Chapter 6

THE CONSTITUTION RESTORED (1986) AND THE CONSTITUTION (8TH AMENDMENT) CASE

1. A lull and a gush

With the revived Constitution in full bloom during 1979-82, the Supreme Court saw a spate of constitutional litigations springing up from various quarters. It was as if the cork of the constitutional bottle was opened and the pent-up constitutional injuries gushed out of the corked bottle in a fury. All this came to a halt in 1982 when Martial Law was clamped. Even pending writ petitions abated. When the Supreme Court started functioning with revived constitutional jurisdiction from the 11th November, 1986 the High Court Division lay fragmented into 7 parts. All constitutional matters originate by way of an application under Article 102 of the Constitution in the High Court Division, but the High Court Division was a shadow of its former self after the Constitution was revived and such debilitating situation was hardly conducive to constitutional litigation. The revocation, therefore, did not make any difference, it was only in 1988 that the Supreme Court became seized with a constitutional issue of momentous importance, triggered off by the Eighth Amendment to the Constitution.

2. The Eight Amendment

The original Article 100 of the Constitution was as follows :

> "100. The permanent seat of the supreme Court shall be in the capital, but sessions of the high Court Division may be held at

such other place or places as the Chief Justice may, with the approval of the President, from time to time appoint."

On the 8th May, 1982 General Hussain Muhammad Ershad as Chief Martial Law Administrator amending the Schedule to his Proclamation of the 24th March, 1982 (which has earlier been referred to as a mini-constitution) assumed powers to set up permanent Benches of the High Court Division with seats at such places and for such areas as he may specify by notification. Permanent Benches were set up initially at 3 places – Rangpur, Comilla and Jessore and later at 3 other places – Chittagong, Sylhet and Barisal. Areas under their respective jurisdictions were specified. The High Court Division at Dhaka continued to function, albeit with a truncated jurisdiction. Judges were transferred to the six permanent Benches. By a further amendment of the Proclamation by Proclamation Order No. III of 1986, dated the 17th June, 1986, these permanent Benches were designated as Circuit Benches and it was provided that when Article 100 of the Constitution is revived, the Circuit Benches shall be deemed to he sessions of the High Court Division at Dhaka under that Article. Martial Law was withdrawn by a Proclamation on the 10th November, 1986 and the Constitution was also fully revived on the same date. The Constitution (Seventh Amendment) Act, 1986 Act 1 of 1986) was published in the official Gazette on the 11th November, 1986. By the Seventh Amendment Proclamations etc., were "ratified and confirmed" and "declared to have been validly made" not to be "called in question in or before any court, tribunal or authority on any ground whatsoever." It was quickly realised that Proclamation Order No. III of 1986 dated the 17th June, 1986 was no longer an operative law and therefore the Chief Justice issued a fresh notification on the 24th November, 1986 in exercise of his powers under Article 100 appointing with the approval of the President the same six places where Circuit Benches were functioning

during the Martial Law period to be the places in which sessions of the High Court Division may be held on such dates and for such period as may be specified by him. The Chief Justice issued six other notifications of the same date specifying the jurisdiction to be exercised by each session and the areas covered by them.

These notifications raised eyebrows as to their constitutional validity. Lawyers continued a sustained and powerful agitation and movement since 1986 against the dismantling of the High Court Division. The Chief Justice's Notifications added fuel to the fire.

Perhaps to set at rest the unrest thus created, the Constitution (Eighth Amendment) Act, 1988, Act No. XXX of 1988, was enacted on the 9th June, 1988 substituting Article 100 altogether, providing that the High Court Division shall have a permanent Bench each at the same places where Circuit Benches and Sessions were held during the Martial Law period and the period following. Judges of the High Court Division were made transferable to the permanent Benches. In consultation with the Chief Justice the President shall assign the area in relation to which each permanent Bench shall have jurisdiction, powers and functions conferred or that may be conferred on the High Court Division by the Constitution or any other law. The High Court Division at Dhaka shall have like jurisdictions, powers and functions over the unassigned area. The Chief Justice shall make rules to provide for all incidental, supplemental or consequential matters relating to the permanent Benches.

On 11-6-88 the President issued Notifications assigning areas of the six permanent Benches and on the same date the Chief Justice issued Notifications relating to the permanent Benches. The amendment and the Notification were counterproductive. The unrest was intensified.

3. Constitution (8th Amendment) Case

A. The Facts and the Contentions

By two Writ Petitions the amended Article 100 and the Notification of the Chief Justice dated 11-6-88 were challenged as *ultra vires*. A Division Bench of the High Court Division summarily dismissed the writ petitions on the 15th August, 1988. Leave was granted by the Appellate Division. This appeal, Anwar Hossain Chowdhury vs. Bangladesh, 1989 BLD (Spl.) 1 = 41 DLR (AD) 165, along with two other appeals, is popularly known as the Constitution (8th Amendment) case.

The main ground on which the amendment of Article 100 was challenged was that the High Court Division of the Supreme Court with plenary judicial power over the Republic is a basic structure of the Constitution which cannot be altered or damaged and the amendment is void having rendered the High Court Division with plenary judicial power over the entire Republic non-existent.

The basis for this argument is that the power of amendment of the Constitution under Article 142 is a power under the Constitution and not above and beyond it and is not an unlimited power. The concept that Parliament has unlimited power of amendment is inconsistent with the concept of supremacy of the Constitution embodied in the Preamble and Article 7 of the Constitution. Article 7 itself is basic, fundamental and unalterable. It is a question of construction of the word "amendment" which has to be interpreted in the context and scheme of the whole Constitution. Read with the Preamble and Article 7, it means that there is an implied limitation on the power of amendment and that the basic structure of the Constitution cannot be altered or damaged and that 'amendment' can only make the Constitution more "complete, perfect or effective".

This argument was countered by the State by stating that independence of judiciary and separation of powers are basic features of our Constitution but the impugned amendment has not affected either of the two. The makers of the Constitution have imposed no limitation on the power of amendment of "any provision" of the Constitution. The amending power cannot be limited by some vague doctrine of repugnancy to the Preamble and Article 7. The argument that Parliament cannot change the basic structure of the Constitution is untenable. There cannot be any implied limitation to Parliament's power of amendment of the Constitution. The power of amendment under Article 142 is a constituent power, not an ordinary legislative power.

Although the Appellate Division by a majority of 3:1 struck down the impugned amendment of Article 100 and the Notification it remains to be seen how the issues of implied limitation to the power of amendment, difference between legislative power and constituent power, the meaning of the word 'amendment' and the basic structure doctrine have been treated in its hands.

B. The Majority Judgment.

(i) Judgment of B. H. Chowdhury, J.

On the question of implied limitation to the power of amendment. B.H. Chowdhury. J. has been unduly economic, having devoted for all practical purposes only one paragraph (Para 184 in DLR. Para 166 in Spl. BLD) to it, although his treatment of the evolution of Letters Patent of various High Courts and the details of past Constitutions has been quite generous prompting a critic to say that "It appears to have been not quite necessary" (Article on "Holding of Periodic Sessions a Flagrant Abuse of Power – by Justice Debesh Chandra Bhattacharya, 42 DLR Journal 41(43)). From the labyrinth of his

myriad forensic inquisitions one can gather that he has mainly held that there is no distinction in our Constitution between a legislative power and a constituent power, that the constituent power is with the people of Bangladesh as reflected in the Preamble and Article 7, that in the absence of any exclusion as in Article 26 the word 'law' in Article 7 is conclusively intended to include an amending law, that an amending law cannot be valid if it contravenes any express provision of the Constitution, so says Article 7, that Article 142 merely confers enabling power for amendment, that the term 'amendment' implies such an addition or change within the lines of the original instrument as will effect an improvement or better carry out the purposes for which it was framed and that Article 7 stands between the Preamble and Article 8 as a statue of liberty, supremacy of law and rule of law and is the pole star of our Constitution which no Parliament can amend because all power followed from Article 7.

On the question of 'basic structures', B.H. Chowdhury, J. has listed 21 'unique features' of the Constitution and held that 'some' (without specifying which) of the said 21 features are the basic features of the Constitution and they are not amendable by the amending power of Parliament. He accepted the contention of the appellants that the impugned amendment is to be tested against Article 7 because the amending power is but a power given by the Constitution to Parliament and although that is a higher power than any other given by the Constitution to Parliament, it is nevertheless a power within and not outside the Constitution. The impugned amendment, according to B.H. Chowdhury, J. has directly violated two Articles, namely, Articles 102 and 44 without amending expressly Articles 94 to 116 of the Constitution. It has disrupted the provisions in relation to the judiciary given in Article 94 by introducing some alien concept of 'permanent benches' conferring specifically 'jurisdictions, powers and functions' of the High Court Division, thereby creating seven

rival courts to the High Court Division, doing something indirectly which cannot be done directly. It has disrupted the constitutional fabric of Article 102 by introducing territorial concept fraught with innumerable difficulties and incongruities.

