CHAPTER ONE

INTRODUCTORY

1.1 By instinct man is gregarious and lives in company of his fellow beings. This has led to the emergence of society and rules to regulate the conduct of the members of the society. The association was not, however, for mere companionship, but to achieve various objectives and purposes. Dealings between the individuals in the society invariably resulted in disputes. The need to settle disputes gave rise to leadership in the society and with the problem of protection of life and property came the concepts of allegiance and obedience. By a slow and intermittent process of social, economic and political evolution the State emerged as an indispensable institution run by an agency called the government. Constitutional law is a set of legal rules which regulate the structure of the organs of government, their functions, and their relationship with each other and with the citizens. Power has to be conceded to the State for the sake of ordered society, but every power given to the State makes a corresponding inroad into the bundle of rights and liberty of individuals. Gone are the days of *laissez-faire* when the individuals hardly felt the existence of the government. The vast explosion of population, the momentous advancement of technology and the resulting perceived welfare needs of the complex modern society have made pervasive governmental control inevitable. In such a situation the life of individuals is sure to become intolerable if the State can exercise unfettered or arbitrary power. Hence, the modern emphasis is on constitutionalism and constitutional government which not only recognise the need for governmental power, but also insist on limitations on the power of the government. "Western institutional theorists have concerned themselves with the problems of ensuring that the exercise of governmental power, which is essential to the realisation of the values of their societies, should be controlled in order that it should not itself be destructive of the values it was intended to promote."[1] Today, constitutional law, in defining the State power, circumscribes the extent of that power and sets the limit of individual freedom. Thus it not only deals with the powers and functions of the principal branches of government, but also effects an adjustment between individual freedom

[1] M.J. Vile - Constitutionalism and the Separation of Powers, p.1

and the collective needs of society.

1.2 *Sources of constitutional law:* In all cases, except that of the United Kingdom, the fundamental provisions of the governmental system are set forth in a document or set of documents which, as a document, is called the constitution. Constitutional law, however, should not be taken to be synonymous with a constitution. The text of a constitution contains only a bare statement, in general terms, of those aspects of the question relating to the establishment of government as have been considered essential. From this one cannot know fully the constitutional law of a country, though he may form a fair idea about it. A constitution is the core or centre-piece of the constitutional law of a country, but constitutional law is something more which gathers round a constitution in the form of legislation, judicial decisions and conventions and practices to complement it.

1.3 Legislation is an important source of constitutional law. For various reasons which need not be detailed here, a constitution does not make provisions for all conceivable matters but leaves them to be provided by legislation. The Constitution of Bangladesh stipulates that the provisions of the General Clauses Act, 1897 shall apply to the interpretation of the Constitution.[1] For the meaning of 'citizen' reference must be made to the Citizenship Act. The election of the President by the members of Parliament is governed by an Act of Parliament. The Indian Constitution is the lengthiest of all constitutions. Even then it leaves many matters of constitutional importance to be determined by legislation.

1.4 Judicial decisions make up a considerable portion of constitutional law. American constitutional law is not what the framers of the American Constitution set forth more than two hundred years ago. American constitutional law today is what has emerged from the numerous decisions handed down by the American Supreme Court over these years. Even though the Constitution of Bangladesh is far more detailed and recent in origin than the American Constitution, the constitutional law of Bangladesh cannot be fully comprehended without referring to the decisions given by the Supreme Court of Bangladesh. For example, in the exercise of the power of judicial review, the Supreme Court applies certain principles developed by the courts of foreign jurisdictions which are not incorporated in the language of the

[1] Art.152(2)

Constitution. These principles form part of the constitutional law of Bangladesh because of their application by the Supreme Court.

1.4A The law and custom of parliament is a source of constitutional law. It consists of the rules relating to the functions, procedure, privileges and immunities of parliament, its members and committees. Some of it is stated in the constitution. Most of the matters are covered by the rules of procedure of parliament. There are judicial decisions touching the matter. But part of the law and custom of parliament rests on informal understandings and practices which are to be culled from the resolutions recorded in the proceedings of parliament.

1.5 With the passage of time, in working a constitution and running State affairs, many precedents occur and practices develop. When such precedents and practices are found to have been consistently followed, they are treated as constitutional conventions. Constitutional conventions are "rules of political practice which are regarded as binding by those to whom they apply, but which are not laws as they are not enforced by the Courts or by the House of Parliament".[1] Even though we come across the term in discussions about English constitutional law, it will be wrong to suppose that conventions are peculiar to an unwritten constitution. In Australia and Canada many of the English conventions are observed. Many conventions have also developed in the United States relating to election of the President, the formation, selection and functioning of the President's Cabinet, senatorial approval of certain political appointments and other matters. Speaking about the creation of a convention Sir Ivor Jennings observed-

> We have to ask ourselves three questions: first, what are the precedents; secondly, did the actors in the precedents believe that they were bound by a rule; and thirdly, is there a reason for the rule? A single precedent with a good reason may be enough to establish a rule. A whole string of precedents without such a reason will be of no avail, unless it is perfectly certain that the persons concerned regarded them as bound by it.[2]

1.6 Conventions are generally to be distinguished from law and are treated as non-legal rules. These conventions cannot be enforced in the court of law. Nevertheless, these form part of the constitutional law of a country and deviations from these conventions evoke serious criticism

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[1] O. Hood Phillips - Constitutional and Administrative Law, 4th ed., p.77

[2] The Law and the Constitution, 5th ed., p.136

and create political difficulties in running the government. The question is whether a convention will always have the status of a non-legal rule. There are instances of conventions becoming law by legislative recognition. According to K.C. Wheare, "Convention can become law also by judicial recognition".[1] Kuldip Singh J of the Indian Supreme Court observed, "Once it is established to the satisfaction of the Court that a particular convention exists and is operating then the convention becomes a part of the 'constitutional law' of the land and can be enforced in the like manner."[2] But there are judicial decisions[3] upholding the contrary view and citing these decisions, it has been contended, "On grounds of principle, and on the evidence of these cases, it may safely be concluded that conventions are unable to make the leap from being rules of political obligation to being part of the common law".[4] "

1.6A Authoritative works on constitutional law are treated to be a source of constitutional law, though such works have only persuasive value. When important questions on constitutional law arise, the views of reputed authors like Dicey, Willoughby, Wade, deSmith, Wynes and Seervai carry considerable weight and are often taken into consideration, particularly by the courts. On parliamentary practice, Erskine May is regarded as an undisputed authority.

HISTORICAL BACKGROUND

1.7 In order to understand the constitutional law of a country we must not only refer to the laws and principles that exist outside the constitution, we must also acquaint ourselves with its historical background. There are usually many provisions in a constitution which can be properly understood and applied only if we know the historical facts which led to the adoption of the scheme and the formulation of those provisions of the constitution.

1.8 *Partition of India.* India was being governed by the Government of India Act, 1935 when it was partitioned in 1947. This Act provided for a federal parliamentary form of government, though the Governor

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[1] Modern Constitutions, 2nd ed., p.135

[2] *S.C. Advocates-on-Record Association v. India*, AIR 1994 SC 268, 404

[3] *Reference Re Amendment of the Constitution of Canada*, [1981] 1 SCR 753; *Manuel v. Attorney General*, [1982]3 All E.R. 822

[4] Colin R. Munro – Studies in Constitutional Law, 2nd ed., p.74

General was the real repository of power as the representative of the British sovereign. While partitioning the country, the British Parliament amended this Act and passed the Indian Independence Act, 1947 creating two Dominions - India and Pakistan - and two Constituent Assemblies for the two Dominions. Until the adoption of constitution, the Constituent Assemblies were also to function as federal legislature for the Dominions.

1.9 *Delay in framing constitution in Pakistan:* The Constituent Assembly of India promptly enacted a constitution which came into operation in January, 1950. The Constituent Assembly of Pakistan could not complete its work for quite a long time. There ensued a tussle for power among persons who held positions of advantage in the government. Politicians, no doubt, bungled; but bureaucrats and military officials availed of the opportunity and engaged themselves in palace intrigue. In 1950 the Prime Minister, Liaquat Ali, was murdered and the murderer was killed on the spot so that the real persons behind the murder could not be traced out. Khawaja Nazimuddin, who became the Governor General on the death of M.A. Jinnah, became the Prime Minister and Ghulam Mohammad, an ex-civil servant holding the office of Finance Minister, became the Governor General. In April, 1953 Ghulam Mohammad dismissed Khawaja Nazimuddin and his Cabinet. He appointed Mohammad Ali of Bogra as the Prime Minister. General Ayub Khan joined the Cabinet as the Minister of Defence. Khawaja Nazimuddin clearly commanded a majority in the Constituent Assembly. Under the circumstances, Ghulam Mohammad, only a titular head, had no constitutional authority to dismiss the Prime Minister and to assume the role of a sovereign.[1]

1.10 *Dissolution of Constituent Assembly:* Ultimately the making of the constitution reached the final stage. The draft constitution based on the Objectives Resolutions adopted by the Constituent Assembly had been prepared with the assent of the leaders of various political parties in the Constituent Assembly.[2] The Prime Minister announced that the constitution for Pakistan would be put into operation in December 1954. The vested interests had something other than a smooth constitutional transition in mind. On 24 October 1954 Ghulam Mohammad issued a Proclamation dissolving the Constituent Assembly and reconstituting the Cabinet with Mohammad Ali as the Prime Minister. Ayub Khan and

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[1] *Asma Jilani v. Punjab*, PLD 1972 SC 139, 212.
[2] Ibid, p.213

Iskander Mirza, two army men, were included in the Cabinet.

1.11 S.19 of the Government of India Act, 1935, as originally enacted, conferred power on the Governor General to dissolve the federal legislature. While amending the Act to bring it in line with the Indian Independence Act, this power of dissolution was omitted from s.19. Tamizuddin Khan, the President of the Constituent Assembly, filed a writ petition under s.223-A of the Government of India Act in the Sind Chief Court challenging the dissolution of the Constituent Assembly mainly on the ground that the Governor General had no power of dissolution. The respondents took the plea that the insertion of s.223-A by amendment of the Government of India Act by the Constituent Assembly was invalid for want of assent of the Governor General and the Sind Chief Court had no jurisdiction to entertain the writ petition. The petitioner contended that the amendment of the Government of India Act was a constituent law passed by the Constituent Assembly. It did not require assent of the Governor General and became law as soon as it was authenticated by the Constituent Assembly and published in the official Gazette as per r.62 of the Rules framed by the Constituent Assembly. The constituent laws passed by the Constituent Assembly were never placed before the Governor General for assent and those Acts were acted upon and enforced by the executive government. Such was also the case in India. The Sind Chief Court found that such assent was not necessary for the validity of the amendment and on merits found that the Governor General had no power to dissolve the Constituent Assembly.[1]

1.12 The respondents preferred an appeal before the Federal Court which by a majority judgment allowed the appeal[2] holding that the insertion of s.223-A was invalid for want of assent of the Governor General and the Sind Chief Court had no jurisdiction to entertain the writ petition. Munir CJ, in coming to this finding, resorted to the royal prerogative of the British Crown of withholding assent which was not exercised for the last two and half centuries. The Federal Court did not go into the merits of the case. It was beyond doubt that the Governor General had no power to dissolve of the Constituent Assembly. Cornelius J wrote a powerful dissenting judgment. He held that neither the British sovereign nor the Governor General was a part of the Constituent Assembly and assent was not necessary to impart validity to

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[1] *Tamizuddin Khan v. Pakistan*, 7 DLR (WP) 121

[2] *Pakistan v. Tamizuddin Khan*, 7 DLR (FC) 291

the laws passed by the Constituent Assembly. Reading the dissenting judgment one gets the impression that the majority judgment was erroneous.[1] The requirement of assent in respect of constitutional enactments as found by the Federal Court strengthened the hand of the Governor General in manipulating political events. Politics in Pakistan foundered and went adrift, monopolised by wrong persons.

1.13 In view of the finding of the Federal Court in *Tamizuddin Khan*, a large number of constitutional enactments of the Constituent Assembly were going to be invalid for want of assent. The Governor General sought to validate those Acts by indicating his assent retrospectively by an Ordinance. But the Federal Court ruled this to be *ultra vires* the power of the Governor General.[2] In this situation, the Governor General resorted to the advisory jurisdiction of the Federal Court[3] to find a solution for the constitutional deadlock created by the judgment of the Federal Court in *Tamizuddin Khan*. Although the Federal Court could not find any law to meet the situation, it invoked the doctrine of necessity embodied in the maxim, *salus populi est suprema lex* (public welfare is the highest law), and evolved a new political formula for setting up a new Constituent Assembly.[4] The Federal Court found the dissolution of the Constituent Assembly by the Governor General valid stating that when the Constituent Assembly failed to give a constitution and turned itself into a perpetual legislature, the Governor General could dissolve the Constituent Assembly. The Federal Court ignored the fact that the draft constitution was ready and the Prime Minister announced that the constitution would be put into operation by 25 December 1954. The maxim of *salus populi est suprema lex* was pleaded in *Tamizuddin Khan* and the serious consequence of invalidating constitutional enactments for want of the formal assent of the Governor General was pointed out, but the Federal Court refused to apply the maxim in that case. Yet the Federal Court applied this maxim in the situation created by its own decision in *Tamizuddin Khan*.

1.14 *Constitution of 1956:* East Pakistan had a population larger than the population of the four provinces of West Pakistan taken together. East Pakistan was entitled to a larger representation in the federal legislature. In order to avoid the situation, the four provinces of West

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[1] *Asma Jilani v. Punjab*, PLD 1972 SC 139, 214.
[2] *Usif Patil v. Crown*, 7 DLR (FC) 385.
[3] *Reference by Governor General*, 7 DLR (FC) 395
[4] *Asma Jilani v. Punjab*, PLD 1972 SC 139

Pakistan were merged into one province of West Pakistan and the principle of parity between the two units of Pakistan was introduced. The new Constituent Assembly adopted a constitution based on the principle of parity. In the meanwhile Iskander Mirza succeeded Ghulam Mohammad as the Governor General. He refused to assent to the constitution unless the members of the Constituent Assembly agreed to make him the President and he became the first President of Pakistan using the threat.[1]

1.15 This constitution prescribed a federal parliamentary government with the President as its constitutional head. The National Assembly (federal legislature) would be composed of an equal number of members from the two units, East Pakistan and West Pakistan, on the basis of direct election by the people. The Prime Minister and the Cabinet would be responsible to the federal legislature. The constitution incorporated a number of fundamental rights which the legislatures and the executive were forbidden to transgress. The Supreme Court and the High Courts of the provinces were given the power of judicial review. The Supreme Court could be directly petitioned for enforcement of fundamental rights.

1.16 *Martial Law of 1958 and demise of the constitution:* Though the constitution came into operation in March, 1956, no election was held under it to compose the federal legislature with the representatives directly elected by the people. When it was decided that an election would be held in 1959, Iskander Mirza had little chance of being elected as the President by the newly elected federal legislature. He with Ayub Khan abrogated the constitution, dissolved the National and Provincial Assemblies and imposed Martial Law throughout the country by a Proclamation on 7 October 1958. Ayub Khan was appointed the Chief Martial Law Administrator. On 10 October 1958 Iskander Mirza issued the Laws (Continuance in Force) Order which provided that notwithstanding the abrogation of the constitution and subject to any order of the President or Regulation made by the Chief Martial Law Administrator, the country would be governed as nearly as may be in accordance with the abrogated constitution. On 13 October 1958 the now famous case of *State v. Dosso*[2] came up for hearing before the Supreme Court. The main question agitated there was whether the pending proceedings in the nature of *habeas corpus* or *certiorari* had

[1] Ibid, p.161
[2] 11 DLR (SC) 1

abated by reason of the provisions of the Laws (Continuance in Force) Order, 1958. The court on the very next day announced its decision that the proceedings abated, but in giving the reasons for the decision on 23 October 1958 Munir CJ went on to accord legal recognition to the Martial Law itself by describing it as a successful revolution and, therefore, a fresh law-creating organ, even though it does not appear from the judgment that any argument was advanced in this regard.[1] Relying on a theory of jurisprudence propounded by Hans Kelsen (not a principle of law), Munir CJ observed –

> It sometimes happens, however, that a Constitution and the national legal order under it is disrupted by an abrupt political change not within the contemplation of the Constitution ... any such change is called revolution, and its legal effect is not only the destruction of the existing Constitution but also the validity of the national legal order ... if the revolution is victorious in the sense that the persons assuming power ... can successfully require the inhabitants of the country to conform to the new regime, then the revolution itself becomes a law-creating fact because thereafter its own legality is judged not by reference to the annulled Constitution but by reference to its own success. ... Thus a victorious revolution or a successful *coup d'etat* is an internationally recognised legal method of changing a Constitution.[2]

And how effective was the revolution? The person who issued the Proclamation of Martial Law was deposed by Ayub Khan the next day.[3] Munir CJ who went out of the way to give legal recognition to the Martial Law attended a meeting presided over by Iskander Mirza one or two days after imposition of Martial Law[4] and modified the draft of the Laws (Continuance in Force) Order.[5] On the principle of *nemo debet esse judex in causa propria sua* he should not have adjudicated upon the validity and effectiveness of that Order.[6] Having regard to the role of

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[1] *Asma Jilani v. Punjab*, PLD 1972 SC 139, 161

[2] *State v. Dosso*, 11 DLR (SC) 1,5

[3] *Asma Jilani v. Punjab*, PLD 1972 SC 139, 161, 219

[4] M. Asghar Khan - Generals in Politics, p.7

[5] *Asma Jilani v. Punjab*, PLD 1972 SC 139, 178

[6] In *Asma Jilani*, ibid, the Pakistan Supreme Court overruled *Dosso*, but rejected the plea of bias stating, "Mere association with the drafting of a law does not necessarily disqualify a judge from interpreting that law in the light of the arguments advanced before him." The observation is debatable as a person modifying or correcting a draft of a document is likely to have an inclination to hold the document, particularly of the kind involved in the case, valid.

Munir CJ in *Tamizuddin Khan* and *Dosso*, M. Anwar, a senior Advocate of the Supreme Court of Pakistan, gave an interview implicating Munir CJ in the drama of the constitutional breakdown in Pakistan.[1]

1.17 *Constitution of 1962, its demise and birth of Bangladesh:* Ayub Khan set up a Constitution Commission to make recommendations for the future constitution of the country. Even though no election was held under the constitution of 1956 to give the parliamentary form of government prescribed by that constitution a fair trial, the Commission was asked to find out the causes of failure of parliamentary form of government. The Commission recommended a presidential form of government, stating one of the causes of the failure of parliamentary form of government to be undue interference by the Head of the State with the ministries and political parties, and by the central government with the functioning of the government in the provinces. Ayub Khan then managed to secure a so-called mandate by some sort of a referendum to frame a constitution.[2] The constitution framed by him came into operation on 7 June 1962. This constitution of 1962 introduced a system which was euphemistically called a presidential form of government even though the normal checks and balances of such a form of government to prevent one-man rule were not incorporated in the constitution. It, in fact, prescribed an authoritarian rule by one who occupied the position of the President. The President and the members of the National and Provincial Assemblies were to be elected by the members of the Electoral College who were to be elected

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[1] His interview published in weekly "Kahani" runs thus: "There is documentary proof of the fact that Mr. Mohammad Munir was present in Karachi several days before the (imposition of Martial Law) to advise (those that imposed it). And after the imposition of Martial Law he did something, the far-reaching consequences of which ultimately have pushed us in the lap of disaster. He gave this good news to the nation that if a usurper forcibly captures power, then that usurper becomes a legitimate source of law. This was such a dangerous decision that it paved the way for new adventurers." See the case of *Inayat Khan v. M. Anwar*, PLD 1976 SC 354, 361. The Supreme Court found that the language employed was extremely harsh and derogatory and far exceeded the limit of fair comment and it constituted scandalisation of the Court. But in view of the mitigating circumstances, namely, that the decision in *Tamizuddin Khan* and *Dosso* caused misgivings in public mind, and had been criticised at least in private and that *Dosso* was reversed, the court considered that the ends of justice would be met if the respondents were severely reprimanded. See Dieter Conrad's article, *In Defence of the Continuity of Law: Pakistan's Courts in Crises of State, published in Orient, 1983, p.134, 145 (a German Journal for Politics and Economics of the Middle East).*

[2] *Asma Jilani v. Punjab*, PLD 1972 SC 139, 161

by the people. The members of the National and Provincial Assemblies were thus not responsible to the people. People electing the members of the Electoral College had no way of ensuring that their wishes would be reflected in the election of the President and the members of the National and Provincial Assemblies. It was easy to win over the members of the Electoral College contrary to the wishes of the people. The National Assembly had no control over the President who was the repository of all executive powers of the Republic and had also the power of legislation in case of urgent need of which he was the sole judge. To all intents and purposes, it was a one-man show. 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 got himself re-elected as the President. The general impression in the country was that the election was rigged.[1] In 1966 Sk. Mujibur Rahman started a movement in East Pakistan with his 6-Point programme[2] which reflected the

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[1] Ibid, p.220

[2] The Six Points

1. The character of the government shall be federal and parliamentary, in which the election to the Federal legislature and to the legislatures of the federating units shall be direct and on the basis of universal adult franchise. The representation in the Federal legislature shall be on the basis of population.

2. The Federal government shall be responsible only for defence, foreign affairs and currency, subject to the conditions provided in (3) below.

3.(i) Two separate but freely convertible currencies for the two wings may be introduced, or

(ii) One currency for the whole country may be maintained. In this case effective constitutional provisions are to be made to stop flight of capital from East to West Pakistan. Separate Banking Reserve
is to be made and separate fiscal and monetary policy to be adopted for East Pakistan.

4. The power of taxation and revenue collection shall vest in the federating units and the Federal Centre will have no such power. The Federation will have a share in the state taxes for meeting their required expenditures. The Consolidated Federal Fund shall come out of a levy of certain percentage of all state taxes.

5.(i) There shall be two separate accounts for foreign exchange earnings of the two wings.

(ii) Earnings of East Pakistan shall be under the control of East Pakistan Government and that of West Pakistan under the control of West Pakistan Government.

(iii) Foreign exchange requirements of the Federal Government shall be met by the two wings either equally or in a ratio to be fixed.

(iv) Indigenous products shall move free of duty between the two wings.

(v) The Constitution shall empower the unit Governments to establish trade

genuine grievances of the people of East Pakistan. Towards the end of 1968, an agitation was started all over Pakistan by the main political parties against the despotic rule of Ayub Khan and the undemocratic constitution imposed by him. The agitation gathered momentum day by day and was accompanied by wide-spread disturbances throughout the country. The Agartala Conspiracy case started against Sk. Mujibur Rahman and others aborted because of massive movement in East Pakistan. 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 decided to relinquish the office of the President and 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, in disregard of his constitutional and legal duty, 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 elections were held in December, 1970 to the National and Provincial Assemblies on the basis of adult franchise. After a good deal of political manoeuvring, a session of the National Assembly was summoned by Yahya Khan on 3 March 1971 at Dhaka. But the Peoples Party led by Z.A. Bhutto which emerged with majority seats in West Pakistan refused to attend the session at Dhaka and Yahya Khan postponed the session indefinitely. The Awami League led by Sk. Mujibur Rahman which won almost all the seats in East Pakistan and held a clear majority in the National Assembly 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 talks with the important political leaders in Dhaka which subsequent events clearly indicated was a ruse. The ruling junta really intended to take serious military action in East Pakistan to suppress all dissidents for all times. 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. The people of

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and commercial relations with, set up trade missions in and enter into agreements with, foreign countries.

6. The setting up of a militia or a paramilitary force for East Pakistan.

East Pakistan took this as an act of betrayal. Sk. Mujibur Rahman "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".[1] Thousands took up arms to fight against the Pakistani Armed Forces to liberate the country, Bangladesh. The members of the National and Provincial Assemblies elected in the 1970 election from East Pakistan proclaimed independence of Bangladesh on 10 April 1971 and formed the Government of Bangladesh with Sk. Mujibur Rahman, then in custody in Pakistan, as the President and Syed Nazrul Islam as the Acting President till the release of Sk. Mujibur Rahman.

1.18 *Independence of Bangladesh:* The war of liberation continued for about nine months, at the end of which war broke out between the Pakistan Armed Forces on the one side and the Indian Armed Forces and the Bangladesh Freedom Fighters on the other. On 16 December 1971 the Pakistan Armed Forces surrendered and Bangladesh became fully liberated.

1.19 *Constitution of Bangladesh, 1972:* Sk. Mujibur Rahman was released by the Government of Pakistan in January, 1972 and he returned to Dhaka on 10 January 1972. The next day he, in his capacity as the President of Bangladesh, issued the Provisional Constitution of Bangladesh Order, 1972[2] providing for a parliamentary form of government in the interim period[3] and constituting the Constituent Assembly with the members of National Assembly and East Pakistan Provincial Assembly who were elected by the people of East Pakistan in December 1970 for giving the country a democratic constitution. The Constituent Assembly adopted a constitution[4] which came into operation on 16 December 1972, exactly one year after the liberation of Bangladesh. The fact that the Constitution was thereafter turned into a document permitting autocratic rule is a different matter. The Constitution originally adopted was truly a democratic constitution.

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[1] The Proclamation of Independence, 6th Para, Appendix A; Preamble of the Constitution of Bangladesh.

[2] Appendix C

[3] In *Fazlul Hoque v. State*, 26 DLR (AD) 11, establishment of the parliamentary form of government was challenged as being contrary to the Proclamation of Independence, but the Appellate Division turned down the challenge stating that the Proclamation of Independence invested the President with the "Legislative powers of the Republic" which empowered him "to make any law or legal provision, even of a constitutional nature".

[4] Appendix D

FEATURES OF THE CONSTITUTION OF 1972

1.19A *Origin and character:* The Constitution of Bangladesh is not the outcome of a negotiated settlement with a former colonial power, nor drawn up with the concurrence or approval of any external sovereign power. It is the fruit of a historic war of independence making it a class apart from other constitutions of comparable description.[1] In the Constitution the people feature as the dominant actors and it is a manifestation of what is called 'the people's power'.[2]

1.20 *Sovereign Republic:* The Constitution established Bangladesh as a sovereign unitary Republic.[3] It created one government composed of representatives chosen by the people in contrast to the rule of one man, as in kingship, or one class of men, as in aristocracy. The term 'sovereign' indicates that Bangladesh is subject to no external authority and the term 'Republic' denotes that the Head of the State is not a monarch, but an elected functionary. The Constitution declares that the sovereignty lies with the people and the Constitution is the embodiment and solemn expression of the will of the people.[4]

1.21 *Preamble and Fundamental Principles of State Policy:* Having regard to the constitutional misadventures of the past and usurpation of power by unauthorised persons, the framers of the Constitution thought it necessary to spell out the objectives of the Constitution in the preamble in some detail. Declaring the people to be the source of power and the Constitution, the preamble referred to the national liberation struggle and pledged that the high ideals of nationalism, socialism, democracy and secularism shall be the fundamental principles of the Constitution. The Constitution sought to establish a welfare State and the preamble declared the fundamental aim of the State to be the realisation through democratic process of a socialist society, free from exploitation - a society in which the rule of law, fundamental human rights and freedom, equality and justice would be ensured. The concept of a welfare State was further strengthened by the fundamental principles of State policy which set out the economic, social and political goals of the Constitution and those principles were declared to be fundamental to the governance of Bangladesh and a guide to the

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[1] *Dr. Mohiuddin Farooque v. Bangladesh*, 49 DLR (AD) 1, Para 41

[2] Ibid

[3] Art.1

[4] Preamble and art.7

interpretation of the Constitution and the laws of Bangladesh.[1]

1.22 *Territory:* The Constitution defined the territory of the Republic to be the territories which immediately before the proclamation of independence constituted the territory of East Pakistan and such other territories as may become included in the Republic.[2] When Bangladesh entered into an agreement with India giving up its claim to Berubari and retaining Dahagram, the Appellate Division held that the agreement involved cession of territory which could not be done except by constitutional amendment.[3] As a result, the Constitution (Third Amendment) Act, 1974 was passed to give effect to the agreement.

1.23 *Supremacy of the Constitution:* The Constitution declared the supremacy of the Constitution and sought to establish a limited government in the sense that every authority in the Republic had power prescribed and limited by the Constitution.[4]

1.24 *Separation of powers:* The Constitution provided for separation of powers between the three organs of the State - executive, legislature and judiciary. It was not a separation of powers of the type practised in the American jurisdiction. What the Constitution did can be said to be an assignment or distribution of different powers of the Republic to the three organs and it provided for separation of powers in the sense that no one organ could transgress the limits set by the Constitution.

1.25 *Fundamental rights:* The Constitution enumerated a number of rights as fundamental rights and no law could be made which was inconsistent with these rights and no action could be taken by the government in derogation of such rights. To that extent, the power of Parliament and the executive was limited. However, certain laws were set apart which could not be challenged on the ground of violation of fundamental rights.[5]

1.26 *Parliamentary form of government:* The Constitution introduced a parliamentary form of government with the President of the Republic as the constitutional head elected by the members of Parliament. The members of Parliament were to be directly elected by the people on the basis of adult franchise. The President would appoint a member of

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[1] Art.8(2)
[2] Art.2
[3] *Kazi Mukhlesur Rahman v. Bangladesh*, 26 DLR (AD) 44
[4] Art.7
[5] Arts.45 - 47A

Parliament who commanded the support of the majority of the members of Parliament as the Prime Minister and would appoint ministers on the recommendation of the Prime Minister. The executive authority of the Republic vested in the Prime Minister who, and also the Cabinet, were responsible to Parliament and through Parliament to the ultimate sovereign, the people. The Prime Minister and the Cabinet could continue so long as they commanded the support of the majority of the members of Parliament. In order to bring in stability of the government, the Constitution made provision prohibiting floor crossing by the members of Parliament.[1]

1.27 *Local government:* The Constitution stipulated that the State shall encourage local government institutions composed of the representatives of the area concerned and that the Republic shall be a democracy in which effective participation by the people through their elected representatives in administration at all levels shall be ensured. In furtherance of these fundamental principles of State policy, the Constitution provided that local government in every administrative unit of the Republic shall be entrusted to bodies composed of persons elected in accordance with law and the power of imposing tax for local purposes shall be conferred on the local government bodies.[2]

1.28 *Judicial review:* The guardianship of the Constitution was given to the Supreme Court. The Supreme Court was given the power of judicial review. Save in some specified situations, the Supreme Court, in exercise of that power, could not only review the State actions to ensure that it did not contravene any provision of the Constitution or the laws of the land, but also could strike down any law for inconsistency with any provision of the Constitution including the provisions guaranteeing fundamental rights.[3]

1.28A *Independence of judiciary:* For guardianship of the Constitution and for the establishment of rule of law independence of judiciary is necessary. Provisions were made to ensure the independence of the Judges of the Supreme Court, subordinate judicial officers and the magistrates exercising judicial functions.[4]

1.29 *Election:* To ensure free and fair election which is an

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[1] Part IV & V
[2] Arts.59 & 60
[3] Art.102; see *Fazlul Quader Chowdhury v. Shah Nawaz*, 18 DLR (SC) 62, 65
[4] See Part VI

indispensable pre-requisite for the success of democracy, the Constitution provided for an independent Election Commission upon which the duty of holding election of the President and the members of Parliament was cast.[1]

1.30 *Civil Service:* The civil service maintains the continuity of the government and the success of the government to a great extent depends on the efficiency of the civil service. So to ensure recruitment of efficient persons in the services of the Republic, the Constitution provided for public service commissions. To obtain the best service it is necessary to have secure and satisfied civil servants and the Constitution guaranteed equality of treatment and security of tenure to them.[2]

1.31 *Amendment of the Constitution:* Parliament was given the power to amend the Constitution. Art.142 provided for a special procedure for such amendment and prescribed that no Bill for amendment should be presented to the President unless it was passed by the votes of not less than two-thirds of the total number of members of Parliament.

CHANGES IN THE CONSTITUTION

1.32 *First Amendment:* In 1973 the Constitution (First Amendment) Act was passed, inserting sub-art.(3) in art.47 whereby any law providing for the detention and trial of war criminals was kept out of the purview of the provisions of Part III relating to fundamental rights.

1.33 *Second Amendment:* The Constitution did not provide for proclamation of emergency and suspension of fundamental rights during emergency and in view of the provisions of art.33 preventive detention was not possible. It was felt that the Constitution should be amended to provide for these. Accordingly, by the Constitution (Second Amendment) Act of 1973 art.33 was amended providing for preventive detention and Part IXA was inserted conferring power on Parliament and the executive to deal with emergency situations and providing for suspension of enforcement of the fundamental rights during the period of emergency.

1.34 *Third Amendment:* As stated earlier, the Constitution (Third Amendment) Act, 1974 was passed to give effect to the agreement with India giving up the claim in respect of Berubari and retaining Dahagram

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[1] Part VII
[2] Part IX

and Angorpota.

1.35 *Fourth Amendment:* In January, 1975 the Constitution (Fourth Amendment) Act, 1975 was passed transforming the Constitution beyond any resemblance with the original.[1] Part VIA was incorporated prescribing that there would be only one political party in the State, thereby rendering a severe blow to the democratic set up of the Constitution. Art.102(1) which conferred power on the High Court Division to enforce the fundamental rights was repealed and by an amendment of art.44 Parliament was empowered to establish by law a constitutional court, tribunal or commission for enforcement of the fundamental rights. The parliamentary form of government was replaced by a form of government which was an apology of a presidential form as the normal checks and balances of a presidential form of government were not incorporated. A provision was made for a Vice-President who was to be appointed by the President. The President became the repository of the executive power of the Republic which he would exercise with the assistance of ministers selected by him. The President was empowered to appoint the Prime Minister and other ministers from among the members of Parliament or persons qualified to be elected as members of Parliament. The President would preside over the meetings of the Council of Ministers, and the Prime Minister and all other ministers would hold office during the pleasure of the President. The Ministers had the right to speak and take part in the proceedings of Parliament, but they were not entitled to vote unless they were members of Parliament. The Judges of the Supreme Court were made removable by the President on the ground of misbehaviour or incapacity. The provision for consultation with the Chief Justice in respect of the appointment of puisne Judges of the Supreme Court was repealed. The control in respect of subordinate courts and judges was taken away from the Supreme Court and vested in the President. The system introduced was a mishmash of parliamentary and presidential forms of government and the upshot was that the President emerged as the all-powerful authority in the Republic.

1.36 *First Martial Law:* The government of Sk. Mujibur Rahman

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[1] In *Hamidul Huq Chowdhury v. Bangladesh*, 34 DLR 381, the High Court Division observed that by the Fourth Amendment the basic and essential features of the Constitution were altered and destroyed, but did not declare the amendment to be invalid because of the lapse of time and change of political system in consequence of the change of government.

was toppled by an army *coup d'etat* on 15 August 1975. Khandoker Mushtaque Ahmed assumed the office of the President and imposed Martial Law in the country. On 20 August 1975 he issued a Proclamation providing that the Constitution would, subject to the Proclamation and Martial Law Regulations and Orders made by him, continue to remain in force, but no court including the Supreme Court or any tribunal or authority would have any power to call in question or declare void the Proclamation or any Martial Law Regulation or Order made by him. On 6 November 1975 by the Proclamation (Second Amendment) Order, 1975 Khandoker Mushtaque Ahmed assumed power to hand over the office of the President to any person and he handed over the office of the President to A.M. Sayem CJ. Justice Sayem issued the Proclamation of 8 November 1975 in his capacity as the President and Chief Martial Law Administrator modifying the Proclamation of 20 August 1975. Part VIA, which provided for the one-party system, was omitted from the Constitution and it was stated, "Parliament shall stand dissolved ... and general election of Members of Parliament shall be held before the end of February, 1977." Thereafter by successive Proclamation Orders amendments were made in the Constitution. By the Second Proclamation (Seventh Amendment) Order, 1976 the President and Chief Martial Law Administrator amended art.44, inserted a new art.64A and substituted Part VI of the Constitution, bifurcating the Supreme Court into Supreme Court and High Court, replacing the term 'Supreme Court' by the term 'High Court' in art.44 and creating the office of Advocate General. This amendment restored the power of the High Court Division (then called 'High court') to enforce the fundamental rights. By Third Proclamation of 29 November 1976 the President appointed Ziaur Rahman as the Chief Martial Law Administrator. In 1977 Ziaur Rahman became the President and in his capacity as the President and Chief Martial Law Administrator he issued the Proclamation Order No.1 of 1977 adding the expression 'Bismillah-Ar-Rahman-Ar-Rahim' before the preamble of the Constitution and amending the preamble replacing the expression 'historic struggle for national liberation' by the expression 'a historic war for national independence' and the expression 'nationalism, socialism, democracy and secularism' by the expression 'absolute trust and faith in the Almighty Allah, nationalism, democracy and socialism meaning economic and social justice'. By the Second Proclamation (Tenth Amendment) Order, 1977, the bifurcation of the Supreme Court was undone and the original position was restored. The Constitution gave the President the power to dissolve Parliament at any time. If

Parliament refused to pass the budget as demanded by the President, the President could exercise his power of dissolution, but there was a snag in it. If Parliament refused to accede to the demand of the President, dissolution of Parliament would land him in difficulty because without a budget having been passed he could not run the government as no money could be withdrawn from the Consolidated Fund except under an appropriation made by an Act of Parliament. Hence Ziaur Rahman further amended the Constitution by inserting a new art.92A which authorised the President, in the event of failure of Parliament to pass the Appropriation Act, to withdraw money from the Consolidated Fund for a period of 120 days and that time was sufficient to have a new Parliament elected. This power enabled the President to have any monetary demand met by Parliament under threat of dissolution. The Fourth Amendment already gave huge power to the President and this amendment removed the only difficulty relating to the budget, giving the President a handle to render Parliament subservient.

1.37 *Fifth Amendment:* The above amendments of the Constitution, not made by Parliament, were *per se* invalid and would be inoperative once the Constitution was fully restored. So, when a new Parliament was elected in the election held under the Martial Law, Ziaur Rahman got Parliament to pass the Constitution (Fifth Amendment) Act, ratifying all the Proclamations and Proclamation Orders and the amendments, modifications and omissions made in the Constitution by such Proclamations and Proclamation Orders and all actions of the Martial Law authorities and declaring those to have been validly made and done.[1] It may be noted that the Constitution (Fifth Amendment) Act was passed when the Constitution was not fully restored.

1.38 *Sixth Amendment:* On the death of Ziaur Rahman, Justice Abdus Sattar, the then Vice-President, became the Acting President. In the election of the President in 1981 he was a candidate and the question arose whether he could contest in the election without resigning from the office of the Vice President. To remove any doubt the Constitution (Sixth Amendment) Act, 1981 was passed providing, among others, that if a Vice-President is elected as President, he shall be deemed to have vacated his office on the date on which he enters upon the office of the President.

1.39 *Another Martial Law:* After the Presidential election in 1981, the political situation continued to deteriorate and Hussain Muhammad

[1] For a discussion on the validity of such amendment, see Para 4.69

Ershad, the Chief of the Army, proclaimed Martial Law on 24 March 1982, assumed all powers of the government as the Chief Martial Law Administrator and suspended the Constitution with immediate effect. The Proclamation mentioned the state of turmoil in which the country was placed and the necessity of imposing Martial Law. On 11 April 1982 he issued the Proclamation (First Amendment) Order, 1982 laying down rules as to how Bangladesh would be governed. In the Proclamation Order it was provided that a Chief Justice shall retire on reaching the age of sixty two or completing three years as Chief Justice, whichever was earlier. This provision was directed against the sitting Chief Justice who completed more than three years as Chief Justice and it was repealed when the turn of the next Chief Justice to retire came on completion of three years as Chief Justice[1] and he continued as the Chief Justice beyond three years.

1.40 On 8 May 1982 the Proclamation (Second Amendment) Order of 1982 was issued inserting paragraph 4A in the Schedule of the Proclamation of 24 March 1982 providing that the Chief Martial Law Administrator might establish permanent Benches of the High Court Division at such places as may be fixed by him. Pursuant to this permanent Benches of the High Court Division were set up at four places in the beginning and the number was ultimately increased to seven. In June, 1986 the Proclamation (Third Amendment) Order, 1986 was passed whereby the permanent Benches of the High Court Division outside the capital were renamed as Circuit Benches. After withdrawal of Martial Law in November, 1986 the Circuit Benches were, by notification, renamed as Sessions of the High Court Division.

1.41 *Seventh Amendment:* On the withdrawal of Martial Law on 10 November 1986 Ershad got Parliament to pass the Constitution (Seventh Amendment) Act, 1986 following the pattern adopted in the Constitution (Fifth Amendment) Act, 1979. By the same amending Act, the retiring age of the Judges of the Supreme Court was fixed at 65 in place of 62.

1.42 *Eighth Amendment:* The lawyers started a movement against the setting up of permanent Benches of the High Court Division outside the capital by the Martial Law authorities and the movement continued even after the withdrawal of Martial Law. The process of setting up permanent Benches of the High Court Division was contended to be

[1] Proclamation Order No.IV of 1985

unconstitutional and in this situation the Constitution (Eighth Amendment) Act, 1988 was passed amending art.100 of the Constitution and thereby setting up six permanent Benches of the High Court Division outside the capital and authorising the President to fix by notification the territorial jurisdiction of the permanent Benches. By the same amending Act, Islam was made the State religion of Bangladesh.[1]

1.43 *Ninth Amendment:* The Constitution (Fourth Amendment) Act, 1975 made provision for a Vice-President to be appointed by the President. In the absence of the President, the Vice-President would act as the President. The Constitution (Ninth Amendment) Act, 1989 was passed providing for election of the Vice-President and making amendments in respect of the terms of office of the President and Vice-President. Before this amendment was made, political movement was going on for formation of a care-taker government for holding free and fair election. The opposition gave a formula for the appointment of a neutral person as the Vice-President and resignation of the President so that the newly appointed Vice-President could act as the President and hold the election. To put a spanner in the operation of the formula, the Ninth Amendment inserted a new art.55A whereby appointment of a new Vice-President, to be effective, would require the confirmation by the majority of the total number of members of Parliament.

1.44 *Tenth Amendment:* Art.65(3) originally provided for reservation of fifteen seats for women for ten years who would be elected by the members of Parliament. By the Second Proclamation Order No. IV of 1978 the number of the reserved seats was increased to thirty and the period was increased to fifteen years. By the Constitution (Tenth Amendment) Act, 1990 the period was extended for another ten years from the date of the first meeting of the next Parliament.[2]

1.45 The movement against the Ershad regime was going on and the movement intensified in 1990. In October that year the movement took a serious turn and the three alliances formed by the political parties demanded transfer of power to a caretaker government headed by a neutral person. The three alliances reached a consensus and made a public declaration setting forth the mode and manner of the transfer of power.

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[1] The amendment so far as it related to the creation of permanent Benches of the High Court Division was found to be *ultra vires* the Constitution by the Appellate Division in *Anwar Hossain Chowdhury v. Bangladesh*, 1989 BLD (Spl) 1 = 41 DLR (AD) 165

[2] This period expired on 14 July 2001

1.46 *Eleventh and Twelfth Amendments:* Ershad had to yield to the demand of the three alliances and he handed over power to Shahabuddin Ahmed CJ after appointing him as the Vice-President. Justice Shahabuddin Ahmed formed the caretaker government in line with the Joint Declaration of the three alliances and held the election of the members of Parliament. The new Parliament passed the Constitution (Eleventh Amendment) Act, 1991 ratifying all actions taken by the caretaker government and the appointment of Justice Shahabuddin Ahmed as the Vice-President. Parliament also passed the Constitution (Twelfth Amendment) Act, 1991 restoring the parliamentary form of government substantially as provided in the original Constitution. Pursuant to the last amendment of the Constitution, the election of the President was held and the new government was formed.

1.46A *Thirteenth Amendment:* Under the original dispensation, when Parliament was dissolved or stood dissolved the Prime Minister and other Ministers would hold office till the general parliamentary election was held. There were allegations of massive rigging in a by-election resulting in movement for non-party care-taker government for the period between dissolution of Parliament and holding of the general parliamentary election. The sixth Parliament passed the Thirteenth Amendment providing for such non-party care-taker government consisting of one Chief Adviser and not more than ten Advisers to run the affairs of the government during that period in order to ensure free and fair general election.[1]

INTERPRETATION OF CONSTITUTION

1.47 *Necessity of interpretation:* Language is an imperfect vehicle of communication and there arises the necessity and problem of interpretation. Even the plainest word or phrase may have more than one meaning. Professor H.L.A. Hart spoke of general words which, according to him, have a core meaning or 'standard instance' in which no doubts are felt about its application.[2] L. Fuller took up the simple word 'sleep' and presented the following situation to demonstrate the fallacy in Hart's contention -

> Let us suppose that in leafing through the statutes, we come upon the

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[1] See Para 3.55 - 3.59

[2] Positivism and the Separation of Law and Morals, 71 Harv. Law Review, 593, 607

> following enactment: "It shall be a misdemeanour, punishable by fine of five dollars, to sleep in any railway station." ... Suppose I am a judge, and that two men are brought before me for violating this statute. The first is a passenger who was waiting at 3 A.M. for a delayed train. When he was arrested he was sitting upright in an orderly fashion, but was heard by the arresting officer to be gently snoring. The second is a man who had brought a blanket and pillow to the station and had obviously settled himself down for the night. He was arrested, however, before he had a chance to go to sleep. Which of the cases presents the 'standard instance' of the word 'sleep'.[1]

The problem becomes acute when it comes to constitutional interpretation. In the words of White J of the US Supreme Court, a constitution "is not a deed setting forth the precise metes and bounds of its subject matter, rather, it is a document announcing fundamental principles in value-laden terms that leave ample scope for the exercise of normative judgment by those charged with interpreting and applying it."[2] Furthermore, the language of a constitution being general, the expressions used are capable of harbouring divergent conclusions.[3]

1.48 ***The proper approach to interpretation:*** The rules for interpretation of all written documents are the same in the sense that the object is the ascertainment of the intention sought to be expressed in words. Hence it is generally said that the principles relating to interpretation of statutes are applicable in interpreting the provisions of a constitution.[4] The question is how far the literal interpretation approach of statutory construction is applicable to the interpretation of a constitution. Even in statutory interpretation, the literal approach does not hold the complete sway. Geoffrey Marshall[5] observed that the traditional English principles and maxims of interpretation have wavered

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[1] Positivism and Fidelity to Law - A Reply to Professor Hart, 71 Harv. Law Review, 630, 664

[2] Opinion in *Thornberg v. American College of Obstetricians*, 476 US 747, 789

[3] Tribe and Dorf – On Reading of the Constitution, p.15 (It is therefore not surprising that readers on both the right and left of the American political center have invoked the Constitution as authority for strikingly divergent conclusions about the legitimacy of existing institutions and practices.)

[4] *Reference by President*, 9 DLR (SC) 178; *Commissioner of I.T. v. Gulistan Cinema*, 28 DLR (AD) 14; *Osman Gani v. Moinuddin*, 27 DLR (AD) 61; *British Coal Corp. v. R*, (1935) AC 500; *Gopalan v. Madras*, AIR 1950 SC 27; *Wali Ahmed v. Mahfuzul Huq*, 8 DLR 429

[5] Constitutional Theory, 1971, p.74

between two positions - one being that the words in which legislators have couched their instructions merely provide evidence (possibly the best) of their aims or intentions[1] and the other being that the actual aims and intentions of legislative persons merely provide evidence of the meaning of the legislators' words (and thereby) of the instruments which emerge from their deliberations.[2] Before we consider the extent of application of the principles of statutory interpretation in respect of a constitution, it is necessary to understand the nature of a constitution as a written instrument.

1.49 A constitution is different from statutes in nature and character. It is an organic instrument; it grows with the passage of time. It is general in its statements, while a statute is generally specific. Unlike a statute liable to revisions to meet different situations, a constitution is intended to be permanent and to cover all situations of the unfolding future regarding the political organisation of a nation. Above all it is a document under which laws are made and from which laws derive their validity.

1.50 From the beginning, the American Supreme Court felt that a constitution must be given a treatment different from statutes and proceeded on liberal interpretation. In *McCulloch v. Maryland*[3] it observed, "We must never forget that it is a constitution we are

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[1] *A.G. v. Lockwood*, (1842) 9 M & W 378, 398 (The rule of law I take it upon the construction of all statutes is, whether they be penal or remedial, to construe them according to the plain literal and grammatical meaning of the words in which they are expressed unless that construction leads to a plain and clear contradiction of the apparent purpose of the Act or to some palpable and evident absurdity.)

[2] *Luke v. I.R.C.*, [1963] AC 557, 577 (It is only where the words are absolutely incapable of construction which will accord with the apparent intention of the provision and will avoid a wholly unreasonable result, that the words of the enactment must prevail.)

[3] 17 US 316; *U.S. v. Classic*, 313 US 299, 316 (In determining whether a provision of the Constitution applies to the new subject-matter, it is of little significance that it is one with which the framers were not familiar. For in setting up an enduring framework of government they undertook to carry out for the indefinite future and in all the vicissitudes of the changing affairs of men, those fundamental purposes which the instrument itself discloses. Hence we read its words, not as we read legislative codes which are subject to continuous revision with the changing course of events, but as the revelation of the great purposes which were intended to be achieved by the Constitution as a continuing instrument of the government. If we remember that 'it is a Constitution we are expounding', we cannot rightly prefer, of the possible meanings of the words, that which will defeat rather than effectuate the constitutional purpose.)

expounding" and went on to say that a constitution is intended to endure for ages to come and consequently to be adapted to the various crises of human affairs. In the words of Roscoe Pound -

> The Constitution is not a glorified police manual. Constitutional provisions lay down great principles to be applied as starting points for legal and political reasoning in the progress of society. A constitution may lay down hard and fast rules such as, for example, those fixing the exact terms of office and apportioning duties among public functionaries. But the principles established by the constitution are not to be interpreted and applied strictly according to the literal meaning of words used by the framers as if they laid down rules. Interpretation of constitutional principles is a matter of reasoned application of rational precepts to conditions of time and place.[1]

1.51 In the colonial era the Privy Council followed the literal interpretation rule in the interpretation of constitutional enactment.[2] In interpreting the Constitutional Acts of Canada and Australia, the Privy Council, however, noted the difference between a statute and a constitutional enactment and observed in respect of the Constitutional Act of Canada -

> But there are statutes and statutes; and the strict construction deemed proper in the case, for example, of a penal or taxing statute or one passed to regulate the affairs of an English Parish, would often be subversive of Parliament's real intent if applied to an Act passed to ensure the peace, order and good government of a British Colony.[3]

Subsequently, the Privy Council in *James v. Commonwealth of Australia*[4] quoted with approval the following observation of Higgins J of the Australian High Court -

> Although we are to interpret words of the Constitution on the same principles of interpretation as we apply to any ordinary law, these very

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[1] Law Finding Through Experience and Reason, 1960, p.63

[2] *R. v. Burah*, 4 Cal 172; *Emperor v. Benoari Lal*, AIR 1945 PC 48 (The question whether an Ordinance is intra vires or ultra vires does not depend on consideration of jurisprudence or policy. It depends simply on examining the language of the Government of India Act and of comparing the legislative authority conferred on the Governor-General with the provisions of the Ordinance by which he is purporting to exercise that authority.)

[3] *Edwards v. A.G. of Canada*, [1930] AC 124

[4] [1936] AC 578, 614

> principles of interpretation compel us to take into account the nature and scope of the Act that we are interpreting - to remember that it is a Constitution, a mechanism under which laws are to be made and not a mere Act which declares what the law is to be.[1]

1.52 After the colonial era gave way to the Commonwealth era, the attitude of the Privy Council changed. While giving independence to the former colonies, the British Parliament in agreement with the representatives of various shades of political opinion enacted constitutions for these colonies which are now called constitutions of the Westminster model.[2] These constitutions, adopted under the influence of the European Convention for the Protection of Human Rights and the United Nations Universal Declaration of Human Rights, 1946, provided for fundamental rights with entrenched provisions. In *Ministry of Home Affairs v. Fisher* the question arose whether for the purpose of citizenship and related rights the word 'child' in the Bermudan Constitution meant only legitimate child. Lord Wilberforce deliberated-

> ... the question must inevitably be asked whether the appellants' premise, fundamental to their arguments, that those provisions are to be construed in the manner and according to the rules which apply to the Acts of Parliament, is sound. In their Lordships' view there are two possible answers to this. The first would be to say that, recognising the status of the Constitution as, in effect, an Act of Parliament, there is room for interpreting it with less rigidity, and greater generosity, than other Acts, such as those which are concerned with property, or succession, or citizenship ... The second would be more radical: it would be to treat a constitutional instrument such as this as *sui generis*, calling for principles of interpretation of its own, suitable to its character as already described, without necessary acceptance of all the presumptions that are relevant to legislation of private law.[3]

The Privy Council adopted the second one and observed -

> This is in no way to say that there are no rules of law which should

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[1] *A.G. of New South Wales v. Brewery Employees Union*, 6 C.L.R. 469, 611.

[2] A discussion on the nature, character and pattern of such constitutions can be found in *Hinds v. The Queen,* [1976] 1 All E.R., 353, 359-60. It is to be noted that the Constitution of Bangladesh is similar in nature and pattern and the decisions of the Privy Council in respect of constitutions of the Westminster model have great persuasive value.

[3] [1979] 3 All E.R. 21, 26

> apply to the interpretation of a constitution. A constitution is a legal instrument giving rise, amongst other things, to individual rights capable of enforcement in a Court of law. *Respect must be paid to the language which has been used and to the traditions and usage which have given meaning to that language. It is quite consistent with this, and with the recognition that rules of interpretation may apply, to take as a point of departure for the process of interpretation a recognition of the character and origin of the instrument, and to be guided by the principle of giving full recognition and effect to those fundamental rights and freedoms with a statement of which the Constitution commences.*[1] (italics supplied)

One may say that the approach in *Fisher* is confined to the consideration and interpretation of fundamental rights. But this is not correct. The Privy Council clearly stated in a subsequent case that a constitution, and in particular, its provisions relating to fundamental rights should be given a generous and purposive construction.[2] In *Hinds v. The Queen*, another Westminster model constitution came up for consideration and though there was no express prohibition in the Constitution of Jamaica on Parliament in the matter of setting up courts, the Privy Council implied such limitation as was necessary to conform to the manifest intention emerging from the scheme of the constitution. Lord Diplock observed -

> To seek to apply to constitutional instruments the canons of construction applicable to ordinary legislation in the fields of substantive criminal or civil law would, in their Lordships' view, be misleading ...[3]

In respect of the grant of legislative power the following observation in *R. v. Burah* is cited to support the literal approach or to negative an implied prohibition on legislative power -

> If what has been done is legislation, within the general scope of the affirmative words which give the power and it violates no *express* condition or restriction by which that power is limited ... it is not for any Court of Justice to inquire further, or to enlarge constructively those

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[1] Ibid; see also *Ong Ah Chuan v. Public Prosecutor*, [1981] AC 648, 671 (Having regard to the scheme of the constitution, the Privy Council refused to give a literal construction to the expression 'in accordance with law'.)

[2] *A.G. for The Gambia v. Momodou*, [1984] AC 689, 700

[3] [1976] 1 All E.R. 353, 360.

> conditions and restrictions.[1] (italics supplied)

The word 'express' does not exclude necessary implications.[2] Immediately after speaking against constructively enlarging the express conditions and restrictions, the Privy Council found an implied prohibition observing -

> Their Lordships agree that the Governor-General in Council could not, by any form of enactment, create in India, and arm with general legislative authority a new legislative power, not created or authorised by the Councils Act.[3]

Though legislative power cannot be narrowed down by enlarging express conditions and restrictions, the nature of a constitution must be kept in view. Having regard to the federal nature of the Canadian Constitution, the Privy Council refused to give a literal meaning to the expression 'peace, order and good government' in s.91 of British North America Act, 1867 as there was hardly any subject enumerated in s.92 of the Act upon which the Parliament of Canada could not legislate to the exclusion of the provincial legislatures and a literal interpretation would destroy the autonomy of the provinces.[4]

1.53 Every constitution is founded on some social and political values and legal rules are incorporated to build a structure of political institutions aimed to realise and effectuate those values. Therefore, the legal rules incorporated in the body of a constitution cannot be interpreted in isolation from those social and political values and the purpose which emerge from the scheme of the constitution. That is why Lord Wilberforce in *Fisher* held that though the rules of statutory interpretation will generally be applicable, the court has to take as a point of departure for the process of interpretation a recognition of the character and origin of the constitution. Need for recognition of the character and origin arises for giving purposive interpretation of a constitution. The Appellate Division took into consideration the character and origin of the Constitution to determine the purpose of

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[1] 4 Cal 172, 180-181

[2] Seervai - Constitutional Law of India, 3rd ed., p.2669

[3] 4 Cal 172, p.181

[4] *A.G. for Ontario v. A.G. for Canada*, [1896] AC 348, 361; See also *Hinds v. The Queen*, [1976] 1 All E.R. 353, *Liyanage v. R*, [1967] AC 258, *Ong Ah Chuan v. Public Prosecutor*, [1981] AC 648; *Ali v. R*, [1992] 2 All E.R. 1, for implied limitations on legislative power.

judicial review under art.102 and from such determination arrived at the meaning of the expression 'person aggrieved' in art.102.[1] It is true that the meaning of express provisions of a constitution cannot be altered on consideration of the supposed spirit of the constitution or on notions of any political theory.[2] But when the spirit and purpose emerge clearly from the scheme or express provisions of the constitution, it will be contrary to the intention of the framers to give a construction which is not in accord with such spirit or purpose.[2] Thus if the scheme of the constitution assimilates the principle of separation of powers, a prohibition in making a law contrary to that principle has to be implied.[3] The court cannot rightly prefer, of the possible meanings of the words, that which will defeat rather than effectuate the constitutional purpose.[4] The imperatives of a liberal and generous interpretation are much more in respect of the Bangladesh Constitution in view of the fact that the social and political objectives have been clearly stated in the preamble and the fundamental principles of State policy.[5] The Appellate Division in accepting the theory of basic structure of the Constitution in *Anwar Hossain Chowdhury v. Bangladesh*[6] interpreted the Constitution on the basis of its spirit and scheme without caging the interpretation within the confines of the written words. The said decision recognised some basic features of the Constitution like supremacy of the Constitution, independence of judiciary and rule of law[7], and unless there is any definite contra indication in the Constitution, the constitutional language must be interpreted in a way as will subserve those basic features of the Constitution. It has to be noted that the principles of statutory interpretation are "frequently statements not so much of hard-and-fast rules of law, as of a general judicial approach to the task of interpreting

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[1] *Dr. Mohiuddin Farooque v. Bangladesh*, 49 DLR (AD) 1, Para 40-48

[2] See the approach of the Appellate Division in *Dr. Mohiuddin Farooque v. Bangladesh*, 49 DLR (AD) 1

[3] *Ali v. R*, [1992] 2 All E.R. 1 (Though there was no specific prohibition in the Constitution, the Privy Council held invalid a law permitting the Director of Public Prosecutions, a member of the executive government, to select the mandatory death penalty simply by choosing the forum as it breached the principle of separation of powers)

[4] *U.S. v. Classic*, 313 US 299, 316; *Aftabuddin v. Bangladesh*, 48 DLR 1, 13 (An interpretation repugnant to the intent and object of the Constitution cannot be adopted in preference to the one which conforms to it.)

[5] See Para 1.70 & 1.95

[6] 1989 BLD (Spl) 1

[7] Ibid, Para 377 and 443

statutes in particular contexts."[1] The Constitution, however, has provided a binding rule of law in stating that the fundamental principles of State policy shall be a guide to the interpretation of the Constitution and the laws of Bangladesh.[2] The court is, therefore, required to take note of the scheme and objectives of the Constitution as evinced by those principles of State policy and cannot construe any provision contrary to such principles of State policy unless the language of a provision is so clear as to convince the court that in that particular instance the framers wanted to make a departure.

1.54 *Express and implied meaning:* It is sometimes stated that in interpreting a written constitution no implication can be made.[3] Such a statement does not take into account the meaning of 'meaning'. Every expression of ideas has express and implied meanings and both meanings are real and important. In statutory construction courts do take cognisance of implications. There is no reason to exclude the consideration of implications in constitutional interpretation. "The implications from the provisions of a constitution are sometimes exceedingly important, and have large influence upon its construction."[4]

1.55 The language of a constitution being general in nature, it is imperative to take notice of the implications, particularly those which arise from the words used.[5] The maxim *expressio unius est exclusio alterius*, applied also in constitutional interpretation, is an instance of negative implication. The Constitution of Bangladesh nowhere says that the Supreme Court has power of judicial review of laws on the ground of inconsistency with any provision of the Constitution other than the provisions of Part III. But this power of judicial review is accepted as a

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[1] Sir Rupert Cross - Statutory Interpretation, 2nd ed., p.4. These principles are merely guides and often it will be found that two principles applicable to the same case guide one to opposite directions and if a court wants to apply both the principles, it will end with a blank sheet of paper.

[2] Art.8(2)

[3] *Kudrat-E-Elahi v. Bangladesh*, 44 DLR (AD) 319, 351 (It may be noted that shortly before this case the Appellate Division in *Mujibur Rahman v. Bangladesh*, 44 DLR (AD) 111, invoked the doctrine of implied powers.)

[4] Cooley - Constitutional Limitations, 1927, p.138

[5] 16 Am Juris 2d. Const. Law Para 107 (Since constitutions must of necessity be general rather than detailed and prolix, many of the essentials with which they treat are impliedly controlled or dealt with by them, and implication plays a very important part in constitutional construction.)

necessary implication from the scheme of the Constitution and art.7. In *Kudrat-E-Elahi* the court found limitation on the power of the government in respect of the formation of a local government body with nominated persons as a necessary implication from the provisions of art.59 read with arts.7, 9 and 11.[1] Even though art.117 is silent about the person manning the administrative tribunal, M.H. Rahman J, having regard to the scheme of the Constitution, implied that the person must have knowledge of law and skill in adjudication.[2] The decision in the famous case of *Marbury v. Madison*[3] was based on implications, so was the decision in *Anwar Hossain Chowdhury v. Bangladesh*[4]

1.56 ***Principles of statutory interpretation:*** With the caveat in respect of the special position of the Constitution of Bangladesh calling for principles of interpretation of its own, we shall briefly discuss the principles of statutory interpretation as are applicable in respect of interpretation of the Constitution.[5]

1.57 *Ascertainment of intention:* The function of the court in interpreting any provision of a constitution is to ascertain the intention of its makers.[6] This is the polestar of the principles of construction of a constitution and all other principles are only rules or guides to aid in the determination of that intention.[7] As the language primarily expresses the intention, effort should be made at the first instance to gather it from the words used[8] and upon consideration of the whole of the enactment.[9] A clause cannot be interpreted in isolation and must be construed as part of

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[1] 44 DLR (AD) 319; *Liyanage v. R*, [1967] AC 259, 286 (The Constitution of Ceylon did not expressly vest judicial power in the judiciary exclusively, but having regard to the scheme of the constitution and particularly the fact that judicial power had always been vested in the courts, the Privy Council held that the constitution had vested the judicial power in the judiciary exclusively.)

[2] *Mujibur Rahman v. Bangladesh*, 44 DLR (AD) 111, 122

[3] 2 L. Ed. 60

[4] 1989 BLD (Spl) 1

[5] For detailed discussion of the principles of statutory interpretation the readers are referred to the standard text books on the subject like Maxwell and Craies in the English jurisdiction and Sutherland and Crawford in the American jurisdiction.

[6] *Anwar Hossain Chowdhury v. Bangladesh*, 1989 BLD (Spl) 1

[7] 16 Am Juris 2d. Const. Law Para 92

[8] *Mujibur Rahman v. Bangladesh*, 44 DLR (AD) 111; *Mahboobuddin Ahmed v. Bangladesh*, 50 DLR 417, 423; *Aftabuddin v. Bangladesh*, 48 DLR 1

[9] *Anwar Hossain Chowdhury v. Bangladesh*, 1989 BLD (Spl) 1; *Reference by President*, 9 DLR (SC) 178

a unified whole. "The legal intendment is that each and every clause has been inserted for some useful purpose, and, when rightfully understood has some practical operation; each word, it has been said, must be presumed to have been carefully chosen and intentionally placed, as though it had been hammered into place."[1] Every word must be given effect to and no word as a general rule should be rendered meaningless or inoperative.[2] The court must lean in favour of a construction which will render every word operative rather than that which makes some words idle or nugatory.[3] When the same expression is used in several places, it has to be construed as meaning the same thing unless the context otherwise requires. In the same way if different words are used, they must be understood as conveying different meanings[4], unless the context otherwise requires[5]. For example, though in popular sense the expressions 'dismissal' and 'removal from service' have the same meaning, but different expressions having been used, the same meaning to both terms was not given.[6] In ascertaining the intention it is wrong to start with some *a priori* idea of that intention and then to try by interpretation to wedge into the words of the constitution.[7] If the language of the constitution is not only plain, but admits of only one meaning, the language declares the intention[8] even if the result is harsh.[9] In such a case the court is not at liberty to search for a meaning beyond the instrument.[10] But when a provision apparently within the competence of the legislature to make appears to be unduly harsh or absurd, the court is put to inquiry whether the framers of the constitution intended to confer such power on the legislature.[11] This is particularly so

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[1] 16 Am Juris 2d, Const. Law, Para 101

[2] *Anwar Hossain Chowdhury v. Bangladesh*, 1989 BLD (Spl) 1; *Begum Shamsunnahar v. Speaker*, 17 DLR (SC) 21

[3] *Reference by President*, 9 DLR (SC) 178

[4] *Quarry Owners Assocn v. Bihar*, AIR 2000 SC 2870

[5] *Kanhaiyalal v. Arun Dattatraya*, AIR 2000 SC 3681

[6] *Ghulam Sarwar v. Pakistan*, PLD 1962 SC 142, 199

[7] *Reference by President*, 9 DLR (SC) 178

[8] *Anwar Hossain Chowdhury v. Bangladesh*, 1989 BLD (Spl) 1; *Punjab v. Ajaib Singh*, AIR 1953 SC 10

[9] *Bazlur Rahman v. Shamsunnissa*, 11 MIA 604; *Halima Khatun v. Bangladesh*, 30 DLR (AD) 207

[10] *Lake City v. US*, 130 US 662

[11] Cooley - Constitutional Limitations, 1927, p.153 (We do not say, however, that if a clause should be found in a constitution which should appear at first blush to demand a construction leading to monstrous and absurd consequences, it might not be the duty of

when the concept of reasonable law is woven in the fabric of the constitution as in the case of the American and the Bangladesh Constitution. It will be seen that generally the court defers to the legislative judgment regarding the reasonableness of a law[1], but when a statute was found to be quite unreasonable and unnecessarily impinging on the accepted values of the society, the American Supreme Court declared such law void as not being permitted by the constitution.[2]

1.58 It is said that though the spirit of the constitution is to be respected no less than its letters, that spirit is to be gathered from its words, and neither practice nor extrinsic circumstances can control its clear language.[3] "When the fundamental law has not limited, either in terms or by necessary implication, the general powers conferred upon the legislature, we cannot declare a limitation upon the notion of having discovered something in the spirit of the Constitution which is not even mentioned in the instrument".[4] On this reasoning the Indian Supreme Court refused to import the concept of reasonableness of 'procedure established by law' in art.21. But having regard to the scheme and objective of the constitution, the court subsequently did so.[5] When the spirit and purpose of the constitution clearly emerge from the express words and an apparently clear language of a provision is found to be inconsistent with that spirit or purpose, it becomes doubtful if the framers of the constitution intended the meaning the language of the provision apparently bears. The court is then required to search for a meaning in conformity with the spirit or purpose of the constitution.

1.59 *The golden rule of interpretation:* The golden rule of interpretation is that words should be read in their ordinary, natural and grammatical meaning. But the rule cannot be applied when a word used is ambiguous or obscure. And even the plainest word may have different meanings. For example, the word 'residence' may mean the place where

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the court to question and cross-question such clause closely, with a view to discover in it, if possible, some other meaning more consistent with the general purposes and aims of these instruments.); *Rashid Ahmed v. State*, 21 DLR (SC) 297; *Ali Ekabbar Farazi v. Bangladesh*, 26 DLR 394 (reversed on a different ground)

[1] *Williamson v. Lee Optical Co.*, 348 US 483; *New Orleans v. Dukes*, 427 US 297

[2] *Moore v. East Cleveland*, 431 US 494

[3] *Sturges v. Crowninshield*, 4 L. Ed 529

[4] *People v. Fisher*, 24 Wnd. 215, 220 (quoted in Cooley's Constitutional Limitations, 1927, p.351; *Gopalan v. Madras*, AIR 1950 SC 27

[5] *Maneka Gandhi v. India*, AIR 1978 SC 597; *Special Court Bill*, 1978, AIR 1979 SC 478

a person has his abode for some period or his permanent home, whether or not he is residing there for the time being. Hence a word used cannot be construed in isolation and must be understood in the context in which it is used. It was thought that it would be wrong for a court to look beyond the words with which it was immediately concerned if their meaning was clear when they were considered in isolation. But this isolationist approach did not find favour with the courts. The words used in a provision must be read in its context to find out if its meaning is clear and unambiguous.[1] In *A.G. v. Prince Ernest Augustus* Viscount Simmonds observed -

> ... words, and particularly general words, cannot be read in isolation, their colour and content are derived from their context. So it is that I conceive it to be my right and duty to examine every word of a statute in its context, and I use "context" in its widest sense, which I have already indicated as including not only other enacting provisions of the same statute, but its preamble, the existing state of the law, other statutes in *pari materia*, and the mischief which I can, by those and other legitimate means, discern the statute was intended to remedy.[2]

1.60 In order to clear up ambiguity, obscurity or other difficulties resort may be had to history in construing the constitution.[3] The mischief rule enunciated in *Heydon's* case[4] is particularly useful in removing ambiguity. The rule requires consideration of four matters: (a) what was the common law before the making of the Act, (b) what was the defect for which the common law did not provide, (c) what remedy Parliament

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[1] Sir Rupert Cross - Statutory Interpretation, 2nd ed., p.48-49

[2] [1957] AC 436, p.461

[3] Dr. Wynes - Legislative, Executive and Judicial Powers in Australia, 5th ed., p.19; *State v. Joynal Abedin*, 32 DLR (AD) 110; *Chamarbaughwalla v. India*, AIR 1957 SC 628; *River Wear Commissioners v. Adamson*, [1877] 1 App. Cas 743 (A statute provided that the owner of every vessel would be answerable for any damage done by the vessel to the dock except where at the time when the damage was caused the vessel was in charge of a compulsory pilot. A question arose whether an owner of an abandoned vessel which was driven by storm (act of God) against a pier would be liable. The court examined the position prior to the enactment of the statute and having regard to the fact that there was no liability in common law for damage done by act of God held that the statute did not create liability in such situation stating, "The sections appear ... to be sections of procedure only, dealing with mode in which a right of action for damages already existing shall be asserted, and not creating a right of action for damages where no right of action for damages against any one existed before.")

[4] (1584) 3 Co Rep 7a

has provided and (d) the true reason of the remedy.[1] Where the words used are ambiguous and susceptible of more than one meaning, it is legitimate to consider the consequences which would result from any particular construction, for, there are many things which the legislature is presumed not to have intended to bring about and a construction which would not lead to any one of these things should be preferred to one which would lead to one or more of them.[2] If two meanings are possible that meaning is to be assigned which comports with justice and good conscience[3] or which is reasonable[4] or which will ensure the smooth and harmonious working of the constitution[5] or which will not be inconsistent with fundamental rights[6] or which saves the statute from invalidity.[7] However, constitutional provisions should not otherwise be stretched by interpretation to save the validity of statutes; in all circumstances the full scope and extent of the constitutional provisions must first be determined and if the statute in question is capable of a construction which is in conformity with the true meaning of the constitution, then that construction is to be adopted.[8]

1.61 *Liberal interpretation:* Even though the principles of statutory interpretation will generally be applicable in case of interpretation of a constitution, a constitution being an organic instrument intended to be permanent and to cover all changing situations in the society "it has the

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[1] *Smith v. Hughes*, [1960] 1 WLR 830 (A law prohibited prostitutes from soliciting 'in the street'. The defendant contended that she was in the balcony or window and not in the street. The contention was rejected and it was held, "For my part, I approach the matter by considering what is the mischief aimed at by this Act. Everybody knows that this was an Act intended to clean up the streets, to enable people to walk along the streets without being molested or solicited by common prostitutes.")

[2] *Vacher & Sons v. London Society of Compositors*, [1913] AC 107; *Anwar Hossain Chowdhury v. Bangladesh*, 1989 BLD (Spl) 1

[3] *Cox v. Hakes*, [1890] 15 AC 506; *Ghulam Sarwar v. Pakistan*, PLD 1962 SC 142, 171 (where restricted meaning of 'dismissal' in s.240(3) of the Government of India Act, 1935 would result in injustice in that termination of service for misconduct would entitle a delinquent employee to show cause notice while termination of service without any allegation of misconduct would not entitle an innocent employee to any show cause notice, the court preferred the wider meaning)

[4] *Countess of Rhodes v. Kireally Waterworks*, [1882] 7 AC 649

[5] *Punjab v. Ajaib Singh*, AIR 1953 SC 10

[6] *Abdul Latif Mirza v. Bangladesh*, 31 DLR (AD) 1, 14; *Kanhaiyalal v. Indumati*, AIR 1958 SC 444, 447.

[7] *US v. Delaware*, 213 US 366

[8] *Abdul Aziz v. West Pakistan*, 11 DLR (SC) 126

greatest claim to be construed *ut res magis valeat quam pereat*"[1] (it is better that it should live than it should perish). If two constructions are possible, the court shall adopt that which implements, and discard that which stultifies, the apparent intention of the framers of the constitution.[2] The rule of strict construction applied to penal and fiscal statutes is not applicable in the matter of constitutional interpretation. Constitutional enactment should be interpreted liberally and not in any narrow or pedantic sense.[3] In interpreting a constitution, the widest construction possible in its context should be given according to the ordinary meaning of the words and each general word should be held to extend to all ancillary and subsidiary matters.[4] Where the constitution grants a power, that construction most beneficial to the widest amplitude of powers must be adopted[5] and all such powers which are necessary to effectuate the power specifically granted must be presumed to have been given.[6] The court in construing a provision conferring a right ought not to adopt a construction which would unduly restrict that right; that construction which renders the right fully effective and operative should be given.[7] In respect of fundamental rights and freedoms of individuals, the court will give a generous interpretation avoiding what has been called 'the austerity of tabulated legalism' suitable to give the individuals the full measure of the fundamental liberties.[8] However, it

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[1] *C.P. & Berar Motor Spirit Sales Tax Act*, AIR 1939 FC 1; *Mujibur Rahman v. Bangladesh*, 44 DLR (AD) 111; *Goodyear India Ltd. v. Haryana*, AIR 1990 SC 779

[2] *Bihar v. Kameswar*, AIR 1952 SC 252; *Chandra Mohan v. U.P.*, AIR 1966 SC 1987

[3] *C.P. & Berar Motor Spirit Sales Tax Act*, AIR 1939 FC 1; *Anwar Hossain Chowdhury v. Bangladesh*, 1989 BLD (Spl) 1; *Mujibur Rahman v. Bangladesh*, 44 DLR (AD) 111; *James v. Commonwealth of Australia*, [1936] AC 578, 614

[4] *Nur Hossain v. East Pakistan* 11 DLR (SC) 423 (It was contended that the expression 'acquisition' is confined to obtaining proprietary right and does not include 'requisition' which is a mere taking of possession. The court gave a wide meaning to include requisition within the expression 'acquisition'); *Golam Ali Shah v. State*, 22 DLR (SC) 247; *Mujibur Rahman v. Bangladesh*, 44 DLR (AD) 111

[5] *British Coal Corp. v. R.*, AIR 1935 PC 158; *Mujibur Rahman v. Bangladesh*, 44 DLR (AD) 111

[6] *Mujibur Rahman v. Bangladesh*, 44 DLR (AD) 111 (Power given under art.117(2) to provide for appeal against the decision of Administrative Tribunal is construed to include the power to provide the forum of the appeal).

[7] *Rashid Ahmed v. State*, 21 DLR (SC) 297; *Life Insurance Corp. v. Manubhai*, AIR 1993 SC 171

[8] *Minister of Home Affairs v. Fisher*, [1980] AC 319, 328 (A question arose whether Bermuda-born illegitimate children fell within the meaning of 'child' in s.11(5)(d) of the Bermudan Constitution. The Privy Council held that changes in social condition

has to be kept in mind that by construction a provision is not extended to meet a case for which provision has clearly and undoubtedly not been made.[1]

1.62 *Rules of language:* In construing the provisions of a constitution, the principles of *noscitur a sociis*[2], *ejusdem generis*[3] and *expressio unius est exclusio alterius* are applicable. *Noscitur a sociis* is the principle that where two or more words, which are susceptible of analogous meaning are coupled together, they are understood to be used in their cognate sense. They take their colour from each other, and the more general is restricted to a sense analogous to the less general.[4] *Ejusdem generis* represents the principle that where particular words are followed by general words, the general words should not be construed in their widest sense, but should be held as applying to objects, persons or things of the same general nature or class as those specifically enumerated unless of course there is a clear manifestation of a contrary purpose. Where the general words immediately follow or are closely associated with specific words, their meaning must be limited by reference to the preceding words.[5] Thus when the word 'tribunal' followed the word 'court' in art.102(5), the Appellate Division held that the former must be one which is shown to exercise the judicial power of the State, possess some trappings of a court and has been cast the duty to act judicially and does not include a mere administrative tribunal.[6] To invoke the application of the *ejusdem generis* rule, there must be a distinct genus or category. The specific words must apply not to different objects of a widely differing character but to something which can be called a class or a kind of objects. Where this is lacking, the rule cannot apply.[7] *Expressio unius est exclusio alterius* means that express mention of a thing excludes things which are not mentioned. If a statute

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had narrowed down the gulf between legitimate and illegitimate children and constitutional provisions require generous interpretation particularly in respect of fundamental rights and hence 'child' included illegitimate child); *Ong Ah Chuan v. Public Prosecutor*, [1981] AC 648, 670.

