to appoint village watch-men called chowkidars for the maintenance of law and order. The panchayet could also assess and collect taxes from the villagers to pay the salaries of the chowkidars.

The most direct mode of western self governance was attempted by Viceroy LORD RIPON (1880-1884). His administration resolved in 1882 to introduce local self-governing institutions in phases. In implementing the resolution, the Bengal Council passed the Local Self-Government Act, 1885 under which a three-tier system of local government for rural areas was provided:

(i) a District Board in each district,

(ii) a Local Board in a sub-division of a district,

(iii) a Union Committee for a group of villages.

Members of the union committee and local board were elected by a restricted electorate and the district board members were indirectly elected. The district board was made the principal unit of local self-government and the collector was the chair, exercising the real authority.

Later, through the enactment of the Bengal Village Self-Government Act 1919, the former three-tier system was replaced by a two-tier system consisting of union board and district board. Two third of the members of Union Board were elected and one third nominated. The system of nomination was abolished in 1946. The Union Board could dispose of minor criminal cases and was given the authority to levy Union rate. Primary functions of the Union Board were:

(a) Supervision of chowkidars,

(b) Maintenance of sanitation and public health,

(c) Maintenance of roads, bridges and waterways,

(d) Establishment and upkeep of schools and dispensaries at its discretion and

(e) Supply of information as and when needed by the District Board.

**Pakistan Period**

The colonial situation of local government persisted until 1959. A new experiment was tried by Ayub Khan who was in favour of a kind of democracy called BASIC DEMOCRACY which was to be characterized by authoritarian government at the top and qualified representative government at the local level. Under the Basic Democracy Order of 1959 local government bodies were set up at four tires. From bottom to top, this consisted of;

1. Union Council at Union level,

2. Thana Council at Thana level,

3. District Council at District level and

4. Divisional Council at Divisional level.

## Local Government Experiments in Bangladesh

After liberation, Dramatic changes were brought in the structure of the local government in Bangladesh.

### Bongabandhu Sheikh Mujibur Rahman Regime (1972—1975)

In order to continue local administration, the government appointed designated committees to replace the defunct committees. The Union Council was renamed as Union Panchayat (later Union Parishad) and the District Council was renamed as the District Board (later Zila Parishad). The Thana and Divisional Councils were not replaced by such ad hoc committees. The Presidential Order No 22 specified that each union composed of several villages would be divided in three wards; three UP members would be elected from each ward. Besides, provisions were made for the Chairman and Vice Chairman to be directly elected by all eligible voters living within a UP. The Order further stipulated that the Sub-divisional Officer (SDO) and the Deputy Commissioner would be ex-officio chairmen at thana and district level local bodies respectively.

### Ziaur Rahman Regime (1975—1981)

During Ziaur Rahman Regime, the Local Government Ordinance 1976 was promulgated that introduced a three-tier local government system:

1. Union Parishad,

2. Thana Parishad, and

3. Zila Parishad hierarchically arranged in ascending order.

The structure and functions of the UP remained almost same as they were under the Presidential Order No.22, with exceptions that the post of the Vice Chairman was abolished and four additional nominated members were included.

### Ershad Regime (1982—1990)

In 1982, the military government headed by General Ershad constituted a ten-member committee for administrative reorganization. Based on the committee's recommendations the government undertook major steps to reorganize the existing local bodies at thana level in particular. On 23 December 1982 the Local Government (Thana Parishad and Thana Administration Reorganisation) Ordinance was promulgated to introduce major changes with respect to the system of local government at the thana level. The Upazila Parishad was entrusted with the power to impose tax, rates, fees and tolls. Responsibility for all development activities at the local level was transferred to the Thana Parishad which was hub centre for development along with Union Parishad and Zila Parishad.

**Khaleda Zia regime (1991-1996)**

After the changeover to the parliamentary system of government in 1991, the first Khaleda Zia government (1991-1996) abolished the upazila system. A Local Government Reorganization Commission was constituted on 24 November 1991 to review the effectiveness of the contemporary structure of the local government and recommended on possible reorganization in accordance with the 12th amendment made to the constitution. This Commission proposed a two tier system for the rural area:

1. Union Parishad at union level and

2. Zila Parishad at district level

**Sheikh Hasina Regime (1996-01)**

The Sheikh Hasina government formed a commission to suggest the structure of local government consistent with democratic spirit and with sustainable base. This commission suggested for a four-tier system:

1. Gram parishad at village level,

2. Union parishad at union level,

3. Upazila parishad at Thana level, and

4. zila parishad at district level.