(ii) Judgement of Shahabuddin Ahmed, J.

Shahabuddin Ahmed, J. on the other hand, is of the considered opinion that an amendment of the Constitution is not included in 'law' within the meaning of Article 7 in the same way it is not law within Article 26. In other words he is not prepared to test the validity of a constitutional amendment on the touchstone of Article 7. He did not agree with the contention that if a constitutional amendment is excluded from 'law' within the meaning of Article 7, that Article will become redundant and ineffective. His reasoning is that an ordinary statute is enacted through an ordinary legislative process, but a constitutional amendment, following the special procedure and not altering any basic structure or essential feature of the Constitution becomes a part of the Constitution whereupon it derives the same sanctity as the Constitution itself. "If an amendment of the Constitution is the same thing as a law it is the Constitution whose position will fall down to the level of ordinary legislation. Validity of a law is tested by the touchstone of the Constitution : but there is no such touchstone to test the validity of the Constitution. Its validity is inherent and as such it is unchallengeable."

By an 'amendment' of a Constitution, he means that it must pass through some tests. Tests are that the amendment has been made after strictly complying with the mandatory procedural requirements, that it has not been brought about by practising any deception or fraud upon statutes and that it is not so repugnant to the existing provision of the Constitution that its co-existence therewith will render the Constitution unworkable, and that, if the

doctrine of bar to chance of basic structure is adopted, the amendment has not destroyed any basic structure of the Constitution.

With regard to Preamble of a Constitution it is his opinion that it is the intention of the makers of the original Constitution as expressed in the Preamble that is the guide to its interpretation.

Shahabuddin Ahmed, J. further held that 'constituent power' in the sense of power to make a Constitution, belongs to the people alone, although opinions differ whether it can be vested in Parliament, but even if the constituent power is vested in Parliament the power is a derivative one and the mere fact that an amendment has been made in exercise of derivative constituent power will not automatically make the amendment immune from challenge. He then found that our Constitution stands on certain fundamental principles which are its structural pillars and if those pillars are demolished or damaged the whole constitutional edifice will fall down. He listed the following to be the basic structures of our Constitution, namely, sovereignty belongs to the people, supremacy of the Constitution as the solemn expression of the will of the people, democracy, Republican Government, Unitary State, separation of powers, independence of the Judiciary and fundamental rights. He held that these are the structural pillars of the Constitution and they stand beyond any change by amendatory process. Amendment will be subject to the retention of the basic structures. The Court, Therefore, has power to undo an amendment if it transgresses its limit and alters a basic structure of the Constitution. By a clause by clause examination of the amended Article 100, Shahabuddin Ahmed, J. held that the amendment has created more than one permanent seat of the Supreme Court, thus destroying the unitary character of the judiciary, the transferability of Judges has a likely effect of jeopardizing the independence of the judiciary, a basic feature of the Constitution and the amendment has resulted ill irreconcilable

repugnancies to all other existing provisions of the Constitution rendering the High Court Division virtually unworkable in its original form.

There is thus a noticeable distinction in the approaches of the two learned Judges. While B.H. Chowdhury, J. would measure the validity of a constitutional amendment in the touchstone of Article 7, which is for him the 'pole star' of the Constitution. Shahabuddin Ahmed, J. would not do so. A constitutional amendment is not, in his view, 'law' within the meaning of Article 7. To B.H. Chowdhury, J. the word 'amendment' implies an improvement on the existing provisions of the Constitution, to Shahabuddin Ahmed. J. it means the passing of some tests. B.H. Chowdhury, J. holds that the Preamble is unamendable (it has to be referred to the people) and the Preamble preserves the constituent power with the people, Shahabuddin Ahmed, J. regards the Preamble as a guide to the interpretation of the Constitution. To B.H. Chowdhury, J. of the 21 'unique features' of the Constitution. 'some' are basic features, but those are not specified. The impugned amendment in his judgment has directly violated Articles 102 and 44 and disrupted the provisions of Article 94. To Shahabuddin Ahmed, J. there are 8 specified basic structures of our Constitution. The impugned amendment has broken the 'oneness' of the High Court Division, it has the likely effect of destroying the independence of the judiciary and it is in irreconcilable conflict with other Articles of the Constitution relating to High Court Division.

(iii) Judgement of M.H. Rahman, J.

M.H. Rahman, J. has not given his unqualified welcome to and acceptance of the doctrine of basic structure. He is quite conscious that the doctrine of basic structure is a new one and it may take some time before this doctrine gets acceptance from the superior courts of the countries where constitutionalism is

prevailing and he has left the doctrine at that. His reasoning is that the appeals were concerned with only one basic feature, the rule of law, marked out as one of the fundamental aims of our society in the Preamble. It is his opinion that if any provision of the Constitution can be called the 'pole star' of the Constitution then it is the Preamble. The impugned amendment is to be examined on the touchstone of the Preamble, with or without resorting to the doctrine of basic feature. As the impugned amendment has badly impaired the structure of rule of law which is the fundamental aim of our society as laid down in the Preamble, he has struck down the amendment. This he has done not on the ground of uncertainties or irreconcilability (as was done by the other two learned Judges) but on the ground of the amendment's irreconcilability with rule of law as envisaged in the Preamble. He has been categorical in his rejection of Article 7 as the 'pole star' of the Constitution and has held very clearly that the validity of an amendment of the Constitution cannot be examined on the touchstone of Article 7. Even without clause (3) of Article 26 'law' does not mean a constitutional amendment. Clause (2) of Article 142 was enough to exclude application of Article 26 to an amendment of the Constitution. He has not dealt with the difference between legislative power and constituent power in any great details or with the meaning of the word 'amendment'.

These are the three learned Judges in the majority who declared the impugned amendment of Article 100 to he *ultra vires* and void, but there is a distinct lack of Commonness in their individual approach to the basic issues in these appeals. While B.H. Chowdhury, J. and Shahabuddin Ahmed, J. have accepted the basic structure doctrine in their own different ways, M.H. Rahman, J. has stopped short of accepting the doctrine and has struck down the amendment because of its irreconcibility with rule of law as laid down in the Preamble which he considers to be the 'pole star' of the Constitution.

C. The Minority Judgement

Judgement of A.T.M. Afzal, J.

A.T.M Afzal, J. in his dissenting opinion has been clear and unequivocal in rejecting tile theory of basic structures on two grounds. "The first is that it is inconceivable that the makers of the Constitution had decided on all matters for all people of all ages without leaving any option to the future generation. Secondly, if it is right that they wanted the so-called 'basic features' to be 'permanent features' of the Constitution there was nothing to prevent them from making such a provision in the Constitution itself." He reasons that the incorporation of sub-Article (1A) in Article 142 providing for a more difficult procedure of referendum in case of amendment of some of the provisions of the Constitution is a clear manifestation of the principle that no other provision of the Constitution is so basic that it will need a referendum for it to be incorporated in the Constitution.

A.T.M. Afzal, J. gives, however, some additional reasons as to why "the doctrine of basic features has indigenous and special difficulties for acceptance". Features that were considered to be basic to our Constitution on the 16th December, 1972 "have been varied in such abandon and with such quick succession that the credibility in the viability of the theory of fundamentality is bound to erode". He gives a few examples by reference to various amendments of the Constitution made upto the Eighth Amendment Act, namely, amendment of the Preamble itself, of Article 44, Article 94 (and of their comeback), of secularism etc., and then proceeds to say :

> "In view of the experience as noticed above, any doctrainaire approach as to "basic features", in my opinion, will amount to tracing a blind eye to our constitutional evolution and further

will not be in the interest of the country. I shall give one example. Today a basic feature in our Constitution is the Presidential form of Government. We can take judicial notice that there is a demand by some political parties to restore Parliamentary form of Government as it originally obtained. Why should a roadblock be created by the Court, if people choose to send the members of these political parties to the Parliament, against amending the Constitution providing for Parliamentary system?"

Badrul Haider Chowdhury, J. in his judgment mentioned the then Articles 48 and 58 of the Constitution to be the basic features of the Constitution. These Articles then provided for direct election of the President in a Presidential form of Government and the selection by the President of a member of Parliament as Prime Minister who commands the support of the majority. These Articles, he said, are protected. He then invoked Article 7 and said, "Hence the constitutional scheme if followed carefully reveals that these basic features are unamendable and unalterable."