[1] *Reference by President*, 9 DLR (SC) 178

[2] *Neal v. Clerk*, 95 US 704; *I.R.C. v. Frere*, [1965] AC 402

[3] 16 Am Juris 2d, Const. Law, Para 91; *Powell v. Kempton Park Race-Course Co.*, [1899] AC 143

[4] *Angus v. Robertson*, [1879] 5 AC 63; *Ranganathan v. Madras*, AIR 1955 SC 604

[5] *Smelting Company of Australia v. Commr. of Inland Revenue*, [1897] 1 QB 275

[6] *Bangladesh v. A.K.M. Zahangir*, 34 DLR (AD) 173, 205

[7] *Electricity Board v. Mohan Lal*, AIR 1967 SC 1857

enumerates the things upon which it is to operate, everything else must necessarily and by implication be excluded from its operation and effect. So if a statute directs certain acts to be done in a specified manner by certain persons, their performance in any manner other than that specified or by any person other than the one named is prohibited.[1] In order to apply this principle it is not enough to show that the express and the tacit are incongruous, it must also be shown that they cannot be reasonably intended to co-exist.[2] There are other limitations on the application of this principle, such as, where something has been mentioned by way of abundant caution without any attempt to make it exhaustive the principle shall have no application.[3] The principle is to be used only as a means of ascertaining the legislative intent and is not applicable where it is clear that the law makers did not intend to exclude a thing not mentioned.[4]

1.63 *Titles, headings and arrangement of particular provisions:* In *Mujibur Rahman v. Bangladesh*[5] it was contended that the provision for administrative tribunals having been included in the Judiciary Part, a tribunal is to be treated as co-ordinate to, or equally effective as, the High Court Division and in the absence of any express provision must be composed of a person appointed in the same manner and entitled to the same security of tenure as a Judge of the Supreme Court. The court, however, did not accept the contention based on the place occupied by art.117 in the Constitution. It is sometimes said that the division of a constitution into chapters and sections is a mere matter of convenience for the purpose of reference, and is not of significance in applying the rules of construction and interpretation.[6] When the language of the provision sought to be construed, read in the context, is unambiguous, title, headings, marginal notes and particular position occupied by the provision cannot control the clear meaning of the provision. But when the language is not clear or doubt is felt as to its true meaning, the place occupied by a particular provision in the statute may be decisive.[7] The

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[1] Crawford - The Construction of Statutes, 1940, p.335; Cooley - Constitutional Limitations, 1927, p.139; *Kudrat-E-Elahi v. Bangladesh*, 44 DLR (AD) 319, 333

[2] *Lowe v. Darling*, [1906] 2 KB 772

[3] *Gorham v. Bishop of Exeter*, [1850] 15 QBD 52; see *A.B. Siddique v. Justice Shahabuddin Ahmed*, 49 DLR 1

[4] *A.B. Siddique v. Justice Shahabuddin*, 49 DLR 1

[5] 44 DLR (AD) 111

[6] 16 Am Juris 2d, Const. Law, Para 131

[7] Sir Rupert Cross - Statutory Interpretation, 2nd ed., p.55 (citing the decision of

headings prefixed to sections or set of sections in modern statutes are regarded as preambles to those sections and they may be consulted to resolve any ambiguity in the law.[1] Though long title may be used as an aid to construction, the balance of authorities suggests that short title may not be taken into account in construing a statute.[2] In *Chandler v. Director of Public Prosecutions*[3] Lord Reid opined that marginal notes cannot be used as an aid to construction. But his observation in the later decision of *Schildkamp*[4] has resulted in uncertainty in this regard.

1.64 *Definition Clause and General Clauses Act:* Art.152(1) defines certain terms used in the Constitution. Those terms must be understood as defined in that article and the court is not at liberty to give any other meaning to those terms. The court can give a different meaning where the subject dealt with or the context in which the term is used necessitates a departure. Art.152(2) provides that the General Clauses Act, 1897 shall be applicable in relation to the Constitution as it applies in relation to statutes and s.6 of that Act shall be applicable in respect of any statute which has been repealed by the Constitution or has become void or ceases to have effect by virtue of the provisions of the Constitution. The rules of construction laid down in this Act are applicable to the interpretation of the Constitution.[5] The court has also to follow the definition of the terms given in the Act in interpreting the Constitution, unless the context requires some other meaning to be given.[6]

1.65 Art.153(2) provides for an authentic text of this Constitution in Bengali and an authentic text of an authorised translation in English and as per the terms of art.153(3) in case of conflict between the Bengali text and the English text, the Bengali text shall prevail.[7]

1.66 *Mandatory and directory provisions:* The question frequently arises whether a particular provision is mandatory or directory. The

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Director of Public Prosecution v. Schildkamp, [1971] AC 1); Seervai – Constitutional Law of India, 4th ed., vol.1, p.244

[1] Maxwell - Interpretation of Statutes, 12th ed., p.11; *Dixon v. B.B.C.*, [1979] 2 All E.R. 112; *Abdul Haq v. Fazlul Quader Choowdhury*, 15 DLR 35

[2] Maxwell, p.4, 6

[3] [1964] AC 763

[4] [1971] AC 1

[5] *Pradyat v. Chief Justice*, AIR 1956 SC 285

[6] *Kannayan v. I.T.O.*, AIR 1968 SC 637

[7] *Osman Gani v. Moinuddin*, 27 DLR (AD) 61

courts usually hesitate to declare that a constitutional provision is directory. As a general rule a constitutional provision is held to be mandatory unless it appears from the express terms thereof, or by necessary implication from the language used, that it is intended to be directory.[1] Prohibitory language is nearly always construed as being mandatory.[2] It is a cardinal rule of construction that when statutory restrictions are couched in negative terms they are almost invariably held to be mandatory.[3] When a provision requires that something shall be done or done in a particular manner or form declaring what shall be the consequence of non-compliance, it has to be regarded as imperative.[4] The use of the expression 'shall' is generally, but not always, taken to be indicative of the mandatory nature of a particular provision.[5] The court has to ascertain the intention of the legislature and in doing so the court may consider the nature and design of the statute and the consequence which would follow from construing it the one way or the other, the impact of other provisions whereby the necessity of complying with the provisions in question is avoided, the circumstances, namely, that the statute provides for a contingency of the non-compliance with the provision, the fact that the non-compliance with the provision is or is not visited by some penalty, the seriousness or trivial consequences that follow therefrom and, above all, whether the object of the legislation will be defeated or furthered.[6] When a particular provision relates to performance of a public duty and the case is such that to hold null and void acts done in respect of this duty would work serious general inconvenience or injustice to persons who have no control over those entrusted with the duty and at the same time would not promote the main object of the provision, such a provision should be held to be

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[1] *Osman Gani v. Moinuddin*, 27 DLR (AD) 61; 16 Am Juris 2d. Const. Law Para 136; Cooley - Constitutional Limitations, 1927, p.159 (Constitutions do not usually undertake to prescribe mere rules of proceeding, except when such rules are looked upon as essential to the thing to be done; and they must be regarded in the light of limitations upon the power to be exercised ... If directions are given respecting the times or modes of proceeding in which a power should be exercised, there is at least a strong presumption that the people designed it should be exercised in that time and mode only ...)

[2] 16 Am Juris 2d., Const. Law, Para 137

[3] *Osman Gani v. Moinuddin*, 27 DLR (AD) 61

[4] *Rasharaj v. State*, 52 DLR 598

[5] *U.P. v. Srivastava*, AIR 1957 SC 912 (Court held that the provision of consultation with the Public Service Commission by the government is directory)

[6] *Forkan Ali v. Banglaesh*, 2000 BLD 415

directory only, the neglect of which does not affect the validity of the acts done.[1] Permissive constitutional language, such as the word 'may' is usually treated as intended to be merely permissive. But the use of a such word is not conclusive[2] and it depends largely, if not altogether, on the object sought to be achieved by the provision in question. "Where the object of the provision is to clothe public officers with power to be exercised for the benefit of third persons, or for the public at large, that is, where the public interest or a private right requires that the thing be done, then the language though permissive in form is peremptory".[3]

1.67 If a mandatory provision is disobeyed, the transaction contrary to that provision will be void. But non-compliance with a provision which is directory will not render any transaction invalid. It, however, does not mean that a directory provision need not be complied with; substantial compliance, as opposed to strict compliance, with such provision is required, though the entire disregard of such directory provision would not necessarily invalidate the action.[4] In *F v. F*[5] it was held that in certain situations non-compliance with a mandatory

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[1] *Montreal Street Rly Co. v. Normandin*, AIR 1917 PC 142; *Abdul Jabbar v. Registrar, Co-operative Societies*, 1986 BLD 145 (s.18(2) of the Co-operative Societies Ordinance, 1985 required the election of the managing committee of co-operative societies to be held in accordance with the rules. Framing of the rules was delayed and in the meanwhile the term of the managing committee of a society having expired, election was held according to the old procedure. The constitution of the new managing committee was treated as illegal as it was not in accordance with the rules later prescribed. The court held that the provision of s.18(2) requiring holding of the election in accordance with the rules was directory); *Biswanath v. Emperor*, AIR 1945 FC 67; *U.P. v. Srivastava*, AIR 1957 SC 912

[2] *U.P. v. Srivastava*, AIR 1957 SC 912

[3] 16 Am Juris 2d., Const. Law, Para 138; *Principal Secretary, President's Secretariat v. Mahtabuddin*, 42 DLR (AD) 214 (Martial Law Order No.9 gave to the persons removed from service under the Order a right to apply for review and provided that the Chief Martial Law Administrator 'may' review the order. The court held that the word 'may' ought to be read as 'shall'.); *Dinkar v. Maharashtra*, AIR 1999 SC 152 ('May' read as 'shall' to prevent arbitrary exercise of power by the authority)

[4] Cooley at p.154 observed, "In respect to statutes it has long been settled that particular provisions may be regarded as *directory* merely; by which is meant that they are to be considered as giving directions which *ought* to be followed, but not as so limiting the power in respect to which the directions are given that it cannot effectually be exercised without observing them"; see *Secretary, Ministry of Food v. M.F. Ltd.*, 44 DLR (AD) 166; *Bharat Hari Singhania v. Commr. of Wealth Tax*, AIR 1994 SC 1355, 1365

[5] [1971] Probate 1

direction of law may render a transaction voidable and not void.[1]

1.68 *Retrospective and prospective operation:* In the absence of any clear indication to the contrary, statutory provisions are to be construed as having prospective and not retrospective operation and this rule is equally applicable to constitutional provisions.[2]

1.69 *Generic interpretation:* The general rule governing statutory interpretation that a statute may be read as having a fixed meaning, speaking from the date of enactment is not applicable in the case of constitutional interpretation.[3] "It is undoubted that the terms of the constitution are to be interpreted by reference to their meaning when it was framed, but this does not mean that they are to be read as comprehending only such manifestation of the subject matters named as were known to the framers. Constitution can be and is construed to include such new specific developments of particular matters as may arise."[4] Though the terms of a constitution do not undergo any change and the nature of the grant of power must always remain the same, they apply from generation to generation to all things to which they are in their nature applicable.[5] Thus while interpreting the term 'trade and commerce' in ss.51 and 82 of the Australian Constitution Act, the Privy Council observed -

> The words used are necessarily general and their full import and true

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[1] For a critical analysis of the decision, see Seervai - Constitutional Law, 4th ed., p.253

[2] Cooley - Constitutional Limitations, 1927, p.137; *Muhammad Ishaq v. State*, PLD 1956 SC 256; *Keshavan Madhava Menon v. Bombay*, AIR 1951 SC 128; *Sarwarlal v. Hydrabad*, AIR 1960 SC 862, 865; *Ranjit Singh v. C.I.T.*, AIR 1962 SC 92, 96

[3] *S.C. Advocates-on-Record Association v. India*, AIR 1994 SC 268, 303. Even in statutory interpretation courts have departed from this principle. See Sir Rupert Cross - Statutory Interpretation, 2nd ed., p.51.

[4] Dr. Wynes - Legislative, Executive and Judicial Powers in Australia, 5th ed., p.26; Sir Rupert Cross - Statutory Interpretation, 2nd ed., p.50-51; *House Building & L. Association v. Blaisdell*, 290 US 398; *U.S. v. Classic*, 313 US 299; *A.G. for Ontario v. A.G. for Canada*, [1947] AC 127

[5] 16 Am Juris 2d, Const. Law, Para 92; *Euclid v. Amber Realty Co.*, 272 US 265; *S.C. Advocates-on-Record Association v. India*, AIR 1994 SC 268, 397 (The Constitution has not only to be read in the light of contemporary circumstances and values, it has to be read in such a way that the circumstances and values of the present generation are given expression in its provisions.); *Madras v. Gamon Dunkerly & Co.*, AIR 1958 SC 560; *Dysons Holdings Ltd v. Cox*, [1976] QB 503 (For the protection under the Rent Act, tenant's family was held to include the lady who was living together with the tenant for 21 years as man and wife since the meaning of family has radically changed.)

> meaning can often be appreciated when considered as the year goes on in relation to the vicissitudes of fact which from time to time emerge. It is not that the meaning of the words changes, but the circumstances illustrate and illuminate the full import of that meaning ... It may be that in 1900 the framers of the constitution were thinking of border tariffs and restrictions in the ordinary sense and desired to exclude difficulties of that nature, and to abolish the barrier of the State boundaries so as to make Australia a single country. Thus the framers presumably did not anticipate those commercial and industrial difficulties which have in recent years led to marketing schemes and price control, or traffic regulations such as those for the co-ordination of rail and road services, to say nothing of the new inventions, such as aviation or wireless. The problems, however, of the Constitution can only be solved as they emerge by giving effect to the language used.[1]

The test is whether the new conditions can be included within the scope of the power granted in general terms by the constitution and whether the inclusion would be barred by some of the provisions of the constitution.[2]

1.70 *Harmonious interpretation:* A constitution must be read as a whole. If there be apparent repugnancy between different provisions of a constitution, it should be removed by interpretation. If the repugnancy is real, the court should harmonize them if possible.[3] Where two constructions are possible, the court must adopt that which will ensure a smooth and harmonious working of the Constitution and eschew the other which will lead to absurdity or give rise to particular inconvenience.[4] The court should at the first instance try by interpretation to reconcile the conflict between the two provisions and give effect to both provisions, and a construction which renders either of them inoperative should not be adopted except as the last resort.[5] An amended constitution must also be read as a whole, as if every part of it

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[1] *James v. Commonwealth of Australia*, [1936] AC 587, 614; see also *A.G. of Ontario v. A.G. of Canada*, [1937] AC 99; *A.G. of Alberta v. A.G. of Canada*, [1939] AC 117

[2] *Pensacola Tel. Co. v. W.U. Tel. Co.*, 24 L. Ed 708

[3] *Fazlul Quader Chowdhury v. Abdul Huq*, 18 DLR (SC) 69; *Lutfur Rahman v. Election Commn.*, 27 DLR 278; *Mahboobuddin Ahmed v. Bangladesh*, 50 DLR 417, 423

[4] *Chandra Mohan v. U.P.*, AIR 1966 SC 1987 (Para 14)

[5] *Bengal Immunity Co. v. Bihar*, AIR 1955 SC 661, 736; *Mahboobuddin Ahmed v. Bangladesh*, 50 DLR 417, 423; *Rafique (Md.) Hossain v. Speaker*, 47 DLR 361

had been adopted at the same time and as one law.[1] Art.133(2) of the Pakistan Constitution of 1962 provided that the validity of a law shall not be questioned on the ground of lack of power of the legislature to pass the law. It was in conflict with the provisions of arts.58 and 98 relating to the power of the Supreme Court and the High Courts. By applying the principle of harmonious construction the Pakistan Supreme Court held that art.133(2) was confined to the questions relating to the competence of the central and provincial legislature and the President and the Governors to make law and did not oust the jurisdiction of the superior courts to decide the question of constitutionality of laws.[2] If such a harmonious interpretation is not possible, generally the later provision will prevail over the earlier.[3] But this principle will not apply when there is a particular enactment and a general enactment in the constitution, and the latter, taken in its most comprehensive sense, would overrule the former. The particular enactment must be operative, and the general enactment must be taken to affect only the other parts of the constitution to which it may properly apply.[4] Thus though the judicial officers and magistrates exercising judicial functions are members of the services of the Republic, the general provision of art.133 will not be applicable in respect of their recruitment and Parliament cannot enact law in this regard as art.115 is a special provision conferring plenary power on the President to make rules relating to the recruitment of judicial officers and magistrates exercising judicial functions.[5] Sometimes a provision starts with the expression 'notwithstanding anything in any other law'. Such a *non-obstante* clause is often used by way of abundant caution.[6] However, a *non-obstante* clause comes into play if there is an irreconcilable conflict between two provisions on the same subject matter or on the same issue and the provision containing the *non-obstante* clause prevails over the other provision.[7] In case of conflict between two non-obstante clauses, the

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[1] 16 Am Juris 2d, Const. Law, Para 102; *Anwar Hossain Chowdhury v. Bangladesh* 1989 BLD (Spl) 1

[2] *Fazlul Quader Chowdhury v. Abdul Huq*, 18 DLR (SC) 69, 112

[3] *Mahboobuddin Ahmed v. Bangladesh*, 50 DLR 417, 423;

[4] *Reference by President*, 9 DLR (SC) 178; 16 Am Juris 2d. Const. Law Para 103; *Secretary, Ministry of Finance v. Masdar Hossain*, 2000 BLD (AD) 104 (see the finding of the court relating to the extent of rule making power under arts.115 and 133)

[5] *Secy. Ministry of Finance v. Masdar Hossain*, 2000 BLD (AD) 104. Para 34

[6] Bindra - Interpretation of Statutes, 7th ed., p.567

[7] *Mahboobuddin Ahmed v. Bangladesh*, 50 DLR 417, 423

later in point of time will prevail.[1]

1.71 ***Use of foreign decisions:*** In interpreting a constitution foreign decisions are often cited and considered by the court. This is permissible, but the Federal Court rightly gave the warning -

> ... in the last analysis the decision must be based upon the words of the Constitution which the Court is interpreting; and since no two constitutions are in identical terms, it is extremely unsafe to assume that a decision on one of them can be applied without qualification to another. This may be so even where the words and expressions used are the same in both cases; for a word or phrase may take colour from its context and bear different senses accordingly.[2]

The same caution has been given by the Privy Council while interpreting the Jamaican Constitution -

> In seeking to apply to the interpretation of the Constitution of Jamaica what has been said in particular cases about other constitutions, care must be taken to distinguish between judicial reasoning which depended on the express words used in the particular constitution under consideration and reasoning which depended on what, though not expressed, is nonetheless a necessary implication from the subject-matter and structure of the constitution and the circumstances in which it had been made.[3]

1.72 ***Prospective overruling:*** A court does not make law, but finds or discovers the true law. It necessarily follows that a law declared by the court to be invalid becomes invalid from the time of its enactment. In other words, the judicial pronouncement operates retrospectively as also prospectively. Retrospective overruling often causes administrative inconvenience or results in great hardship by disturbing vested rights acquired on the basis of the rule found invalid. To avoid the situation, the American Supreme Court developed the doctrine of prospective overruling whereby a decision of the court operates only in respect of future transactions and does not affect past and closed transactions.[4] However, prospective overruling creates a situation where people similarly placed are dealt with differently simply because of the

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[1] *A.P. State Financial Corp. v. Off. Liquidator*, AIR 2000 SC 3642

[2] *C.P.& Berar Motor Spirit S.T. Act*, AIR 1939 FC 1

[3] *Hinds v. The Queen*, [1976] 1 All E.R. 353, 359

[4] *G.N. Railway v. Sunburst*, 287 US 358; *Hill v. California*, 401 US 797; *Griffin v. Illinois*, 351 US 12; *Williams v. U.S.*, 401 US 646

difference in the time of occurrence. Hence the court resorts to the doctrine of prospective overruling when the normal retrospectivity not merely creates inconvenience, but results in grave injustice or involves extremely burdensome sorting out process for courts or administrators. The Indian Supreme Court applied the doctrine of prospective overruling in the case of *Golak Nath v. Punjab*[1]. In *Suman Gupta v. J & K*[2] the court declared the absolute power of the government to nominate candidates for admission to medical college to be violative of the equality clause, but refused to disturb the existing nominations as the candidates had already covered a substantial part of the course. The Appellate Division while declaring the amendment of art.100 of the Constitution void in *Anwar Hossain Chowdhury v. Bangladesh*[3] ordered "This invalidation, however, will not affect the previous operation of the amended Articles and judgments, decrees, orders etc. rendered or to be rendered and transactions past and closed."[4]

PREAMBLE

1.73 The preamble of a statute throws light as to what the statute intends to reach and it has been clearly permissible to have recourse to it as an aid to construing the enacted provisions of the statute.[5] However, as it is not recognised as a part of the statute on the ground that it is not enacted in the same way the substantive parts of a statute are enacted, it cannot be used to qualify or cut down the statute if the statute is clear and unambiguous.[6] If, however, the language of the statute is not clear and the words used therein are vague or equivocal, then the meaning which comports with the preamble is to be preferred.[7] The same view is sought to be taken about the preamble of a constitution. It is said that the

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[1] AIR 1967 SC 1643

[2] AIR 1983 SC 1235; *Janaki v. J & K*, AIR 1973 SC 930; *Raymond Ltd. v. M.P. Electricity Bd*, AIR 2001 SC 238

[3] 1989 BLD (Spl) 1, Para 201

[4] Ibid, p.234; see also *Bangladesh v. Idrisur Rahman*, 1999 BLD (AD) 291

[5] *A.G. v. Prince Ernest Augustus*, 1957 AC 436; *Powell v. Kempton Park Race-Course Co.*, [1899] AC 143.

[6] *Powell v. Kempton Park Race-Course Co.*, [1899} AC 143

[7] *A.G. v. Prince Augustus*, 1057 AC 436, 467-68 (If the enacting words admit only one construction, that construction will receive effect even if it is inconsistent with the preamble, but if the enacting words are capable of either of the constructions offered by the parties, the construction which fits in with the preamble may be preferred.)

preamble is neither a source of power, nor a limitation on the enacted provisions of a constitution[1] and it cannot be used to modify the language of the constitution if it is clear, plain and unambiguous, giving one and only one meaning.[2] If, however, the language is not clear and the words used therein indicate or are capable of bearing more than one meaning, then the meaning which is nearest to the purpose of the constitution is to be preferred.[3] If the enacting part of the constitution is ambiguous or open to doubt, the preamble may be referred to resolve the ambiguity or doubt, as it is a good means of finding out the meaning.[4] But an ambiguity or doubt must not be created or imagined in order to bring in the aid of the preamble.[5]

1.74 The position of the preamble of the Constitution of Bangladesh is somewhat different and it should not, it is submitted, be likened to the preamble of a statute. The preamble is a part of our Constitution[6] and cannot be amended without a referendum.[7] The framers of the Constitution took pains to state clearly the philosophy, aims and objectives of the Constitution and to describe the qualitative aspects of the polity the Constitution is designed to achieve.[8] In this situation, the preamble of the Constitution, in its role, cannot be relegated to the position of the preamble of a statute. However clear a provision of the Constitution may be, if it is found that the plain meaning of the provision runs counter to the spirit and objectives of the Constitution as stated in the preamble, the question should immediately be asked whether the framers of the Constitution intended to bring about the result which the literal construction produces and the court should search for a meaning in conformity with the spirit and objectives of the Constitution as indicated in the preamble because the substantive provisions have been made to achieve the objects and purposes stated in the preamble. It does not, however, mean that the court can stretch the meaning of the preamble so as to receive support for an interpretation

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[1] *Re Berubari Union*, AIR 1960 SC 845; *Indira Gandhi v. Rajnarayan*, AIR 1975 SC 2299

[2] *Anwar Hossain Chowdhury v. Bangladesh*, 1989 BLD (Spl) 1

[3] Ibid

[4] *Pakala Narayan v. Emperor*, AIR 1939 PC 47

[5] *Powell v. Kempton Park Race-Course Co.*, [1899] AC 143; *Anwar Hossain Chowdhury v. Bangladesh*, 1989 BLD (Spl) 1

[6] *Anwar Hossain Chowdhury v. Bangladesh*, 1989 BLD (Spl) 1

[7] Art.142(1A)

[8] See Para 1.21

the court wants to give.[1] In *Registrar, University of Dacca v. Sajjad Hussain*[2] the majority judgment of the Appellate Division referred to the 'historic struggle for national liberation' mentioned in the preamble and construed it as being one phase of the continuing struggle after liberation and for such a construction analogy was drawn from communist political philosophy. It is submitted that the qualifying words 'for national liberation' restricted the expanse of the 'historic struggle' which ended with national independence and cannot be comprehended as continuing after achievement of independence. Furthermore, the Constitution of Bangladesh clearly envisages a traditional democratic process and its language cannot be construed with reference to a radically different political philosophy merely because of the use of the words `socialist society' in the preamble.

1.75 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 framers not only used these expressions but also stated the mode of achieving it by using the expression 'through democratic process' and providing in the substantive part of the Constitution an 18th Century tripartite form of government. Read in the proper perspective, there remains no doubt that the framers did not allude to the communist philosophy of State organisation, 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.[3] 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 civilised living.[4] It brings in the concept of distributive justice which aims at the removal of economic inequalities and the undoing of injustice resulting from transactions and dealings between unequal persons in the society.[5]

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[1] *Anwar Hossain Chowdhury v. Bangladesh*, 1989 BLD (Spl) 1

[2] 34 DLR (AD) 1

[3] See *D.S. Nakara v. India*, AIR 1983 SC 130, Para 33-34; *Kerala Hotel & Restaurant Association v. Kerala*, AIR 1990 SC 913

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

[5] See *Lingappa v. Maharashtra*, AIR 1985 SC 389 (It comprehends more than lessening of inequalities by differential taxation, giving.debt relief or regulation of contractual relations; it also means the restoration of properties to those who have been

This becomes clearer if we refer to arts.14 and 19 of the Constitution. The preamble also speaks of the supremacy of the Constitution, rule of law and fundamental human right which will be dealt with separately.

CITIZENSHIP

1.75A Art.6 of the Constitution provides that the citizenship of Bangladesh shall be determined and regulated by law. Since most of the rights guaranteed by the Constitution are dependent on citizenship, it is necessary to briefly deal with the legal position in respect of citizenship of Bangladesh.

1.75B The acquisition of the status of citizenship of Bangladesh is governed by two sets of provisions. The provisions of P.O. No.149 of 1972[1] lay down the conditions for claiming citizenship of Bangladesh as on 15.12.1972, while the Citizenship Act, 1951[2] lays down the conditions for the acquisition of citizenship on or after 15.12.1972 by birth within Bangladesh, by descent, by registration and by naturalisation. In terms of art.2 of P.O. No.149 of 1972, (i) a person who or whose father or grandfather was born in the territory now comprising Bangladesh and was a permanent resident of Bangladesh on 25 March 1971 and continued to be so resident, or (ii) a person who was a permanent resident of such territory on 25 March 1971 and continued to be so resident and is not otherwise disqualified for being a citizen by or under any law for the time being in force, shall be deemed to be a citizen of Bangladesh. Hence a person having domicile of origin or domicile of choice in Bangladesh will be a citizen of Bangladesh if he continued to be a permanent resident of Bangladesh after 25 March 1971 till the commencement of the Order.

1.75C Now the question is what is meant by the expression 'permanent resident' and whether a person temporarily residing outside Bangladesh on or after 25 March 1971 will be treated to be a citizen of

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deprived of them by unconscionable bargains; it may also take the form of forced redistribution of wealth as a means of achieving a fair distribution of material resources among the members of the society.)

[1] Bangladesh Citizenship (Temporary Provisions) Order, 1972

[2] This Act has been continued by the Laws Enforcement Continuance Order, 1971 and art.149 of the Constitution. The provision of this Act relating to the status of persons on the commencement of this Act is, however, not applicable and P.O. No.149 of 1972 has made provision in this regard.

Bangladesh. The question of permanent residence is linked with domicile and by domicile we mean a permanent home.[1] When a person resides in a country with the intention to reside there permanently or for an indefinite period, he acquires domicile of that country. Nobody can be without a domicile and the law assigns a domicile of origin to every person at his birth, namely, to a legitimate child the domicile of the father, to an illegitimate child the domicile of the mother and to a foundling the place where he is found.[2] For having a permanent residence a person is not required to be rooted to the place of his permanent residence; for various reasons he may move out; for staying abroad alone a citizen cannot be said to have discontinued his permanent residence.[3] It is only when a person leaves his permanent residence with an intention never to return that he can be said to have changed his permanent residence. The proviso to art.2 stipulates that a person having a permanent residence in the territory now comprised in Bangladesh will be deemed permanent resident of Bangladesh even though he is, in the course of his employment or for the pursuit of his studies, residing in a country which was at war with, or engaged in military operation against Bangladesh and is being prevented from returning to Bangladesh. This provision will not, however, preclude a citizen from explaining his stay abroad for other good reasons.[4] One M.S. Ispahani is the son of a retired Judge of the High Court of East Pakistan who died in Dhaka and his mother is still living in Dhaka. He himself rented a flat apart from is own house at Dhaka which he has acquired with money earned working as a Chartered accountant in the U.K. It has been held that in the facts of the case, M.S. Ispahani has his permanent residence in Bangladesh.[5] Mere expression of a desire to go to Pakistan without taking further steps and thereafter affirming allegiance to Bangladesh will not affect a man's permanent residence in Bangladesh and his citizenship of Bangladesh cannot be denied.[6]

1.75D The Citizenship Act, 1951 recognises citizenship by birth and citizenship by descent. Subject to the exceptions and conditions

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[1] Per Lord Cranworth in *Whicker v. Hume*, (1858) 7 HL Cas 77 at p.79

[2] Cheshire & North – Private International Law, 11th ed., p.143

[3] *Bangladesh v. Ghulam Azam*, 46 DLR (AD) 192, 209. For a detailed discussion on the question of permanent residence and change of domicile, the reader is referred to Chesire & North's Private International Law, 11th ed., chapter 9.

[4] *Bangladesh v. Ghulam Azam*, 46 DLR (AD) 192

[5] *Bangladesh v. Mirza Shahab Ispahani*, 40 DLR (AD) 116

[6] *Mukhtar Ahmed v. Bangladesh*, 34 DLR 29

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stipulated in ss.4 and 5 of the Citizenship Act, 1951, every person born in Bangladesh, and every person whose father was a Bangladeshi at the time of his birth outside Bangladesh, shall be a citizen of Bangladesh. Under s.9 of this Act, the government may confer citizenship on any person who will be citizen of Bangladesh by naturalisation. S.10 of the Act makes provision for citizenship of Bangladesh in case of women marrying Bangladesh citizens. S.14 of the Act prohibits dual citizenship and a citizen of Bangladesh will cease to be a citizen of Bangladesh unless he renounces citizenship of any other State. By amendment of P.O. No.149 of 1972 a citizen of Bangladesh has been allowed to continue as a citizen of any of the specified States and accordingly, a citizen of Bangladesh can acquire citizenship of any such specified State without losing his citizenship of Bangladesh.

FUNDAMENTAL PRINCIPLES OF STATE POLICY

1.76 Part II of the Constitution narrates the fundamental principles of State policy. It translates into words the socialist society envisioned by the framers in the preamble and sets the economic, social and political goals which the government is required to strive for. These principles adumbrate (a) promotion of local government institutions composed of representatives of the area concerned and with special representation of peasants, workers and women to build democratic structures at the grass-root level[1], (b) participation of women in all spheres of national life[2], (c) guarantee of fundamental human rights and freedoms and respect for the dignity and worth of human persons and effective participation by the people through their elected representatives in administration at all levels[3], (d) principles of State, co-operative and private ownership and control of the instruments and means of production and distribution[4], (e) emancipation of the peasants, workers and backward sections of the people from all forms of exploitation[5], (f) fundamental responsibility of the State to attain, through planned economic growth, a constant increase of productive forces and steady improvement in the material and cultural standard of living of the people with a view to securing to the citizens the provisions of basic necessities of life, right to work, right

[1] Art.9
[2] Art.10
[3] Art.11; *B.S.E.H.R. v. Bangladesh*, 53 DLR 1
[4] Art.13
[5] Art.14

to reasonable rest, recreation and leisure and right to social security in the form of public assistance in cases of undeserved want[1], (g) radical transformation in the rural areas through the promotion of agricultural revolution, rural electrification, development of cottage industry and other industry and improvement of education, communication and public health with a view to remove the disparity in the standards of living between the urban and the rural areas[2], (h) establishment of a uniform, mass-oriented and universal system of education and extending free and compulsory education to all children to such level as may be determined by law, relating education to the needs of society and removal of illiteracy[3], (i) raising the level of nutrition and improvement of public health and morality and measures to prevent the consumption of alcoholic and other intoxicating drinks and of drugs injurious to health and prevention of prostitution and gambling[4], (j) equal opportunity of work and removal of social and economic inequality to attain a uniform level of economic development throughout the Republic[5],(k)payment for work on the basis of the principle 'from each according to his abilities to each according to his work'[6],(l) separation of judiciary from the executive[7],(m) conservation of the cultural traditions and heritage of the people[8], (n) protection of national monuments and objects and places of special artistic or historic importance or interest[9] and (m) promotion of international peace, security and solidarity[10]. Art.21 declares that it is the duty of every citizen to observe the Constitution and the laws and of every public servant at all times to serve the people.

1.77 Art.8(1) states that the principles of absolute trust and faith in

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[1] Art.15
[2] Art.16
[3] Art.17
[4] Art.18
[5] Art.19
[6] Art.20
[7] Art.22; See *Aftabuddin v. Bangladesh*, 48 DLR 1 (Art.116A is a step towards realisation of the principle)
[8] Art.23
[9] Art.24
[10] Art.25; *Saiful Islam v. Bangladesh*, 50 DLR 318 (Extradition of a person who is wanted in another State for criminal activities is not violative of art.25); *Saleemullah v. Bangladesh*, 47 DLR 218 (Sending troops to Haiti as part of international force is not in derogation of art.25)

the Almighty Allah, nationalism, democracy and socialism meaning economic and social justice, together with the principles set out in Part II, shall constitute the fundamental principles of State policy.[1] Further, art.8(1A) stipulates that absolute trust and faith in the Almighty Allah shall be the basis of all actions. Art.8(2) states that these principles shall be fundamental to the governance of Bangladesh and shall be applied by the State in making the laws. Thus these principles place the government under obligation to achieve and maximise social welfare and the basic values of life. Art.8(2), however, specifically provides that these principles are not judicially enforceable.[2] In *Kudrat-E-Elahi v. Bangladesh*[3] the appellants sought enforcement, though indirectly, of these principles pressing in aid the provision of art.7(2). The Appellate Division negatived the contention of the appellants. M. Kamal J pointed out that these are 'principles' as distinguished from 'laws' and as such there is no question of application of art.7. S. Ahmed CJ held these principles to be non-enforceable, stating -

> 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 require resources, technical know-how and many other things including mass-education. Whether all these pre-requisites for a peaceful socio-economic revolution exist is for the State to decide.[4]

Although not judicially enforceable, the fundamental principles of State policy cast an obligation upon the government to act on them.[5]

1.78 These principles have special value as they are described in art.8(2) as a guide to the interpretation of the Constitution and the laws of Bangladesh. The courts shall have to construe the provisions of the Constitution and the laws in conformity with these principles. Thus in construing the provision of art.59 the Appellate Division took note of the principles of popular representation as stated in arts.9 and 11 and held that there was no scope for forming a local government body outside the ambit of art.59 or composed of non-elected persons.[6] These

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[1] See *Dr. Mohiuddin Farooque v. Bangladesh*, 49 DLR (AD) 1

[2] See *Saleemullah v. Justice M.A. Quddus Chowdhury*, 46 DLR 691; *Aftabuddin v. Bangladesh*, 48 DLR 1

[3] 44 DLR (AD) 319

[4] Ibid, p.331

[5] *Wahab v. Secretary, Ministry of Land*, 1 MLR 338

[6] *Kudrat-E-Elahi v. Bangladesh*, 44 DLR (AD)

principles provide the yardstick for testing the reasonableness of a legal provision challenged on the ground of violation of fundamental rights.[1] Any legal provision made to further the principles of State policy will *prima facie* be constitutional. 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 principles set out in Part II of the Constitution.[2] 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. However, it will not be permissible, on the basis of those principles, to give the language of any provision of the Constitution a meaning which it cannot bear, unless the language is ambiguous.[3] An apparently clear language of a provision of the Constitution may not appear to be unambiguous when it is found to be inconsistent with any provision of Part II 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, realisation of the aims and objectives stated in Part II.

1.79 In the Indian jurisdiction the question arose whether the provisions relating to fundamental rights will prevail in case of conflict with the principles of State policy. The Supreme Court initially held that the provisions relating to fundamental rights shall have primacy over the principles of State policy.[4] Subsequently, the court held that it did not see any conflict on the whole between fundamental rights and the principles of State policy.[5] The court held that one should not ignore the principles of State policy, but should adopt the principle of harmonious construction and attempt to give effect to both as much as possible.[6] Fundamental rights are but means to achieve the goals indicated in the principles of State policy. Fundamental rights and the 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.[7] The scheme of the Constitution relating to fundamental

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[1] *Kasturi Lal v. J & K*, AIR 1980 SC 1992, 2000

[2] *Mumbhai v. Abdulbhai*, AIR 1976 SC 1455; *Bhim v. India*, AIR 1981 SC 234

[3] *Excel Wear v. India*, AIR 1979 SC 25

[4] *Madras v. Champakam Dorairajan*, AIR 1951 SC 226

[5] *C.B. Boarding & Lodging v. Mysore*, AIR 1970 SC 2042, 2050

[6] *In Re Kerala Education Bill*, AIR 1958 SC 995; *Unni Krisnan v. A.P.*, AIR 1993 SC 2178

[7] *Unni Krisnan v. A.P.*, AIR 1993 SC 2178, Para 141

rights and the principles of State policy is the same as in the Indian Constitution and the same position should obtain under our constitutional dispensation. However, the framers of the Constitution were aware of the possible conflict between the provisions of Part III and the principles of State policy. They envisaged that welfare measures of the State may be hindered by the provisions of Part III of the Constitution and they specifically provided in art.47(1) that in specified matters any law made shall be immune from challenge on the ground of inconsistency with Part III if Parliament declares that such law has been made to give effect to any of the fundamental principles of State policy.

1.80 These principles of State policy will also be a guide to the interpretation of the laws of Bangladesh which means that the provisions of the laws are to be interpreted in conformity with the principles of State policy. What happens if the language of a statute is absolutely clear and that statute is completely repugnant to some of the principles of State policy? In the name of interpretation, the court cannot create a new law and thereby enforce the principles of State policy contrary to the mandate of the Constitution. The court may apply the doctrine of reading down[1] the statute so as to bring it in conformity with the principles of State policy, but the doctrine cannot be applied when the language of the statute is absolutely clear. In such a case the court can do nothing more than leave it for the electorate for a political verdict. Except in such extreme cases, the court has to interpret the statutory provisions in accord with the principles of State policy as mandated by art.8(2).

1.81 In *Winifred Rubie v. Bangladesh*[2] the High Court Division narrowly 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 void. The court noted that the school did not conform to the national educational policy and was not recognised by the Director of Public Instruction and, having regard to the principles of State policy stated in arts.14, 17 and 19(1), held that the school could not be categorised as serving a 'public purpose'. The Appellate Division while disagreeing with the High Court Division regarding interpretation of 'public purpose' observed -

> As for the State policy of education it is unfortunate that the learned

[1] see Para 5.12(2)
[2] 1981 BLD 30

> Judges have taken upon themselves an enquiry which is neither warranted by law in the Constitution nor by the arguments of the parties. It is for this reason that the constitutional mandate provides in the chapter on Directive Principles of State Policy that these are not enforceable in the Court of Law.[1]

Whether the particular construction given by the High Court Division to the expression 'public purpose' in relation to education is correct or not is beyond the scope of this work, but no exception can be taken to the effort of the High Court Division to construe the expression with reference to the relevant principles of State policy, as art.8 clearly states that the principles of State policy enumerated in Part II shall be a guide to interpretation of the laws of Bangladesh and such an effort cannot be termed as enforcement of State policy. In order to find the meaning of 'public purpose' in relation to education, the High Court Division was not only entitled, but was also under constitutional obligation, to consider whether the requisition of property for a school of the type involved could be said to serve a public purpose when art.17 mandates the State to adopt effective measures for the purpose of establishing a uniform, mass-oriented and universal system of education.[2] It is submitted that in making the above observation, the Appellate Division did not take into account the relevant provisions of the Constitution. There is a definite distinction between the enforceability of the principles of State policy and the interpretation of laws in conformity with those principles and this distinction has been clearly brought out in *Kudrat-E-Elahi v. Bangladesh*[3]. The Appellate Division laid down that a law cannot be struck down for inconsistency with any of the principles of State policy, but by a process of interpretation with reference to the principles enunciated in arts.9 and 11 held that the government cannot refrain from designating an area as an administrative unit and through that device constitute a local government body with nominated persons in place of elected representatives of the people. In holding this, the Appellate Division did not enforce the principles of art.9 or 11, but construed the provisions of arts.59 and 60 in conformity with those principles to find the limitation on the power of the State in the matter of

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[1] *Bangladesh v. Winifred Rubie*, 1982 BLD (AD) 34, 37

[2] Compare the approach of the Indian Supreme Court in *Unni Krisnan v. A.P.*, AIR 1993 SC 2178, even though the Indian Constitution does not expressly provide that the directive principles of State policy will be guide to interpretation of the constitution and laws of India.

[3] 44 DLR (AD) 319

establishment of local government bodies.

RULE OF LAW

1.82 *Meaning and content:* The preamble of the Constitution of Bangladesh states 'rule of law' as one of the objectives to be attained. The expression 'rule of law' has various shades of meaning and of all constitutional concepts, the rule of law is the most subjective and value laden. A.V. Dicey's concept of rule of law included three things - (i) absence of arbitrary power, that is, no man is above law and the persons in authority do not enjoy wide, arbitrary or discretionary powers, (ii) equality before law, that is, every man, whatever his rank or position, is subject to ordinary laws and the jurisdiction of ordinary courts, and (iii) individual liberties. His thesis has been criticised from many angles, but his emphasis on the subjection of every person to the ordinary laws of the land, the absence of arbitrary power and legal protection for certain basic human rights remains the undisputed theme of the doctrine of rule of law. According to Professor Wade rule of law connotes three ideas - (1) it expresses a preference for law and order within a community rather than anarchy, warfare and constant strife, (2) 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 (3) 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.[1]

1.82A If we take into consideration the different views on rule of law, we find two definite lines of thinking. One represents the view that the power of the State should not be exercised against individuals except in accordance with rules explicitly set out in books available to all and the government as well as the individuals must play according to the rules until they are changed according to rules already stipulated and known to all. This view is not concerned with the quality and contents of the rules, but only insists that whatever be the rules in existence, these must be certain and known and followed until changed. According to this view, the quality of the rules is a matter of substantive justice and not a matter to be considered as a connotation of the rule of law. The other view puts stress upon the quality and content of the rules that may be prescribed. This view assumes that individuals have moral rights and

[1] Wade & Bradley - Constitutional and Administrative Law, 10th Ed., p.97

duties with respect to one another and political rights against the State as a whole. Accordingly, it is not sufficient that the rules should be stated and known and followed by both individuals and the State, something more has to be there to have a truly democratic society in which human dignity and freedom may be ensured, for, in a dictatorship law and order can be maintained and the government can be run in accordance with law promulgated by the dictator and yet there may not be any freedom of the people if the laws made by the dictator do not provide for such freedom. So the proponents of the second view vouch for the quality of the rules to make the concept a meaningful one. The latter view is gradually gaining ground and according to this view, "Law in the context of the rule of law does not mean any law enacted by the legislative authorities, howsoever arbitrary or despotic it may be ... What is a necessary element of the rule of law is that the law must not be arbitrary or irrational and it must satisfy the test of reason and the democratic form of the polity seeks to ensure this element by making the framer of the law accountable to the people."[1] The concept is intended to imply not only that (1) the powers exercised by State functionaries must have a legal basis, that is, they must be based on authority conferred by law, but also that (ii) the law should conform to certain minimum standards of justice, both substantive and procedural. "The concept implies that the ruler must also be subject to law. It is the subordination of all authorities, legislative, executive and others to certain principles which would generally be accepted as characteristic of law, such as the ideas of the fundamental principles of justice, moral principles, fairness and due process. It implies respect for the supreme value and dignity of the individual."[2] It is generally agreed that the minimum content of the concept is that "the law affecting individual liberty ought to be reasonably certain or predictable; where the law confers wide discretionary powers there should be adequate safeguards against their abuse; like should be treated alike, and unfair discrimination must not be sanctioned by law; a person ought not to be deprived of his liberty, status or any other substantial interest unless he is given the opportunity of a fair hearing before an impartial tribunal; and so forth."[3] The rule of law demands that power is to be exercised in a manner which is just, fair and reasonable and not in an unreasonable, capricious or arbitrary

[1] *Bachan Singh v. Punjab*, AIR 1982 SC 1325, 1337
[2] Walker - Oxford Companion to Law, 1980, p.1093
[3] S.A. de Smith - Constitutional and Administrative Law, 4th Ed., p.30

manner leaving room for discrimination.[1] It requires that decisions should be made by the application of known principles and rules and in general, such decisions should be predictable and the citizen should know where he stands; a decision without any principle or rule is unpredictable and is the antithesis of a decision in accordance with the rule of law.[2] Hilaire Barnett rightly concluded saying -

> The rule of law - in its many guises - represents a challenge to State authority and power, demanding that powers both be granted legitimately and that their exercise is according to law. 'According to law' means both according to the legal rules and something over and above purely formal *legality* and imputes the concepts of *legitimacy* and constitutionality. In its turn, legitimacy implies *rightness* or *morality* of law. [3]

1.83 *The Delhi Declaration:* The International Commission of Jurists endeavoured to give material content to the concept in a Congress in New Delhi in 1959 which was attended by eminent jurists from more than fifty countries including Lord Denning and Lord Devlin. That Congress made a declaration known as the *Declaration of Delhi, 1959.*[4] The 'rule of law' according to that declaration relates to:

> (1) the Legislature: there is a right to representative and responsible government; and there are certain minimum standards or principles for the law, including those contained in the Universal Declaration and the European Convention, in particular, freedom of religious belief, assembly and association, and the absence of retroactive penal laws;
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> (2) the Executive: especially that delegated legislation should be subject to independent judicial control, and that a citizen who is wronged should have a remedy against the State or Government;
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> (3) the Criminal Process: a 'fair trial' involves such elements as certainty of the criminal law, the presumption of innocence, reasonable rules relating to arrest, accusation and detention pending trial, the giving of notice, and provision for legal advice, public trial, right of appeal, and absence of cruel or unusual punishment;
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> (4) the Judiciary and the Legal Profession: this requires the independence of the Judiciary, and proper grounds and procedure for

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[1] *Delhi Transport Corp. v. D.T.C. Mazdoor Congress*, AIR 1991 SC 101

[2] *Jaisinghani v. India*, AIR 1967 SC 1427, Para 14

[3] Constitutional and Administrative Law, 1998, p.125

[4] (1959) 2 Jo. International Commission of Jurists 7-54

removal of judges; and imposes a responsibility upon an organised and autonomous legal profession.[1]

1.84 *Rule of law in Bangladesh:* The rule of law is a basic feature of the Constitution of Bangladesh.[2] What is the meaning of 'rule of law' as envisaged in the Constitution? It can be seen from the preamble that fundamental human rights and freedom, equality and justice, political, economic and social have been mentioned after 'rule of law' as if these concepts are not included in 'rule of law'. From this one may argue that 'rule of law' as contemplated in the Constitution concerns the certainty and publicity of law and its uniform enforceability and has no reference to the quality of the law; the Constitution deals with substantive justice separately from 'rule of law'. This argument is merely academic. As there is difference of opinion as to the actual meaning of 'rule of law', the framers of the Constitution, after mentioning 'rule of law' in the preamble, took care to mention the other concepts touching on the qualitative aspects of 'law', thereby showing their adherence to the concept of rule of law as propounded by the latter viewers. If the relevant paragraph of the preamble is read as a whole in its proper context, there remains no doubt that the framers of the Constitution intended to achieve 'rule of law' as advocated by the latter viewers.[3] To attain this fundamental aim of the State, the Constitution has made substantive provisions for the establishment of a polity where every functionary of the State must justify his action with reference to law.[3] 'Law' does not mean anything that Parliament may pass. Arts.27 and 31 have taken care of the qualitative aspects of law. Art.27 forbids discrimination in law or in State actions, while art.31 imports the concept of due process, both substantive and procedural, and thus prohibits arbitrary or unreasonable law or State action.[4] The Constitution further guarantees in Part III certain rights to ensure respect for the supreme value of human dignity.

1.85 *Independent judiciary:* An independent and impartial judiciary is, however, a precondition to rule of law. Constitutional provisions will be mere moral precepts yielding no result unless there is a machinery for enforcement of those provisions and faithful enforcement of those provisions is not possible in the absence of an independent and impartial

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[1] Quoted from O'Hood Phillips - Constitutional and Administrative Law, p.20
[2] *Anwar Hossain Chowdhury v. Bangladesh*, 1989 BLD (Spl) 1, Para 443
[3] Arts. 7 and 31
[4] *West Pakistan v. Begum Shorish Kashmiri*, 21 DLR (AD) 1, 12

judiciary. The provisions of the Constitution ensure the independence and impartiality of the judges of the Supreme Court.[1] For the establishment of rule of law the subordinate judiciary must also be independent and impartial. "It is the Subordinate Judiciary who are brought most closely into contact with the people, and it is no less important, perhaps indeed even more important, that their independence should be placed beyond question."[2] So that there may not be any interference with judicial work, the rules of procedure of Parliament incorporated the *sub-judice* rule. Parliament shall not accept any petition for consideration by the Committee on Petitions which contains matter *sub-judice* before any court of law[3], nor shall admit any question which contains any reflection on a decision of court of law or any remark as is likely to prejudice a matter which is *sub-judice*[4]. No adjournment motion or resolution shall deal with or relate to any matter which is under adjudication by a court of law.[5] Rule 148 of the Rules of Procedure provide that the right of a member of Parliament to make a motion shall be governed by the condition that it shall not relate to any matter which is under adjudication by a court of law. With regard to the executive branch, art.22 of the Constitution provides that the State shall ensure the separation of the judiciary from the executive organs of the State. But nothing has been done to give effect to this fundamental principle of State policy. The Constitution originally provided that district judges would be appointed on the recommendation of the Supreme Court and other members of the subordinate judiciary would be appointed in accordance with the rules made by the President after consulting the Public Service Commission and the Supreme Court[6] and the control and discipline of persons employed in the judicial service and magistrates exercising judicial functions would vest in the Supreme Court.[7] By the Fourth Amendment it was provided that the appointment 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[8] and control and discipline of these persons shall vest

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[1] See Para 5.8

[2] *Chandra Mohan v. U.P.*, AIR 1966 SC 1987, 1993

[3] Rule 100 of the Rules of Procedure

[4] Rule 53 of the Rules of Procedure

[5] Rule 63 and 133 of the Rules of Procedure

[6] Art.115

[7] Art.116

[8] Amended art.115

in the President.[1] By the Second Proclamation Order no.IV of 1978 it was provided that the President shall exercise control and discipline over the persons in the judicial service and the magistrates exercising judicial functions in consultation with the Supreme Court. By the Fourth Amendment art.116A was inserted providing that subject to the provisions of the Constitution, the judicial officers and magistrates shall be independent in the exercise of their judicial functions. In view of the method of appointment and the control of the executive in respect of their service including the power of posting, promotion and grant of leave, the declaration that persons exercising judicial functions shall be independent is without any substance unless the consultation with the Supreme Court is a meaningful one. In order to give effect to the provision of art.116A, the Appellate Division in *Secretary, Ministry of Finance v. Masdar Hossain*[2] ruled that in any consultation under art.116A, the views and opinion of the Supreme Court shall have primacy and gave further directions to ensure the independence in the functioning of the subordinate judiciary.[3]

1.85A *Access to justice:* Rule of law is meaningless unless there is access to justice for the common people. The courts must be accessible to all if rights are to be enforced. It is not sufficient that there exists a system of independent courts, the cost of having recourse to the courts must be such that there is real access to the courts. There may be a set of laws defining the rights of the people, but if the common people cannot seek enforcement of those rights, those rights merely embellish the papers on which they are described and have no significance in real life. The rich and the powerful can always have their way, it is the poor and the weak who need the support of the law. Having regard to the economic situation of the common people, the cost of litigation in Bangladesh is high and is mounting and most people cannot afford to seek remedies in courts. It is absolutely necessary to undertake a meaningful legal aid scheme to ensure access to justice without which it is idle to talk about rule of law.[4]

SEPARATION OF POWERS

[1] Amended art.116

[2] 2000 BLD (AD) 104

[3] See the discussion on subordinate courts in Para 5.234B-5.234C

[4] See Para 2.111A and Para 2.120

1.86 The powers of the State are generally classified as the legislative power of making rules, the executive power of enforcing those rules and the judicial power of adjudicating disputes by applying those rules. In order to avoid autocratic exercise of powers of the State it is thought that these three powers should be entrusted to three different organs. In practice, however, no water-tight separation of powers is possible or desirable. Even in the United States of America a strict separation of powers is not followed. The prevalent "doctrine of checks and balances requires that after the main exercise has been allocated to one person or body, care should be taken to set up a minor participation of other persons or bodies. Budget and impeachment, judicial review and pardon, are examples of this sort of check".[1]

1.87 The Constitution vests the executive power of the Republic in the executive and the legislative power of the Republic in Parliament. Though there is no specific vesting of the judicial power of the Republic, it is vested in the judiciary.[2] The division of powers is not, however, absolute. The executive can legislate under certain circumstances[3], and, in fact, Parliament cannot make any law relating to the appointment of judicial officers and magistrates exercising judicial functions, which has to be provided for by the President[4]. On the other hand, Parliament can cause a fall of the executive government and impeach the President. Parliamentary Standing Committees can review the enforcement of laws by the Ministries and propose measures for such enforcement and 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 the Ministries.[5] While the judiciary has the legislative power to make certain rules[6], Parliament can adjudicate certain disputes; it has power to enforce its own privileges and to punish those who offend against them. This may in certain situations bring it in conflict with the courts.[7]

1.87A What the Constitution has done can very well be described as

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[1] Carl J. Friedrich - Constitutional Government and Democracy, 4th ed., p.184

[2] *Mujibur Rahman v. Bangladesh*, 44 DLR (AD) 111; M. Kamal J - Bangladesh Constitution: Trends and Issues, p.16

[3] Arts.62(2), 93, 115 and 133

[4] See *Secretary, Ministry of Finance v. Masdar Hossain*, 2000 BLD (AD) 104

[5] Art.76

[6] Arts.107 and 113

[7] See Para 4.92

an assignment or distribution of the powers of the Republic to the three organs of the government and it provides for separation of powers in the sense that no one organ can transgress the limit set by the Constitution or encroach upon the powers assigned to the other organs.[1] The result is that unless the Constitution has expressly provided otherwise, no one organ can wield the powers of the other organs. Thus in the name of interpretation of the Constitution and the laws, the judiciary cannot create a new law or amend an existing law, which will be offensive as a judicial legislation.[2] Nor can the judiciary give direction to Parliament to make laws or to the President to make rules.[3] The Appellate Division held that when there is a constitutional deviation and constitutional arrangements have been interfered with and altered by Parliament by enacting laws and by the government by issuing various orders, the higher judiciary is within its jurisdiction to bring back Parliament and the executive from constitutional derailment and give necessary direction to follow the constitutional course by making or amending laws or rules.[4] It is submitted that when there is a constitutional deviation in legislative measures, the court can declare such legislative measures to be *ultra vires*, but cannot give a direction to repeal or modify it. It may be noted that art.112 stipulates that all authorities, executive and judicial (but not legislative), shall act in aid of the Supreme Court. Parliament may amend a law retrospectively within certain limits so as to destroy the foundation on which a judicial decision is based, but it cannot set aside a judgment of a court or declare it to be invalid as it will be void as legislative judgment.[5] Parliament cannot pass

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[1] Art.7

[2] Though courts cannot make laws, judicial decisions are important source of law. While acknowledging that courts do make laws, Warren CJ of the US Supreme Court stated, "It doesn't make it consciously, it doesn't do it by intending to usurp the role of Congress but because of the very nature of our job. When two litigants come into court, one says the act of Congress means this, the other says the act of Congress means the opposite of that, and we say the act of Congress means something – either one of the two or something in between, We are making law, aren't we?" – quoted from Henry J. Abraham's The Judicial Process, 1993, p.318

[3] *Bangladesh v. Shafiuddin Ahmed*, 50 DLR (AD) 27; *Bangladesh v. Amir Hossain*, 48 DLR (AD) 75 (Government having taken decision to remove anomaly in service, the court can direct the government to implement its decision); see also Para 5.234F and 5.234F

[4] *Secretary, Ministry of Finance v. Masdar Hossain*, 2000 BLD (AD) 104; *Kudrat-e-Elahi v. Bangladesh*, 44 DLR (AD) 319

[5] *Mofizur Rahman v. Bangladesh*, 34 DLR (AD) 321; *Haryana v. KCF Samity Ltd*,

a law creating an offence and holding a person guilty of the offence nor can pass a law giving a decision in a controversy.[1] A "legislative enactment to pass one man's property over to another would nevertheless be void. If the act proceeded upon the assumption that such other person was justly entitled to the estate and therefore it was transferred, it would be void, because judicial in its nature ...".[2] The power of passing a sentence is essentially judicial and cannot be exercised by any executive authority. A law provided for different sentences for the offence of trafficking in certain drugs to be passed by different forums. In one forum death sentence was mandatory and in other forums a sentence of imprisonment of various terms could be passed. The Director of Public Prosecution, who is a member of the executive government, has been given the discretion to select the forum and he selected the forum in which death sentence was mandatory. Determination of sentence is a judicial act. The convict complained of a breach of the separation of powers as the power of selection of the forum gave the Director of Public Prosecution power to determine the sentence. The Privy Council invalidated the law, holding -

> The vice in the present case is that the Director's discretion to prosecute importation with an allegation of trafficking either in a Court which must impose the death penalty on conviction with the requisite finding or in a Court which can only impose a fine and imprisonment enables him in substance to select the penalty to be imposed in a particular case.[3]

SUPREMACY OF THE CONSTITUTION

1.88 Generally, in a written constitution, all laws must conform to the provisions of the constitution. If there be no limitation on the power of the legislature in making law and the provisions of the constitution can be amended following the same procedure by which an ordinary law can be enacted or amended, there is supremacy of the legislature in the sense that the court cannot question the *vires* of the laws passed by the legislature. If a law is passed which is inconsistent with the constitution, the constitution will be held *pro tanto* amended. But if there are

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AIR 1994 SC 1

[1] *Indira Gandhi v. Rajnarayan*, AIR 1975 SC 2299

[2] Cooley - Constitutional Limitations, 1927, p.357

[3] *Ali v. R*, [1992] 2 All E.R. 1, 9

entrenched provisions in the constitution limiting the power of the legislature in the enactment of laws and amendment of the provisions of the constitution requires stricter procedure, there is no supremacy of the legislature; it is the constitution which is supreme and to it all actions of the legislature and executive must conform whether or not it is stated in the constitution. Having regard to the past constitutional developments, the framers of the Constitution thought it necessary and proper not only to declare the supremacy of the Constitution in the preamble, but also to make a substantive provision in the Constitution and thus art.7 declares that all powers in the Republic belong to the people, and their exercise on behalf of the people shall be effected only under, and by the authority of, the Constitution and further that the Constitution, as the solemn expression of the will of the people, is the supreme law of the Republic, and if any other law is inconsistent with 'this Constitution' that other law shall, to the extent of the inconsistency, be void. This one article fully encompasses the law of the Constitution as regards paramountcy.[1] This article explicitly speaks of (a) sovereignty of the people and the republican character of the State and government, (b) supremacy of the Constitution as the solemn expression of the will of the people and (c) voidability of other laws inconsistent with the supreme law, 'this Constitution' and implicit in the article are the concepts of (d) limited government with three organs performing functions by and under the authority of the Constitution, (e) separation of powers between the three co-ordinate organs of the State as a corollary of designated functions and (f) enforceability of the supremacy of the Constitution by the Supreme Court.[2] When art.7 requires that all powers of the Republic shall be exercised by or under the authority of the Constitution, it means that no public functionary can act arbitrarily or unreasonably inasmuch as the Constitution seeking to establish rule of law and arts.27 and 31 requiring all laws and actions to be non-discriminatory and reasonable, an arbitrary or unreasonable law or action cannot be said to be a law or action passed or taken by or under the authority of the Constitution and will come within the mischief of art.7. The Appellate Division has found 'supremacy of the Constitution' to be one of the basic features of the Constitution of Bangladesh[3] and thus the provisions of art.7 are beyond the amending power of Parliament.

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[1] *Md. Shoib v. Bangladesh*, 27 DLR 318

[2] See the Summary of Submissions in *Anwar Hossain Chowdhury v. Bangladesh*, 1989 BLD (Spl) 1, 28.

[3] Ibid, Para 377

1.89 Supremacy of the Constitution means that its mandates shall prevail under all circumstances. As it is the source of legitimacy of all actions, legislative, executive or judicial, no action shall be valid unless it conforms with the Constitution both in letter and in spirit. If any action is actually inconsistent with the provisions of the Constitution, such action shall be void and cannot under any circumstance be ratified by passing a declaratory law in Parliament. If a law is unconstitutional it may be re-enacted removing the inconsistency with the Constitution or re-enacted after amendment of the Constitution. However, supremacy of the Constitution is a basic feature of the Constitution and as such even by an amendment of the Constitution an action in derogation of the supremacy of the Constitution cannot be declared to have been validly taken. Such an amendment is beyond the constituent power of Parliament and must be discarded as a fraud on the Constitution.

1.90 The Constitution is the supreme law and any other law inconsistent with the Constitution will be void. The question arises whether the expression 'other law' includes an amendment of the Constitution. In *Anwar Hossain Chowdhury*[1] it was contended that an amendment of the Constitution is made by Act of Parliament which falls within the definition of law in art.152(1) and is a law within the meaning of 'that other law' in art.7. It was argued that for paramountcy of constitutional provisions over ordinary laws art.7 was not necessary as such paramountcy is invariably implied in all written constitutions as an accepted principle of constitutional jurisprudence, and unless amendment of the Constitution is included in 'that other law' art.7 will be redundant. Three learned Judges refused to hold an amendment to be included in 'that other law' as it is made by a different procedure in exercise of derivative constituent power. For the purpose of interpretation of art.7 this cannot be a relevant factor as art.7 declares the Constitution itself to be a law and an amendment of the Constitution must also be so. It may be seen that the Constitution (Second Amendment) Act, 1973 included new clauses in arts.26 and 142 to take an amendment of the Constitution out of the mischief of art.26, but no such amendment was made in art.7. One of the learned Judges treated this amendment as an action in abundant caution, but when such caution was not taken in respect of art.7 it is reasonable to contend that Parliament did not intend to exclude amendment of the Constitution from the purview of art.7. It is important to note the difference in

[1] Ibid

language in arts.7 and 26. Art.26 uses the expression 'All existing law inconsistent with the provisions of Part III' while art.7 uses the expression 'if any other law is inconsistent with this Constitution'. 'This Constitution' and 'the provisions of the Constitution' do not have the same meaning and purport. 'This Constitution' means whatever the Constitution stands for, or, in other words, includes the manifest spirit and scheme of the Constitution. 'This Constitution' has been used purposefully, because the use of the expression 'the provisions of the Constitution' would bring art.7 in conflict with art.142 as any amendment of the Constitution must be inconsistent with one or the other provision of the Constitution. It is submitted that having regard to (i) the cardinal principle that by construction no words or provisions should be rendered surplusage, (ii) the omission to amend art.7 in the Constitution (Second Amendment) Act, 1973, (iii) the difference in language in arts.7 and 26 and (iv) the definition of 'law' in art.152(1), an amendment of the Constitution is to be treated as 'that other law' within the meaning of art.7 and such an interpretation is in conformity with the basic structure doctrine accepted in *Anwar Hossain Chowdhury*. In a subsequent case M. Kamal J opined that 'that other law' in art.7 includes constitutional amendments.[1]

SUPREMACY OF THE CONSTITUTION AND MARTIAL LAW

1.91 *Martial Law abrogating constitution:* In international law, Martial Law refers to the powers of a military commander in war time in enemy territory. The Duke of Wellington said in the House of Lords that it is neither more nor less than the will of the General who commands the army. This is distinct from Martial Law as a machinery for the enforcement of internal order in times of war or internal disorder. The latter is normally brought in by a proclamation issued under the authority of the civil government in a situation where it becomes impossible for the civil government to function. Such Martial Law is brought in to assist the State in suppressing disorder and does not destroy the civil government or the legal order. What happens if the military commander forcibly takes over the State power and abrogates the constitution? In 1958 persons bound by oath to maintain the supremacy of the constitution imposed martial law and abrogated the Constitution of Pakistan. The Pakistan Supreme Court found this

[1] *Kudrat-E-Elahi v. Bangladesh*, 44 DLR (AD) 319, 346

revolutionary government to be legal, holding -

> It sometimes happens, however, that a Constitution and the national legal order under it is disrupted by an abrupt political change not within the contemplation of the Constitution. Any such change is called a revolution, and its legal effect is not only the destruction of the existing Constitution but also the validity of the national legal order.[1]

In such a situation, the legality of the revolutionary government is not to be judged by reference to the annulled constitution but by the success of the revolution.[2]

1.92 The High Court of Uganda came to the same conclusion when the 1962 Constitution of Uganda was abolished by the National Assembly and the 1966 Constitution adopted in its place, as a result of which the then Prime Minister was installed as Executive President with power to appoint a Vice-President. This, according to the court, was a revolution.[3]

1.93 When the Prime Minister of Rhodesia made a unilateral declaration of independence, the question of legality of revolutionary government came up for consideration by the Privy Council in the case of *Madzimbamuto v. Lardner-Burke*[4]. The appellant challenged her husband's detention without trial by the rebel government. Referring to *Dosso* and *Matuvo* Lord Reid, delivering the majority judgment, observed, "Their Lordships would not accept all the reasoning in these judgments but they see no reason to disagree with the results." Then referring to the finding in those two cases that the usurpers effectively entrenched themselves and had no rivals, his Lordship observed -

> It would be very different if there had been still two rivals contending for power. If the legitimate government had been driven out but was trying to regain control it would be impossible to hold that the usurper who is in control is the lawful ruler, because that would mean that by striving to assert its lawful right the ousted legitimate government was opposing the lawful ruler.
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> In their lordships' judgment that is the present position in Southern Rhodesia. The British government acting for the lawful Sovereign is

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[1] *State v. Dosso*, 11 DLR (SC) 1
[2] See Para 1.16
[3] *Uganda v. Commr. of Prisons, Ex p. Matuvo*, [1966] E.A. 514
[4] [1968] 3 All E.R. 561

> taking steps to regain control and it is impossible to predict with certainty whether or not it will succeed ... their lordships are therefore of opinion that the usurping government now in control of Southern Rhodesia cannot be regarded as a lawful government.
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> **** ****
>
> Their lordships are satisfied that it cannot be held to enact a general rule that a usurping government in control must be regarded as a lawful government.

Lord Pearce agreed with the majority regarding the application of the principle of revolutionary legality, but differed with the opinion of Lord Reid that in the facts of the case the principle of necessity could not be applied to find valid the detention of the husband of the appellant. It clearly appears that the Privy Council was ready to apply the principle of revolutionary legality only in a situation where the usurper had taken full control and had been accepted by the people and there was no one who was opposing the usurper in his claim of right to govern the country, but refused to legitimise the usurper in that case as it thought the restoration of the violated constitutional order to be possible because of the pressure applied by the British Government. If the Privy Council, on the facts of the case, had found otherwise, the Privy Council would have approved the actions of the usurper government.[1]

1.94 The question of revolutionary legality again came up before the Pakistan Supreme Court in *Asma Jilani v. Punjab*[2]. The court found Yahya Khan to be an usurper, overruled *Dosso* and observed -

> We must distinguish clearly between Martial Law as a machinery for the enforcement of internal order and Martial Law as a system of military rule of a conquered or invaded alien territory. Martial Law of the first category is normally brought in by a proclamation issued under the authority of the civil government and it can displace the civil government only where a situation has arisen in which it has become impossible for the civil Courts and other civil authorities to function. The imposition of Martial Law does not of its own force require the closing of the civil Courts or the abrogation of the authority of the civil government. The maxim *inter armes leges silent* applies in the municipal field only where a situation has arisen in which it has become

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[1] see Oxford Essays in Jurisprudence, 2nd series (ed. A.W.B. Simpson) p.23
[2] PLD 1972 SC 139

> impossible for the Courts to function, for, on the other hand, it is an equally well established principle that where the civil Courts are sitting and the civil authorities are functioning the establishment of Martial Law cannot be justified. The validity of Martial Law is, in this sense, always a judicial question, for, the Courts have always claimed and have in fact exercised the right to say whether the necessity for the imposition of Martial Law in this limited common law sense existed.[1]
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> From the examination of the various authorities on the subject one is driven to the conclusion that the Proclamation of Martial Law does not by itself involve the abrogation of the civil law and the functioning of the civil authorities and certainly does not vest the commander and the Armed Forces with the power of abrogating the fundamental law of the country. It would be paradoxical indeed if such a result could flow from the invocation in the aid of a State of an agency set up and maintained by the State itself for its own protection from external invasion and internal disorder. If the argument is valid that the Proclamation of the Martial Law by itself leads to the complete destruction of the legal order, then the Armed Forces do not assist the State in suppressing disorder but actually create further disorder, by disrupting the entire legal order of the State. It is, therefore, not correct to say that the Proclamation of Martial Law by itself must necessarily give the commander of the Armed Forces the power to abrogate the Constitution, which he is bound by his oath to defend.[2]

This decision was delivered one day before Martial Law was withdrawn and Z.A. Bhutto, who was holding the rein, was interested in having Yahya Khan declared as a usurper. Furthermore, Pakistan till then claiming East Pakistan as an integral part of Pakistan, it was necessary to overrule *Dosso*. Notwithstanding the political overtone of the decision, it must be said that the usurper not being in control, jurisprudentially, the decision in *Asma Jilani* is correct. It was possible for the court to give the decision as the usurper was not holding power, but a practical difficulty remains when the usurper is running the show. Even if the court refuses to recognise the usurper and declare his actions to be without lawful authority, there is no one to give effect to the decision. This may merely increase the difficulty of the people because of the confusion as to whether to obey the dictate of the usurper or the decision of the court. In this situation, the judge is also in a dilemma, whether to

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[1] ibid, p.187
[2] ibid, p.190.

accept the revolutionary regime contrary to his oath or to resign from office. Judges often reason that resignation would not advance the cause, rather it may be helpful to hold on and wait for the appropriate time to decide the issue of legality.[1] Some writers are of the opinion that finding the rebel government illegal would not in most cases deter the usurper from continuing and he could not be held to be a usurper for all times.[2] But there are others who hold the view that the court should not so readily find legitimacy for the usurper and should explore other possibilities for restoration of the constitutional order as the possibility of the usurper yielding to the verdict of the court cannot be so easily ruled out.[3] It cannot, however, be gainsaid that when a revolutionary regime deeply entrenches itself and is accepted by the State functionaries and the people and the old legal order is dead as it happened in East Pakistan in 1971, there cannot be any conclusion other than that the revolutionary regime is to be given legal recognition for peace and order in the country.

1.95 *Martial Law without abrogating constitution:* In March, 1977 the Peoples Party won the majority in the general election held in

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[1] See the comments of M.H. Rahman J in his article, The Role of Judiciary in Developing Societies, Law and International Affairs, vol.11, Nos.1 & 2 of 1988, p.1, at p.5 ("In that unenviable condition the primary role of a judge will be, if he does not decide to leave post, to hold on. If he fails to roar like a lion it is understandable. If he keeps a glum face and gives a withering look then that will be a good work. For the time being the worthwhile role for him will be to do justice between a citizen and a citizen, so that a foundation may be laid for the future when a citizen will be able to expect justice against the mighty and overbearing as well."); *Anwar Hossain Chowdhury v. Bangladesh*, 1989 BLD (Spl) 1, Para 488

[2] see Dieter Conrad's article in Orient, 1983; M. Kamal J - Bangladesh Constitution: Trends and Issues, p.61 ("Resignation of Judges in revolutionary situations has not been uncommon, but except for the ripple that it causes in the body politic neither the Judges by resignation *en masse* or in ones or twos have been able to deflect the revolutionary regime from following the course of action it chose to pursue nor have the people at large carried the mantle from the Judges to overthrow the extra-constitutional force. On the other hand when Judges resigned in protest against an unconstitutional takeover or when Judges were removed because of obstruction to the wishes of the new authority, their successors on the Bench merely conformed to the wishes of the new regime and often they were also of so low calibre that justice was no longer administered properly. On the other side it may perhaps be rightly argued that the continuance in office of the Judges gives the new regime a semblance of legitimacy.")

[3] Oxford Essays in Jurisprudence, 2nd series, p.41-42

Pakistan. The opposition parties alleged massive rigging in the election. There was passionate street agitation and disturbance resulting in the loss of lives. Inter-party negotiations failed on the issue of an interim authority with adequate powers to supervise fresh election. There was a general crisis of confidence in the government formed by Bhutto. In this background, the Commander-in-Chief of the Army took over power and proclaimed Martial Law. In a case brought by Mrs. Bhutto[1] the respondents took the stand that the constitution was not abrogated; the elected President continued in office; the Chief Justice was giving advice and guidance in legal matters and the sole aim of taking over power was to organise a free and fair election. The Pakistan Supreme Court found as a matter of fact that the government of Bhutto had lost its constitutional authority to rule the country and there was a constitutional deadlock. The court held that the situation was different from the situation obtaining in *Dosso* and *Asma Jilani* where the constitutions were abrogated; the Chief of Army Staff took over temporarily to hold a free and fair election and it was a mere constitutional deviation rather than usurpation as was the case in *Reference by President of Pakistan*[2]. The court applied the principle of State necessity to hold that the taking over of power by the Chief of Army Staff was valid and legal.[3] The Pakistan Supreme Court took somewhat similar view about the Army take-over by General Parvez Mosharraf in October, 1999 proclaiming Provisional Constitution Order and putting the Constitution of 1973 in abeyance; the court pronounced validity of the "extra-constitutional take-over" on the ground of State necessity and conceded to the usurper the power to amend the constitution in *Zafar Ali Shah v. General Parvez Mosharraf*.[4]

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[1] *Begum Nusrat Bhutto v. Chief of Army Staff*, PLD 1977 SC 657

[2] 9 DLR (SC) 178

[3] For re-appraisal of *Begum Nusrat Bhutto*, see *M.K. Achakzai v. Pakistan*, PLD 1997 SC 426 and *Zafar Ali Shah v. General Parvez Mosharraf*, PLD 2000 SC 869

[4] PLD 2000 SC 869 (The court noted, "An overall view of the whole spectrum of circumstances prevalent on or before 12th October, 1999 reveals that the representatives of the people who were responsible for running the affairs of the State were accused of corruption and corrupt practices and failed to establish good governance in the country as a result whereof a large number of references have been filed against the former Prime Minister, Ministers, Parliamentarians and members of the Provincial Assemblies for their disqualification on account thereof. The process of accountability carried out by the former Government was shady, inasmuch as, either it was directed against the political rivals or it was not being pursued with due diligence. We have also noted with concern that all institutions of the State including Judiciary were being systematically

1.96 *Principle of necessity:* We have seen that unconstitutional acts were found legal on application of the principle of necessity. The principle, in its application to constitutional law, means that acts which are otherwise illegal or not permitted by the constitution are to be held legal if done *bona fide* under the stress of necessity with the intention to preserve the constitution, the State or the society.[1] In *Reference by Governor General*[2] Munir CJ after quoting from the statement of Lord Mansfield in *R. v. Stratton*[3] observed -

> The principle clearly emerging from this address of Lord Mansfield is that subject to the condition of absoluteness, extremeness and imminence, an act which would otherwise be illegal becomes legal if it is done bona fide under the stress of necessity, the necessity being referable to an intention to preserve the constitution, the State or the Society and to prevent it from dissolution, and affirms Chitty's statement that the necessity knows no law and the maxim cited by Bracton that necessity makes lawful which otherwise is not lawful. Since the address expressly refers to the right of a private person to act in necessity, in the case of Head of the State justification to act must *a fortiori* be clearer and more imperative.