In the mean time the Union Parishad has been constructed following its elections in 1997. To facilitate increased representation of the women folk one unique and unprecedented measure has been adopted in the form of their direct election in the three wards of the Union Parishad. The Seventh Jatiya Sangsad has approved the formation of the Upazila Parishad.

**Khaleda Zia regime (2001-06)**

During this period there were four tiers of administrative body; functions included public welfare, maintenance of law and order, revenue collection, development and adjudication.

(i) Gram sarker

(ii) Union Parishad

(iii) Upazila Parishad

(iv) Zilla Parishad.

**Sheikh Hasina Regime (2008...)**

Gram Sarkar system is abolished. Therefore, at the present day, there are three tiers of administrative body like-

i) Union Parishad

ii) Upazila Parishad

iii) Zilla Parishad

**Local Government in the Bangladesh Constitution**

It is a unique feature of the Constitution of Bangladesh that specific provisions for local government have been made in it. This uniqueness was recognized by the Appellate Division of the Supreme Court in Kudrat-E-Elahi V Bangladesh[7]. Here the court made it clear that a combined reading of the Preamble, Articles 7, 11, 59 and 60 of the Constitution indicate that the makers of the Constitution devised a scheme of total democracy, both at the centre and at the level of local government.[8]

Basically, the framers of Bangladesh Constitution have included, among others, the provisions for promotion of local government institutions and democracy in Part II, under the heading of "Fundamental Principles of State Policy." Article 11 of the Constitution of Bangladesh says "The Republic shall be a democracy in which fundamental human rights and freedoms and respect for the dignity and worth of the human person shall be guaranteed, and in which effective participation by the people through their elected representatives in administration at all levels shall be ensured." This Article encourages for the establishment of local government for the direct participation of the people in the local development through their elected representatives.

In order to give effect to the above fundamental principles of State Policy, a new, separate Chapter (Chapter III of the Constitution) about local government has been included, containing two Articles i.e. Article 59 and 60. These Articles make provisions for local government and local government bodies and set out their powers.

Article 59(1) of the Constitution is directly concerned with the provisions of local government and its compositions. It says "Local government in every administrative unit of the Republic shall be entrusted to bodies, composed of persons elected in accordance with law."

The functions of the local government are briefly outlined in Article 59(2). It provides: "Everybody such as is referred to in clause (1) shall, subject to this Constitution and any other law, perform within the appropriate administrative unit such functions as shall be prescribed by Act of Parliament, which may include functions relating to

(a) administration and the work of public officers;

(b) the maintenance of public order;

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[7] 44 DLR (AD).

[8] Kamal, Mustafa, Bangladesh Constitution: Trends and Issues, 2nd edition. University of Dhaka,1994,p134

(c) the preparation and implementation of plans relating to public services and economic development.

Article 60 of the Constitution says about the powers of the local government. It says "For the purpose of giving full effect to the provisions of article 59 Parliament shall, by law, confer powers on the local government bodies referred to in that article, including power to impose taxes for local purposes, to prepare their budgets and to maintain funds." So, the local government shall have the power –

1. To raise tax;
2. To monitor funds; and
3. To maintain budget in the local area for the development of the local areas.

Being empowered by the Constitution the Parliament has enacted some laws having the force of law, relating to local government, these are:

1. The Local Government (City Corporation) Act 2009 for the City Corporations.
2. The Local Government (Paurashava) Ordinance, 2008 for the Paurashavas.
3. The Zila Parishad Act, 2ooo for Zila Parishad
4. The Local Government (Upazila Parishad) Ordinace, 2008 for Upazila Parishads.
5. The Local Government (Union Parishads) Act, 2009 for Union Parishads.

**Existing Classification of Local Government in Bangladesh**

Now, there are two distinct kinds of local government institution in Bangladesh- One for the rural areas and another for urban areas.

The local government in the rural areas comprises three tiers

1. Union Parishads

2. Thana/Upazila Parishads

3. Zila (District) Parishads

And the local government in the urban areas consists of Pourashavas and Municipal Corporation (City Corporation).

**Conclusion**

Local government is one of vital institutions of the State. In accordance with the provisions of Articles 11, 59 and 60 of the Constitution, local government institutions should be set up to ensure people's participation in the development of the country. Local government should be seen as a grass root level democratic organ, an efficient delivery method and a mechanism of engaging local people in the development of their respective geographical area.