Yet, within two years from this judgment, after the general elections of February, 1991, the then Articles 48 and 58, exemplified as a "basic feature" by B.H. Chowdhury, J. were substituted by the Constitution (Twelfth Amendment) Act, 1991, Act XXVIII of 1991, with effect from 18-9-91, replacing a Presidential system of Government with a Parliamentary one.

No one has yet complained that the majority judgment in the Eighth Amendment case is a "roadblock" to the Twelfth Amendment.

A.T.M. Afzal, J. in the last analysis, has come to accept a limited and highly restricted concept of 'basic features'. He holds that the word "amendment" has a built-in limitation in that it does not authorise the abrogation or destruction of the Constitution or

any of its three structural pillars – executive, legislature and judiciary – which will render the Constitution defunct or unworkable. In his words, "in exercise of the power under Article 142 the Constitution cannot be destroyed or abrogated. The destruction of the Constitution will be the result if any of its "structural pillars", that is, the three organs of the Government, Executive, Legislature and Judiciary is destroyed. The result will also be the same if any of these organs is emasculated or castrated in such a manner as would make the Constitution unworkable. For example, if the Supreme Court or a Superior Court by any name is retained but the power of Judicial Review as under Article 102 is taken away, the result will be that the form will be there but the soul of the judiciary will be gone and the Constitution will be rendered unworkable inasmuch as the balance which is struck in the scheme of the Constitution cannot be maintained. There can be no objection to the exercise of amending power to fulfil the needs of time and of the generation. But the power cannot be so construed as to turn the Constitution which is the scripture of hope of a living society and for its unfolding future, into a scripture of doom."

It follows from the above view of A.T.M. Afzal, J. that he rejects the doctrine of implied limitation to the power of amendment. "Who is to decide and how to decide when the Constitution-makers themselves in their wisdom chose not to distinguish, what are to be considered as transcendental, in limitation to the power of amendment given to Parliament?" A power to amend the Constitution, constituent power, is different from the power to amend ordinary law, legislative power. The validity of an ordinary law when questioned is to be justified by reference to a higher law, but the validity of a constitutional amendment cannot be justified by reference to another higher law. The Constitution generates its own validity. A.T.M. Afzal, J. therefore rejects the contention that the validity of a constitutional

amendment is to be tested in the touchstone of Article 7. He is of the opinion that in our Constitution no article or clause is unamendable. The limitation in Article 142 relates only to procedure for amendment and not substantive in the sense that no article is beyond the purview of amendment.

A.T.M. Afzal, J. then holds that the impugned amendment has not destroyed the High Court Division as originally conceived as an integral part of the Supreme Court, nor affected its jurisdiction and power in a manner so as to render the Constitution unworkable. The consequences of the amendment belong to the domain of policy and whatever may be the personal view of a Judge regarding the wisdom behind the amendment, he would be concerned with only the legality of it. He held the impugned amendment and Notification not to be *ultra vires* on any grounds alleged.

D. The Ratio Decidendi

Lawyers and constitutional analysts will look in vain for a consensus *ratio decidendi* of the majority judgment, except for the result.

The lowest common denominator of the two majority judgments – those of B. H. Chowdhury, J. and Shahabuddin Ahmed, J. and of the minority judgment of A.T.M. Afzal, J. is that there are after all some basic structures of the Constitution, although the learned Judges are not unanimous on those. But the existence of basic structures is one thing and their non-amendability is another. The basic difference between the two learned Judges in the majority and the learned Judge in the minority concerns the amendability of basic structures. And the difference *inter se* between the two learned Judges in the majority is with regard to the yardstick with which the violation of basic structures is to be measured.

According to B.H. Chowdhury, J. an amendment of the Constitution "directly violating" or "disrupting" other provisions of the Constitution and thus bringing about "innumerable difficulties and incongruities" will be *ultra vires* and void on the touchstone of Article 7. According to Shahabuddin Ahmed, J. an amendment of the Constitution which fails to pass the "tests" mentioned by him (not altering any basic structure of the Constitution – or not being so repugnant to the existing provision of the Constitution that its coexistence with the amendment will render the Constitution unworkable, being one of such "tests") will be *ultra vires* and void, not on the touchstone of Article 7 (or presumably even the Preamble), but because the derivative constituent power has to pass through the ordeal of validity test. According to A.T.M. Afzal, J. there is a built-in limitation in the word 'amend' which does not authorise the abrogation or destruction of the Constitution or any of its three structural pillars which will render the Constitution defunct or unworkable and an amendment of the Constitution which does the same will be *ultra vires* and void, neither on the touchstone of Article 7 and the Preamble nor on any validity test, but because of the built-in limitation of the word 'amend'. Thus if only A.T.M. Afzal, J. could persuade himself that the impugned amendment has brought about the result he talked of, it would have been theoretically possible for him to strike down the same, even though on a much narrower ground.

The view of M.H. Rahman, J. stands out in marked contrast to the views held by the three other learned Judges, even though he eventually found himself with the majority. He would not test the validity of a constitutional amendment either on the touchstone of basic structures, or of Article 7 or of any validity test, or of any definition of the term 'amendment'. For him the Preamble of the Constitution is the 'pole star' of the Constitution, rule of law is one of its main planks, the impugned amendment violates rule of law and therefore it is *ultra vires* and void.

Dr. D. Conrad, a German political scientist, wrote an article on "Limitation of Amendment Procedures and the Constituent Power", in XVI - XVII Indian Yearbook of International Affairs, pp. 347-430 in 1970. Along with other text-book writers his views on the limitation of amending power were considered and noted by the majority Judges in Kesavananda vs. State of Kerala, AIR 1973(SC) 1461 at pages 1861 and 2020. After the basic structure doctrine was further reinforced by the Indian Supreme Court in Indira Gandhi vs. Raj Narain, AIR 1975 (SC) 2299, he wrote an article on "Constituent Power, Amendment and Basic Structure of the Constitution: A Critical Reconsideration" in Delhi Law Review Vol. 6 and 7, 1978-79. He noted the above two decisions of the Indian Supreme Court and observed,

> "In spite of the practical acceptance, however, and the added credibility after a historic test, the theoretical contours and further implications of the doctrine have remained somewhat obscure and controversial."

The observation seems to have equal, if not more, validity after the "historic test" in the Constitution 8th Amendment Case. Dr. Conrads critical reconsideration of the basic structure doctrine and of limitation on constituent power makes interesting reading.

From the above analysis of the Constitution (8th Amendment) Case it can be seen that the basic structure doctrine had a rather close shave, as it had in Keshavananda's case (supra) in the Indian Supreme Court. It will be for the next generation of constitutional lawyers and Judges to develop and crystalize the theoretical base of this doctrine in its application to Bangladesh. As it is the doctrine stands on a nebulous footing.

4. The Sessions continue

The woos of the High Court Division were not over after the original Article 100 of the Constitution was restored by the majority judgment in the Constitution (8th Amendment) Case. One of the operative orders of the majority judgment was : "In view of this invalidation, old Article 100 of the Constitution stands restored along with the Sessions of the High Court Division."

The Chief Justice almost immediately framed Rules authorising holding of Sessions of the temporary Benches of the High Court Division at a place or places outside the permanent seat under the original Article 100 of the Constitution and directed holding of such Sessions. Such Sessions were held regularly in some of those very places where during Martial Law period Circuit Benches were functioning and this state of affairs continued not only during the tenure (1989-90) of the Chief Justice who was not a party to the Constitution (8th Amendment) Case, but also during the tenure of the two succeeding Chief Justices (1990-91) who wrote the majority judgment in that case. Articles were written in law journals questioning the validity and constitutionality of these Rules and regular sessions, but no challenge was thrown in the Court. It was only in February, 1991 that these Sessions were wound up by the last of the two Chief Justices who happened to assume the office of the Vice-President, eventually to be the Acting President, to oversee the general election in the country. The High Court Division started functioning exclusively in the permanent seat since February, 1991. No Sessions were held outside the permanent seat ever since.

5. Constitutional Amendments (1986-90)

Apart from the Seventh (1st November, 1986) and Eighth (9th June, 1988) Amendments to the Constitution, two further

amendments to the Constitution were brought about during the tenure of President Hussain Muhammad Ershad (1982-90).

The Constitution (Ninth Amendment) Act, 1989, Act No. XXXVIII of 1989, published in the official Gazette on the 11th July, 1989 effected some amendments in the Constitution, mainly to limit the tenure of office of the President and the Vice-President. This Amendment has now been rendered infructuous after the Presidential system of government was replaced by a Parliamentary form of government.