In the case of *Madzimbamuto*[4] Lord Pearce in his dissenting judgment applied the principle of implied mandate to find the detention of the husband of the appellant by the rebel government valid even though he agreed with the majority that the government of Ian Smith was an unlawful government. Lord Pearce quoted from Grotius, a part of which is reproduced below -

> Now while such a usurper is in possession, the acts of government which he performs may have a binding force, arising not from a right possessed by him, for no such right exists, but from the fact that one to whom the sovereignty actually belongs, whether people, king, or senate, would prefer the measures promulgated by him should meanwhile have the force of law, in order to avoid the utter confusion which would result

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destroyed in the pursuit of self-serving policies. We uphold the plea raised on behalf of the Federation that the democratic institutions were not functioning in accordance with the Constitution, they had become privy to the one man rule and the very purposes for which they were established stood defeated by their passive conduct." – p.1207)

[1] See Para 3.17A

[2] 7 DLR (FC) 395

[3] (1779) 21 St. Tr. 1045

[4] [1968] 3 All E.R. 561

from the subversion of laws and suppression of the Courts.[1]

Lord Pearce termed it as an implied mandate from the lawful sovereign. He cited several decisions from the American, Pakistani and Cypriot jurisdictions[2] to apply the principle of implied mandate in the case. The doctrine of necessity was again applied by the Pakistan Supreme Court in *Asma Jilani, Begum Nusrat Bhutto* and *Zafar Ali Shah.* Dealing with the principle, S.A. de Smith observed -

> In some situations where unconstitutional action has been taken by persons wielding effective political power, it is open to a judge to steer a middle course. He may find it possible to assert that the framework of the pre-existing order still survives, but that deviation from its norms can be justified on grounds of necessity. The principle of necessity, rendering lawful what would otherwise be unlawful, is not unknown to English law; there is a defence of necessity (albeit of uncertain scope) in criminal law, and in constitutional law the application of martial law is but an extended application of this concept. *But the necessity must be proportionate to the evil to be averted, and acceptance of the principle does not normally imply total abdication from judicial review or acquiescence in the supersession of the legal order; it is certainly a transient phenomenon.*[3] (italics supplied)

1.97 What acts of the usurper can be validated by the application of the principle of necessity? Lord Pearce was of the view that such unconstitutional acts can be validated (a) so far as they are directed to and reasonably required for the ordinary orderly running of the State, (b) so far as they do not impair the rights of citizens under the lawful constitution and (c) so far as they are not intended to and do not in fact directly help the usurpation and do not run contrary to the policy of the lawful sovereign.[4] Hamoodur Rahman CJ preferred to call it a principle

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[1] A somewhat similar view was expressed by the Supreme Court of Pakistan in *M.K. Achakzai v. Pakistan*, PLD 1997 SC 426 (517). The court observed that *bona fide* acts in public interest performed by persons assuming authority which turns out to be illegal , are to be assumed to have been performed by a *de jure* authority to avoid dislocation, instability and confusion, while declaring the *de facto* authority illegal.

[2] *Texas v. White*, 19 L. Ed 227; *Horn v. Lockhart*, 21 L.Ed. 657; *Hanauer v. Woodruff*, (1872) 17 Wallace 570; *Baldy v. Hunter*, 171 US 388; *Reference by Governor General*, 7 DLR (FC) 395; *A.G. v. Mustafa Ibrahim*, 19 CLR 195

[3] Constitutional and Administrative Law, 4th Ed., p.78; Pakistan Supreme Court emphatically held against ouster of jurisdiction in *Zafar Ali Shah v. General Pervez Mosharraf*, PLD 2000 SC 869, 1123

[4] *Madzimbamuto v. Lardner-Burke*, [1968] 3 All E.R. 561, 579

of condonation rather than a principle of necessity (where the constitution is sought to be abrogated) and he would condone (1) all transactions past and closed, (2) all acts and legislative measures which are in accordance with, or could have been made, under the abrogated constitution or the previous legal order, (3) all acts which tend to advance or promote the good of the people, and (4) all acts required to be done for the ordinary orderly running of the State, but not any act intended to entrench the usurper more firmly in his power or to directly help him run the country contrary to its legitimate objective.[1] It can be seen that Hamoodur Rahman CJ was expanding the scope of the principle beyond what was proportionate to the necessity. His items (2) and (3) are additions to what Lord Pearce considered to be permissible. Certainly it is dangerous to give the usurper such a long rope which would enable him to further entrench himself as it actually happened in Pakistan after the Pakistan Supreme Court held the 'constitutional deviation' by Ziaul Haq valid by application of the principle of necessity. It seems that Hamoodur Rahman CJ was expanding the scope of the principle to validate the holding of power by Bhutto who was in control of the government. There is no forensic reason to go beyond what Lord Pearce considered valid on the application of the principle.[2]

1.98 Whatever view may be taken about the scope of the principle of necessity, the tests laid down by the courts are easier stated than applied. Referring to the Rhodesian case, it was observed -

> The tests laid down by the Court were obviously difficult ones to apply. The regulations, for example, of the armed forces was, in a sense, something which was within the powers of previous legitimate governments. But the maintenance of discipline in the armed forces and the orders issued to them were equally clearly connected with the purpose of maintaining the government in possession. What, after all, was the order preserved by the government for? Any stability or order preserved by a rebellious government is preserved in some measure against those who might otherwise bring about its fall or the restoration of lawful authority.[3]

This observation underscores the danger of expanding the scope of the principle of necessity. The events following the decision in *Begum*

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[1] PLD 1972 SC 139, 207

[2] For an elaborate discussion on the doctrine of State necessity, see *Zafar Ali Shah v. General Pervez Mosharraf*, PLD 2000 SC 869

[3] Geoffrey Marshall - Constitutional Theory, 1971, p.68

Nusrat Bhutto clearly showed how validation of unconstitutional acts by the court deeply entrenched the usurper in power and yet the Pakistan Supreme Court conceded to the usurper the power of amendment of the constitution in *Zafar Ali Shah.*

1.99 *Bangladesh situation:* The factual position in Bangladesh was different from the situation obtaining in *Dosso* and *Asma Jilani*; rather it had some similarity with the fact pattern of *Begum Nusrat Bhutto* and *Zafar Ali Shah* . In 1975 the usurper did not abrogate the Constitution, but allowed the Constitution to operate subject to the Proclamation and Martial Law Regulations and Orders and shortly thereafter by another Proclamation set a time limit for holding election for full restoration of the disturbed constitutional order. It could not be said that the legal order established by the Constitution was dead. Dieter Conrad in his article[1] made a distinction between the two types of usurpation -

> Briefly, the typical two situations and their essential differences may be described thus: one, where the revolutionary power attempts to change the basic constitutional structure and to introduce a new order; the other, where extra-constitutional action is but taken in order to defend and eventually restore the existing constitution. These two types of extra-constitutional action may conveniently be characterised by drawing on a distinction from German doctrinal discussion, namely of commissarial and sovereign dictatorship ... The difference is that the commissarial dictator is ultimately bound to, though not presently restricted by, the existing constitution, while the sovereign dictator justifying his actions from the future order is not measured by any precise constitutional yardstick (though by the requirements of either a mandate or a final ratification) and usually reserves power to judge on the appropriate time required.

The question of the application of the principle of revolutionary legality arises in the case of a sovereign dictatorship; if the regime is found to be legal because of the effective control of the sovereign dictator and the death of the old legal order, that is the end of the matter. The declaration of independence of East Pakistan was an act of rebellion so far as the constitutional and legal order of Pakistan was concerned, but the destruction of that legal order in East Pakistan was so complete and the acceptance of the new legal order was so indisputable that there could not be any doubt about the lawful right of the emerging Government of

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[1] see f.n. of Para 1.16

Bangladesh to govern the territory. If the court finds that the taking over of power in a manner not contemplated by the constitution was illegal and cannot be legitimised by application of the principle of revolutionary legality, the question would then arise as to whether, and which of, the acts of the sovereign dictator will have to be found legal on application of the principle of necessity.[1] In the case of commissarial dictatorship there is no claim of death of the old legal order and as such the question of application of the principle of revolutionary legality does not arise. It is straightaway a question of the application of the principle of necessity to legalise the actions of the usurper, which the court considers to be a temporary constitutional deviation rather than usurpation, till the constitutional order is restored.

1.100 Thus in the situation obtaining in Bangladesh, the courts were not required to decide on the application of the principle of revolutionary legality. In *Halima Khatun v. Bangladesh*[2] the petitioner filed a writ petition challenging an order of the government treating certain property as abandoned property. The writ petition was dismissed on the ground that the petition involved disputed questions of fact. The petitioner filed a leave petition , but before the petition could be heard, Martial Law Order No. VII of 1977 was promulgated abating the pending proceedings relating to properties treated as abandoned properties by the government. At the hearing, a preliminary objection was raised that in view of the Martial Law Order the leave petition abated. From the petitioner's side it was pointed out that the Constitution has not been abrogated and as such a Martial Law Order cannot be passed ousting the constitutional jurisdiction of the Supreme Court and furthermore the Proclamation under the authority of which the Martial Law Order was passed could not and, in fact, did not oust the constitutional jurisdiction of the Supreme Court. The Appellate Division, while dismissing the leave petition, did not take into consideration the fact that the *Dosso* situation did not prevail in the present case and that the Constitution having not been abrogated the question of a new legal order replacing the existing legal order could not arise. If the Constitution is allowed to operate and the court is operating under the Constitution, there is no principle of law except the principle of State necessity which can be resorted to find the action of the usurper

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[1] *Asma Jilani v. Punjab*, PLD 1972 SC 139, 207; *Begum Nusrat Bhutto v. Chief of Army Staff*, PLD 1977 SC 657

[2] 30 DLR (AD) 207

justified and legal. But the principle of necessity, even if applicable, cannot normally extend to the ouster of the court's jurisdiction.[1] Such ouster of the court's jurisdiction does not really pass the tests of State necessity laid down by the courts[2] and the superior courts continue to have the power of judicial review to judge the validity of any act or action of the Armed Forces, if challenged, in the light of the principles underlying the law of State necessity.[3] It may be argued that without going into the legal issues the Appellate Division should not have accepted the position, as a matter of law, that when any person takes over power in a manner not contemplated by the Constitution and proclaims that the Constitution will be subordinate to his proclamations, the Constitution is relegated from its position as the supreme law and is to operate subject to the proclamations and orders passed by the usurper. In *Joynal Abedin v. Bangladesh*[4] a conviction by a Martial Law Court was challenged in writ jurisdiction and the point was squarely raised that the proclamation of Martial Law cannot take away the constitutional jurisdiction of the Supreme Court when the Constitution remains operative. The High Court Division noted the fact that the Constitution was not abrogated and was allowed to operate, though subordinate to the Martial Law Proclamations, Regulations and Orders, and found that the instant Martial Law was merely a constitutional deviation and not one of Wellingtonian style[5] and notwithstanding the provisions of the Proclamation and Martial Law Regulations, the jurisdiction of the Supreme Court in respect of Martial Law Courts was not ousted. On appeal, the Appellate Division by a majority decision, reversed the High Court Division's judgment without making any inquiry into the legal status of the Martial Law and simply holding, "The moment the country is put under Martial Law, the above noted constitutional provision along with other civil laws of the country loses its superior position."[6] In the subsequent case of *Khandker Ehteshamuddin v. Bangladesh*[7] the

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[1] see S.A. de Smith - Constitutional and Administrative Law, 4th Ed., p.78

[2] *Begum Nusrat Bhutto v. Chief of Army Staff*, PLD 1977 SC 657

[3] *Zafar Ali Shah v. General Pervez Mosharraf*, PLD 2000 SC 869, 1123-24 (On no principle of necessity could powers of judicial review vested in the Superior Courts under 1973 Constitution be taken away); see also *Wasim Sajjad v. Pakistan*, PLD 2001 SC 233

[4] 30 DLR 371

[5] Para 1.91

[6] *State v. Joynal Abedin*, 32 DLR (AD) 110, 123

[7] 1981 BLD(AD) 107 = 33 DLR (AD) 154

Appellate Division following *Halima Khatun* and *Joynal Abedin* held, "It is true that Article 7(2) declares the Constitution as the supreme law of the Republic and if any law is inconsistent with the Constitution that other law shall, to the extent of the inconsistency, be void, but the supremacy of the Constitution cannot by any means compare with the Proclamation issued by the Chief Martial Law Administrator." It appears that the court could not come out of the influence of the holding in *Dosso* even though the situation in that case was different from the situation in *Dosso*. The Appellate Division referred to the decision in *Asma Jilani v. Punjab*[1], *State v. Zia-ur Rahman*[2] and *Pakistan v. Saeed Ahmed*[3] but the important decision of the Pakistan Supreme Court in *Begum Nusraat Bhutto v. Chief of Army Staff* does not appear to have been cited from the Bar.

1.101 Martial Law was imposed in Bangladesh for the second time in 1982. This time the Constitution was suspended. The usurper did not abrogate the Constitution and did not evince any intention to create a new legal order. All throughout the period during which the usurper remained in power there was popular movement against the regime. The usurper sat in dialogue with various political parties disclosing his intention to restore the suspended Constitution. By the *Madzimbamuto* standard, the taking over of the power could not be legalised by application of the principle of revolutionary legality. He could not be treated as a sovereign dictator, having expressed an intention to restore the suspended Constitution and, in fact, having restored it and it was merely a question of the application of the principle of necessity. In *Bangladesh v. Md. Salimullah*[4] the question arose whether the proceedings in writ jurisdiction abated as a result of the suspension of the Constitution and the Proclamation of 24 March 1982. The Appellate Division referring to *Dosso* and *East Pakistan v. Mehdi Ali Khan Panni*[5] answered the question in the affirmative. The court held that where leave petitions or appeals against decision of the High Court Division were pending before the Appellate Division, not only the proceeding before the Appellate Division but also the proceeding concluded in the High Court Division abated on the principle that an appeal is a

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[1] PLD 1972 SC 139
[2] PLD 1973 SC 49
[3] PLD 1974 SC 151
[4] 1983 BLD (AD) 10 = 35 DLR(AD) 1
[5] 11 DLR (SC) 318

continuation of the suit. It is submitted that abatement of an appeal does not have the effect of abatement of the suit and if the analogy of suit is brought in, the result should be otherwise. From the judgment it does not appear that any argument was advanced from the Bar that this was a case where the question of application of the principle of revolutionary legality could not arise and the principle of necessity which alone could justify the action of the usurper does not normally permit ouster of the court's jurisdiction.

1.102 *Effect of Martial Law after its withdrawal:* Irrespective of the question of validity of the actions of the usurper during the continuance of Martial Law, it must be accepted that once Martial Law is lifted and the Constitution holds the field exclusively, such extra-constitutional acts cannot have any force and effect except for matters past and closed and by no logic can Martial Law Proclamations, Regulations and Orders have any further force or effect. In *Monoranjan Mukherjee v. Election Commissioner*[1] the question arose whether, after lifting of Martial Law, a person convicted by a Martial Law Court is disqualified from holding an elective office under the Local Government (Union Parishad) Ordinance, 1983. The High Court Division observed -

> The ordinary laws of the country cannot ever contemplate or visualize extra-constitutional offences tried by extra-constitutional Courts or Tribunals in an extra-constitutional dispensation. Nor is there any constitutional mandate to read Martial Law offences and Martial Law Courts whenever there is any reference to criminal offences and conviction in any general law of the land. It is well-settled that Martial Law is not a part of the constitutional scheme of this country. It is a temporary measure, a short-term arrangement. It meets only an interim need. When it leaves, it usually legalises all past actions for purposes of immunity, with the tacit acknowledgement that its interference with the constitutional process is an aberration and needs to be condoned. But while leaving, the Martial Law does not leave any trail of disqualification. It is good as long as it lasts, but with its departure it no longer casts a shadow upon the ordinary laws of the land.

The question in this case was whether a conviction by a Martial Law Court is a criminal conviction within the meaning of the Ordinance to attract the disqualification. The High Court Division rightly took the view that the Ordinance contemplated a criminal conviction by an

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[1] 41 DLR 484

ordinary criminal court under the ordinary law of the land and not a conviction by a Martial Law Court under Martial Law Regulations or Orders. It should, however, be noticed that the Fifth and Seventh Amendments of the Constitution by way of inclusion of Paragraphs 18 and 19 in the Fourth Schedule of the Constitution, ratified the Proclamations, Proclamation Orders, Martial Law Regulations and Martial Law Orders and all actions taken under them were imparted validity. The provisions of the General Clauses Act were made applicable to the Proclamations, Martial Law Regulations and Martial Law Orders as if those were Acts of Parliament. Whether these amendments of the Constitution are at all valid is a different question and will be discussed later.[1] Proceeding on the assumption that those amendments are valid, the consequence was that the repeal of Martial Law Regulations and Martial Law Orders attracted the provisions of s.6 of the General Clauses Act[2]. In *Bangladesh v. Mahbubur Rashid*[3] the Appellate Division held valid an order of review under Martial Law Regulations passed after the lifting of Martial Law. The court did not refer to s.6, but it was apparent that the court was proceeding on the premise that the power of review of the government continued by virtue of s.6 notwithstanding the repeal of Martial Law Regulations by the Proclamation withdrawing the Martial Law. In *Mahtabuddin v. Principal Secretary, President's Secretariat*[4] the petitioner's review petition against the order of his removal from service was pending when martial law was withdrawn and the High Court Division issued a *mandamus* for disposal of the review application. Naimuddin Ahmed J made specific reference to the provisions of s.6 to come to the finding that the repeal of the Martial Law Order did not affect the review proceeding. On appeal the Appellate Division approved the reasoning of Naimuddin Ahmed J.[5]

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[1] see Para 4.69

[2] *Nasrin Kader Siddiqui v. Bangladesh*, 44 DLR (AD) 16, Para 71 & 72 (Martial law goes but its actions are ratified and the remnants of martial law are grafted into the constitutional system. Therefore the Proclamation of Martial Law, Martial Law offences and Martial Law courts die a natural death when the martial law is revoked but its legacies and fall outs continue to the extent and in the manner expressly provided by the saving clauses repealing Martial Law Regulations and Orders. - per M. Kamal J)

[3] 1981 BLD (AD) 300

[4] 42 DLR 1

[5] *Principal Secretary, President's Secretariat v. Mahtabuddin*, 42 DLR (AD) 214; *S.M. Wadud v. Principal Secretary, President's Secretariat*, 46 DLR 251; see also *Lutfur*

1.103 Paragraphs 3A(6) and 19(8) of the Fourth Schedule of the Constitution provide that the revocation of Martial Law Proclamations and withdrawal of the martial law shall not revive or restore any right or privilege which was not existing at the time of such revocation and withdrawal. With the imposition of Martial Law in 1982, the pending writ petitions were abated. After withdrawal of Martial Law, the petitioner of one such abated writ petition filed a fresh writ petition which was summarily dismissed by the High Court Division upon a view that at the time of withdrawal of the Martial Law there was no right to invoke writ jurisdiction under art.102 and that right has not been revived or restored. On appeal, the Appellate Division reversed the decision[1] and pointed out that the cause of action (or the right for the enforcement of which the earlier writ petition was filed) did not cease to exist; only the remedy was barred by the Martial Law Proclamation and with the withdrawal of the Martial Law, the bar to the remedy was removed and the writ petition on the same cause of action was maintainable. In *Shahida Mohiuddin v. Bangladesh*[2], the prosecution of the killers of Sheikh Mujibur Rahman was challenged on the ground that at the time of withdrawal of the Martial Law of 1975 the right to prosecute the killers was not in existence because of the provisions of the Indemnity Ordinance, 1975 and in view of paragraph 3A(6) of the Fourth Schedule the prosecution was without lawful authority. In view of the decision of the Appellate Division in *Anwaruddin*, the challenge should fail inasmuch as the Indemnity Ordinance did not exonerate the liability of murder, but merely sought to prevent the prosecution and with the repeal of that Ordinance, there is no bar to the prosecution. Read in proper context, paragraphs 3A(6) and 19(8) refer to, and apply in respect of, the rights and privileges destroyed or affected by the Martial Law Proclamation and not by ordinary laws. The High Court Division, though *prima facie* disagreed with the contention of the petitioner, dismissed the writ petition on the ground that a writ in the nature of *certiorari* would not lie in respect of a proceeding which is pending before the criminal Bench of the High Court Division and left the question of validity of the prosecution open to be raised in the

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Rahman v. Div. Mechanical Engr., 51 DLR 133

[1] *Anwaruddin v. Asstt. Commissioner*, 1 BLC (AD) 164

[2] W.P. no.530 of 2001 (Unreported)

pending death reference case. Subsequently, the learned Judge hearing the death reference rejected the contention that the prosecution was without lawful authority.[1]

[1] *State v. Lt. Col. Farook Rahman & others*, 53 DLR 287

CHAPTER TWO

FUNDAMENTAL RIGHTS

2.1 Part III of the Constitution enumerates a host of rights called fundamental rights. In 1650, Grotius, the Dutch political thinker, propounded a theory that when a sovereign of a State infringes the basic human rights of his subjects, it becomes an international question and the sovereign forfeits his right to rule under the law of nations and other nations may be justified in intervening. Though the theory had no immediate impact, it drew the attention of the contemporary political thinkers and by the next century it was being considered that every man has certain natural and inalienable rights necessary for the development of his personality which should be inviolable. The American Constitution adopted in 1787 did not guarantee the enjoyment of any such right. The reaction that followed led to the inclusion of a Bill of Rights in 1789 in the form of ten amendments. More than a century thereafter, the American Supreme Court observed, "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and of officials and to establish them as legal principles to be applied by courts."[1] The Second World War saw the worst trampling of the basic rights of men. In 1948 the United Nations General Assembly adopted the Universal Declaration of Human Rights[2]. The European Convention for the Protection of Human Rights and Fundamental Freedoms was signed in 1950. The importance of fundamental rights in the third world countries, where the democratic tradition has yet to take root, cannot be over-emphasised. Majority rule is accepted because there is no better alternative to it. But there are certain aspects of the liberty of individuals which must be kept beyond the political decision of persons having majority support for the time being. Even in Britain where common law recognised many of the rights mentioned in the Universal Declaration of Human Rights, Parliament's competence to pass laws in derogation of these rights led to the comment that "Civil liberties in Britain are extremely precarious *legal* concepts. They may enjoy a more assured *conventional* status, insofar as the courts, the executive and the

[1] *West Virginia State Bd. of Edn v. Barnette*, 319 US 624, 638

[2] Appendix E

legislature may fear the political or moral consequences of undermining them; but ... conventional understandings about constitutional morality may themselves be nebulous creatures".[1] Speaking about the utility of incorporation of fundamental rights in the constitution, Lord Scarman observed –

> Without a Bill of Rights protected from repeal, amendment, or suspension by the ordinary process of a bare Parliamentary majority controlled by the government of the day, human rights will be at risk.[2]

The necessity of a Bill of Rights may well be demonstrated by citing two English decisions. In *Entick v. Carrington*[3] the warrant issued by the Secretary of State for search and seizure of seditious materials in the house of Entick was found illegal for want of any legal authority, while in *Malone v. Metropolitan Police Commissioner*[4] the practice of telephone tapping by the executive without any clear lawful authority was upheld on the ground that Malone could not point to any legal right of his which the government was under duty not to infringe. The European Convention of Human Rights was ratified by the United Kingdom in 1951, but the British courts regarded the Convention as an aid to interpretation, but had no jurisdiction directly to enforce the rights and freedoms under the Convention.[5] However, the position is now different with the passing of the Human Rights Act, 1998.

2.1A When the framers of our Constitution were considering the question of incorporation of a Bill of Rights, they had before them the experience of different States in the working of such Bill of Rights. The framers of the Constitution were particularly impressed with the formulation of the basic rights in the Universal Declaration of Human Rights. If we make a comparison of Part III of the Constitution with the Universal Declaration of Human Rights, we shall find that most of the rights enumerated in the Declaration have found place in some form or other in Part III of the Constitution and some have been recognised in Part II. The Declaration was followed by two Covenants – Covenant on Civil and Political Rights and Covenant on Economic, Social and Cultural Rights – adopted by the United Nations General Assembly in

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[1] Ian Loveland - Constitutional Law, 1996, p.560; see also H.W.R. Wade – Administrative Law, 6th ed. p.30

[4] English Law - The New Dimension, p.69

[3] (1765) 19 St Tr 1030

[4] [1979] Ch 344

[5] *Waddington v. Miah*, [1974] 2 All E.R. 377

December, 1966. Our courts will not enforce those Covenants as treaties and conventions, even if ratified by the State, are not part of the *corpus juris* of the State unless these are incorporated in the municipal legislation. However, the court can look into these conventions and covenants as an aid to interpretation of the provisions of Part III, particularly to determine the rights implicit in the rights like the right to life and the right to liberty, but not enumerated in the Constitution.[1]

2.1B In recent times we have been talking about human rights and pondering over the means and method of ensuring it. It may be kept in mind that a large segment of our citizenry live in utter poverty and they not only do not have access to the courts to vindicate the rights the Constitution has given them, they are, in fact, not aware that they are entitled to those rights. To talk about their rights in posh hotels and in big seminars is something which does not really help the poor people. It is only by adopting a viable legal aid scheme[2] and pursuing it that we can make the catalogue of rights in the Constitution meaningful for the economically backward section of our citizenry. We have just to remind us that keeping in mind the question of access to justice, the framers of the Constitution have made provision in art.44 for courts other than the High Court Division for enforcement of fundamental rights and Parliament may pass necessary law to enable the poor people seek enforcement of the rights the Constitution has given them.

2.2 *The rights not to be absolute:* Fundamental rights, if granted without any qualification or limitation, may be harmful as absolutely free exercise of such rights by one may be destructive of similar rights of others[3] and such fundamental rights would be a hindrance to governmental measures for the welfare of the community. The First Amendment rights of the American Constitution were granted without

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[1] Ibid, 379 ; *H.M. Ershad v. Bangladesh*, 2001 BLD (AD) 69, 70 (The national courts should not ... straightway ignore the international obligations which a country undertakes. If the domestic laws are not clear enough or there is nothing therein the national courts should draw upon the principles incorporated in the international instruments.); *Apparel Export Promotion Council v. Chopra*, AIR 1999 SC 625, 634 (In cases involving violation of human rights, the courts must for ever remain alive to the international instruments and conventions and apply the same to a given case when there is no inconsistency between the international norms and the domestic law occupying the field.}

[2] Parliament passed the Legal Aid Ain, 1999 and the government has adopted a scheme of legal aid.

[3] *Maneka Gandhi v. India*, AIR 1978 SC 597, 620

any qualification or limitation. The American Supreme Court, however, imported the concept of 'police power', that is, the governmental power exercisable for the welfare of the community, as a limitation on the exercise of such rights. Carefully considering the operation of fundamental rights in the American and other jurisdictions, the framers of the Indian and Pakistani Constitutions specifically provided for restrictions which can be constitutionally imposed on the exercise of fundamental rights guaranteed by the constitution.

2.3 The preamble of the Constitution states that it shall be a fundamental aim of the State to realise a socialist society in which the rule of law, fundamental human rights and freedom, equality and justice will be ensured. For the realisation of this aim, Part III of the Constitution provides for a number of rights as fundamental which the State is prohibited from transgressing. The very purpose stated in the preamble necessitates limitations on the exercise of fundamental rights and the framers of the Constitution provided the limitations, striking a fine balance between the individuals' freedoms and the governmental needs for the welfare of the community.

GENERAL CONSIDERATIONS

2.4 Art.26 provides that all existing laws inconsistent with the fundamental rights as provided in Part III shall to the extent of the inconsistency become void on the commencement of the Constitution and the State shall not make any law inconsistent with those rights. In 1967 the Indian Supreme Court held in *Golak Nath v. Punjab*[1] that a constitutional amendment by an Act of Parliament was a 'law' within the purview of art.13(2) (corresponding to art.26(2) of the Constitution) and it could not take away any fundamental right. So that such an interpretation may not be given, the Constitution (First Amendment) Act, 1973 was passed incorporating clause (3) in art.26 which states, "Nothing in this article shall apply to any amendment of this Constitution made under article 142". Similar amendment has also been made in art.142.

2.5 'State' is defined in art.152 to include Parliament and the expressions 'All existing law' and 'State shall not make law' clearly

[1] AIR 1967 SC 1643 (overruled in *Kesavananda Bharati v. Kerala*, AIR 1973 SC 1461)

show that the prohibition of art.26 is principally addressed to Parliament. It must be understood that the provisions of arts.27 to 29 and 31 to 44 are primarily limitations on the plenary power of legislation of Parliament and these provisions are to be interpreted accordingly. Otherwise the purported entrenchment of arts.27 to 29 and 31 to 44 by art.26 "would be little more than a mockery".[1] In *Jibendra Kishore v. East Pakistan* it was contended that art.18 of the Constitution of Pakistan of 1956 guaranteeing freedom of religion did not put any limitation on the power of the legislature to legislate, but the Supreme Court rejected the contention stating -

> 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 it may be taken away by the law.[2]

2.6 'Law' is defined in art.152 to include rules, regulations and all those instruments, customs and usages which have the force of law. The prohibition of art.26 is not only applicable to the Acts of Parliament, but to all those which come within the definition of law. As a law cannot be

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[1] *Ong Ah chuan v. Public Prosecutor*, [1981] AC 648, 671 Art.(9(1) of the Singapore Constitution provides, "No person shall be deprived of his life or personal liberty save in accordance with law". It was argued by the Public Prosecutor that the requirements of the constitution are satisfied if the deprivation of life or liberty complained of has been carried out in accordance with provisions contained in any Act passed by Parliament of Singapore, however arbitrary or contrary to fundamental rules of natural justice the provisions of such Act may be. The Privy Council rejected the contention and held "In a constitution founded on the Westminster model and particularly in that part of it that purports to assure to all citizens the continued enjoyment of fundamental liberties or rights, reference to 'law' in such context as 'in accordance with law' and the like, in their Lordships' view, referred to a system of law which incorporates those fundamental rules of natural justice that had formed part and parcel of the common law of England that was in operation in Singapore at the commencement of the Constitution. It would have been taken for granted by the makers of the Constitution that the 'law' to which the citizens could have recourse for the protection of fundamental liberties assured to them by the Constitution would be a system of law that did not flout those fundamental rules. If it were otherwise it would be misuse of language to speak of law as something which affords 'protection' for the individual in the enjoyment of his fundamental liberties, and the purported entrenchment (by article 5) of articles 9(1) and 12(1) would be little more than a mockery.")

[2] 9 DLR (SC) 21, 44; see also the observation of Kaikaus J in *Pakistan v. Syed Akhlaque Hussain*, PLD 1965 SC 527, 580

inconsistent with the provisions of Part III of the Constitution, executive and administrative actions, which must have the backing of law to encroach upon the rights of individuals, cannot also infringe the fundamental rights guaranteed by Part III.

2.7 When rights are guaranteed by the Constitution in achieving the aims and objectives stated in the preamble, those rights are to be liberally interpreted and the exceptions provided in the Constitution are not to be interpreted in a manner which renders those rights inconsequential or illusory.[1] The court will employ intensive level of scrutiny in assessing the lawfulness of the exercise of public powers when fundamental rights are at stake.[2]

2.8 *Trifling violation:* Sometimes infringement of a fundamental right is minimal in nature. In such cases, efforts have been made to apply the maxim of *de minimis non curat lex* (the law does not concern itself with trifles). Though courts generally do not take trifling and immaterial matters into account except under peculiar circumstances, this principle should not be applied in the case of infringement of fundamental rights. In *Olivier v. Buttigieg*[3] the Privy Council observed–

> ... where 'fundamental rights and freedom of the individual' are being considered, a court should be cautious before accepting the view that some peculiar disregard of them is of minimal account.

In stating the danger of applying the principle of *de minimis* the American Supreme Court held -

> It may be that it is the obnoxious thing in its mildest form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure.[4]

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[1] *Jibendra Kishore v. East Pakistan*, 9 DLR (SC) 21, 44; *Pakistan v. Syed Akhlaque Hussain*, PLD 1965 SC 527, 580; see also *Rashid Ahmed v. State*, 21 DLR (SC) 297, Para 22; *Ministry of Home Affairs v. Fisher*, [1979] 3 All E.R. 21, 25; *A.G. of Gambia v. Momodou*, [1984] AC 689, 706

[2] *Bugdaycay v. Secy. of State for Home Deptt.*, [1987] AC 514; *R. v. Secy. Of State for Home Deptt.*, [1993] 4 All E.R. 539

[3] [1966] 2 All E.R. 459, 466

[4] *Boyd v. U.S.*, 116 US 616, 635 (quoted with approval in *Silverman v. U.S.*, 365 US 505, 512); *Thomas v. Collins*, 323 US 516 ("if the restraint were smaller than it is, it is from petty tyrannies that large ones take root and grow. This fact can be no more plain than when they are imposed on the most basic rights of all. Seedlings planted on that soil grow great and, growing, break down the foundations of liberty." – at p.543)

2.8A *Illegality and fundamental right*: There may be prohibition or restriction imposed by law. If such prohibition is not violative of any of the fundamental rights enumerated in Part III, there cannot be any right, much less any fundamental right, which will inspire violation of such provision of law; fundamental right can never be invoked for violating any provision of law or other man's right under the law.[1] If a man obtained, through mistake of the administration, certain benefit which is not permissible under the law, another man cannot press in aid art.27 to claim that benefit.[2] On the other hand, though freedom of assembly is subject to reasonable restrictions on the ground of public order, a man's freedom of assembly cannot be curbed simply because it will lead to violence and disturbance of peace by people opposing the purpose of the assembly.[3] It is the duty of the police to prevent those who want to resort to violence.

2.9 ***Scheme of Part III*** : The rights guaranteed by Part III of the Constitution can be classified into two groups. On the one side fall the rights which are general in nature covering the whole range of human activities and on the other fall the rights in respect of specific activities. Fundamental rights guaranteeing equality before law, the equal protection of law and protection of law fall in the first category. Irrespective of the subject matter of legislation, every law must satisfy the requirements of arts.27 and 31. Art.27 is a guarantee against discrimination both in conferment of privileges and imposition of liabilities. Art.28 prohibits discriminatory treatment only on grounds of religion, race, caste, sex or place of birth. Art.29 prohibits discrimination in the matter of employment in the service of the Republic. Art.31

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[1] *Bangladesh NCTB v. Shamsuddin*, 48 DLR (AD) 184, 189 – See Para 2.177A for comments on this decision.

[2] *Gursharan Singh v. New Delhi Municipal Corp*, AIR 1996 SC 1175; *Bihar v. Kameswar Prasad*, AIR 2000 SC 2306

[3] *Beatty v. Gillbanks*, (1882) 9 QBD 308 (An earlier march by Salvation Army was abandoned when it was attacked by a violent mob calling itself 'Skeleton Army'. Local magistrate issued notice forbidding any public assembly. Salvation Army ignored the notice and began a march led by Beatty. Members of Skeleton Army appeared in the scene and Beatty refusing to stop the march was arrested. The High Court held the notice unlawful. A man may not be convicted for doing a lawful act simply because he knew that his doing it might cause another to do an unlawful act.); *Banamali Pal v. Nazrul Islam*, 3 BLC (AD) 162 (If a person is rightfully in possession of his land, his possession should be protected and those who want to commit breach of the peace should be prevented and dealt with by the law enforcing agency.)

prohibits detrimental action affecting individuals otherwise than in accordance with law. This is an analogue of the 'due process concept' of the American jurisdiction.[1] Art.32 provides a protection in respect of deprivation of life and personal liberty. All other relevant articles in Part III offer guarantees in respect of specific liberties of speech and expression, movement, association, assembly, trade and occupation, religion, property, security of home and privacy and rights involved in arrest, detention and trial and punishment.

2.10 Art.27 deals with equality before law and the equal protection of law in general. It does not prohibit reasonable classification. Art.28 has been introduced to make classification only on grounds of religion, race, caste, sex or place of birth *per se* unreasonable except when a provision is made in favour of women, children and backward section of citizens. In the absence of the provisions of art.28, the objection of what is known as reverse discrimination would be raised whenever a beneficial legislation is made in favour of women, children and the backward section of citizens. The matters covered by art.29 would have been covered by arts.27 and 28, but art.29 has been introduced to allow certain special provisions in the matter of public employment in the service of the Republic.

2.11 Art.31 deals with the protection of law to be enjoyed by citizens and persons residing in Bangladesh and, in particular, in respect of life, liberty, body, reputation and property. Deprivation of life or personal liberty can well be covered and protected by art.31, but in view of the fact that deprivation (which means total loss) of life or personal liberty is far more serious a matter than detrimental action in respect of life or personal liberty, the framers of the Constitution thought it necessary to make a separate provision in respect of deprivation of life or personal liberty. Thus detrimental action short of deprivation in respect of life or personal liberty will be covered by art.31, while deprivation of life or personal liberty must fulfil the requirement of art.32. The expression 'liberty' has a personal content in it. So when the framers of the Constitution used the expression 'personal liberty' in art.32 after using the term 'liberty' in art.31, the expression 'personal liberty' must have a narrow connotation meaning freedom from bodily restraint.[2]

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[1] *Mujibur Rahman v. Bangladesh*, 44 DLR (AD) 111 (per M.H.Rahman J)

[2] In *Maneka Gandhi v. India*, AIR 1978 SC 597, and in some other decisions, the Indian Supreme Court has given expansive meaning to the expression 'personal liberty' appearing in art.21 (corresponding to our art.32). The necessity for such interpretation

2.12 Both arts.31 and 32, so far as 'liberty' is concerned, are in the same terms - any action affecting liberty must be in accordance with law. We will find that the expression 'law' has been used in the sense of *jus* and not in the sense of *lex*[1]. Both the provisions mandate reasonable laws. But since two separate provisions have been made, it may be reasonable to presume that the framers of the Constitution intended the standard of reasonableness to be different for the two provisions; otherwise art.32 will simply be a surplusage.[2]

2.13 The arrest and detention of individuals are actions detrimental to liberty covered by art.31. Yet separate provisions have been made in art.33 to safeguard the individuals against arbitrary and unreasonable arrest and detention. Thus any law providing for arrest or detention, to be valid, must not only be reasonable and non-arbitrary to satisfy the requirement of art.31, it must also be consistent with the provisions of art.33. Art.35 provides certain protection in respect of trial and punishment of individuals.

2.14 The word 'liberty' includes many freedoms in respect of some of which the framers of the Constitution thought it proper to make special provisions in arts.36, 37, 38, 39, 40, 41, 42 and 43. The difference between these articles and art.31 is that while art.31 mandates contemporaneous and reasonable laws for interference with liberty in general, the aforementioned articles mandate that laws dealing with the liberties covered by those articles can authorise interference only on specified grounds. Thus any law interfering with the freedoms protected by these articles must not only be reasonable and non-arbitrary as required by art.31, it must also conform to the limitations put by any of these articles which may be attracted in the facts of a given case.

2.15 The framers of the Constitution by incorporating art.44 made the right to move the Supreme Court for enforcement of fundamental rights itself a fundamental right. We shall later discuss the effect of art.44 and consider whether art.117 is in conflict with art.44 so that the sweep of art.44 can be said to have been curtailed in respect of matters covered by art.117.

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arose because of absence of any provision like our art.31 in the Indian Constitution. But our art.31 covering whole range of liberties, it is neither necessary, nor reasonable for us to give an extended meaning to the expression 'personal liberty'.

[1] *West Pakistan v. Begum Shorish Kashmiri*, 21 DLR (SC) 1

[2] See Para 2.115

2.16 Arts.45, 46 and 47 provide that laws of some specified categories can be made by Parliament free from the limitation put by art.26.

2.17 *Inter-relation between different rights* : Often the question arises whether the fundamental rights guaranteed by the Constitution are mutually exclusive. The question arose in the Indian jurisdiction when it was urged that preventive detention must not only pass the test of arts.21 and 22 (corresponding to arts.32 and 33 of the Constitution) but also the test of art.19(a) and (d) (corresponding to arts.39 and 36 of the Constitution) as such detention interferes with the freedom of speech and expression and movement. The purpose of raising the question was to import the concept of procedural due process as it is known in the American jurisdiction. In *Gopalan v. Madras*[1] the Indian Supreme Court rejected the contention holding that the rights guaranteed under art.19 and arts.21 and 22 are mutually exclusive and refused to import the concept of procedural due process. But subsequently, the court shifted from that position and held that the procedure mentioned in art.21 must not be arbitrary, unfair or unreasonable and that arts.14, 19 and 21 were not mutually exclusive.[2] Because of the provisions of art.31 of the Constitution, which prohibits arbitrariness in all fields, all laws must be tested for reasonableness. The Constitution boldly proclaims the establishment of rule of law as one of the prime objectives and incorporates art.31 as a fundamental right. As a result, the concept of reasonableness pervades the entire Constitution and the provisions of the Constitution cannot be interpreted in a manner which will in any way shelter arbitrariness in any degree or form.

2.17A The rights enumerated in Part III are not necessarily and in all circumstances mutually supportive, though taken together they weave a fabric of a free and egalitarian society. It is often found that the exercise of a particular right by one person affects a different right of another person. Right to reside and settle anywhere in Bangladesh may be thwarted by a local group freely expressing its views against the persons wanting to settle in the locality of the group. Proper exercise of rights may have implicit in them, certain restrictions. The rights must be harmoniously construed so that they are properly promoted with the minimum of such implied and necessary restrictions.[3] There may be

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[1] AIR 1950 SC 27

[2] *Maneka Gandhi v. India*, AIR 1978 SC 597

[3] *Devendrappa v. Karnataka SSID Corp.*, AIR 1998 SC 1064, 1069 (The court took

conflict between the fundamental rights claimed by the parties. The right of privacy of one which is a part of the right to life may come in conflict with the right to healthy life of another which is also a part of the right to life. In such a case, it has been held that only that right which advances public morality or public interest should be enforceable.[1]

2.18 Any restriction imposed by law may affect the exercise of more than one fundamental right. In such a case the test of direct and inevitable impact has to be applied. Any restriction imposed must be permissible in terms of the article which guarantees the right directly affected. If a law, while imposing a valid restriction upon a particular fundamental right, incidentally interferes with another fundamental right, it cannot be said to constitute a restriction on the latter right.[2] The right to go abroad cannot be said to be included in the freedom of expression or of profession, but an order denying the right to go abroad to a person by refusing him passport may contravene either art.39 or art.40 if such a person seeks to go abroad for academic pursuits or to carry on a profession.[3]

2.19 *Persons entitled to fundamental rights* : All the rights guaranteed in Part III of the Constitution are available to the citizens of Bangladesh. Only the rights guaranteed by arts.31, 32, 33, 34, 35 and 44 are available to non-citizens also. 'Citizen' means a person who is a citizen of Bangladesh according to the law relating to citizenship.[4] The concept of citizenship does not include in it legal persons like companies and societies as distinguished from natural persons. It has been so held in the Indian jurisdiction.[5] There is no reason why in our jurisdiction

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restrictive view of the freedom of speech of employees having regard to the interest of the employer in the discipline and efficiency of service)

[1] *Mr."X" v. Hospital"Z"*, AIR 1999 SC 495 (The court considered the implication and importance of right of privacy and the doctor's moral duty to maintain confidentiality regarding the disease of the patient, but having regard to the serious communicable disease of the patient and the danger to the life and health of the person seeking to marry the patient, the court held that the right to privacy is not absolute and may be lawfully restricted for the prevention of crime, disorder or protection of health or moral or protection of rights and freedoms of others and disclosure of the disease by the doctor would not be violative of the rule of confidentiality or the patient's right of privacy.)

[2] *Express Newspapers v. India*, AIR 1958 SC 578

[3] *Maneka Gandhi v. India*, AIR 1978 SC 597

[4] See Para 175A – 1.75D

[5] *State Trading Corp. v. Comml. Tax Officer*, AIR 1963 SC 1811; *Tata Engineering*

'citizen' should include companies or societies even though they may be formed under the laws of Bangladesh. Though arts.31, 32, 33 and 35 use the expression 'person' in place of 'citizen', the rights guaranteed by these articles and art.34 are of such nature that those rights can be claimed only by natural persons and there is no scope for the legal persons to claim such rights. It may be argued that the legal persons are capable of holding property and protection of law being available in respect of property, the right guaranteed by art.31, so far as it relates to property, cannot be denied to the legal persons.[1] But it has to be noticed that the expression 'other person' in the first part of art.31 is preceded by the expression 'citizen' and in the context it means natural persons other than citizens. The second part of art.31 being illustrative of the first part, it cannot have application wider than the first part. It is submitted that a person other than a natural person may not be entitled to the protection under art.31. Freedom of the press is guaranteed under art.39(2)(b) without any express limitation. Whether this freedom can be claimed by non-citizens is debatable, but from the scheme of art.39 it is clear that the freedom can be claimed by both natural and legal persons. Even though other fundamental rights cannot be claimed by companies and societies, their members may claim the rights when any law affects the companies and societies on the ground that their fundamental right has been affected by the law.[2] A partnership firm has no legal entity apart from the partners and a petition filed by it for the enforcement of

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Ltd v. Bihar, AIR 1965 SC 40 (the shareholders argued that the corporate veil of the company should be pierced which would show the interest of its shareholders, but the court refused to do it holding that the company had a legal entity of its own which is entirely separate from that of its shareholders and to accept the plea of the shareholders would amount to enforcing indirectly what the company could not do directly); *Barium Chemicals v. C.L. Board*, AIR 1967 SC 295; *Amritsar Municipality v. Punjab*, AIR 1969 SC 1100 (a municipal committee is not a citizen); *Gujarat v. Ambica Mills*, AIR 1974 SC 1300

[1] 16A Am Juris 2d, Para 580 (There is an important distinction between liberty and property with respect to the protection included in the Fourteenth Amendment, as far as the persons who may invoke the constitutional guarantees of due process are concerned; for although corporations cannot invoke the 'liberty' concept for their own protection, since they are not natural persons, they are fully entitled to the protection of the due process clause in their property or their property rights.); *Pierce v. Society of Sisters*, 268 US 510

[2] *R.C. Cooper v. India*, AIR 1970 SC 564; *Bennett Coleman & Co, v. India*, AIR 1973 SC 106; *D.F.O. v. Biswanath Tea Co.*, AIR 1981 SC 1369; *D.C. & G.M. v. India*, AIR 1983 SC 937

fundamental right is virtually a petition by its partners and is maintainable.[1]

2.20 *Restriction and prohibition* : Many of the rights guaranteed by the provisions of Part III are subject to restrictions that may be imposed by law. Such restriction cannot be imposed by executive instruction.[2] A question arises whether in imposing restriction, a law can impose prohibition. The Indian Supreme Court has held that the expression 'restriction' includes 'prohibition'.[3] While dealing with the freedom of assembly guaranteed under art.37, the High Court Division held that the expression 'restriction' includes 'prohibition'.[4] In the Indian Constitution the expression 'restriction' is used in art.19 and this interpretation presents no difficulty as the expression is qualified by the expression 'reasonable'. But the 'restriction', which may be imposed under the Constitution in respect of the fundamental rights relating to trade or occupation and property, is not qualified by the expression 'reasonable'. Hence, if 'restriction' is taken to include 'prohibition', there will be virtually no fundamental right relating to trade and occupation and property. On the other hand, the language of art.47(1) shows that when prohibition is intended in respect of trade or occupation and property the expression 'extinction' has been used along with the expression 'restriction'. But if it is generally held that the expression 'restriction' does not include 'prohibition' it creates difficulty in respect of the freedoms of assembly, association and speech and it cannot be said that the framers did not intend to include 'prohibition' in arts.37, 38 and 39. Having regard to the context, it may be contended that in arts.37,38 and 39 the expression 'restriction' includes 'prohibition', but not in arts.36, 40 and 42. Alternatively, degrees of prohibition may be recognised and it be held that the expression 'restriction' includes 'prohibition' but not 'total prohibition'. However, it may not solve the problem as the question will remain as to what is meant by 'total prohibition' and the interest of morality or public order or security of State may require total prohibition of a particular type of assembly, association or speech in a given circumstance. An authoritative pronouncement is required in respect of the meaning of the expression 'restriction'.

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[1] *A.I. Works v. C.C. Exports*, AIR 1974 SC 1539
[2] *Krisnan Kakkanath v. Kerala*, AIR 1997 SC 128
[3] *Narendra Kumar v. India*, AIR 1960 SC 430
[4] *Oali Ahad v. Bangladesh*, 26 DLR 376

2.21 *Reasonable restriction* : In some of the articles the rights are guaranteed subject to reasonable restrictions imposed by law on specific grounds. The question is when a restriction can be said to be reasonable. What is the standard by which the reasonableness of a restriction can be judged? The courts opine that no fixed standard can be laid down for general application and it will vary depending on the varying circumstances of each case.[1] In *Madras v. V.G.Row*[2] Patanjali Sastri CJ of the Indian Supreme Court stated -

> ... no abstract standard, or general pattern of reasonableness can be laid as applicable to all cases. The nature of the right alleged to have been infringed, the underlying purpose of the restrictions imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions at the time, should all enter into the judicial verdict. In evaluating such elusive factors and forming their own conception of what is reasonable, in all the circumstances of a given case, it is inevitable that the social philosophy and the scale of values of the judges participating in the decision should play an important part, and the limit to their interference with legislative judgment in such cases can only be dictated by their sense of responsibility and self-restraint and the sobering reflection that the Constitution is meant not only for the people of their way of thinking but for all, and that the majority of the elected representatives of the people have, in authorising the imposition of the restrictions, considered them to be reasonable.[3]

Similar view was expressed by Hamoodur Rahman J in *Abul A'la Moudoodi v. West Pakistan*[4] in the following words -

> 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 ... there can be no general standard of reasonableness applicable to all cases. It will certainly depend upon the nature and extent of the right sought to be restricted, the nature and extent of the restrictions sought to be imposed, the nature and circumstances in which restriction is to be imposed, the evil sought to be

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[1] Ibid

[2] AIR 1952 SC 196

[3] Ibid, p.200; *Laxmi Khandsari v. U.P.*, AIR 1981 SC 873; *Pathumma v. Kerala*, AIR 1978 SC 771; *Maharashtra v. H.N. Rao*, AIR 1970 SC 1157; *U.P. v. Kausaliya*, AIR 1964 SC 416

[4] 17 DLR (SC) 209; see also *Chitta Ranjan v. Secy. Judicial Department*, 17 DLR 451

> prevented or remedied, the necessity or urgency of the action proposed to be taken and the nature of the safeguards, if any, provided to prevent the possibilities of abuse of power. All these and there may well be other considerations, such as the objectives of the legislation and prevailing conditions at the time, in the light of which the reasonableness has to be considered.

The learned Judge then stated that a restriction will be treated as unreasonable "if the restriction is for an indefinite or an unlimited period or disproportionate to the mischief sought to be prevented or if the law imposing the restriction has not provided any safeguard at all against arbitrary exercise of power."

2.22 From the decided cases it appears that there are several factors which are to be taken into consideration in judging the reasonableness of a restriction. Presence of any one of the factors may not be decisive. The overall situation is to be considered and such consideration will vary with varying circumstances. The substance of the legislation and not merely its form has to be looked into in considering the validity of the restriction. It is the direct and real effect, and not the remote effect, which has to be taken into consideration.[1] Of course, it has to be kept in mind that the legislature cannot do indirectly what it cannot do directly and if a restriction is sought to be put indirectly when the legislature cannot directly put that restriction, the restriction will be void.[2] The restriction must be reasonable in both substantive and procedural aspects. Generally, where the restriction has no reasonable nexus with the evil sought to be removed[3], or the restriction imposed by law is in excess of the requirement or disproportionate to the mischief sought to be remedied[4] or when the restriction is for an indefinite period of time

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[1] *Express Newspapers v. India*, AIR 1958 SC 578

[2] *In re Kerala Education Bill*, AIR 1958 SC 956

[3] *Municipal Corp. v. Jan Mohammad*, AIR 1986 SC 1205; *Pathumma v. Kerala*, AIR 1978 SC 771; *Arunachala Nadar v. Madras*, AIR 1959 SC 300; *MRF Ltd. v. Inspector, Kerala Government*, (1998) 8 SCC 227

[4] *Chitta Ranjan v. Secy. Judicial Department*, 17 DLR 451; *Oali Ahad v. Bangladesh*, 26 DLR 376; *Chintaman Rao v. M.P.*, AIR 1951 SC 118 (A law prohibiting manufacture of bidis during the agricultural season enacted to ensure availability of agricultural labour arbitrarily interferes with private business. The law not only compels those who can be engaged in agricultural work from taking up any other avocation, but also prohibits persons who have no connection with or relation to agricultural operation from engaging in the business of bidi making. There are infirm and disabled people and old women who cannot be employed in agricultural work, but can be engaged in bidi

and not for a temporary period[1] or when the law confers a discretion upon the executive authority to impose restrictions without providing any guideline regulating the exercise of the discretion[2], the restriction imposed by law is treated to be substantively unreasonable. Conferment of unguided discretion on the executive in imposing restriction may not be unreasonable where the situation is such that power must be vested in some authority to take immediate action to prevent acts fraught with imminent danger.[3] However, in such a case the law should provide a check against arbitrary exercise of the discretion. One of the modes of providing the safeguard is to require the authority to record reasons before taking action and to supply copy of the statement of reasons to the person affected. Such a requirement not only compels the authority to apply its mind, but also facilitates judicial review of the action. In the absence of emergent or extraordinary circumstances, the exercise of fundamental rights cannot be made dependent upon the subjective satisfaction of the governmental authority.[4] A law imposing a restriction may be void if it is vague and uncertain.[5]

2.23 A restriction will be unreasonable in its procedural aspect if there is no provision for complying with the principles of natural justice.[6] There may be a situation where it may not be possible to give notice and hearing to the aggrieved party, but in all such cases there must be a way of hearing the aggrieved party after the action is taken so that he may have an opportunity of showing that the exercise of the power in his case was unwarranted or arbitrary.[7] If there is no safeguard

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making. The law arbitrarily travels beyond requirement.); *M.P. v. Baldeo Prasad*, AIR 1961 SC 293; *Municipal Corp. v. Jan Mohammad*, AIR 1986 SC 1205; *Pathumma v. Kerala*, AIR 1978 SC 771; *India v. Ganayutham*, AIR 1997 SC 3387; *MRF Ltd. v. Inspector, Kerala Government*, (1998) 8 SCC 227

[1] *Mustafa Ansari v. Dy. Commr.*, 17 DLR 553; *Khare v. Delhi Administration*, AIR 1950 SC 211; *Madras v. V.G.Row*, AIR 1952 SC 196

[2] *Municipal Corp. v. Jan Mohammad*, AIR 1986 SC 1205, 1210 *Maharashtra v. Kamal*, AIR 1985 SC 119; *Kaushal v. India*, AIR 1978 SC 1457; *Harichand v. Mizo Dist. Council*, AIR 1967 SC 829

[3] *Abul A'la Moudoodi v. West Pakistan*, 17 DLR (SC) 209; *Joseph v. Reserve Bank*, AIR 1962 SC 1371; *Pooran Mal v. Director of Enforcement*, AIR 1974 SC 348

[4] *Seshadri v. Dist. Magistrate*, AIR 1954 SC 747; *Ebrahim v. Bombay*, AIR 1954 SC 229; *Maneklal v. Makwana*, AIR 1967 SC 1373

[5] *Abbas v. India*, AIR 1971 SC 481

[6] *Mustafa Ansari v. Dy. Commr.*, 17 DLR 553, 561

[7] *Abul A'la Moudoodi v. West Pakistan*, 17 DLR (SC) 209; *Tofazzal Hossain v. East Pakistan*, 17 DLR 76

against arbitrary exercise of power, the restriction imposed by law will be treated as unreasonable.[1]

2.24 The reasonableness of restrictions has to be determined in an objective manner.[2] The legislative opinion is neither final nor conclusive.[3] The court has to decide the question of reasonableness of restriction. Reasonableness will not be dependent on the personal views or notions of the individual Judges; it must be an objective standard which, in a given circumstance, an average prudent man will employ.[4] As the fundamental principles of State Policy are fundamental in the governance of the State and are to serve as guide to interpretation of the Constitution and the laws, these fundamental principles are to be kept in view in determining the reasonableness of any restriction.[5] Any restriction imposed to effectuate any of the principles of State Policy will carry a presumption of reasonableness.[6] A just balance has to be struck between the restriction to be imposed and the social control envisaged by the provisions of the Constitution guaranteeing the fundamental rights.[7] In doing that the court must consider the values of life in the society, the circumstances obtaining at a particular point of time when the restriction is imposed and the degree and the urgency of the evil sought to be controlled.[8] What was reasonable at the time of enactment of a law may cease to be reasonable with the change of time and circumstances.[9] In judging the reasonableness of restrictions, the court is entitled to take into consideration matters of common report, history of the times and matters of common knowledge and the circumstances existing at the time of the legislation.[10]

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[1] *Mustafa Ansari v. Dy. Commr.*, 17 DLR 553, 561

[2] *Oali Ahad v. Bangladesh*, 26 DLR 376 *Municipal Corp. v. Jan Mohammad.*, AIR 1986 SC 1205

[3] *Chintaman Rao v. M.P.*, AIR 1951 SC 118; *Abul A'la Moudoodi v. West Pakistan*, 17 DLR (SC) 209

[4] *Oali Ahad v. Bangladesh*, 26 DLR 376

[5] *Pathumma v. Kerala*, AIR 1978 SC 771; *Kerala v. N.M. Thomas*, AIR 1976 SC 490; *Bombay v. Balsara*, AIR 1951 SC 318

[6] See *Bombay v. Balsara*, AIR 1951 SC 318,328

[7] *Pathumma v. Kerala*, AIR 1978 SC 771; *Narendra Kumar v. India*, AIR 1960 SC 430; *MRF Ltd v. Inspector, Kerala Government*, (1998) 8 SCC 227

[8] *Madras v. V.G.Row*, AIR 1952 SC 196; *Pathumma v. Kerala*, AIR 1978 SC 771

[9] *Motor General Traders v. A.P.*, AIR 1984 SC 121; *Malpe Viswanath v. Maharashtra*, (1998) 2 SCC 1

[10] *Pathumma v. Kerala*, AIR 1978 SC 771

RIGHT TO EQUALITY

2.25 Art.27 provides that all citizens are equal before the law and are entitled to the equal protection of law. It combines the English concept of equality before law and the American concept of equal protection of law. 'Equality before law' means that among equals law shall be equal and shall be equally administered. There shall not be any special privilege by reason of birth, creed, etc. 'Equal protection of law' means that all persons in like circumstances shall be treated alike and no discrimination shall be made in conferment of privileges or imposition of liabilities. The first part is negative while the second is positive in approach. Equality before law is involved in the enforcement of law, while equal protection of law involves the validity of a law. But these are not independent or severable concepts in their application and will often be found to overlap each other.[1] This article more than others firmly embodies the concept of rule of law the establishment of which is one of the prime objectives of the Constitution.

2.25A The guarantee of equality is a positive concept and cannot be enforced in court in a negative manner. If an illegality or irregularity has been committed in favour of an individual, no one can press in aid art.27 to claim that the same illegality or irregularity be committed in his favour, though he can challenge the validity of the illegal or irregular action. Otherwise, the article can be used for perpetuation of illegal or irregular acts which no constitutional dispensation seeking to establish rule of law can permit. Before a claim based on equality clause is upheld, it must be established by the petitioner that his claim, though just and legal, has been denied discriminating him from others.[2]

2.26 ***Doctrine of classification*** : We speak of equality of treatment. But every legislation involves classification between persons, things, occupations and so on for differential treatment. "In dealing with the paradox, the law has neither abandoned the command of equality nor denied the governmental power to classify. It has followed a middle course, reconciling the contradictory demands of specialised legislation

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[1] *Dr. Nurul Islam v. Bangladesh*, 33 DLR (AD) 201

[2] *Gursharan Singh v. New Delhi Municipal Corp.*, AIR 1996 SC 1175; *Bihar v. Kameswar Prasad*, AIR 2000 SC 2306; *Secy. Jaipur Dev. Authority v. Daulat*, (1997) 1 SCC 35; *Haryana v. Ram Kumar*, (1997) 2 SCC 321; see *Bangladesh NCTB v. Shamsuddin*, 48 DLR (AD) 184, 189 (... there cannot be any right, much less any fundamental right, which will inspire a violation of the law. See Para 2.177A for comments on this decision)

and generalised equality by the doctrine of reasonable classification."[1] Art.27 does not guarantee absolute equality requiring the law to treat all persons alike.[2] The principle of equality does not mean equality of operation of legislation upon all citizens of the State.[3] All persons are not alike and nothing can be a greater inequality than to treat unequals as equals.[4] The principle of equality does not require universal application of laws for all persons. By nature, attainment or circumstances all persons are not in the same position and the varying needs of different classes of persons often require different treatment.[5] The very purpose of legislation is to draw the line in such a way that different people are treated differently.[6] The right to equality stated in simple terms means that persons under like circumstances and conditions should be treated alike both in the conferment of privileges and in the imposition of liabilities.[7] The principle requires that no person or class of persons shall

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[1] *Quaker City Cab Co. v. Pennsylvania*, 277 US 389, 406

[2] *S.A. Sabur v. Returning Officer*, 41 DLR (AD) 30; *Tigner . Texas*, 310 US 141

[3] *Jibendra Kishore v. East Pakistan*, 9 DLR (SC) 21,41; *S.A. Sabur v. Returning Officer*,41 DLR (AD) 30

[4] *Dennis v. U.S.*, 339 US 162; *S.A. Sabur v. Returning Officer*, 41 DLR (AD) 30; *Direct Recruit Class II Engineering Officers Association v. Maharashtra*, AIR 1990 SC 1607; *All India Sainik School Association v. Sainik School Society*, AIR 1989 SC 88, Para 11

[5] *Bombay v. Balsara*, AIR 1951 SC 318

[6] *Trimble v. Gordon*, 430 US 762,779

[7] *S.A. Sabur v. Returning Officer*, 41 DLR (AD) 30 (disqualification in respect of elective office); *Bangladesh v. A.K. Al-Mamun*, 1997 BLD (AD) 77 (reinstatement of dismissed police personnel on recommendation of review Committee); *Secretary, Ministry of Establishment v. Md. Jahangir Hossain*, 51 DLR (AD) 148 (appointment of some and refusal to appoint others from out of the list of Mujibnagar employees prepared by the government is discriminatory); *Director General NSI v. Sultan Ahmed*, 1 BLC (AD) 71; *Jibendra Kishore v. East Pakistan*, 9 DLR (SC) 21 (acquisition of rent-receiving interest); *Harford Steam Boiler Inspection and Ins. co. v. Harrison*, 301 US 459; *Ramana Shetty v. International Airport Authority*, AIR 1979 SC 1628 (award of contract to a tenderer who did not fulfil tender qualification); *M.P. v. Nandalal*, AIR 1987 SC 251; *Kamala Gaind v. Punjab*, 1990 Supp SCC 800 (Under the scheme of providing job to one member of the families of public officers killed by terrorists, offering class I post to one and class II post to another, though similarly situated, is discriminatory); *Secy. Aircraft Engrs. of Bangladesh v. Registrar of Trade Union*, 45 DLR (AD) 122 (when two provisions of law operate in dissimilar situations, no question of violation of the equality clause can arise); *Bangladesh Retired Government Employees Welfare Association v. Bangladesh*, 51 DLR (AD) 121 (pensioners retiring on different dates do not form a homogenous class to claim equal treatment in the

or class of persons shall be denied the same protection of laws which is enjoyed by other persons or other class of persons in like circumstances in their lives, liberty and property and pursuit of happiness.[1] When a provision of law is made applicable to all persons forming a class, it does not violate equality clause.[2] In the application of the principle it has always been recognised that classification of persons or things is in no way repugnant to the equality doctrine, provided the classification is not arbitrary or capricious, but is reasonable and bears a fair and substantial relation to the object of the legislation.[3] The question then is when is a classification made by Parliament reasonable so as to pass the test of constitutionality.

2.27 *Reasonable classification* : Reasonableness of a classification has to be decided with reference to the realities of life and not in the abstract. It is the substance and not the form alone which must be seen.[4] A classification will be reasonable if it is based upon material and substantial difference having a reasonable relation between the objects or persons dealt with and the governmental objective sought to be achieved by the legislation in question.[5] In other words, the classification, to be valid, must rationally further the purpose for which the law is enacted.[6] To pass the test of constitutionality, the classification made in the legislation must satisfy two conditions - (i) the classification must be logically correct, i.e. must be founded upon some intelligible *differentia* which distinguish the persons or things grouped together from others left out of the group, and (ii) the *differentia* must have a rational relation or nexus to the object sought to be achieved by the statute in question.[7]

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matter of payment of pension); *United Bank Ltd. v. Meenakshi*, AIR 1998 SC 789

[1] *Jibendra Kishore v. East Pakistan*, 9 DLR (SC) 21; *Bangladesh Krishi Bank v. Meghna Enterprises*, 50 DLR (AD) 194 (all defaulting borrowers having been equally treated in respect of appeal, review and revision, there is no violation of equality clause); *Secretary, Ministry of Establishment v. Md. Jahangir Hossain*, 51 DLR (AD) 148

[2] *Bangladesh Krishi Bank v. Meghna Enterprises*, 50 DLR (AD) 196 (S.10A of PDR Act, held valid)

[3] Ibid; *S.A. Sabur v. Returning Officer*, 41 DLR (AD) 30; *Afsar Ali v. Bangladesh*, 43 DLR 593

[4] *Kerala Hotel & Restaurant Association v. Kerala*, AIR 1990 SC 913

[5] *Trimble v. Gordon*, 430 US 762; *Carington v. Rash*, 380 US 89

[6] *Massachusetts Board of Retirement v. Murgia*, 427 US 307

[7] *S.A. Sabur v. Returning Officer*, 41 DLR (AD) 30; *Retd. Govt. Employees Assn. v. Bangladesh*, 46 DLR 426 *Jibendra Kishore v. East Pakistan*, 9 DLR (SC) 21; *Ohio*

2.28 A classification will not be logically correct if the persons or things are grouped together in such a way that some of the persons or things grouped together may also fall within the group left out. To meet the test of constitutionality, it must include or embrace in a class all persons or things who or which naturally belong to the class.[1] The persons or things grouped together in one class must possess a common characteristic which distinguishes them from those excluded from the group.[2] But perfection in making the necessary classification is neither possible nor necessary[3]and equality clause does not insist on scientific perfection or mathematical exactitude.[4] "Classification is not to be condemned because there may be occasional instances in which it does not fit the situation; it is proper if the great mass of situations to which the law applies justifies the formation of a class and application of some special or different legislative provisions to that class."[5] "The legislature as well as the executive government, while dealing with diverse problems arising out of an infinite variety of human relations must of necessity, have the power of selection or classification of persons and things upon which such laws are to operate."[6] In a classification for governmental purposes one cannot ask for exact exclusion or inclusion of persons or things and it is often impossible for the legislature to foresee and provide for every imaginable and exceptional case and a law cannot be struck down for not providing for such imaginable and exceptional cases.[7]

2.29 It must then be seen whether the *differentia* by which the classification has been made have any reasonable relationship with the object for which the law is made, or, in other words, it has to be seen if the classification subserves the purpose of the legislation. Where a law

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Bureau of Employment service v. Hodory, 431 US 471; *County Board of Arlington v. Richards*, 434 US 5; *Ram Krisna Dalmia v. Justice Tendulker*, AIR 1958 SC 538; *Akramuzzaman v. Bangladesh*, 52 DLR 209

[1] *Mutual Loan co. v. Martell*, 222 US 225

[2] *Shashikant v. India*, (1990) 4 SCC 366; *Anwar Karim v. Bangladesh Bank*, 52 DLR 1 (defaulting borrowers themselves form a separate and distinct class and legislature can make stringent law against them)

[3] *Massachusetts Board of Retirement v. Murgia*, 427 US 307

[4] *Dandridge v. Williams*, 397 US 471; *S.A. Sabur v. Returning Officer*, 41 DLR (AD) 30, 35; *Kedar Nath v. W.B.*, AIR 1953 SC 404

[5] *Peterson v. Widule*, 157 Wis 641

[6] *Karnataka v. Suvana Malini*, AIR 2001 SC 606

[7] *Ozan Lumber Co. v. Union Country Nat Bank*, 207 US 251

made provisions for dissolution of several companies owning printing establishments and taking over their assets and undertakings leaving other similar printing establishments untouched and the classification was not shown to subserve any legitimate governmental objective, the classification was unreasonable and the law was held discriminatory.[1] In order to determine reasonableness of a classification it is necessary to discern the purpose or object of the impugned enactment. The validity of a classification depends on the existence of a rational nexus of the *differentia* of classification with the object sought to be achieved by the enactment.[2] Here the difference between the *differentia* and the object of the legislation must be kept in view and the object of the legislation cannot by itself be the basis of the classification.[3] Parliament passes a law to attain certain objectives and makes a selection of persons or things to whom or which to apply the law. The yardsticks used for the selection are the *differentia* which separate persons or things included within the purview of the law from the persons or things excluded from the operation of the law. In demonstrating the difference between reasonable and arbitrary classification it was observed -

> Upon what differences or resemblances it may be exercised depends necessarily upon the object in view, may be narrow or wide according to that object. Red things may be associated by reason of their redness, with disregard to all other resemblances or distinctions. Such classification would be logically appropriate. Apply it further: make a rule of conduct depend upon it and distinguish in legislation between red-haired men and black-haired men, and the classification would immediately be seen to be wrong; it would have only arbitrary relation to the purpose and province of legislation.[4]

Thus a statute prohibiting diabetics from acting as trade union officials will be a law based on arbitrary classification. Here the disease is the *differentium* on the basis of which persons are classified as diabetic and non-diabetic. Even though classification of diabetics is perfectly logical in the abstract and may be valid in health related legislation, the *differentium* has no rational connection with the purpose any trade union

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[1] *Hamidul Huq Chowdhury v. Bangladesh*, 34 DLR 190
[2] *Shashikant v. India*, (1990) 4 SCC 366
[3] *W.B. v. Anwar Ali Sarker*, AIR 1952 SC 75; *Ram Krisna Dalmia v. Justice Tendulker*, AIR 1958 SC 538
[4] *Tanner v. Little*, 240 US 369, 382

related law can be expected to serve.[1] Similarly, when of the two similarly situated surplus government servants, one is differently treated from the other in the matter of counting past services for fixation of seniority after absorption on the basis of a fortuitous fact that one got the nomination for absorption while in service and the other got it after the post was abolished, the equality clause is violated.[2] But in a prohibition law which relaxed the rule of prohibition in warships, troopships and military and naval messes and canteen, the classification treating the military personnel differently was found to be reasonable and not arbitrary having regard to the nature of the duty and the service condition of the military personnel and the requirement of keeping up their morale.[3] Barring a thrice-elected member of the managing committee of a co-operative society from standing in the election for the next two years does not violate the equality clause as it subserves the purpose of infusing new blood in the committee.[4] Restrictions put on the sponsors and directors of banks and financial institutions and the members of their families in becoming sponsors, directors or chief executive of any insurance company do not violate art.27 as it subserve the objective of preventing monopoly in the control of money market.[5] The classification of banks, insurance companies and other financial institutions for putting embargo on nomination of director on the Board of a financial institution has been found to be reasonable.[6] For the purpose of recovery of bank loans treating defaulting borrowers as a distinct class to apply stringent legal provisions against them is not violative of equality clause. Default in repayment of loans extended by banks and financial institutions being rampant, classification of the borrowers of banks and financial institutions from the rest is reasonable as it subserves the purpose of fighting the default culture in repayment of loans of banks and financial institution.[7] When pension rules were liberalised allowing pensioners retiring after a specified date an increased pension, the classification between pensioners retiring before the specified date and pensioners retiring after that date was held by the

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[1] *Air-way Electric Appliance Corp v. Day*, 266 US 71, 85

[2] *Director General, NSI v. Sultan Ahmed*, 1 BLC (AD) 71

[3] *Bombay v. Balsara*, AIR 1951 SC 318

[4] *Abdus Sattar v. Bangladesh*, 45 DLR (AD) 65

[5] *Nasreen Fatema v. Bangladesh*, 49 DLR 542 (affirmed in 3 BLC (AD) 190)

[6] *City Bank Ltd. v. Bangladesh Bank*, 51 DLR (AD) 262

[7] *Chandpur Jute Suppliers v. Artha Rin Adalat*, 2 BLC 49; *Anwar Karim v. Bangladesh Bank*, 52 DLR 1

High Court Division to be arbitrary and unreasonable as the purpose of the revision of pension rules was to enable the pensioners to cope with the increased cost of living with which the date of retirement has no rational connection and pensioners retiring before and after the specified date are equally hit by the rise in the cost of living.[1] On appeal, the Appellate Division did not differ with the High Court Division on the question of nexus between the object and the classification, but reversed the decision on the ground that the pensioners retiring on different dates and receiving different pensions did not form a homogenous class of similarly situated persons and as such they cannot claim the same treatment for all the pensioners irrespective of the date of retirement.[2] The Appellate Division further held that for the purpose of calculation of pension on the basis of last pay drawn is a real and rational classification. The Appellate Division observed that morally it is desirable to treat them at par at least for the purpose of calculation of pension on the basis of emoluments which they were receiving immediately before retirement, but for the court to say so would amount to legislation.

2.29A In this case[3] it has been observed by the Appellate Division that a legislative enactment or a government action cannot be knocked down as unconstitutional even if it results in inequity or is even shocking to the conscience unless such enactment or such action is violative of any provision of the Constitution or law and that inequity or unconscionable effect cannot be rectified by the court by applying art.27. It is submitted that the proposition is open to exception. If a differential treatment satisfies the twin test of logical classification and reasonableness, it cannot be shocking to conscience. If any legal provision or action is shocking to conscience, it will often, if not always, be arbitrary and it will fail to pass the test of reasonable classification. It is said that pensioners retiring on different dates do not form a homogenous class of similarly situated persons. There will always be difference between a man and another man or a pensioner and another pensioner, but the question is whether such difference has any relevance in search of nexus between the object of the legislation and the classification made.[4] The object of the pension rules is to save the retired

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[1] *Bangladesh Retd. Govt. Employees Welfare Assn. v. Bangladesh*, 46 DLR 426 relying on *D.S. Nakara v. India*, AIR 1983 SC 130;

[2] *Bangladesh Retd. Govt. Employees Welfare Assn v. Bangladesh*, 51 DLR (AD) 121

[3] Ibid

[4] See *Air-way Electric Appliance Corp v. Day*, 266 US 71

employees from penury and inflation affecting all pensioners equally, it must be said that the pensioners retiring on different dates are similarly situated in the matter of cost of living. Having regard to this, the Indian Supreme Court held, "If the person retiring is eligible for pension at the time of his retirement and if he survives till the time by subsequent amendment of the relevant pension scheme, he would become eligible to get enhanced pension or would become eligible to get more pension as per the new formula of computation of pension subsequently brought into force .... In such a situation the additional benefit available to the same class of pensioners cannot be denied to him on the ground that he retired prior to the date on which the aforesaid additional benefit was conferred on all the members of the same class of pensioners ...".[1]

2.30 *Completeness:* The equality clause does not require that a law should cover the entire field of proper legislation and it is not unconstitutional merely because it is not all-embracing and does not include all the evils within its reach.[2] The legislature is free to recognise the degrees of harm and may confine its restriction to those cases where the need is deemed to be the clearest.[3] It may even regulate only the aggravated form of a mischief.[4] The legislature may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. It may select one phase of one field and apply a remedy there neglecting the others.[5] It may choose to introduce a reform gradually by applying the law, in the first instance, to some institutions or objects or areas according to the exigency of the situation.[6] The equal protection clause does not require that the

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[1] *Kasturi v. M.D. State Bank of India*, AIR 1999 SC 81, 95-96; *Marwaha v. India*, (1987) 4 SCC 31

[2] *Zucht v. King*, 260 US 174; *Hughes v. Superior Court of California*, 339 US 460

[3] *Skinner v. Oklahoma*, 316 US 535; *Ram Krisna Dalmia v. Justice Tendulker*, AIR 1958 SC 538; *S.A. Sabur v. Returning Officer*, 41 DLR (AD) 30 (disqualifying a person defaulting in repayment of loan taken from bank from holding elective office in local government but not from being elected as member of Parliament); *Nasreen Fatema v. Bangladesh*, 49 DLR 542 (see para 2.29); *Reference on Kerala Education Bill*, AIR 1958 SC 956 (provision for earmarking certain areas as 'compulsion areas', in introducing compulsory education, is not discriminatory even though such classification may affect certain educational institutions in such compulsion areas without affecting similar institutions in non-compulsion areas)

[4] *Sakhwant v. Orissa*, AIR 1955 SC 166

[5] *Williamson v. Lee Optical Co.*, 348 US 483, 489; *Geduldig v. Aiello*, 417 US 484, 495

[6] *L.N. Mishra Institute v. Bihar*, AIR 1988 SC 1136

legislature must choose between attacking every aspect of the problem or not attacking at all.[1] A statute is not invalid merely because it might have gone further than it did.[2]

2.31 *Classification of single person* : Picking up a single person for differential treatment is not necessarily discriminatory and will be constitutional if it can be shown that such a single person forms a class by himself because of traits peculiar to him which distinguish him from the rest. A large cotton textile mill of a company employing a large number of labourers was closed down due to mismanagement. Parliament made a law authorising the government to appoint its own directors to take over the management and control of the company and its assets. A shareholder of the company challenged the law as discriminatory on the ground that the company had been singled out for discriminatory treatment. The mismanagement of the company's affairs prejudicially affected the production of an essential commodity and led to serious unemployment among a section of the community. The court held that the facts with regard to the company were of extraordinary character and Parliament was justified in treating the company as a class by itself.[3] A special law for a particular temple which held unique position amongst the Hindu temples was also found valid.[4] Special provisions can be made for each of the Universities of the country as each University forms a separate class by itself.[5] When special procedure in respect of the rights of the victims of the Bhopal gas disaster was provided by law, it was found to be non-discriminatory inasmuch as the enormity of the disaster and other factors rendered those victims a class by themselves.[6] But the equality clause was held violated where the petitioner's companies were singled out for adverse treatment leaving many others of the same class and standing on the same footing and no rationale can be found for the classification.[7] A law made to put an end to protracted litigation which arose on the death of a rich landowner allowing claims of some and rejecting the claims of others was found unconstitutional. Protracted litigation between rival claimants to the property of an individual is not an unusual or exceptional circumstance

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[1] *Dandridge v. Williams*, 397 US 471, 486-487
[2] *Roschen v. Ward*, 279 US 337, 339
[3] *Chiranjit Lal v. India*, AIR 1951 SC 41
[4] *Bira Kishore Deb v. Orissa*, AIR 1964 SC 1501
[5] *Azeez Basha v. India*, AIR 1968 SC 662
[6] *Charan Lal Sahu v. India*, AIR 1990 1480; *Mittal v. India*, AIR 1983 SC 1, 40.
[7] *Hamidul Huq Chowdhury v. Bangladesh*, 34 DLR 190

so as to render a particular case a class by itself justifying the legislature to differentiate it from the rest of the cases.[1]

2.32 *Presumption of constitutionality* : Classification is essentially a function of Parliament being inextricably connected with enactment of laws and from this stems the presumption of constitutionality of statutes.[2] There is always a presumption of constitutionality of a legislative classification and the burden is upon him who attacks it to show that there has been a clear transgression of the constitutional principles.[3] If an Act of Parliament would be validated only in the event certain circumstances exist, it will be presumed that all such circumstances do exist.[4] Where the classification embodied in a legislation is under challenge, if any state of facts can be reasonably conceived that would sustain it, the existence of such a state of facts must be assumed.[5] It must be presumed that the legislature understands and correctly appreciates the need of its people, that its laws are directed to problems made manifest by experience and that its discriminations are based on adequate grounds.[6] In order to sustain the presumption of constitutionality "the court may take into consideration matters of common knowledge, matters of common report, the history of the times and may assume every state of facts which can be conceived existing at the time of legislation".[7] No objection can be taken to the judges taking notice of the facts and circumstances prevailing in the society.[8] One who attacks a statute as being violative of the equality clause carries the burden of clearly establishing the invalidity of the statute and a claim of violation of the equality clause cannot be upheld on mere speculation or conjecture.[9] A person challenging the validity of a law must come out with a pleading clearly demonstrating that the differentia of the

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[1] *Ameerunnessa v. Mahboob Begum*, AIR 1953 SC 91; see also *Ram Prasad Sahi v. Bihar*, AIR 1953 SC 215

[2] *Kathi Raning Rawat v. Saurashtra*, AIR 1952 SC 123

[3] *S.A. Sabur v. Returning Officer*, 41 DLR (AD) 30; *Ram Krisna Dalmia v. Justice Tendulker*, AIR 1958 SC 538; *Prabhu Das v. India*, AIR 1966 SC 1044

[4] *Alabama State Federation of Labour v. McAdory*, 325 US 450

[5] *New York Rapid Transit Corporation v. New York*, 303 US 573; *Wampler v. Lecompte*, 282 US 172

[6] *Ward & Gow v. Krinsky*, 259 US 503; *Ram Krisna Dalmia v. Justice Tendulker*, AIR 1958 SC 538; *S.A. Sabur v. Returning Officer*, 41 DLR (AD) 30

[7] *Ram Krisna Dalmia v. Justice Tendulker*, AIR 1958 SC 538

[8] *Nasreen Fatema v. Bangladesh*, 49 DLR 542 (affirmed in 3 BLC (AD) 190)

[9] *Hodge Drive-It-Yourself Co. v. Cincinnati*, 284 US 335

classification contained in the law have no reasonable nexus with any legitimate governmental objective and must adduce evidence in support of the pleading.