Chapter Twenty Four

# Ombudsman

The necessity for the office of Ombudsman has been felt in Bangladesh ever since its independence. So, the framers of Bangladesh constitution incorporated a provision for the office of Ombudsman for protecting long cherished public rights against administrative excess. Even after 24 years of enactment of the Ombudsman Act, 1980, Bangladesh is yet to have an Ombudsman.

## Origin of the Word "Ombudsman"

"Ombudsman" is a Swedish term dating back to the 1800's. The Swedish word "ombuds" means "officer" or "spokesman" or "representative". It also connotes "attorney, solicitor, deputy, proxy, delegate and representative agent."

## Definition of Ombudsman

Many scholars defined Ombudsman in different perspective. According to Bernard Frank, "Ombudsman means an office established by constitution or statute headed by an independent, high level public official who is responsible to the legislature, who receives complaints from aggrieved persons against government agencies, officials and employees or who acts on his own motion, and has power to investigate, recommend corrective action and issue reports"[1].

Professor Rowat in his famous book "The Ombudsman: Citizen's Defender" wrote that, "Ombudsman is an independent and politically neutral officer of the legislature who receives and investigates complaints from the public against administrative action and who has the power to criticize and publicize but not the reverse such action."[2]

According to Davis Ombudsman "-- occupies a position of high prestige in the Government and his job is to handle complaints from any citizen who displeased with the action or in action of any administration or civil servant."[3]

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1 Frank, Bernard 1986, The Ombudsman and Human rights (Revisited), p. 11

2 Rowat, R.C 1968 The Ombudsman, Citizen's defender London: George Allen and Unwin. p.1X

3 Davis, Kenneth Kulp, 1961.Ombudsman in America: officers to criticize Administrative Action, University of Pennsylvania Law Review. p. 1057-1076

According to Professor Garner, "Ombudsman is an officer of parliament, having as his primary function, the duty of acting as an agent for parliament, for the purpose of safeguarding citizens against abuse or misuse of administrative power by the executive."[4]

Professor Cutchin defined Ombudsman as," a respected, a political individual outside the bureaucracy who is empowered to investigate citizen's complaints about government services and recommend rectification. Usually he has the power to investigate, criticize and publicize administrative actions, but can't reverse them".[5]

So, Ombudsman is an independent and nonpartisan officer of the legislature, provided for by law, who is an experienced person having authority to inquire into pronounce upon grievances of citizens against public authorities.

**Features of Ombudsman**

The Ombudsman is

i. independent of government.
ii. responsible for making sure that administrative practices and services of public bodies are fair, reasonable, appropriate and equitable.
iii. able to conduct confidential investigations that are non threatening and protect complainants against retribution.
iv. required to file an annual report with the legislative Assembly.

Many scholars view that the essential characteristics of the Ombudsman's post require that the individual filling it be:

1. Independent;
2. Impartial;
3. Expert in government;
4. Universally accessible; and
5. Empowered only to recommend and to publicize

In 1962 a seminar was arranged by the UNO a judicial and other remedies, that seminar suggested some features of Ombudsman as follows:

1. It is not only an instrument of parliament for supervising administrative action but also a protector of individual rights.

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[4] Garner 1989. Administrative Law, 7th edition. London: Butterworths, p. 92
[5] Cutchin, D. A. 1981, Guide to Public Administration, p. 68

2. Investigations conducted by it are completely impartial and independent of the administrators.
3. Investigation can be started by the Ombudsman at his own initiatives basing his actions of information received by him.
4. The investigation is conducted informally.
5. The ombudsman has considerable flexibility in the form of action which he would take in given case.[6]

However, based on literature survey and practical experiences in various countries the following features of the Ombudsman system are notable:

1. The Ombudsman is an important and mutually reinforcing pillar in the national integrity system, complementing the work of other watchdog institutions like the Anti-corruption Commission;
2. Ombudsman is an independent and non-partisan institution established usually by the Parliament. It may also be established by the president, or an institutional authority (e.g., Board of Directors/Trustees if it is private or non-government organization;
3. Where Parliament exists the Ombudsman provides independent assistance to the legislative body, with regard to its oversight function to make the government, public institutions and officials accountable to people;
4. The Ombudsman receives complaints from aggrieved persons against concerned institutions, departments, officials and employees;
5. The main mandate of Ombudsman is to represent citizen's voices and concerns about possible abuse of power and discretion by the administration, officials and/or institution;
6. The Ombudsman is headed by a non-partisan individual of high integrity, credibility, and professional experience reputed for commendable contribution in public life;
7. The Ombudsman conducts a free, fair and impartial investigation into the allegations and recommends corrective actions by the concerned authority, which may be a relevant institution of the government, the parliament, the judiciary or another watchdog body which has legal authority to take corrective measures;

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[6] UN Technical Assistance Operation, 1962:12-17

8. The Ombudsman reports to its creating authority, e.g., the Parliament if it is the Parliamentary Ombudsman for Administration;
9. The Ombudsman does not have the same power as the court of law. Its recommendations may not have mandatory implications, but constitute an obligation on the part of the respective authority to take corrective action;
10. Ombudsman can be a national as well as regional, sub-national or local institution;
11. There can be public as well as private and non-governmental sector Ombudsman;
12. There can be Ombudsman with omnibus jurisdiction areas such as administration, but there can also be Ombudsman with issue-based coverage
13. The Ombudsman is an expert and impartial grievance redress institution for citizens that act informally, without delays and complexities of courts and administrative procedure, without counsel, and without expense;
14. The presence of an effective and resourceful Ombudsman has a moral and psychological value for all parties. The citizens are confident as there is a watchdog that serves as deterrent to misuse of power by the bureaucracy. The officials, on the other hand, are assured that trivial and frivolous complains without proper evidence will be dropped and no undue harassment of legal and administrative procedures will be applicable.

**Report of Law Commission on the Ombudsman Act, 1980 (Act XV of 1980)**

With the ever- increasing complexities of governance, abuse of powers, maladministration, nepotism and corruption by public functionaries have also increased. Every modern democratic state provides conventional constitutional and legal machineries for coping with these evils. These conventional machineries are the judiciary, the legislature, various enquiry commissions set up by the government, etc. The superior courts are empowered to check maladministration, abuse of powers by public functionaries and infringement of citizens' rights by issuing various types of writs. They are also empowered to quash administrative decisions in certain circumstances. The administration can also be sued in ordinary courts for damages in respect of acts or omissions committed by it. But, it is increasingly felt

that the judicial remedy is costly, complicated, and time-consuming and is not easily accessible by common people. There are also certain aspects of maladministration and illegal practices which are out of reach of the courts.

On the contrary, the process of Ombudsman's investigation is very informal and flexible and there is an element of personal touch and concern. Furthermore, as the complaint is required to pay a very nominal or no fee/deposit, the Ombudsman provides a much cheaper justice than the regular system can offer.[7]

Bernard Frank, a Pennsylvanian lawyer and chairman, Ombudsman Committee, International Bar Association, made extensive research on Ombudsman system. According to him the reasons for adoption of the system are:

- The Ombudsman as an independent arm of the legislature body assists the legislature in its function of maintaining the activities of government agencies and officials.
- The Ombudsman system has as its basic purpose the protection of the human rights of the citizens.
- The existing mechanisms for adjusting grievances in modern system are inadequate. In law courts litigation is expensive, tension creating and protracted. Administrative courts follow court like procedures. Executive complaint handling agencies lack the essential characteristics of independence.
- The Ombudsman provides the citizens with an expert and impartial agent who acts informally, without delay, without requirement of counsel and recommends corrective action.
- The presence of the Ombudsman has psychological value. The citizens become confident as there is a watchdog and it serves as deterrent to the bureaucracy.

So, the Significance of Ombudsman System is that it

1. Protects human and constitutional rights of the citizens.
2. Works as a watchdog to oversee the activities of public officials and institutions.
3. Promotes rule of law.

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[7] Abedin, Nazmul, 1992. The Ombudsman: An Overview of Relevance for the developing countries, Asian Affairs, vol. 14, No. 1:5-17, p. 11

4. Recognizes that public agencies are supposed to serve the citizens.
5. A person affected by the activities to the public agencies can get quick remedy.
6. Promotes morale values and confidence of the citizens giving a feeling that there is someone in their favors to hold the government accountable.