The Constitution (Tenth Amendment) Act, 1990, Act No. XXXVIII of 1990, published in the official Gazette on the 23rd June, 1990, has however survived. 30 reserved seats for women to be elected by members of Parliament for another ten years have been re-introduced. The original provision ran its course on the 16th December, 1987.

Chapter 7

PARLIAMENTARY SYSTEM REVIVED

1. Further Constitutional Amendments

Following a movement against his regime President Hussain Muhammad Ershad resigned on the 6th December, 1990, appointing Mr. Justice Shahabuddin Ahmed, the Chief Justice, as the Vice-President, the incumbent Vice-President having resigned earlier. The Vice-President exercised the powers and performed the functions of the President in his capacity as Vice-President and a Parliamentary election was held under his supervision in February, 1991.

The new Parliament passed the Constitution (Eleventh Amendment) Act, 1991, Act No. XXIV of 1991, published in the Official Gazette on the 10th August, 1991. This amendment was made for the purpose of making the Vice-President exercising the powers and discharging the functions of the President eligible to resume the duties and responsibilities of the Chief Justice after a new President is elected under the Constitution and enters upon his office. The other purpose of this amendment was to ratify and confirm (a) his appointment as Vice-President and (b) the powers exercised and laws and ordinances made during his above tenure.

But the more radical and far-reaching constitutional amendment was to come a month later. The new Parliament passed the Constitution (Twelfth Amendment) Act, 1991, Act No. XXVIII of 1991, published in the Official Gazette on the 18th September, 1991. The earlier transformation of the Constitution (beginning from the Fourth Amendment) from Parliamentary to

Presidential was now reversed in the opposite gear, resulting in the re-appearance of many or most of the original provisions of the Constitution. The amendment was made with the concurrence of both the ruling party and the opposition parties in Parliament.

2. Post-General Election Constitutional cases

Some constitutional cases came up in quick succession, both in the High Court Division and in the Appellate Division, following the general election of February, 1991. Two of them relate to the Tenth Amendment and the others to various other provisions of the Constitution.

(i) Open Ballot vs. Secret Ballot – Article 39 and Section 10, President's Election Act, 1991.

The case of Abdus Samad Azad and others vs. Bangladesh, 44 DLR (HCD) 354, decided on February 13 & 18, 1992.

Following the general election in the country held in February, 1991 Parliament enacted the Presidents Election Act, 1991 (XXVII of 1991) following which the President's Election Rules, 1991 were framed by the Chief Election Commissioner. Section 10 of the said Act provides that the election of the President shall be by open ballot by the Members of Parliament, each Member of Parliament having one vote. Several Members of Parliament instituted writ petitions, challenging section 10 of the President's Election Act, 1991 as *ultra vires* the Constitution being violative of the Preamble and the fundamental right of freedom of thought and conscience guaranteed under Article 39 of the Constitution, as also being violative of Article 11 of the Constitution preventing the people from effectively participating in the administration of Government through their elected representatives. It was also alleged to be violative of Article 7 of

the Constitution which provides that all powers belong to the people. It was further contended that this provision destroys election as a concept and converts an election to a mere selection. The so-called open voting is a denial of free exercise of franchise.

A Division Bench having split over the question of issuing or not issuing a *Rule Nisi*, the matter was referred to a learned Single Judge (Anwarul Haque Chowdhury, J.) who repelled (in Abdus Samad Azad vs. Bangladesh, 44 DLR (HCD) 354) the above contentions and held that the system of open ballot procedures could not be said to have taken away the right to vote freely and fearlessly. The expression "freedom of conscience and thought" have the ordinary meaning of freedom of choice between right and wrong and the system of open voting will not prohibit a Member of Parliament from distinguishing the right from the wrong and from choosing one person from among several candidates on his own free will. Both the systems, open and secret ballot, is recognised by the Constitution itself and there is no warrant for the view that in a democratic Government all votings must be by secret ballot and never by an open ballot. The High Court Division refused to issue any *Rule Nisi* and there the controversy between open and secret ballot rests at present.

(ii) When is Parliament Constituted? Article 65(3) and Article 67(1) (a)

The case of Fazle Rabbi vs. *Election Commissioner. 44 DLR (HCD) 14, decided on April 2, 1991.*

Another case of constitutional significance came up before the High Court Division, that of Fazle (Md.) Rabbi and others vs. The Election Commissioner, 44 DLR (HCD) 14, decided on the 2nd April, 1991.

Clause (3) of Article 65 of the Constitution originally provided in substance that for the next ten years fifteen seats shall

be reserve exclusively for women members, who shall be elected according to law by the 300 elected members of Parliament. By subsequent Martil Law Proclamation the reserved seats for women were increased from fifteen to thirty and the period was extended to fifteen years. Clause (3) exhausted itself on the 16th December, 1987. By the Constitution (Tenth Amendment) Act, 1990 (Act No. XXXVIII of 1990) clause (3) was substituted providing in substance that for the next ten years thirty seats shall be reserved exclusively for women members who shall be elected according to law by the 300 elected members of Parliament.

The earliest challenge to this constitutional amendment was made by Dr. Ahmed Hussain, a senior Advocate of the Supreme Court, in Writ Petition No. 2306 of 1990, but more of this later. After the general election of February, 1991 some members of the Jatiya Party challenged the working of the constitutional amendment by a separate Writ Petition No. 465 of 1991. Their contention was that 31 members of the Jatiya Party elected to Parliament after February, 1991 general election had taken a decision not to make and subscribe the required oath or affirmation till the Chairman of the Jatiya Party Hussain Muhammad Ershad and other members are released from detention and orders of detention passed or warrants of arrest issued against them are withdrawn. Under Article 67(1)(a) of the Constitution the members of Parliament can make and subscribe the oath or affirmation within a period of ninety days from the date of the first meeting of Parliament after their election. If therefore the election of the 30 women members of Parliament is held within the period of ninety days the Jatiya Party members will be deprived of their voting right as also the right to nominate their candidates for election to those seats, thereby infringing the petitioners' right of equality before law and their entitlement to get equal protection of law. They contended that the electoral roll of 300 elected members of Parliament is not complete until the

elected members of the Jatiya Party make and subscribe the oath or affirmation.

A Division Bench of the High Court Division (judgment by Fazle Hussain Mohammad Habibur Rahman, J.) rejected the application summarily. It was held that of the members of Parliament elected from the general seats, only those who have made and subscribed the oath or affirmation shall be the voters in the election to reserved seats for women. It is nowhere provided in the Constitution that if one or some of the 300 members of Parliament do not make and subscribe the oath or affirmation the election to the reserved seats for women cannot be held. The High Court Division held that no one is permitted to construe a statute and the Acts of Parliament so as to reduce it to rank absurdity. If election to the reserved seats for women can be held up because even a single member of Parliament has failed to make and subscribe the oath or affirmation then Parliament itself cannot meet, but, Article 67(1)(a) clearly indicates that even if some persons elected to Parliament fail to make and subscribe the oath or affirmation Parliament can meet and the grace period of ninety days within which a member of Parliament has to make and subscribe the oath or affirmation is for the purpose of saving his membership and not for formal constitution of Parliament.

(iii) Constitutionality of the Tenth Amendment – Article 65(3) and Articles 121 and 122(1)

The case of Dr. Ahmed Hussain vs. Bangladesh, 44 DLR (AD), 109, decided on March 2, 1992.

In this case, the petitioner having unsuccessfully challenged the vires of the aforesaid Tenth Amendment of the Constitution sought leave to appeal from the judgment of the High Court Division dated 28-11-91 in Writ Petition No. 2306 of 1990. The leave petition was dismissed on 2-3-92, 44 DLR (AD) 109,

decided on March 2, 1992. The petitioner Dr. Ahmed Hussain challenged the Tenth Amendment of the Constitution being violative of Articles 121 and 122(1) of the Constitution. Article 121 provides that there shall be one electoral roll for each constituency for the purposes of elections to Parliament, and no special electoral roll shall be prepared so as to classify electors according to religion, race, caste or sex. Article 122(1) provides that the elections to Parliament shall be on the basis of adult franchise. It was held by the Appellate Division that the principle of single electoral roll for each constituency and the principle of adult franchise are not violated in the case of election to reserved seats for 30 women members, because the Constitution on the date of its commencement provided for two different kinds of elections. 300 members in general seats are to be elected directly on the basis of adult franchise. Additionally, some seats reserved for women members are to be filled up by a method of indirect election. There is thus no conflict between the Constitution (Tenth Amendment) Act and Articles 121 and 122(1) of the Constitution.