2.33 Even though a law enacted by the legislature is entitled to great regard in respect of validity, a still greater deference has to be accorded to the constitutional mandate and the presumption of validity cannot prevail where no reason whatever is discoverable for an attempted discrimination.[1] If there is nothing on the face of the law or the surrounding circumstances brought to the notice of the court on which the classification may reasonably be regarded to be based, the presumption of constitutionality cannot be carried to the extent of always holding that there must be some undisclosed and unknown reasons for subjecting certain individuals or corporations to hostile and discriminatory legislation[2], for to carry the presumption to that extent is to make the protection of the equality clause a mere rope of sand.[3] Once a person challenging a law succeeds in showing discrimination by the law, it becomes obligatory for the persons vouching the validity to come out with facts showing that the classification is logically correct and is reasonable in the sense that it subserves a legitimate governmental objective. The presumption of constitutionality is of no avail when a law is discriminatory on the face of it and it is clear that the legislature made no attempt to make any classification at all[4] or that there is no reasonable nexus between the differentia of the classification and the governmental objective sought to be achieved. Besides, "there may conceivably be cases where having regard to the nature and character of legislation, the importance of the right affected and the gravity of the injury caused by it and the moral and social issues involved in the determination, the court may refuse to proceed on the basis of the presumption of constitutionality and demand from the State, justification of the legislation with a view to establishing that it is not arbitrary or discriminatory."[5]

2.34 In *Bangladesh v. Azizur Rahman*[6] the petitioners of several writ petitions challenged the Bangladesh Ad-hoc Appointees (Counting and

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[1] 16A Am Juris 2d, Const. Law, Para 749
[2] *Ram Krisna Dalmia v. Justice Tendulker*, AIR 1958 SC 538
[3] *Gulf Colorado Company v. Ellis*, 165 US 150
[4] *Garg v. India*, AIR 1981 SC 2138
[5] *Bachan Singh v. Punjab*, AIR 1982 SC 1325, 1352
[6] 46 DLR (AD) 19

Determination of Seniority) Rules, 1990 as being discriminatory. The general rule for counting seniority is that a person in the service of the Republic counts his seniority from the date of regular appointment on the recommendation of the Public Service Commission and in case of several appointments made on the same date, in order of merit assigned by the Public Service Commission. The impugned Rules made a change providing that persons getting ad-hoc appointment between 9.4.1972 and 12.5.1983 and thereafter obtaining regular appointment on the recommendation of the Public Service Commission would count their seniority from the date of their ad-hoc appointment. Clearly a different rule has been prescribed for that particular period and it is discriminatory unless the government can justify the classification between the appointees within that particular period and the appointees outside that period. The government came up with a justification stating that during the stipulated period large number of ad-hoc appointments had to be made, but as the Public Service Commission could not function properly, these ad-hoc appointees could not be regularised promptly for no fault of the appointees and injustice was being caused to them in excluding the period of their ad-hoc service. If this was factually correct, the impugned rules can be said to have made a reasonable classification to attain the objective of removing an injustice. But the writ petitioners contended that in their services except for one ad-hoc appointee, all other appointees had the chance to apply to the Public Service Commission for regular appointment within months of their ad-hoc appointment so that there was no question of any injustice done to them. Hardship of the ad-hoc appointees, if any, flowed not from want of opportunity to appear before the Public Service Commission, but from their failure to do well in the examination held by the Public Service Commission. The documents produced indeed showed the correctness of the contention. The governmental objective of doing justice for which the classification has been alleged to have been made was non-existent. The Appellate Division noted the object of the classification, but observed -

> Mr. Ahmed ... tried to show that the grounds on which the impugned classification was made may be present in the other Cadres but they are not present in the Cadres to which the writ petitioners belong. He has argued that the chance for appearing before the PSC was there for all the ad-hoc appointee-respondents but they did not avail of it. But want of chance for getting regularisation was not the only ground for making

> the impugned classification as has been elaborately discussed above. The main ground for the classification is to do justice to a large number of ad-hoc employees appointed during this period as a matter of policy as well as of necessity, by giving benefit of continuous ad-hoc service...[1]

It is submitted that the above does not answer the point raised. The reference to policy is not relevant as policy is not outside the purview of the equality clause. A discriminatory policy may be as void as a discriminatory law or action. The benefit of ad-hoc service is not given to any ad-hoc appointee outside the stipulated period and the ground for according this benefit to the appointees of the stipulated period is that for a long period of time they had no chance of appearing before the Public Service Commission. Hence if the appointees of the particular period had no "want of chance for getting regularisation" there cannot be any question of "doing justice to a large number of ad-hoc employees" which, according to the Appellate Division, is the main ground for the classification. The writ petitioners filed review applications[2] on various grounds, one of which was that the court did not examine whether the object of the classification at all existed. The court rejected the review applications.[3] It is submitted that the presumption of constitutionality of law cannot be carried to the extent of refraining from examining whether the object proffered by the government is at all real, otherwise the protection of art.27 will be a mere rope of sand as the government can always plead an object for a classification when it is not required to show that the object is real and in existence.

2.35 ***Bases of classification:*** Classification can be made on different bases, but it is not possible to fully describe the different bases of classification. Whatever be the base of classification, it must have a rational relationship with the object of the law which prescribes the differential treatment of persons, things, occupations, business or property. Some of the important bases of classification which were the subject of judicial scrutiny from the point of view of equal protection of law are described below.

2.36 *Size, amount, quantity or number:* Size, amount, quantity or number may be properly used as a basis for classification for different

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[1] Ibid, p.33
[2] C.R.P. No.26-32 of 1993
[3] See Para 5.210

treatment for the large or the small since the legislature is competent to determine that control of the smaller manifestations of a particular evil would not appreciably remove the evil whereas the regulation of large manifestations would.[1] Where size is an index to the evil at which the law is directed, discrimination between the large and the small is permissible.[2] For public benefit the legislature may grant some privilege to smaller undertakings which is denied to larger undertakings.[3] The legislature may prescribe different treatment on the basis of largeness or smallness in respect of immovable property[4], earnings[5], rental value[6] volume of sale or export[7], loans[8], population[1] or taxes[2]. Criminal

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[1] 16A Am Juris 2d, Const. Law, Para 761

[2] *Morey v. Doud*, 354 US 457 overruled in *New Orleans v. Dukes*, 427 US 297, on the ground that in invalidating the law *Morey* constituted a "needlessly intrusive judicial infringement on the State's legislative powers")

[3] *Harnam Singh v. R.T.A. Calcutta*, AIR 1954 SC 190 (statutory order prescribing cheaper tariff for small taxis is not discriminatory against owners of large taxies. Where "in the interests and for the benefit of a section of the public small taxis have been introduced and cheaper rates have been fixed having regard to the size, horsepower and expenses of running such cars, there is nothing unreasonable in this classification ...")

[4] *Summerville v. Pressley*, 33 SC 56 (a statute permitting the owner of a small parcel of ground to cultivate a larger proportion of his ground than the owner of larger tract where same maximum limit is fixed for all)

[5] *Hunter v. New York*, 396 NY 2d 186 (law requiring financial disclosure by city employees earning a salary of $25,000 or more)

[6] *Darshanlal v. India*, AIR 1992 SC 1848 (imposition of different rates of theatre tax on the basis of rental value of cinema houses)

[7] *Clerk v. Titusville*, 184 US 329 (law requiring payment of tax at different rates depending on the amount of sales); *P.V. Shivarajan v. India*, AIR 1959 SC 556 (different treatment between exporters who had exported a particular quantity of goods during a stated period and the exporters who had not, for the purpose of export registration and licence is not unconstitutional as the classification is reasonably related to the object of stopping malpractices in, and loss of reputation of, the export trade in coir); *India v. Hindustan Development Corp.*, AIR 1994 SC 988 (Railway's decision to enter into contracts for purchase of steel wagons paying higher price to small manufacturers and lower price to big manufacturers is not discriminatory as the railway pleaded that the cost of production of small manufacturers is higher and adoption of uniform low rate would render their business non-viable and dual pricing procedure was adopted to save small manufacturers from extinction and thereby to further the governmental policy of prevention of monopoly and concentration of wealth and economic power.)

[8] *Mutual Loan Co. v. Martell*, 200 Mass 482 (law forbidding assignment of wages to secure small loans unless accepted by the employer or consented to by the wife of the employee, but permitting such assignment without restriction to secure larger loans is

offences may also be classified into grades for different punishment according to the distinction of amount involved.[3] But the law cannot differentiate between the large and the small where size or quantity is not an index to the problem dealt with.[4] Although the mere factor of number cannot be a reasonable basis for classification and discrimination based solely upon numbers is invalid[5], a classification based on number is not necessarily unconstitutional and may be found valid if it has a rational relationship with the object of the legislation.[6] Classifications in various regulations of occupations on the basis of the number of persons employed are valid when such basis is not arbitrary or unreasonable.[7]

2.37 *Exemption of minima:* Classification made in a statute on the basis of value and amount for grant of exemptions is valid and constitutional. The courts have upheld statues exempting from execution and attachment the books and library of professional men, the surgical instruments of physicians or the household furniture and other articles of ordinary debtors.[8]

2.38 *Time:* Time may form a basis for valid classification and the equality clause is not violated simply by application of a law from a certain date and thereby discriminating between the right of an earlier

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not unconstitutional)

[1] *Ditty v. Hampton*, 490 SW 2d 772 (law requiring that in large cities, but not in small ones, police judges must be lawyer or trained in law is not violative of equality clause)

[2] *Commonwealth v. Hazel*, 155 Ky 30 (imposition of licence tax on persons who purchase at a tax sale to specific amount without taxing those who purchase at a less amount s not invalid); *Orient Weaving Mills v. India*, AIR 1963 SC 98 (exempting goods produced by small power-loom weavers from excise duty); *Indian Express Newspapers v. India*, AIR 1986 SC 515 (classification of newspapers into small, medium and big on the basis of circulation for levying customs duty on newsprint).

[3] *Allen v. Smith*, 84 Ohio St. 283

[4] *Engel v. O'Malley*, 219 US 128

[5] *Douglas v. South Georgia Grocery Co.*, 180 Ga 519

[6] *Fox v. Standard Oil Co.*, 294 US 79 (chain stores may be classified separately from individual establishments and may be subjected to tax or fees graduated according to the number of units contained therein)

[7] *Middleton v. Texas Power & Light Co.*, 249 US 152; *Goodman v. Kennedy*, 459 Pa 313 (a statute prohibiting Sunday sale of fresh meat, but exempting stores with less than 10 employees is valid)

[8] *Denny v. Bennett*, 128 US 489; *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 US 356 (law exempting individuals from ad valorem property tax payable by companies is not unconstitutional)

time and later time.[1] Persons appointed before and after a particular date may be differently treated in respect of their appointment, dismissal etc. when they form a separable class in relation to the object of the law and there is a rational basis for the selection of the date.[2] The choice of a date as a basis for classification cannot always be dubbed as arbitrary even if no particular reason is forthcoming for the choice unless it is shown to be capricious or whimsical in the circumstances, while fixing a line, a point is necessary and there is no mathematical or logical way of fixing it.[3] Classification between *ad hoc* appointees who qualified in the first available examination for regularisation and other *ad hoc* appointees who did not has a reasonable basis for giving benefit of the service as *ad hoc* appointee in counting seniority.[4] But for the purpose of determining inter se seniority, classification of employees selected for appointment at the same time pursuant to the same advertisement on the basis of the time of completion of training in different batches was found invalid being arbitrary.[5] Classification of buildings for the purpose of fixation of standard rent on the basis of the date of construction is valid.[6] Statutes are often made effective from a particular date without applying it to previously established conditions and such statutes are found valid.[7] It is a matter exclusively for the legislature to decide from what date a civil law should be made operative and the law cannot be challenged as discriminatory for not affecting prior transactions or pending proceedings if it applies equally to all persons coming within its ambit from the date on which it becomes operative.[8] But in extinguishing or modifying the rights of a natural class of persons, the legislature cannot

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[1] *Califano v. Webster*, 430 US 313

[2] *Jagadish Pandey v. Chancellor, University of Bihar*, AIR 1968 SC 353; *Udayasankaran v. India*, AIR 1996 SC 1901

[3] *India v. Valliappan*, AIR 1999 SC 2526

[4] *Mohiuddin Ahmed v. Bangladesh*, 49 DLR 353

[5] *Aminul Haq v. Rafiqul Hassan*, 1996 BLD (AD) 174

[6] *Roshan Lal v. Ishwar Dass*, AIR 1962 SC 646 (the criteria for the fixation of standard rent of both new and old buildings are not substantially different; the minor differences that exist in the matter, can be justified on grounds of (a) difference in the cost of construction of old and new buildings, (b) difference in the rate of return on investments made in building houses before and after 1947, (c) the need to encourage the building of houses to meet the acute shortage of accommodation; *M/S Punjab Tin Supply Co. v. Central Government*, AIR 1984 SC 87

[7] *Williams v. Walsh*, 222 US 415; *Ramjilal v. I.T. Officer*, AIR 1951 SC 97

[8] *Inder Singh v. Rajasthan*, AIR 1957 SC 510; *Hathising Manufacturing Co. v. India*, AIR 1960 SC 923; *Jain Brothers v. India*, AIR 1970 SC 778

select an arbitrary date having no rational relation with the necessity for such extinction or modification so as to split the class into two having different rights and liabilities without any reasonable grounds for such differential treatment.[1] A classification attempting to give an economic advantage to those engaged in a business at an arbitrary date as against all those who enter the industry after that date is invalid as not being a regulation of business in the public interest unless it is shown to effect a public welfare in a manner which creates some reasonable basis for the classification.[2] Statutes which enact conditions and qualifications for professions without applying it to those persons previously engaged therein are not unconstitutional as such statutes proceed on the theory that those who have acceptably followed the profession in the community for a period of years may be assumed to have the qualifications which others are required to manifest on examination.[3] A law prohibiting sale of foodstuff on pushcarts in certain areas of a city, but exempting the vendors who have operated continually in the same locality for 8 years prior to the effective date of the law is not violative of the equality clause on the ground that it accorded discriminatory treatment to vendors who operated for less than 8 years.[4] Classification on the basis of number of years of service for compulsory retirement of public servants has been found valid.[5] But classification on the basis of time will be unconstitutional if it has no rational relationship with the object of the legislation.[6] When the object of pension rules is to permit

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[1] *Jalan Trading Co. v. Mill Mazdoor Sabha*, AIR 1967 SC 691

[2] *Mayflower Farms Inc. v. P.G. Ten Eyck*, 297 US 266; *Pabst Corporation v. Milwaukee*, 190 Wis 349 (a classification of public utilities, for the purpose of regulation, into those in existence before and those created after a specified date is purely arbitrary, without reason and invalid)

[3] *Watson v. Maryland*, 218 US 173

[4] *New Orleans v. Dukes*, 427 US 297; *M.B. Cotton Association Ltd. v. India*, AIR 1954 SC 634 (`hedging' in cotton trading, like insurance and banking, requires experience and a statutory order exempting an Association dealing in such trading for 20 years or more from the prohibition in respect of `hedging' in cotton trading does not violate the equality clause)

[5] *Shivacharana v. Mysore*, AIR 1965 SC 280

[6] *Jaila Singh v. Rajasthan*, AIR 1975 SC 1436 (in allotting land to landless, the classification made between pre-1955 and post-1955 tenants for differential treatment in respect of the quantum of land and price to be paid is unconstitutional; plea that lesser quantum was allotted to post-1955 tenants because of pressure for the land is untenable as the difference in the period of occupation between pre-1955 and post-1955 tenants could not be of such an extent as to justify allotment of larger extent of land to

retired public servants live free from penury, different rates of pension for persons retiring on different dates is discriminatory as the time of retirement has no rational connection with the object of the pension rules, increase in the cost of living hitting all pensioners alike.[1]

2.39 *Personal traits, attributes and characteristics:* Classification is often made upon the traits, attributes or characteristics of persons sought to be dealt with by a particular legislation. When such traits, attributes or characteristics have rational relationship with the object of the law, such classification is held to be valid. A classification is unreasonable which is based on such mere physical characteristics as height, weight, complexion, mentality or other personal attributes which pertain solely to the particular person and not to any relation that person may bear to others in human conduct and activity.[2] Personal qualifications on which classification is sought to be made are many and include race, caste, religion, colour, sex, place of birth, age, marital or family status, fitness, literacy. alienage, military service, labour union membership, residence, property ownership and wealth and poverty. Classification has often been made on the basis of personal characteristics such as insanity[3] or

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the pre-1955 tenants than to the post-1955 tenants and the differentiation of price); *Probhakar v. A.P.*, AIR 1986 SC 210 (age of retirement was reduced from 58 to 55 years, but immediately thereafter it was realised that the reduction was a serious error and caused grave injustice and the old provision was restored. However, the benefit of restoration was not given to those who in the meanwhile retired on reaching the age of 55. The court found prospective operation of the amended provision arbitrary and discriminatory); *Ameerunnessa Begum v. Mahboob Begum*, AIR 1953 SC 91 (a law making a classification between disputes which have continued for a long time between rival claimants and disputes which have not so continued and thereby singling out two groups of persons and preventing them from establishing their rights in court under their personal law is arbitrary); *Ram Lubhaya Kapur v. India*, AIR 1973 P&H 297 (Government's decision to allocate imported shoddy wool only to industries established prior to 1959 is unconstitutional inasmuch as the selection of the date is most arbitrary and extraneous to the purpose of importing raw material for the industry as a whole)

[1] *D.S. Nakara v. India*, AIR 1983 SC 130; *Bangladesh Retd. Govt. Employees Assn. v. Bangladesh*, 46 DLR 426 (reversed on appeal on the ground that all pensioners did not form a homogenous class and were not as such similarly situated - see 51 DLR (AD) 121); see, however, *Kasturi v. M.D., State Bank of India*, AIR 1999 SC 81

[2] 16A Am Juris 2d, Const. Law, Para 767

[3] Statutes providing for sexual sterilization of feeble-minded persons have been held not to deny equal protection of law, see *Buck v. Bell*, 274 US 200. But in *Jackson v. Indiana*, 406 US 715, it was held that state deprives an accused of equal protection of laws by committing him to state department of health, until he is certified sane, because

illegitimacy[1]. Benefit given to widows in respect of eviction of tenants is permissible as the widows *per se* form a class different from others.[2] Individuals cannot be accorded discriminatory treatment because of their social or political attitudes.[3] In case of committed felons a law denying the right to vote has been upheld.[4] A law making a classification between offenders and habitual offenders in imposing restriction on the right of free movement was upheld as being reasonable because of the purpose behind such restriction.[5] But in *Deodat Rai v. State*[6] the court found a further classification between a habitual criminal having acquired a bad reputation and a habitual criminal having not acquired a bad reputation to be discriminatory as having no rational relationship with the object of the law.

2.40 *Race, caste, religion, sex and place of birth:* Classification on the basis of race, caste, religion, sex or place of birth is generally suspect and will be found invalid unless it can be shown that it subserves a legitimate governmental objective.[7] In view of the provisions of art.28 of the Constitution, no differential treatment can be made only on the ground of race, caste, religion, sex or place of birth[8] except that the State is not prevented from making special provisions in favour of women or children or for the advancement of any backward section of the citizens.[9]

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he lacked comprehension sufficient to make his defence, while civilly committing persons as mentally ill only on showing of mental illness and showing that individual is in need of care, treatment, training or detention, and civilly committing persons as feeble-minded only when they are unable properly to care for themselves, and permitting release of persons committed as mentally ill or feeble-minded where the individual no longer requires custodial care or treatment or detention which occasions commitment, or when the department of mental health believes that release would be in his best interest)

[1] *Jiminez v. Weinberger*, 417 US 628 (a law discriminating an illegitimate child is invalid where classification is justified by no legitimate state interest, compelling or otherwise)

[2] *Malhotra v. Prakash Mehra*, AIR 1991 SC 99

[3] *Cipriano v. Houma*, 395 US 701

[4] *Richardson v. Ramirez*, 418 US 24

[5] *P. Arumugham v. Madras*, AIR 1953 Mad 664

[6] AIR 1951 All 718

[7] *Chittaranjan v. Secy. Judicial Department*, 17 DLR 451

[8] *Rabia Bashri Irene v. Banglaesh Biman*, 52 DLR 308 (Fixing retirement age of flight stewardess below the age of retirement of flight steward constitutes gender discrimination); *Dalia Parveen v. Bangladesh*, 48 DLR 132

[9] See Para 2.72 and 2.73

However, in view of differences in the matter of faith and religious practices the equality clause is not violated by the legislature providing for the constitution of Boards for the superintendence of Hindu and Jain religious endowments differently.[1] In *Khodeja Begum v. Sadeq Sarker*[2] a Single Bench of the High Court Division held that the law relating to restitution of conjugal rights is a violation of liberty, freedom, equality and social justice and is therefore void. Apart from expressing his opinion, the learned Judge did not advance any reason relevant in a decision on equality clause and did not at all discuss the issues involved in the matter, and the decision, and more than that, the manner of arriving at the conclusion, is open to exception.

2.41 *Age:* Classification on the basis of age is permissible provided it is not arbitrary or unreasonable. Thus a minimum and maximum age may be fixed as a qualification for public as well as private employment as also for voting rights.[3] The protection of the equality clause applies both to young and old and yet minors, requiring the protection of law, constitute a class apart and the legislature may make special provisions for them for their safety, health, morals and general welfare.[4] The legislature may classify persons by age for the purpose of determining punishment for crimes and such a classification will not be unconstitutional if it has reasonable relationship with the object of the law. A provision in law debarring persons above the age of 45 years from being enrolled as advocate may be discriminatory.[5]

2.42 *Marital or family status:* The right to marry is an important part of the liberty guaranteed by art.31 of the Constitution and unless there is any compelling State interest in making a classification on the basis of marital or family status, a law providing for differential treatment on the basis of marital or family status will be unconstitutional. In respect of employment rights and benefits, differential treatment based on marital

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[1] *Moti Das v. S.P. Sahi*, AIR 1959 SC 942

[2] 50 DLR 181; *Sharmin Hossain v. Mizanur Rahman*, 2 BLC 509

[3] *Massachusetts Board of Retirement v. Murgia*, 427 US (law providing for retirement at the age of 50 found valid); *Radha Charan v. Orissa*, AIR 1969 Orissa 237 (Rules prescribing age group for recruitment of District Judge from the Bar is a valid classification as indicative of sufficient maturity for the appointment)

[4] *Gopeswar Prasad v. Bihar*, AIR 1951 Pat 570 (law providing for different age of majority in case of persons whose property was under the management of Court of Wards is not discriminatory)

[5] *Indian Council of Legal Aid v. Bar Council*, AIR 1995 SC 691

or family status and policies and practices directed against married women, pregnant women and women with small children are violative of art.27.[1] But school and university regulations distinguishing between married and single students have been generally held constitutional.[2]

2.43 *Fitness:* Classification of persons may be made according to their personal fitness to carry on a particular business or vocation. This is characteristic of all licence laws and so far as they provide that all persons desiring to engage in a particular occupation shall be examined as to fitness or otherwise show that they possess proper qualifications, such laws are usually held valid.[3] But a statute which permits the members of a partnership or a company to pursue a particular calling without a licence provided any member of the partnership or the company has procured a licence is unconstitutional as it does not operate equally upon all of a class pursuing the calling under like circumstances.[4] Qualifications set down by law, in order to be valid, must have a rational relationship with the fitness required for the specific job, business or occupation.

2.44 *Wealth and poverty:* Generally speaking, mere presence of wealth or lack of it in an individual citizen cannot be the basis of a valid classification. Denying an indigent prisoner access to the courts to defend a civil suit, while free persons and prisoners possessing the means to hire counsel retain such access, constitutes *prima facie* a violation of the equality clause.[5] Similarly, a person may not be denied, on the basis of wealth, the right to vote[6] or to become a candidate for a

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[1] *Air India v. Nergesh Meerza*, AIR 1981 SC 1829

[2] *Prostrollo v. University of South Dakota*, 507 F.2d 775

[3] *Linehan v. Waterfront Company* 347 US 439; *J & K v. T.N. Khosa*, AIR 1974 SC 1 (classification of Assistant Engineers between diploma-holders and degree-holders for the purpose of promotion to the post of Executive Engineer is valid as a classification founded on variant educational qualification is not unjust on the face of it); *Ramesh Prasad v. Bihar*, AIR 1978 SC 327 (classification between a person specially trained and having experience in tele-communication engineering and a person not so trained for appointment to the post of Executive Engineer (Tele-communication) is valid)

[4] *Henry v. Campbell*, 133 Ga 882

[5] *Payne v. Superior Court of Los Angeles*, 17 Cal 3d 908

[6] *Harper v. Virginia State Board of Elections*, 383 US 663 (a law is violative of the equality clause whenever it makes affluence of a voter or payment of fee an electoral standard, since voter qualifications have no relation to wealth, or to payment or non-payment of poll tax)

public office[1]. But it does not mean that legislation cannot be made on the basis of economic position where such a position has a rational relationship with the object of the legislation. It is always a legitimate governmental interest to ameliorate the condition of the poor, and when the removal of social and economic inequality is one of the fundamental principles of State policy Parliament may legislate on the basis of financial condition to grant some privilege to the poor which is denied to the rich. The government's decision to allow first class government servants who have been promoted from fourth class and third class to purchase the abandoned houses allotted to them earlier as third and fourth class government servants at a stipulated price is not unconstitutional discrimination against other first class and second class government servants in view of the fact that the government intended to confer the benefit on those who were not a in sound financial position and were not capable of purchasing otherwise an abandoned property.[2] The legislature may validly tax an economically stronger class leaving out economically weaker class from the tax net[3] or may impose a greater tax burden on the persons having greater means. Thus income tax imposed at progressive or graduated rates, increasing according to the amount of tax payer's income, is not violative of the equality clause.[4] A distinction made amongst the tax-payers, for an annuity deposit scheme, between those belonging to upper income groups and those belonging to lower income groups and requiring only the former to pay annuity deposits is a reasonable classification.[5] A school financing system authorizing *ad valorem* tax is not unconstitutional on the ground that the burdens or benefits of a State measure fall unevenly depending on the relative wealth of the political subdivision in which the citizens live.[6]

2.45 *Locality or territory:* The equal protection clause relates to equality between persons rather than between areas, and territorial uniformity in operation of laws is not constitutionally mandated.[7] The legislature is free to determine whether a law should extend to the whole of the territory or be limited to particular areas provided that the classification made has a rational relationship with the object of the

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[1] *Lubin v. Panish*, 415 US 709
[2] *Afia Khatun v. Secretary, Ministry of Works*, 44 DLR 225
[3] *Kerala Hotel & Restaurant Assn. v. Kerala*, AIR 1990 SC 913
[4] 16A Am Juris 2d, Constitutional Law, Para 774
[5] *Hari Krisna v. India*, AIR 1966 SC 619
[6] *San Antonio Independent School District v. Rodriguez*, 411 US 1
[7] *McGowan v. Maryland*, 366 US 420

law.[1] The equality clause does not prevent the State from applying different laws to different parts of the country according to the local circumstances.[2] The legislature may empower the government to declare an area as a dangerously disturbed area and provide for a different procedure for the trial of offences[3] or a different forum[4] It may also prescribe different standards for different areas in a law directed against adulteration of food according to the differing conditions of different areas.[5] In the same way, different prices may be fixed for different areas in consideration of differences in cost of production in different areas.[6] Special treatment given to the industries in the backward areas on the basis of a rational policy does not violate the equality clause.[7] Local authorities may be authorised to levy taxes at different rates in different areas.[8] A geographical classification based on historical reasons subjecting persons of one locality of the State to a particular tax is not unconstitutional.[9] The zonal or territorial division of the State for the purpose of implementing a scheme of nationalised motor transport according to the circumstances prevailing in different localities is not unconstitutional.[10] But classification by districts or otherwise for the purpose of prescribing regulations that in effect impose different burdens upon some of the citizens of the State from those imposed upon other citizens under similar conditions, with conceivably no just basis for the classification, constitutes a denial of equal protection.[11] Where the object to be achieved is to get the best talent for admission to professional colleges, the allocation of seats districtwise has no

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[1] *Kishan Singh v. Rajasthan*, AIR 1955 SC 795; *Jia Lal v. Delhi Administration*, AIR 1962 SC 1781

[2] *Nagaland v. Ratan Singh*, AIR 1967 SC 212; *Gopal Narain v. U.P.*, AIR 1964 SC 370

[3] *Gopichand v. Delhi Administration*, AIR 1959 SC 609

[4] *Kangshari Haldar v. W.B.*, AIR 1960 SC 457

[5] *U.P. v. Kartar Singh*, AIR 1964 SC 1135

[6] *Anakapalle Co-operative v. India*, AIR 1973 SC 735

[7] *M.P. Oil Extraction v. M.P.*, AIR 1998 SC 145

[8] *Gopal Narain v. U.P.*, AIR 1964 SC 370

[9] *M.P. v. Bhopal Sugar Industries*, AIR 1964 SC 1179 (native state of Bhopal was merged in state of M.P. in 1956 and agricultural income tax imposed in 1953 continued to be levied and collected in the territory of former Bhopal state while this tax was not levied in other parts of state of M.P.)

[10] *Ram Chandra v. Orissa*, AIR 1956 SC 298

[11] 16A Am Juris 2d, Const. Law, Para 764; *Caldwell v. Mann*, 157 Fla 633

reasonable relation with the said object and is unconstitutional.[1]

2.46 *State and subjects:* The state is a definite class distinct from the subjects and the legislature has a wide power to legislate according differential treatment to the State and individuals, provided that the differentiation has a reasonable relationship with the object of the legislation. Existence of public interest will generally render sufficient justification for differential treatment between State and individuals. A law may be made granting a monopoly to the State in respect of certain trade or business affected with public interest excluding others from the said trade or business.[2] The government, even as a banker, can be put into a separate class and special facility for recovery of the dues of government banks can be accorded in view of the fact that the dues of the government are the dues of the entire people and quick recovery of the dues of the government is in the public interest.[3] Imposition of customs duty at a lower rate for imports by a statutory authority is not violative of art.27.[4] It is not impermissible to provide for a summary procedure for eviction of tenants or occupants from government premises.[5] The legislature may exclude the buildings belonging to the government or local authorities from the application of rent control law.[6] The longer period of limitation provided under art.149 of the Limitation Act is not unconstitutional in view of the fact that if the claim of the government is barred by limitation, the loss falls on the public and that governmental machinery does not move as quickly as in the case of individuals.[7] But where the object of the law was to ameliorate the condition of the Jagirdars (whose capacity to pay the debt had been reduced by the resumption of Jagirs under another law) by reduction of debts, there is no rationale for excluding the debts due to the

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[1] *P. Rajendra v. Madras*, AIR 1968 SC 1012

[2] *Saghir Ahmed v. U.P.*, AIR 1954 SC 728 (exclusive right of the state to operate in certain motor routes); *Khoday Distilleries Ltd v. Karnataka*; AIR 1996 SC 911

[3] *Manna Lal v. Collector of Jhalawar*, AIR 1961 SC 828; *Lachman Dass v. Punjab*, AIR 1963 SC 222; *Corporation of Trivandram v. Md. Haneefa*, AIR 1958 Ker 61 (recovery of municipal tax)

[4] *Bharat Surfactants (Pvt) Ltd v. India*, AIR 1989 SC 2054

[5] *Maganlal v. Greater Bombay Municipality*, AIR 1974 SC 2009; *Gujarat v. Bava*, AIR 1980 SC 1144; *Gujarat v. Dharamdas*, AIR 1982 SC 781

[6] *Baburao v. Bombay Housing Board*, AIR 1954 SC 153; *Venketadri v. Tenali Municipality*, AIR 1956 AP 61

[7] *Afsar Ali Chowdhury v. Bangladesh*, 43 DLR 593 *Nav Rattanmal v. Rajsthan*, AIR 1961 SC 1704

government or the local authorities from the purview of the law and the law so far as it excludes debts due to the government or the local authority from the definition of 'debt' is unconstitutional.[1]

2.47 *Classification of occupations, business, pursuits:* The legislature has power to classify on the basis of differences in occupation, business and pursuits and such classification is valid so long as it has a reasonable basis and is not merely an arbitrary selection without any real difference between the subjects included in and omitted from purview of the law. Classification of sponsors and directors of private sector banks and financial institutions and the members of their families from the rest of the people for imposition of restriction on their becoming sponsors or directors of insurance companies to prevent monopoly in the money market is not unreasonable.[2] Every business forms a distinct class and it is not unreasonable for the legislature to place a particular business in a single class in order to attain the objective of the law.[3] The equality clause does not require all occupations or businesses to be treated in the same way.[4] It is for the legislature to select the kind of business which shall be the subject of regulation[5] and in this regard the legislature has a wide discretion. Any substantial difference between particular businesses may serve as a reasonable basis for classification.[6] The classification of businesses may be based upon such factors as location, time and number of persons employed.[7] A classification of borrowers

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[1] *Rajsthan v. Mukan Chand*, AIR 1964 SC 1633

[2] *Nasreen Fatema v. Bangladesh*, 49 DLR 542 (affirmed in 3 BLC (AD) 190); see also *City Bank Ltd v. Bangladesh Bank*, 51 DLR (AD) 262

[3] *Estrin v. Moss*, 221 Tenn 657

[4] *Dominion Hotel Inc. v. Arizona*, 249 US 265; *Bhikusha v. Kamgar Union*, AIR 1963 SC 806 (different minimum wages may be fixed for different industries); *C.B. Boarding & Lodging v. Mysore*, AIR 1970 SC 2042

[5] *New York ex rel. Lieberman v. Van de Carr*, 199 US 552

[6] *H.R. Banthia v. India*, AIR 1970 SC 1453 (distinction made in licensing provision under the Gold (Control) Act between licensed dealers and certified goldsmith); *P.T.I. v. India*, AIR 1974 SC 1044 (classification between newspaper and news agency for fixation of minimum wages of employees); *Joseph Kuruvilla v. Reserve Bank*, AIR 1962 SC 1371 (classification between banking companies and non-banking companies in respect of winding up); *Mathrumal v. Chief Inspector of Shops*, AIR 1952 All 773 (classification between trade employing outside labour and the trade with the assistance of family members); *Catholic Bank of India v. George Jacob*, AIR 1968 Ker 3 (classification between banking company and private money lender); *Bombay v. Balsara*, AIR 1951 SC 318 (classification between cargo boats and passenger boats).

[7] 16A Am Juris 2d, Const. Law, Para 775

based on the nature of the institution from which they borrow to fight the default culture in financial institutions is not discriminatory as the classification is logically permissible and subserves the objective of the legislation.[1] The wide power of classification is, however, subject to the limitation to the extent that it does not permit discrimination by which persons engaged in the same business are subjected to different restrictions or are held entitled to different privileges under the same conditions.[2] The constitutionality of a statute cannot be sustained which selects particular individuals from a class or locality and subjects them to peculiar rules or imposes upon them special obligations or burdens from which others in the same locality or class are exempt.[3] The equality clause requires that no impediment should be interposed in the pursuits of anyone except as applied to the same pursuits by others under similar circumstances and that no greater burdens in engaging in a calling should be laid upon one than are laid upon others in the same calling or condition.[4] It is a denial of the equal protection of law where the State regulates one who does much business without regulating another in the same enterprise doing less business.[5] The legislature may not, under the guise of classification, impose upon a particular industry or business discriminatory or burdensome measure which has no vital or reasonable relation to the object sought by a just and permissible classification.[6] There are dangerous or hazardous callings or businesses which may be classified for different treatment and such legislations are generally held to be constitutional unless the differential treatment *ex facie* appears to be arbitrary or unreasonable.[7]

2.48 *Classification among companies:* Companies are legal entities and the legislature may divide companies into different classes and confer upon them such rights, capacities and powers and impose such burdens as it may see fit.[8] No complaint about unequal treatment can be

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[1] *Chandpur Jute Suppliers v. Artha Rin Adalat,* 2 BLC 49

[2] *Minneapolis & S.L.R.Co. v. Beckwith,* 129 US 26

[3] *Truax v. Raich,* 239 US 33

[4] *Connolly v. Union Sewer Pipe Co.,* 184 US 540

[5] *McLeans v. Arkansas,* 211 US 539; *Stewart Dry Goods Co. v. Lewis,* 294 US 550 (the equal protection guarantee is violated by a gross sales tax which classifies vendors for the imposition of a varying rate of taxation solely by reference to the volume of their transaction)

[6] *Gulf C & S.F.R. Co. v. Ellis,* 165 US 150

[7] *R.E. Sheehan Co. v. Shuler,* 265 US 371

[8] *City Bank Ltd. v. Bangladesh Bank,* 51 DLR (AD) 262

made so long as the differential treatment has a rational relationship with the object of the law and so long as the legal provisions are applicable to all companies similarly situated. In order to justify the diversity of treatment, the classification must be based on differences such as are natural or intrinsic[1] and reasonable[2]

2.49 *Classification among companies and individuals:* In many situations distinction has been drawn between companies and individuals and different treatment has been prescribed by the legislature. The inherent difference between companies and natural persons is sufficient to sustain a classification between individuals and companies.[3] But a law which is directed solely to companies but eliminates individuals from its operation without any basis for such differential treatment is violative of the equality clause.[4]

2.50 *Classification among individuals and partnership:* The legislature may differentiate between individuals and partnerships, provided the differentiation has a rational relationship with the object of

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[1] *Consolidated Rendering Co. v. Vermont*, 207 US 541; *Joseph Kuruvilla v. Reserve Bank*, AIR 1962 SC 1371 (different provision for winding up of banking companies, not applicable to non-banking companies, made in Banking Companies Act was found constitutional having regard to the wide difference between the two types of companies and the need for special laws dealing with banking companies); *R.L. Arora v. U,P.*, AIR 1964 SC 1230 (distinction made between public companies and private companies to allow acquisition of land only in favour of public companies is reasonable as the profit of private companies goes to a few hands)

[2] *Lake Shore & M.S.R. Co. v. Smith*, 173 US 684; *Davidow v. Wadsworth Manufacturing Co.*, 211 Mich 90 (Statute imposing upon certain companies a confiscatory and unreasonable penalty for failure to pay the wages due to an employee leaving their employment, which is not made applicable to other companies of similar character is unconstitutional)

[3] *Crescent Cotton Oil Co. v. Mississippi*, 257 US 129; *Chicago R.I. & P.R. Co. v. Perry*, 259 US 548; *Raja Narayanlal v. Maneck P. Mistry*, AIR 1961 SC 29 (ss.239 and 240 of the Indian Companies Act, 1956 were not violative of equality clause on the ground that the ordinary protection afforded to witnesses under s.132 of the Evidence Act and s.161 of Cr.P.Code have been denied to the persons in charge of the management of companies as a citizen can and may protect his own interest, but where the financial interest of a large number of citizens is left in charge of persons who manage the affairs of the companies it would be legitimate to treat such companies and their managers as a class by themselves and to provide for necessary safeguards and checks against a possible abuse of power)

[4] *Luis K. Ligett Co. v. Lee*, 288 US 517

the law.[1] It is not an unconstitutional discrimination to require a licence for the sale of partnership securities when none is required for the sale of securities issued by individuals.[2]

2.51 *Classification of commodities and things:* The legislature may make classifications between commodities and things for differential treatment and may require licence to be obtained for trading in or manufacturing specified commodities and things without requiring such licence in respect of other commodities and things and such classifications are upheld when not arbitrary or unreasonable. In this field, the power of the legislature is so wide and the courts defer so much to the wisdom of the legislature that the very fact of classification justifies the classification.[3] Apart from the general classification usually made, classification is made of the commodities which are identified as essential[4] or hazardous, qualifying those commodities for different treatment. Classification of goods shipped and not shipped for the purpose of giving retrospective effect to a change in import policy and exempting the goods shipped before the change was made is found

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[1] *Abdul Wahab v. Securities & Exchange Commission*, W.P. 2053 of 2000 (Unreported) (Law requiring that financial statement of an issuer of listed securities has to be audited by a partnership firm of Chartered Accountants was held valid)

[2] *People v. Simonsen*, 64 Cal App. 97

[3] *Daruka & Co. v. India*, AIR 1973 SC 2711 (exclusion of mica powder from export canalisation scheme without excluding mica scrap or mica waste is valid having reasonable relationship with the object of development of mica powder industry); *Hanif Quareshi v. Bihar*, AIR 1958 SC 731 (prohibition regarding slaughter of cattle without including other animals like goat and sheep within the prohibition is not unconstitutional as the classification has close connection with the object sought to be achieved by the law, namely, the preservation, protection and improvement of livestock)

[4] *Chiranjit Lal v. India*, AIR 1951 SC 41 (a company, which is engaged in production of a commodity vitally essential to the community, has a social character of its own and one cannot say that the legislature has no authority to treat it as a class by itself and make special legislation applicable to it alone in the interest of the community at large); *M/S Bishamber Dayal v. U.P.*, AIR 1982 SC 33 (to obviate hoarding and black marketing the government fixed the maximum limit of wheat (an essential commodity) permitted to be stocked by a wholesale dealer and the court held that fixation of such stock limit, having regard to the object sought to be achieved, is neither arbitrary nor unreasonable and is not violative of the equality clause); *Suruj Mal v. India*, AIR 1982 SC 130 (fixation of stock limit of an essential commodity is not violative of equality clause simply because no distinction has been made between wholesale dealer and retailer)

reasonable.[1] Though classification of tenancies can be made to allow greater rights in respect of tenancies of commercial premises[2], such a classification between commercial and residential premises cannot be made in the matter of eviction of tenants[3].

2.52 *Manner of trading in commodities:* Trades and businesses are often sought to be regulated upon classification based on the kind and the technique of trading. It is generally held that legislation providing for classification based upon the type of trading done by persons sought to be regulated by it is constitutional if the particular mode of trading so classified is substantially different from other trading and forms a rational basis for the legislative distinction and if all persons so engaged and regulated are treated alike. The differences between manufacturers and dealers, regular dealers or merchants and transients like peddlers, hawkers and itinerant vendors, between retailers and wholesalers and between sellers for cash and sellers on credit are substantial and may form the basis of reasonable classification.[4]

2.53 ***Economic regulations, taxation and equal protection*** : The equality clause is applicable in respect of economic activities of the State. But the courts view the laws relating to economic activities with greater latitude than the laws touching civil rights such as freedom of speech, religion etc.[5] The courts feel more inclined to accord judicial deference to the legislative judgment in the field of economic regulation than in other areas where fundamental human rights are involved.[6] The American Supreme Court consistently deferred to the statutory

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[1] *Darshan Oils Pvt. Ltd v. India*, AIR 1995 SC 370

[2] *Gauri Shankar v. India*, AIR 1995 SC 55

[3] *Asoka Marketing Ltd v. Punjab National Bank*, AIR 1991 SC 855

[4] 16A Am Juris 2d, Const. Law, Para 780; *Southwestern Oil Co. v. Texas*, 217 US 114; *Narendra Kumer v. India*, AIR 1960 SC 430 (distinction between manufacturer and dealer in respect of non-ferrous metal); *Muhammadbhai v. Gujarat*, AIR 1962 SC 1517 (bye-law charging higher licence fee from wholesale trader as compared with retailer); *Gem Palace v. India*, AIR 1970 Raj 225 (distinction between dealers or refiners and non-dealers)

[5] *SIEL Ltd v. India*, AIR 1998 SC 3076, 3084; *Dalmia Cement (Bharat) Ltd. v. India*, (1996) 10 SCC 104

[6] *Garg v. India*, AIR 1981 SC 2138; *Elahi Cotton Mills v. Pakistan*, PLD 1997 SC 582, 675; *Nasreen Fatema v. Bangladesh*, 49 DLR 542 (legislative judgment relating to social and economic policy must not be interfered unless it is palpably arbitrary) (affirmed in 3 BLC (AD) 190)

classifications concerning the regulation of economic activities.[1] It is not the function of the court to sit in judgment over matters of economic policy and it must necessarily be left to the expert bodies[2] and the court will not interfere unless discrimination clearly emerges from the facts of a case.

2.54 *Taxation:* The same is the position with tax laws. A tax law is no exception to equal protection and it will be struck down as infringing art.27 if there is no reasonable classification.[3] To find out discrimination what is decisive is not the language of the statute, but the effect of the law. A law which on the face of it is non-discriminatory may be discriminatory if it, in effect, operates unevenly on persons or property similarly situated. A land tax at a flat rate of Rs.2 per acre was declared unconstitutional as it made no reference to the income derived or derivable from the land taxed. Lack of classification gave rise to inequality and this was evident from the fact that the petitioner was required to pay a tax of Rs.54,000 per year while the income from the land taxed came to about Rs.3000 and the law was virtually confiscatory.[4] Art.27 can be violated by ignoring the differences that exist between persons or things as also by finding a difference where there is none. Imposition of uniform tax on buildings on floor space basis without taking into account the location of the buildings, the purpose for which the buildings are used and the rent obtainable from such buildings may be violative of art.27.[5] In the matter of taxation, the legislature has, however, a wide discretion and in view of the complexity inherent in the fiscal adjustment of diverse elements, the courts allow a great latitude to the legislature in making the classification.[6] Taxation is not now a mere source of raising money for government expenditure, it

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[1] *New Orleans v. Dukes*, 427 US 297; *Idaho Dept. of Employment v. Smith*, 434 US 100

[2] *Peerless G.F. & I. Co. Ltd. v. Reserve Bank of India*, AIR 1992 SC 1033

[3] *Khandige v. Agricultural I.T.O.*, AIR 1963 SC 591; *Kunnahat v. Kerala*, AIR 1961 SC 552

[4] *K.T. Moopil Nair v. Kerala*, AIR 1961 SC 552; *A.P. v. Raja Reddy*, AIR 1967 SC 1458 (land revenue imposed at flat rate without taking into account the productivity of lands was unconstitutional)

[5] *Kerala v. Haji Kutty*, AIR 1969 SC 378

[6] *Karnataka v. D.P. Sharma*, AIR 1975 SC 594; *Kerala Hotel & Restaurant Association v. Kerala*, AIR 1990 SC 913; *Srinivasha Theatre v. T.N.*, AIR 1992 SC 999; *Elahi Cotton Mills v. Pakitan*, PLD 1997 SC 582, 675

is a recognised fiscal tool to achieve fiscal and social objectives.[1] The classification must not, however, be palpably arbitrary.[2] The legislature may select the persons or objects it will tax and a statute will not be open to attack on the ground that it taxes some persons or objects and not others. "The Legislature that is competent to levy a tax must inevitably be given full freedom to determine which articles should be taxed, in what manner and at what rate."[3] Thus the State is allowed to pick and choose districts, objects, persons, methods and even rates of taxation if it does so reasonably.[4] A tax on purchasers of hides and skins without taxing purchasers of other commodities, in the absence of materials on record to show that purchasers of other commodities are similarly situated with the purchasers of hides and skins, is not discriminatory.[5] A sales-tax on Virginia tobacco, but not on country tobacco has been found valid as the former has certain features which distinguish it from the latter.[6] The State may not consider it administratively worthwhile to tax sales by small traders who have no organisational facilities to collect tax from their buyers and turn it over to the government and the State may in imposing tax fix its own limits below which it does not consider imposition and collection of tax administratively feasible or worthwhile.[7] A higher amusement tax on cinema houses having large seating accommodation and situated in fashionable and rich localities than on other cinema houses having less accommodation and situated in poor localities is not unconstitutional.[8] Progressive gradation of income-tax with different rates applying to different income groups is not discriminatory. If the classification is made with the object of taxing only the economically stronger while leaving out the economically weaker sections of society, that would be a good reason to uphold the classification if it does not offend any other accepted norm of valid classification.[9]

2.55 The legislature has the freedom not only in the choice of persons

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[1] *Srinivasha Theatre v. T.N.*, AIR 1992 SC 999
[2] *Kerala Hotel & Restaurant Asociation v. Kerala*, AIR 1990 SC 913
[3] *Khyerbari Tea Company v. Assam*, AIR 1964 SC 925
[4] Ibid
[5] *V.M. Syed v. A.P.*, AIR 1954 SC 314
[6] *East India Tobacco Company v. A.P.*, AIR 1962 SC 1733
[7] *Bombay v. United Motors*, AIR 1953 SC 252, 263
[8] *Western India Theatres v. Cantonment Board*, AIR 1959 SC 582
[9] *Kerala Hotel & Restaurant Association v. Kerala*, AIR 1990 SC 913 (taxing only the sale of costlier food)

or articles to be taxed[1], but also in respect of the method, manner and rate of taxation. When more than one method is available, the court will not be justified in striking down the method adopted unless it is clear that the method is capricious, fanciful, arbitrary or patently unjust.[2] The legislature may prescribe different rates for different categories of persons, objects or transactions.[3] For the necessity of flexibility the legislature may empower the executive to exempt particular goods from duty[4] and may even delegate the power of determining the rate of tax in terms of the policy of the statute.[5] When the government classified match factories into mechanised and non-mechanised units to realise lower excise duty from non-mechanised units, the court rejected the contention that the taxation was bad for not making a classification between strong and weak units holding that classification on the basis of productive process having already been made, further sub-classification could not be insisted upon with reference to the equality clause.[6]

2.56 ***Conferment of discretionary powers:*** When a statute makes a classification for its application the question arises whether the classification is reasonable in relation to the object of the statute. But often a statute makes a provision and leaves it to the discretion of the government or the administrative authority to select and classify persons or things to whom its provisions should apply. Such a discretionary power is not necessarily discriminatory. In *Ram Krisna Dalmia v. Justice Tendulker*[7] the Indian Supreme Court held that the mere fact that no classification was made by the statute or that discretion was left to the government would not lead to the law being struck down, but the court would inquire whether the statute contained any principle or policy for guiding the exercise of discretion by the government in the matter of selection or classification and if it did not, the statute would be struck down on the ground that it conferred arbitrary and uncontrolled power

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[1] *Khyerbari Tea Company v. Assam*, AIR 1964 SC 925

[2] *Sham Bhat v. Agricultural I.T.O.*, AIR 1963 SC 591; *Shetty v. Karnataka*, AIR 1989 SC 100 (though the method adopted may not be the best arrangement in social and economic policies legislative preference for one of the available alternatives cannot be questioned on the ground of lack of legislative wisdom or that there are better methods of adjusting the competing interests and claims.)

[3] *Twyford Tea Co. v. Kerala*, AIR 1970 SC 1133

[4] *Orient Weaving Mills v. India*, AIR 1963 SC 98

[5] *Gopal v. U.P.*, AIR 1964 SC 370

[6] *M. Match Works v. Assistant Collector*, AIR 1974 SC 497

[7] AIR 1958 SC 538

on the government to discriminate between persons or things similarly situated, so that the discrimination is inherent in the statute itself. When a statute confers wide discretion on the executive authority without any policy guideline, it clothes the executive authority with naked and arbitrary power to select persons or things in the exercise of the discretion and the statute even though non-discriminatory on its face permits discrimination in the exercise of the discretion. But if the statute contains the policy or guidance for the exercise of the discretion, the discretion is no longer unfettered and cannot be exercised arbitrarily[1] and any exercise of discretion contrary to such policy or guideline can be struck down.[2] It is not essential that the rules of guidance should be laid down expressly in the statute or the rule. Such guidance may be had from the preamble read in the light of the surrounding circumstances which necessitated the legislation in conjunction with the facts of which the court can take judicial notice or of which it might be apprised by affidavits, or from the policy and purpose of the enactment or from other operative provisions applicable to analogous or comparable situations or generally from the object of the law.[3] In a number of cases the Indian Supreme Court struck down statutes for conferring wide discretionary power to the government or the administrative authority without providing any guideline or policy for the exercise of the discretion.[4] There is much conflict of opinion as to whether a statute conferring discretionary power contained any guideline or policy for the exercise of

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[1] *Secy. Aircraft Engrs. of Bangladesh v. Registrar of Trade Union*, 45 DLR (AD) 122

[2] *Dr. Abu Ahmed v.Bangladesh*, 1982 BLD 98 (order of compulsory retirement was struck down when no record was placed before the court to show that the order was passed in the public interest)

[3] *Jyoti Prasad v. Administrator of Delhi*, AIR 1961 SC 1602 (the observation that the policy of a law can be gathered from affidavits has been criticised because it renders the validity of a law dependent upon affidavits affirmed on behalf of the government long time after the enactment and because of the possibility of different officers of the government affirming conflicting affidavits. See H.M. Seervai's Constitutional Law of India, 3rd ed. p.351)

[4] *W.B. v. Anwar Ali Sarker*, AIR 1952 SC 75; *Dwaraka Prasad v. U.P.*, AIR 1954 SC 224; *Dhirendra Kumar Mondal v. Superintendent & Remebrancer, Legal Affiars*, AIR 1954 SC 424; *Punjab v. Khan Chand*, AIR 1974 SC 543 (law empowering the government and its authorised officers to requisition any movable property was held unconstitutional as no guidelines have been laid down regarding the object or the purpose for which it becomes necessary to requisition a movable property); *Maharashtra v. Kamal*, AIR 1985 SC 119

the discretion.[1] In a number of cases the court held the statutes valid on the ground that those contained guideline or policy for the exercise of the discretion.[2]

2.57 When there are two laws covering the same matter, one harsher than the other, and the administration is given the discretion to select the law to apply in a given case, there may be discrimination between two similarly situated persons resulting from the exercise of the discretion by the administration. To avoid discrimination, the courts insist that the harsher law should lay down some reasonable guideline or principle to regulate the administrative discretion.[3] A Punjab law provided a summary procedure for eviction of unauthorised occupants from public premises with the result that the Collector had the unfettered discretion to go for the ordinary remedy of civil suit or pass an order of eviction under the special law. The special law was declared void by the Supreme Court as the special law did not contain any policy to regulate the discretion of the Collector.[4] *Maganlal Chhaganlal v. Municipal Corporation of Greater Bombay*[5] presented a similar situation, but the Supreme Court reviewing *Northern India Caterers* modified the proposition stating that where a statute providing for a more drastic procedure different from the ordinary procedure covers the whole field occupied by the ordinary procedure, without any guidelines as to exercise of the discretion, the law will be violative of the equality clause, but even in such a case a provision of appeal may cure the defect. Where, however, the law covers only a class of cases, it will not be bad and the fact that in such cases the administration will have the choice to

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[1] See the conflicting opinions in *W.B. v. Anwar Ali Sarker*, AIR 1952 SC 75 and *Kathi Raning Rawat v. Saurashtra*, AIR 1952 SC 123

[2] *Kathi Raning Rawat v. Saurashtra*, AIR 1952 SC 123; *Kedar Nath Bajoria v. W.B.*, AIR 1953 SC 404 ; *Orissa v. Dhirendra*, AIR 1961 SC 1715; *P.J. Irani v. Madras*, AIR 1961 SC 1731 (power vested on the government to exempt any building or class of building from all or any of the provisions of rent control law); *Rayala Corporation v. Director of Enforcement*, AIR 1970 SC 494 (law providing for two alternative forums with different penalties for violation of foreign exchange regulations was challenged on the ground that Director of Enforcement was given unguided discretion to select the forum); *Kandaswamy v. T.N.*, AIR 1985 SC 257 (power vested on the Government to exempt any building or class of building from any or all of the provisions of rent control law)

[3] *Rayala Corporation v. Director of Enforcement*, AIR 1970 SC 494

[4] *Northern India Caterers v. Punjab*, AIR 1967 SC 1581

[5] AIR 1974 SC 2009; *Pandia Nadar v. T.N.*, AIR 1974 SC 2044

select cases for the special procedure will not affect the validity of the law. The court held that the object of speedy eviction of unauthorised occupants offers sufficient guidance to the authorities and it is unreal to hold that an officer would resort to the dilatory procedure of a civil suit and a law cannot be struck down "on a fanciful theory that power would be exercised in such an unrealistic fashion." Certain other observations in the case exemplify the tolerant view of the courts in the matter of unguided discretionary power.

2.58 When a law provides for different procedures for trial and leaves it to the discretion of the administration to apply different procedures to different persons without providing any guideline or policy, but the difference of procedure is minor and not substantial, the courts refuse to strike down the law.[1] In some cases, the Indian Supreme Court refused to strike down the laws conferring wide discretion without any guideline or policy when the discretion was left with high and responsible officials who, according to the court, were expected in the usual course of business to apply the law in a non-discriminatory manner free from arbitrariness.[2] The court observed that there might be cases where improper exercise of the power could result in injustice to parties, but the possibility of such discriminatory treatment cannot necessarily invalidate the legislation and where there is abuse of the power, the parties are not without ample remedies under the law.[3] Where the impugned provision of law confers uncontrolled power if read literally, but is capable of being read down[4], it should be so read in order to uphold the impugned provision.[5]

2.59 In *Jibendra Kishore v. East Pakistan*[6] the State Acquisition and Tenancy Act was challenged as discriminatory as it empowered the government to acquire the interests of such rent-receivers as may be

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[1] *W.B. v. Anwar Ali Sarker*, AIR 1952 SC 75; *Syed Qasim Razvi v. Hydrabad*, AIR 1953 SC 156

[2] *Gurbachan Singh v. Bombay*, AIR 1952 SC 221 (discretion conferred on Commissioner of Police); *Pannalal Binjraj v. India*, AIR 1957 SC 397 (discretion conferred on Income Tax Commissioner and Board of Revenue); *C.B. Boarding & Lodging Co. v. Mysore*, AIR 1970 SC 2042 (discretion conferred on the State Government); Contra *Delhi Transport Corp. v. D.T.C. Mazdoor Congress*, AIR 1991 SC 101, Para 223, 267

[3] *Pannalal Binjraj v. India*, AIR 1957 SC 397

[4] See Para 5.12 for the meaning of the principle of `reading down'.

[5] *Jagadish Pandey v. Chancellor, Bihar University*, AIR 1968 SC 353

[6] 9 DLR (SC) 21

specified in the notification in any district. In upholding the law the Pakistan Supreme Court referred to the following comments of Professor Willis:

> Is it proper classification to put in one class those who get the consent of a Board or of an official and into another class those who do not, where no standard is set up to control the action of the Board or official? Some cases answer it in the affirmative, while other cases answer it in the negative. Perhaps the best view on this subject is that due process and equality are not violated by the mere conference of unguided power, but only by its arbitrary exercise by those upon whom it is conferred. If this is the correct position, the only question that would then arise would be the delegation of legislative power. If a statute declares a definite policy, there is sufficiently definite standard for the rule against the delegation of legislative power, and also for equality if the standard is reasonable. *If no standard is set up to avoid the violation of equality, those exercising the power must act as though they were administering a valid standard.*[1] (Italics supplied)

The court observed, "in cases where a statute is not *ex facie* discriminatory, but is capable of being administered in a discriminatory manner, the party challenging the constitutionality of that statute must show that it has actually been administered to the detriment of a particular class and in a partial, unjust and oppressive manner". In *East and West Steamship Co. v. Pakistan*[2] s.3 of the Control of Shipping Act was challenged as discriminatory on the ground that it conferred unguided and uncontrolled power on the authority to grant or refuse licence for the business of carrying cargo and passengers. The Pakistan Supreme Court turned down the challenge making the same observation that where a statute is not *ex facie* discriminatory, the party challenging the constitutionality of the statute must show that it has been administered in a discriminatory manner. These two decision cannot, however, be taken to be authority on the question as to whether wide discretion conferred on the executive without providing any guideline or policy is violative of the equality clause. In *Jibendra Kishore* the law provided for wholesale acquisition of the rent-receiving interests and permitted the government to acquire it at a time or part by part so that ultimately all the rent-receiving interests would be acquired and as such the question of discrimination cannot arise. The government was to

[1] Constitutional Law, 1936 ed, p.586
[2] 10 DLR (SC) 52

select which interests to acquire first based on administrative convenience. In *East and West Steamship* the court found that the law contained a definite policy so that there was no question of conferment of wide discretionary power without policy guideline in that case. The proposition laid down in the two cases must be understood in the light of the facts of those cases. On the other hand, in *Warris Meah v. State*[1] an amendment of the Foreign Exchange Regulations Act, 1947 made in 1956 set up three tribunals for the trial of offences under the Act, namely, (a) the courts under the ordinary law with power to impose sentence of imprisonment and fine, (b) adjudication officers with power of imposing only fine and (c) tribunals with power to impose sentence of imprisonment and fine. The law gave no indication as to which class of cases was to go to the court and which class of cases was to go to the tribunal or adjudication officer and left it entirely on the discretion of the government to make the selection. The Pakistan Supreme Court struck down the law as being violative of the equality clause holding:

> It confers discretion of a very wide character upon stated authorities to act in relation to subjects falling within the same class in three different modes varying greatly in severity. By furnishing no guidance whatsoever in regard to the exercise of this discretion, the Act, on the one hand, leaves the subject, falling within its provisions, at the mercy of the arbitrary will of such authority, and, on the other, prevents him from invoking his fundamental right to equality of treatment under the Constitution.[2]

The court further observed -

> The scope of the unguided discretion so allowed is too great to permit application of the principle that equality is not infringed by the mere conferment of unguided power, but only by its arbitrary exercise. For, in the absence of any discernible principle guiding the choice of forum, among the three provided by the law, the choice must always be, in the judicial viewpoint, arbitrary to a greater or lesser degree. The Act, as it is framed, makes provision for discrimination between the persons falling, qua its terms, in the same class, and it does so in such manner as to render it impossible for the Courts to determine, in a particular case, whether it is being applied with strict regard to the requirements of art.5(1) of the Constitution.

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[1] 9 DLR (SC) 117; *Hasan Ali v. Collector of Customs*, 10 DLR (WP) 71

[2] Ibid, para 7

2.60 The question of conferment of wide discretionary power without any guideline for its exercise came up for consideration before the Appellate Division in *Dr. Nurul Islam v. Bangladesh*[1]. S.9(2) of the Public Servants Retirement Act, 1974 providing for compulsory retirement of public servants completing 25 years of service was challenged on the ground that the law, conferring discretion on the government to retire a public servant without providing any policy or guideline, was violative of arts.27 and 29 of the Constitution. Upon consideration of a large number of decisions including *Jibendra Kishore, East and West Steamship Co.* and *Warris Meah*, Munim J (with whom Ruhul Islam and B.H. Chowdhury JJ agreed) observed -

> The minimum principle or guideline as has been provided in service rules as appeared from the cases cited in this judgment is that of public interest or the interest of public service. If either the impugned Act or the rules made thereunder provided such principle, the minimum requirement of law as showing the existence of some guideline for the exercise of discretion in retiring a govern servant who has completed 25 years of service would, I think, be satisfied, thus making it immune from any challenge on the ground of discrimination violative of Articles 27 and 29 of the constitution. I am of opinion, therefore, that in the absence of such a guideline either in the Act or the rules framed thereunder, Section 9(2) ... suffers from unconstitutionality ..."[2]

The Appellate Division took note of the fact that in respect of compulsory retirement the previous service rules provided the guideline of 'public interest'. The relevant service rules were replaced by P.O. No.14 of 1972. The rules framed in 1973 under P.O. No.14 of 1972 specified the circumstances in which the power of compulsory retirement could be exercised by the government. When the Public Servants Retirement Act, 1974 was enacted the rules of 1973 were applicable by virtue of s.24 of the General Clauses Act. Subsequently the rules of 1973 were repealed leaving the exercise of the power under s.9(2) without any guideline. In this background it was possible for the government to urge the court to 'read down' and it was possible for the court to 'read down' the law as conferring on the government a power of compulsory retirement only in the 'public interest' and thereby save the

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[1] 33 DLR (AD) 201

[2] Ibid, para 75 (K.Hossain CJ and S. Ahmed J refrained from passing on the constitutionality of the statute as, in their lordships' view, the case could be disposed of on ground of malice in law alone)

law. The government could have urged that whenever a power is conferred on the government it may be implied that the power is to be exercised in the public interest or for the public good.[1] But the government instead claimed an absolute power to compulsorily retire a pubic servant without any limiting consideration of 'public interest' or 'public good'. The law omitting the guideline of 'public interest' and the government claiming absolute power of compulsory retirement, the court was left with no alternative but to declare the impugned provision of law violative of the equality clause.[2]

2.61 In dealing with the question relating to conferment of wide discretionary power, Munir CJ observed in *Jibendra Kishore* -

> In England, the doctrine of due process of law was intended to provide protection to the individual from arbitrary action on the part of the Crown, but, in the United States, the scope of the doctrine has been gradually extended to secure the citizens not only against the arbitrary exercise of governmental powers but against such exercise of legislative power. Many instances are, therefore, to be found in the States where statutes have been held unconstitutional on the ground that they vested in an administrative official or board an arbitrary power or discretion to interfere with an individual's rights relating to his life, liberty and property ...
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> ... in determining the constitutionality or otherwise of statutes in Pakistan we cannot have that approach to the question because there is no provision in our Constitution which is capable of such a flexible and varying meaning as the 'due process of law' part of the Fifth and the Fourteenth Amendments.[3]

It will be a highly doubtful proposition to say that in the absence of a due process guarantee in the constitution conferment of uncontrolled and unfettered discretionary power on the executive can pass the test of the equality clause. *Warris Meah* answers the question in the negative. At any rate, the Constitution having incorporated the American 'due process' concept in art.31 there can be no doubt that conferment of unfettered and uncontrolled discretionary power will not only be hit by art.27, but will also be inconsistent with the provision of art.31.

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[1] *Province of Bombay v. Bombay Municipal Corporation*, AIR 1947 PC 34, 36 (Every statute must be supposed to be "for the public good" at least in intention)

[2] See *Senior Superintendent of Post Office v. Izhar Hossain*, AIR 1989 SC 2262

[3] 9 DLR (SC) 21, Para 26-27

2.62 In *Jibendra Kishore* and *East and West Steamship Co.* the Pakistan Supreme Court referred to the observation of Professor Willis that when the law does not provide any standard, the law need not be declared unconstitutional and those administering the law must act as though they were administering a valid standard. The application of this principle is beset with difficulty. In the situation of compulsory retirement the principle stated by Professor Willis arguably may be followed in that the government may, notwithstanding the omission of the guideline of 'public interest', use it as a guideline for the exercise of the discretion. But in a situation as was present in *Warris Meah* this principle cannot be applied inasmuch as the very selection of a case by whatever supposed standard for trial by court or tribunal would be discriminatory, the former being more onerous. Furthermore, application of this principle may render many discriminatory treatments immune from challenge as in the absence of any standard provided by the statute it may be very difficult to establish that the authority acted discriminatorily in administering the law even though it has so acted.[1] The argument that in case of conferment of unfettered discretionary power, if the authority clothed with the discretion made arbitrary or impermissible classification, the action rather than the law is to be struck down is untenable. The authority's action in such a case cannot be challenged as the authority would plead that the action was authorised by the relevant law.[2]

2.63 The principle enunciated by the Indian Supreme Court that a law will not be held discriminatory when unguided discretion is given to a high and responsible officer on the expectation that the discretion will be exercised reasonably is difficult to accept. The expression

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[1] American Supreme Court noted the difficulty in *Yick Wo v. Peter Hopkins*, 30 L.Ed. 220, stating "... and when we remember that this action or non action may proceed from enmity or prejudice, from partisan zeal or animosity, from favouritism and other improper influences and motives easy of concealment and difficult to be detected and exposed, it becomes unnecessary to suggest or comment upon the injustices capable of being wrought under cover of such a power, for that becomes apparent to every one who gives to the subject a moment's consideration. In fact, an Ordinance which clothes a single individual with such power hardly falls within the domain of law and we are constrained to pronounce it inoperative and void."

[2] *W.B. v. Anwar Ali Sarker*, AIR 1952 SC 75, Para 27 ("I think the fallacy of the argument lies in overlooking the fact that the "insidious discrimination complained of is incorporated in the Act itself', it being so drafted that whenever any discrimination is made such discrimination would be ultimately traceable to it." - per Fazl Ali J)

'reasonable' is vacuous unless used with reference to a specific standard and in the absence of a standard no exercise of discretion can be judged for reasonableness. Furthermore, in our society we have found high and responsible officers acting arbitrarily even though such arbitrariness is hard to prove in the absence of any standard of reasonableness, particularly in the face of the presumption of legality of official acts. In *Dr. Nurul Islam* the government urged this principle, but the Appellate Division rightly refused to accept it even though the discretion was conferred on the government itself.[1]

2.64 A statute conferring wide discretion on the executive authority without any policy guideline for the exercise of the discretion may be rendered valid by providing reasonable standards in the subordinate legislation. If the subordinate legislation specifies the circumstances in which the wide discretion has to be exercised so that the exercise of the discretion no longer depends on the arbitrary will of the authority exercising the discretion, the statute will no longer be liable to be struck down on the ground that it gave unfettered discretion to the executive.[2]

2.65 ***Equality clause and arbitrariness:*** The Indian Supreme Court gave a new dimension to the equality clause when it delivered the judgment in *E.P. Royappa v. T.N.*[3]. Bhagwati J observed -

> The basic principle which, therefore, informs both Arts.14 and 16 is equality and inhibition against discrimination. Now, what is the content and reach of this great equalising principle? It is the founding faith, to use the words of Bose J, 'a way of life', and it must not be subjected to a narrow pedantic or lexicographic approach. We cannot countenance any attempt to truncate its all embracing scope and meaning, for to do so would be to violate its activist magnitude. Equality is a dynamic concept with many aspects and dimensions and it cannot be 'cribbed, cabined and confined' within traditional and doctrinaire limits. From a positivistic point of view , equality is antithetic to arbitrariness. In fact

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[1] See *Delhi Transport Corp. v. D.T.C. Mazdoor Congress*, AIR 1991 SC 101, Para 223, 267 (There is only a complacent presumption that those who occupy high posts have a high sense of responsibility. The presumption is neither legal not rational. History does not support it and reality does not warrant it.); *Central Inland Water Transport Corp v. Brojo Nath*, AIR 1986 SC 1571

[2] *Tika Ramji v. U.P.*, AIR 1956 SC 676; certain observations made by Pakistan Supreme Court in *Warris Meah v. State*, 9 DLR (SC) 117, 123 lend support to this view.

[3] AIR 1974 SC 555

> equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary, it is implicit in it that it is unequal both according to the political logic and constitutional law and is therefore violative of art.14 ...[1]

This principle of equating discrimination with arbitrariness has been affirmed by the Indian Supreme Court in a number of decisions.[2] It is not clear whether this principle is being applied as an addition to or a substitute for the old doctrine of classification. The principle was criticised and it was pointed out, "No doubt arbitrary actions ordinarily violate equality; but it is simply not true that whatever violates equality must be arbitrary. The large number of decided cases, before and after *Royappa*, make it obvious that many laws and executive actions have been struck down as violating equality without their being arbitrary."[3] In *Aftabuddin v. Bangladesh*[4] the High Court Division held, "If an executive or a legislative act is found to be arbitrary and if such arbitrary act adversely affects a person it must be held that such arbitrary act adversely affecting a person hits at the very root of the ... equality clause."

2.66 *Test of arbitrariness:* When it is held that an arbitrary action is discriminatory and violative of the equality clause, the question arises as regards the standard for testing the reasonableness of an action. In *Shrilekha Vidyarthi v. U.P.*[5] the Indian Supreme Court observed -

> The question, whether an impugned act is arbitrary or not, is ultimately to be answered on the facts and in the circumstances of a given case. An obvious test to apply is to see whether there is any discernible principle emerging from the impugned act and if so, does it satisfy the test of reasonableness. Where a mode is prescribed for doing an act and there is no impediment in following that procedure, performance of the act

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[1] Ibid, Para 85

[2] *Maneka Gandhi v. India*, AIR 1978 SC 597; *Ramana Shetty v. International Airport Authority*, AIR 1979 SC 1628, *Ajay Hashia v. Khalid Mujib*, AIR 1981 SC 487; *D.S. Nakara v. India*, AIR 1983 SC 130; *A.L. Kalra v. P & E Corp of India*, AIR 1984 SC 1361; *Express Newspapers v. India*, AIR 1986 SC 872, Para 71; *M/S Dwarakadas Marfatia v. Board of Trustees, Port of Bombay Authority*, AIR 1989 SC 1642; *Shrilekha Vidyarthi v. U.P.*, AIR 1991 SC 537

[3] H.M. Seervai - Constitutional Law of India, vol. 1, 4th ed., p.437

[4] 48 DLR 1

[5] AIR 1991 SC 537, 554

> otherwise and in a manner which does not disclose any discernible principle which is reasonable, may itself attract the vice of arbitrariness. Every State action must be informed by reason and it follows that an act uninformed by reason, is arbitrary.

And speaking about the burden of proof of arbitrariness, the court continued -

> No doubt, it is for the person alleging arbitrariness who has to prove it. This can be done by showing in the first instance that the impugned State action is uninformed by reason inasmuch as there is no discernible principle on which it is based or it is contrary to the prescribed mode of exercise of the power or is unreasonable. If this is shown, then the burden is shifted to the State to repel the attack by disclosing material and reasons which led to the action being taken in order to show that it was an informed decision which was reasonable.[1]

2.67 In the American jurisdiction, the Fifth Amendment is applicable in the District of Columbia, but it does not contain an equal protection clause as does the Fourteenth Amendment which applies only to the states. When the blacks complained against segregation in the public schools of the District of Columbia, the American Supreme Court held,,

> But the concept of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. The 'equal protection of the laws' is a more explicit safeguard of prohibited unfairness than 'due process of law', and therefore, we do not imply that the two are always interchangeable phrases. But, as this Court has recognized, discrimination may be so unjustifiable as to be violative of due process.[2]

The Indian Supreme Court in a number of decisions held that the Indian Constitution has not incorporated the American 'due process' concept and it is debatable whether the 'due process' concept of non-arbitrariness can be invoked in the equality clause of art.14. It may be seen that in the American jurisdiction equal protection challenges to laws and actions are usually accompanied by 'due process' challenge. Even if there be any doubt about the correctness of the holding of the Indian Supreme Court in the context of art.14, that holding is fully

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[1] Ibid, p.555; see *Bangladesh Krishi Bank v. Meghna Enterprise*, 50 DLR (AD) 194 (Provision of s.10A of PDR Act having been made for recovery of dues from defaulting borrowers was not held to be arbitrary.)

[2] *Bolling v. Sharpe*, 347 US 497

applicable in respect of art.27 of the Constitution inasmuch as art.31 of the Constitution incorporates the 'due process' concept and arbitrariness, whether in law or in action, is totally impermissible and unconstitutional.[1] It may, however, be argued that we need not press in aid art.27 against an arbitrary law or action and instead can invoke art.31. In the American jurisdiction, the court relied on the due process concept to strike down discriminatory actions as in the District of Columbia the equality clause was not applicable. In our jurisdiction there is no such difficulty and we need not add to or substitute the doctrine of classification by the new doctrine enunciated by the Indian Supreme Court. But it cannot be overlooked that in most cases arbitrariness infringes both the equality clause and the due process clause and an arbitrary law or action can be violative of both art.27 and art.31. Though *Bolling v. Sharpe* spoke of the difference between the two, it is very difficult to say where equal protection ends and due process begins.