**Ombudsman in the Constitution of Bangladesh**

The framers of Bangladesh constitution incorporated a provision for the office of Ombudsman for protecting long cherished public rights against administrative excess. Article 77(1) of the Constitution stipulates that

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

Article 77(2) of Bangladesh Constitution also stipulates that, once established the Ombudsman shall have the power to investigate any action taken by a ministry, a public officer or a statutory authority and such other powers and functions as may be prescribed by Parliament.

According to Article 77(3) of Bangladesh Constitution, The Ombudsman shall prepare an annual report concerning the discharge of his functions and such report shall be laid before Parliament.

Actually, an institution like the Ombudsman would be essential for safeguarding the interests and rights of the public in Bangladesh from maladministration or administrative excesses. Our constitution makers have made such provision for it in the constitution. So, when the Constitution had, when it was adopted on 4 November 1972, but commenced from 16th December 1972, desired that Parliament should pass a law establishing the office of Ombudsman, it thereby expressed the will of the people. The expression, "may", used in clause (1) of the Article 77 clearly indicates that the constitution did not mandate Parliament to establish the office of the Ombudsman but left it to the desire and discretion of Parliament. History reveals that in pursuance of Article 77 of our Constitution, a Bill was passed in the Parliament in 1980. The Bill is known as 'The Ombudsman Act, 1980[8].

**Ombudsman Act, 1980**

The main characteristics of Ombudsman Act 1980 are:

(a) There shall be an Ombudsman who shall be appointed by the president on the recommendation of the parliament.

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[8] Act XV of 1980

(b) Parliament shall recommend for appointment a person of known legal or administrative ability and conspicuous integrity [Sec. 3(2)].

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

(d) The Ombudsman shall hold office for a term of three years and shall be eligible for reappointment for one further term [Sec. 4 (1)].

(e) The Ombudsman shall not be removed from his office except by an order of the president passed pursuant to a resolution of parliament supported by majority of not less than two thirds of the total numbers of parliament on the ground of proved misconduct or physical incapacity.

(f) The Ombudsman may investigate action taken by a ministry, a statutory public authority, or a public officer in case where a complaint in respect of such action is made to him by a person.

(g) For the purposes of an investigation, the Ombudsman may require any public officer or any other person who in his opinion is able to furnish information or produce documents relevant investigation [Sec. 8 (1)].

(h) For the purposes of any such investigation the Ombudsman shall have all the powers of a civil court while trying a suit under the Code of Civil Procedure, 1908 in respect of the following matters: (a) Summoning and enforcing the attendance of any person and examining him on oath;(b) requiring the discovery and production of any document; (c) requiring evidence on affidavit;(d) requisitioning any public record or a copy thereof from any court or office; (e) issuing commissions for the examination of witnesses of documents [Sec. 8 (2)].

(i) Ombudsman shall have the power to punish any person who, without lawful excuse obstructs him in the performance of his functions with simple imprisonment, which may extend to three months, or with fine which may extend to two thousand taka, or with both.

(j) The Ombudsman shall prepare an annual report concerning his discharge of functions and submit it to the President who shall cause it, together with an explanatory memorandum to be laid before Parliament [Sec. 9 (6)].

(k) The Ombudsman may appoint officers and other employs to assist him in the discharge of his functions. The categories of officers and other employees who may be appointed by the Ombudsman and

their terms and conditions of service shall be such as may be prescribed after consultation with the Ombudsman. The Ombudsman may with previous sanction of the government, utilize the services of any officer, employees or agency of the Government, if such services are required by him for the purpose of discharging his functions [Sec. (10)].

**Legal position of Ombudsman in Bangladesh**

Article 77(1) of Bangladesh Constitution clearly says "Parliament may, by law, provide for the establishment of the office of Ombudsman".

In pursuance of this Article the Ombudsman Act 1980 was enacted by Parliament, but this Act of 1980 is not enforceable in our country. Because Section 1 of the Ombudsman Act 1980 clearly says

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

But the Government of our country did not issue any notification in the official Gazette about its enforcement. Therefore, there is no application of the Ombudsman Act, 1980 in Bangladesh.

**Conclusion**

The framers of Bangladesh constitution incorporated Article 77 for the office of Ombudsman for protecting long cherished public rights against administrative excess. And the Parliament passed a Bill in 1980 known as the Ombudsman Act 1980 (Act XV of 1980) containing provisions relating to the establishment of the office of Ombudsman. But the office of Ombudsman is yet to be implemented by the Government. So, the Government should take initiatives to establish an office of Ombudsman in Bangladesh for the well being of the people at large.

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