It was also argued that the method of indirect election for the seats reserved exclusively for women has destroyed the principle of democracy as expressed in the Preamble, in clause (1) of Article 7 and in Articles 8 and 11 of the Constitution. The Appellate Division held (judgment by M.H. Rahman, J.) that a system of indirect election cannot be called undemocratic. It is provided in the Constitution itself. Article 28 clause (4) of the Constitution provides that nothing in this article shall prevent the State from making special provision in favour of, among others, women and therefore the amendment is also not violative of Article 28.

(iv) Constitutionality of Administrative Appellate Tribunal – Articles 102(5) and 117. Section 3(3) and 5, Administrative Tribunal Act, 1980.

The case of Mujibur Rahman vs. Bangladesh, 44 DLR (AD) III, decided on 28 November, 1991.

Article 117 of the Constitution conferred an enabling power to Parliament to establish one or more administrative tribunals to exercise jurisdiction in respect of matters relating to or arising out of *inter alia* the terms and conditions of persons in the service of the Republic. It was contained in the proviso that Parliament may by law provide for appeals from or the review of decisions of any such tribunal.

Administrative Tribunals Act, 1980 established such an Administrative Tribunal, shortly the Tribunal, as also an Administrative Appellate Tribunal, shortly the Appellate Tribunal. Section 6(3) provided that the decision of the Appellate Tribunal in the appeal shall be final. Writ Petitions (including the present one) were filed from the decisions of the Appellate Tribunal, but those were held by the High Court Division to be not maintainable, because writ petitions do not lie, as per Article 102(5) of the Constitution, to "a tribunal to which Article 117 applies." It was argued that the embargo applies only to the Tribunal which was specifically established in exercise of Parliament's power under Article 117, and not to the Appellate Tribunal, which was established under the plenary legislative power of Parliament. The argument was not accepted and it was held that the power to provide for appeals, under the proviso to Article 117(2), also includes the power to create a forum.

In the Appellate Division, this particular writ petition, so held to be not maintainable by the High Court Division, was argued on a larger canvass. The vires of section 3(3) of the Administrative Tribunals Act, 1980 providing that the one-member Administrative Tribunal shall be from among persons who are or have been District Judges, was challenged as being void, being in

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conflict with Article 117 and Part VI of the Constitution. Section 5 of the Act establishing the Appellate Tribunal was also challenged as void on the same ground.

The argument was that the Tribunal now combines in itself the entire bundle of constitutional power and powers of the civil court which the High Court Division and the civil courts enjoyed prior to its establishment. As the Constitution itself does not expressly state the status and qualification of the Tribunal's incumbents, those are to be deduced from both Article 117 and Part VI as its necessary intendment. The Tribunals are not subordinate courts, but are part of the "Judiciary" under Part VI. The Tribunals wield the judicial power of the State. The broad sweep of the Tribunal's jurisdiction is such that though not a substitute, it must at least be co-ordinate to or equally effective as the High Court Division. As such the Tribunal can only be composed of a person appointed in the same manner and entitled to the same security of tenure as the holder of the Superior Courts named in Chapter 1 of Part VI. The District Judge is the seniormost post in the judicial service which comprises of persons holding judicial posts and who do not enjoy the same security of tenure as Supreme Court Judges. By designating a District Judge as Chairman of a Tribunal section 3(3) of the Act in effect has established a court subordinate to the Supreme Court which Parliament had no power to do.

The further argument was that Articles 102(5) and 117(2) attach a finality to the decision of the Tribunal and bar a judicial review. The proviso to Article 117(2) enables Parliament to provide for appeal against the decision of the Tribunal and the *raison d'etre* of the proviso is that in its absence Parliament could not have by ordinary law disturbed the finality of the Tribunal's decision. The expression "such Tribunal" in Article 117(2) leaves no room for doubt that it is referable to the Tribunal established

under Article 117(1). The view of the High Court Division that the power to provide for appeals includes a power to create a forum for appeal has no basis in law or constitution, nor is there any such doctrine in legal or constitutional jurisprudence, it was claimed. The Appellate Tribunal is not a tribunal established under Article 117, but is one established under the plenary legislative power of Parliament under Article 65. Such a Tribunal can only be established under Article 114 as a Subordinate Court. Its decision cannot have finality as the original section 6 of the Act sought to give it and cannot remain immune from judicial review by the High Court Division under Article 102. Consistent with the finality of the Tribunal's decision and in the scheme of Part VI the only forum for appeal under Article 117(2) can be the Supreme Court. There is no other option. It was redundant to expressly say so in the proviso itself. The enabling power to provide for appeal in Article 103(4) was not enough to disturb the finality of the decisions of the Tribunal. Hence the proviso, it is only when either Division of the Supreme Court is made the forum for appeal that the interpretation will be in full harmony with the manifest intention deduced from Article 117 and Article 103(4), it was submitted.

Several principles of interpretation of Constitution were settled in that case, but to begin with it was held (by Mustafa Kamal, J.) that "there is a presumption of validity of legislative statutes. The maxim *utres magis valeat quam pareat* (it is better for a thing to have, effect than to be made void) applies even more liberally in the case of a Constitution regard being had to the nature of the instrument". When two constructions are possible, one invalidating a statute and the other upholding it, the Court is inclined to adopt that which will remove the statute furthest from constitutional infirmity.

Dealing with the argument that it was imperative to consider the pre-existing legal and judicial order while determining the

constitutionality of a present statute, M.H. Rahman, J. said in the main judgment :

> "In the instant matters the past history can hardly be used against the constitutionality of the law Parliament is empowered in the Constitution to make. Rather, it will sustain the presumption of the constitutionality of the Act for the simple reason that the makers of the Constitution knowing the state of things obtaining before the framing of the Constitution deliberately chose to provide what is provided in Article 117."

The arguments on constitutionality were based not upon violation of any particular Article or Articles of the Constitution, but upon the necessary intendment of the Constitution in Part VI. Dealing with the question as to when and how to gather necessary intendment or manifest intention of a written Constitution, Mustafa Kamal, J. holds :

> "Necessary intendment or manifest intention of a Constitution need not be gathered at all when the Constitution expresses itself in adequate words. When it is necessary to gather the necessary intendment or manifest intention, a Court of law will try to gather the same primarily from the language used which must be construed according to well-established rules of interpretation. If the language fails or is inadequate, then as a secondary source matters outside the language used may be looked into gather the necessary intendment or manifest intention of a written Constitution."

The answer to the questions raised can be found in Part VI of the Constitution itself and in the *non-obstante* clause in Article 117(1).

Regarding the *non-obstante* clause in Article 117(1), M .H. Rahman, J. observed as follows :

"From the first four words, the *non-obstante* clause, in Article 117 it follows that the Constitution has not only granted power to the Parliament to make a law like the Act of 1981, it has also emancipated such grant of power from any restrictive provisions in Chapters 1 and 2 of Part VI. The tribunals are not meant to be like the High Court Division or the subordinate court over which the High Court Division of the Supreme Court exercises both judicial review and superintendence. The tribunals are not in addition to the Courts described in Chapters I and II. They are set apart, as *sui generis* in a separate chapter. The situational argument that for about ten years when no tribunal was set up the Civil Courts and the High Court Division exercised the functions of the tribunals delineated in Article 117(1), and will in future exercise the same jurisdiction if the Act of 1981 is repealed is hardly relevant for interpreting the Constitution which is supposed to endure till it runs out its fortune of survivance."

Mustafa Kamal, J. says of the *non-obstante* clause :

"Chapter III, because of the *non-obstante* clause, is liberated completely from Chapters I and II. In Chapter III, the Parliament was granted the legislative power to establish one or more Administrative Tribunals, not Courts. Chapter I and Chapter II of Part VI deal with settlement of disputes through Courts, Chapter III with administrative justice, i.e., settlement of disputes through the mechanism of administrative tribunals. A Tribunal has all the trappings of a Court, but it is not a Court proper."

Repelling the contention that the Tribunal wields the judicial power of the Republic, Mustafa Kamal, J. says "

"Although the Constitution itself omitted to confer judicial power on the Supreme Court and the subordinate Courts by any express provision, there can be no doubt whatsoever that the Supreme

Court and the subordinate Courts are the repository of judicial power of the State, because they have been previously existing and the Constitution allows them to function, although in a new form. But the Tribunals are not pre-existing adjudicative machineries. They are a new creation. Mere placing them in the Part on Judiciary in the Constitution will not make them wielders of judicial power of the State. In their case, there must be an express conferment of judicial power, more so because they are not Courts, but tribunals. Since there is none in our Constitution. I hold that Administrative Tribunals do not exercise the judicial power of the State."

"Consequently, Parliament has a relatively free hand in the selection of person/s for manning the Tribunals."