2.68 ***Discrimination by administrative acts:*** The prohibition of the equality clause is not only addressed to Parliament, but also to the government and the statutory authorities. In the administration of law, if the action of a public functionary is found to have been taken in disregard of the policy laid down by the law or it produces a discriminatory effect in violation of any provision of the law, the action may be struck down not only as an *ultra vires* act, but also as an act violative of art.27 of the Constitution.[2] Thus where a licensing authority creates a monopoly in favour of a person by excluding all others from the trade even though the law under which the licence is granted did not authorise such creation of a monopoly, the action will be violative of the equality clause.[3] In dealing with the nature of the functions of a modern government, the Indian Supreme Court observed -

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[1] *Abul Hossain v. Secretary of Ministry of Home*, 44 DLR 521 (Relying on the Indian decisions the court held an arbitrary action in cancelling a gun licence to be discriminatory)

[2] *Pannalal Binjraj v. India*, AIR 1957 SC 397, Para 30; *Kathi Raning Rawat v. Saurashtra*, AIR 1952 SC 123, Para 47; *Bidi Supply Co. v. India*, AIR 1956 SC 479, Para 9 (the income tax authorities have by an executive order, unsupported by law, picked out the petitioner and transferred all his cases by an omnibus order unlimited in point of time. The order is calculated to inflict considerable inconvenience and denies to the petitioner as compared with other Bidi merchants similarly situated equality before the law and the order is void)

[3] *Mannalal v. Assam*, AIR 1962 SC 386

> To-day the Government, in a welfare State is the regulator and dispenser of special services and provider of a large number of benefits, including jobs, contracts, licences, quotas, mineral rights etc. the Government puts forth wealth, money, benefits, services, contracts, quotas and licences ... Government owns and controls hundreds of acres of public land valuable for mining and other purposes. These resources are available for utilisation by private corporations and individuals by way of lease or licence ... Can they be regarded as gratuity furnished by the State so that the State may withhold, grant or revoke it at its pleasure? Is the position of the government in this respect the same as that of a private giver? We do not think so ... The Government cannot be permitted to say that it will give jobs or enter into contracts or issue quotas or licences only in favour of those having grey hair or belonging to a particular political party or professing a particular religious faith. The government is still the Government when it acts in the matter of granting largess and it cannot act arbitrarily.
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> ... The power or discretion of the Government in the matter of grant of largess including award of jobs, contracts, quotas, licences etc., must be confined and structured by rational, relevant and non-discriminatory standard or norm and if the government departs from such standard or norm in any particular case or cases, the action of the Government would be liable to be struck down, unless it can be shown that the departure was not arbitrary, but was based on some valid principle which in itself was not irrational, unreasonable or discriminatory.[1]

The Appellate Division agreed with this view of the Indian Supreme Court in *Sharping Matshajibi Samity v. Bangladesh*[2]. Following *Ramana Shetty*, it has been held that every activity of the government contains a public element and it must therefore be informed with reason and guided by public interest. If the government awards a contract or leases out or otherwise deals with its property or grants any other largess, the act would be liable to be tested for its validity on the touchstone of reasonableness and public interest and if it fails to satisfy either test, it would be unconstitutional and invalid.[3] It is, however, to be

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[1] *Ramana Shetty v. International Airport Authority*, AIR 1979 SC 1628

[2] 39 DLR (AD) 85, 96

[3] *Kasturilal v. J & K*, AIR 1980 SC 1992; *Dwarakadas Marfatia v. Board of Trustee, Port of Bombay Authority*, AIR 1989 SC 1642 (the Court took note of and explained the observation of the Court in *L.I.C. v. Escorts Ltd*, AIR 1986 SC 1370, making a distinction between Governments's function in public law domain and in the private law

remembered that there is a presumption of constitutionality of governmental action and the onus is entirely on the person who challenges the action to establish that the action has not been taken in the public interest but for collateral purposes or is *mala fide* or that the government had acted in a manner contrary to art.27.[1]

2.69 In some cases the Indian Supreme Court held that when a law is itself non-discriminatory, but the administrative action taken under it is challenged as violative of the equality clause, it must be shown that the action is *mala fide* or is actuated by a hostile intention[2] and an action will not be struck down if the discrimination is not intentional but merely inadvertent.[3] Such a holding is rooted in the American Supreme Court decision of *Snowden v. Hughes*[4]. But this decision was given in the context of the federalism in the United States[5] and there is no rationale for the application of this principle in a unitary set-up like ours. An unintentional discriminatory action is nonetheless a discriminatory action and is to be struck down.

2.70 The court will not interfere with matters of administrative policy or changes made thereto[6] unless it can be shown that the policy is

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field and holding that when the State or any instrumentality of the State ventures into the corporate world and purchases the shares of a company it assumes to itself the ordinary role of a shareholder and dons the robes of a shareholder and there is no reason why the State as a shareholder should be expected to state its reasons when it seeks to change the management by a resolution of the company like any other shareholder)

[1] *Dwarakadas Marfatia v. Board of Trustees, Port of Bombay Authority*, AIR 1989 SC 1642

[2] *Budhan Chowdhury v. Bihar*, AIR 1955 SC 191, Para 9; *J & K v. Ghulam Rasool*, AIR 1961 SC 1301; *Narain Dass v. Improvement Trust, Amritsar*, AIR 1972 SC 865

[3] *Ramanath v. Rajasthan*, AIR 1967 SC 603 (in this case the respondent pleaded that the impugned action was taken through oversight and it would have been corrected but for the stay order obtained by the appellant from the Court)

[4] 321 US 1 ("The unlawful administration by state officers of a state statute fair on its face, resulting in its unequal application to those who are entitled to be treated alike, is not a denial of equal protection unless there is shown to be present in it an element of intentional or purposeful discrimination.")

[5] See the discussion about it in H.M. Seervai's Constitutional Law, 4th ed. p.448-452

[6] *Debaranjan v. Comptroller*, AIR 1985 SC 306, Para 6; *Maharashtra State Board v. Paritosh*, AIR 1984 SC 1543, Para 22 (It is not within the legitimate domain of the Court to determine whether the purpose of a statute can be better served by adopting any policy different from what has been laid down by the legislature or its delegate and to strike down a bye-law merely on the ground that the policy enunciated therein does

arbitrary or irrational or that the policy adopted has no rational relationship with the object sought to be achieved.[1] When the matter is not exclusively within the parameter of determination of policy in respect of which the government has a large freedom, the court will strike down an administrative action as violative of equality clause which is arbitrary or discriminatory.[2]

2.71 *Government contracts:* The government can enter into any

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not meet with the approval of the Court in regard to its efficacy for implementation of the object and purpose of the Act)

[1] *Nagaraj v. A.P.*, AIR 1985 SC 551; *Col. A.S. Sangwan v. India*, AIR 1981 SC 1545 (while the discretion to change policy in exercise of executive power, which is not trammelled by statute or rule, is wide, the equality clause requires that change of policy must be made fairly and should not give the impression that it was done arbitrarily or by any ulterior criteria); *Krishnan Kakkanath v. Kerala*, AIR 1997 SC 128; *Punjab v. Ram Lubhaya Bagga*, AIR 1998 SC 1703

[2] *A L Kalra v. P & E Corporation of India* , AIR 1984 SC 1361; *Om Prakash v. State of J & K*, AIR 1981 SC 1001; *Parashram Thakur v. Ram Chand*, AIR 1982 SC 872 (the applications of respondents for allotment of nazul lands were rejected on the ground of policy, but when the policy was reversed, it was incumbent on the Government to reconsider those applications or to notify that the land was available for allotment and invite fresh applications; it was not open to the Government to allot plots to the appellants in disregard of the claims of others who had also applied for allotment); *Bidi Supply Co. v. India*, AIR 1956 SC 479 (when the law permits transfer of a case of a particular year or years for assessment by the income tax officer at a different place, an omnibus wholesale order of transfer without reference to any particular case and without any limitation of time denies to the assessee, as compared with other merchants who are similarly situate, equality before law); *Devadashan v. India*, AIR 1964 SC 179; *Bishan Das v. Punjab*, AIR 1961 SC 1570 (R, on behalf of a joint family firm, with the permission of the Government, built a dharmasala on Government land and on his death, other members of the joint family were running the dharmasala, but were dispossessed by executive order of the S.D.O. and the dharmasala was placed in charge of a municipal committee without due process of law; the Court held that the executive singled out a particular individual from his fellow subjects and visited him with a disability which is not imposed upon others); *Satwant Singh v. Assistant Passport Officer*, AIR 1967 SC 1836, Para 33 (where the passport authority arbitrarily withdraws one passport of an individual, exercise of the discretion of the authority patently violates the doctrine of equality, for the difference in the treatment of persons rests solely on the arbitrary selection of the executive); *Shrilekha Vidyarthi v. U.P.*, AIR 1991 SC 537 (where the Legal Remembrancer's Manual provides ordinarily for renewal of the tenure of the appointees, the ground of streamlining the conduct of government cases and effective prosecution thereof cannot be a reasonable basis for the drastic and sweeping action of terminating the appointment of all District Government Counsels throughout the State and is violative of the equality clause)

contract with any body it chooses. No person has a fundamental right to insist that it must enter into a contract with him. But even in entering into a contract the government acts as the government and cannot act arbitrarily, thereby affecting the citizens prejudicially.[1] It cannot act arbitrarily to choose any person it likes for entering into such a relationship or to discriminate between persons similarly situated.[2] In disposing of a State property or in entering into a contract, the government must adopt such method as would afford reasonable opportunity to the public at large to participate.[3] The sale and purchase by the State or a State instrumentality should generally be through public auction or by inviting tenders[4] as it fetches reasonable price and avoids unfairness. However, negotiation may be permissible where the policy of the government may not be achieved by such auction or tender.[5] The government cannot "give a contract or sell or lease out its property for a consideration less than the highest that can be obtained for it, unless, of course, there are other considerations which render it reasonable and in the public interest to do so. Such considerations may be that some Directive Principle is sought to be advanced or implemented or that the contract or the property is given not with a view to earning revenue but for the purpose of carrying out a welfare scheme for the benefit of a particular group or section of people deserving it or that the person who has offered a higher consideration is not otherwise fit to be given the contract or the property."[6] Thus to effectuate the policy of prevention of

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[1] *Ramana Shetty v. International Airport Authority*, AIR 1979 SC 1628 (entering into contract with a person who does not fulfil the qualification stipulated in the tender notice is arbitrary and violative of the equality clause); *Kasturi Lal v. J & K*, AIR 1980 SC 1992;; *Brij Bhushan v. J & K*, AIR 1986 SC 1003; *India v. Hindustan Development Corp.*, AIR 1994 SC 988

[2] *Eurasian Equipments and Chemicals Ltd. v. W.B.*, AIR 1975 SC 266 (The State need not enter into any contract with anyone, but if it does so. it must do so fairly without discrimination and without unfair procedure.); *Rash Behari Panda v. Orissa*, AIR 1969 SC 1081 (government's decision to invite offers for advance purchase of Kendu leaves from persons who satisfactorily complete contracts in the previous year is discriminatory against new entrants in the business as the classification is not based on real and substantial distinction bearing a just and reasonable relationship to the object sought to be achieved, i.e., effective execution of the monopoly of the state in the public interest)

[3] *U.P. v. Shiv Charan*, AIR 1981 SC 1722

[4] *T.M. Hasan v. Kerala Financial Corp.*, AIR 1988 SC 157

[5] *M.P. Oil Extraction v. M.P.*, AIR 1998 SC 145

[6] *M/S Kasturi Lal v. J & K*, AIR 1980 SC 1992

monopoly and concentration of economic power, the government may adopt dual pricing for the purchase of steel wagons allowing higher price to small manufacturers and lower price to big manufacturers.[1] The State may negotiate with private entrepreneurs in the public interest.[2] But the State cannot arbitrarily and without giving any opportunity of being heard blacklist a citizen, thereby preventing him from participating in the tenders floated by the government.[3] Though the government is at liberty to reject the highest bid at a tender, the court may strike down the action as violative of art.27 if the rejection of the tender is arbitrary and unreasonable or contrary to the public interest.[4] Even though the State is not bound to accept the highest bid, acceptance of a negotiated offer without giving an opportunity to the highest bidder to improve upon his bid may be violative of art.27.[5] But where the authority reserved the right to reject all tenders and the amount quoted in the highest tender is found inadequate, negotiation with all the tenderers and acceptance of the offer significantly higher than the highest bid cannot be said to be arbitrary.[6] Unless any administrative policy is involved, the government choosing to invite tenders should abide by the result of the tender and cannot arbitrarily or capriciously accept the next lowest bid.[7] Alteration of the tender terms after submission of bid may sometimes result in discrimination[8], but it has been held by the High Court Division in the facts of the case that alteration of the tender terms allowing instalment to the highest bidder did not violate any legal or constitutional right.[9] Generally the operation of the equality clause will be limited to cases of entering into contract and once a contract is entered into, the rights of the contracting parties will be guided by the

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[1] *India v. Hindustan Development Corp*, AIR 1994 SC 988

[2] *M/S Kasturi Lal v. J & K*, AIR 1980 SC 1992 (Negotiation with private entrepreneur to induce him to set up an industry was found permissible); *Sachidananda v. W.B.*, AIR 1987 1109 (allotment of land by private negotiation with the object of promoting tourism found valid)

[3] *Lt. Col. (Retd) Abdul Mannan v. Bangladesh*. 1981 BLD 78; *Joseph Vilangandoa v. Executive Engineer*, AIR 1978 SC 930; *Raghpathi v. Bihar*, AIR 1989 SC 620

[4] *Ramana Shetty v. International Airport Authority*, AIR 1979 SC 1628; *M/S Kasturi Lal v. J & K*, AIR 1980 SC 1992; *Parashram v. Ram Chand*, AIR 1982 SC 872.

[5] *Ram & Sham Co. v. Haryana*, AIR 1985 SC 1147

[6] *Food Corp. v. Kamdhenu Cattle Feed Ind.*, AIR 1993 SC 1601

[7] *Harminder Singh v. India*, AIR 1986 SC 1527

[8] See *Ramana Shetty v. International Airport Authority*, AIR 1979 SC 1628; *Monarch Infrastructure (P) Ltd v. Commr. UMC*, AIR 2000 SC 2272

[9] *Kafiluddin v. Dhaka City Corp*, 1 BLC 268

terms of the contract and art.27 will not be attracted[1], but the question of discriminatory treatment in the contract administration by the government is not totally irrelevant. If, after entering into a contract, the government, in dealing with the contractors similarly situated, accords discriminatory treatment or acts arbitrarily, the action of the government will be violative of art.27.[2] When the government cannot act arbitrarily in the contract administration, it certainly cannot act *mala fide* or for collateral purposes. S. Ahmed J observed -

> ... in case of breach of any obligation under a contract between government and a private party, proper remedy lies in a civil suit and not in a writ petition under the extra-ordinary jurisdiction given by the Constitution. But this principle will not apply when the government violates the terms of the contract with a mala fide intention or acts arbitrarily or in a discriminatory manner.[3]

This observation of S. Ahmed J holds good even in the case of an ordinary commercial contract entered into by the government because *mala fide* or arbitrariness results in violation of arts.27 and 31 and the provision of art.102(1) is attracted.

2.72 *Discrimination on ground only of religion, race, caste, sex or birth place* : Art.27 enunciates the general principle of equality and forbids a classification on arbitrary or unreasonable grounds. Art.28(1) relates to a particular application of the principle of equality. Under art.28(1) classification of citizens on grounds of only religion, race, caste, sex or birth place is *per se* discriminatory and no question of reasonableness of the classification arises. Unless differential treatment is meted out only on one of those grounds, this article is not attracted. In one case the High Court Division found the failure of a nationalised company to give benefit of an agreement to some of its employees violative of art.28, the judgment does not show that discrimination has been made on one of those grounds.[4] Art.28(2) provides that women shall have equal rights with men in all spheres of the State and of public life, while art.28(3) provides that no citizen shall, on grounds only of

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[1] *C.K. Achuthan v. Kerala*, AIR 1959 SC 490 *Radhakrisna Agarwal v. Bihar*, AIR 1977 SC 1496; *Bareilly Dev. Authority v. Ajai Pal*, [1989] 2 SCC 117

[2] *Dwarakadas Marfatia v. Board of Trustees, Port of Bombay Authority*, AIR 1989 SC 1642; H.M. Seervai - Constitutional Law of India, 4th ed. pp.443-444

[3] *Sharping Matshajibi Samabaya Samity v. Bangladesh*, 39 DLR (AD) 85, 100; *Sumikin Bushan Corp v. C.P.A.*, 6 MLR 251

[4] *Carew and Company v. Labour Court*, 50 DLR 396

religion, race, caste. sex or place of birth be subjected to any disability, liability, restriction or condition with regard to access to any place of public entertainment or resort, or admission to any educational institution. The use of the word 'only' makes it clear that what is forbidden is discrimination purely and solely on account of any of the specified grounds.[1] A discrimination based on one or more of the specified grounds and also on other grounds is not violative of art.28[2], but it may be unconstitutional under art.27 if the differentiation is not based on a reasonable classification. The moot question is whether the operation of the challenged law results in a prohibition only on any of the specified grounds. It is the effect of the challenged law that is to be considered and if the effect is discrimination only on any of the specified grounds, the law will be unconstitutional. The offending ground must be the immediate and direct cause of the discrimination.[3] Thus fixation of 35 years as the age of retirement for a Flight Stewardess and 44 years for a Flight Steward is unconstitutional being differentiation on ground only of sex.[5] A law providing that a male proprietor could be declared incapable of managing his property only on one of the five stated grounds after giving him notice to show cause, but a female proprietor could be declared incapable of managing her property on any ground without giving her any notice to show cause is unconstitutional as it amounts to discrimination on the ground of sex.[6] Where women teachers and employees in the education department were being given lower salaries and lesser promotion avenues as compared with their male counterparts doing the same work, it was found discriminatory.[7] In *Vishaka v. Rajasthan*[8] the Indian Supreme Court held that women have the right to gender equality which includes protection from sexual harassment and right to work with dignity and each incident of sexual harassment is a violation of the right to gender equality and right to life and liberty. Acting on reports that the inhabitants of a definite area were harbouring dacoits, the government sanctioned the posting of additional

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[1] *Rajasthan v. Pratap Singh*, AIR 1960 SC 1208

[2] *Chitra v. India*, AIR 1970 SC 35

[3] *Bombay v. Bombay Education Society*, AIR 1954 SC 561

[5] *Dalia Parveen v. Bangladesh Biman*, 48 DLR 132; *Rabia Bashree Irene v. Bangladesh Biman*, 52 DLR 308

[6] *Rajeswari v. U.P.*, AIR 1954 All 608

[7] *Uttar Khand Mahila Parishad v. UP*, AIR 1992 SC 1695

[8] AIR 1997 SC 3011 (The court prescribed some guidelines and norms to be followed in work places); *Apparel Export Promotion Council v. Chopra*, AIR 1999 SC 625

police in the area, the expense of which is to be borne by the inhabitants of the area other than Harijans and Muslims. The action was discriminatory as it amounted to discrimination on the ground of caste or religion against the peace-loving inhabitants of the area other than Harijans and Muslims.[1] Under the City of Bombay Police Act a person born outside Greater Bombay could be externed if he was convicted of any of the specified offences, while a person born within Greater Bombay could not be so externed. The court found the law unconstitutional as the discrimination was only on ground of place of birth.[2] But when the residents of a State were exempted from payment of a capitation fee for admission to the State Medical College, but the non-residents were required to pay it, there was no unconstitutionality as the ground of exemption was residence and not place of birth.[3] However, a classification on the basis of residence may be tested on the touchstone of art.27 and a wholesale reservation on the basis of residence for admission in the educational institutions regardless of merit may be found violative of the equality clause.[4]

2.73 Art.14 stipulates that "it shall be a fundamental responsibility of the State to emancipate ... backward sections of the people from all forms of exploitation", while art.19(2) provides, "The State shall adopt effective measures to remove social and economic inequality between man and man ...". But art.28(1) may operate as an obstacle to the achievement of these State policies. In *Madras v. Champakam Darairajan*[5] to help the backward people a government order was passed fixing the proportion of students of each community that could be admitted into the State medical colleges. Even though the Directive Principles of State Policy lay down that the State should promote with special care the educational and economic interests of weaker sections of the people, the court struck down the order as being unconstitutional as it discriminated on the ground of caste. Such a case of reverse discrimination was alleged and found by a sharply divided American Supreme Court in *University of California Regents v. Bakke*[6]. The special admissions programme of the State medical school reserved for

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[1] *Rajasthan v. Pratap Singh*, AIR 1960 SC 1208
[2] In re *S.H.S. Mohammad*, AIR 1951 Bom 285
[3] *Joshi v. M.B.*, AIR 1955 SC 334
[4] *Pradeep Jain v. India*, AIR 1984 SC 1420
[5] AIR 1951 SC 226
[6] 438 US 265

blacks and members of other minority groups 16 out of 100 places. A white applicant who was denied admission challenged the programme alleging that he was excluded on the ground of his race in violation of the equal protection clause. In order to prevent such a position, the framers of the Constitution included clause (4) in art.28 which stipulates that nothing in art.28 shall prevent the State from making any special provision in favour of women or children or for the advancement of any backward section of the citizens. They recognised the fact that an equality clause without any qualification would promote *status quo* even though there is a necessity to ameliorate the position of women, children and backward sections of the people. Thus in view of the provision of art.28(4) Parliament may make laws providing to women, children or backward sections of the people such privileges as are not accorded to others.[1] Such a law will not be violative of art.28, though it may be struck down under art.27 on showing that it contains a classification which bears no reasonable nexus to the object of the legislation.

2.74 ***Discrimination in the matter of admission to educational institutions*** : We will find that the right to education flows from the liberty protected by art.31. Availability of education makes a whole lot of difference in a man's life and considering its importance, the framers of the Constitution treated it as a fundamental responsibility of the State to provide education to the citizens as a basic necessity of life.[2] To provide education to its citizens is thus one of the most important functions of the State. But because of limited resources the State cannot make provision for education for all. Hence the question of discrimination in the matter admission to educational institutions is fast coming up. The question comes up in two situations - (a) when wide discretion is allowed to an authority in selecting candidates for admission and (b) when reservation of seats are made. If the selection is made on the basis of interview only and no guideline for it is given, the process of selection by interview will be discriminatory. Again if the proportion of marks allotted to the *viva voce* test is so high that the selection is virtually dependent on the subjective satisfaction of the selectors, the process will also be discriminatory. When one-third of the total marks was allocated for interview and the time earmarked for each

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[1] *Yusuf v. Bombay*, AIR 1954 SC 321 (Provision of s.497 Penal code making adultery an offence for men only is not void); *Sowmittri v. India*, AIR 1985 SC 1618

[2] Art.15

candidate was four minutes, the Indian Supreme Court observed -

> It is difficult to see how it is possible within this short span of time to make a fair estimate of the candidate's suitability ... It is not clear how by merely looking at a candidate the selection committee could come to a conclusion about his or her physical fitness. The fact that the allotment of marks is in accordance with a policy decision may not conclude the matter in all circumstances if that decision is found to be arbitrary and infringing Art.14 of the Constitution.[1]

Later in *Ajay Hasia v. Khalid Mujib*[2] the court held, "under the existing circumstances allocation of more than 15% of the total marks for the oral interview would be arbitrary and unreasonable and would be liable to be struck down as constitutionally invalid." Admission to an institution must be on the basis of merit. Any other criteria is generally discriminatory. Departure from the merit criteria in particular cases must bear the burden of challenge on the ground of discrimination and must be justified by a permissible and legitimate governmental objective.

2.75 Even though a reservation of seats may not come within the mischief of art.28(1), it will be found violative of art.27 if it is found arbitrary and unreasonable, not having any rational nexus with any legitimate governmental objective. Reservation of seats is often discriminatory as such reservation operates against merit. Reservation only on the ground of race, religion, caste or place of birth will be discriminatory under art.28(1). But reservation of some seats for women or backward section of citizens will not be discriminatory in view of the provision of art.28(4).

2.76 Apart from the institutions run by the government, there are recognised or affiliated private institutions. Do these institutions have an absolutely free hand in the matter of admission of students? One may argue that these institutions do not fall within the definition of State and therefore the limitations of the provisions of Part III do not apply to them. In a recent decision the Indian Supreme Court held, "Clearly and indubitably, the recognised/affiliated private educational institutions, supplement the function performed by the institutions of the State. Theirs is not an independent activity but one closely allied to and supplemental to the activity of the State."[3] Referring to arts.14 and 21

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[1] *Nishi Maghu v. J & K*, AIR 1980 SC 1975, 1980

[2] AIR 1981 SC 487, 502

[3] *Unni Krisnan v. A.P.*, AIR 1993 SC 2178, 2246; *Mohini Jain v. Karnataka*, AIR

and the directive principles of State policy, the court held that even in the private institutions the admission process must be fair and must mete out equal treatment and the recognising or affiliating authority of the State must impose conditions upon the private institutions to ensure equal treatment in admission.[1] It cannot be said that the management of the private educational institution has a right to admit non-meritorious candidates by charging a capitation fee as a consideration. This practice strikes at the very root of the constitutional scheme.[2] The fundamental principles of State policy of the Constitution in respect of education are similar to the directive principles of State policy of the Indian Constitution. On the other hand, art.31 is wider in scope than art.21 of the Indian constitution. There is no reason why the decisions of the Indian Supreme Court in this regard shall not be applicable in our jurisdiction.

2.77 ***Discrimination in public employment*** : Art.27 is attracted in all cases of employment by the State[3] and any differentiation between the citizens in respect of all matters concerning public employment, to be valid, must be based on reasonable classification. Statutory corporations are public authorities and are public corporation of public character. The rule of master and servant is not applicable in respect of their employees[4] and being part of the State they cannot act arbitrarily or discriminatorily.[5] The framers of the Constitution, however, attached greater importance to the service of the Republic[6] and re-iterated the guarantee of equality in art.29 which is not attracted in the case of public employment other than in the service of the Republic.[7] Art.29(1) provides, "There shall be equality of opportunity for all citizens in

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1992 SC 1858

[1] Ibid; the reader may see the decision of the High Court Division in *Winifred Rubie v. Bangladesh*, 1981 BLD 30 (reversed in *Bangladesh v. Winifred Rubie*, 34 DLR (AD) 162

[2] *Unni Krisnan v. A.P.*,AIR 1993 SC 2178

[3] Art.152 defines "State" as including Parliament, the Government and statutory public authorities.

[4] *B.S.I.C. v. Mahbub Hossain*, 29 DLR (SC) 41

[5] *Chowdhury Md. Yusuf v. Bangladesh Biman*, 31 DLR 199

[6] Under Art.152 "service of the Republic" means any service, post or office whether in a civil or military capacity, in respect of the Government of Bangladesh, and any other service declared by law to be a service of the Republic.

[7] Corresponding article in the Indian Constitution, Art.16, is not confined to government servants and is applicable in case of all public employment.

respect of employment or office in the service of the Republic". In *Carew and Company v. Labour Court*[1] the High Court Division held the failure of the nationalised company in giving benefits of an agreement to some of its employees to be violative of art.29. It is not understood how the employees of a nationalised company can be treated to be in the service of the Republic to attract the mischief of art.29. In guaranteeing equality of opportunity to all members of the service of the Republic, art.29 really gives effect to the equality before the law and equal protection of law guaranteed by art.27.[2] Art.29(1) is an instance of the application of the general rule of equality prescribed by art.27 and it does not debar reasonable classification.[3] Even under art.27 there is a requirement of maintaining equality in the matter of public employment. Art.29(2) provides, "No citizen shall, on grounds only of religion, race, caste, sex or place of birth, be ineligible for, or discriminated against in respect of, any employment or office in the service of the Republic." The difference between art.27 and art.29(2) is that while under art.27 classification on grounds only of religion, race, caste, sex or place of birth is permissible provided the classification has reasonable or rational nexus with the object of the law, under art.29(2), subject to the exceptions made in art.29(3), a classification on the ground only of religion, race, caste, sex or place of birth, whether reasonable or not, is not permissible. Therefore, subject to the provisions of art.29(3), a classification on ground only of religion, race, caste, sex or place of birth is *per se* unconstitutional in respect of employment in the service of the Republic. We shall first examine the effect of art.27 and art.29(1) on public employment and then discuss the extent of the guarantee under art.29(2). Before we proceed, it must be remembered that equality of opportunity in the matter of employment does not mean equality only in respect of initial appointment. The words "in respect of employment" are wide enough to include all matters in relation to employment, both prior and subsequent to initial appointment; it includes the conditions of service pertaining to the office to which appointment is made, i.e., salary, periodical increments, revision of pay, promotion, terms of leave, gratuity, pension, age of superannuation etc.[4]

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[1] 50 DLR 396

[2] *General Manager v. Rangachari*, AIR 1962 SC 36

[3] *Mysore v. Narasinga Rao*, AIR 1968 SC 349

[4] *Md. Faizullah v. Bangladesh*, 1981 BLD 1; *Gazi Jashimuddin v. Bangladesh*, 50 DLR 31; *General Manager v. Rangachari*, AIR 1962 SC 36; *India v. Kashikar*, AIR 1986 SC 431; see also *Bangladesh v. Md. Azizur Rahman*, 1982 BLD (AD) 176 (plea

2.78 *Public employment - appointments* : The provisions of art.27 and art.29(1) do not exclude the laying down of selective tests, nor do they preclude the government and statutory public authorities from laying down qualifications for the posts in question. Such qualifications need not be only technical, but there can also be general qualifications relating to the suitability of the candidate for public service as such.[1] Art.27 and art.29(1) require that all these must be reasonable and not arbitrary and must have a rational relationship with the suitability of the candidates for the post or office. Educational criteria is acceptable for determining suitability for appointment to a particular post or cadre. Thus a requirement that the professor in orthopedics must have a post-graduate degree in the particular specialty is reasonable and constitutional.[2] In the matter of recruitment of district munsiffs in a State, knowledge of the local law and knowledge of the regional language may be prescribed in the rules as qualifications of a candidate.[3] For selection to an ex-cadre selection post, seniority is not relevant and the government can appoint to such post a person whom it considers most suitable and the court will not interfere except on the ground of *mala fide*.[4]

2.79 In India patwaris in the employment of a State resigned *en masse* to compel the government to accept their demands. The government instead accepted their resignations and created a new service by recruiting new personnel. The old Patwaris were also eligible for the new service, but not the old ones who had taken an active part in the agitation. These persons raised the plea of denial of equal opportunity of employment. The court rejected the plea and opined that the government was within its rights to lay down qualifications for the new recruits and exclude those who showed lack of proper sense of discipline.[5] Appointment falls within the executive sphere and can be made without any formal rules framed. But the posts and the conditions of service must be advertised before making the selection so that every one eligible for the posts may have an opportunity of being considered

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of discrimination in respect of pay rejected)

[1] *Mysore v. Narasinga Rao*, AIR 1968 SC 349

[2] *India v. Dr. Kohli*, AIR 1973 SC 811

[3] *Pandurangarao v. A.P.*, AIR 1963 SC 268 (the rule was declared unconstitutional as the classification made by the rule had no rational nexus with the objective sought to be achieved)

[4] *J.N. Mishra v. Bihar*, AIR 1971 SC 1318

[5] *Banarsi Das v. U.P.*, AIR 1956 SC 520

by the appointing authority.[1] A rule empowered the government to appoint any successful candidate at a competitive examination to any cadre. A candidate was appointed to a lower cadre while other candidates who fared below the former were appointed to the higher cadre. The rule was held discriminatory as it made no provision for testing the candidate's suitability for a particular cadre, did not give an opportunity to a candidate to join the cadre of his preference and vested arbitrary power of patronage in the government.[2] When in selecting candidates the interview committee did not take into account the service records of the candidates and candidates who secured even less than 30% marks at the interview were selected, the court held that selection made on such a poor basis is no real selection and set it aside.[3]

2.79A In order to maintain equality of opportunity in public employment, the method of selection should be such as to exclude the possibility of arbitrariness or pick and choose. Allocation of high marks to *viva voce* test which is subjective makes room for such arbitrariness and pick and choose and therefore the Appellate Division commented in favour of keeping marks for interview to as minimum as possible.[4]

2.80 Arts.27 and 29(1) do not forbid creation of different cadres or categories of posts carrying different emoluments, nor do they stipulate equal pay for equal work. There is no principle that every one appointed to the same post must be paid the same salary irrespective of the method of appointment and the source from which he was drawn for appointment to that post. Classification of tracers into two grades, matriculate tracers with higher pay and non-matriculate tracers with lower pay, is valid under arts.27 and 29(1).[5] Equality under these two articles means equality between the members of the same class of employees and not between the members of separate classes.[6] Giving a special pay to the members of one service, but not to pay it to the members of the other service is not necessarily discriminatory when methods of recruitment, qualifications etc. are not identical in the two services.[7] But when the government makes reference to the Pay

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[1] *Nagarajan v. Mysore*, AIR 1966 SC 1942
[2] *Mysore v. Jayaram*, AIR 1968 SC 346
[3] *Janaki Prasad v. J & K*, AIR 1973 SC 930
[4] *Bangladesh v. Shafiuddin Ahmed*, 50 DLR (AD) 27
[5] *Mysore v. P.N. Rao*, AIR 1968 SC 349
[6] *C.A. Rajendran v. India*, AIR 1968 SC 507; *Sham Sundar v. India*, AIR 1969 SC 212
[7] *Menon v. Rajasthan*, AIR 1968 SC 81

Commission in respect of all its employees and accepts the recommendation of the Commission, it should implement the recommendation in respect of all the employees and non-implementation of the recommended revised pay scale for certain categories of employees is discriminatory and violates arts.27 and 29(1).[1]

2.81 *Promotion* : No employee has any right to claim promotion. If the rule provides that promotion will be given only on the basis of seniority, promotion given to a junior bypassing the senior who has also the qualification required for the promotion post will be violative of arts.27 and 29(1). Where the promotion post is to be filled up on seniority-cum-suitability basis, the guarantee of arts.27 and 29(1) requires that an employee fulfilling the qualification of the promotion post should be considered for promotion.[2] Thus if a junior employee is promoted without considering the case of the senior employee who fulfills the qualification of the promotion post, the guarantee of equality of opportunity is violated.[3] The appointing authority being the judge of the suitability of a candidate for the promotion post, once the senior employee's case is considered and a junior is promoted, the promotion cannot be challenged as unconstitutional unless it can be shown that the action of the authority is *ex facie* arbitrary or *mala fide* or unreasonable in the *Wednesbury* sense[4]. In selecting candidates for promotion, the annual confidential reports show their performance and hence not more than 15% marks need be allocated for interview.[5]

2.82 In respect of promotion the question of equality of opportunity comes in only when the employees belong to the same grade or category. Persons holding posts in different grades or categories cannot claim equality of opportunity in matters of promotion.[6] Each class may be a separate entity having its own rules of promotion.[7] The railways provide the guards with a better channel of promotion to higher-grade station-masters than to the roadside station masters. This is not discriminatory as the guards and the station-masters belong to separate categories with separate avenues of promotion and equality of opportunity cannot be

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[1] *Purshottam v. India*, AIR 1973 SC 1088
[2] *Delhi Jal Board v. Mahindar*, AIR 2000 SC 2767
[3] *Md. Faizullah v. Bangladesh*, 34 DLR = 1981 BLD 1
[4] *Badrinath v. T.N.*, AIR 2000 SC 3243. For the meaning of reasonableness in the *Wednesbury* sense, see Para 5.72
[5] *Bangladesh v. Shafiuddin Ahmed*, 50 DLR (AD) 27
[6] *Nurul Islam v. Bangladesh*, 46 DLR (AD) 188
[7] *Sham Sundar v. India*, AIR 1969 SC 212

predicated between them.[1] Difficult questions have at times arisen in matters of promotion from lower to higher grade within the same category. How far distinctions are permissible within the same class for promotion purposes? The general rule is that inequality of opportunity of promotion among the members of a single class, which is based on no rational criteria, is invalid.[2] The court will not countenance 'mini-classification' based on 'micro-distinctions'.[3] However, conditions designed to promote efficiency and best service have been accepted as valid, i.e., the basis of seniority-cum-merit.[4] When employees were recruited from different sources, but were ultimately integrated in one cadre, it would not be valid to accord a favoured treatment to some of them on the basis of source of appointment.[5] But if the employees appointed to a cadre from different sources are not integrated into one class, different rules of promotion according to the original source of appointment may be valid.[6] To the cadre of assistant engineers, graduate engineers could be appointed directly, but diploma-holders could enter by promotion from the lower grade. A rule provided that only graduate assistant engineers would be eligible for promotion to the post of executive engineers. The question was whether such a distinction, based on educational qualification, could be made within the same cadre for purposes of promotion. The court held such a classification valid as it was made with a view to achieve administrative efficiency.[7] But in another case[8], the cadre of supervisors consisted of both graduate and diploma-holder engineers. A rule provided that three out of every four vacancies in the next higher cadre of assistant engineers would be reserved for promotion of graduate supervisors. The court held that the distinction made was unreasonable. Referring to *T.N. Khosa* the court pointed out that the State could say that keeping in view the needs of efficiency, only graduate engineers would be eligible for promotion. But when both are treated as eligible for promotion it is difficult to see how, consistently with the claim for equal opportunity, any differentiation can be made between them by laying down a quota of promotion for each

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[1] Ibid
[2] *Mysore v. Krisna Murthy*, AIR 1973 SC 1146
[3] *J & K v. T.N. Khosa*, AIR 1974 SC 1
[4] *India v. V.J. Karnik*, AIR 1970 SC 2092
[5] *S. M. Pandit v. Gujarat*, AIR 1972 SC 252
[6] *Ram Lal Wadhwa v. Haryana*, AIR 1972 SC 1982
[7] *J & K v. T,N. Khosa*, AIR 1974 SC 1
[8] *Shujat Ali v. India*, AIR 1974 SC 1631

and giving preferential treatment to the graduates. To permit discrimination based on educational qualification not necessitated by the nature of the duties of a higher post is to stifle the social thrust of the equality clause.

2.83 *Seniority* : Seniority is an important factor in the matter of promotion and therefore seniority of employees cannot be fixed or affected arbitrarily without violating the equality clause. As a general rule the *inter se* seniority of employees in a cadre should be fixed on the basis of the date of appointment. When an appointment is made on officiating basis without recommendation of the Public Service Commission and not approved by the President, the claim for seniority from the date of officiating appointment or from a date prior to the recommendation of the Public Service Commission is not tenable in law.[1] Where a cadre consists of both permanent and temporary employees, the date of confirmation, which depends upon various factors often beyond the control of the employees, cannot be a rational criteria for determining seniority as between the permanent and temporary employees. The period of temporary appointment should count for seniority.[2] The period of *ad hoc* appointment for fortuitous reasons or as a stop-gap arrangement cannot rank for the purpose of seniority.[3] In the ultimate analysis the question is whether the employee is a member of the service in which he is to count his seniority. An employee having temporary appointment is not outside the service cadre, but an *ad hoc* appointee is outside the service cadre so that the question of counting his period of service outside the cadre cannot arise. As between persons regularly appointed or promoted, seniority should count from the date of appointment in case of direct recruits and in case of promotion from the date from which the promotee has been officiating

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[1] *Abdul Mannan v. Hasan Mahmud Khandkar*, 1996 BLD (AD) 147

[2] *Patwabardhan v. Maharashtra*. AIR 1977 SC 2051

[3] *Singla v. India*, AIR 1984 SC 1595; *Asoke Gulati v. B.S. Jain*, AIR 1987 SC 424, Para 22 (It is well settled that an *ad hoc* or fortuitous appointment on a temporary or stop-gap basis cannot be taken into account for the purpose of seniority even if the appointee was qualified to hold the post on a regular basis as such temporary tenure hardly counts for seniority in any system of service jurisprudence); in *Bangladesh v. Azizur Rahman*, 46 DLR (AD) 19, the Appellate Division upon consideration of the relevant rules made a distinction between *ad hoc* appointment for limited period on lump sum salary and *ad hoc* appointment on scale of pay continued for indefinite period and held that the incidence of *ad hoc* appointment does not attach to latter type of *ad-hoc* appointment.

continuously either in temporary posts created or in substantive vacancies to which he was appointed.

2.84 Where the cadre consists of persons recruited or promoted from the same source, their seniority *inter se* should be governed by the period of continuous appointment in or promotion to the grade in respect of which seniority is to be fixed.[1] But where the cadre consists of persons recruited from different sources, i.e., direct recruits and promotees, it was not unconstitutional to fix the seniority on rotational basis as the recruits form two classes from the time of their recruitment.[2] But no differentiation is permissible after recruits from different sources have been integrated into one grade.[3] However, even after integration, a classification may be made for the purpose of promotion if the differentiation is for administrative efficiency, e.g., preference given to the degree-holders to the exclusion of the diploma-holders.[4] The moot question is whether the differential treatment is based on reasonable classification and where the differential treatment is founded on the fact that the recruits belong to two different groups or classes, but the differences between the two groups are not sufficient to warrant differential treatment, or in other words, there is no reasonable nexus between the differences and the recruitment, the classification will be unconstitutional.[5]

2.85 When seniority is fixed, an employee has a vested right to it.[6] Once determined, the question of seniority should not be re-opened after a lapse of reasonable period[7] unless necessitated by a new or amended rule which has been given retrospective effect[8]. A question, however, arises whether by giving retrospective effect to a new rule or by an amendment of an old rule the vested right to seniority under the old rule can be prejudicially affected? Assuming that the government has the power to make rules or amend the existing rules with retrospective effect

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[1] *Mervyn v. Collector of Customs*, AIR 1967 SC 52
[2] *Govinda v. Chief Controller*, AIR 1967 SC 839
[3] *T.N. Educational Services Association v. T.N.*, AIR 1980 SC 379
[4] *General Manager v. Shiddhanti*, AIR 1974 SC 1755; *Orissa v. Khageswar*, AIR 1975 SC 1906
[5] *Mervyn v. Collector of Customs*, AIR 1967 SC 52
[6] *Md. Faizullah v. Bangladesh*, 1981 BLD 1
[7] *Bajwa v. Punjab*, AIR 1999 SC 1510
[8] *Mohan Reddy v. Charles*, AIR 2001 SC 1240

under art.133[1], if the new rule or the amended rule purports to take away the vested right to seniority and is arbitrary and not reasonable, then such retrospective rule will be violative of arts.27 and 29(1).[2] Thus when a person joined as Assistant Engineer and was allowed under the rules to count the period of his military service, subsequent amendment of the rules excluding the period of the military service retrospectively for fixation of his seniority is unconstitutional.[3] In *Bangladesh v. Azizur Rahman*[4] a rule of 1990 was challenged as violative of arts.27, 29 and 31.[5] It was contended, *inter alia*, that the writ petitioners had vested right of seniority under the previous dispensation and as seniority is inextricably connected with employment, it cannot be affected without violating art.29. The Appellate Division rejected the contention stating-

> Though by seniority alone a person cannot earn promotion, he, by virtue of seniority, has a right to be considered for promotion. In the instant case, the impugned rules did not deprive the writ petitioners of their right to be considered for promotion. At best they may say that their chances for promotion has been reduced to a great extent thereby. Reduction of chance of promotion does not amount to deprivation of the right to equal opportunity for employment.

It is submitted that the Appellate Division has not properly appreciated the meaning of 'chance of promotion'. When a man's seniority is affected and is placed below the position he is entitled to, it is not called a reduction of the 'chance of promotion'. When as a result of change of rules or reorganisation the number of posts available for promotion is reduced it results in a reduction of the chance of promotion.[6] Seniority has no value whatsoever except that it gives an employee a right to be considered for promotion. If he is No.1 in the seniority list, no one junior to him can be promoted before his case is considered. But if he is down-graded to No.10 and one post is available for promotion, what is done generally is that the cases of the top 4 or 5 persons are sent to the

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[1] See Para 6.20

[2] *P.D. Agarwal v. U.P.*, AIR 1987 SC 1676, 1685. Under our constitutional dispensation, the retrospectivity will also have to be tested for reasonableness under art.31 - see Para 2.109

[3] *K.C. Arora v. Haryana*, AIR 1987 SC 1858

[4] 46 DLR (AD) 19

[5] For facts of the case see Para 2.34

[6] see *Deodhar v. Maharashtra*, AIR 1974 SC 259; *Sujat Ali v. India*, AIR 1974 SC 1631; *Reserve Bank of India v. Sahasranaman*, AIR 1986 SC 1830

selection committee and one of them is selected. The No.10 graded person cannot complain. Thus when the writ petitioners' seniority was affected, it affected their right to be considered for promotion. By terming it as a reduction of the chance of promotion seniority is rendered valueless. If it is only a question of reduction of the chance of promotion, there is no reason why an employee jealously guards it and why it will be considered as an important term of employment and there are so many varieties of rules to grapple with the problems relating to seniority.

2.86 In *Zainul Abedin v. Bangladesh*[1] grant of two-years ante-dated seniority in favour of the freedom fighters was challenged. S.M. Hussain J (with whom A.W. Chowdhury J agreed) found the rules violative of arts.27 and 29 as, in view of the learned Judge, arts.27 and 29 kept no scope for classification between freedom fighters and non-freedom fighters and art.29(3) has not protected such a classification. M.H. Rahman J dissented finding that in view of the attending circumstances including the history of liberation struggle, the classification cannot be said to be arbitrary or unreasonable. It is submitted that the dissenting view is correct. In view of the presumption of constitutionality of classification, the onus was upon the petitioner to show that the classification was arbitrary. The majority overlooked that neither art.27 nor art.29(1) prohibited differential treatment and all that these articles require is that there should be reasonable nexus between the classification and the legitimate governmental objective sought to be achieved. Reference to art.29(3), it is submitted, is not correct inasmuch as art.29(3) does not prohibit classification, but merely takes certain cases out of the purview of the equality clause. Any differentiation not covered by art.29(3) does not *per se* become unconstitutional and such differentiation is invalid only on showing that it proceeds upon arbitrary or unreasonable classification. S.M. Hussain J did not go into the question of reasonableness of the classification at all. In *M.M. Shahidur Rahman v. Bangladesh*[2] the respondents were appointed after the petitioner after liberation of Bangladesh, but they served under the Mujibnagar Government in different capacities and were out of employment after liberation. The impugned rules provided for counting the period of service under the Mujibnagar Government and for treating the period of unemployment as leave without pay in determining the

[1] 34 DLR 77; see also *Aminul Islam v. Bangladesh Biman*, 1982 BLD 1
[2] 46 DLR 187

seniority of the respondents. The court rejected the challenge under the equality clause holding, "The impugned Rules were made for limited purpose of treating the services rendered by them at Mujibnagar and treating the period for which the Government could not keep them employed as leave without pay."

2.87 *Termination of service* : There should be no discrimination in the matter of termination of service. If out of a large number of employees, one is reverted even though persons junior to him are allowed to officiate, the action will be discriminatory and unconstitutional.[1] The constitutional provisions make no distinction between temporary and permanent posts and are applicable to all posts equally. Retrenchment of employees in a department by applying a selective test is not unconstitutional provided that the test is not arbitrary or unreasonable. A selective test cannot be unreasonable or arbitrary if there is some proximate connection between the test and efficient performance of duties of the relevant office.

2.88 In the service rules of the statutory corporations, often a power is given to the corporation to terminate the services of permanent employees without assigning any reason, giving notice of a fixed period or paying salary for that period in lieu of notice. This is purely a grant of unfettered and uncanalised power to select employees for termination without any guideline whatsoever and on the principle enunciated in *Dr. Nurul Islam v. Bangladesh*[2] such a grant of power is violative of art.27 of the Constitution. In several cases, the Indian Supreme Court declared such a power of termination to be violative of the equality clause.[3] The High Court Division set aside an order of termination of service of several employees of the Parjatan Corporation under rule 41(2)(i)(a) of the corporation's service rules which permitted the corporation to terminate the services of employees without assigning any reason by giving notice of a fixed period or paying salary of the notice period. The Appellate Division set aside the order of the High Court Division in *Bangladesh Parjatan Corporation v. Shahid Hossain*[4]. It could very

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[1] *U.P. v. Sughar Singh*, AIR 1974 SC 423

[2] 33 DLR (AD) 201

[3] *West Bengal State Electricity Board v. Desh Bandhu*, AIR 1985 SC 722; *Central Inland Water Transport Corporation v. Brojo Nath*, AIR 1986 SC 1571; *O.P. Bhandari v. Indian Tourism Development Corporation*, AIR 1987 SC 111; *Delhi Transport Corp. v. D.T.C. Mazdoor Congress*, AIR 1991 SC 101

[4] 43 DLR (AD) 154

well be argued that the rule conferring unfettered discretion on the corporation was violative of art.27, but no such argument was advanced.[1]

2.88A *Conditions of service:* Discrimination in the matter of conditions of service of the same category of employees is a violation of arts.27 and 29. Thus disparity in the wages in the promoted post depending on the date of promotion[2], or payment of higher emolument to the staff of one unit as against the staff of other units[3] or making a distinction between a person marrying during service and a person marrying after retirement in the Pension Rules[4] constitutes discrimination. The equality clause is also applicable in respect of leave, allowances, superannuation and other service terms and benefits. Order of transfer often causes a lot of difficulties and dislocations in the family, but on such ground an order cannot be struck down as arbitrary and violation of arts.27 and 29. Unless such order is passed *mala fide* or in violation of the rules of service and guidelines for transfer without any proper justification, the court should not interfere with the order of transfer. In a transferable post, an order of transfer is a normal incident and personal difficulties are matters for consideration of the department.[5] Even if an order of transfer is made without following the guidelines issued by the government, that cannot be interfered with by the court unless it is vitiated by *mala fide* or is made in violation of any statutory provision or is made by an incompetent authority.[6]

2.89 We have seen the meaning and content of the principle of equality of opportunity of employment under art.27. Art.29(1) specifically incorporates that principle in respect of the service of the Republic.

2.90 Art.29(2) provides further guarantee in respect of the service of

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[1] The point was raised in the review application, but the Appellate Division though found that the rule was capable of being applied discriminatorily did not review the judgment as it was altogether a new ground which could not be considered in review. See *Bangladesh Bank v. Abdul Mannan*, 46 DLR (AD) 1, 7

[2] *Bhoomi Vikash Bank Ltd v. Its Workmen*, AIR 1990 SC 495

[3] *Gopika Ranjan v. India*, AIR 1990 SC 1212

[4] *Bhagwati v. India*, AIR 1989 SC 2088

[5] *Rajendra Roy v. India*, AIR 1993 SC 1236; see also *Gujrat Electricity Bd. v. Atmaram*, AIR 1989 SC 1433; *Bangladesh v. Md. Farouque*, 51 DLR (AD) 112

[6] *India v. S.L. Abbas*, 1993 Labour IC 1311; *State Bank of India v. Anjan Sanyal*, AIR 2001 SC 1748

the Republic in that no citizen shall be discriminated against on the ground only of religion, race, caste, sex and place of birth in the matter of employment. The effect of the word 'only' in art.29(2) is the same as in art.28(3).[1] Thus reservation of posts in favour of Hindus, Muslims and Christians is inconsistent with the provisions of art.29(2).[2] Art.29(2) makes place of birth, but not residence[3], a prohibited ground of differentiation. Hence introduction of quota system area-wise will not offend art.29(2). But preference given to some necessarily involves discrimination against others and introduction of quota system may offend the general principle of equality under art.27 and art.29(1) and must satisfy the requirement of reasonable classification. The State may have a legitimate interest in equal development of all areas and reservation of posts area-wise within reasonable limits may under certain circumstances be found to be valid in terms of arts.27 and 29(1). But it should be seen that such reservation should not be made in such manner as to destroy the guarantee under arts.27 and 29(1).

2.91 Art.29(3) incorporates some exceptions to the prohibition contained in art.29(1)&(2). It provides that nothing in art.29(1)&(2) shall prevent the State from (a) making special provision in favour of any backward section of citizens for the purpose of securing adequate representation in the service of the Republic; (b) giving effect to any law which makes provision for reserving appointments relating to any religious or denominational institution to persons of that religion or denomination; and (c) reserving for members of one sex any class of employment or office on the ground that it is considered by its nature to be unsuited to members of the opposite sex. The expression 'special provision in art.29(3)(a) includes reservation as also preference, concession and exceptions.[4] Such provision can be made not only by law, but also by executive orders.[5] From a reading of art.29(3) it is clear that the exception is only with regard to appointment and not with regard to conditions of service, increment, gratuity, pension and age of superannuation. As such any differentiation regarding conditions of service etc. must be based on reasonable classification even in respect of backward section of the citizens. The reservation in the service of the

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[1] See Para 2.72
[2] *Venkataraman v. Madras*, AIR 1951 SC 229
[3] See Para 2.72
[4] *Indra Sawhney v. India*, AIR 1993 SC 477
[5] Ibid.

Republic can be made not only at the initial stage of recruitment, but also in the matter of promotion. Selection posts may also be reserved for backward section. The words 'adequate representation' are sufficiently expressive to import consideration of 'size' as also 'values'.[1]

2.92 Art.29(3) does not, however, confer any right on any one, nor impose any constitutional duty on the State to make the reservation. In the face of art.29(1)&(2), it merely confers an enabling power. But as it is an exception to the guarantee of art.29(1)&(2) it should not be interpreted or given effect to in such a way as to nullify the guarantee under art.29(1)&(2). The Indian Supreme Court held that reservation in excess of 50% would be unconstitutional.[2] In the backdrop of the social condition prevailing in Bangladesh it will have to be considered up to what percentage reservation of posts for backward section of the citizens will not be unconstitutional.

2.93 We are to consider the meaning of 'backward section'. Art.29 is comparable with art.16 of the Indian Constitution which uses the expression 'backward class' whereas the expression used in art.29(3) is 'backward section'. The Indian Supreme Court has interpreted the expression 'backward class' in several decisions.[3] Those decisions may be helpful, but not decisive, in interpreting 'backward section. This expression has no reference to 'race' or 'caste' and there may be 'backward section' within a race or caste which as a whole may not be backward. But as identification of 'backward section' may coincide with a race or caste and reservation for a 'backward section' may be challenged as violative of art.29(1)&(2), reservation in favour of 'backward section' has been included within the exceptions to art.29(1)&(2). However, such a reservation must not be arbitrary or unreasonable so as to offend art.27 operation of which is not excluded by art.29(3).

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[1] *General Manager v. Rangachari*, AIR 1962 SC 36; *Punjab v. Hira Lal*, AIR 1971 SC 1777

[2] *Devadason v. India*, AIR 1964 SC 179; In *Indra Sawhney v. India*, AIR 1993 SC 477, it was held that a year should be taken as a unit or basis for applying the rule of 50% and not the entire cadre strength.

[3] The latest decision of *Indra Sawhney v. India*, AIR 1993 SC 477, reviews the earlier decisions in this matter.

PROTECTION OF LAW

2.94 Art.31 guarantees the protection of law. It has two parts - (i) the citizens and the residents of Bangladesh have the inalienable right to be treated in accordance with law and (ii) no action detrimental to the life, liberty, body, reputation or property of any citizen or resident of Bangladesh shall be taken except in accordance with law. The second part is illustrative of the first. Art.31 is wider in its scope and operation than the due process clause of the American jurisdiction inasmuch as it covers the entire range of human activities and is attracted when a person is adversely affected by any State action irrespective of the question whether it affects life, liberty or property. The American due process clause is attracted only when the detrimental action relates to life, liberty or property of a person. We shall discuss the meaning of life, liberty, body, reputation and property as the article has put special emphasis on these aspects, but it must be understood that the article is not confined to these aspects only.

2.95 ***Meaning of "in accordance with law"***: The key expression in this article is 'in accordance with law' and the content of this fundamental right depends on the meaning of this expression.

2.96 When the Pakistan Constitution of 1962 was promulgated no bill of rights was included in it. Instead, art.2 was included which in language is similar to that of the present art.31. Even before promulgation of the Constitution of 1962 the position in law so far as the executive power was concerned was that the executive could take any action without any specific statutory sanction, but an action which prejudicially affected the right or liberty of any person ought to have the authority of law to support it.[1] The government often claims its action to be an 'act of State' which is not subject to law. Whether or not a particular act can be treated as an 'act of State', the courts have taken the view that with respect to the citizens, there can be no `act of State' and the government has only such powers as are granted to it by the law of

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[1] *Mohammad Hossain v. General Manager, E.B. Railway*, 14 DLR 874 (Any invasion upon the rights of citizens by any body, no matter whether by a private individual or by a public official or body, must be justified with reference to some law of the country, otherwise, such invasion would be illegal); *Ram Jawaya Kapur v. Punjab*, AIR 1955 SC 549; *Brahmanbaria Paurashava v. Bangladesh*, 51 DLR (AD) 64 (No action detrimental to vested right of an individual or a corporate body can be taken except in accordance with law); however, when a privilege given is not availed, it cannot be equated with a vested right – *Janapriya Rice Mills v. Bangladesh*, 1997 BLD 63

the country.[1] In *Jamal Shah v. Election Commissioner.*[2] kaikaus J of the Pakistan Supreme Court observed that art.2 did not effect any change of law but merely negatived any claim of any inherent power of the government to deal with the subjects without the backing of law.[3] Subsequently, a bill of rights was incorporated by amendment of the constitution, but art.2 was not included in the list of the fundamental rights.

2.97 A plain reading of art.2 of the Pakistan Constitution of 1962 showed that for any governmental interference with the right of any person, there must be a law which authorised such action at the time of taking the action. Murshed J took the view -

> It (art.2) furnishes a citizen with a constitutional guarantee that he will not be called upon to do something or to refrain from doing anything without a valid provision of law to that effect. This means that there is a constitutional protection in *praesenti*; or, in other words, whenever an order is made, which invades upon the rights of a citizen or requires him to do something, there must be, in existence, contemporaneously, a law which would authorise such a course.[4]

He further observed that such an order without authorisation of law "was a still-born order and no life can be imparted to it by a subsequent legislation without a constitutional amendment."[5] In other words, the legislature cannot retrospectively validate such an unlawful action. The Pakistan Supreme Court, however, upon consideration of the fact that art.2 did not guarantee a fundamental right held that art.2 could not be conceived to produce so wide an effect as to prevent the legislature from making retrospective legislation.[6]

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[1] *Mir Ahmed Nawaz Khan v. Superintendent, Lyallpur Jail*, PLD 1966 SC 357, 360

[2] 18 DLR (AD) 1, Para 55

[3] Kaikaus J, however, observed in *Jamal Shah* (ibid) "It ... debars the legislature from creating an authority whose actions are not subject to law. The legislature cannot, in the face of Art.2, enact that whatever action a particular person may take shall be immune from challenge." – Para 56

[5] *Ghulam Zamin v. A.B. Khondker*, 16 DLR 486, Para 101

[5] Ibid

[7] *Mohd. Yusuf v. Chief Settlement Commissioner*, 20 DLR (SC) 187 (on the question of contemporaneous law, the observation of the court at p.193 shows that the court did not finally decide the question and kept it for consideration in the appeal against the decision of the High Court in *Ghulam Zamin* and, in fact, at p.194 the court found that the parties in this case were dealt with in accordance with contemporaneous law and the

2.98 In the backdrop of these events, the framers of the Constitution included art.31 in Part III of the Constitution. If they intended to protect the individuals against unauthorised executive actions only, art.31 was totally unnecessary. The Constitution in art.26(2) mandates that the State (which includes Parliament) shall not make a law inconsistent with the provisions of Part III and includes the provision of art.31 in Part III. This entrenchment must be given a meaning. As such art.31 must be read as guaranteeing a fundamental right and as a limitation on the power of Parliament in the enactment of laws.[1] If the expression 'in accordance with law' is interpreted to mean any law passed by Parliament, art.31 will cease to be a fundamental right as such an interpretation takes away the entrenchment on the power of Parliament which is the quintessence of a fundamental right and such an interpretation will make a non-sense of the entrenchment by art.26.[2] Furthermore, it is a requirement of the concept of rule of law that the law must be reasonable and not arbitrary and the Constitution seeking to establish rule of law, the framers cannot but be taken to have used the expression 'law' in art.31 in a sense which comports with the concept of rule of law. Art.21 of the Indian Constitution provides that there shall not be any deprivation of life or personal liberty except according to 'procedure established by law'. In the beginning, the Indian Supreme Court refused to import the concept of reasonable and non-arbitrary 'procedure established by law'.[3] Subsequently, realising that such an interpretation is inconsistent with the provisions of art.21 as a fundamental right, the Indian Supreme Court held that 'procedure established by law' must mean reasonable and non-arbitrary procedure and not any procedure that may be prescribed by Parliament.[4] Thus in order to preserve the integrity of art.21 as a fundamental right, the Indian Supreme Court virtually imported the concept of due process as is known in the American jurisdiction. Even though art.2 was not incorporated as a fundamental right in the Pakistan Constitution of 1962, Hamoodur Rahman J observed,

> Law here is not confined to statute law alone but is used in its generic sense as connoting all that is treated as law in this country including

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question relating to restrospectivity was not moot.)

[1] see *Ong Ah Chuan v. Public Prosecutor*, [1981] AC 648, 671

[2] *Ong Ah Chuan v. Public Prosecutor*, [1981] AC 648, 671

[3] *Gopalan v. Madras*, AIR 1950 SC 27

[4] *Maneka Gandhi v. India*, AIR 1978 SC 597; *Sunil Batra v. Delhi Administration*, AIR 1978 SC 1675; *Jolly George v. Bank of Cochin*, AIR 1980 SC 470

> even the judicial principles laid down from time to time by the Superior Courts. It means according to the accepted forms of legal process and postulates a strict performance of all the functions and duties laid down by law. It may well be, as has been suggested in some quarters, that in this sense it is as comprehensive as the American `due process' clause in a new garb.[1]

Art.31 finding its place in Part III and not speaking about procedure only cannot but be taken to be an incorporation of both substantive and procedural 'due process' as is known in the American jurisdiction[2] and the expression 'law' must mean reasonable and non-arbitrary law in both substantive and procedural aspects.[3]

2.99 ***American 'due process':*** In order to understand the actual content of art.31, it will be helpful to know the content of the due process clause as contained in the Fifth and Fourteenth Amendment of the American Constitution. The Fifth Amendment relates to federal action while the Fourteenth Amendment deals with State action. Both these amendments prohibit deprivation of life, liberty or property 'without due process of law'. The American Supreme Court has never attempted to define with precision the expression 'due process of law' as it is not susceptible of more than a general statement of its intent and meaning.[4] The essence of the concept is fairness and avoidance of arbitrariness. The concept has two aspects - procedural and substantive. The procedural due process is the American counterpart of the English principles of natural justice with the difference that while the principles of natural justice can be excluded by statute, the due process requirement cannot be so excluded.

2.100 Procedural due process makes it necessary that one whom it is sought to deprive of any right or liberty must be given notice of the proceedings against him, must be given reasonable opportunity to defend himself and the problem of propriety of the deprivation, under the circumstances presented, must be resolved in a manner consistent

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[1] *West Pakistan v. Begum Shorish Kashmiri*, 21 DLR (SC) 1, 12; *Abdul Latif Mirza v. Bangladesh*, 31 DLR (AD) 1, 21

[2] *Mujibur Rahman v. Bangladesh*, 44 DLR (AD) 111; 122 (Art.31 is the analogue of the American due process concept)

[3] It may be seen that the definition of `law' given in Art.152 is not confined to law made by or under the authority of Act of Parliament.

[4] 16A Am Juris 2d, Const. Law, Para 807

with essential fairness.[1] Due process is flexible and calls for such procedural protections as the particular situation demands.[2] Consideration of what due process may require under any given circumstances must begin with a determination of the precise nature of the governmental function involved as well as the private interest that has been affected by the governmental action.[3] The contents of the notice and the nature of the hearing must be such that the individual may know the allegations against him and may have reasonable and meaningful opportunity of defending himself. Thus the accusation must not be vague and must include material facts and the individual is given such opportunity of defending himself as fairness may demand in the facts and circumstances of a given case. It is also required that the hearing takes place before an impartial tribunal.

2.101 Whatever be the form of the notice and hearing, an individual must be given an opportunity for hearing before action is taken against him.[4] "If the right to notice and a hearing is to serve its full purpose, then, it is clear that it must be granted at a time when the deprivation can still be prevented."[5] It is only in an extraordinary situation where some valid governmental interest is at stake that postponing the hearing until after the event may be justified.[6] Such an extraordinary situation was presented in the seizure of property to collect internal revenue of the government[7], to meet the needs of national war effort[8], to protect the people against the economic disaster of a bank failure[9] and to protect the public from misbranded drugs[10] and contaminated foods[11]. Postponement of notice and hearing until after taking action was found justified to stop transportation of a controlled substance like marijuana[12] or to prevent the immediate danger to public health or safety resulting

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[1] Ibid, Para 813
[2] *Morrisey v. Brewer*, 408 US 471, 481
[3] *Cafetaria & Restaurant Workers Union v. McElroy*, 367 US 886, 895
[4] *Boddie v. Connecticut*, 401 US 67, 81
[5] *Fuentes v. Shevrin*, 407 US 67, 81
[6] *Boddie v. Connecticut*, 401 US 371, 379
[7] *Phillips v. Commission*, 283 US 589
[8] *Central Union Trust Co. v. Garvan*, 254 US 554
[9] *Fahey v. Mallonee*, 332 US 245
[10] *Ewing v. Mytinger & Casselberry*, 332 US 245
[11] *North American food Co. v. Chicago*, 211 US 306
[12] *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 US 663

from a mining disaster.[1]

2.102 Even the application of the fairest procedure may destroy the enjoyment of life, liberty or property if the law is unreasonable or arbitrary. So substantive due process guarantees that no person shall be deprived of his life, liberty or property for arbitrary reasons, such a deprivation being constitutionally supportable only if the conduct from which the deprivation flows is proscribed by a reasonable legislation reasonably applied. It is a limitation on arbitrary power and a guarantee against arbitrary legislation demanding that "the law shall not be unreasonable, arbitrary or capricious and that the means selected shall have a real and substantial relation to the object sought to be attained."[2] A statute prohibiting any person from selling any publication from which the title page or cover or identification marks have been removed or obliterated is unconstitutional as it does not serve any legitimate governmental purpose and is thus violative of due process.[3]

2.103 *Test of reasonableness:* When it is said that substantive due process requires a law to be reasonable, the question arises: reasonable in relation to what? The American Supreme Court evolved the concept of 'police power', which is a short description of the inherent power of the State to promote the general welfare of the community, and judged reasonableness of laws in relation to the police power of the State.[4] But the question still remains as to whose conception of reasonableness is to control - that of the legislator or that of the court? In *Lochner v. New York*[5] a New York statute prescribed maximum hours of work for bakers. The court substituted its judgment for that of the legislators to hold the statute arbitrary. The court held -

> It is manifest to us that the limitation of the hours of labor as provided for in this section of the statute ... has no such direct relation to, and no such substantial effect upon, the health of the employee, as to justify us in regarding the section as really a health law. It seems to us that the real

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[1] *Hodel v. Virginia Surface Mining*, 452 US 264

[2] *Nebbia v. New York*, 291 US 502; *West Coast Hotel v. Parrish*, 300 US 379

[3] *People v. Bunis*, 9 NY 2d 1

[4] Schwartz - Constitutional Law, p.204

[5] 198 US 45; *Adams v. Tanner*, 244 US 590 (A law prohibiting taking of fees from persons seeking employment which virtually prohibited private employment-agency business, was struck down by the court upon a view that abuses in the business could have been dealt with by regulatory measures and prohibition of the business was unnecessary and arbitrary.)

> object and purpose were simply to regulate the hours of labor between the master and his employees (all being men, sui juris), in private business, not dangerous in any degree to morals, or in any real and substantial degree to the health of he employees. Under such circumstances the freedom of master and employee to contract with each other in relation to their employment, and in defining the same, cannot be prohibited or interfered with, without violating the Federal Constitution.

Holmes J dissented, saying, "This case is decided upon an economic theory which a large part of the country does not entertain." According to him, it is an awesome thing to strike down an act of the elected representatives of the people, and that the power to do so should not be exercised save where the occasion is clear beyond fair debate. The court soon, however, started shifting from the *Lochner* approach. The legislators are the elected representatives of the people on whom the constitution casts the responsibility of making laws for the welfare of the society and the court should not lightly interfere with their judgment. The court, upon reconsideration of the matter, began to defer to the wisdom of the legislature saying that they are principally the judge of the reasonableness of a law. Attack on legislation on the ground of substantive due process was of no avail unless it became clear that the legislators acting reasonably could not have passed the challenged law. In *West Coast Hotel v. Parrish*[1] the Supreme Court upheld a statute fixing minimum wages for women holding -

> What can be closer to the public interest than the health of women and their protection from unscrupulous and overreaching employers? And if the protection of women is a legitimate end of the exercise of State power, how can it be said that the requirement of the payment of a minimum wage fairly fixed in order to meet the very necessities of existence is not an admissible means to that end?

In applying the due process test the court has abandoned the *Lochner* approach and now the issue is whether the statute challenged is so clearly arbitrary that the legislators acting reasonably could not have believed it necessary or appropriate for the legitimate governmental objective sought to be achieved. The judiciary "may not sit as a super-legislature to judge the wisdom or desirability of legislative policy determinations ... in the local economic sphere, it is only the ... wholly

[1] 300 US 379

arbitrary act which cannot stand."[1] In *Williamson v. Lee Optical Co.*[2] a law prohibited eyeglass wearers from changing the frame or lens of eyeglass without first obtaining a prescription from an ophthalmologist or optometrist and this took away substantial and profitable business from the opticians. In many cases this requirement is needless and wasteful, as for example, in cases where the lens or the frame has been broken and there is no real necessity of eye examination. But the court took into consideration the fact that there were enough cases where prescriptions were necessary to justify the law and the legislature may reasonably conclude that eye examination is so critical for correction of vision and detection of latent eye diseases that every change of frame or lens should be accompanied by a prescription. The court thus found the required rational relationship between the legal provision and the public health and upheld the law even though its economic effect was to divert from the opticians a substantial part of their business. In *Euclid v. Amber Realty Co.*[3] the Supreme Court upheld the constitutionality of a zoning law which permitted zoning and town planning restricting the use of land by the land owners recognising the fact that the realities of modern city life require such a regulation which has a real and substantial relationship to public safety and welfare. A statute provided that any employee entitled to vote might absent himself from employment for specified time on the day of election and the employer was prohibited from deducting wages for such absence. Question arose whether it amounted to anunlawful deprivation of the property right of the employer. The legislative judgment that the time out for voting costs the employer nothing is debatable, but the court deferring to the legislative judgment observed, "Our recent decisions make plain that we do not sit as a super-legislature to weigh the wisdom of legislation nor to decide whether the policy which it expresses offends public welfare."[4] Thus

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[1] *New Orleans v. Dukes*, 427 US 297, 303; *Ferguson v. Skrupa*, 372 US 726 (a law made it a crime to engage in the business of debt adjusting except as an incident of the lawful practice of law. Following *Adams v. Tanner* (ibid) it was argued that the abuses of the business could be corrected by regulatory measures. The court overruled *Adams* holding the challenged law valid and observed that it was not for the judges to strike down a prohibitory law on the ground that less drastic measures would be adequate; it is for the legislature and not for the court to make the choice about proper remedy; the court cannot hold a law unconstitutional on a finding that the legislature had acted unwisely); *Whalen v. Roe*, 429 US 589

[2] 348 US 483

[3] 272 US 365

[4] *Day-Brite Lighting Inc v. Missouri*, 342 US 421, 423

when a statute involving matters other than personal rights is challenged as violative of the due process clause, the court inquires whether the legislators acting as reasonable men would have been satisfied that there was a rational relationship between the provisions of the statute and the legitimate governmental objective sought to be achieved. "If the required rational relation is present, it makes no difference that there exists differences of opinion on the efficacy of the particular measure. The very existence of differing views indicates that the matter was open to discussion and the legislative judgment was, at the minimum, reasonable."[1]

2.103A When, however, life or personal liberty is involved, the American Supreme Court goes for a stricter scrutiny of reasonableness. "The presumption of constitutionality gives way today more readily in cases where life and liberty are restrained. The legislative judgment is scrutinized with greater care to ensure that personal rights are not impaired."[2] In *Moore v. East Cleveland*[3] a zoning ordinance limited residence in a dwelling unit to the nuclear family. Mrs. Moore was living in a house together with her son and two grandsons who were cousins so that they did not form one family within the meaning of the ordinance and Mrs. Moore was convicted for the offence of violating the ordinance. The ordinance was held to be violative of the due process guarantee as the court found the law to be an unreasonably intrusive regulation of the family. Powell J deliberated -

> The city seeks to justify it as a means of preventing overcrowding, minimizing traffic and parking congestion, and avoiding an undue financial burden on East Cleveland's school system. Although these are legitimate goals, the ordinance before us serves them marginally, at best. For example, the ordinance permits any family consisting only of husband, wife and unmarried children to live together, even if the family contains half a dozen licensed drivers, each with his or her own car. At the same time it forbids an adult brother and sister to share a household, even if both faithfully use public transportation. The ordinance would permit a grandmother to live with a single dependent son and children, even if his school-age children number a dozen, yet it forces Mrs. Moore to find another dwelling house for her grandson, John, simply because of the presence of his uncle and cousin in the same household.

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[1] Schwartz - Constitutional Law, p.207
[2] Ibid, p.236
[3] 431 US 494

> We need not labor the point. Section 1341.08 has but a tenuous relation to alleviation of the conditions mentioned by the city.

2.104 Apart from the requirement of rational relationship between the provisions of a statute and legitimate governmental objectives, the due process concept requires that laws should not be vague or disproportionate to the mischief sought to be remedied. Penal laws which did not provide ascertainable standard of guilt[1] and other laws from the language of which it was not definitely ascertainable what was permissible and what was not[2] have been held unconstitutional. In *Giaccio v. Pennsylvania*[3] it was held, "... a law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits or leaves the judges or jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case." A law is also struck down if it is found to be in excess of the requirement to remove the evil sought to be remedied by the law.

2.105 ***Sweep of art.31:*** Art.31, it is submitted, envisages a concept similar to the due process concept of the American Constitution and demands reasonable and non-arbitrary laws and procedures. Art.31 prohibits Parliament from passing an unreasonable or arbitrary law, both from the substantive and procedural points of view. From the substantive point of view a law will be violative of art.31 if the court finds that it is so demonstrably unreasonable or arbitrary that the members of Parliament acting as reasonable men could not pass that law.[4] In other words, a law shall pass the test of art.31 if there is a rtional relationship between the provision of the law and the legitimate governmental objective sought to be achieved. A law cannot be struck down merely on the assertion that it is arbitrary, the unconstitutionality

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[1] *Musser v. Utah*, 338 US 95; *Herndon v. Lowry*, 301 US 241; *Ferguson v. Skrupa*, 372 US 726

[2] *Connaly v. General Construction co.*, 269 US 385 (law requiring a contractor to pay his employees "not less than the current rate of per diem wages in the locality"); *U.S. v. Cohen Grocery Co.*, 255 US 81 (law seeking to punish any person who wilfully makes "any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries"); *Joseph v. Wilson*, 343 US 495 (a cinematograph licensing law prohibiting exhibition of sacrilegious films)

[3] 382 US 399, 402; *Kolender v. Lawson*, 451 US 352

[4] See para 2.103; *Shohan Ajmee v. Commr. of Customs*, W.P. 1882 of 2000, unreported (Whether law is reasonable is to be seen through the eyes of the legislators; if the legislators thought it to be so, it cannot be unreasonable)

must be plainly and clearly established.[1] A law when passed may be justified, but may later on become arbitrary or unreasonable with the lapse of time and change of circumstances.[2] A law will not pass the test of art.31 if it is found to be vague, uncertain or grossly in excess of the requirement as stated in the foregoing paragraph. If there is some legitimate reason for a provision of law, it cannot be arbitrary merely because it operates harshly.[3]

2.106 The article speaks of treatment to be accorded to persons who are citizens or who, though not citizens, are for the time being is present in Bangladesh[4]. A person may be detrimentally treated not only by action, but also by inaction and inaction may contravene the article when it is arbitrary or unreasonable. Arts.31 and 32, though couched in negative language, confer fundamental right to life, liberty, body, reputation and property and the State cannot by unreasonable or arbitrary action or inaction deny the right.[5] The governmental action must be based on law and the law must be reasonable and non-arbitrary with reference to some legitimate objectives to be achieved.

2.107 Art.31 like the American due process clause ensures fair procedure in any proceeding affecting rights and liberties of individuals and this fairness concept is embodied in the principles of natural justice.[6] Our courts have held that the principles of natural justice can be excluded by statute, but because of the guarantee of art.31 it may not now be possible for Parliament to exclude its application unless it can be shown that there is a compelling governmental interest to exclude its application in a particular case.[7] Even in case of exclusion of the requirement of notice and hearing in emergent cases, there should be provision for *post facto* hearing or other safeguards against arbitrary or unlawful application of law.

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[1] *Bihar v. Bihar Distillery Ltd.*, AIR 1997 SC 1511

[2] *Malpe Viswanath v. Maharashtra*, (1998) 2 SCC 1

[3] *Bangladesh Krishi Bank v. Meghna enterprises*, 50 DLR (AD) 194; *Chandpur Jute Mills v. Artha Rin Adalat*, 2 BLC 49

[4] *HFDM De Silva v. Bangladesh*, 2 BLC 179

[5] *Maneka Gandhi v. India*, AIR 1978 SC 597, 620

[6] For a discussion on natural justice see Para 5.51 - 5.70B

[7] The Indian Supreme Court held a rule permitting termination of service without compliance with the principles of natural justice to be arbitrary and unreasonable and therefore violative of the equality clause - *Central Inland Water Transport Corp v. Brojo Nath*, AIR 1986 SC 1571; see also *Maneka Gandhi v. India*, AIR 1978 SC 597; *India v. Tulsi Ram*, AIR 1985 SC 1456; *Basudev v. Sida Kanhu*, (1998) 8 SCC 194

2.108 In making an inquiry into the reasonableness of a law, the court will keep in mind the existing economic and social conditions and the current values of the society with reference to which reasonableness or fairness of a law or procedure will have to be judged. The American decisions may throw light in making the inquiry, but the standard set by the American courts cannot be applied without careful evaluation of our economic and social conditions and values. The right to privacy furnishes an example. Implicit in the concept of 'liberty' is the right to privacy of individual citizens and the American courts in the context of the American society have taken this right to a level where a New York legislation making it a crime to sell or distribute contraceptives to minors under the age of 16 was struck down for unconstitutional invasion on the right to privacy.[1] But acceptance of the right to privacy to that extent in our society is at present unthinkable and the court may not concede the right to privacy to such an extent even though right to privacy is protected under art.31 as a part of 'liberty'.

2.109 *Contemporaneous law and retrospectivity:* Art.31 guarantees that an individual shall be dealt with in accordance with law.[2] Thus an individual cannot be prejudicially affected unless there is contemporaneously in existence a legal provision to sustain the action.[3] A person shall not be prevented from or hindered in doing an act which is not prohibited by law.[4] A public functionary in discharge of his official function taking away a car of an individual without any authority of law, the action is not only illegal, but also violative of the fundamental right guaranteed under art.31. The question is whether Parliament can retrospectively validate an act which was unconstitutional because of the absence of any contemporaneous law to sustain the act. The Appellate Division in *Mofizur Rahman v. Bangladesh*[5] answered the question in the affirmative. The provision of s.9(2) of the Public Servants Retirement Act, 1974 conferring a discretion on the government to retire public servants on completion of

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[1] *Carey v. Population Services International*, 431 US 678

[2] *Faisal Mahtab v. Bangladesh*, 44 DLR 168; *Raghib Ali v. Bangladesh*, 34 DLR 185; *Md. Shoib v. Bangladesh*, 27 DLR 315; *Abdur Rashid v. Industrial Court*, 19 DLR (SC) 449

[3] *Ghulam Zamin v. A.B. Khondker*, 16 DLR 486; *Adamjee Jute Mills v. Controller of Imports*, 20 DLR 791

[4] *Golam Sabir v. Pan Allotment Committee*, 19 DLR 689

[5] 34 DLR (AD) 321 = 1982 BLD (AD) 120; contra *Ghulam Zamin v. A.B. Khondker*, 16 DLR 486

25 years of service was declared void by the Appellate Division[1] as being discriminatory for want of any guideline for the exercise of the discretion. As a result, all actions under the Act retiring public servants became unconstitutional. S.9(2) was later amended providing the guideline of 'public interest' and the amending Act validated the previous actions retiring public servants. The court referred to a number of decisions of the Indian Supreme Court, the British Indian Federal Court and the Australian High Court and took note of the difference in language between art.31 and art.35 to hold that the expression 'in accordance with law' does not mean 'in accordance with law in force' at the time of taking action and upheld the amending Act validating the unconstitutional actions of retirement of public servants. It is submitted that reference to the decisions of the Indian Supreme Court is inappropriate inasmuch as the Indian Constitution does not contain any provision similar to art.31. The same was the position under the Government of India Act, 1935 and in the Australian jurisdiction. A noted author criticised the Indian Supreme Court for not considering whether those validating laws were reasonable restrictions within the meaning of art.19 of the Indian Constitution and made a comparative study of the British, Canadian, Australian and Indian positions.[2] The absence of the expression 'in force at the time of commission of the act' may be important in determining the permissibility of retrospective laws. The difference in language is there because the framers of the Constitution did not intend to take away the power of Parliament to enact retrospective laws which do not offend the constitutional limitations, but from the said difference of language an interpretation cannot be given to permit Parliament to avoid the constitutional limitation of art.31 or render art.31 nugatory. In the American jurisdiction, the legislature has the power to pass retrospective laws if the retrospectivity does not offend any provision of the constitution including the 'due process' clause. When a law is passed, the retrospective aspect of the legislation, as well as the prospective aspects, must meet the test of due process and the justifications for the latter may not suffice for the former.[3] Even when the court finds the law (operating

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[1] *Dr. Nurul Islam v. Bangladesh*, 33 DLR (AD) 201

[2] D.D. Basu - Limited Government and Judicial Review, 1972, pp.257-264

[3] *Usery v. Turner Elkhorn Mining co.*, 428 US 1 (The due process clause poses no bar to requiring a coal mine operator to provide compensation for a former employee's death or disability due to pneumoconiosis arising out of employment in its mines , even if the former employee terminated his employment in the industry before the Act was

prospectively) valid under the due process clause, the court will have the further duty to inquire whether the retrospective operation given to the law is unreasonable or arbitrary, or in other words, the court will inquire whether there was a rational relationship between the retrospectivity and the legitimate governmental interest sought to be achieved by the retrospectivity.[1] When a retrospective law is one covered by art.35, no question of reasonableness will arise, and the very fact that the law is retrospective will be sufficient for the court to declare it void. The question of reasonableness will be moot when such law is not covered by art.35. Parliament has power to make retrospective laws; the only limitation is that like all other laws it must pass the test of constitutionality under art.31 and the retrospectivity must not be arbitrary or unreasonable. If the retrospectivity is found to be arbitrary or unreasonable, it will be violative of art.31 and therefore void.

2.110 Retrospective operation of a law and retrospective validation of an illegal act are, however, different things. In the American jurisdiction, a statute validating an illegal action is called a curative statute. "A curative statute is necessarily retrospective in character and may be enacted to cure or validate errors or irregularities in legal or administrative proceedings, except such as are jurisdictional."[2] A curative statute may validate all defects in a proceeding except those which have resulted in the violation of constitutional rights.[3] When a law requires an authority to take a particular action after publication of notice in the official Gazette and the action has been taken without such publication, the legislature may amend the law omitting the requirement of publication of notice and validate the prior action. But the position is different when a constitutional limitation is involved. The editors of American Jurisprudence stated the position in law as follows -

> The true rule seems to be that where a statute is invalid by reason of an

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passed.(p.19) While the Operators have clearly been aware of the danger of pneumoconiosis for at least 20 years ... we would nevertheless hesitate to approve the retroactive imposition of liability on any theory of deterrence or blameworthiness. We find, however, that the imposition of liability for the effects of disabilities bred in the past is justified as a rational measure to spread the costs of employees' disabilities to those who have profited from the fruits of their labor - the operators and the coal consumers.(p.17-18)

[1] Ibid; *Pension Benefit Guarantee Corp. v. R.A. Gray*, 467 US 717; *U.S. v. Sperry Corp.*, 493 US 52

[2] 16A Am Juris 2d, Const. Law, Para 678

[3] *Sauders v. Carr*, 268 Cal App 2d 10

> absence of power in the legislature in the first instance under the constitution to enact the law, it is not possible for that body to confirm or render the same valid by amendment; but where the obnoxious features of the statute may be removed or essential ones supplied by a proper amendment, so that had the law been primarily thus framed it would have been free from objections existing against it, then the statute may be rendered valid by amendment, so far as its future operation may extend[1]

The same must be the position under our constitutional dispensation. Thus an order of compulsory retirement, made without applying any yardstick as the law provided for none, cannot be validated by introducing a fiction in the law as if the order has been made applying the yardstick of 'public interest'. If such a validation is possible, the protection of law ensured by art.31 will cease to be a protection at all inasmuch as today's right and liberty of an individual will depend upon what Parliament will legislate tomorrow. Thus the act of taking away of the car of an individual in the absence of law to sustain the act is an act in contravention of the constitutional guarantee of art.31 at the time when the act was done and this act cannot be validated by Parliament by a subsequent law. It is submitted that the decision in *Mofizur Rahman v. Bangladesh* is open to doubt as regards its correctness on this point. This decision might have some justification if art.31 remained outside Part III of the Constitution so that an argument could possibly, if not convincingly, be made on the basis of the decision of the Pakistan Supreme Court in *Mohd Yusuf v. Chief Settlement Commissioner*[2] that art.31 would not be read as a limitation on the power of Parliament in making laws.[3] The decision in *Mofizur Rahman* renders the protection of art.31 dependent on the will of Parliament. But this is not what the framers of the Constitution intended. The rights guaranteed in Part III cannot be interpreted in a way which will enable Parliament to whittle down such rights by 'artful' legislative device.[4] If the reasoning of the Appellate Division in *Mofizur Rahman* is carried to its logical limit it will produce a result which the framers of the Constitution did not intend. Art.32 prohibits deprivation of life or personal liberty save in

[1] 16 Am Juris 2d, Const. Law, Para 258

[2] 20 DLR (SC) 187

[3] Any provision of the Constitution placed in any part of it, unless otherwise specified, is a mandate to be obeyed by all functionaries of the State including Parliament and the Pakistan Supreme Court's decision in *Mohd Yusuf* is debatable and broadly stated.

[4] *Ghulam Zamin v. A.B. Khondker*, 16 DLR 486

accordance with law. Like art.31 this article does not include the expression 'in force at the time' of taking the action. Following the reasoning of the Appellate Division in *Mofizur Rahman* it is possible for the State to deprive a person of his life or personal liberty without the backing of law and then to pass a law retrospectively validating the action. If contemporaneous existence of law is not required by art.31, it is possible for the government to demolish a building of a citizen without any authorisation of law and then to get Parliament to pass a law authorising such action and impart retrospective validity to the otherwise unconstitutional action. It is submitted that in incorporating the provisions of arts.31 and 32 the framers of the Constitution wanted to forestall such consequences. Speaking about art.2 of the Pakistan Constitution of 1962, Murshed J observed –

> The guarantee that has been given by the Constitution cannot be washed away by an ingenuous legislative device which can wipe out an illegal invasion of today by an artful enactment of tomorrow, pretending to act retrospectively, without any constitutional change to that effect.[1]

The observation of Murshed J may be debatable in the context of the Pakistan Constitution, but is fully justified in the context of art.31 of the Constitution. It is submitted that art.31 does not prohibit retrospective legislation in the same way the due process clause does not prohibit Congress or State legislatures from making retrospective legislation which do not affect fundamental rights or transgress other constitutional limitations; but the article prohibits retrospective validation of unconstitutional acts. This article also prohibits retrospective operation of a law when the retrospectivity is arbitrary or unreasonable. Any other interpretation will render art.31 without meaning and content as a fundamental right. The legislative power of making retrospective laws is not now as wide and unlimited as it was before adoption of the Constitution.

2.111 ***Life, liberty, body, reputation and property:*** 'Life' within the meaning of art.31 means something more than mere animal existence.[2] It includes the right to live consistently with human dignity and

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[1] Ibid, Para 101; (Rule of law being a basic feature of the Constitution and art.31 being one of the main device through which rule of law is sought to be enforced, it is debatable whether a constitutional amendment hinted by Murshed J will be legally valid)

[2] *Munn v. People of Illinois*, 94 US 113 (per Field J)

decency[1], right to the bare necessities of life such as adequate nutrition, clothing and shelter and the facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and commingling with fellow human beings[2] and all that which gives meaning and content to a man's life[3] including his tradition, culture and heritage[4]. Right to life includes right to livelihood because no person can live without a means of living. It includes a right to protection of health and normal longevity[5] and right to protection and improvement of environment[6]. Dealing with the right to pollution free environment and ecology, the Indian Supreme Court extended and applied the English common law doctrine of public trust[7] to quash a lease of forest land by the side of a river for interfering with natural flow of the river and ordering the lessee to pay compensation by way of restitution of the environment and ecology.[8] A victim girl abducted and taken out of the country and detained in custody in Calcutta is entitled to legal protection through the High Commission of Bangladesh.[9] 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

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[1] *Vikram v. Bihar*, AIR 1988 SC 1782 (Minimum human condition in care homes for females)

[2] *Francis Coralie v. Union Territory*, AIR 1981 SC 746; *Shantistar Builders v. Narayana*, AIR 1990 SC 630; *Bandhua Mukti Morcha v. India*, AIR 1984 SC 802

[3] *H.P. v. Umed Ram*, AIR 1986 SC 847 (Access to road is access to life for residents in hilly areas); *Vincent v. India*, AIR 1987 SC 990 (Ban on injurious drugs); *Mehta v. India*, AIR 1987 SC 1086 (Relief against leakage of gas injurious to health).

[4] *Ramsharan v. India*, AIR 1989 SC 549, 552

[5] *Dr. Mohiuddin Farooque v. Bangladesh*, 48 DLR 438 (Health hazard); *Prof. Nurul Islam v. Bangladesh*, 52 DLR 413 (Hazard of tobacco consumption); *Mr. "X" v. Hospital "Z"*, AIR 1999 SC 495 (Disclosure of information regarding dangerous disease); *Mehta v. India*, (1997) 2 SCC 411 (Pollution of river water); *Mehta v. India*, (1997) 11 SCC 327 (Relocation of hazardous industries); see *Paschim Banga Khet Mazdoor Samity v. W.B.*, AIR 1996 SC 2426 (Court awarded compensation for denial of emergency medical aid by government hospital)

[6] *Mehta v. India*, (1998) 9 SCC 589; *World Saviours v. India*, (1998) 9 SCC 247; *Godavarman v. India*, AIR 1997 SC 1233 (Protection and conservation of forest)

[7] The doctrine provides that submerged and submersible lands are preserved for public use in navigation, fishing and recreation and State as a trustee for the people, bears the responsibility of preserving and protecting the right of the public to the use of the waters for those purposes – Black's Law Dictionary, 6th ed., p.1232.

[8] *Mehta v. Kamal Nath*, (1997) 1 SCC 388

[9] *Abdul Gafur v. Secy. Ministry of Foreign Affairs*, 1997 BLD 453

livelihood the individual already has.[1] When rootless people have taken shelter in slums and somehow eking a livelihood, their wholesale eviction without any scheme of their rehabilitation has been found to offend the provisions of arts.31 and 32.[2] The right to life does not, however, include any right to die.[3] The expression 'body' has been used to provide inhibition against detrimental action in respect of all those limbs and faculties by which life is enjoyed even though it would have been covered by 'life' without the expression 'body'.[4] Custodial violence, torture, rape or death in police custody or lock-up infringes the right guaranteed by arts.31 and 32.[5]

2.111A Implicit in arts.31 and 32 is the right to access to justice as a man cannot be said to have been dealt with in accordance with law unless he has a reasonable opportunity to approach the court in vindication of his right or grievance.[6] Even a fugitive is entitled to be defended when death penalty is involved.[7] *In Nurun Nahar Zaman v. State*[7] an accused charged with an offence punishable with death was absconding. A senior Advocate was appointed as the State defence lawyer. During the pendency of the trial the appointment was cancelled and in his place another Assistant Public Prosecutor was appointed. The court found the change of the lawyer to be hasty and motivated and therefore violative of the right guaranteed by arts.31 and 32.[7] A victim girl abducted and taken out of the country and remaining in custody in Calcutta is entitled to legal protection through the Deputy High Commission of Bangladesh in Calcutta.[8]

2.112 A man cannot be detained except in accordance with law. Thus a major girl who is not an accused or a witness in a case cannot be

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[1] *Olga Tellis v. Bombay Municipal Corporation*, AIR 1986 SC 180; *Ain O Salish Kendra v. Bangladesh*, 1999 BLD 488 (Basti clearance); but see *Giasuddin v. Dhaka Municipal Corp*, 49 DLR 199 (A trespasser can't claim protection of art.31 to resist eviction from a park.); *Ahmedabad Municipal Corp. v. Nawab Khan*, AIR 1997 SC 152

[2] *Ain O Salish Kendra v. Bangladesh*, 1999 BLD 488; *Kalam v. Bangladesh*, 2001 BLD 446; *Aleya Begum v. Bangladesh*, 53 DLR 63; *B.S.E.H.R. v. Bangladesh*, 53 DLR 1 (Wholesale eviction of sex-workers depriving their livelihood)

[3] *Gian Kaur v. Punjab*, AIR 1996 SC 946

Munn v. People of Illinois, 94 US 113

[5] *D.K. Basu* v. W.B., AIR 1997 SC 610

[6] *Liaquat Hossain v. Pakistan*, PLD 1999 SC 504, 652

[7] 1995 BLD 537

[8] *Abdul Gafur v. Secy. Ministry of Foreign Affairs*, 1997 BLD 453

detained even in judicial custody.[1] But 'liberty' is not limited to personal locomotion. It includes a wide range of things. It means the right of an individual to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; and to pursue any livelihood or avocation and for that purpose to enter into all contracts which may be proper, necessary or essential to his carrying out to a successful conclusion these purposes.[2] This denotes "the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognised ... as being essential to the orderly pursuit of happiness by free men."[3] For the women liberty includes the right to work with dignity free from sexual harassment.[4] Liberty under law extends to the full range of conduct which an individual is free to pursue and which cannot be restricted except for a proper governmental purpose.[5] Since their profession is not declared unlawful, the sex workers are entitled to be protected under art.32.[6] Conviction does not render a person a non-person and his rights cannot be at the whims of the prison authorities; his liberty within the jail precincts cannot be unreasonably or arbitrarily curtailed.[7] A person because of his detention or imprisonment does not forfeit all his fundamental rights and he can claim his right to life and liberty even in detention or imprisonment. Thus a detenu has the right to have

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[1] *Rehana Begum v. Bangladesh*, 50 DLR 557

[2] *Grosjean v. American Press Co.*, 297 US 233; *Pierce v. Society of Sisters*, 268 US 510

[3] *Meyer v. Nebraska*, 262 US 390, 399; *Board of Regents v. Roth*, 408 US 564; *Unni Krisnan v. A.P.*, AIR 1993 SC 2178 (Right to education); *Kharak Singh v. U.P.*, AIR 1963 SC 1295 (Right of privacy); *Maharashtra v. Madhukar*, AIR 1991 SC 207 (Even a woman of easy virtues is entitled to her privacy and no one can invade her privacy as and when he likes)

[4] *Vishaka v. Rajasthan*, AIR 1997 SC 3011; *Apparel Export Promotion Council v. Chopra*, AIR 1999 SC 625

[5] *Bolling v. Sharpe*, 347 US 497

[6] *Sultana Nahar v. Bangladesh*, 1998 BLD 363

[7] *Sunil Batra v. Delhi Administration*, AIR 1978 SC 1675; *Harbans Singh v. U.P.*, AIR 1991 SC 531 (Prisoner cannot be kept in fetters inside the jail); *Prem Sankar v. Delhi Administration*, AIR 1980 SC 1535 (Handcuffing on the basis of classification based on the nature of offence is arbitrary; the only valid basis is the need to prevent the prisoner from escaping)

interviews with the members of his family and his lawyer[1] and he can send books outside the jail for publication.[2]

2.112A *Privacy*: Implicit in the right to life and liberty is the right to privacy or the right to be let alone.[3] A citizen has a right to safeguard the privacy of his own, his family, marriage, procreation, motherhood, child bearing and education among other matters. None can violate this right by publication or otherwise.[4] Position will be otherwise if the person concerned consents to it or otherwise voluntarily thrusts himself into the controversy or voluntarily invites or raises a controversy, or the publication is based upon public records including court records.[5] Public officials cannot claim this right with respect to their acts and conduct relevant to the discharge of their official duties.[6]

2.113 Reputation is a great possession and asset of a man. But reputation alone, apart from some more tangible interest such as employment, is not a 'property' and by itself has not been found sufficient in the American jurisdiction to invoke the protection of the due process clause.[7] Art.31, however, specifically mentions reputation which, accordingly, is entitled to the due process protection in Bangladesh.

2.114 The word 'property' is an equivocal legal term. In the American jurisdiction this word as used in the due process clause of the Fifth and Fourteenth Amendment embraces all valuable interests which a man possesses outside of himself - outside of his life and liberty.[8] It relates not only to those tangible things of which one may be the owner, but to everything which he may have of an exchangeable value.[9] It definitely extends beyond actual ownership of real estate, chattels or money.[10] When art.31 declares it to be the inalienable right of citizens and residents of Bangladesh to be treated in accordance with law, and by

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[1] *Francis Coralie v. Union Territory*, AIR 1981 SC 746

[2] *Maharashtra v. Provakar*, AIR 1966 SC 424

[3] For privacy of home and correspondence see Para 2.217 – 2.221

[4] *Rajagopal v. T.N.*, AIR 1995 SC 264; see also *Mr. "X" v. Hospital "Z"*, AIR 1999 SC 495

[5] *Rajagopal v. T.N.*, AIR 1995 SC 264

[6] Ibid; for other limitations to this right, see Para 2.17A

[7] *Paul v. Davis*, 424 US 693

[8] *Campbell v. Holt*, 115 US 620

[9] 16A Am Juris 2d, Const. Law, Para 584

[10] *Board of Regents v. Roth*, 408 US 564

way of particularisation, mentions life, liberty, property, etc., there is no reason why the word 'property' should be given a narrow meaning. Property within the meaning of art.31 includes the rights which, by themselves and taken independently, are capable of being acquired, held or disposed of as property.[1] It includes not only real and personal property but also incorporeal rights[2] like patents, copyrights, leases, easements, chose in action and everything of exchangeable value which a person may have. It extends to concrete as well as abstract rights of property.[3] Money is property[4], so also the right to pension which is not a bounty of the State.[5] A right under a valid contract or a franchise is treated as a property for protection of the due process clause.[6] A profit-a-pendre or an interest of a tenant in the demised property is a property,[7] but not a statutory right to apply for purchase of land.[8]

2.115 ***Deprivation of life and personal liberty:*** Art.32 provides that no person shall be deprived of life or personal liberty[9] save in accordance with law. Because of the seriousness of the deprivation, the framers of the Constitution made this specific provision even though deprivation can be covered by art.31. No provision of the Constitution can be treated as surplusage and we must find something more in the

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[1] *Chiranjit Lal v. India*, AIR 1951 SC 41 (A share in a joint stock company is a property, but the right of voting of shareholders and their right to select directors are not property as by themselves and taken independently they cannot be reckoned as property capable of being acquired, held or disposed of)

[2] *Dwarkadas v. Sholapor S. & Co.*, AIR 1951 Bom 86, on appeal, AIR 1954 SC 119

[3] *Commissioner, HRE v. Swamiar*, AIR 1954 SC 282 (Right to the office of a mohanta of a math is a proprietory right). In *Zain Yar Jung v. Director of Endowments*, AIR 1963 SC 985, position of mutawalli was held different from a mohanta as a mutawalli has only right of management of waqf property and no right to the property as such. Similar is the position of a trustee administering trust property as held in *Bira Kishore v. Orissa*, AIR 1964 SC 1501

[4] *M.P. v. Ranojirao*, AIR 1968 SC 1053

[5] *Salabuddin v. A.P.*, AIR 1984 SC 1905

[6] *Lynch v. U.S.*, 292 US 571; *Frost v. Corporation Com. of Oklahoma*, 278 US 515 (right to operate a cotton gin and collect tolls therefor); *Atchison T & S.F.R. Co. v. Campbell*, 61 Kan 439 (right to charge and collect tolls for transportation); *Superior Water, Light & Power Co. v. Superior*, 263 US 125 (exclusive right to supply the municipality with water for a specified time); *Los Angeles v. Los Angeles Gas Corporation*, 251 US 32

[7] *Bombay Corporation v. Pancham*, AIR 1965 SC 1008

[8] *S.M. Transports v. S. Mutt*, AIR 1963 SC 864

[9] See Para 2.11 for the meaning of 'personal liberty'.

quality of the protection provided by art.32 than is provided in art.31. No right is so basic and fundamental as the right to life and personal liberty and exercise of all other rights is dependent on the existence of the right to life and personal liberty. We have seen that the due process concept of art.31 involves a relaxed scrutiny of reasonableness of a law passed by Parliament and the court defers to the wisdom of the legislators. If the framers of the Constitution intended to apply the same standard of reasonableness to a law involving deprivation of life or personal liberty, making a separate provision as in art.32 was unnecessary. In the American jurisdiction, statutes impairing life and personal liberty are subjected to stricter scrutiny by the court.[1] From the scheme of Part III it may be concluded that in making a separate provision in respect of deprivation of life and personal liberty, the framers of the Constitution intended application of a stricter scrutiny of reasonableness. A law providing for deprivation of life or personal liberty must be objectively reasonable and the court will inquire whether in the judgment of an ordinary prudent man the law is reasonable having regard to the compelling, and not merely legitimate, governmental interest. It must be shown that the security of the State or of the organised society necessitates the deprivation of life or personal liberty.

2.116 Art.33 provides some specific procedural safeguards and arts.34 and 35 provide some specific substantive and procedural safeguards in respect of deprivation of life and personal liberty. But art.32 ensures reasonableness of a law regarding deprivation of life or personal liberty both from the substantive and from the procedural point of view. Art.33 provides protection against unreasonable arrest and detention while art.35 ensures fair trial in criminal prosecutions. A man should not be punished prior to conviction. So the law makes provision for enlargement of an accused on bail. In making such a provision, two considerations arise. First is the freedom of the accused and the second is the safety and security of the victim of the crime and necessity of a fair trial.[2] Incidence of threat and injury to the victims and witnesses of the crime has become commonplace today and the legislators are inclined to make provision for no-bail at least at the stage of investigation and trial, the court having no power to grant bail. Is such a provision in conformity with the provision of art.32?

2.116A In the United States bail is an absolute right in non-capital

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[1] See Para 2.103A

[2] See *Tayazuddin v. State*, 2001 BLD 503

cases. Bail Reform Act of 1984 made provision for no-bail even in non-capital cases where the government can demonstrate to the court by clear and convicing evidence that the detainee presents an identified and articulable threat to an individual or the community. Putting the law to due process test, the U.S. Supreme Court by a majority upheld the legislation holding that pre-trial detention is regulatory and not penal and the government's regulatory interest in community safety outweighed the liberty interest of a pre-trial detainee.[1] In our country offences are classified into bailable and non-bailable offences and even in non-bailable cases the court has the discretion to grant bail. No-bail provision has been made in s.497 of the Code of Criminal Procedure in cases of offences punishable with death or imprisonment for life. Even in such cases it is for the court to decide whether there is any reasonable ground to believe that the accused is guilty of the offence. So long the matter is left to the court to decide whether there is a prima facie case against the accused and whether he will pose a threat to the community, no exception can be taken to the provision of no-bail as there is always a question of balancing between the liberty interest of the accused and the liberty interest of the victim and witnesses of the crime. But the legislators complain that the court is often very liberal in granting bail resulting in serious set back in the administration of criminal justice. Due process test must take the social condition into consideration to determine whether a no-bail provision stricter than a provision like s.497 of the Code of Criminal Procedure is reasonably related to the compelling governmental interest in the safety and security of the State and the community and if the answer is in the affirmative, whether there should be further provision to prevent arbitrary action of the police in initiating prosecution.

2.117 Life is the most precious thing and nothing can be more fundamental than preservation of life. Hence, deprivation of life can follow only when it is needed for the security of the State or the security of the ordered society where individuals can freely enjoy life and liberty. Thus a death sentence will not be permissible unless it appears that there is a compelling State necessity to take the life. The taking of life will be justified when it is necessary to ensure the safety and security of life and personal liberty of the individuals in the society or for the safety and security of the State which can ensure safety and security of the life and personal liberty of individuals. S.367(5) of the Code of Criminal

[1] *U.S. v. Salerno*, 481 US 739

Procedure, 1898 provided that if an accused convicted of an offence punishable with death is given a lesser sentence, the court should state the reason for awarding the lesser sentence. In India when the Code was re-enacted in 1974, s.354(3) provided, "When the conviction is for a sentence punishable with death or, in the alternative, with imprisonment for life or imprisonment for a terms of years, the judgment shall state the reasons for the sentence awarded and, in the case of sentence of death, special reasons for such sentence." The death sentence was challenged as being violative of arts.14, 21 and 19 of the Indian Constitution. In *Bachan Singh v. Punjab*[1] by a majority decision the Indian Supreme Court held the sentence of death to be constitutional, recognising the right of the State to deprive a person of his life in accordance with fair, just and reasonable procedure established by law. The court, however, emphasised that the death sentence ought to be imposed only in the rarest of the rare cases when the alternative option is unquestionably foreclosed. Bhagawati J dissented holding the death sentence to be arbitrary and unreasonable and violative of art.21.[2] In 1978 s.367(5) of the Code of Criminal Procedure was amended in Bangladesh requiring the court to assign reasons for passing the sentence, be it death sentence or life imprisonment. The law in this regard is now more in conformity with the requirement of art.32 than it was previously, but further change providing for the death penalty only when it is absolutely necessary should be effected to bring the law in full conformity with art.32.

2.118 A penal statute by providing punishment prescribes deprivation of life or personal liberty. Hence such a statute must pass the test of reasonableness and non-arbitrariness under art.32 in respect of the punishment prescribed, particularly where the discretion of the court in passing the sentence is curtailed either by providing a mandatory

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[1] AIR 1980 SC 898; see also *Jagmohan v. U.P.*, AIR 1973 SC 947; *Rajendra v. U.P.*, AIR 1979 SC 916

[2] *Bachan Singh v. Punjab*, AIR 1982 SC 1325 ("... death penalty as provided under s.302 of the Penal Code ... does not serve any legitimate end of punishment, since by killing the murderer it totally rejects the reformative purpose and it has no additional deterrent effect which life sentence does not possess and it is therefore not justified by the deterrence theory of punishment. Though retribution or denunciation is regarded by some as a proper end of punishment, I do not think, for reasons I have already discussed, that it can have any legitimate place in an enlightened philosophy of punishment. It must therefore be held that death penalty has no rational nexus with any legitimate penological goal or any rational penological purpose and it is arbitrary and irrational and hence violative of Arts.14 and 21 of the Constitution."

sentence or by providing a minimum sentence. The reasonableness of the punishment is to be tested having regard to the nature of the offensive conduct and the governmental need and if the court comes to a finding that the punishment prescribed is disproportionate, the law will be violative of art.32. The Indian Supreme Court held that s.303 of the Penal Code providing for mandatory death sentence is arbitrary and unreasonable and is violative of art.14 and 21 of the Indian Constitution. The same position should obtain in our jurisdiction. But a question may arise whether, in view of the provision of art.35(6), an inquiry into reasonableness of a punishment prescribed in an existing law is permissible. This is dealt with in Para 2.155.

2.119 A law providing for deprivation of personal liberty must subserve a compelling State interest and if the mischief sought to be remedied can be remedied by any other reasonable means, deprivation of personal liberty will be unreasonable or arbitrary and void in terms of art.32. Thus a law providing for preventive detention must show that there is a compelling State necessity for such detention and the necessity cannot be fulfilled by any other reasonable means keeping at large the person sought to be detained. In other words the grounds of detention must be substantively reasonable in relation to the demands of an ordered society and the security of the State.

2.120 As a criminal prosecution may result in deprivation of personal liberty, the Indian Supreme Court held that an accused, who due to poverty, indigence or an incommunicado situation, cannot afford legal service is entitled to free legal aid at the cost of the State as part of fair and reasonable procedure under art.21.[1] In the opinion of the court, the trial court should inform the accused of his right to legal aid[2] and if because of the failure to inform, the accused remains unrepresented, the trial will be vitiated.[3] The Sixth Amendment of the American Constitution specifically guarantees to an accused assistance of a lawyer in criminal cases. But the Sixth Amendment is applicable only in respect of trials by federal courts and has no application in the case of State prosecutions. In some cases it was held that the due process clause of the Fourteenth Amendment generally did not mandate legal aid to the

[1] *Hoscot v. Maharashtra*, AIR 1978 SC 1548; *Hossainara v. Bihar*, AIR 1979 SC 1369; *Sheela Barse v. Maharashtra*, AIR 1983 SC 378

[2] *Khatri v. Bihar*, AIR 1981 SC 928

[3] *Sukdas v. Union Territory*, AIR 1986 SC 991

indigent accused.[1] Without the help of Counsel, all other safeguards for a fair trial may be empty rituals,[2] and the American Supreme Court later held that the right of an indigent accused to have legal aid is incorporated in the due process clause of the Fourteenth Amendment[3] even in case of crimes punishable by imprisonment for less than six months.[4] As art.32 includes both substantive and procedural due process, the principle laid down by the American and Indian Courts is applicable in Bangladesh with full force. It is true that the application of this principle is connected with the question of the burden on the public exchequer, but a sincere effort should be made to implement the constitutional principle. Unless this can be done, for the vast majority of the people of the country the principles of rule of law and fundamental fairness grafted in the Constitution will have no meaning.

SAFEGUARDS AS TO ARREST AND DETENTION

2.121 We have seen that under art.32 any law depriving a person, citizen or non-citizen, of personal liberty, must not be arbitrary and must be reasonable and fair. Art.33 provides for specific procedural safeguards against arbitrary arrest and detention and together with arts.32 and 35 makes a total code in respect of arrest, detention and trial. Arrest or detention affects several other rights guaranteed by the Constitution, but only incidentally, resulting from arrest or detention and the provisions guaranteeing those rights will not be attracted. For application of the different provisions of the Constitution guaranteeing rights the test is what right is directly affected and as such any arrest or detention will have to be tested with reference to arts.32 and 33.

2.122 Art.33(1) & (2) provide that (i) a person arrested must be informed as soon as possible of the grounds of arrest, (ii) he must be allowed to consult and be defended by a lawyer of his choice, (iii) he must be produced before a magistrate within twenty-four hours of arrest, excluding the time necessary for the journey from the place of arrest to the court of the magistrate and (iv) he must not be detained for a period

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[1] *Betts v. Brady*, 86 L.Ed. 1595 (It requires the State under the 14th Amendment to provide a counsel only where the particular circumstances of a case indicate that the absence of counsel would result in a trial lacking fundamental fairness)

[2] *Powell v. Alabama*, 287 US 45

[3] *Gideon v. Wainwright*, 372 US 335

[4] *Argersinger v. Hamlin*, 407 US 25

longer than twenty-four hours plus the time of journey without the authority of the magistrate. These four rights are not available to an enemy alien and to a person arrested or detained under a law providing for preventive detention.[1] In case of preventive detention, art.33(3)&(4) provide two safeguards - (a) the detaining authority shall, as soon as may be, communicate to the detenu the grounds of the detention order and shall afford the detenu the earliest opportunity of making representation against the detention order, provided that the detaining authority may refuse to disclose facts which he considers to be against public interest to disclose, and (b) no law providing for detention should authorise detention for a period exceeding six months unless an Advisory Board, after hearing the detenu in person, approves the detention.

2.123 *Arrest or detention:* The arrest or detention dealt with under art.33 is one by a non-judicial authority upon accusation of some offence or prejudicial activity on the part of the arrested or detained person.[2] Thus art.33 will not be attracted in case of (a) arrest on warrant as it will be senseless to ask the magistrate to apply his judicial mind once again within 24 hours, (b) removal of a minor girl from brothel under an Act for suppression of immoral traffic[3] (c) taking into custody under s.100 or s.522 of the Criminal Procedure Code of a person wrongfully confined or an abducted female[4], (d) arrest under warrant issued by civil court[5] (e) arrest and imprisonment of a defaulter under a revenue recovery law[6]. The Indian Supreme Court held that this fundamental right is attracted in case of arrest under orders of the Speaker of a legislature for contempt.[7]

2.124 ***Arrest in cases other than preventive detention:*** Art.33(1)&(2) guarantee four rights to a person arrested. Any law or action not in conformity with those rights will be void and the arrest made will be unlawful.

2.125 *Communication of grounds of arrest:* The arrested person shall not be detained in custody unless he is informed, as soon as may be, of the grounds of arrest to enable him to prepare for his defence and to

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[1] Art.33(3)
[2] *Punjab v. Ajaib Singh*, AIR 1953 SC 10
[3] *Raj Bahadur v. Legal Remembrancer*, AIR 1953 Cal 522
[4] *Punjab v. Ajaib Singh*, AIR 1953 SC 10
[5] Ibid
[6] *Collector of Malabar v. Erimmal Ebrahim*, AIR 1957 SC 688
[7] *Gunapati v. Nafisul*, AIR 1954 SC 636; *Reference by President under Art.134*, AIR 1965 SC 745

move the court for bail or writ of *habeas corpus*. Failure to inform the reason of arrest would entitle the arrested person to be released.[1] 'Grounds' include all the basic facts on which the satisfaction of the arresting authority is based, but not the details of such basic facts.[2] It is not necessary to inform him of the full details of the offence; but the information should be sufficient to give him an idea of the offence he is alleged to have committed.[3] Where the arrested person does not know Bengali, the reasons should be communicated in a language he understands.[4] Sufficiency of the information is justiciable and insufficiency of information would render the arrest unlawful. Mere disclosure of the provision of law does not constitute sufficient information.[5] The expression 'as soon as may be' shows that the information should be given as early as is reasonably practicable in the circumstances of a particular case. "The words 'as soon as may be' would normally produce effect before the prisoner is taken to a Magistrate, that is to say, within twenty-four hours. For, a prisoner is not produced before a Magistrate merely to inform him that there are Magistrates in the land ... he is produced so as to enable him to complain to the Magistrate if there is ground for any complaint. And the first complaint which a prisoner will make will be: why have I been arrested? And if the Magistrate cannot tell him why, there is no charm in styling this production a fundamental right."[6]

2.126 *Right to consult and be defended by lawyer:* The person arrested has a right to consult a lawyer of his choice from the moment he is arrested and this right necessarily includes the right to effective interview with the lawyer out of the hearing of the police, though the police may be within sight and this right exists whether the person is arrested under a general or a special law. He has also the right to be defended by a lawyer of his choice and this right is not lost when he is released on bail.[7] Any provision of law denying this right will be

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[1] *Madhu Limaye v. State*, AIR 1969 Punj 506
[2] *Hansmukh v. Gujarat*, AIR 1981 SC 28
[3] *Rowshan Bijaya S. Ali Khan v. East Pakistan*, 17 DLR 1
[4] *Hari Kishan v. Maharashtra*, AIR 1962 SC 911 (This is a case of preventive detention, but the principle will be applicable)
[5] *Vimal v. U.P.*, AIR 1956 All 56; *Madhu Limaye v. Punjab*, AIR 1959 Punj 506
[6] *G.M. Loondhkhar v. State*, PLD 1957 Lah 497
[7] *M.P. v. Shobharam*, AIR 1966 SC 1910

inconsistent with the provisions of art.33 and will be void.[1] The right to be defended by a lawyer must be read to be a part of the law, irrespective of whether the law gives or denies the right.[2] The arrested person must be given a reasonable opportunity to engage a counsel, and the counsel must be given a reasonable opportunity to defend him.[3] Where railway porters offering *Satyagraha* were arrested, tried and convicted without informing them about the date of trial and without telling them that they have the right to consult and be defended by a lawyer of their choice, the trial and conviction were held to be unconstitutional.[4] But in *Ramsarup v. India*[5] the Indian Supreme Court held that there would be no breach of this fundamental right if no request to be represented by a lawyer was made by the arrested person and no such request was turned down.

2.127 The Indian Supreme Court earlier took the view that the arrested person did not have an absolute right to be provided with a lawyer by the State; he had to be given the opportunity to engage a lawyer.[6] But after amendment of the directive principles of State policy in 1976 enjoining the State to provide free legal aid by suitable legislation, the court held in *Hussainara v. Home Secretary*[7] that an indigent accused who is unable to engage a lawyer at his own cost has a constitutional right to assistance of a lawyer at State cost. The Constitution does not make it an obligation of the State to provide an indigent accused with the assistance of lawyer at its cost. The Legal Remembrancer's Manual, 1969 provides that an indigent person accused of an offence punishable with death sentence is to be provided with the assistance of a lawyer at the expense of the State.[8] In view of the provisions of art.32 an indigent accused is entitled to legal aid even in case of offences not punishable with death.[9]

2.128 *Production before magistrate:* A person arrested must be produced before a magistrate within 24 hours plus the time necessary for

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[1] *M.P. v. Shobharam*, AIR 1966 SC 1910
[2] *Rowshan Bijaya Shaukat Ali Khan v. East Pakistan*, 17 DLR 1
[3] *Moslemuddin Sikdar v. Chief Secretary*, 8 DLR 526
[4] *Hansraj v. State*, AIR 1956 All 641
[5] AIR 1965 SC 247; *M.P. v. Shobharam*, AIR 1966 SC 1910
[6] *Janardhan v. Hydrabad*, AIR 1951 SC
[7] AIR 1979 SC 1377; *Hossainara v. Bihar*, AIR 1979 SC 1360
[8] Paragraph 6, Chapter XII, quoted in *State v. Purna Chandra*, 22 DLR 289
[9] See Para 2.120

the journey from the place of arrest to the court of the magistrate[1]. Failure to comply with this requirement would render further detention of the arrested person illegal.[2] Thus the period of detention without a magisterial order cannot be longer than the period stated above. This rule is applicable to all arrests, whether under or without a warrant of arrest.[3] This rule ensures that a judicial mind is applied immediately as regards the legality of the arrest and detention. The requirement was not be fulfilled if a magistrate arrested a person without a warrant and the arrested person was remanded by the same magistrate as in that case the magistrate in directing the arrest did not act as a court and had no opportunity to apply his independent judgment.[4] The magistrate is not to act mechanically but must apply his judicial mind to see whether the arrest of the person produced before him is in accordance with law as otherwise the protection under art.33 will be meaningless.[5] In *Ram Manohar v. Superintendent, Central Jail*[6] a person was arrested by a Station Officer on his own authority, and immediately thereafter the City Magistrate in his executive capacity went there. The arrested person was produced before the City Magistrate who remanded the arrested person to custody. The Allahabad High Court held that there was sufficient compliance with the constitutional requirement. D. Basu in his Commentary on the Indian Constitution[7] questioned the correctness of the decision and pointed out that the City Magistrate visiting the spot in his executive capacity was not holding court and the arrested person was deprived of the opportunity to consult lawyer when he was not taken to a court. Every day we see the casual way in which the matter of arrest and remand is dealt with in court. The position of an arrested person produced on the spot must be far worse and would make a mockery of the constitutional protection. In this situation the criticism of D. Basu cannot be brushed aside. In a case where the magistrate is himself a witness, the constitutional requirement will not be fulfilled by

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[1] *Mehnaz Sakib v. Bangladesh*, 52 DLR 526

[2] *U.P. v. Abdus Samad*, AIR 1962 SC 1506; *Bhim Singh v. J & K*, AIR 1986 SC 494 (where remand order was obtained from a magistrate without producing the arrested person before him, the detention was illegal)

[3] Ibid; contra *Sakhi Daler Khan v. Superintendent in-echarge*, PLD 1957 Lah 813

[4] *Hariharananda v. Jailor*, AIR 1954 All 601

[5] In re *Madhu Limaye*, AIR 1969 SC 1014

[6] AIR 1955 All 193

[7] Vol.D, 1978, p.146

production of the arrested person before him.[1] A person was arrested in Bombay on a warrant issued by the Speaker of U.P. Legislative Assembly and taken to Lucknow in custody to be produced before the Speaker to answer the charge of breach of privilege of the Legislative Assembly. He was not produced before a magistrate within the stipulated time. The Supreme Court held it to be a contravention of the constitutional requirement of production before a magistrate and ordered the release of the arrested person.[2]

2.129 ***Preventive detention:*** Art.33 as originally adopted did not leave any scope for preventive detention. Preventive detention, though an evil, is a necessity for State security and by the Constitution (Second Amendment) Act, 1973 the old art.33 was replaced by the present one providing that the above rights will not be available in the case of persons arrested or detained under any law providing for preventive detention. Preventive detention has three distinguishing features - (i) it is detention and not imprisonment, (ii) it curtails the liberty of a person by executive order without any preceding trial or inquiry and (iii) its object is preventive and not punitive. Under art.32 a law providing for preventive detention must both substantively and procedurally be free from arbitrariness and unreasonableness and must not be vague or disproportionate to the mischief sought to be remedied. In order to protect the individuals from arbitrary or high-handed arrest and detention by the executive, clauses (4) and (5) of art.33 provide two important safeguards - (i) approval by Advisory Board and (ii) communication of the grounds of detention. Both these safeguards are to be observed by the detaining authority. It is immaterial whether the constitutional safeguards are incorporated in the law as even if not so incorporated, it would be deemed to be incorporated in the law as superimposed by the Constitution.[3]

2.130 *Approval by Advisory Board:* Art.33(4) provides that no law shall authorise detention for a period of more than six months and the period of six months can be extended only if an Advisory Board, before the expiry of six months, opines that there is sufficient cause for detention.[4] If no such affirmative opinion is given by the Advisory

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[1] *Bir Bhadra Pratap v. D.M. Azamgarh*, AIR 1959 All 384

[2] *Ganapati v. Nafizul Hasan*, AIR 1954 SC 636

[3] *Vimal v. Prodhan*, AIR 1979 SC 1501; *Rowshan Bijaya Shaukat Ali Khan v. East Pakistan*, 17 DLR 1

[4] *Abdul Aziz v. West Pakistan*, PLD 1958 SC 499, 513

Board, the detenu has to be released on the expiry of six months.[1] In a writ of *habeas corpus* the court is not required to wait for the opinion of the Advisory Board and should dispose of the petition if it is otherwise ready for hearing.[2] The Advisory Board is to be constituted with three persons, two of whom must be persons who are, have been, or are qualified to be appointed as Judges of the Supreme Court and the other must be a senior officer in the service of the Republic. The Advisory Board shall consider the representation of the detenu against the detention order along with the materials produced by the detaining authority to show the basis of its satisfaction regarding the necessity of detention of the detenu and after hearing the detenu in person, the Advisory Board will have to form an opinion as to whether there are sufficient materials to sustain the satisfaction of the detaining authority as regards the necessity of detention. In *Gopalan v. Madras*[3] Sastri J held that the Advisory Board is only to consider whether there is sufficient cause for detention, while Kania CJ and Fazal Ali J took the view that the function of the Board is to consider whether there is sufficient cause for detention for a longer period. However, the Advisory Board cannot express an opinion as to how long the detention should continue.[4] It is for the detaining authority to decide on the period of detention. The approval by the Board is only a safeguard against the vagaries and arbitrariness of the detaining authority.[5] Not only does the opinion of the Advisory Board have to be rendered before the expiry of six months, the detaining authority must also extend the period of detention before the expiry of that period.[6] But once the order is made within time, delay in communicating the order to the detenu is a mere irregularity which does not vitiate the detention order.[7] Art.33(6) provides that Parliament may enact law prescribing the procedure of the Advisory Board which must, of course, pass the test of reasonableness under art.32.

2.131 *Communication of grounds of detention:* Art.33(5) requires that the grounds of detention must, as soon as may be, be communicated

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[1] *Monwara Begum v. Secy., Ministry of Home*, 41 DLR 35
[2] *Dr. Habibullah v. Secy., Ministry of Home*, 41 DLR 160
[3] AIR 1950 SC 27
[4] *Dattatraya v. Bombay, AIR 1952 SC 181*
[5] *Puranlal v. India*, AIR 1958 SC 163
[6] *Deb Sadhan Roy v. W.B.*, AIR 1972 SC 1924; *Satya Deo Prasad v. Bihar*, AIR 1975 SC 367
[7] *Deb Sadhan Roy v. W.B.*, AIR 1972 SC 1924

to the detenu and the detaining authority must afford him the earliest opportunity of making a representation against the order of detention.[1] It is very important because it not only enables the detenu to make the representation, but also enables him to file a proper application for a writ of *habeas corpus*, though, of course, the detenu may present an application for the writ even before the grounds of detention are served on him. 'Grounds' means the conclusions drawn by the authority from the facts or particulars.[2] The service of the grounds of detention is mandatory. The reasons and grounds stated in the initial order of detention cannot be a substitute for the service of separate grounds of detention and non-service of the grounds renders the detention without lawful authority.[3] Grounds served need not be the particulars in all details, but they must contain sufficient particulars so that an effective and meaningful representation may be made by the detenu.[4] The grounds served must be in a language the detenu understands.[5] The detaining authority has to inform the detenue that he has a right of opportunity to make representation and failure to inform may render the continued detention illegal.[6] There is a proviso to art.33(5) which permits the detaining authority to refuse to disclose facts which such authority considers to be against the public interest to disclose.

2.132 Art.33(5) requires that the grounds must be communicated 'as soon as may be' which means as early as is reasonable in the particular circumstances of a case. The Constitution left the time indeterminate to allow the detaining authority reasonable time to formulate the grounds. In construing the expression 'as soon as may be' Kayani CJ of the Lahore High Court observed -

> If these words 'as soon as may be' have the same meaning in clause (5) as they have in clause (1), or at least as near them as may be, then a delay of sixteen days clearly violates the constitutional safeguard. The grounds on which the detaining authority makes the order, must be

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[1] *Ghulam Azam v. Bangladesh*, 46 DLR 29

[2] *Abdul Latif Mirza v. Bangladesh*, 31 DLR (AD) 1; *Bombay v. Atma Ram*, AIR 1951 SC 157

[3] *Chunnu Chowdhury v. D.M.*, 41 DLR 156

[4] *Habiba Mahmud v. Bangladesh*, 45 DLR (AD) 89; *Rowshan Bijaya S. Ali Khan v. East Pakistan*, 17 DLR 1; *Sekendar Ali v. Bangladesh*, 42 DLR 346; *Bombay v. Atma Ram*, AIR 1951 SC 157; For discussion on legally valid grounds, see Para 5.106 - 5.109.

[5] *Hari Kishan v. Maharashtra*, AIR 1962 SC 911

[6] *Jayendra Thakur v. India*, AIR 1999 SC 3517

known to it on the day when the order is made, and can ordinarily be served on the detenu along with the order of detention. We were referred by the learned counsel for the State to a decision of the Indian Supreme Court in *Tarapada De v. W.B.*[1] in which a delay of sixteen days was not held to violate the Constitution 'under the circumstances of the case'. The circumstances were these. 'Under Bengal Criminal Law Amendment Act, 1930, a very large number of persons were detained. The validity of that Act was being challenged in the High Court and the judgment was expected to be delivered towards the end of February 1950. The Preventive Detention Act, 1950 was passed by Parliament in India, in the last week of February 1950 and these orders on all these detenus (1000 persons) were served on 26th February 1950. Having regard to the fact that the Provincial government had thus suddenly to deal with a large number of cases on one day, we are unable to accept this contention'. Their Lordships might have added that the detenus having already been under detention under another enactment the words as soon as may be were robbed of practical value. The delay in the present case resulted from ordinary dilatoriness in various offices and cannot be allowed to invade a Fundamental Right. *While examining the quality of these rights, we should place ourselves in the position of a detenu and assume that we are the innocent victims of a misunderstanding or intrigue. If then we are kept in the dark even for a single day as to the reason for our arrest, should we not feel that we are still in the dark ages?*[2] (Italic supplied)

The logic of the statement is undeniable. Exceptional cases apart, there is no reason why generally one or two days shall not be taken to be a reasonable time. By leaving the time indeterminate, the Constitution has not sanctioned dilatoriness. Reasonable time should be determined keeping in view the fact that we are dealing with the most cherished human right to be free from bondage.[3] We have lately seen appalling abuse of the preventive detention law. Hundreds have been detained, but on being challenged hardly one of these cases stands scrutiny of the court. If the detention order is based on existing materials, as it should

[1] AIR 1951 SC 174

[2] *G.M. Loondhkhar v. State*, PLD 1957 Lah 497

[3] *Dr. Habibullah v. Secy., Ministry of Home*, 41 DLR 160 (The extraordinary provision of s.8(2) of the Special Powers Act regarding service of grounds not later than fifteen days from the date of detention does not give a general licence to the authority to serve the grounds in a leisurely way within fifteen days in every case deliberately to deprive the detenu of his valuable legal right to make effective representation at the earliest possible opportunity)

be, there is no reason why with reasonable effort it should take more than one or two days to formulate and serve the grounds. Time is required when materials are to be gathered to concoct grounds of detention. One may say that it is a small matter. But it is not so and even if it is a small matter, deviations from constitutional requirements start with a small measure and unless immediately checked, gradually gains in proportion. Time and again the Supreme Court admonished against the infraction of this important fundamental right without any visible effect on the executive.[1] The executive has gone even to the extent of devising ways to avoid compliance of the order of release passed by the Supreme Court compelling the Supreme Court to initiate proceedings for contempt of court.[2] In one case, the court had to resort to the now forgotten procedure of having the detenu physically present in court and releasing the detenu from the court premises.[3]

PROHIBITION AGAINST FORCED LABOUR

2.133 Art.34(1) provides that all forms of forced labour are prohibited and any contravention of this provision shall be an offence punishable in accordance with law. The corresponding provision of the Indian Constitution is art.23 which stipulates that traffic in human beings and begar and other similar forms of forced labour are prohibited. It is beyond the dignity of a person to be compelled to labour when he would not do so voluntarily. It includes every form of labour which is supplied under compulsion and not willingly and it is immaterial whether remuneration is paid or not.[4] In the same way, forced labour is involved when a man is obliged to work at wages below the minimum wages.[5] Traffic in women and children also involve forced labour.[6] Labour may be `forced' not only owing to physical force, but also on account of a legal provision such as imprisonment or fine in case an

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[1] *Abdul Latif Mirza v. Bangladesh*, 31 DLR (AD) 1

[2] *Tahera Nargis v. Shamsur Rahman*, 41 DLR 508

[3] *Alam Ara Haq v. Bangladesh*, 42 DLR 98

[4] *People's Union v. India*, AIR 1982 SC 1473; *Sanjit v. Rajasthan*, AIR 1983 SC 328

[5] *Sanjit v. Rajasthan*, AIR 1983 SC 328; *BIWTA v. BIWTA Ghat Sramik Union*, 1982 BLD (AD) 83 (appointment of stevedores and handling contractors by BIWTA for loading and unloading of goods in inland ports through coolies does not result in forced labour)

[6] *Raj Bahadur v. Legal Remembrancer*, AIR 1953 Cal 522; *Nihal v. Rambai*, AIR 1987 MP 126

employee fails to provide service, and also owing to hunger and poverty which compels a person to accept employment for a remuneration which is less than the statutory minimum wages.[1] Where a contract for personal service is enforceable under a penal law, the prohibition is attracted. Art.34 will be attracted where the penalty for default in rendering service is founded on custom or administrative fiat or in repayment of an alleged debt.[2] But compulsion to do overtime is not forced labour because when the rules make liability to work overtime a term of employment no question of forced labour is involved as the worker entered into the employment contract voluntarily.[3]

2.134 Art.34(2) provides the exception to art.34(1). Compulsory labour by a person undergoing lawful punishment for a criminal offence or compulsory labour required by any law for a public purpose shall not attract the prohibition of art.34(1). However, if the exaction of hard labour is without payment of wages or even with payment of nominal wages this will be a case of forced labour violating art.34(1).[4] The expression 'public purpose' is wide enough to include military and police service[5] as also social service[6]

PROTECTION IN RESPECT OF TRIAL AND PUNISHMENT

2.135 Art.35 guarantees a cluster of rights in respect of trial and punishment. Clause (1) provides protection against *ex post facto* laws, clause (2) provides guarantee against double jeopardy, clause (3) ensures speedy and fair trial, clause (4) grants privilege against self-incrimination and clause (5) prohibits torture and cruel, inhuman or degrading punishment. Clause (6) provides that nothing in clause (3) or clause (5) shall affect the operation of any existing law, which prescribes any punishment or procedure for trial. 'Existing law' means a law which was in existence at the commencement of the Constitution but

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[1] *People's Union v. India*, AIR 1982 SC 1473

[2] Ibid; *Bandhua Mukti Morcha v. India*, AIR 1984 SC 804; *Kahaosan v. Simirei*, AIR 1961 Manipur 1; *Chandra v. Rajasthan*, AIR 1956 Raj 188

[3] *Dalmia Cement Ltd v. Dalmia Cement Workers' Union*, PLD 1958 SC 153

[4] *Gujrat v. Hon'ble High Court of Gujrat*, (1998) 7 SCC 392

[5] *Dulal v. District Magistrate*, AIR 1958 Cal 365

[6] *Acharaj v. Bihar*, AIR 1967 Pat 114 (cultivator compelled to carry food grains without remuneration to government godown in a scheme of procurement of food grains as an essential commodity

does not include any amendment of the existing law made after the commencement of the Constitution.[1]

2.136 ***Protection against ex post facto laws:*** In the American jurisdiction an *ex post facto* law is one which, in its operation, (i) makes that criminal which was not so at the time the act was performed, or (ii) which increases the punishment, or, in short, which in relation to the offence or its consequence, alters the situation of a party to his detriment or disadvantage.[2] *Ex post facto* laws relate to crimes only, whereas retrospective laws relate to civil as well as criminal matters.[3] The basic principle is that a person has a right to fair warning of that conduct which will give rise to criminal penalties and, therefore, the criminal quality attributable to an act should not be altered, after the fact, to the detriment of the accused.[4] Art.35(1) of the Constitution prohibits the first two categories of *ex post facto* laws providing, "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." The expression 'law in force' must be understood in its natural sense as being the law in fact in existence at the time of commission of the offence as distinct from a law 'deemed' to have become operative.[5] Art.35(1) is not applicable in respect of a civil penalty which is not a punishment for an offence.[6] A law which comes in conflict with the provisions of art.35(1) becomes void only in so far as it is retrospective and the invalidity will not affect its prospective operation.[7]

2.137 Laws which retrospectively create offences and punish them

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[1] Where the Constitution intended to include an amendment of the existing law within the meaning of `existing law', the Constitution specifically mentioned such amendment. See art.47.

[2] 16A Am Juris 2d, Const. Law, Para 635; *Dobbert v. Florida*, 432 US 282; *Lindsey v. Washington*, 301 US 397

[3] 16A Am Juris 2d, Const. Law, Para 636

[4] *Marks v. U.S.*, 430 US 188; *Beazell v. Ohio*, 269 US 167

[5] *Rao Shiv Bahadur v. V.P.*, AIR 1953 SC 394

[6] The observation of the majority in *Registrar, University of Dacca v. Sajjad Hussain*, 34 DLR (AD) 1, 19, that P.O. 67 of 1972 cannot be construed to have retrospective operation as it would offend art.35 is wrong inasmuch as the said law did not provide for punishment of criminal offence, but only civil penalties relating to service.

[7] *Jaehne v. New York*, 128 US 189

are bad as being highly inequitable and unjust.[1] Where an act at the time of commission is not an offence though a fine leviable by the Rent Controller is provided as a penalty, and subsequently that act is made an offence, the law making that act punishable as an offence is violative of art.35(1).[2] The prohibition is a limitation on the power of the legislature and does not apply to judicial decisions.[3] The immunity is, again, against criminal legislation only and not against retrospective imposition of civil liability.[4] However harsh its consequences, a law is not within the bar of art.35(1) unless it inflicts a criminal punishment.[5] But the form of the penalty is not conclusive and the prohibition cannot be evaded by giving a civil form to that which is essentially criminal.[6] An Act passed in June, 1957 imposed on the employers closing their undertaking the liability to pay compensation to their employees since November 28, 1956. This liability could be enforced by coercive process leading to imprisonment in case of failure to discharge the liability. The court held that this was a civil liability and as such the prohibition relating to *ex post facto* law would not be attracted.[7] In determining whether a law imposes punishment for past conduct in violation of the prohibition, the test is whether the legislative aim is to punish an individual for past activity or whether the restriction comes about as a relevant incident to a regulation of a present situation.[8] A law does not come within the prohibition of art.35(1) by providing punishment or penalty for the continued maintenance of certain conditions which, prior to enactment of the law, were lawful.[9] "A statute making unlawful the possession of intoxicating

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[1] *Rao Shiva Bahadur v. V.P.*, AIR 1953 SC 394

[2] *Kanaiyalal v. Indumati*, AIR 1958 SC 444

[3] *Frank v. Mangnum*, 237 US 309; see, however, *Bouie v. City of Columbia*, 378 US 347 (An unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an ex post facto law ... If a state legislature is barred by the Ex Post Facto Clause from passing such law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving the same result by judicial construction.); *Marks v. U.S.* 430 US 188.

[4] *Calder v. Bull*, 3 Dall. 386

[5] *Mahler v. Eby*, 264 US 32

[6] *Burges v. Salmon*, 97 US 381

[7] *Hathi Singh Manufacturing Company v. India*, AIR 1960 SC 923; *Jawala Ram v. Pepsu*, AIR 1962 SC 1246 (retrospective imposition of special rate for unauthorised use of canal water); *Shiv Dutt v. India*, AIR 1984 SC 1194 (penalty under a tax law imposed retrospectively for non-payment of tax)

[8] *Flemming v. Nestor*, 363 US 603

[9] *Samuels v. McCurdy*, 267 US 188

liquor, although it may have been lawfully obtained before the passage of the prohibitory act, is not *ex post facto* insofar as it affects continued possession in future."[1]

2.138 The second part of art.35(1) gives immunity to a person from a penalty greater than, or different from, that which he might have incurred at the time of commission of the offence. Today a person commits an offence which carries a maximum sentence of three years. Tomorrow the maximum sentence may be increased to five years to be operative prospectively, but not retrospectively to cover the offence committed today.[2] What is to be considered is whether the law retrospectively imposes a penalty greater than that which might be inflicted under the law in force at the time of the commission of the offence. According to s.420 of the Penal Code an unlimited fine can be imposed. Subsequent to the commission of the offence, an amendment of the law by an Ordinance of 1943 prescribed retrospectively a minimum fine which the court must inflict on a person found guilty under s.420. The court held that it did not violate the prohibition because the minimum penalty could not be said to be greater than what could be inflicted under the law in force at the time of commission of the offence.[3] A government servant misappropriated government money before August, 1944. In August, 1944 an Ordinance provided that upon conviction the misappropriated sum should be forfeited from the property of the accused. The court held the Ordinance valid as it did not impose a penalty, but merely provided a method of recovering the misappropriated amount.[4] No difficulty is faced to find out whether a punishment has been increased in violation of art.35(1). But the problem arises when it is alleged that the altered punishment is different from the punishment prescribed at the time of commission of the offence. The test is whether a reasonable person would regard the change as one increasing the punishment.[5] Where the punishment is altered from death to life imprisonment or where the death sentence is not changed but a human method of execution is introduced, the bar of art.35(1) is not violated.[6]

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[1] 16A Am Juris 2d, Const. Law, Para 641

[2] *Kedar Nath Bajoria v. W.B.*, AIR 1953 SC 404; *Tiwari Kanhaiyalal v. C.I.T.*, AIR 1975 SC 902

[3] *Satwant Singh v. Punjab*, AIR 1960 SC 266

[4] *W.B. v. S.K. Ghose*, AIR 1963 SC 255

[5] *Rooney v. North Dakota*, 196 US 319

[6] See Schwartz - Constitutional Law, p.306

2.139 ***Protection against double jeopardy:*** Art.35(2) incorporates the American concept of due process against 'double jeopardy' in clear terms stating, 'No person shall be prosecuted and punished for the same offence more than once.' The concept was firmly established in s.403 of the Code of Criminal Procedure. Incorporation of the concept in the Constitution makes it a fundamental right taking away the power of Parliament to provide to the contrary. The protection is available only when both the proceedings are criminal proceedings and both the prosecutions are for the same offence. Thus when a person is acquitted or convicted of an offence, disciplinary proceedings for the same facts on which the previous prosecution was based is not barred as the disciplinary proceedings cannot be treated as a prosecution for criminal offence.[1] Proceedings for confiscation of goods or for fine under s.167 of the Sea Customs Act or proceedings before an administrative or departmental tribunal are not criminal proceedings.[2]

2.140 To determine the application of art.35(2) three things are to be considered - (i) whether the accused was prosecuted and punished in a prior proceeding, (ii) whether the subsequent proceeding is a fresh proceeding or a continuation of a prior proceeding and (iii) whether the previous charge was substantially the same as the present one.

2.141 *Previous proceeding:* In order to apply art.35(2) there must have been a previous proceeding before a judicial tribunal of competent jurisdiction in which the accused was prosecuted.[3] The previous proceeding must not be a void proceeding.[4] The proceeding must be a criminal proceeding.[5] In the previous criminal proceedings the accused must have been convicted or acquitted and the conviction or acquittal must be in force at the time of the subsequent proceeding.[6] Art.35(2) will not be attracted where the previous proceeding was dismissed for default of the complainant.

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[1] *Sk. Harunur Rashid v. Secretary, Ministry of Jute*, 49 DLR 596; *Serajul Islam v. Director General*, 42 DLR (AD) 199; *Venkataraman v. India*, AIR 1954 SC 375; *India v. Sunil Kumar*, AIR 2001 SC 1092

[2] *Venkataraman v. India*, AIR 1954 SC 375; *Thomas Dana v. Punjab*, AIR 1959 SC 375; *Narayanlal v. Mistry*, AIR 1961 SC 29

[3] *Muhamadullah v. Sessions Judge*, 52 DLR 374; *Maqbool v. Bombay*, AIR 1953 SC 325; *Thomas v. Punjab*, AIR 1959 SC 375; *Assistant Collector v. Melwani*, AIR 1970 SC 962

[4] *Baijnath v. Bhopal*, AIR 1957 SC 494 (for want of jurisdiction of court)

[5] *Narayanlal v. Mistry*, AIR 1961 SC 29; *Thomas Dana v. Punjab*, AIR 1959 SC 375.

[6] *Assistant Collector v. Melwani*, AIR 1970 SC 962

2.142 *Subsequent proceeding:* The subsequent proceeding must be a fresh proceeding where the accused is sought to be prosecuted for the same offence. Art.35(2) will not be attracted if the subsequent proceeding is merely a continuation of the previous proceeding by way of an appeal or retrial.[1]

2.143 *Same offence:* The prohibition will be attracted only when the subsequent proceeding is for the same offence for which the accused was once tried and punished.[2] The previous conviction for one offence does not bar subsequent prosecution for a separate and distinct offence even though the two offences arise out of the same facts or transaction and the allegations in the two complaints are identical.[3] If the same facts constitute two offences, conviction for one offence does not debar subsequent prosecution and punishment for the other offence.[4] Where one act, or a related set of acts, constitutes more than one offence, it does not contravene the prohibition of art.35(2) to have two prosecutions.[5] Where the ingredients of the two offences are different in scope and content, art.35(2) has no application. In *Abdur Rashid v. State*[6] the petitioner was charged and convicted under s.395/397 Penal Code. Subsequently, he was charged under s.19(a) and (f) of Arms Act for possession of arms while committing the offence in the first case. The High Court Division held that the second prosecution was barred under art.35(2). It is submitted that the decision of the High Court Division is not correct inasmuch as the offence under s.19 of the Arms Act is different from the offence under ss.395/397 of the Penal Code and art.35(2) is not attracted.[7] The principle of double jeopardy prohibits

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[1] *Ludwig v. Massachusetts*, 427 US 618; *Kalawati v. H.P.*, AIR 1953 SC 131; *M.P. v. Veereswar*, AIR 1957 SC 592.

[2] *H.M. Ershad v. State*, 45 DLR 533

[3] Schwartz - Constitutional Law, p.300; *Bombay v. Apte*, AIR 1961 SC 578

[4] *Bhagwan Swarup v. Maharashtra*, AIR 1965 SC 682; *Leo Roy Frey v. Superintendent, District Jail*, AIR 1958 SC 119 (a particular crime and a conspiracy to commit that crime are two distinct offences and punishment of one does not debar prosecution for the other); *M.P. v. Veereswar*, AIR 1957 SC 592; *Bihar v. Murad Ali Khan*, AIR 1989 SC 1 (offence under s.429 Penal Code and offence under s.9(1) of wild Life Protection Act are different offences)

[5] *Albrecht v. U.S.*, 273 US 1; *Gore v. U.S.* 357 US 386

[6] 1 BLC 180

[7] The High Court Division relied on *Abdul Majid v. State*, PLD 1963 Dac 661, and *Sultan Mahmudul Hossain v. State*, 1985 BLD (AD) 323 which are decisions on s.403 of the Code of Criminal Procedure. The facts of the first case were quite distinguishable and in the facts and circumstances of the second case s.403(2), which permitted the

trial of a person for a greater offence after he has been convicted of a lesser included offence.[1] The bar of art.35(2) will not be attracted in case of an offence which is a continuing offence, i.e., where continuation of the offence constitutes fresh offence from day to day.[2]

2.144 ***Speedy and fair trial:*** Sometimes delay in holding a trial amounts to an abuse of the process of the court and in such cases criminal proceedings may be quashed under s.561A of the Code of Criminal Procedure for wanton delay. But speedy trial is so important that the framers of the Constitution made it a fundamental right under art.35(3) which corresponds to the Sixth Amendment of the American Constitution. Though the right to speedy trial is not specifically provided in the Indian Constitution, the Indian Supreme Court has held that the right to speedy trial is implicit in the right to life and personal liberty protected by art.21.[3]

2.145 Expeditious trial and freedom from detention are a part of human rights and basic freedoms and a judicial system which allows incarceration of individuals for long periods of delay without trial must be held to be denying human rights to such under-trials prisoners.[4] Though an accused is guaranteed a speedy trial, it is difficult to set down the time limit for trial in all cases. It is not possible, in the very nature of things and because of various factors coming into play, to draw a limit beyond which a criminal proceeding will not be allowed to go. Any accused who is denied this right of speedy trial is entitled to approach the Supreme Court to enforce his right to speedy trial and the Supreme Court, in discharge of its constitutional obligation, has power to give the necessary direction to the government for securing this right.[5] Whenever a complaint of infringement of the right to speedy trial is made, the court has to consider all the circumstances of the case to arrive at a decision whether, in fact, the proceedings have been pending for an unjustifiably long time.[6] In dealing with the question of time required for trial, the

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subsequent trial, was applicable and not s.403(1). See *Mahindra v. Punjab*, AIR 1999 SC 211

[1] *Brown v. Ohio*, 432 US 161

[2] *Ranendranath v. India*, AIR 1965 Cal 434 (Para 8)

[3] *Hussainara v. Bihar*, AIR 1979 SC 1369

[4] *A.R. Antulay v. R.S. Nayak*, AIR 1992 SC 1701, 1718

[5] *Kadra Pahadiya v. Bihar*, AIR 1982 SC 1167

[6] *A.R. Antulay v. R.S. Nayak*, AIR 1992 SC 1701

American Supreme Court in *Barker v. Wingo*[1] noted that deprivation of this right often works to the advantage of the accused and often the delay is not an uncommon defence tactic. It cannot be said definitely how long is too long in a system where justice is supposed to be swift but deliberate. The court laid down the following four factors which should be taken into consideration in deciding whether the right to speedy trial has been infringed:

> (1) Length of delay: "Until there is some delay which is presumptively prejudicial, there is no necessity for enquiry into the other factors that go into the balance. Nevertheless, because of the imprecision of the right to speedy trial, the length of delay that will provoke such an inquiry is necessarily dependent upon the peculiar circumstances of the case. To take but one example, the delay that can be tolerated for an ordinary street crime is considerably less than for a serious, complex conspiracy charge."
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> (2) Reasons given by prosecution to justify the delay: "A deliberate attempt to delay the trial in order to hamper the defense should be weighted heavily against the government. A more neutral reason such as negligence or overcrowded court should be weighted less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant. Finally, a valid reason, such as a missing witness, should serve to justify appropriate delay."
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> (3) The responsibility of the accused for asserting his right: "Whether, and how, a defendant asserts his right is closely related to the other factors we have mentioned. The strength of his efforts will be affected by the length of the delay, to some extent by the reason for the delay, and most particularly by the personal prejudice, which is not always readily identifiable, that he experiences. The more serious the deprivation, the more likely a defendant is to complain."
>
> (4) Prejudice to the accused: "Prejudice, of course, should be assessed in the light of the interests of defendants which the speedy trial right was designed to protect. This Court has identified three such interests: (i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired. Of course, the most serious is the last ... If witnesses die or disappear during a delay, the prejudice is obvious. There is also prejudice if defense witnesses are unable to recall accurately events of the distant past. Loss of memory however, is not

[1] 407 US 514

> always reflected in the record because what has been forgotten can rarely be shown."[1]

In this case, the Supreme Court denied relief to the convict noting that the prejudice to the convict was minimal, he was in custody only for 10 months and was thereafter free and he did not himself really want a speedy trial. In *Strunk v. U.S.*[2] the Supreme Court held that the aforesaid considerations are for the purpose of determining whether there has been a denial of the right to speedy trial and once it is found that the right to speedy trial has been denied, in the light of the policies which underlie the constitutional right to a speedy trial, dismissal of the charges is the only possible remedy.[3]

2.146 In *A.R. Antulay v. R.S. Nayak*[4] the Indian Supreme Court considered a large number of decisions including the above mentioned decisions and laid down the following propositions:

(a) Right to speedy trial is the right of the accused. The fact that speedy trial is also in the public interest does not make it any-the-less the right of the accused.

(b) The right encompasses all the stages, namely, the stage of investigation, inquiry, trial, appeal, revision and retrial.

(c) The accused should not be subjected to unnecessary or unduly long incarceration prior to his conviction. The worry, anxiety, expense and disturbance to his vocation and peace resulting from an unduly prolonged investigation, inquiry or trial should be minimal. Undue delay may well result in impairment of the ability of the accused to defend himself, whether on account of death, disappearance or non-availability of witnesses or otherwise.

(d) Often the accused is interested in delaying the proceedings. Therefore, when a complaint of violation of the right to speedy trial is made, the first thing to be asked is who is responsible for the delay.

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[1] Ibid, p.530-532; the relevance and importance of these four factors was acknowledged by the Privy Council in *Bell v. Director of Public Prosecutions of Jamaica*, [1985] 2 All E.R. 585

[2] 412 US 434

[3] Ibid, p.440

[4] AIR 1992 SC 1701; see also *Phoolan Devi v. M.P.*, (1996) 11 SCC 19; *Raj Deo Sharma v. Bihar*, (1998) 7 SCC 507

(e) While determining whether undue delay has occurred resulting in violation of the right to speedy trial regard must be had to all the attendant circumstances, including the nature of the offence, number of accused and witnesses, the work-load of the court concerned, prevailing local conditions and so on.

(f) Every delay does not necessarily prejudice the accused. Some delays may indeed work to his advantage. However, inordinate delay may be taken as a proof of prejudice. In this context the fact of incarceration of the accused will be a relevant fact.

(g) An accused's plea of denial of the right to speedy trial cannot be defeated by saying that he did not at any time demand a speedy trial. If in a given case, he did make such a demand and yet he was not tried speedily, it would be a plus point in his favour, but the mere non-asking for a speedy trial cannot be put against him.

(h) It is neither advisable nor practicable to fix any time-limit for trial of offences. In every case of complaint of denial of the right to speedy trial, it is primarily for the prosecution to justify and explain the delay and it is for the court to balance and weigh the several relevant factors to determine in each case whether the right to speedy trial has been denied.

(i) Once the right to speedy trial is found to have been infringed, generally the charges or the conviction shall be quashed. But this is not the only course open. The nature of the offence and other circumstances in a given case may be such that quashing of proceedings may not be in the interest of justice. In such a case, it is open to the court to make such other appropriate order - including an order to conclude the trial within a fixed time where the trial is not concluded or reducing the sentence where the trial has concluded - as may be deemed just and equitable in the circumstances of the case.

2.147 It can be seen that *Antulay* differs from *Strunk* in respect of the relief to be granted once the right to speedy trial is found to have been infringed. Having regard to the conditions obtaining in India, the Indian Supreme Court justifiably made this departure.

2.148 In Bangladesh by an amendment of the Code of Criminal Procedure provision was made for stopping the proceeding after expiry

of the time fixed for concluding the trial[1], but the provision did not work and by another amendment[2] the provision for stopping of the proceeding was repealed and a provision for release of the accused on bail was made. The provision of art.35(6) excluding the operation of art.35(3) in case of existing law does not present any difficulty in view of the provision of s.561A of the Code of Criminal Procedure and the Supreme Court can always enforce the provision of art.35(3) relating to speedy trial whenever justice demands it.

2.149 *Fair trial:* The gist of art.35(3) is fair trial which requires public trial by an independent and impartial court or tribunal. Though the Code of Criminal Procedure makes provision for transfer of cases in case of reasonable apprehension of bias of the trial judge or magistrate, to ensure trial by an independent court it is absolutely necessary to ensure the separation of the judiciary from the executive organ of the State. It may be stated that the fundamental principle of State policy as contained in art.22 requires separation of the judiciary from the executive.[3]

2.150 Every court of justice is to remain open to all citizens as publicity is the authentic hall-mark of judicial as distinct from administrative procedure.[4] Accordingly, art.35(3) requires public trial by an independent and impartial court or tribunal. The underlying object is to provide a fair trial. S.352 of the Code of Criminal Procedure provides for public trial. This does not mean that the court cannot restrict the admission into the court room of persons not connected with the trial where the necessity to do so arises. In fact, s.352 of the Code confers a discretion on the court to restrict admission or hold the trial in the jail premises if the necessity arises.[5] In the American jurisdiction, an accused has the right guaranteed by the Sixth Amendment to remain present at the trial.[6] Even then the court, if confronted with a disruptive accused, may order him out of the court until he promises to behave.[7]

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[1] Ordinance no.XXIV of 1982

[2] Code of Criminal Procedure (Amendment) Act, 1992

[3] See *Secy. Ministry of Finance v. Masdar Hossain*, 2000 BLD (AD) 104

[4] *McPherson v. McPherson*, AIR 1936 PC 246

[5] *Nadira v. State*, 2 DLR 80; *Abdur Rashid v. State*, 18 DLR (WP) 154; *Prasanta v. State*, AIR 1952 Cal 91

[6] *Faretta v. California*, 422 US 806

[7] *Illinois v. Allen*, 397 US 337 (in such case it is deemed that the accused by his conduct lost his Sixth Amendment right)

The requirement of public hearing in a court of law for a fair trial is, however, subject to the need of the proceeding being held in camera to the extent necessary in the public interest and to avoid prejudice to the accused.[1]

2.151 The guarantee of art.35 will be violated if the trial held is found to be not fair in substance. In spite of an impartial court, a public trial may not be fair as it happened in *Sheppard v. Maxwell*[2], an extreme case of trial by press. In this case from the time of the discovery of the murder massive and pervasive attention was given by the radio and local newspapers and the community was served with information and publicity hostile to the accused and the press constantly emphasised matters that tended to incriminate the accused. During trial the newsmen took over practically the entire courtroom, hounding most of the participants in the trial. The American Supreme Court found the trial inherently lacking in due process, set aside the conviction and released the convict. In our country similar situations arise because of press reporting of sensational crimes. At the core of the matter lies the conflicting claims of the right to fair trial and the freedom of the press.[3] The requirement of fair trial may also involve legal aid for the indigent accused.[4]

2.152 ***Protection against self-incrimination:*** It is a fundamental principle of common law criminal jurisprudence that the prosecution has to prove its case and the accused cannot be compelled to make any statement against his will. The principle emanates from the apprehension that without protection against self-incrimination, an accused would be exposed to coercion and torture. In the American jurisdiction the Fifth Amendment includes a prohibition against self-incrimination by an accused.[5] The American Supreme Court extended this privilege to witnesses[6] and also in civil cases.[7] In American jurisdiction the privilege

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[1] *Vineet Narain v. India*, AIR 1998 SC 889

[2] 384 US 333

[3] See Para 2.198

[4] See para 2.120

[5] Fifth Amendment provides, "No person ... shall be compelled in any criminal case to be a witness against himself."