M.H. Rahman, J. repelled the contention that the Appellate Tribunal was set up in exercise of the plenary legislative power Parliament under Article 65 :

"Both the Tribunal and the Appellate Tribunal have been set up by Parliament in the exercise of its legislative power – in one case by an express grant in clause (1) and in the other by necessary implication following from the proviso to clause (2) of Article 117. The distinction between a law made by Parliament by an enabling power in the Constitution and the one by the plenary power under Article 65 may only be relevant in a case where the former is made in excess of the enabling power. There is nothing in the Act of 1981 that is exceptionable."

"There is no command nor any necessary intendment in the Constitution that the Tribunal or the Appellate Tribunal is to be construed as a forum substitute, alternate or co-equal to the High Court Division."

... ...

> "It is a settled principle of interpretation that an expression used in a constitutional enactment conferring legislative powers must be construed not in any narrow or restricted sense, but in a sense beneficial to the widest possible amplitude of the powers."

Mustafa Kamal, J. holds that the rule of strict interpretation may be applied to ordinary laws especially penal and revenue laws, but it has no application to the interpretation of a written Constitution. He quotes Lord Diplock expressing the majority view in Hinds and others vs. The Queen, (1976) 1 All ER 353 which is as follows :

> "To seek to apply to constitutional instruments the canons of construction applicable to ordinary legislation in the fields of substantive criminal and civil law would, in their Lordships' view, be misleading – particularly those applicable to taxing statutes as to which it is a well-established principle that express words are needed to impose a charge on the subject." (P. 360)

Mustafa Kamal, J. holds that the judicial power of the State in our Constitution lies with the Supreme Court and with the Subordinate Courts, but the Administrative Tribunals not being Courts and not having been expressly conferred judicial power and not also having the power of judicial review conferred upon the High Court Division under Article 102 of the Constitution, does not exercise the judicial power of the State. Parliament is not fettered in its choice of persons to man the Tribunal. Its hands have been released from the binding knots of Article 94 to Article 116A and it has to act without the compulsion of establishing either a substitute High Court Division or a body coordinate to or as effective as the High Court Division.

Mustafa Kamal, J. also holds that in the case of ordinary law there is a presumption that the legislature does not intend that what it has not clearly expressed. No such presumption applies to

a grant of legislative power by a written Constitution. Where there is a grant of legislative power by the Constitution the widest meaning must he given to the words used. To do otherwise will be to define and delimit the words which the Constitution has not defined or delimited. In paragraphs 85 to 87 of the judgment he discussed two principles of interpretation of a written Constitution, namely, the doctrine of implied powers and the doctrine of incidental and ancillary powers and held that the fact that the proviso to Article 117(2) enables Parliament to "provide for appeals, does not mean that the Constitution withholds the power to create an appellate forum under this proviso altogether. Quite contrarily, the power is bestowed in Article 117(2) itself. It is not extraneous to the Constitution nor is it repugnant to its sense. A provision for appeal will be impossible of enforcement without creating a forum for appeal. The power to create a forum for appeal is inherently incidental and ancillary to the power to provide for an appeal.

Agreeing with M.H. Rahman, J. Mustafa Kamal, J. held that there was no compelling constitutional requirement that an appellate forum must of necessity be either the High Court Division or the Appellate Division of the Supreme Court. The proviso to Article 117(2) gives Parliament a choice. It can establish either an Appellate Court or an Appellate Tribunal. Section 5 of the Act is not *ultra vires* the Constitution.

M.H. Rahman, J. answered the appellant's contention with regard to the Tribunals' jurisdiction to adjudicate on fundamental rights which is as follows :

> "Within its jurisdiction the Tribunal can strike down an order for violation of principles of natural Justice as well as for infringement of fundamental rights, guaranteed by the Constitution, or of any other law, in respect of matters relating to or arising of sub-clause (a), but such tribunals cannot, like the

Indian Administrative Tribunals in exercise of a more comprehensive jurisdiction under Article 323A (see SP Sampath Kumar vs. Union of India, AIR 1987 SC 386 (para 16) and JB Chopra vs. Union of India, AIR 1987 SC 357 (para 2)), strike down any law or rule on the ground of its constitutionality. A person in the service of the Republic who intends to invoke fundamental right for challenging the vires of a law will seek his remedy under Article 102(1), but in all other Cases he will be required to seek remedy under Article 117(2)."

"An aggrieved person may, out of desperation or just for taking a sportive chance in the summary writ jurisdiction, allege contravention of some fundamental right which may turn out to be frivolous or vexatious or not even remotely attracted in his case. The Court is, however, to be on guard so the great value of the right given under Article 102(1) is not frittered away or misused as a substitute for more appropriate remedy available for an unlawful action involving no infringement of any fundamental right."

(v) Constitutionality of Ordinance Abolishing Upazilla Parishad – Articles 9, 11, 59 & 60.

The case of Kudrat-E-Elahi Panir and others vs. Bangladesh. 44 DLR (AD) 319, decided on July 30, 1992.

In this case some constitutional questions of immense importance came to be decided by the Appellate Division.

By Ordinance No. LIX of 1982 Upazila Parishads wet constituted by the then Government to run and manage certain local government functions by transferring some powers and functions of the Government to the Upazila Parishads. After the general election held in February, 1991 the new Government promulgated Ordinance No. XXXVII of 1991, later on made Act

No.II of 1992, abolishing the Upazila Parishads altogether and vesting in the Government all rights, powers, authorities and privileges of the dissolved Upazila Parishads.

This Repealing Ordinance/Act was unsuccessfully challenged by some Chairmen of some Upazila Parishads in the High Court Division by various writ petitions. The High Court Division however granted a Certificate under Article 103(2) of the Constitution.

In these certificated appeals the main ground of attack on the Repealing Ordinance/Act was that it was inconsistent with Articles 9, 11 and 59 of the Constitution and hence void under Article 7(2). Article 9, a Fundamental Principle of State Policy, enjoins upon the State to encourage the local Government institutions, but, it was argued, the Ordinance abolished a local government, the Upazila Parishad. Article 11, also a Fundamental Principle of State Policy, provides that the Republic shall be a democracy in which, among other things, "effective participation by the people in administration" at all levels shall be ensured, but, it was argued, the Repealing Ordinance/Act has done away with such participation in the administration at the Upazila level. Article 7(2) of the Constitution says that any law inconsistent with the Constitution shall be void.

In the main judgment Shahabuddin Ahmed, C.J. held that Articles 9 and 11 of the Constitution are Fundamental Principles of State Policy. These are not judicially enforceable. That is to say, if the State does not or cannot implement these principles the Court cannot compel the State to do so. The other such Fundamental Principles also stand on the same footing. He says, "The reason for not making these principles judicially enforceable is obvious. They are in the nature of people's programme for socio-economic development of the country in peaceful manner, not overnight, but gradually. Implementation of these programmes

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" (para 22). He then proceeds to discuss some Indian decisions on the subject and holds, "In those cases no law was made in contravention of any directive principles and as such there was no occasion for the Court to declare any such law void"

Mustafa Kamal, J. deals with the voidability of legislation on the ground of inconsistency with the Fundamental Principles of State Policy in the following manner :

> "Article 7(2) provides that this Constitution is, as the solemn expression of the will of the people the supreme law of the Republic, and if any other law is inconsistent with this Constitution that other law shall, to the extent of the inconsistency, he void." (Underlines are mine). Therefore, this Constitution taken as a whole is a law, albeit the supreme law and by "any other law" and "that other law" the Constitution refers to the definition of "law" in Article 152(1), including a constitutional amendment. It is the Law of the Constitution itself that the fundamental principles of state policy are not "laws" themselves but "principles". To equate "principles" with "laws" is to go against the Law of the Constitution itself. These principles shall be applied by the State in the making of laws, i.e., principles of policy will serve as a beacon of light in the making of laws, shall be a guide to the interpretation of the Constitution and of the other laws of Bangladesh, and shall form the basis of the work of the State and of its citizens. Not being laws, these principles shall not be judicially enforceable."
>
> "There the Constitution rests. It does not say, as it says in Article 26 in respect of fundamental rights:
>
> > "26(1). All existing law inconsistent with the provisions of this Part shall, to the extent of such

inconsistency, become void on the commencement of this Constitution.

(2) The State shall not make any law inconsistent with any provisions of this Part, and any law so made shall, to the extent of such inconsistency, be void.

(3) ... ...".