[6] *Counselman v. Hitchcock*, 142 US 547. S.132 of our Evidence Act provides that an answer which a witness is compelled to give shall not subject him to any arrest or prosecution, or be proved against him in any criminal proceeding, except a prosecution for giving false evidence by such answer.

[7] *Malloy v. Hogan*, 378 US 1; *Lefkowitz v. Cunningham*, 431 US 801

is not confined to the courtroom and is available in all governmental proceedings.[1] Art.35(4) states, "No person accused of any offence shall be compelled to be a witness against himself." Art.20(3) of the Indian Constitution is in the same language. The Indian Supreme Court did not give such a liberal interpretation to the provision as has been given by the American Supreme Court. According to the Indian Supreme Court, the language 'accused of any offence' qualifies the person entitled to the protection. In order that the privilege can be claimed by a person there must be a formal accusation against him of commission of an offence which in the normal course may result in prosecution.[2] In *Naryanlal v. Mistry*[3] upon a report of the Registrar of Joint Stock Companies the government appointed an inspector to investigate into the affairs of a company and the inspector issued notice to the appellant (a director of the company) to attend his office for being examined. The appellant claimed the privilege, but the Supreme Court rejected the claim stating that the investigation carried on by the inspector is no more than the work of a fact-finding commission and at no stage of the inquiry is there any accused person, or accuser or accusation against any one that he has committed an offence. The commission of offences might be discovered as a result of the inquiry and the government may institute criminal proceedings against the offending persons, but the fact that prosecution may be launched will not retrospectively convert the complexion of the proceedings held by the inspector. The Registrar's report could hardly amount to an accusation against the appellant as it was only intended to enable the government to decide whether it should appoint an inspector.[4]

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[1] Schwartz - Constitutional Law, 1979, p.276

[2] *Dastagir v. Madras*, AIR 1960 SC 756; *Sharma v. Satish Chandra*, AIR 1954 SC 300 (It is not necessary that actual trial or enquiry has commenced; a person against whom first information report has been recorded and investigation has been ordered by a magistrate can claim the protection); but in *Nandini Sathpathy v. Dani*, AIR 1978 SC 1025, the court extended the protection holding that a person who was not an accused, but was suspect and was being interrogated in the police station was entitled to the protection against self-incrimination)

[3] AIR 1961 SC 29

[4] See also *K. Joseph v. Narayanan*, AIR 1964 SC 1552 (inquiry by liquidator into the affairs of a banking company under liquidation); *Popular Bank v. Madhav Nair*, AIR 1965 SC 654 (even where the liquidator accuses the directors of fraud in his report, privilege not available); *Ramesh Mehta v. W.B.*, AIR 1970 SC 940 (proceedings before customs authorities under s.171A of the Sea Customs Act for confiscation of goods and imposition of penalty); *Veera Ibrahim v. Maharashtra*, AIR 1976 SC 1167; *Poolpandi v. Supdt. Central Excise*, AIR 1992 SC 1795

The High Court Division held that notice issued by the Bureau of Anti-corruption for the purpose of an inquiry does not attract the provision of art.35(4) as the person notified is not an accused at that stage.[1]

2.153 The guarantee is against compulsion 'to be a witness' which includes making of oral or written statements in or out of court by an accused. Such statements are not confined to confessions but also to cover statements which have a reasonable tendency to point to the guilt of the accused. As to the extent of the protection against self-incrimination, the Indian Supreme Court in *Bombay v. Kathi Kalu*[2] stated -

> It is well established that clause (3) of Article 20 is directed against self-incrimination by the accused person. Self-incrimination must mean conveying information based upon the personal knowledge of the person giving the information and cannot include merely the mechanical process of producing documents in court which may throw a light on any of the points in the controversy, but which do not contain any statement of the accused based on his personal knowledge. For example, the accused person may be in possession of a document which is in his writing or which contains his signature or his thumb impression. The production of such a document, with a view to comparison of the writing or the signature or the impression, is not the statement of the accused person which can be said to be of the nature of personal testimony.

The protection being against any compulsion, art.35(4) is not attracted in the case of a confession which must be voluntary and without any inducement.[3] But the number of confessions has increased manifold in criminal prosecutions creating doubt as to whether those confessions are at all voluntary.

2.154 ***Protection against torture and degrading punishment:*** The Eighth Amendment of the American Constitution contains a prohibition against cruel and unusual punishments. In the same way art.35(5) provides, "No person shall be subjected to torture or to cruel, inhuman or degrading punishment or treatment". This provision ensures that the

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[1] *Mustafizur Rahman v. D.G. Anti-corruption*, 49 DLR 599; *Abdul Hafiz v. D.G. Anti-corruption*, 51 DLR 72; *Tarique Rahman v. D.G. Anti-corruption*, 52 DLR 518; *Begum Tahmina v. Bangladesh*, 52 DLR 503

[2] AIR 1961 SC 1808

[3] *Kalawati v. H.P.*, AIR 1953 SC 131

power to punish is exercised within the limits of civilised standards.[1] The sweep of this provision depends upon the current mores and values of the society in which it is to operate. There were many forms of punishment which were not found fault with two hundred years ago, but are now considered cruel and unusual in the American society[2] where it is now being debated whether the death penalty should be treated as unconstitutional under the Eighth Amendment.[3] Execution of death sentence in public is a degrading punishment and cannot pass the test of constitutionality.[4] Inordinate delay can render a decision to carry out the sentence of death an inhuman and degrading punishment.[5] What amounts to an inordinate delay is a question which has to be answered having regard to the existing social conditions, the time generally taken in conclusion of the trial, the nature of the crime and the brutality in the commission of the crime. Considering the fact that the accused was in the death row for more than three years, an Indian High Court did not confirm the death sentence, but the Indian Supreme Court restored the death sentence having regard to the brutality of the attack, number of persons murdered, age and infirmity of the victims, the diabolic motive and the act of perversion which made it a rarest of the rare cases.[6] In this country, the system of investigation of crimes has, in the circumstances, become inefficient, to say the least. The administration of criminal justice is failing in dealing with the problem. Delay in investigation and disposal of cases has been causing untold suffering with the attendant violation of the guarantee under art.32. On the other hand, perversity and ruthlessness in commission of the crime is regularly found. In this state of affairs whether and how far refinement of the punishment can be made is an open but serious question.

2.155 Art.32 requires that a punishment provided by a law must be

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[1] *Woodson v. North Carolina*, 428 US 280

[2] See Schwartz - Constitutional Law, p.303

[3] *Gregg v. Georgia*, 428 US 153 (constitutionality of death sentence upheld); for the decisions of the Indian Supreme Court, see Para 2.117

[4] *Attorney General v. Lachman Devi*, AIR 1986 SC 467

[5] *Pratt v. A.G. of Jamaica*, [1994] 2 AC 1; *Guera v. Baptiste*, [1995] AC 397; see also *Vatheeswaran v. Tamil Nadu*, AIR 1983 SC 361; see *Fisher v. Minister of Public Safety*, [1998] AC 673 (pre-trial period whether a relevant consideration for determining whether the delay is cruel and degrading); *Fisher v. Minister of Public Safety*, [1999] 2 WLR 349 (whether execution could proceed despite pendency of application before international human rights tribunal)

[6] *U.P. v. Dharmendra Singh*, AIR 1999 SC 3789

reasonable and non-arbitrary. Art.35(5) prohibits cruel, inhuman or degrading punishment, but art.35(6) provides that art.35(5) shall not affect the operation of any existing law, i.e., a law in existence at the commencement of the Constitution. The question arises whether art.35(6) takes a penal law out of the purview of art.32 as regards reasonableness of a prescribed punishment. S.303 of the Penal Code providing for mandatory death sentence has been declared by the Indian Supreme Court to be void being violative of art.14 and 21 of the Indian Constitution.[1] Can any such declaration be given in our jurisdiction? The principle of harmonious interpretation requires that in case of conflict between two provisions, a construction should be given which permits both the provisions to have effect. It may be reasonably argued that a punishment may be arbitrary or unreasonable even without being cruel, inhuman or degrading and the bar of art.35(6) will be attracted only if a punishment is challenged as cruel, inhuman or degrading and the bar is not applicable in respect of challenge under art.27 or 32. The punishment prescribed by s.303 of the Penal Code without being cruel, inhuman or degrading is arbitrary in that it takes away the discretion of the court even when there are extenuating circumstances.

FREEDOM OF MOVEMENT

2.156 Right of locomotion is an important part of liberty. The right of a person to move freely, to reside where he will, and to work where he will is connected with his livelihood and pursuit of happiness. Even though this right may be protected by the due process clause of art.31[2], as an important segment of liberty, the framers of the Constitution made special provision to protect the freedom of movement of citizens. Art.36 provides that subject to reasonable restrictions imposed by law in the public interest, every citizen has the right to move freely through out Bangladesh, to reside and settle in any place in Bangladesh and to leave and re-enter Bangladesh.[3] The corresponding provisions of the Indian and Pakistani Constitution do not include the expression 'to leave and re-enter' and as such there was considerable controversy as to whether the freedom of movement included the right to leave and re-enter the

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[1] *Mithu v. Punjab*, AIR 1983 SC 473

[2] In the American jurisdiction the right of free movement as a vital element of personal liberty is protected by the due process clause. See Schwartz - Constitutional Law, p.99

[3] see *Kazi Mukhlesur Rahman v. Bangladesh*, 26 DLR (AD) 44; *Dr. Mohiuddin Farooque v. Bangladesh*, 49 DLR (AD) 1

country.[1] The framers of the Constitution did not leave it for interpretation by the court and made specific provision guaranteeing the right to leave and re-enter the country. The right to travel abroad must include the right to a passport as it is an essential pre-requisite to foreign travel.[2] The American Supreme Court made a distinction between travel abroad and travel inside the country. The conduct of the citizens abroad may have a direct impact on foreign policy and hence the court is of the view that Congress may have more latitude in regulating international travel.[3]

2.157 Proper exercise of this right is possible only in an organised society and, as unbridled exercise of this right may prejudicially affect or even destroy that organised society, there is a legitimate governmental interest in restricting the right in the public interest. Thus the article permits imposition of restrictions. Such restrictions must be by a law and must be reasonably needed in the public interest.[4] Without the backing of law imposition of restriction on the freedom of movement by an executive order will be unconstitutional. By law a reasonable restriction may be put on the movement of a citizen or he may even be externed from one place of the country to another, but he cannot be externed from the country.[5] Art.36 guarantees only the right of physical movement and as such watch by police over movements of a suspect and domiciliary visits at night causing disturbance to his sleep will not be a violation of art.36[6], but may be a violation of art.31 or 43 of the Constitution.

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[1] *Maneka Gandhi v. India*, AIR 1978 SC 597; *Abul A'la Moudoodi v. State Bank*, PLD 1969 Lah 908

[2] *Syed Makbool Hossain v. Bangladesh*, 44 DLR 39; *Kent v. Dulles*, 357 US 116 (refusal to issue passport, held violative of the freedom of movement); *Ekram Ibrahim v. Bangladesh*, 47 DLR 256 (Revocation of passport without giving reasonable opportunity to show cause is unfair and unjust); *Bangladesh v. Ghulam Azam*, 2001 BLD (AD) 62 (Renewal of passport); *H.M. Ershad v. Bangladesh*, 2001 BLD (AD) 69 (Impounding of passport without giving the holder opportunity of being heard and without reasonable grounds); *Dilruba Rana v. Secy. Ministry of Home*, 6 MLR 50 (Seizure of passport); *Nasrin Hossain v. Bangladesh*, 1 MLR 344

[3] Schwartz - Constitutional Law, p.100

[4] *Shapiro v. Thompson*, 394 US 610 (Residence requirement as qualification for receiving welfare benefits imposed to effect economy in the state's expenditure was found unconstitutional as it impinged on the right of movement from one State to another State)

[5] *Abdur Rahim v. Bombay*, AIR 1959 SC 1315; *Ebrahim Vazir v. Bombay*, AIR 1954 SC 229

[6] *Kharak Singh v. U.P.*, AIR 1963 SC 1295 (Subba Rao J dissenting observed that

Eviction of a person from the precincts of a market for violation of the rules of the market, but not from his house, does not violate the freedom of movement.[1]

2.158 'Public interest' is an expression of wide amplitude and it is impossible to precisely define 'public interest'. In the matter of freedom of movement, 'public interest' may embrace many things including public security, public order and public morality.[2] It may even include public health in that the freedom of movement of a person suffering from an infectious disease has to be curtailed and he has to be quarantined.[3] The interest of public morality may require restriction of movement of a prostitute. The restriction will not be unconstitutional if it is found that the activities of a prostitute in an area is subversive of public morals and public health.[4] The requirement of wearing crash helmet while riding a motor cycle facilitates movement and is not violative of the freedom of movement.[5] The interest of public security may require denial of access to public places like forts, arsenals and other protected areas.[6] The interest of public order may require the arrest and detention of a person[7], or externment or internment of habitual criminals or dangerous persons, e.g., goondas.[8] In all such cases, the restrictions imposed by law will be valid if the restrictions are found reasonable.[9] The inquiry as regards reasonableness of the restriction has two aspects - substantive and procedural.[10] It must be remembered that

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freedom of movement is not mere freedom to move without physical obstruction and movement under the scrutinising gaze police cannot be free movement); see also *Govinda v. M.P.*, AIR 1975 SC 1378

[1] *Jan Mohammad v. Gujarat*, AIR 1966 SC 385

[2] *Ram Narayan v. U.P.*, AIR 1984 SC 1213 (Law providing for arrest and detention of defaulter of public dues who has fraudulently secreted his assets has been found reasonable); *Jeshingbai v. Emperor*, AIR 1950 Bom 363; *Sodhi v. India*, AIR 1983 SC 65

[3] *Gopalan v. Madras*, AIR 1950 SC 27.

[4] *Mehtab Jan v. Municipal Committee*, PLD 1958 Lah 929; *U.P. v. Kaushilya*, AIR 1964 SC 416

[5] *Ajay Canu v. India*, AIR 1988 SC 2027

[6] *Gopalan v. Madras*, AIR 1950 SC 27

[7] *W.B. v. Asoke Dey*, AIR 1972 SC 1660

[8] *Hari Khemu v. Deputy Commissioner*, AIR 1956 SC 559; *Gurbachan v. Bombay*, AIR 1952 SC 221; *Korematsu v. U.S.*, 323 US 214

[9] For general discussion on reasonable restriction see Para 2.21 – 2.24

[10] *Khare v. Delhi*, AIR 1950 SC 211; *Bazal Ahmed v. West Pakistan*, PLD 1957 Lah 388; *Rao Mahroz Akhtar v. District Magistrate*, PLD 1957 Lah 676

no hidebound definition of reasonableness can be given. The reasonableness of a restriction will depend upon the nature of the right affected, the nature and object of the law providing the restriction and the possibility of arbitrariness in applying the law in particular cases and also the existence of any mechanism to remedy a wrong or arbitrariness.

2.159 *Substantive reasonableness:* A restriction imposed by law will not be substantively reasonable if it is so vague that it cannot be said what is the extent of the restriction[1], or if the restriction is in excess of the requirement, that is, in excess of the requirement having regard to the object of the law.[2] A restriction will also be unreasonable if it is indefinite in duration[3] or if the legislature confers wide discretion on the executive to impose the restriction[4] without providing a meaningful guideline so that the freedom of movement depends on the *ipse dixit* of the executive.

2.160 *Procedural reasonableness:* A law imposing a restriction will be procedurally unreasonable if it permits the executive to impose the restriction without giving a meaningful hearing to the citizen affected[5] or, in an extreme case of emergency where delay would defeat the purpose of the law, does not provide for giving a notice and hearing to

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[1] *M.P. v. Baldeo Prasad*, AIR 1961 SC 293 (A law authorised district magistrates to direct a 'goonda' not to remain within a specified part of the district. The Supreme Court declared the law invalid on the ground that the definition of a 'goonda' afforded no assistance to decide as to who fell in that category and it was left to the unguided discretion of the district magistrate to treat any citizen as a goonda)

[2] Ibid; *Mustafa Ansari v. Deputy Commissioner*, 17 DLR 553; *Govinda v. M.P.*, AIR 1975 SC 1378 (a law permitting surveillance will be reasonable only against persons against whom reasonable materials exist to induce the opinion that they show a determination to lead a life of crime); *Prem Chand v. India*, AIR 1981 SC 613 (The law must be strictly construed and in passing externment order there must be sufficient reason to believe that the person externed is so desperate and dangerous in character that his mere presence in the place from which he is externed is hazardous to the community and its safety)

[3] *Mustafa Ansari v. Deputy Commissioner*, 17 DLR 553; *Khare v. Delhi*, AIR 1950 SC 211 (where an externment order is for an indefinite period it may be unreasonable, but if the law under which the order is passed is itself temporary, the order may not be unreasonable as it cannot extend beyond the expiry of the law)

[4] *M.P. v. Baldeo Prasad*, AIR 1961 SC 293; *Kent v. Dulles*, 357 US 116

[5] *Gurbachan v. Bombay*, AIR 1952 SC 221; *Nawabkhan v. Gujarat*, AIR 1974 SC 1471 (externment order passed without giving hearing to the affected party is violative of the right of movement and the affected party cannot be convicted for violation of the externment order)

the affected citizen after the order is passed.[1] Withholding or cancellation of a passport affects a citizen's right of travel abroad and hence the seizure and cancellation of a passport without following a reasonable procedure and giving the holder of the passport an opportunity of being heard is illegal as being a violation of the freedom of movement.[2]

2.161 In *Mustafa Ansari v. Deputy Commissioner*[3] the Deputy Commissioner of the Chittagong Hill Tracts externed the petitioner from the Kassalong Rehabilitation Area of the Chittagong Hill Tracts under rule 51 of the Chittagong Hill Tracts Regulation Rules which provided as follows:

> *Expulsion of Undesirables.* - If the Deputy Commissioner is satisfied that the presence in the district of any person who is not a native of the district, is or may be injurious to the peace or good administration of the district, he may, for reasons to be recorded in writing, order such person if he is within the district to leave the district within a given time or if he is outside the district forbid him to enter it.

The petitioner challenged the externment order complaining violation of the freedom of movement. The High Court found the rule void holding-

> The power given to the Deputy Commissioner under the rule is indeed of a sweeping and drastic nature and the mere satisfaction of the Deputy Commissioner ... is enough to order such person to leave the district ... there is no provision for giving to the aggrieved person any opportunity to show cause why he should not be ordered to leave the district nor is there any provision for the person to be present before the Deputy Commissioner and challenge the source or the veracity of any adverse report against the person, on the basis of which the Deputy commissioner may pass such an order. The rule does not put any limitation on the period during which an order passed thereunder will remain in force. The result is that the Deputy Commissioner can, on the *ipse dixit* of any person, turn a person out of the district for ever. It is therefore evident that such unlimited power with such far-reaching consequences and without any check and without any remedy of a judicial character provided to the aggrieved person to obtain redress of his grievance do not satisfy the test of 'any reasonable restriction

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[1] *Rao Mahroz Akhtar v. District Magistrate*, PLD 1957 Lah 676

[2] *Syed Makbool Hussain v. Bangladesh*, 44 DLR 39; *Kent v. Dulles*, 357 US 116

[3] 17 DLR 553

> imposed by law in the public interest'. The restriction under the rule is for an indefinite or an unlimited period. It is disproportionate to the mischief sought to be prevented, viz., 'is or may be injurious to the peace or good administration of the district'. ... the rule provides no check or safeguard against arbitrary exercise of the power. The aggrieved person has no remedy as of right to protest against an arbitrary exercise of such power ... It is true that ... the Local government ... may revise any order made under the Regulation. But as has been rightly observed by Kaikaus J in the aforesaid case[1] that discretionary remedies are no substitute for remedies to which a person has a right even though the discretion is a judicial one.

In *M.P. v. Bharat Singh*[2] a law authorised the district magistrate to require a person to live at a particular place in the interest of security of the State or public order. The law provided procedural safeguards against arbitrary exercise of the power. But the Supreme Court held the law unreasonable as it required a person to reside at a place ordered by the district magistrate without giving him a hearing before selecting the place for him; a place could be selected where he might not have any residential accommodation or means of livelihood and there was no provision for providing him with a residence or livelihood in the place selected for him.

FREEDOM OF ASSEMBLY

2.162 Art.37 provides that every citizen shall have the right to assemble and participate in public meetings and processions peacefully and without arms. This right can be restricted only by a law imposed in the interest of public order or public health. The restriction must, however, be reasonable and not arbitrary. The right of assembly is intertwined with the freedom of speech. But the freedom of speech is governed by art.39[3] and, as we will find, restrictions which may be imposed on the freedom of speech are of a somewhat wider range.

2.163 The freedom of assembly is not an absolute right and it cannot be construed as a licence for illegality or incitement to violence and crime. The right is subject to two limitations - (i) the assembly is

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[1] *Abul A'la Moudoodi v. West Pakistan*, 17 DLR (SC) 209
[2] AIR 1967 SC 1170
[3] see *Nasarullah Khan v. West Pakistan*, PLD 1965 Lah 642

peaceful and (ii) the members of the assembly must not bear arms. Therefore, laws to punish unlawful assembly (within the meaning of s.141 of Penal Code) or authorising the use of force to disperse an unlawful assembly is not inconsistent with the provisions of art.37. A peaceful use of the highway for a political protest unless it substantially obstructs the traffic is protected under art.37 of the Constitution.[1] The right to assemble peacefully involves the right to security against assault for exercising the right. Hence people cannot be prohibited from assembling in a public place for a peaceful purpose merely because some others are threatening to forcibly prevent them from peacefully assembling.[2] It is the plainest duty of the government to prevent the obstruction and not to prevent the peaceful assembly. But the position may be different in case of an emergency which may necessitate prohibition of the assembly.[3]

2.164 A law may impose restrictions on the exercise of this right in the interest of public order or public health. The expression 'public order' includes absence of all acts which are a danger to the security of the State and absence of insurrection, riot, turbulence or crimes of violence, but not acts which merely disturb the serenity of others.[4] A distinction must be made between 'law and order' and 'public order. Mere disturbance of peace will not disturb public order; only when an act has the potential of disturbing the even tempo of community life it can be said that the interest public order is involved.[5] It is also to be noticed that there is a difference between 'maintenance of public order' and 'in the interest of public order' and the latter expression is of wider import. If certain activities have a tendency to cause public disorder a law penalising such activities may not be an unreasonable restriction in the interest of public order though in some cases those activities may not

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[1] See *Director of Public Prosecution v. Jones*, [1999] 2 All E.R. 257; *Kh. Modarresh Elahi v. Bangladesh*, 2001 BLD 352

[2] *Beatty v. Gillbanks*, (1882) 9 QBD 308 (mere knowledge that an adverse party may cause disorder does not turn a lawful assembly into an unlawful one)

[3] *Babulal Parate v. Maharashtra*, AIR 1961 SC 884, 891 (public order has to be maintained in advance in order to ensure it, and, therefore, it is competent to a legislature to pass a law permitting an appropriate authority to take anticipatory action or place anticipatory restrictions upon particular kinds of acts in an emergency for the purpose of maintaining public order); *Duncan v. Jones*, [1935] All E.R. Rep. 710

[4] *Madhu Limaye v. S.D.M., Monghyr*, AIR 1971 SC 2486, 2495

[5] *U.P. v. Kamal Kishore*, AIR 1988 SC 208; *Asoke Kumar v. Delhi Administration*, AIR 1982 SC 1143

lead to a breach of the peace.[1] Thus restrictions may be imposed to avert danger to property, human life and safety and public tranquillity. However, a restriction can be said to be in the interest of public order only if the connection between the restriction and public order is proximate and direct. A restriction which does not directly relate to public order cannot be said to be reasonable on the basis of its remote and far fetched connection with public order.[2] A law which bans every type of demonstration and does not confine itself to those forms of demonstration which are likely to lead to breach of the peace will be void.[3] Though there is no fundamental right to strike[4], call for hartal without any threat to use force and not using force to observe hartal may attract the protection of art.37[5]. The provisions of s.144(1) Code of Criminal Procedure authorising issuance of temporary orders to prohibit meetings and processions in order to avoid breach of the peace do not constitute an unconstitutional restriction.[6] But s.144(6) has been found to be unconstitutional as an order made under this provision may not be of temporary duration and there are no procedural safeguards against an arbitrary use of the power.[7] The right to assemble includes the right to hold public meetings and processions.[8] Such rights can be regulated by law in the interest of public order and may be subject to regulations for controlling traffic.[9]

2.165 The right is to be exercised in public places and there is no fundamental right to hold meetings on private property or on government property which is not a public place even where the government is the employer of the persons seeking to hold the meeting.[10]

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[1] *Ramjilal Modi v. U.P.*, AIR 1957 SC 620

[2] *Ghosh v. Josheph*, AIR 1963 SC 812

[3] *Kameswar v. Bihar*, AIR 1962 SC 1166; *Ghosh v. Joseph*, AIR 1963 SC 812

[4] *Radhey Sham v. P.M.G.*, AIR 1965 SC 311

[5] *Kh. Modarresh Elahi v. Bangladesh*, 2001 BLD 352

[6] *Madhu Limaye v. S.D.M. Mongyr*, AIR 1971 SC 2486; see, however, the footnote to para 2.8A citing *Beatty v. Gillbanks.*

[7] *Bihar v. Misra*, AIR 1971 SC 1667; *Babulal Parate v. Maharashtra*, AIR 1961 SC 884

[8] *Manzur Hassan v. S.M. Zaman*, AIR 1925 PC 36 (there is always a right to lead a religious procession, but it should be conducted in a way not to obstruct the general public user and subject to lawful restrictions imposed a magistrate)

[9] *Himmatlal v. Police Commissioner*, AIR 1973 SC 87; *Pilu Bux v. Kalandi*, AIR 1970 SC 1885

[10] *Himatlal v. Police Comissioner*, AIR 1973 SC 87; *Railway Board v. Niranjan*, AIR

Without abridging the right of assembly, the government may reasonably and without discrimination regulate the use of the premises within its control by requiring permits for public assemblies in streets and parks. But the requirement of a permit would be violative of art.37 if the executive authority has an absolute discretion to refuse a permit.[1] A district magistrate may prohibit a public meeting if he considers it necessary in the circumstances in the interest of public order.[2] But where the prohibitive order under s.144 of the Code of Criminal Procedure banning public meeting did not state the material facts showing some kind of nexus between the prohibited act and the apprehended danger to public order, nor such nexus was established in the affidavit of the government, the order was held violative of the freedom of assembly.[3]

2.166 *Reasonable restriction:* The restrictions imposed by law, even if these be in the interest of public order or public health, must be reasonable. To determine the reasonableness of the law, the conditions prevailing at the time, the nature, extent and duration of the restrictions and all the surrounding circumstances are to be taken into consideration. The right can be restricted to a greater extent in times of national emergency than in more normal times. A restriction will be invalid if it be found to be one not in the interest of public order or public health, or if the law is vague or in excess of the requirement, or if unguided or absolute discretion is given to the executive in the exercise of the power.[4] Such a law will also be invalid on procedural grounds if it does not permit the aggrieved party an opportunity of being heard against the exercise of the power or does not make any provision for redress against an arbitrary or unreasonable use of the power.

FREEDOM OF ASSOCIATION

2.167 The very existence of democracy is dependent on the right to

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1969 SC 966

[1] *Himmatlal v. Police Commissioner*, AIR 1973 SC 87

[2] *Qari Abdul Hameed v. District Magistrate*, Lahore, PLD 1957 Lah 213

[3] *Oali Ahad v. Bangladesh*, 26 DLR 376

[4] *Shuttlesworth v. Birmingham*, 394 US 147; *Southeastern Promotions Ltd v. Conrad*, 420 US 546; *Himmatlal v. Police Commissioner*, AIR 1973 SC 87; *Nasarullah Khan v. District Magistrate*, PLD 1965 Lah 642 (where a law vests absolute discretion in the district magistrate to depute any person to attend any public meeting for the purpose of causing a report to be made of the proceedings and there is no provision to control or regulate the exercise of the power, it is violative of the right of assembly)

form associations. Without that right, there cannot be any political party which is an essential institution of democracy. The right of free association is closely allied with the freedom of speech and is a right which, like free speech, lies at the foundation of a free society.[1] Art.38 guarantees the freedom of association of the citizens. It provides, "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." Originally it contained a proviso to the effect that, "no person shall have the right to form , or be a member or otherwise take part in the activities of, any communal or other association or union which in the name or on the basis of any religion has for its object, or pursues, a political purpose". This proviso was deleted by the Second Proclamation Order No.III of 1976 which was in turn sought to be protected by the Constitution (Fifth Amendment) Act, 1979. In view of the doctrine of basic structure upheld in *Anwar Hossain Chowdhury v. Bangladesh*[2] it is an open question whether the Constitution (Fifth Amendment) Act, 1979 in so far as it sought to validate *ex facie* unconstitutional actions and for that matter whether the Second Proclamation Order no.III of 1976 can be held to be valid and enforceable.

2.168 Before we proceed to discuss the meaning and content of art.38, it may be seen that freedom of association as a fundamental right is a right conferred by the Constitution and the question may arise whether such a right can be claimed dehors the Constitution. Art.7(2) states that this Constitution is, as the solemn expression of the will of the people, the supreme law of the Republic. As such no right, fundamental or otherwise, can be claimed if it is inconsistent with the Constitution. Art.21 states that it is the duty of every citizen to observe the Constitution. Can the Constitution be observed by denying any of the fundamental concepts and precepts of the Constitution? Can any citizen claim any right under the Constitution inconsistent with the fundamental features of the Constitution? There can be no doubt that sovereignty of the people, supremacy of the Constitution, the republican character of the Constitution and rule of law are the fundamentals on which the foundation of the Constitution rests. It is debatable if the right of association can be claimed to form an association whose objectives run counter to the fundamental concepts of the Constitution. One may argue

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[1] *Shelton v. Tucker*, 364 US 479; *Buckley v. Valeo*, 424 US 1

[2] 1989 BLD (Spl) 1

that an association may have an objective of amending the Constitution and such an objective may not be inconsistent with the Constitution since the Constitution itself provides for its amendment. But when the basic features of the Constitution are unamendable, it isdebatable if the right to form association with the objective of making amendments to the basic features of the Constitution can be claimed under the Constitution.

2.169 The freedom of association is not limited to associations for any particular purpose. It includes the right to engage in group advocacy of various kinds of political or governmental beliefs and ideas and not certainly confined to the advocacy of views which are non-controversial or popular. It extends to the protection of associations which advocate unpopular, controversial, dissident or unorthodox views.[1] The freedom to associate includes the right to organise and join in any association for the advancement of beliefs and ideas pertaining to religious, economic, civic, political, cultural or other matters.[2] It may take the form of a political party, company[3], firm, society, club or any other association. The right is available to all citizens including the public servants. A law which requires a public servant to obtain previous permission to form or join an association is invalid as an unreasonable restriction.[4] But this right cannot be claimed in case of an association the formation and composition of which is determined by and under a statute.[5] The right to

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[1] *Communist Party of Indiana v. Whitcomb*, 414 US 441

[2] *National Assocn. for the Advancement of Colored People v. Alabama*, 357 US 449

[3] *Progress of Pakistan Co. Ltd. v. Registrar, Joint Stock Companies*, PLD 1958 Lah 887

[4] *Romesh Thappar v. Madras*, AIR 1950 SC 124

[5] *Asaduzzaman v. Bangladesh*, 42 DLR (AD) 144 (The Bangladesh Red Crescent Society (Amendment) Act, 1989 making changes in the composition of the Society was challenged on the ground of violation of the freedom of association. Upon consideration of the history of the Red Cross Movement and the history of the legislation in this sub-continent, the court rejected the claim of violation of the freedom of association observing "... though the Society is an association of persons it is an association *sui generis*. Though membership of the Society is open to all citizens of Bangladesh who comply with the terms and conditions laid down in the rules framed under the Order, no one has the right to form a similar society. As the appellant's right does not flow from his right to form an association he cannot claim any right or protection under Article 38. Whatever right he has as a member of the Society has been given under the Order and he can legitimately claim protection under Article 102 of the Constitution for enforcement of his statutory right but he cannot claim that his right under the statute cannot be modified, altered or affected by an amendment of P.O. 26 of

form an association includes the right to continue it.[1] Otherwise that right can be rendered nugatory by a law passed after the association has been formed.[2] Thus a government order closing down a private medical institute was held illegal as it had interfered with the right of the citizens to form an association.[3] It necessarily gives the citizens a right to choose who shall be and who shall not be the members of the association and the composition of an association cannot be altered by law so as to introduce as members other than those who voluntarily joined to form the association.[4] Taking over of a research institute established by a society without interfering with the constitution and power of the society does not constitute interference with the freedom of association.[5] Though a law cannot alter the composition of a voluntary association, it can regulate the affairs of the association.[6] Hence, a law requiring the compulsory affiliation of an educational institution with a University does not interfere with the right of association and an association cannot insist that its activity of imparting education should be allowed to go on unrestricted.[7] The freedom of association includes the right to refuse to be a member of an association and hence the government cannot make it obligatory for every employee to become a member of an association sponsored by the government.[8] Where a rule made it compulsory on the part of every teacher of a school to become a member of a government

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1973, validly passed by the legislature."); see *U.P. v. COD Chheoki Employees' Coop Society Ltd.*, AIR 1997 SC 1413; See also *Phoenix Leasing Ltd. v. Bangladesh Bank*, 51 DLR (AD) 258

[1] *Asaduzzaman v. Bangladesh*, 42 DLR (AD) 144; *Secy. Aircraft Engrs. of Bangladesh v. Registrar Trade Union*, 45 DLR (AD) 122

[2] *Damyanti v. India*, AIR 1971 SC 966

[3] *Dacca National Medical Institute v. East Pakistan*, 10 DLR 343

[4] *Damyanti v. India*, AIR 1971 SC 966 Ibid (Any law by which members are introduced in the Voluntary Association without any option being given to the members to keep them out, or any law which takes away the membership of those who have voluntarily founded it, will be a law violative of freedom of association); *Asom Rashtrabhasha Pracher Samity v. Assam*, AIR 1989 SC 2126

[5] *L.N. Misra Institute v. Bihar*, AIR 1988 SC 1136

[6] In *Secy. Aircraft Engrs of Bangladesh v. Registrar of Trade Union*, 45 DLR (AD) 122, the court held that the legislature can prescribe a particular organisational structure of a trade union. The decision has to be understood in the light of the fact that the legislature was exercising its power in relation to an association whose operation is dependent upon recognition governed by law and no association has any right of recognition.

[7] *D.A.V. College v. Punjab*, AIR 1971 SC 1737

[8] *Sitharamachary v. Senior Deputy Inspector*, AIR 1958 AP 78

sponsored association, the court held the rule to be an infringement of the right and it cannot be contended that the rule was a reasonable restriction imposed in the public interest to increase the efficiency of the teachers, since that object can be achieved in many other ways without curtailing the freedom of association.[1] On the other hand, citizens cannot claim the right of recognition of their association as a part of the right of association and the right of association cannot be invoked for support, sustenance or fulfilment of every object of an association.[2] Freedom of association gives right to the citizens to form an insurance company, but it does not extend to a right to select persons of their choice as directors of the company and the law can prohibit election of certain class of persons as directors.[3] Similarly, from the right to form a trade union neither the right to strike nor the right of collective bargaining necessarily follows.[4] Where an employee's service was terminated because of his membership of the Communist Party, the Indian Supreme Court held that the freedom of association has not been infringed as the aggrieved person is not prevented from being a member of the Communist Party; his real complaint is against termination of service, but he has no fundamental right to continue in employment.[5] The decision does not appear to be a sound one as the "right of free association also means that no individual may be subjected to adverse consequences for exercising the right to join any lawful association."[6] By applying the *Balakotiah* reasoning the freedom of association may be totally denied to a person employed in the service of the Republic.

2.170 The Industrial Relations (Amendment) Act, 1990 put an end to the concept of 'as many trade unions as establishments' and introduced the concept of 'one establishment one trade union'. In *Secy. Aircraft*

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[1] Ibid

[2] *Assaduzzaman v. Bangladesh*, 42 DLR (AD) 144; *Secy. Aircraft Engrs. of Bangladesh v. Registrar, Trade Unions*, 45 DLR (AD) 122; *All India Bank Employees Association v. National Industrial Tribunal*, AIR 1962 SC 171.

[3] *Nasreen Fatema v. Bangladesh*, 49 DLR 542

[4] *All-India Bank Employees' Association v. National Industrial Tribunal*, AIR 1962 SC 171 (Art.19(1)(c) extends to the formation of an association and in so far as the activities of the association are concerned or as regards the steps which the union might take to achieve the purpose of its creation, they are subject to such laws as might be framed and that the validity of such laws are not to be tested by reference to the criteria to be found in art.19(4)); *Abu Hossain v. Registrar, Trade Unions*, 45 DLR 192

[5] *Balakotiah v. India*, AIR 1958 SC 232

[6] Schwartz - Constitutional Law, p.335

Engineers of Bangladesh v. Registrar, Trade Unions[1] the registrations of the appellant unions of the workers of Bangladesh Biman formed vocation-wise were liable to be cancelled and the appellants challenged the amendment as violative of the fundamental right of association. The Appellate Division took the view that though the workers have a right to form associations, there is no fundamental right to obtain recognition of the association and for such recognition Parliament may prescribe the organisational structure of the trade union and "no worker has a fundamental right to a particular form of organisational set-up". When it was pointed out that in view of the provision of s.11A of the Industrial Relations Ordinance, 1969 no trade union which is unregistered or whose registration is cancelled shall function as a trade union and it was contended that the right to form trade union except in the manner prescribed by law has been prohibited and thus the right has been curtailed, the court pointed out -

> If the appellant trade unions had organised themselves along the lines indicated in the amended legislation and has (sic) wanted to survive as a trade union *simpliciter*, without being registered, then perhaps the validity of section 11-A of the Ordinance, 1969 could be considered. But that is not their case. Nor is section 11-A under challenge in these appeals.

This observation indicates that the law cannot prohibit the formation of a trade union otherwise than in the manner prescribed. A trade union may be formed in any manner and it may claim the right to exist and operate. S.11-A cannot operate to prevent the functioning of such a trade union. But from this no right to be recognised or to function as a collective bargaining agent can be claimed as an adjunct to the fundamental right of association. The law can very well say that only a trade union formed in the prescribed manner may be registered and may function as a bargaining agent.

2.171 The right of association is not an absolute right. In the American jurisdiction although a governmental action having the effect of curtailing the right of association is subject of the closest scrutiny, neither the right to associate nor the right to participate in political activities is absolute and even a significant invasion of that right may be sustained if the government can show a sufficient interest and employs

[1] 45 DLR (AD) 122

means closely drawn to avoid unnecessary abridgement of the right.[1] Under art.38, in the formation and continuance of an association reasonable restriction may be imposed by law in the interest of morality or public order.[2] There cannot be any fundamental right to immorality, obscenity, commission of crime or violence or illegal acts. An association the object of which is to carry on an immoral purpose[3] or illegal activity or to overthrow a government by unlawful means[4] may be prohibited by law. In *NAACP v. Alabama*[5] the American Supreme Court struck down a law which required the association to produce a list of all its Alabama members. Secrecy of membership was essential to its members' freedom of association and the court held that the law constituted an unwarranted invasion on the freedom. But a similar law applied to the Ku Klux Klan was upheld by the court in *New York ex rel. Bryant v. Zimmerman*[6]. The difference in the holdings is because in the former case the association was a lawful organisation carrying on its activities lawfully, while in the latter case the organisation was engaged in activities which involved criminal intimidation and violence. The government servants have as much right as other citizens have to form an association and a rule which requires a government servant to retire from an association if the government cancels its recognition of that association is violative of the freedom of association.[7] An association of government servants formed to ventilate their grievances is not unlawful.[8] But restriction on the government servants in the matter of membership of a political party may not be unconstitutional for the protection of the community against the evil of political partisanship of the government servants.[9] A law authorising the government to declare an association unlawful if in its opinion it has as its object interference with the maintenance of law and order, is violative of the freedom of association in conferring arbitrary and unqualified power exercisable on the government's subjective satisfaction.[10]

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[1] *Buckely v. Valeo*, 424 US 1

[2] For the meaning of 'public' order, see Para 2.164 supra

[3] *Progress of Pakistan Co. Ltd v. Registrar, Joint Stock companies*, PLD 1958 Lah 887

[4] *American Communications Association v. Doud*, 339 US 382

[5] 357 US 449

[6] 278 US 63

[7] *Ghosh v. Joseph*, AIR 1963 SC 812

[8] *Ghosh v. Joseph*, AIR 1963 SC 812

[9] *Civil Servants Commission v. National Association of Letter Carriers*, 413 US 548

[32] *Madras v. V.G. Row*, AIR 1952 SC 196; *Abul A'la Moudoodi v. West Pakistan*, 17 DLR (SC) 209

2.172 *Reasonable restrictions* : Restriction on the freedom of association in the interest of morality or public order may be imposed by law and not by an administrative order without the backing of law. Thus when an administrative order was issued by the government directing a medical institute to stop admitting students, the court struck down the order holding it to be violative of the freedom of association.[1] A restriction imposed by law in the interest of morality or public order must be a reasonable one. When challenged an inquiry has to be made as to whether the restriction has any rational connection with morality or public order.[2] Administrative pre-censorship of the activities of an association will be an unreasonable restriction. A law authorising the district magistrate to depute a person to attend a meeting for the purpose of reporting the proceedings of the meeting and requiring the persons convening the meeting to admit the deputed person is an unjustified invasion on the right of assembly and association.[3] A restriction will be unreasonable if it is to remain in force for an indefinite period at the pleasure of the executive.[4] A law imposing restrictions will be unreasonable if it is disproportionate to the mischief sought to be remedied[5], or confers unguided power on the executive to interfere with the right of association.[6] Such a law has also to be examined for its procedural reasonableness. If it does not permit issuance of notice and opportunity of being heard to the aggrieved persons either before passing the order or after passing of the order or does not make any provision to challenge an arbitrary exercise of the power, the law will be found unreasonable and violative of art.38.[7] In *Madras v. V.G. Row*[1] the

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[1] *Dacca National Medical Institute v. East Pakistan*, 10 DLR 343 (If the Government think that the existence of an unrecognised medical school is not in the interest of the country, it can pass the necessary legislation authorising the appropriate authority to close down such institution.)

[2] *Ghosh v. Joseph*, AIR 1963 SC 812; *Damayanti v. India*, AIR 1971 SC 966

[3] *Nasarullah Khan v. West Pakistan*, PLD 1965 Lah 642

[4] *Madras v. V.G. Row*, AIR 1952 SC 196

[5] *Louisiana ex rel. Gremillon* v. NAACP, 366 US 293 (where freedom of association is at stake, any regulation must be highly selective in order to survive challenge, for even though the governmental purpose may be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.); *Keyishian v. Board of Regents*, 385 US 589 (the breadth of legislative abridgement of freedom of association must be viewed in the light of less drastic means of achieving the same basic purpose.)

[6] *Nasarullah Khan v. West Pakistan*, PLD 1965 Lah 642

[7] *Abul A'la Moudoodi v. West Pakistan*, 17 DLR (SC 209; *Bihar v. Misra*, AIR 1971

Indian Supreme Court emphasised that curtailment of the right to form association is fraught with such potential reactions in the religious, political or economic fields, that the vesting of authority in the executive government to impose restrictions on this right without allowing the grounds of such imposition to be duly tested in a judicial inquiry is a strong element which must be taken into account in judging the reasonableness of the restrictions. A political party was banned in exercise of a power conferred by the Criminal Law Amendment Act, 1908. The *vires* of the law was challenged on the ground that the law conferred unguided discretion on the government to declare an association unlawful on an opinion formed subjectively without regard to the objective facts and which opinion was not open to judicial review and there was no provision for hearing the aggrieved party either before or after the order was passed. The West Pakistan High Court discharged the rule[2], but the East Pakistan High Court found the law *ultra vires*[3]. On appeal, the Supreme Court held the law to be violative of the freedom of association for want of both substantive and procedural reasonableness. The Supreme Court held that the law conferred a naked arbitrary power on the government to put an end to all activities of a political party and thus to virtually kill it, on an *ex parte* and one-sided view of its activities. This unguided discretion is subject to no check, judicial or otherwise, and has the potential to become an engine of suppression and oppression of an opposition political party at the hands of an unscrupulous party in power. No period for the duration of the order is laid down in the Act. The association against whom the order is made has no right to be heard in its defence, nor is there any obligation on the authority to hear the association. It does not contain even limited substituted procedural safeguards which have been given to one held in preventive detention. It in effect destroys the right of association for an indefinite period on the subjective satisfaction of the executive.[4] In this case it was pointed out that in an emergent situation it may not be possible to give notice to the aggrieved party before passing the order and in such case it is necessary to give *post facto* hearing.

SC 1667

[1] AIR 1952 SC 196

[2] *Abul A'la Moudoodi v. West Pakistan*, PLD 1964 Kar 478

[3] *Tamizuddin Khan v. East Pakistan*, PLD 1964 Dac 795

[4] *Abul A'la Moudoodi v. West Pakistan*, 17 DLR (SC) 209

FREEDOM OF THOUGHT, CONSCIENCE, SPEECH AND PRESS

2.173 Freedom of thought and conscience is essential to the development of human personality and every person should be free in his thought and conscience. On the other hand, freedom of speech is essential for the development and functioning of democracy.[1] Without freedom of speech there cannot be any democracy[2] and the first thing an autocrat does is to curb the freedom of speech. Art.39(1) guarantees the freedom of thought and conscience. This right is given in absolute form and it is not possible to pass any law curbing this right on any ground whatsoever. Thus no action can be taken against an individual for whatever he has written in his diary. The open ballot system for presidential election was challenged as violative of the freedom of thought and conscience, but the High Court Division rejected the contention.[3] When a man wants to express his thinking to others, the freedom of speech comes into play.

2.174 ***Freedom of speech and expression***: Art.39(2) guarantees the freedom of speech and expression but subject to the limitation that restrictions on the exercise of this right can be imposed by law in the interest 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. The freedom consists of the right to express freely one's conviction and opinion on any matter orally or by writing, printing or any other mode addressed to the eyes and ears of other persons. It includes not only the freedom to express one's ideas through any visible or audible representations made to others, but also the right to acquire and import from others ideas, thoughts and information about matters of common interest[4] and thus the right to read

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[1] *Romesh Thappar v. Madras*, AIR 1950 SC 124 (Freedom of speech and of the press lay at the foundation of all democratic organisations, for, without free political discussion no public education, so essential for the proper functioning of the processes of popular Government is possible. A freedom of such amplitude might involve risks of abuse. But the framers of the Constitution may well have reflected, with Madison who was the leading spirit of the First Amendment of the Federal Constitution, that `it is better to leave a few of its noxious branches to their luxuriant growth than, by pruning them away, to injure the vigour of those yielding the proper fruits.)

[2] *Farid Ahmad v. West Pakistan*, PLD 1965 Lah 135

[3] *Abdus Samad Azad v. Bangladesh*, 44 DLR 354

[4] *Hamdard Dawakhana v. India*, AIR 1960 SC 554

and be informed.[1] The right to paint, sing, dance or to write poetry or literature is covered by this article as at the core of these activities lies the freedom of speech and expression.[2] The freedom includes the right to educate, to inform and to entertain and also the right to be educated, informed and entertained. This involves communication and the right to communicate includes the right to communicate through any media that is available whether print, electronic or audio-visual.[3] It includes the right to exhibit and see cinematographic films and dramatic performances as being very important media of expression.[4] The freedom includes the right to communicate and the right to communicate includes right to communicate through any media that is available whether print or electronic or audio visual.[5] In India the right of a citizen to exhibit films on the *Doordarshan*, the State-owned television, subject to the terms and conditions imposed by *Doordarshan* has been held to be a fundamental right guaranteed by art.19(1)(a) of the Indian constitution.[6] When the conditions laid down by *Doordarshan* are fulfilled, denial of access by it amounts to denial of the freedom of expression.[7] In *Life Insurance Corp. v. Manubhai*[8] the respondent published a study paper 'A fraud on policy holders'. A member of the Corporation published a counter to the study paper in the Corporation's magazine 'Yogakshema'. But the Corporation refused to publish the rejoinder of the respondent in the magazine. The Supreme Court held that the Corporation being a State instrumentality, its refusal to publish the rejoinder was a denial of the freedom of expression. The community is entitled to be informed whether or not the requirement of law is being satisfied in the functioning of the Corporation. The freedom extends to the original ideas as also to explanations, commentaries or annotations of the original idea expressed by another.[9]

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[1] *Bennett & Coleman v. India*, AIR 1973 SC 106, 143

[2] *Maneka Gandhi v. India*, AIR 1978 SC 597, 640

[3] *Secy., Ministry of I & B v. Cricket Assoc. of Bengal*, AIR 1995 SC 1236 (The court held that freedom of speech and expression is involved in telecasting sports events and the court made important observation regarding use of air waves and frequencies which are public properties)

[4] *Abbas v. India*, AIR 1971 SC 481; *Southeastern Promotions v. Conrad*, 420 US 346

[5] *Secretary, Ministry of I & B v. Cricket Association of Bengal*, AIR 1995 SC 1236

[6] *Odyssey Communications Pvt. Ltd. v. Lok-udayan Sangathna*, AIR 1988 SC 1642

[7] *Life Insurance Corporation v. Manubhai*, AIR 1993 SC 171

[8] AIR 1993 SC 171

[9] *Dewan Abdul Kader v. Bangladesh*, 46 DLR 596; see para 2.174A

2.175 The freedom is not limited to mere expression of words. It extends to symbolic speech like the display of a red flag as a symbol of opposition to organised government[1] or the display of the national flag upside down with a peace symbol affixed as a protest against a government action[2] or the wearing of black armbands by students as a symbolic protest against war[3]. Freedom of speech and expression preserves "an uninhibited market place of ideas in which truth will ultimately prevail ... It is the right of the public to receive suitable access to social, political, aesthetic, moral and other ideas and experiences".[4] It includes the freedom of discussion and dissemination of knowledge and ideas. The right cannot be denied simply because the idea is not a popular one or that it is a hateful or foolish idea.[5] The freedom includes the right of peaceful demonstrations[6] and the right of the labour to publicise facts of a labour dispute by peaceful picketing[7]. The right to strike was not held to be a fundamental right.[8] The High Court Division recognised hartal as a means of protest by the people for communicating thoughts, discussing public question and ventilating grievances. In the Indian jurisdiction 'bandh' which is accompanied by threat and use of force has not been treated as a part of the freedom of expression.[9] Referring to those decisions, the High Court Division held that calling for hartal not accompanied by threat to use force is only an expression guaranteed as a fundamental right under the Constitution. But any attempt to enforce the hartal interfering with individuals' right would render the call illegal and not protected under the Constitution.[10]

2.176 Freedom of speech and expression is not confined to any particular field of human interest[11], but guarantees the broadest exercise of the right for religious, political, economic, scientific or informational

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[1] *Stromborg v. California*, 283 US 359
[2] *Spence v. Washington*, 418 US 405
[3] *Tinker v. Des Monies School District*, 393 US 503
[4] *Kleindiest v. Mandel*, 408 US 753, 763
[5] *Roth v. U.S.*, 354 US 476
[6] *Kameswar v. Bihar*, AIR 1962 SC 1166
[7] *N.L.R.B. v. Drivers*, 362 US 274
[8] *All India Bank Employees Association v. National Industrial Tribunal*, AIR 1962 SC 171; *Radhey Sham v. P.M.G.*, AIR 1965 SC 311
[9] *Bharat Kumar v. Kerala*, AIR 1997 Kerala 291, affirmed in *Communist Party v. Bharat Kumar*, AIR 1998 SC 184
[10] *Kh. Modarresh Elahi v. Bangladesh*, 2001 BLD 352
[11] *Thomas v. Collins*, 323 US 516

ends.[1] The right to discuss public affairs includes the right to criticise the government including its defence policy and the conduct of the Armed Forces.[2] "In a free democratic society ... those who are responsible for public administration must always be open to criticism. Any attempt to stifle or fetter such criticism amounts to political censorship of the most insidious and objectionable kind."[3] The freedom includes the right not to speak and an individual cannot be compelled to speak unless there is an overriding public interest involved.[4] Thus in the absence of overriding public interest, an individual cannot be penalised for his refusal to take the loyalty oath[5], or to salute the national flag[6]. But the freedom to remain silent will not exempt a person from the obligation to give evidence in a judicial proceeding, except when the question of self-incrimination is involved.[7] Compulsion on exhibitor of cinema to show scientific, educational or documentary films has not been held to infringe the freedom of speech.[8] When a person is talking on telephone, he is exercising his freedom of speech and telephone-tapping unless it comes within the grounds of restrictions, is violative of the freedom of speech.[9]

2.177 Freedom of speech and expression includes the freedom of circulation and distribution of printed matters like pamphlets and leaflets. Any prior restraint or requirement of licence or permit for the distribution of any literature would, in general, be unconstitutional.[10] A municipality may punish a person for littering the street or any public place, but distribution of any printed matter cannot be forbidden.[11] Though the distribution of any printed matter in public places cannot generally be restricted, sending it to an individual at his home may be restricted at the instance of the individual for the protection of his right

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[1] *Douglas v. Jeanette*, 319 US 157

[2] *Schacht v. U.S.*, 398 US 58

[3] *Hector v. A.G. of Antigua and Barbuda*, [1990] 2 All E.R. 103, 106

[4] *Wooley v. Maynard*, 430 US 705

[5] *Speiser v. Randall*, 357 US 513

[6] *West Virginia Board of Education v. Walter Barnette*, 319 US 624

[7] *Branzburg v. Hayes*, 408 US 665 (Court refused to recognise the First Amendment right of newsmen to refuse to testify before the grand juries in respect of confidential sources of information)

[8] *India v. Motion Picture Assocn.*, AIR 1999 SC 2334

[9] *People's Union for Civil Liberties v. India*, AIR 1997 SC 568

[10] *Lovell v. Griffin*, 303 US 313

[11] *Schneider v. Irvington*, 308 US 147

to privacy.[1]

2.177A In *Bangladesh NCTB v. Bangladesh*[2] the Appellate Division by a majority decision rejected the contention that Note-Books (Prohibition) Act, 1980 prohibiting publication of note-books on text-books is violative of art.39. The majority took into consideration that the Act does not completely debar publication of note-books which may be published either by the Board or under the authority of the Board in the same way as text-books are approved or prepared and published by it and reasoned that the basic assumption for the exercise of the said right is and must be that it may not offend any law or any right of other person under the law and to give a free hand to the publishers to publish any kind of note-book on text-book without any control from the Board is to defeat the purpose for which the Text Book Board has been vested with authority to prepare and publish or approve text-books for schools. The proposition that the freedom of expression cannot be exercised offending any law has to be understood in the light of the facts of the case. If a law impinges on the freedom of expression, the inquiry will be whether the law can be justified as a permissible restriction and not whether the right can be exercised in the face of the legal prohibition; if the law cannot be brought within the permissible restrictions under art.39(2), the law will be void and it cannot stand on the way of freedom of expression. However, the constitutional provisions cannot be interpreted ignoring the social environment and conditions in which the rights are sought to be exercised. In order to improve the standard of text-books and thereby to improve the standard of education, the impugned law has been made. It is our common experience that getting the easy way out majority of the students do not read the text-books and they rely on the note-books which frustrate the very purpose of education. In writing a note-book, as we see in this country, the author does not really express his views or opinion, but merely reproduces the text-book in a different manner and the motive is nothing but making profit only; 'the immediate object is not to impart any idea or information but to make money at the cost of the Board'. Further, the note-books, as seen in the market, violate the copyright of the Board and freedom of expression cannot be exercised in derogation of another person's intellectual property.

2.178 *Advertisement*: A distinction, however, is to be made in respect

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[1] *Rowan v. Post Office*, 397 US 728

[2] 48 DLR (AD) 184

of any printed matter which is commercial in nature and its distribution may be restricted in terms of the provision of art.40[1], but when expression and commercial activity are mixed up as in the case of newspapers, only such restrictions may be imposed as would not curtail the freedom of speech and expression ensured by art.39.[2] An advertisement may have two aspects - it may be used as a medium of propagation of ideas and/or it may be for the purpose of canvassing goods or services. What will be a reasonable restriction on such advertisements will depend upon the purpose for which it is imposed. When such advertisement is purely for commercial purpose, it does not come within the protection given to the freedom of speech and expression[3] and may be controlled by the provisions relating to the freedom of trade and occupation under art.40. But apart from its commercial object, if it seeks to communicate information, recite grievances, seek financial help in respect of a movement the objectives of which are of public interest or concern, the advertisement will enjoy the protection of art.39.[4]

2.179 *Exercise of the right in public places*: It is generally accepted that a man cannot exercise his fundamental right on another man's property and thus cannot exercise the right on the property owned by the State. An exception is made in respect of public properties which are regarded as public fora. Public places like streets and parks are generally regarded as public fora for gathering and discussion of public questions founded on the 'immemorial claim of the free people to use the streets as a forum'.[5] At the same time the State has a legitimate interest in preserving the property for which it is dedicated and there is always a

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[1] *Hamdard Dawakhana v. India*, AIR 1960 SC 554 (The true character of an advertisement is to be determined by the object which it seeks to promote. It may amount to an expression of ideas and propagation of human thought and in such case the question of freedom of speech and expression would arise, but a commercial advertisement having an element of trade and commerce and promoting business cannot claim the freedom of speech and expression. Advertisement of prohibited drugs cannot be in the public interest and as such cannot be treated as propagating any idea to invoke the freedom of speech and expression); *Ohralik v. Ohio Bar*, 436 US 447.; see *Tata Press Ltd v. MTN Ltd.*, AIR 1995 SC 2438 (Commercial speech held to be a part of the freedom of speech)

[2] *Bennett & Coleman v. India*, AIR 1973 SC 106

[3] *Valentine v. Chrestensen*, 316 US 52

[4] *Virginia Pharmacy v. Virginia Citizens*, 425 US 748 *New York Times v. Sullivan*, 376 US 254; *Indian Express v. India*, AIR 1986 SC 515

[5] *Shuttlesworth v. Birmingham*, 394 US 147; *Schneider v. State*, 308 US 147

question of striking a balance between the people's freedom of speech and expression and the governmental interest in the preservation of such property[1], but no authority can be given an unfettered discretion to determine who will be permitted to use the public places for speech or expression of ideas[2].

2.180 *Freedom of government servants*: A person taking up a government employment does not forfeit his freedom of speech and expression and he will enjoy the same freedom as enjoyed by other citizens. However, for the integrity and discipline of the service, a government servant may be prohibited from expressing his views in respect of or discussing in public any matter connected with his employment. Discipline amongst the government employees and their efficiency may be said to be related to public order.[3] He may be prohibited from criticising any policy pursued or action taken by the government or participating in a strike[4] or disclosing any information obtained by him in the course of his official duties or making any political speech to advance the cause of a particular political party[5]. The question whether a restriction put on a government servant will be an unreasonable restriction on his freedom of speech and expression will depend on whether the restriction is employment-related and whether such restriction is reasonably necessary for the integrity and discipline of the service. The U.S. Supreme Court made a distinction between speech on matters of public concern and employment-related speech and held unconstitutional a dismissal of a school teacher for criticising School Board in a letter to the editor. The letter criticised the division of funds between education and athletics and according to the court it was a matter of public concern.[6] In *Connick v. Meyers*[7] Meyers was dismissed from her position as an Assistant District Attorney on ground of insubordination when after her transfer to a different division she circulated an intra-office questionaire soliciting views of her colleagues

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[1] *Cornelius v. NAACP*, 473 US 788

[2] *Lovell v. Griffin*, 303 US 444; *Southeastern Promotions Ltd. v. Conrad*, 420 US 546

[3] *Ghosh v. Joseph*, AIR 1963 SC 812; *Devendrappa v. Karnataka S.S.I.D. Corp*, AIR 1998 SC 1064 (Plea of freedom of speech not available when an employee was dismissed for writing letter to the Governor making allegations about mismanagement against head of his organisation and making press statement of political nature)

[4] *Ghosh v. Joseph*, AIR 1963 SC 812

[5] *United Public Works v. Mitchell*, 330 US 75

[6] *Pickering v. Board of Education*, 391 US 563

[7] 461 US 138

on matters of office policy and morale and their level of confidence in their superiors. In rejecting the plea of unconstitutionality, the court held that the speech was employment-related and not a matter of public concern. The court further held that even in matters of public concern the speech will not be protected if it substantially interferes with official responsibilities. In another case the court reinstated an employee who remarked after President Regan was shot: "If they go for him again, I hope they get him." After finding the speech a matter of public concern, the court further held that the employee did not discredit or interfere with efficient functioning of the office.[1]

2.181 ***Permissible restrictions***: Under art.39 the freedom of speech and expression is not absolute and is subject to restrictions which may be imposed by law on specified grounds. Restrictions cannot be imposed on this freedom on grounds other than those specified in art.39.[2]

2.182 *Security of the State*: Free expression of opinion and ideas is possible in an organised society and to preserve the right it is necessary to prohibit utterances which threaten to overthrow an organised government by unlawful or forceful means.[3] But peaceful and orderly opposition to the government with the object of changing the government cannot be suppressed.[4] The security of the State is a matter of concern when there is a serious and aggravated form of public disorder as distinguished from ordinary breach of public order or public safety which does not involve any danger to the State. The security of the State is endangered by crimes of violence intended to overthrow the government[5], by waging war or rebellion against the government, or by external aggression or war, but the security of the State is not endangered by minor breaches of public order or tranquillity, such as unlawful assembly, riot, affray, rash driving and the like. However, incitement to violent crimes like murder which is an offence against public order may endanger the security of the State.[6] Advocacy of revolutionary socialism cannot be restricted on the ground of security of State unless it is accompanied by the use, or threat, of violence.[7] Any

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[1] *Rankin v. McPherson*, 483 US 378
[2] *Secy., Ministry of I & B v. Cricket Assoc. of Bengal*, AIR 1995 SC 1236
[3] *Stromborg v. California*, 283 US 359
[4] *Herndon v. Lowry*, 301 US 242
[5] *Santokh Singh v. Delhi Administration*, AIR 1973 SC 1091
[6] *Bihar v. Sailabala*, AIR 1952 SC 329
[7] Ibid; *Brandenburg v. Ohio*, 395 US 444

effort to incite the members of the Police Force to withhold their services may be suppressed in the interest of the security of the State or of public order.[1] In times of external aggression, the State has the power to prohibit or punish utterances which obstruct war measures.[2]

2.183 *Public order*: A reasonable restriction may be imposed by law in the interest of public order.[3] The expression 'in the interest of' enables Parliament to make laws to curb the tendency to break the peace, even though no breach of the peace has actually taken place.[4] However, for the restriction to be valid, the exercise of the right must have a rational nexus with the possible breach of public order. Whether in a particular case an utterance would have a tendency to create a breach of public order is to be determined objectively from the circumstances in which the utterance is made, the nature of the audience and the like.[5] In the interest of public order, the State may prohibit creating loud and raucous noises in streets and public places[6], regulate the hours and the place of public discussion[7]and the use of the public streets for the purpose of exercising the freedom of speech[8].

2.184 The right to free speech includes the right to reach as many people as possible and today a public speech cannot be thought of without the aid of loud speakers. Loudspeakers must, however, be distinguished from pamphlets and leaflets. One to whom a pamphlet or leaflet is given has the liberty not to read it. But in the case of loudspeakers, an individual becomes the recipient of the speech whether he wants to hear it or not. Furthermore, the use of loudspeaker causes some degree of interference with the business and social activities as also the comfort and solitude of the neighbouring people. Can the use of loudspeakers be regulated or restricted? The Privy council justified restrictions on the use of loudspeakers at public meetings giving wide meaning to the expression 'public order' for the avoidance of excessive noise materially affecting the convenience and comfort of the

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[1] *Dalbir Singh v. Punjab*, AIR 1962 SC 1106

[2] *Schaefer v. U.S.*, 251 US 466; *Gora v. U.S.*, 340 US 857; *U.S. v. Mackintosh*, 283 U.S. 605

[3] For the meaning of public order, see Para 2.164 supra.

[4] *Virendra v. Punjab*, AIR 1958 SC 896

[5] *Bihar v. Shailabala*, AIR 1952 SC

[6] *Kovacs v. Cooper*, 336 US 77

[7] *Saia v. New York*, 334 US 558

[8] *Schneider v. New Hampshire*, 315 US 568

neighbouring people.[1] For the purpose of maintaining public order and for prevention of public nuisance, reasonable regulations can be made for the use of loudspeakers and other noisy instruments interfering with the comfort of the people around[2], but use of loudspeaker cannot be prohibited as it is an indispensable means of effective public speech.[3] It is submitted that the context in which the expression 'public order' has been used in art.39 may not support the wide interpretation given by the Privy Council and a restriction put on the use of loudspeaker may not be related to 'public order' unless the disturbance is serious enough to provoke breach of the peace leading to public disorder. It may, however, be considered that even though there is a fundamental right to freedom of speech, there is no fundamental right to use any particular instrument for the exercise of the freedom. An individual may have the liberty to use a loudspeaker and under art.31 such liberty can be curtailed only by a reasonable law. Loudspeakers interfering with the comfort, convenience and privacy of individuals, a law reasonably regulating the time, manner and place of use of loudspeaker cannot be said to be violative of art.31 of the Constitution.

2.185 In the interest of public order a law may be made imposing restrictions on inciting public employees or persons engaged in any employment which is essential for securing the public safety or for maintaining services essential for the life of the community or the members of the police force to withhold their services[4] or inciting breach of discipline amongst the employees engaged in the maintenance of law and order and essential services, or feelings of enmity or hatred between different sections of the community or insulting their religious feelings.[5] The Government employees can be subjected to rules which are intended to maintain discipline amongst them and their efficiency as it is related to public order.[6] Advocacy of non-payment of the government dues without resorting to violence cannot be restricted as it does not raise an issue of public order.[7]

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[1] *Francis v. Chief of Police*, [1973] 2 All E. R. 251
[2] *Rajasthan v. Chawla*, AIR 1959 SC 544
[3] *Saia v. New York*, 334 US 558
[4] *Dalbir v. Punjab*, AIR 1962 SC 1106
[5] *Virendra v. Punjab*, AIR 1957 SC 896
[6] *Ghosh v. Josheph*, AIR 1963 SC 812; *Devendrappa v. Karnataka S.S.I.D. Corp*, AIR 1998 SC 1064
[7] *Superintendent v. Ram Manohar*, AIR 1960 SC 633, 640

2.186 The freedom of speech allows the citizens to criticise the government. The question is whether the provision of s.124A of the Penal Code is a reasonable restriction in the interest of the security of the State and public order. The United States Congress passed the Sedition Act, 1798, a temporary Act, which was declared unconstitutional as an infringement of the First Amendment rights.[1] In the American jurisdiction, mere advocacy to change the form of government, short of the abolition of the republican institutions, without the use of force is not prohibited.[2] In England the offence of sedition covers any attempt to bring into hatred or contempt the Crown, the Houses of Parliament, the constitution, to raise discontent among the people or promote hostility between the various classes of the people.[3] In recent times, prosecution for sedition has become rare unless it is accompanied by an incitement to violence. S.124A of our Penal Code is in wide terms. Though Explanation 3 says that comments expressing disapprobation of the administrative or other actions of the government without inciting or attempting to incite hatred, contempt or disaffection, do not constitute an offence, Explanation 1 defines 'disaffection' in wide terms to include disloyalty and all feelings of enmity. The Privy Council interpreted the term 'disaffection' to mean absence of affection' or 'bad feeling' towards the government whether or not it has any connection with violence or not. In *Niharendu v. Emperor*[4] the Federal Court shifted from the position by holding that mere criticism or ridicule of the government is not an offence unless it is calculated to undermine respect for the government in such a way as to make the people cease to obey it and the law so that only anarchy can follow. But the Privy council overruled the decision holding that the utterances which excite or attempt to excite bad feeling towards the government was punishable irrespective of the intention of the speaker or the effect of the speech on

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[1] *New York Times v. Sullivan*, 376 US 254

[2] *Stromborg v. California*, 283 US 359; *De Jonge v. Oregon*, 299 US 353 ("The greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government.")

[3] see Halsbury's Laws of England, 4th ed., vol.11, Para 827

[4] 46 CWN (FR) 9

the audience.[1] Such an interpretation brings s.124A in conflict with art.39 of the Constitution as it impinges on the freedom of speech. Even though the expression 'in the interest of' enlarges the scope of the restriction which will be constitutionally permissible, the restriction imposed must have a proximate and rational relationship with the security of the State or public order[2] and mere expression of disaffection or hatred towards the government in power without any definite incitement to violence cannot be said to have any proximate tendency to a breach of the security of the State or public order. Thus in order to pass the test of constitutionality s.124A must be interpreted to include within its mischief an utterance when it is intended or has a reasonable tendency to create disorder or disturbance of public order by resort to violence.[3]

2.187 *Friendly relations with foreign states*: Foreign relations is always a touchy matter and the State cannot be embarrassed by irresponsible statements inside the country touching sensitive issues of international affairs. The object of this restriction on the freedom of speech is the prevention of slander and libel against foreign States in the interest of friendly relations with them.

2.188 *Decency or morality*: A law may impose reasonable restrictions on speech which tend to undermine public morality.[4] Whether any speech is likely to undermine decency or morality is to be determined with reference to the probable effect it may have on the people to whom it is addressed.[5] Age, culture and the like of the audience thus become material. Use of mere abusive language without any suggestion of obscenity to the person in whose presence it is uttered will not be a speech offending decency or morality.[6]

2.189 A law against obscenity would be protected under art.39. An obscene publication is outside the realm of constitutionally protected freedom of expression.[7] Obscenity means offensive to modesty, or

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[1] *Sadasiv v. Emperor*, 74 I.A. 89

[2] *Superintendent v. Ram Manohar*, AIR 1960 SC 633

[3] *Kedarnath v. Bihar*, AIR 1962 SC 955

[4] *Ranjit v. Maharashtra*, AIR 1965 SC 881

[5] Ibid; *R. v. Secker & Warburg*, [1954] 1 WLR 1138

[6] *Kartar Singh v. Punjab*, AIR 1956 SC 541

[7] *Paris Adult Theatre v. Slaton*, 413 US 49; *Ranjit v. Maharashtra*, A IR 1965 SC 881 (obscenity by itself has extremely poor value in propagation of ideas and information of public interest or profit)

decency; lewd, filthy, repulsive.[1] But even an immodest representation may not be reasonably restricted in the interest of decency or morality if it conduces to the propagation of ideas and information of public interest, e.g., books on medical science.[2] Ideas having social importance will *prima facie* be protected unless the obscenity is so gross that the interest of the public dictates otherwise. The test of obscenity is thus a question of degree and varies with the moral concepts of the people. The test generally is whether upon reading the publication as a whole it can be said that it has a tendency to deprave or corrupt those whose minds are open to such immoral influences and into whose hands the publication may fall.[3] Each work must be considered by itself and comparison with other works may not improve the quality of a book which is indecent or obscene.[4] "Where obscenity and art are mixed up, art must be so preponderating as to throw obscenity into shadow or render the obscenity so trivial and insignificant that it can have no effect and it can be overlooked."[5] A balance must be struck between freedom of speech and expression and public decency and morality, but when morality or decency is substantially transgressed, freedom of speech must give way.[6] The test to adopt in our country (regard being had to our community *mores*) is that obscenity without a preponderating social purpose or profit cannot have constitutional protection; and obscenity is dealing with sex in a manner appealing to the carnal side of human nature.[7]

2.190 *Contempt of court*: In the exercise of his freedom of speech and expression, nobody can be allowed to interfere with the administration of justice[8] or to lower the prestige or authority of the

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[1] *Ranjit Singh v. Maharashtra*, AIR 1960 SC 881

[2] Ibid

[3] *R. v. Hicklin*, [1868] 3 Q.B. 360

[4] Ibid; *Miller v. California*, 413 US 15 (the court laid down the guideline for determining obscenity - (a) whether the average person applying contemporary community standards may find the work taken as a whole appeals to prurient interest, (b) whether the work depicts or describes, in a patently offensive manner, sexual conduct specifically defined by the relevant law, and (c) whether work, taken as a whole, lacks literary, artistic, political or scientific value)

[5] *Abbas v. India*, AIR 1971 SC 481, 498

[6] *Ranjit v. Maharashtra*, AIR 1965 SC 881

[7] Ibid; *Abbas v. India*, AIR 1971 SC 481

[8] *Namboodripad v. Nambiar*, AIR 1970 SC 2015; *Saxena v. Chief Justice*, AIR 1996 SC 2481; *Narmoda Bachao Andolon v. India*, AIR 1999 SC 3345 (No one can be

court even in the garb of criticising judgments of the court.[1] Freedom of speech and expression is important, but more important is the effectiveness of the administration of justice without which the rights guaranteed by the Constitution will merely be embellishments. It is for this reason that the Constitution specifically provided for the Supreme Court's power to commit for contempt of court. However, the law relating to contempt of court must be reasonable and must not be such as stifles the freedom of speech and expression. As because the contempt power constitutes a restriction on the freedom of speech and expression, this power should be cautiously and sparingly used.[2] People's confidence in the effectiveness of the administration of justice cannot be allowed to be eroded and any attempt to undermine the authority of the court should be adequately dealt with. As regards comments on the proceedings and criticisms of the judgments of the court it has, however, been held that the power of committal for contempt of court should not be readily exercised. Lord Atkin observed-

> Where the authority and position of an individual judge, or the due administration of justice, is concerned, no wrong is committed by any member of the public who exercises the ordinary right of criticizing, in good faith, in private or public, the public act done in the seat of justice. *The path of criticism is a public way: the wrong headed are permitted to err therein: provided that members of the public abstain from imputing improper motives to those taking part in the administration of justice, and are genuinely exercising a right of criticism, and not acting in malice or attempting to impair the administration of justice, they are immune.* Justice is not a cloistered virtue: she must be allowed to suffer the scrutiny and respectful, even though outspoken, comments of ordinary men.[3](Italics provided)

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permitted to distort orders of the court and deliberately slant to its proceedings)

[1] *Daphtary v. Gupta*, AIR 1971 SC 1132

[2] *Rama Dayal v. M.P.*, AIR 1978 SC 921

[3] *Andre P.R. Ambard v. Attorney General of Trininad and Tobago*, [1936] AC 322, 335; see *R v. Metropolitan Police Commissioner, ex p. Blackburn (NO.2)*, [1968] 2 QB 150 (Member of Parliament severely criticising the Court of Appeal in an article on incorrect premises); *P.N. Duda v. P. Shiv Shanker*, AIR 1988 SC 1208 (A Law Minister criticising the Supreme Court as having sympathies with the propertied class and being the haven for anti-social elements and reactionaries); *Viswanath v. Venkatramaih*, 1990 (2) Cr.L.J. 2179 (A former Chief Justice speaking about falling standard of judges for wining and dining in parties) – in these cases the court did not find the scathing criticism to constitute contempt of court. For further discussion on contempt of court

In applying the law of contempt of court a balance should be made between the freedom of expression and the need to maintain the authority of the court[1], otherwise the law will have serious chilling effect on the freedom of expression and speech and cannot pass the test of reasonable restriction. The criticism, to be immune, must not, however, be made in bad faith and must not attribute motives to the judges. The Appellate Division observed in *Saleemullah v. State* -

> Freedom of press being recognised in our Constitution, a Court is to suffer criticism made against it, and, only in exceptional cases of bad faith or ill motive, it will resort to law of contempt.[2]

2.191 *Defamation*: Reputation is a valuable asset or property of a man. Nobody should be allowed to injure the reputation of a man in the name of freedom of speech and expression.[3] The freedom is available so long as it is not malicious or libelous and if the speech or expression is untrue and reckless, the speaker or the author does not get protection of the constitutional right.[4] The American Supreme Court held that libelous utterances are outside the area of constitutionally protected speech.[5] But the court made a distinction between defamation of public officials and private citizens and held that the First Amendment shields criticisms of official conduct and a public official may not sue for defamation growing out of statements concerning the performance of his public duties unless malice is shown.[6] This rule has been applied in the United

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see Para 5.221 – 5.231

[1] *Moinul Hosein v. Sheikh Hasina Wazed*, 53 DLR 138, 147 (Prime Minister referring to bail granted by the court and commenting "as if the court has become the haven of the criminals" – Abdur Rashid J held, no contempt committed)

[2] 44 DLR (AD) 309 (the court, however, rejected the appeal of the contemner noting that in a country where the rate of literacy is low and the words in print are generally revered the court is to consider the impact of written criticism of court in the mind of the public and also that the duty of journalist who is a practising lawyer is more onerous)

[3] *Rama Dayal v. M.P.*, AIR 1978 SC 921; *Gertz v. Robert Welch, Inc*, 418 US 323

[4] *Saxena v. Chief Justice*, AIR 1996 SC 2481

[5] *Beauharnais v. Illinois*, 343 US 520

[6] *New York Times Co. v. Sullivan*, 376 US 254 (The rule is applicable irrespective of whether the public official is elected or appointed); *Rosenblatt v. Baer*, 383 US 75 (In the absence of clear evidence of general fame in the society and pervasive involvement in the affairs of the society, an individual is not to be deemed a public figure for the application of this rule unless he voluntarily throws himself into a particular public controversy); *Gertz v. Robert Welch, Inc.*, 418 US 323; *Time, Inc. v. Firestone*, 424 US

States even though there is better facility to find out the truth about public affairs. In our country it is difficult to find out the correct state of affairs and the possibility of any criticism being found to be untrue is much great. But in view of the propensity to make irresponsible statements without trying to check the truth, it is an open question whether the Supreme Court will be willing to apply the American rule in this regard. However, for democracy to function, it is necessary to maintain some distinction between defamation of public officials and private persons though not as great a distinction as enunciated in the American rule.[1]

2.192 *Incitement to an offence* : This ground will permit legislation not only to punish or prevent incitement to commit serious offences like murder which lead to breach of public order, but also to commit any 'offence', which according to the General Clauses Act means 'any act or omission made punishable by any law for the time being in force'. Hence it is not permissible to instigate another to do any act which is prohibited and penalised by any law.[2]

2.193 *Reasonableness of restrictions:* When a petitioner shows that he has a fundamental right under art.39 which is being denied, the onus lies on the respondent to show that the denial is authorised by a law imposing reasonable restrictions.[3] In determining the reasonableness of a restriction upon the freedom of speech and expression, a reasonable balance must be struck between the need for the freedom in a democratic system of government provided for by the Constitution and the social interest in the prevention of disorder and anarchy.[4] Thus even when a person is under an order of detention, he continues to possess his

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448; in *Derbyshire CC v. Times Newspapers*, [1993] 1 All E.R. 1011, refusing standing of the central or local government (other than its officials) in defamation suit, Lord Keith observed that "it is of the highest importance that a democratically elected government body ... shall be open to uninhibited public criticism" (p.1019). The proposition is too broadly stated taking no account of actual malice in making a report which was excepted in *Sullivan.* see the criticism of *Derbyshire CC* in Ian Loveland's Constitutional Law, 1996, p.600. The Indian supreme Court followed *Derbyshire CC* in *Rajagopal v. T.N.*, AIR 1999 SC 264. See also *Garrison v. Lousiana*, 379 US 64

[1] See *R. v. Sir R. Carden*, (1879) 5 QBD 1 (Whoever fills a public position renders himself open thereto. He must accept an attack as a necessary, though unpleasant, appendage to his office.); *Kartar Singh v. Punjab*, AIR 1956 SC 541

[2] *Daphtary v. Gupta*, AIR 1971 SC 1132

[3] *Life Insurance Corp. v. Manubhai*, AIR 1993 SC 171

[4] *Santokh Singh v. Delhi Administration*, AIR 1973 SC 1091

fundamental right to read[1], but he may be prevented from reading a literature which is prejudicial to the security of the State or any other social interest mentioned in art.39.[2] The restriction is to be imposed by law and when a discretion is conferred on any authority, the law should provide sufficient guidelines for the exercise of the discretion.[3] If the law is vague or arbitrary, or is disproportionate to the mischief sought to be remedied or the restriction has no rational connection with the permissible grounds of restriction, or there is no procedural safeguard against an arbitrary exercise of the power under the law, the restriction imposed will be unconstitutional.[4] Generally, a restriction imposed will be unconstitutional if it is indefinite in duration unless it can be shown that a permanent restriction is necessary in the facts and circumstances of a given case.