"There being no specific provisions in the Constitution providing laws inconsistent with fundamental principles of state policy to be void, the learned Counsels for the appellants have fallen back upon Article 7(2) and have urged for acceptance of an interpretation which will bring Fundamental Principles of State Policy at par with Fundamental rights in so far as voidability is concerned. The submission is unacceptable, because, first, the makers of the Constitution did not lack in expression if they so meant it. Provisions analogous to Article 26 could have been inserted in Part II as well. The omission is deliberate and calculated. Secondly, Article 8(2) proclaims the fundamental principles of State policy as "principles", not "laws", and that is the mandate of this Constitution. Article 7(2) cannot be interpreted to mean that if any other law is inconsistent with the "principles" mentioned in Part II then that other law to the extent of the inconsistency, will be void. The Constitution is the supreme law and if the supreme law prescribes "principles" not "laws", and directs the use of these principles in certain specific manner, then the other law cannot be made void on the ground of inconsistency with these principles. It is argued that Articles 9 and 11 are provisions of the Constitution and if any other law is inconsistent with these provisions, then it will be void. Article 7(2) says "this Constitution", not "provisions of the Constitution", which expression the Constitution uses in some other places. The use of the words "this Constitution" and not "provisions of the Constitution" is also deliberate."

"A hypothetical question has been posed. Parliament passes a law which glaringly violates and flouts a fundamental principle of State policy, and if its vires is challenged solely on the ground of inconsistency with that principle and on no other ground whatsoever, will the High Court Division declare or not declare the law void? It is a madness scenario. The learned Counsels could not show any such legislation in this sub-continent, but suppose, Parliament is struck with such madness, is the High Court Division in its writ jurisdiction the only light at the end of the tunnel? What does public opinion, political party and election do if Parliament goes berserk?"

The second ground of attack on the Repealing Ordinance/Act was based on Article 59 of the Constitution. It provides that Local Government in every administrative unit shall be entrusted to bodies composed of elected representatives of the people and such bodies shall perform such functions as are prescribed by Act of Parliament. As a corollary Article 60 provides that Parliament shall by law confer necessary powers upon local bodies including power of imposing taxes to give effect to the provisions of Article 59. It was argued that the Repealing Ordinance/Act was void as a whole as in the garb of repeal, Upazila as a unit of local administration has been retained and replacing the elected representatives of the people, Government functionaries are now administering the functions of local Government in the Upazilas.

In so far as the power of Parliament to abolish a local government tier altogether Shahabuddin Ahmed, C.J. held as follows :

"1) On construction of Articles 59 and 60, read with Article 9 and 11 of the Constitution and considering the origin, growth and development of Local Government Institutions at different levels of the Administration over one and a half centuries, it is found that local Government is an integral part of the democratic polity

of the country. The system of Local Government Institutions may be altered, re-organised or re-structured, and their powers and functions may be enlarged or curtailed by Act of Parliament, but the system as a whole cannot be abolished."

A. T. M. Afzal, J. also holds the same :

"It has been rightly asserted by the respondents, and no learned Counsel has disputed it, that the constitution of Local Government Bodies and the tiers thereof have undergone changes from time to time since the Bengal Local Self Government Act, 1885 (Bengal Act III of 1885) was enacted, that such changes were made in exercise of Law-making power either by Act or by Ordinance or by President's Order and that thus the constitution and the tiers of local Government Bodies were always dependent on the policy of the respective Governments of the day."

Mustafa Kamal, J. also holds the same which is as follows :

"Lastly, the structure of local government was left fully and completely in the hands of Parliament. No one can claim a vested right in any particular form or in any particular number of tiers of local government. Within the framework of Articles 59 and 60 Parliament retains the power of continually re-organising, re-structuring and remodelling the local government institutions in the light of experiences gained to meet the changing needs of changing times. It is to be remembered however that local government is a part of the constitutional system and therefore Chapter III of Part IV of the Constitution containing Articles 59 and 60 cannot ever be kept as a dead letter. Local Government cannot be abolished altogether. It must exist in some form, in some tier or tiers at any given point of time to give a meaning to Chapter III of Part IV and to justify its rationale, validity and existence. It is not a mere adornment in the Constitution."

Article 152(1) of the Constitution provides that "administrative unit" means a district or other area designated by law for the purpose of article 59 and since Upazila was never designated as an "administrative unit" for the purposes of Article 59 the abolition of Upazila does not attract the mischief of Article 59 of the Constitution, the Appellate Division held. It has been further held that for the purposes of designating an area as an "administrative unit" the district need not be so designated as it stands already designated in the Constitution, but "other area" like unions, municipalities, corporations, etc., have to be designated by law before a Local Government can be established in those areas.

The Appellate Division has also unanimously held that with the re-appearance of Articles 59 and 60 in the Constitution on and from 18-9-91 all legislations on Local Government Institutions must be brought in conformity with Articles 59 and 60 of the Constitution, or else the existing legislatives provisions which are inconsistent with the provisions of Articles 59 and 60 stands the risk of being declared void. To bring the existing legislation of Local Government in conformity with Articles 59 and 60, the first requirement is that a Local Government will have to be constituted in "an administrative unit" by specifically designating a local government area as "an administrative unit" in the concerned law. The second requirement that the Local Government is to be entrusted to a body composed of elected persons.

It was contended on behalf of the State that without fulfilling the requirements of Articles 59 and 60 of the Constitution Parliament in exercise of its plenary power of law-making under Article 65 may establish Local Government. It was held that in that case there will be two classes of Local Governments in the country, one under the ordinary law and the other under the

Constitution. Such a situation is not contemplated by the Constitution. Shahabuddin Ahmed, C.J. held :

> "When the Constitution has made specific provisions as to Local Government, only those provisions shall have to be followed and complied with. Local Governments outside of the ambit of the Constitution will come within the mischief of Article 7(1) of the Constitution which says "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, this Constitution."

A.T.M. Afzal, J. held as follows :

> "The contention of the learned Attorney-General that the Legislature may without designating an area as an administrative unit for the purpose of Article 59 in exercise of its plenary legislative power (Article 65) establish local Government is mischievous as it would amount to defying the mandate of Articles 59 and 60 which cannot be permitted. The argument, therefore, must be rejected."

Mustafa Kamal, J. held as follows :

> "Thirdly, to the extent that Articles 59 and 60 prescribed manner and method of establishing local government, its composition, powers and functions including power of local taxation, the plenary legislative power of Parliament to enact laws on local government is restricted *pro tanto*. The learned Attorney-General submits that the plenary power still remains unaffected. I cannot conceive of a local government existing in terms of Articles 59 and 60 and another outside of it. That will make a mockery Articles 59 and 60 and will be in direct conflict with Article 7(1) of the Constitution, namely, "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 this Constitution". If Parliament has to pass a local government

legislation, it has to conform to Articles 59 and 60, read with Article 152(1), with Articles 59 and 60 in the Constitution local government legislation became very much a subject matter of legislation within the terms of the Constitution. Parliament is not free to legislate on local government ignoring Articles 59 and 60."

The Appellate Division however held that section 2(2)(kha) of the Repealing Ordinance/Act providing that "the rights, powers, authorities, privileges of the abolished Parishads" will henceforth be vested in the Government, has apparently created an impression that those attributes of the Parishads have remained to be enjoyed by the Government : If these words are deleted then no confusion will be left. Upon consideration of the entire Repealing Ordinance/Act, the Appellate Division did not find any substance in the contention that it was a colourable legislation.

The repealing Ordinance/Act was also challenged on the ground that an organic law providing for a vital aspect of the structure Government has been sought to be promulgated by an Ordinance, circumventing Parliament and the law-making procedure of Parliament and no facts have been presented by the Government to show that circumstances existed which rendered immediate legislation necessary.

The Appellate Division held that the President's 'satisfaction' as to whether circumstances exist for taking immediate action under Article 93 is not totally excluded from judicial scrutiny but Parliament in its first meeting following the promulgation of the Repealing Ordinance approved of the Ordinance and made it an Act of Parliament within the prescribed time. In such circumstances the Appellate Division held that this ground for assailing the Repealing Ordinance is no longer available to the appellants.

The significance of this decision is that the implications of the unique constitutional provisions on local government have received the consideration that is their due. Mustafa Kamal, J. highlighted the special features of our Constitution in these words :

> "First, the constitutional provisions on local government namely, Articles 9, 11, 59 and 60 mark out the Constitution of Bangladesh as clearly distinctive from other Constitutions of the world. No Constitution contains any definitive provision on local government. In England the local government units, unlike the central government, are not products of constitutional design, but of historical development. Same is the case in the USA and India. In this sub-continent too local government developed alonged historical lines without following any constitutional pattern. It is the Constitution of Bangladesh which for the first time devised an integrated scheme of local government within a constitutional pattern. This is a most distinctive and unique feature of the Constitution of Bangladesh."
>
> "Secondly, the words "Local Government" have not been defined in the Constitution, nor does the Constitution require any organ of the State to create anew a local government, as it does in respect of a President – "There shall be a President of Bangladesh ...". (Article 48), or a Parliament. " There shall be a Parliament for Bangladesh ... ..." (Article 65) or a Supreme Court – "There shall be a Supreme Court of Bangladesh ... ..." (Article 94) etc. In the absence of any definition and in the absence of any directive to create a local government afresh, the Constitution will be presumed to have referred to the already-known concept and institution of and the existing legislations on local government. Local government, as a concept and as an institution, was already known to have possessed certain common characteristics, namely, local elections, procedure for

public accountability, independent and substantial sources of income, clear areas for independent action and certainty of powers and duties and the conditions under which they would be exercised."