2.194 ***Freedom of the press:*** Even though freedom of the press is implicit in the freedom of speech and expression, considering its importance, the Constitution has specifically mentioned it. There is another reason to mention it separately. Art.39(2) guarantees freedom of expression only to 'citizen' which expression excludes legal persons as distinguished from natural persons. But in many cases the press is owned by legal persons and exclusion of legal persons from the purview of the guarantee may seriously hamper freedom of the press. Hence the guarantee is made available without any limitation as to who can claim it. The freedom of the press consists of the right to publish views not only of the newspaper, but also of its correspondents and others.[5] Subject to reasonable restrictions on specified grounds, the press has the freedom to print or not to print any matter it chooses and the government cannot interfere.[6] The freedom extends to the news, editorial comments, discussion of the governmental affairs, conduct of the public authorities,

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[1] *Maharashtra v. Probhakar*, AIR 1966 SC 424

[2] *Narayana v. Kerala*, AIR 1973 Ker 97

[3] *Saia v. New York*, 334 US 558 (A Municipal Ordinance was violative of freedom of speech as it prohibited use of loudspeaker or amplifier without a permit from the Chief of Police, but did not provide a standard for the exercise of the discretion by the chief of Police.); *Lovell v. Griffin*, 303 US 444; *Shuttlesworth v. Birmingham*, 394 US 147

[4] See Para 2.21 for the meaning of reasonable restriction

[5] *Virendra v. Punjab*, AIR 1958 SC 986

[6] *C.B.S. v. Democratic National Committee*, 412 US 94; *Branzburg v. Hayes*, 408 US 665; *Begum Zebunnisa v. Pakistan*, 10 DLR (SC) 44 (a law which permits the government to prohibit publication for whatever reason it considers necessary or expedient is unenforceable)

the form of government and the manner in which the government is to operate.[1] An Antiguan law making it a punishable offence to publish in a newspaper a false statement which is likely to undermine public confidence in the conduct of public affairs was found invalid by the Privy Council which observed that "it would on any view be a grave impediment to the freedom of the press if those who print, or a fortiori those who distribute, matter reflecting critically on the public authorities could only do so with impunity if they could first verify the accuracy of all statements of fact on which criticism was based."[2] The right includes the right to disseminate information and to circulate its publications.[3] The right to circulate has reference not only to the subject matter of the publication, but also to the volume of circulation and any action which would directly affect the volume of circulation would abridge the freedom of the press.[4] "The constitutional guarantee of the freedom of speech and press are not for the benefit of the press so much as for the benefit of all the people."[5]

2.195 The freedom of the press, however, is no higher than the freedom of speech and expression of the individual citizens.[6] The press is not immune from the application of the general laws that reach equally to all businessmen.[7] The protective cover of press freedom cannot be thrown open for wrong doings. Art.39 will not be attracted if a newspaper publishes what is mischievously false or illegal or abuses its liberty.[8] It is not exempt from the ordinary forms of taxation.[9] It may be

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[1] *New York Times v. U.S.*, 403 US 713; *Mills v. Alabama*, 384 US 214

[2] *Hector v. A.G. of Antigua and Barbuda*, [1990] 2 All E.R. 103, 106

[3] *Sakal Papers v. India*, AIR 1962 SC 305

[4] Ibid

[5] *Time v. Hill*, 385 US 374

[6] *Virendra v. Punjab*, AIR 1958 SC 986; *Branzburg v. Hayes*, 408 US 665; *Arnold v. King Emperor*, 41 I.A. 149 (The freedom of a journalist is an ordinary part of the freedom of the subject, and to whatever lengths the subject in general may go, so also may the journalist, but, apart from statute law, his privilege is no other and no higher. The responsibilities which attach to his power in the dissemination of printed matter may, and in the case of a conscientious journalist do, make him more careful; but the range of his assertions, his criticism or his comments, is as wide as, and no wider than, that of any other subject.)

[7] *Associated Press v. NLRB*, 301 US 103

[8] *Re Harijai Singh*, (1996) 6 SCC 466

[9] *Express Newspapers v. India*, AIR 1958 SC 578; *Grosjean v. American Press Co.*, 297 US 233

subjected to the laws relating to industrial and labour relations[1], conditions of service of employees[2], contempt of court[3], defamation[4] and the regulation of commercial activities.[5] A newspaper cannot be held exempt from a search warrant authorising search for evidence of a crime which could be issued to an individual.[6] Freedom of the press will be violated only if the challenged act impinges on the operation of the press in an unequal manner.[7] Where notices of re-entry upon forfeiture of lease and of the threatened demolition of the building of the newspaper are intended and meant to silence the voice of the newspaper, it must logically follow that those notices constitute direct and immediate threat to the freedom of the press and are therefore void.[8] The press has no fundamental right to get governmental advertisement and the government is not under any obligation to publish its advertisements in any newspaper at all. But if the government publishes any advertisement in newspaper, it cannot select any newspaper arbitrarily and must do in terms of a definite non-discriminatory policy. If the government acts arbitrarily or discriminates between newspapers its actions will be void not only under art.27 but also under art.39.[9]

2.196 Freedom of the press is subject to the same restrictions as is the freedom of speech and expression. It would, however, be not legitimate for the government to subject the press to laws which take away or abridge the freedom of expression[10] or which would curtail and thereby narrow the scope of dissemination of information or fetter its freedom to choose its means of exercising the right or would undermine its independence by driving it to seek government aid.[11] It would be

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[1] *Associated Press v. NLRB*, 301 US 103; *Express Newspapers v. India*, AIR 1958 SC 578

[2] *Oklahoma Press Publication Co. v. Walling*, 327 US 186; *Express Newspapers v. India*, AIR 1958 SC 578

[3] *Sharma v. Srikrisna*, AIR 1959 SC 395

[4] *Sewakram v. Karajiya*, AIR 1981 SC 1514

[5] *Bennet & Coleman v. India*, AIR 1973 SC 213

[6] *Zurcher v. Standford Daily*, 98 Sup. Ct. 1970

[7] Schwartz - Constitutional Law, p.343

[8] *Express Newspapers v. India*, AIR 1986 SC 872

[9] *Ghulam v. State*, AIR 1990 J & K 1

[10] *Hamidul Huq Chowdhury v. Bangladesh*, 34 DLR 190 (Freedom of the pres is violated by a law which singles out the companies of the petitioner for take over of the printing establishments of the companies

[11] *Express Newspapers v. India*, AIR 1958 SC 578; *Bennet & Coleman v. India*, AIR 1973 SC 106

unreasonable for the State to single out the press for laying upon it excessive and prohibitive burdens which would restrict the circulation, impose a penalty on its right to choose the instruments for its exercise or to seek an alternative medium.[1] The State has wide power of taxation, but it would be an unreasonable restriction to impose a specific tax upon the press deliberately calculated to limit the circulation of information.[2] If the tax sought to be imposed is likely to affect the freedom of the press, there is a need to strike a balance between the social need for freedom of speech and expression and the governmental need for revenue. An imposition of excessive import duty may lead to a high rise in the price of newspaper materially affecting its circulation and such an imposition may be an unreasonable restriction of the freedom of speech and expression.[3] The provisions of art.39 will be violated if the government cancels a declaration under the Press law without giving an opportunity of being heard to the persons affected[4] or the statutory authority refuses to authenticate a declaration of a newspaper because of the opinion of the police about the political background of the person making the declaration[5] The right will be violated if the government subjects the press to a statutory wage structure which has no regard to its paying capacity and is beyond its financial capacity.[6] Recognising that a newspaper has both commercial and dissemination of news aspects, the Indian Supreme Court held that the freedom of speech cannot be curtailed with the object of placing restrictions on the business activities of a citizen.[7] In order to overcome the difficulty arising out of newsprint shortage, the Indian Government introduced a system of newsprint quota for the newspapers and imposed a few more restrictions on the use of the newsprint within the quota allowed. The policy was found to curtail the growth of big newspapers which could not increase the number of pages, page-area or periodicity by reducing circulation to meet their requirements even within their admissible quota. The Supreme Court

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[1] *Express Newspapers v. India*, AIR 1958 SC 578; *Bennett & Coleman v. India*, AIR 1973 SC 106; *Indian Express Newspapers v. India*, AIR 1986 SC 515; *Grossjean v. American Press Co.*, 297 US 233

[2] *Grosjean v. American Press co.*, 297 US 233

[3] *Indian Express Newspapers v. India*, AIR 1986 SC 515

[4] *Express Newspapers v. India*, AIR 1958 SC 578; *Bennet & Coleman v. India*, AIR 1973 SC 106

[5] *Fazlul Karim Selim v. Bangladesh*, 1981 BLD 344

[6] *P.T.I. v. India*, AIR 1974 SC 1044

[7] *Sakal Papers v. India*, AIR 1962 SC 305

held that the government could not in the garb of regulating the distribution of newsprint control the growth and circulation of newspapers; the newsprint policy cannot be allowed to become a newspaper control policy; while newsprint quota can be fixed on a reasonable basis, post-quota restrictions could not be imposed and the newspapers should be left free in determining the number of pages, circulation and editions within their fixed quota.[1]

2.197 *Pre-publication censorship* : Pre-publication censorship under normal circumstances will be violative of the freedom of speech and expression and freedom of the press. But in an emergent situation where there is danger to the breach of the peace[2] or danger to the security of State, an anticipatory action may not be an unreasonable restriction of the right guaranteed by art.39. Whether such a restriction will be unreasonable will depend upon the circumstances prevailing, the nature of the urgency, the duration of the restriction and the nature of the publication sought to be restricted.[3] Thus temporary restriction by way of pre-publication censorship of a certain class of publications to prevent breach of the peace during an emergency will be reasonable provided the affected party is afforded an opportunity of being heard. In such a situation it would not also be unreasonable to demand security from the press.[4] A permanent restriction in the form of pre-publication censorship may not be held reasonable unless reasonable safeguards against

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[1] *Bennett & Coleman v. India*, AIR 1973 SC 106

[2] *Babulal Parate v. Maharashtra*, AIR 1961 SC 884; *Madhu Limaye v. S.D.M. Monghyr*, AIR 1971 SC 2486

[3] *Virendra v. Punjab*, AIR 1958 SC 896 (S.2 of Punjab Special Powers Act permitted the government to prohibit publication of any particular matter in a newspaper for a maximum period of two months if it was satisfied that such action was necessary to prevent any activity prejudicial to the maintenance of communal harmony likely to affect public order. The law provided for representation by the aggrieved party to the government which upon consideration of the objection could modify or rescind the order. The law was challenged on the ground that it gave arbitrary and uncontrolled discretion to the government to curtail the freedom. The Supreme Court held that it was necessary to give the power to the government in the interest of public order and in view of the temporariness of the restriction and the provision for representation found the restriction to be reasonable. But the court found void the provision of s.3 which authorised the government to prohibit bringing into the State newspapers containing reports or articles on those matters as the said provision does not prescribe any limitation of time and does not provide for representation against the action.)

[4] Ibid

arbitrary action is provided.[1] In *Tofazzal Hossain v. East Pakistan*[2] s.9 of the East Pakistan Public Safety Ordinance, 1958 was challenged as being violative of the freedom of speech and expression. It conferred power on the government to pass an order for the purpose of securing the public safety or maintenance of public order requiring printers, publishers or editor to submit to the specified authority for scrutiny before publication all matters, or any matter relating to a particular subject or class of subjects[3] or prohibiting or regulating the making or publishing of any document or class of documents or any matter relating to a particular subject or class of subjects[4]. In this case an order was passed prohibiting publication of news relating to students' strike, agitation, unrest etc. Following the decision of *Virendra v. Punjab*[5] the High Court found the provision valid on the ground that of necessity the government must be given the discretion to act and the law providing the time limit for which the order may remain valid and representation against the order, the restriction was not unreasonable. The court was considering the *vires* of sub-clause (b) of s.9(1) which permitted restriction in respect of any particular subject or class of subjects. S.9(1)(a) of the law, however, permitted passing of an order in respect of all matters. All matters published in a newspaper cannot carry the possibility of affecting public safety or public order and the provision allowing pre-censorship in respect of all matters was unnecessarily overdrawn and could hardly pass the test of reasonableness.

2.198 Freedom of the press includes the right to publish information about cases pending in courts. In publication of information about pending cases the freedom of the press sometimes comes in conflict with the right to fair trial which is itself a fundamental right.[6] In order to ensure the right of an accused to a trial by an impartial jury, a judge in the American jurisdiction passed an order in a murder case prohibiting the press from publishing confessions or admissions and facts strongly implicative of the accused. The order of the judge came up for consideration in *Nebraska Press Association v. Stuart*[7]. The Supreme Court opined that the prior restraint came to the court with a heavy

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[1] *Bihar v. Misra*, AIR 1970 SC 1667
[2] PLD 1965 Dac 68
[3] S.9(1)(a)
[4] S.9(1)(b)
[5] AIR 1958 SC 896
[6] See *Sheppard v. Maxwell*, 384 US 333
[7] 427 US 539

presumption against its validity, which the order in issue failed to overcome as there was no finding that measures short of prior restraint would not have protected the accused's right. Having regard to the tone of the opinion, it was observed, "When the time comes for the Court to announce a general rule, it will be that prior restraint on the press is a constitutionally impermissible method for enforcing the right to a fair trial."[1] Our press often does not restrain itself in reporting crimes and the trial of offences, much to the anguish of the persons suspected. But the problem is not as acute in our country as it is in the American jurisdiction because we do not have a jury system and the problem in the American jurisdiction is mainly of finding an impartial jury. Even then the press should restrain itself as it cannot be said that the judge who is ultimately entrusted with the case has not already been influenced by the reports published in the newspapers. But more than that we have seen that pressure groups create a situation in which even a trained judge may find it difficult to remain impartial. Creation of such pressure amounts to interference with the administration of justice and should not be overlooked simply because the pressure has come through press reports.

2.199 *Pre-censorship of cinema films* : Though initially the exhibition of cinema films was treated purely as a commercial activity in the American jurisdiction, it is now settled that the freedom to exhibit movie pictures is included in the freedom of speech and expression[2] The same must be the position in our country as it may "affect public attitudes and behaviour in a variety of ways, ranging from direct espousal of a political or social doctrine to the subtle shaping of thought which characterises all artistic expression."[3] But as cinema films possess greater capacity of doing harm, specially to young people, it has been found desirable to have pre-censorship of cinema films and such pre-censorship will not be unconstitutional[4] provided a definite standard is laid down by law for the guidance of the censors.[5] If the standard laid down by law is vague or indefinite, it will be violative of the freedom of speech and expression.[6] The authority censoring films must balance the

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[1] Schwartz - Constitutional Law, p.340

[2] *U.S. v. Paramount Pictures*, 334 US 131

[3] *Kingsley Pictures Corporation v. Regents*, 360 US 684, 690

[4] *Times Film Corporation v. Chicago*, 365 US 436; *Paris Adult Theatre v. Slatons*, 413 US 49; *Abbas v. India*, AIR 1971 SC 481

[5] *Interstate Circuit v. Dallas*, 387 US 903

[6] *Times Film Corporation v. Chicago*, 365 US 436 (Censor Board authorised to deny licence if in its opinion the film in question is prejudicial to the best interest of the

literary, artistic, sociological and ethical merit of a film with its tendency to deprave and corrupt and must be responsive to social change and must go with the current climate.[1] Even though a law may lay down a definite standard for censorship, it may be violative of the freedom of speech and expression if it lacks procedural safeguards against arbitrary exercise of the power.[2]

FREEDOM OF OCCUPATION, RELIGION AND PROPERTY

2.200 Arts.40, 41 and 42 guarantee freedom of occupation, religion and property. They are dealt with together because of one common feature. Art.40 guarantees freedom of occupation subject to any restriction imposed by law. Art.41 guarantees freedom of religion subject to law and art.42 guarantees right to property subject to restrictions imposed by law. In all these three articles, there is no requirement of reasonable restriction or reasonable law and the restriction by law need not be on specific grounds. On the face of it Parliament may pass any law restricting, curtailing and even prohibiting exercise of these rights; the prohibition is on the executive which cannot invade these rights without the backing of law. It may, however, be kept in view that these three articles have been included in Part III as entrenched provisions limiting the plenary legislative power of Parliament and these provisions are to be construed accordingly. Art.18 of the Pakistan Constitution of 1956 provided, "Subject to law ... every religious denomination ... has the right to establish ... its religious institution." Literally interpreted, the Legislature could by law abolish such institutions and such an argument was advanced in *Jibendra Kishore v. East Pakistan*[3], but the Pakistan Supreme Court rejected the contention stating -

> In the High Court, Mr. Brohi's bold and categorical assertion that the rights, referred to in Article 18 are 'subject to law' and may, therefore, be taken away by law, succeeded. That assertion has been repeated

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people); *Joseph v. Wilson*, 343 US 495 (Censor Board authorised to deny licence if in its opinion the film is 'sacrilegious'); *U.S. v. Paramount Pictures*, 334 US 131 (Censor Board authorised to approve only the films which in its opinion would be of a moral, educational, or amusing and harmless character)

[1] *Raj Kapoor v. Laxman*, AIR 1980 SC 605, 608

[2] *Freedman v. Maryland*, 380 US 51; *Vance v. Universal Amusement Company*, 445 US 308

[3] 9 DLR (SC) 21

> before us, but I have not the slightest hesitation in rejecting it. 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 it may be taken away by the law. I am unable to attribute any such intent to the makers of the Constitution ...[1]

The court further observed –

> ... constitutional rights should not be permitted to be nullified or evaded by astute verbal criticism, without regard to the fundamental aim and object of the instrument and the principles on which it is based. If the language is not explicit, or admits of doubt, it should be presumed that the provision was intended to be in accordance with the acknowledged principles of justice and liberty.[2]

Thus it will not be proper to give a literal interpretation to the language of arts.40, 41 and 42 as it cannot be said that the framers of the Constitution intended to take away by the left hand what they conferred by the right hand. There is, however, a further reason for not giving a literal interpretation. Occupation and religion are important segments of 'liberty' sought to be protected by art.31 and, of course, 'property' comes within the ambit of that article. Hence, any law dealing with occupation, religion or property must be reasonable so as not to fall afoul of art.31. Art.31 ingrains and grafts reasonableness which operates like a free flowing stream running through the entire body of the Constitution and there is no place for unreasonableness or arbitrariness under our constitutional dispensation. Whatever law may be passed and whatever restriction may be imposed touching the guarantees of Arts.40, 41 and 42 must be reasonable to stand constitutional scrutiny. However, the inquiry as to the reasonableness of the restriction imposed by law will be a relaxed one; the test will be the one which is applied for ascertaining reasonableness under art.31.[3] We shall deal with these three rights separately with the assumption that any law touching on these rights must be reasonable and must not be arbitrary.

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[1] Ibid, para 38

[2] Ibid

[3] See para 2.103 and 2.105

FREEDOM OF TRADE, BUSINESS AND OCCUPATIONS

2.201 Art.40 provides that subject to any restriction imposed by law, every citizen possessing such qualification, 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. Dr.F.K.M.A.Munim observed, "The acceptance of socialism as one of the fundamental principles of State policy under the Constitution of Bangladesh has justifiably led to the omission of the qualifying phrase 'reasonable' before the term 'restriction'."[1] The observation does not seem to be correct. Neither in the Pakistan Constitution of 1956 nor in the Pakistan Constitution of 1962 restriction as regards this freedom was qualified by the expression 'reasonable' so that the question of omitting the expression 'reasonable' in art.40 does not arise. Art.12 of the Pakistan Constitution, 1956 provided as follows -

> Every citizen, possessing such qualifications, if any, as may be prescribed by law in relation to his profession or occupation, shall have the right to enter upon any lawful profession or occupation, and to conduct any lawful trade or business:
>
> Provided that nothing in this Article shall prevent -
>
> (a) the regulation of any trade or profession by a licensing system, or
>
> (b) the carrying on, by the Federal or a Provincial Government or by a corporation controlled by any such Government, of any trade, business, industry or service, to the exclusion, complete or partial, of other persons.

The constitution of 1962 in fundamental right no.8 reproduced the language of art.12. It can be seen on comparison that the meaning and content of the present art.40 is substantially the same as that of art.12 of the 1956 Constitution. Art.40 has omitted the proviso and instead added the expression 'subject to restriction imposed by law' to allow a licensing system and to widen the scope of restriction to protect any legitimate governmental interest. There are three important aspects in art.40 - (i) the right guaranteed is in respect of a trade, business or occupation which is lawful, (ii) qualifications can be prescribed by law for entry in such trade, business or occupation and (ii) Parliament may by law put restrictions on the exercise of the right. Dr. Munim observed,

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[1] The Rights of the Citizen under the Constitution and Law, p.287

"The use of the word 'lawful' before 'profession' etc. and of the word 'any' before 'restrictions' in this Article may arguably be viewed as indicating that this right is not actually intended to be a fundamental right."[1] It is submitted that Dr. Munim has taken a very rigid literal view and in doing that he neither considered Part III in its proper perspective, nor considered the real effect of arts.26 and 31 on the over-all enumeration of the rights in Part III. Munir CJ simply brushed aside such a contention in *Jibendra Kishore*[2] as did Kaikaus J in *Pakistan v. Syed Akhlaque Hussain*[3]

2.202 *Lawful trade or occupation* : Under art.40 in order to claim a fundamental right to carry on a trade or occupation, it must be a lawful trade or occupation.[4] It does not mean that Parliament can without any limitation make any trade or occupation unlawful. In *Progress of Pakistan Co, Ltd. v. Registrar, Joint Stock Companies*[5] Kaikaus J elaborately dealt with the meaning 'lawful' in art.12 of the Pakistan Constitution of 1956. He observed -

> I have not the slightest hesitation in rejecting the suggestion that the Legislature can declare the carrying on of any business or profession unlawful. A fundamental right is a limitation on the power of the Legislature and is a guarantee to a person or citizen, that such rights shall not be taken away by legislation. To say that the Legislature can pronounce a business to be unlawful would mean that there is no fundamental right in Pakistan with respect to trade, business etc. then why enact Article 12 at all? ... For my part, I have never had any doubt as regards the effect of the word `lawful' in Article 12 and the extent of the guarantee granted by this Article. The Article entitled the citizens of Pakistan to carry on any business, trade or profession with this condition only that the individual acts involved in it are not unlawful. If an act involved in a business, trade, profession or occupation, is such that if performed otherwise than as a part of a business, trade, profession or occupation, it is unlawful, then it cannot become lawful just because it is performed as a part of a business, trade or profession, that is, as a part of

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[1] The Rights of Citizen under the Constitution and Law, p.288

[2] 9 DLR (SC) 21, Para 38

[3] PLD 1965 SC 527, 580-581

[4] *Sultana Nahar v. Bangladesh*, 1998 BLD 363 (Since the profession of sex workers has not been declared unlawful by the Consitution or any law, the sex workers are entitled to claim protection under art.40)

[5] PLD 1958 Lah 887

> activity indulged in for the purpose of profit or income. That is the only limitation placed on the right to carry on a business, etc. The object of the Article was to grant the citizen the fullest right to carry on any business etc., but the word `lawful' had to be put in because if it did not exist the citizens may have claimed to make a business of an act that is an offence or is prohibited ... I would hold that Article 12 guarantees to the citizen the right to carry on any business, occupation, trade or profession (subject to a licensing system and a monopoly of the State) with this limitation only that the citizen is not entitled by virtue of the Article to do an act which, when done otherwise than as part of a business, etc., was unlawful. There is no other limitation of this fundamental right.

What Kaikaus J said about art.12 of the Pakistan Constitution of 1956 is true about art.40 of the Constitution with the exception that Parliament has power to impose a wider range of restrictions on trade and occupation under art.40.

2.203 The expression 'restriction' in art.40 must mean restriction as distinguished from 'prohibition'. Otherwise, art.40 will cease to be a fundamental right inasmuch as there will be no limitation on the power of Parliament in legislating in respect of trades and callings. To prevent the executive from infringing the right of the citizens no fundamental right is necessary because in the absence of any law the executive cannot interfere with the liberty of the citizens which includes their right to choose and carry on a trade or calling. Furthermore, there is no compulsion to treat 'restriction' as including 'prohibition' because if the act involved in any trade or calling appears to be pernicious, Parliament can pass a law prohibiting such trade or calling. When Parliament makes a law prohibiting a trade or calling, it can be challenged under art.40 read with art.31 as being unreasonable. Unless any legitimate governmental interest demands it, Parliament cannot make any individual act unlawful and *a fortiori* cannot make any profession, trade, business or occupation involving such act unlawful without infringing the guarantee of arts.31 and 40 of the Constitution. When a trade, business or calling is lawful, Parliament can impose reasonable restrictions in respect of such trade, business or calling in the public interest. If a restriction imposed by law is found to be unreasonable or arbitrary, it will be void under art.40 read with art.31.[1] In *Nasreen*

[1] *Chairman, REB v. Abdul Jalil*, 3 BLC (AD) 79 (The decision taken by Rural Electrification Board barring all ex-employees of the Board from participating in any

Fatema v. Bangladesh[1] a law was challenged on the ground that it restricted the right of a sponsor or director of any financial institution from becoming a director of an insurance company in violation of art.40. The High Court Division found that the restriction was put to prevent monopoly in the control of the money market and held the restriction to be reasonable. In *Dalmia Cement (Bharat) Ltd. v. India*[2] the Indian Supreme Court held that in the clash of competing rights of socio-economic justice of the producers of agricultural commodities and the individual right of a citizen to carry on trade or business, the latter has to yield place to the paramount social right. A balanced view of the development of the national economy requires to be taken into consideration to protect the interests of the farmers who produce jute or any other agricultural produce and in the interest of agro-based industry of the country and workers who deliver finished products.

2.204 Art.40 guarantees that every citizen, subject to the restriction that may be put by law and acquiring the requisite qualification prescribed, can choose and carry on any profession, occupation, trade or business[3] which is not unlawful. Though a citizen has a fundamental right to carry on any business of his choice, he has no right to carry on a business inherently dangerous to the community which may be prohibited or may be allowed only under licence[4]. The right to carry on business includes the right not to carry it on and no one can be compelled to do a business against his will.[5] But there is a difference between not doing a business and closing a business. Once a business is started, the right to close it down is not as wide or as large as the right to choose a business. Once a business is started, its closure involves many questions with which public interest may be intimately connected. There may be a question of adverse effect on the national economy, of interruption of supply of essential commodities or of unemployment of a large number of workers. The right of closure may be exercised *mala*

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tender is unreasonable)

[1] 49 DLR 542

[2](1996) 10 SCC 104

[3] *Saghir Ahmed v. U.P.*, AIR 1954 SC 728; *Abdul Jalil v. Chairman, REB*, 45 DLR 24 (right under art.40 is violated when without any backing of any law REB imposed restriction on ex-employees in entering into contract with REB and refused enlistment of an ex-employee as a contractor)

[4] *Cooverjee v. Excise Commissioner*, AIR 1954 SC 220; *Nasirwar v. M.P.*, AIR 1975 SC 360; *Khoday Distilleries v. Karnataka*, (1995) 1 SCC 574

[5] *Hathisingh Manufacturing Co. v. India*, AIR 1960 SC 923

fide to avoid the legitimate demands of the workers.

2.205 This article, however, does not confer any monopoly right to carry on any trade, business or profession and no one can complain against a governmental action which affects any monopoly situation he was enjoying.[1] A citizen cannot claim a fundamental right to carry on a business wherever he chooses, e.g., on the streets, or at any time and his right may be regulated in the public interest.[2] A citizen cannot object to the lawful actions of an authority on the ground that those actions are causing loss in his business. [3]

2.206 As restrictions may be imposed to meet the demands of legitimate governmental interest, Parliament may pass laws in the interest of public health and morals[4] or for the prevention of fraud[5], legislate to prescribe minimum wage rates[6] or hours of employment or opening or closing hours[7], or pass laws in the interest of health and welfare of the workers[8]. Parliament may also pass laws imposing safety and health standards on the employers[9], marketing laws to enable the producers to get a fair price[10], laws regulating the supply and distribution of essential goods[11], laws fixing the price of essential commodities[12], taxing laws[13], laws restraining the formation and

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[1] *Harnam Singh v. Regional Transport Authority*, AIR 1954 SC 190; *Nagar Rice Mills v. N.T.G. Brothers*, AIR 1971 SC 246

[2] *Pyare Lal v. Delhi Administration*, AIR 1968 SC 133; *Ibrahim v. Regional Transport Authority*, AIR 1953 SC 79

[3] *Abdul Momen v. Dhaka City Corp.*, 50 DLR 300

[4] *Maharashtra v. Himmatbhai*, AIR 1970 SC 1157; *Assam v. Sristikar*, AIR 1957 SC 414

[5] *Fedco v. Bilgrami*, AIR 1960 SC 415

[6] *Bijoy Cotton Mills v. Ajmeer*, AIR 1955 SC 33; *U. Unichovi v. Kerala*, AIR 1962 SC 12

[7] *Ramdhan Das v. Punjab*, AIR 1961 SC 1559; *Lincoln Union v. Northwestern Co.*, 335 US 525

[8] *Manohar Lal v. Punjab*, AIR 1961 SC 418

[9] *Atlas Roofing Co. v. Occupational Safety and Health Review Commission*, 430 US 442

[10] *Arunachala Nadar v. Madras*, AIR 1959 SC 300; *Jan Md. v. Gujarat*, AIR 1966 SC 385; *Porwal v. Maharashtra*, AIR 1981 SC 1127

[11] *India v. Bhana Mal Gulzari Mal*, AIR 1960 SC 475; *Ajit Singh v. Punjab*, AIR 1967 SC 856; *P.P. Enterprise v. India*, AIR 1982 SC 1016

[12] *Prag Ice Mills v. India*, AIR 1978 SC 1296; *Saraswati Syndicate v. India*, AIR 1975 SC 460

[13] *Balaji v. Income-tax Officer*, AIR 1962 SC 123; *M.A. Rahman v. A.P.*, AIR 1961 SC

operation of companies[1], laws providing for the settlement of industrial disputes[2] or laws regulating exports and imports[3].

2.207 *Prescription of qualifications* : Art.40 empowers Parliament to prescribe qualifications for particular professions and occupations. Though no restriction is put on the power of prescribing qualifications, all State institutions are required to act essentially in the interest of the public and prescription of qualifications for a particular profession or occupation must be in the public interest. Thus such a prescription must have a reasonable nexus with efficiency in such profession or occupation and other public interests. Otherwise such a prescription will be arbitrary and will amount to impermissible infringement of the freedom of occupation and business. If the legislature, on the pretext of prescribing qualifications, imposes conditions which have no relation to the fitness or suitability of the person seeking to enter a profession it will be void.[4] Requiring a person to take oath of loyalty to the government which has no connection with his fitness for a profession cannot be treated as a valid prescription of qualification.[5] The legislature may prescribe the qualifications to be required of a person in order that he may be authorised to engage in the practice of a certain profession or occupation requiring special knowledge or skill intimately connected with public welfare. Thus, the passing of an examination or compliance with other reasonable requirements may be prescribed as condition precedent to the exercise of the right to practise the professions of law, medicine, pharmacy, optometry, engineering etc and proper regulations may be made for the regular conduct of such professions. The Lahore Bench of the West Pakistan High Court held that qualifications can only be laid down for prospective entrants into a profession and cannot be retrospectively imposed to disqualify persons who have already entered upon that profession by virtue of their possessing the qualification required at the relevant time, but the Supreme Court reversed the decision stating that a person may be deprived by law of the right to

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[1] *Joseph Kuruvilla v. Reserve Bank*, AIR 1962 SC 1371

[2] *Basti Sugar Mills Ltd. v. Ram Ujagar*, AIR 1964 SC 355; *Godavari Sugar Mills Ltd. v. Kopargaon Taluka Sakhar Kamghar Sabha*, AIR 1961 SC 1016; *Moghal Tobacco Co. Ltd. v. Pakistan*, PLD 1959 SC 31

[3] *Daya v. Joint C.C.I.E.*, AIR 1962 SC 1796; *Glass Chatons Importers and Users Association v. India*, AIR 1961 SC 1514

[4] *Jones v. Portland*, 245 US 217

[5] *Cummings v. Missouri*, 18 L. Ed. 356

practice a profession.[1]

2.208 *Licence and permit* : The State has the right, in the public interest, to lay down reasonable conditions subject to which any trade or business can be carried on. If Parliament confers on the executive authority the power to grant or refuse a licence in a quasi-judicial manner[2] having regard to the conditions stipulated by Parliament and in accordance with the principles of natural justice[3] the restriction will not be unreasonable. Except in exceptional circumstances[4], the freedom of trade or business cannot be made dependent upon the absolute discretion of an administrative authority.[5] Thus if a law confers power on the administrative authority to grant or withhold or revoke a permit or licence in its absolute discretion, the law will be unreasonable.[6] If the statute conferring discretion does not lay down the guiding principles for the exercise of the discretion in the matter of granting, cancelling or refusing licence, it would be a case of unreasonable restriction on the freedom of business.[7] The standard laid down by the statute must be objective and the expressions like 'suitability of the applicant' or 'public interest' are vague and do not provide any guidance to the licensing authority.[8] The conditions imposed by the licence must not be onerous or arbitrary so as to virtually lead to the extinction of the business of the licencee.[9]

FREEDOM OF RELIGION

2.209 Art.41 guarantees the freedom of religion. The language of art.41(1) is exactly the same as used in art.18 of the Pakistan

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[1] *Pakistan v. Syed Akhlaque Hossain*, PLD 1965 SC 527

[2] *Chaturbhai v. India*, AIR 1960 SC 424

[3] *Mineral Development Co. v. Bihar*, AIR 1960 SC 468

[4] *Md. Faruk v. M.P.*, AIR 1970 SC 93 (a trade or business which is inherently dangerous to the community); *Harishankar Bagla v. M.P.*, AIR 1954 SC 465 (production, supply and distribution of essential commodities at the time of emergency); *Glass Chatons v. India*, AIR 1961 SC 1514 (trade or business affecting national economy, such as imports and exports)

[5] *Faruk v. M.P.*, AIR 1970 SC 93

[6] *Gunapati v. Ajmeer*, AIR 1955 SC 188; *Harisankar Bagla v. M.P.*, AIR 1954 SC 465

[7] *Dwaraka Prasad v. U.P.*, AIR 1954 SC 224; *Mineral Development Co. v. Bihar*, AIR 1960 SC 468

[8] *Banthia v. India*, AIR 1970 SC 1453

[9] *Seshadri v. District Magistrate*, AIR 1954 SC 747

Constitution of 1956 and in fundamental right no.10 of Pakistan Constitution of 1962. On the other hand, the language of art.41(2) is exactly similar to the language of clause (1) of fundamental right no.12 of the Pakistan Constitution of 1962. The guarantee provided by art.41(1) is not absolute. It provides that subject to law, public order and morality, (i) every citizen has the right to profess, practice or propagate any religion and (ii) every religious community or denomination has the right to establish, maintain and manage its religious institutions. As the guarantee under art.41(1) is stated to be 'subject to law' one may argue that Parliament has full plenary power even to take away this right. But such an argument was rightly rejected by the Pakistan Supreme Court in respect of art.18 of the Pakistan Constitution of 1956.[1] The expression 'subject to law' does not mean that the right to profess, practise and propagate can be taken away by law; it merely means that Parliament may by law regulate the manner of professing, practising and propagating religious beliefs and the working of religious institutions like waqf and debuttar.[2] Regulation of the manner of professing, practising and propagating religious belief, however, does not mean that there may be a law which would regulate the actual performance of religious rites; it means that if in the performance of the religious duties or rites certain secular steps have to be taken, then these steps may be regulated by law.[3] The right is not confined to religious belief, but extends to religious acts and observances and the propagation of religion.[4] In order to constitute a violation of the right there must be some tangible interference with religious acts and observances. Where a micro-wave relay station on the government land established near a temple does not interfere with the pilgrims' visit to the temple, the freedom of religion is not infringed.[5] No religion prescribes that prayers or religious act shall be performed by disturbing the peace of others, nor does it preach that these shall be performed through voice amplifiers and hence a law to curb noise pollution by the use of voice amplifiers or

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[1] See Para 2.200

[2] *Jibendra Kishore v. East Pakistan*, 9 DLR (SC) 21; *Durgah Committee v. Syed Hussain Ali*, AIR 1961 SC 1402

[3] *Abdul Ghani v. Pakistan*, PLD 1958 Lah 584 (the Court rejected the challenge regarding the system of drawing lots by which candidates for Haj were selected out of the total number of applicants.)

[4] *Commissioner H.R.E. v. Lakshmindra*, AIR 1954 SC 282; *Ratilal v. Bombay*, AIR 1954 SC 388; *Saifuddin Shaheb v. Bombay*, AIR 1962 SC 853

[5] *Sashankalal v. Pakistan*, 21 DLR 108

loudspeakers can be violative of the right under art.41.[1]

2.210 The term 'religion' has a reference to one's views of his relation with his Creator and to the obligation they impose of reverence of his being and character and of obedience to his will.[2] The freedom of religion embraces the concepts of freedom to believe and freedom to act.[3] Religious practices or performance of acts in pursuance of religious beliefs are as much part of a religion as faith and belief in particular doctrines.[4] The freedom also includes the right to hold no religious belief at all.[5]

2.211 The right to propagate one's religion means the right to communicate his belief to another person or to expose the tenets of that faith, but would not include the right to 'convert' another person to his faith.[6] But the latter person has the right to adopt another religion in the free exercise of his conscience. The right to propagate religion has to be exercised subject to the requirements of public order and safety. This article does not protect any wrong practised in the name of religion.[7] It does not extend to the doing, in the name of religion, acts which are offences under the law.[8] While the legislature may not interfere with mere profession or belief, law may step in when profession breaks out into open practices inviting breach of the peace or when belief, whether in publicly practising a religion or running a religious institution, leads to overt acts against public order.[9] The right under art.41(1) is subject to law, but the State may not regulate religious practices unless those run counter to public health, public order or morality or are economic, commercial or political activities associated with religious practices.[10] Hence it is necessary to consider whether the practices are essentially of

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[1] *Church of God v. KKRMC Welfare Assocn.*, AIR 2000 SC 2773

[2] 16A Am Juris 2d, Const., Para 465

[3] Ibid

[4] *Commissioner, H.R.E. v. Lakshmindra*, AIR 1954 SC 282

[5] *McGowan v. Maryland*, 366 US 420 (The constitutional guarantee of freedom of religion includes freedom from religion, with the right to believe, speak, write, publish, and advocate antireligious programmes)

[6] *Digyadarson v. A.P.*, AIR 1970 SC 181; *Stainislaus v. M.P.*, AIR 1977 SC 908

[7] *Bangladesh Anjuman-E-Ahmadiya v. Bangladesh*, 45 DLR 185 (forfeiture of a book outraging the religious belief of bulk of Muslims upheld)

[8] *Alver v. U.S.*, 245 US 366; *Davis v. Beason*, 133 US 333

[9] *Jibendra Kishore v. East Pakistan*, 9 DLR (SC) 21, Para 39

[10] *Ratilal v. Bombay*, AIR 1954 SC 388

a religious character or not.[1] Whether a particular religious practice is really an essential or integral part of a religion is to be decided by the court and the opinion of the leaders of the religious denomination is not final.[2] Without violating the constitutional guarantee, the State may enact laws to promote general welfare, public convenience and comfort. The State may regulate religious parades and processions in public places and streets. It has been held in the United States that a regulation requiring children to salute the American flag for being allowed to continue to attend the public schools denies the freedom of worship.[3]

2.212 Art.41(2) provides an absolute guarantee which can neither be restricted nor taken away. It provides that no student in an educational institution shall be required to receive religious instruction or to take part in or attend any religious ceremony or worship other than those of his own religion.

RIGHT TO PROPERTY

2.213 Art.42(1) provides that subject to any restriction imposed by law, every citizen shall have the right to acquire, hold, transfer or otherwise dispose of property.[4] The right cannot be affected by administrative order.[5] The article further provides that no property shall be compulsorily acquired, nationalised or requisitioned save by authority of law. The first part deals with the right in respect of property subject only to restrictions imposed by law.[6] The expression 'restriction' has to be understood as not including 'prohibition' or 'extinction' as otherwise the second part relating to acquisition or nationalisation will be surplusage. Furthermore, in such a case there was no necessity to include the State Acquisition and Tenancy Act in the First Schedule to the Constitution to grant it immunity from challenge on the ground of

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[1] *Saifuddin v. Bombay*, AIR 1962 SC 853

[2] *Durgah Committee v. Hussain*, AIR 1961 SC 1402; *Hanif Quraishi v. Bihar*, AIR 1958 SC 731 (sacrifice of cow has been held to be not an obligatory religious act enjoined by Islam)

[3] *West Virginia City Board of Education v. Barnette*, 319 US 624

[4] For meaning of 'property' see Para 2.114

[5] *Raj Kumar Behani v. Bangladesh*, 1995 BLD 633

[6] *Abdul Khaleque v. Court of Settlement*, 44 DLR 273 (enlistment of property of a citizen, who merely gave an option to migrate to Pakistan, as abandoned property is violative of the right to property)

violation of the provisions of the Constitution.[1] In placing a restriction on the right to property, Parliament cannot prohibit the exercise of the right or extinguish the right. If any restriction imposed by law has the effect of confiscating a property without acquisition or nationalisation under the authority of law, the restriction will be violative of art.42. S.95 of the State Acquisition and Tenancy Act provides that a usufructuary mortgage will be deemed redeemed on the expiry of seven years. By P.O. 88 of 1972 s.95A was inserted in the Act whereby a sale of an agricultural land with an agreement for reconveyance is deemed to be a usufructuary mortgage so that a property sold with an agreement for reconveyance revests in the seller on the expiry of seven years. In *Ali Ekabbar Farazi v. Bangladesh*[2] the High Court Division held s.95A to be violative of art.42 as it rendered the purchaser's right to property extinct, a result not permissible under art.42. The court held that a vested right to property cannot be extinguished except in the manner as provided in art.42(1) or art.47(1). An unreasonable restriction put on the right to transfer property may be violative of art.42.[3]

2.214 The expression 'restriction' is not qualified by the word 'reasonable'. But that does not mean that Parliament has unfettered power to impose any restriction it chooses. The right to property is protected by art.31 which mandates reasonable law to interfere with the right. The inclusion of the word 'reasonable' in this article would have subjected any restriction imposed by law to a stricter scrutiny. In the absence of this qualifying word, the scrutiny of the reasonableness of any restriction imposed by law under art.31 is a relaxed one.

2.215 The second part of art.42(1) provides for extinction of the right to property only by way of compulsory acquisition or nationalisation under the authority of law and an acquisition of property under any law cannot be called in question.[4] The article does not say that an acquisition, requisition or nationalisation of property must be for a public purpose. The question is whether Parliament can authorise acquisition, requisition or nationalisation for any purpose other than a

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[1] *Ali Ekabbar Farazi v. Bangladesh*, 26 DLR 394

[2] 26 DLR 395 (reversed in *Bangladesh v. Haji Abdul Gani*, 32 DLR (AD) 233 on the ground that P.O. 88 of 1972 is a protected law under art.47(2))

[3] *Chittaranjan v. Secy. Judicial Department*,17 DLR 451 (in this case the right to property was subject to 'reasonable restriction', but this may not be very material in respect of a challenge under art.40 of the Constitution)

[4] *M.A. Salam v. Bangladesh*, 47 DLR 280

public purpose. Art.42 cannot be interpreted in a way which will render the protection of art.31 nugatory. A law interfering with the right to property will not be reasonable under art.31 if it does not subserve any legitimate governmental interest and the combined effect of arts.31 and 42 is that any acquisition, requisition or nationalisation of property to be valid must be for a public purpose.

2.216 Art.42(2) as originally adopted permitted acquisition, nationalisation or requisition with or without compensation and provided that when a law provides for compensation, it should either fix the compensation or specify the principle of assessment of compensation and that such a law cannot be challenged on the ground that it provides for inadequate compensation. By a subsequent amendment[1] of this provision, the option to provide for acquisition, nationalisation or requisition without compensation has been taken away and after the amendment Parliament cannot pass a law authorising acquisition, nationalisation or requisition without payment of compensation. Adequacy of compensation, however, remains non-justiciable as before.[2]

2.216A If a man's property does not *ex facie* answer the description of abandoned property, inclusion of the property in the list of abandoned properties violates the right to property[3] and he can enforce his right under art.102(1) and the question of exhaustion of efficacious remedies cannot arise[4], and the High Court Division can exercise jurisdiction under art.102 even though the Court of Settlement rejected the application for the release of the property on the ground of limitation.[5]

PROTECTION OF HOME AND CORRESPONDENCE

2.217 "The right of sanctuary in one's house is the most ancient conception of individual liberty, and perhaps the most profound. A rifle butt against the door at midnight is not only tyrannical, it is tyranny itself."[6] The Fourth Amendment of the American Constitution provides, "The right of the people to be secure in their persons, houses, papers,

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[1] Validity of the amendment by Martial Law Proclamation Order is open to question.
[2] *Shahjahan Ali Khan v. Bangladesh*, 52 DLR 99
[3] *Nurun Nahar v. Bangladesh*, 49 DLR 432
[4] *Rahimuddin Bharsha v. Bangladesh*, 46 DLR 130; *Syeda Chand Sultana v. Bangladesh*, 48 DLR 547
[5] *Rehana Kamal v. Chairman, Court of Settlement*, 3 BLC 213
[6] Alfred H. Knight - The Life of the Law, p.124

and effects, against unreasonable searches and seizures, shall not be violated ...". The amendment recognises "the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion."[1] In the American jurisdiction, a man's house can be searched by police only under a warrant issued by an impartial magistrate on being satisfied of a probable cause. An exception to the requirements of both a warrant and probable cause is a search which is conducted pursuant to consent. Such a consent should not, however, be coerced, by explicit or implicit means, by implied threat or covert force.[2] A warrantless entry does not violate the constitutional guarantee where such entry is based on the consent of a person whom the police at the time of entry reasonably believed to possess common authority over the premises searched.[3] A search warrant must contain a description of the place to be searched and the thing to be seized.[4] The court found valid a search warrant listing items and adding 'other fruits, instrumentalities and evidence at this time unknown'.[5] In the English jurisdiction a man's home is his castle. In the famous case of *Entick v. Carrington*[6] Lord Camden observed, "By the laws of England, every invasion of private property, be it ever so minute, is a trespass. No man can set foot upon my ground without my licence, but he is liable to an action though the damage be nothing." In *Robson v. Hallett*[7] it was, however, held that a police officer coming to a house on lawful business has implied licence from the owner of the house and should be given a reasonable time to leave the house before he can be treated a trespasser.

2.218 Art.43 of the Bangladesh Constitution guarantees the privacy of home and correspondence and communications. It provides that every citizen shall have the right to be secure in his home against entry, search

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[1] *Silverman v. U.S.*, 365 US 505, 511
[2] *Schneckloth v. Bustamote*, 412 US 212
[3] *Illinois v. Rodriguez*, 497 US 177
[4] *Andresen v. Maryland*, 427 US 463
[5] Ibid
[6] [1765] 19 St. Tr. 1030; in *Malone v. Metropolitan Police Commissioner*, [1979] Ch. 344, the practice of telephone-tapping by the executive without any clear lawful authority was upheld on the ground that Malone could not point to any legal right of his which the government was under duty not to infringe. Malone, however, approached European Commission on Human Rights which found in his favour holding that the telephone-tapping violated art.8 of the European Convention on Human Rights relating to right to privacy, *Malone v. United Kingdom*, [1984] 7 EHRR 14
[7] [1967] 2 QB 939

and seizure and to the privacy of his correspondence and other means of communications. Only reasonable restrictions on this right can be imposed by law in the interest of the security of the State, public order[1], public morality or public health. Thus no police officer, nor any other public functionary can enter into the house of any citizen and conduct any search or seize any thing unless he is duly authorised under any law.[2] Any law which permits such entry, search and seizure must be a law made in the interest of the security of the State, public order, public morality or public health and must be a reasonable restriction on the right. If the restriction imposed has no nexus with the specified matters or is in excess of the requirement for which it is imposed, or if the object can be achieved by any less rigorous means, or if the law does not provide a way of checking arbitrary or illegal exercise of the power of search or seizure, it will be found invalid. In *Kharak Singh v. M.P.*[3] domiciliary visit at night by police to the house of a suspected person under the Police Regulation was found to be invalid in view of the fundamental right guaranteed by art.21 of the Indian Constitution which is similar to art.32 of the Constitution. Indian supreme Court found telephone-tapping to be a serious invasion of an individual's privacy.[4] Such actions will be illegal in Bangladesh under the specific provision of art.43. S.47 of the Code of Criminal Procedure permits a person acting under a warrant of arrest or any police officer authorised to arrest to enter any premises to effect arrest if he has reason to believe that the person sought to be arrested has entered in that premises. The government has a legitimate interest in apprehending a person suspected of crime and the provision is reasonable. S.97 of the Code authorises the court to issue a search warrant under certain specified conditions. Though the court cannot issue such a search warrant on the mere asking of the police and must apply its mind to the facts and circumstances of the case to be satisfied about the necessity of the search[5], it is debatable whether the provision permitting the court to issue a general search warrant without specifying the place or locality is a reasonable restriction.

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[1] For the meaning of 'public order' see Para 2.164 supra

[2] *Bangladesh v. H.M. Ershad*, 52 DLR (AD) 162

[3] AIR 1963 SC 1295

[4] *People's Union for Civil Liberties v. India*, AIR 1997 SC 568

[5] *Hoshide v. Crown*, 44 CWN 82; *Pagla Baba v. State*, AIR 1957 Or 130.

2.218A In *Amanullah v. Bangladesh*[1] the validity of s.117 of the Income Tax Ordinance, 1984 was challenged. The provision authorised specified income tax officer to issue order for search and seizure by a subordinate officer, if on information received, he has reason to believe that a person notified to produce documents would not produce it or any person has undisclosed valuable articles which represent wholly or partly his income. The corresponding provision in the previous Act made the provision of s.165 of the Code of Criminal Procedure applicable, which meant that the officer passing the order was not only to be satisfied, but was also required to record the reasons for his satisfaction. But there is no such requirement in the Ordinance of 1984. Two grounds were urged - (1) the restriction imposed on the right of privacy has no nexus with security of State, public order, public morality or public health and (2) the restriction imposed is unreasonable in that there is no safeguard against arbitrary search and seizure. The High Court Division held that the restriction imposed has nexus with security of State and public order. It is submitted that evasion of tax has generally no nexus with security of State or with public order and on those grounds the law cannot be sustained. On the other hand, evasion of tax may reasonably be treated as a matter of public morality. The court further decided that s.117 of the Income Tax Ordinance does not contain arbitrary power as the expression 'has reason to believe' implicitly requires the officer concerned to record his reasons which offers protection against arbitrary exercise of the power.[2]

2.219 In the American jurisdiction the expression `house' has been given extended meaning to include the business premises within the protection of the Fourth Amendment.[3] The language of the Amendment permits such an extended meaning. But art.43 is specific about the security of the home and in view of the language the protection of art.43 cannot be extended to business premises. Yet, because of the provisions of art.31, the business premises of a citizen cannot be subjected to search and seizure without authorisation of law and that law must be a reasonable one. The only difference is that a law relating to the business premises will not be subject to the stricter scrutiny of art.43.

2.220 The same principle applies in respect of correspondence and

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[1] W.P. no.2930 of 1992 (Unreported)

[2] See the decision of *Pooran Mal v. Director of Inspection*, AIR 1974 SC 348

[3] *Marshall v. Barlow's Inc.*, 98 Sup. Ct. 1816 (1978); *Michigan v. Tyler*, 98 Sup Ct. 1942 (1978)

communications. No law can be made impinging on the privacy of correspondence and communications of citizens unless there is a legitimate governmental concern in the interest of matters specified in art.43. S.95 of the Code of Criminal Procedure makes provision for dealing with documents, parcels and other things in the custody of postal or telegraph authorities for the purpose of any investigation, inquiry, trial or other proceeding under the Code. In *Malone v. Metropolitan Police Commissioner*[1] Megarry VC turned down a complaint against telephone-tapping on the ground of absence of any common law right of privacy, but in Bangladesh such telephone-tapping will be unconstitutional for violation of the privacy of communication unless a law permits it on any of the grounds of restriction mentioned in art.43. The Indian Supreme Court found telephone-tapping to be a serious invasion of an individual's privacy.[2]

2.221 Now the question is whether the fruits of an illegal search and seizure can be used in evidence in any trial or inquiry. The American Supreme Court held that the Fourth Amendment barred the introduction of evidence procured through unlawful search and seizure.[3] Though the Fourth Amendment has not specifically created the bar, the reason for the holding is that the exclusionary rule is necessary to deter intentional illegality on the part of the police and the rule is extended where its benefit as a deterrent outweighs the social cost of its use.[4] Where the police made an illegal search and passed over the fruits of illegal search to the federal tax authority, the American Supreme Court refused to apply the exclusionary rule in the tax proceedings as in its view the tax authority having not made the search, there was no question of producing a deterrent effect in tax proceedings.[5]

2.221A In England, the courts took the contrary view that if justice is to be done at a trial relevant evidence should not be excluded. The test of admissibility is whether the evidence is relevant in the matter in issue and there is no other test. If the evidence is relevant, it is admissible and

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[1] [1979] Ch 344

[2] *People's Union for Civil Liberties v. India*, AIR 1997 SC 568

[3] *Weeks v. U.S.*, 232 US 383; *Silverthorne Lumber Co. v. U.S.*, 251 US 385; *Mapp v. Ohio*, 367 US 643

[4] *U.S. v. Ceccolini*, 98 Sup. Ct. 1054 (1978); *Franks v. Delaware*, 98 Sup. Ct. 2674 (1978)

[5] *U.S. v. Janis*, 428 US 433

the court is not concerned with how the evidence was procured.[1] In *Malkani v. Maharashtra*[2] the Indian Supreme Court relied on *Kuruma*, but from this it cannot be said that the court decided against the American exclusionary rule in respect of evidence procured in violation of art.21 inasmuch as the court, in fact, held that the tape recording obtained by the police officer did not violate art.21 as it was obtained with the consent of the party who talked on telephone. In *Pooran Mal v. Director of Inspection*[3] the court gave a clear finding in favour of rejecting the exclusionary rule. The High court Division followed the English principle without giving much thought to the considerations which weighed with the American Supreme Court in applying the exclusionary Rule.[4] It is, however, submitted that the non-application of the exclusionary rule has the effect of undermining the guarantee of treatment in accordance with law under art.31. The present performance of the police in Bangladesh demands the application of the exclusionary rule and no legitimate governmental interest can suffer by the application of the rule as the police can always obtain a search warrant from the court.

RIGHT TO ENFORCE FUNDAMENTAL RIGHTS

2.222 Art.44(1) provides that the right to move the Supreme Court for enforcement of any of the fundamental rights is itself a fundamental right. Art.44(2) enables Parliament to confer the jurisdiction to enforce

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[1] *Kuruma v. R.*, [1955] AC 197; *Herman King v. R*, [1969] AC 304; *R. v. Sang*, [1980] AC 402. S.78 of the Police and Criminal Evidence Act, 1984 provides that the court may refuse to allow evidence for the prosecution which would have an adverse effect on the fairness of the proceeding. In *R v. Khan,* [1996] 3 All E.R. 289, the police obtained certain evidence by placing surveillance device on Khan's property in violation of the right to privacy of home and correspondence as protected by art.8 of the European Convention on Human Rights and the question arose as to the admissibility of the evidence. Though, in the facts of the case, the House of Lords held the evidence admissible, it accepted that if evidence had been obtained in circumstances which involved an apparent breach of the Convention, then it is a matter which may be relevant to the exercise of the power under s.8 of the Police and Criminal Evidence Act. After Human Rights Act, 1998 has been passed, it is to be seen how the English courts treat a piece of evidence procured in violation of the right to privacy of home and correspondence.

[2] AIR 1973 SC 157

[3] AIR 1974 SC 348

[4] *Amanullah v. Bangladesh,* W.P. No.2930 of 1992 (Unreported)

fundamental rights on any other court, but such conferment cat derogation of the power of the Supreme Court under art.102(1), which means that such other court may be given concurrent, but not exclusive, power of enforcement of fundamental rights. The Supreme Court must always have the power of enforcement of fundamental rights.[1]

SAVING OF CERTAIN LAWS

2.223 Art.45 provides that no challenge on the ground of violation of fundamental rights guaranteed by Part III will be available in respect of any provision of a disciplinary law relating to the members of a disciplined force, which is a provision limited to the purpose of ensuring the proper discharge of duties by members of the disciplined force or the maintenance of discipline in that force. Art.45 saves only a law of the specified kind and not any action. Thus where a fundamental right is violated by an action, that action shall not be immune from attack.[2] But if the violation is authorised by a law of the kind mentioned in art.45 no challenge can be maintained.[3] Art.152 defines 'disciplined force' as meaning the army, navy or air force, the police force and any other force declared by law to be a disciplined force. Applying the principle of *ejusdem generis* 'any other force' must mean a force similar to those which have been specifically mentioned and for the application of art.45 Parliament may declare any force engaged in the defence of the country or maintenance of law and order within the country as a disciplined force. Art.152 further defines 'disciplinary law' as being a law regulating the discipline of any disciplined force. In order to attract the provision of art.45 the law must be one which seeks to regulate the discipline of the disciplined force and only those provisions of such disciplinary law will be immune from challenge as are limited to the purpose of ensuring the proper discharge of duties of the members of the disciplined force and the maintenance of discipline in that force.

2.224 In view of the provisions of art.46 violation of fundamental rights cannot be urged in respect of any law that may be passed by Parliament making provisions to indemnify any person in the service of the Republic or any other person in respect of any act done by him in

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[1] For further discussion see Para 5.18 - 5.27

[2] *Major Gen. Moinul Hossain Chowdhury v. Bangladesh*, 50 DLR 370; see *Col. Md. Hasmat Ali v.Bangladesh*, 47 DLR (AD) 1

[3] *New Ideal Engineering Works v. Bangladesh Shilpa Bank*, 42 DLR (AD) 221

connection with the national liberation struggle or the maintenance or restoration of order in any area in Bangladesh or to validate any sentence passed, punishment inflicted, forfeiture ordered, or other act done in such area.

2.225 Art.47(1) creates further immunity from challenge on the ground of violation of fundamental rights in respect of any law making provisions regarding matters specified in art.47(1) if Parliament expressly declares in the law that the provisions are made to give effect to any of the fundamental principles of State policy set out in Part II. Any law in existence before the commencement of the Constitution may also be made immune from challenge if Parliament by amendment makes such a declaration in the existing law. The framers of the Constitution made this provision with the intent to protect welfare measures in furtherance of the fundamental principles of State policy and provided that the declaration of Parliament in the law will create the immunity. As these principles of State policy are a guide to interpretation of the Constitution, they are to be kept in view while interpreting the provisions relating to the fundamental rights.[1] In case of any conflict between these principles and the fundamental rights, the court will try for a harmonious interpretation so as to give effect to both, but if that is not possible, these principles cannot override the fundamental rights[2] except where a law comes within the purview of art.47(1).

2.226 Now the question arises whether the immunity from challenge on the ground of violation of fundamental rights will be available from the parliamentary declaration if *ex facie* there is no nexus between the law and any of the fundamental principles of State policy or, in other words, whether the court can go behind the parliamentary declaration. The court in not giving effect to the declaration will be interfering in a matter which has been left to Parliament to decide, but at the same time ignoring the want of nexus will permit violation of the terms of the Constitution. It can be seen that the corresponding article in the Indian Constitution[3] provided that such a parliamentary declaration shall not be called in question in any court on the ground that the law does not give effect to State policies. The Indian Supreme Court found this provision

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[1] *ABSK Sangh v. India*, AIR 1981 SC 298
[2] *Hanif Qureshi v. of Bihar*, AIR 1958 SC 731
[3] Art.31A

invalid.[1] But art.47(1) does not contain any such provision. Having regard to the fact that there is no express ouster of the jurisdiction of the court and that the Supreme Court has the duty to see that the mandate of art.7 is not violated, the better view will be that the court will be loath to interfere, and will refuse to give effect to the declaration only if, after taking a liberal view in favour of the parliamentary declaration, the law is found to have no nexus with any of the fundamental principles of State policy.

2.227 Art.47(2) provides that the laws mentioned in the First Schedule and the amendments of such laws shall be immune from challenge on the ground of inconsistency with any provision of the Constitution. As such, no provision of any law specified in the First Schedule including the amended provisions of such laws can be declared void by the court because of inconsistency with any provision of Part III of the Constitution.[2] The proviso to art.47(2) originally provided that nothing in art.47(2) will prevent modification or repeal of those laws, but any Bill for modification or repeal which had the effect of divesting the State of any property or of enhancing any compensation should not be presented to the President for assent unless the Bill had been passed by the votes of not less than two-thirds of the total number of members of Parliament. But this proviso has been substituted by a proviso reading 'Provided that nothing in this article shall prevent any amendment, modification or repeal of any such law'.[3]

EFFECT OF VIOLATION OF FUNDAMENTAL RIGHTS

2.228 Art.26(1) provides that all existing law inconsistent with the provisions of Part III shall, to the extent of inconsistency, become void on the commencement of the Constitution, while art.26(2) provides that the State shall not make any law inconsistent with any provisions of Part III, and any law so made shall, to the extent of inconsistency, be void. Questions arise as to whether a law inconsistent with the provisions of

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[1] *Kesavananda Bharati v. Kerala*, AIR 1973 SC 1461; *Minerva Mills v. India*, AIR 1981 SC 1789

[2] see *Bangladesh v. Haji Abdul Gani*, 32 DLR (AD) 233; *New Ideal Engineering v. BSB*, 42 DLR (AD) 221; *Bangladesh Bank v. Abdul Mannan*, 46 DLR (AD) 1; *Mokarram Hossain v. Secretary, Ministry of Cabinet Affairs*, 31 DLR (AD) 64 (requirement of art.135(2) need not be fulfilled for dismissal under P.O. 67 of 1972)

[3] Validity of the amendment is open to question

Part III becomes void *ab initio* or simply unenforceable and whether the effect of inconsistency is the same in respect of the pre-constitution and post-constitution laws.

2.229 The American Constitution does not contain any provision similar to art.7 or art.26 of the Constitution. Applying the general principles of constitutional law[1] the American Supreme Court held early that an unconstitutional law is in reality no law and is wholly void; it imposes no duties and creates no rights and it confers no power or authority and justifies no act performed under it[2]. But an all-inclusive statement of a principle of absolute retroactive invalidity was later found to be not justified.[3] It was held that an unconstitutional statute is not necessarily a nullity; it may have consequences binding upon people.[4] Proceeding on the principle that a statute declared unconstitutional is void in the sense that it is inoperative or unenforceable and remains in a dormant state or hibernation, it was held by the federal Court of Appeal that a statute once declared unconstitutional and later held to be constitutional does not require re-enactment to restore its operative force.[5]

2.230 The Indian Constitution contains art.13 which is similar to art.26 of the Constitution. So far as the pre-constitutional laws are concerned, the Indian Supreme Court held that the provisions relating to fundamental rights are not retrospective in operation on the commencement of the Constitution[6], and any pre-constitution law, to the extent of inconsistency with fundamental rights, is void in the sense that it is unenforceable; when it was passed it was valid and with the commencement of the constitution its operation is eclipsed by the provisions of the constitution[7]. If the constitution is so amended as to remove the inconsistency, the law becomes operative without re-enactment.[8] But the law remains valid all the time as against those who

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[1] *Marbury v. Madison*, 2 L. Ed. 60

[2] *Ex parte Royall*, 117 US 241; *Norton v. Shelby County*, 118 US 425; *Chicago I & L.R. Co. v. Hackett*, 228 US 559; *Osborne v. President, Director & Co. of Bank*, 22 US 738

[3] *Chicot County Drainage District v. Baxter State Bank*, 308 US 371

[4] *Poulos v. New Hampshire*, 345 US 395

[5] *Jamish v. Morlet*, 86 A 2d. 96

[6] *Keshavan v. Bombay*, AIR 1951 SC 128; *Pannalal v. India*, AIR 1957 SC 397

[7] *Keshavan v. Bombay*, AIR 1951 SC 128; *Behram v. Bombay*, AIR 1955 SC 123

[8] *Deepchand v. U.P.*, AIR 1959 SC 648; *Mahendra v. U.P.*, AIR 1963 SC 1019

are not entitled to fundamental rights.[1] So far as post-constitutional law, the Indian Supreme Court held the view that such a law is void *ab initio*[2] and anything done under the unconstitutional law, whether closed, completed or inchoate, will be wholly illegal[3]; such a law is not revived by any subsequent event[4]. The court seems to have shifted from this position in *Gujarat v. Shri Ambica Mills*[5] wherein it took the view that where fundamental rights have been conferred only on some persons, natural or juristic, a pre-constitution or post-constitution law contravening those rights is void qua those persons on whom the rights have been conferred, but is valid qua other persons on whom those rights have not been conferred and it cannot be said that such a law is still-born or *non est*; the doctrine of eclipse equally applies to pre-constitution and post-constitution laws which violate rights conferred only on some persons.

2.231 The Pakistan Constitution of 1956 contained provisions similar to art.26 of the Constitution. In *East Pakistan v. Mehdi Ali Khan*[6] the Pakistan Supreme Court was dealing with a pre-constitution law and following the line adopted by the American Supreme Court made a distinction between the legislature's inherent lack of power to enact a law in which case the law is void *ab initio* and a limitation put on the power of a competent legislature which renders the law void only to the extent of inconsistency in the sense that it cannot be applied to a particular case. Art.6 of the Pakistan Constitution of 1962 contained a similar provision. In *Abul A'la Moudoodi v. West Pakistan*[7] an observation was made making a distinction between pre-constitution and post-constitution laws stating that contravention of fundamental rights would render a post-constitutional law void *ab initio*. In *Ful Chand Das*

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[1] *Keshavan v. Bombay*, AIR 1951 SC 128; *Behram v. Bombay*, AIR 1955 SC 123

[2] *Deepchand v. U.P.*, AIR 1959 SC 648; *Mahendra v. U.P.*, AIR 1963 SC 1019

[3] *Keshavan v. Bombay*, AIR 1951 SC 128

[4] *M.P. v. Bharat Singh*, AIR 1967 SC 1170

[5] AIR 1974 SC 1300

[6] 11 DLR (SC) 319

[7] 17 DLR (SC) 209, per Hamoodur Rahman J, "In case of a law made after the declaration of fundamental rights the Constitution has placed a complete bar on the power of the Legislature to make any law which takes away or abridges any right conferred by the constitution itself. Such law, if made in contravention of clause (2) of Article 6, is to be void ab initio but in case of an existing law, clause (1) of the said Article, it appears, makes a distinction."(Para 185)

v. Md. Hammad[1] the Appellate Division took the view that a post-constitution law coming within the mischief of art.6(2) of the Pakistan Constitution of 1962 was void *ab initio*.

2.232 Under art.26(1) a pre-constitution law inconsistent with any provision of Part III will be inoperative and unenforceable and it may be operative again if the particular provision of the Constitution with which it is inconsistent is amended so as to remove the inconsistency. But under art.26(2) a post-constitution law will be void *ab initio* for lack of competence of Parliament to the extent of inconsistency with any provision of Part III. Thus if any law is violative of any fundamental right which is available for the citizens only, the law will be invalid qua the citizens, but not qua the non-citizens. On the other hand, if any law is found inconsistent with any provision of the Constitution other than Part III, the law will be void *ab initio* whether it be pre-constitution or post-constitution law.

2.233 Like other laws, the provisions of the Constitution cannot be interpreted to give them retrospective effect unless those are expressly or by necessary implication made retrospective in operation. The provisions of Part III have not been given any retrospectivity. The effect of inconsistency stated in art.26 does not automatically attach unless the court declares a law to be inconsistent with the provisions of Part III. But once the declaration is given, the law to the extent of inconsistency becomes inoperative and unenforceable from the commencement of the Constitution in case of pre-constitution laws and from the date of enactment in case of post-constitution laws. A post-constitution law enacted during an emergency when enforcement of fundamental rights remain suspended, remains enforceable till fundamental rights are restored or the emergency lifted.

2.234 As the provisions of Part III are not retrospective in operation[2], art.26 does not affect the transactions past and closed or enforcement of liabilities and rights incurred or accrued under the inconsistent law before the commencement of the Constitution[3]. Any action taken under any law prior to the commencement of the Constitution cannot be challenged after the commencement of the Constitution on the ground of

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[1] 34 DLR (AD) 361 (per R. Islam J)

[2] *Rajendraswami v. HRE, Commission of HRCE*, AIR 1965 SC 502; *Abul A'la Moudoodi v. West Pakistan*, 17 DLR (SC) 209

[3] *Keshavan v. Bombay*, AIR 1951 SC 128; *Abul A'la Moudoodi v. West Pakistan*, 17 DLR (SC) 209

violation of fundamental rights.[1] But an unconstitutional procedure prescribed by a pre-constitution law cannot be followed in respect of any proceeding pending at the commencement of the Constitution or in respect of a new proceeding instituted with regard to a pre-constitution right or liability as there is no vested right or liability in respect of procedure in the absence of any provision to the contrary.[2] However, if the proceedings had been completed or become final before the commencement of the Constitution, nothing in Part III can operate retrospectively to affect those proceedings.[3] The validity of that part of the proceeding which had taken place under the inconsistent law prior to the commencement of the constitution cannot be questioned.[4] Yet where an executive action is sought to be taken under a pre-constitution law after the commencement of the Constitution, it can be challenged without involving a challenge to the validity of the law.[5] Where though the deprivation of the right was made by a pre-constitution order and the deprivation is continued day by day, the order becomes void because of the violation of fundamental right.[6]

2.235 *Doctrine of severability* : As a law inconsistent with the fundamental rights is void to the extent of inconsistency, the doctrine of severability comes into play. When a part of a law is found invalid and the invalid part is separable from the valid part, that is, the nature or object or the structure of the law would not be changed by the omission of the invalid part, only the invalid part of the law is to be declared void leaving the rest to be operative.[7] The intention of Parliament is the determining factor in ascertaining whether the invalid part is separable from the valid part and the question is whether Parliament would have enacted the valid part without the invalid part.[8] When a valid part of the law is inextricably bound up with the part found invalid so that the valid part cannot independently survive, or upon a whole review of the matter

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[1] *Deep Chand v. U.P.*, AIR 1959 SC 648; *Mahendra v. U.P.*, AIR 1963 SC 1019

[2] *Lachman Das v. Bombay*, AIR 1952 SC 235

[3] *Abdul Khader v. Mysore*, AIR 1953 SC 355

[4] *Syed Qasim Razvi v. Hydrabad*, AIR 1953 SC 156

[5] *Zilla Parishad v. K.S. Mills*, AIR 1968 SC 98

[6] *Santi Swarup v. India*, AIR 1955 SC 624

[7] *Hinds v. The Queen*, [1976] 1 All E.R. 353; *R.M.D. Chamabaugwalla v. India*, AIR 1957 SC 628; *Laxmi Khandsari v. U.P.*, AIR 1981 SC 873

[8] *A.G. for Alberta v. A.G. for Canada*, 1947 AC 503, 518; *Chamarbaugwalla v. India*, AIR 1957 SC 628; *Harakchand v. India*, AIR 1970 SC 1453; *Kihota Hollohon v. Zachilhu*, AIR 1993 SC 412

it is seen that Parliament would not have enacted at all that which survives without enacting the part found *ultra vires*, the whole legislation is to be struck down.[1] Even when the valid parts are distinct and separate, but the valid and invalid parts form part of a single scheme intended to operate as a whole or even though the invalid part is separate and not part of a single scheme if what is left after omitting the invalid part is so thin or truncated as to be in substance different from what emerged after enactment by Parliament or if after omitting the invalid part, the valid part cannot be enforced without making alterations or modifications, the entire law must be declared void.[2] The separability of the valid and invalid provisions of a statute does not depend on whether the law is enacted in the same section or different sections; it is not the form, but the substance of the matter that is material and that has to be ascertained on an examination of the Act as a whole and of the setting of the relevant provisions therein.[3]

2.236 There may be another situation in which the doctrine of severability may come into play. A law may be found to be violative of a fundamental right and void as to its application only to a part of its subject matter or with respect to some class of persons or state of facts. The law will be held void in respect of that part of the subject matter, class of persons or the state of facts leaving the law enforceable in respect of the rest if the two parts are found severable.[4] Otherwise, the entire law is to be declared void.

2.237 *Waiver of fundamental rights* : The question arises as to whether a fundamental right can be waived. It has been held in the Indian jurisdiction that there cannot be estoppel against the Constitution and a person cannot waive any of the fundamental rights guaranteed by the Constitution as fundamental rights have been incorporated in the Constitution on grounds of public policy and pursuant to the objectives

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[1] *Anwar Hossain Chowdhury v. Bangladesh*, 1989 BLD (Spl) 1, 113; *Bihar v. Kameshwar*, AIR 1952 SC 252

[2] *Chamarbaugwalla v. India*, AIR 1957 SC 628; *Sewpujanrai v. Collector of Customs*, AIR 1958 SC 845

[3] *Chamarbaugwalla v. India*, AIR 1957 SC 628

[4] Cooley - Constitutional Limitations, vol.1, p. ; 16 Am Juris 2d, Const. Law, Para 273; *Bombay v. Balsara*, AIR 1951 SC 318 (a law prohibited manufacture, marketing and sale of liquor; liquor was defined to include spirit of alcohol, wine, beer and other liquids consisting of or containing alcoholic spirit; the Court found the law invalid in respect of liquid medicinal and toilet preparations and declared the law void so far as it related to liquid medicinal and toilet preparations).

declared in the preamble.[1] The American Supreme Court holds the contrary view. A person may, however, be precluded from challenging the validity of a law under which he has received a benefit. But a fundamental right cannot be lost merely on the ground of non-exercise of it.

[1] *Basheshar Nath v. CIT*, AIR 1959 SC 149