.....

"Fifthly, from a combined reading of the Preamble, Articles 7, 9, 11, 59 and 60 of the Constitution it is clear that the makers of the Constitution devised a scheme of total democracy, both at the centre and at the level of local government. The Preamble declares democracy to be a fundamental principle of the Constitution. Article 7(1) says that all powers in the Republic belong to the people and Article 11 proclaims that "the Republic shall be a democracy". Various autocratic regimes at various times vigorously persisted with the idea of an unrepresentative national government at the Centre but waxed eloquent on grassroot-level democracy solely for the purpose of building up a power base. The makers of the Constitution wanted no such half-way house between autocracy and democracy. The choice was clearly for a fully democratic constitutional pattern, both at the national level and at the local level. And there lies the second step. Local Government "shall be entrusted to bodies, composed of persons elected in accordance with law". Special representation may be given to "peasants, workers and women", as enjoined by Article 9, but not at the cost of robbing the local government institutions, of their elected, hence representative character."

The role that the Appellate Division played is clear from two of the several penultimate orders passed by it which are as follows :

"v) But there are other local bodies constituted by, and functioning, under different statutes. With the re-appearance of Article 59 and 60 with effect from 18 September 1991, on which date the Twelfth Amendment of the Constitution was

made, these local bodies shall have to be updated in conformity with Articles 59 and 60, read with Article 152(1) for the lawful functioning of the said local bodies. The areas in which these bodies other than the Zilla Parishds have been constituted shall have to be designated as administrative units by amending these statutes. Designation afresh of the unions and municipalities is also necessary ... ... Required designations by amending the relevant statutes with effect from the date on which the Twelfth Amendment of the Constitution was made should be provided as soon as possible – in any case within a period not exceeding four months from date.

vi) The other constitutional requirement for these local bodies is that they shall be entrusted to bodies "composed of persons elected in accordance with law". The existing local bodies are, therefore, required to be brought in line with Article 59 by replacing the non-elected persons by election keeping in view the provision for special representation under Article 9. Necessary action in this respect should be taken as soon as possible – in any case within a period not exceeding six months from date. In the suggested amending statutes, all actions taken by the local bodies concerned since 18 September 1991 should be ratified."

Chapter 8

JUDICIAL REVIEW

1. Its place in the Constitution

In the sense in which judicial review is understood in England, it is the power of a Court to hold illegal and hence unenforceable any action by a public official or any judicial or quasi-judicial act or proceeding of Subordinate Courts and tribunals or other administrative bodies and to enforce their performance of statutory duty. The principle has been extended in written Constitutions to cover the power of a Court to declare a law and even a constitutional amendment unconstitutional on the ground of its inconsistency with or repugnance to the Constitution. In later years, judicial review has come to embrace the power of a Court to enforce the fundamental rights guaranteed by the Constitution and also to declare a law or an official action to be invalid if it contravenes a fundamental right.

In the case of Jamil Huq vs. Bangladesh, 34 DLR (AD) 125, K. Hossain, C.J. on reviewing the Preamble, Article 7, Article 26(1) and Article 108 of the Constitution says :

> "A combined reading of the provisions set out above indicates that full judicial power have been conferred by Bangladesh Constitution on the supreme judiciary as an independent organ of the State. It has power to declare a law passed by the legislature inconsistent with the Constitution or fundamental rights it *ultra vires*".

"The supreme judiciary has also been conferred with the power of judicial review of executive acts and other judicial acts and proceedings of subordinate courts or tribunals under Article 102."

The existence and assumption of these powers by the High Court Division in our country have come to be regarded as a natural gift of constitutional government, which it is not, in Britain, the theory of sovereignty of Parliament manifests itself in the power of the Courts, Any law enacted by Parliament and receiving the assent of the Crown becomes the law of the land and is *ipso facto* beyond overturning by the British Courts. In exercise of the ancient writs of *mandamus*, prohibition, *habeas corpus* and *quo warranto*, the Courts interpreat legislation and particularly administrative action based upon it, for all government officials are potentially accountable to the Courts for their actions, but the Courts may not strike down the law itself.

Until the adoption of the Constitution of the Fifth Republic in 1958, French Courts were not clothed with any authority to declare any law unconstitutional. De Gaulle Constitution of 1958 established a Constitutional Council, but it is not a court at all. It is outside the judicial system. It is composed of all ex-Presidents of France plus nine other distinguished persons.

Post-Second World War Basic Law (1949) of Germany rejected "judicial review" in the U.S. pattern because of what the framers regarded as the "stultifying actions" of the U.S. Supreme Court. On U.S. insistence, however, the framers of Basic Law formed the Federal Constitutional Court. This Court exercises jurisdiction over disputes *inter alia* between the Federal Republic and the Lander and exercises guardianship over the fundamental rights and privileges of citizens as determined by the Basic Law.

Italy too established a Constitutional Court under the Italian Constitution of 1948. It is the final interpreter of the Constitution. Before this Constitution, there was no judicial review.

The value of judicial review in our Constitution will be realised if some examples are given from our own experience in this sub-continent.

In the original Pakistan Constitution of 1962, there were no fundamental rights at all and consequently no power of any High Court to enforce fundamental rights. It was by an amendment of the Constitution. The Constitution (First Amendment) Act, 1963 (Act I of 1964) that fundamental rights were inserted and the High Courts were given the jurisdiction under an amended Article 98 of the Constitution to enforce fundamental rights.

In Bangladesh, our Constitution too suffered interference at the cost of judicial review. The Constitution (Fourth Amendment) Act, 1975 abolished the jurisdiction of the High Court Division to enforce fundamental rights and provided that Parliament may by law establish a constitutional court, tribunal or commission for their enforcement. This amendment did not survive eventually, but the actual exercise of judicial review was thwarted over and over again by either a Proclamation of Emergency or a Proclamation of Martial Law. The power of judicial review of the High Court Division has been interfered with at every break-point of constitutional continuity, because this power is commonly viewed with both reverence and suspicion.

2. An exercise in self-restraint

Yet, it is not commonly realised that the power of judicial review is in fact a perennial act in the exercise of self-restraint on the part of the judiciary. These continuous exercises have given birth to some maxims of judicial self-restraint which may properly be called imposed limitations on the exercise of judicial power. The

judiciary in its anxiety not to overstep the legitimate boundaries of judicial interference has formulated these precepts of its own for its own guidance and self-regulation. I will name a few.

(i) Cases or Controversies and Standing

The Court will refrain from pronouncing upon abstract, contingent or hypothetical issues. It will decide a case or controversy between *bona fide* adversaries. In 1911 the U.S. Supreme Court gave the leading decision on this maxim in the case of Muskrat vs. United States, 219 U.S. 346. An Act of Congress authorized Muskrat and others to bring suit in the U.S. Court of Claims, with an appeal to the Supreme Court to determine the validity of certain Acts of Congress which altered the terms of some prior allotments of Cherokee Indian lands. Justice Day, delivering the unanimous judgment, rejected the appeal for not meeting the case or controversy requirement. "If such actions as are here attempted, to determine the validity of legislation are sustained," he said, "the result will be that this court, instead of keeping within the limits of judicial power and deciding cases controversies arising between opposing parties, as the Constitution intended it should, will be required to give opinions in the nature advice concerning legislative action, a function never conferred upon it by the Constitution ...".

In M.G. Bhuiyan vs. Bangladesh, BCR 1981 (AD) 81, the appellant M.G. Bhuiyan, an Advocate of the Supreme Court, filed WP. No. 443 of 1979 seeking a declaration that Government Notification dated April 25, 1979 giving effect to the Law Reforms Ordinance, 1978 was without lawful authority on the ground that it was *ultra vires* the Constitution. It was argued in the High Court Division on his behalf that "every citizen of the country has a right to file an application under Article 102 of the Constitution seeking declaration of nullity of any law or a mandatory order for compelling the performance of a legal duty

by a public officer". The High Court Division, and on appeal, the Appellate Division, held that a citizen may prefer a writ petition only when his right has been affected by any law or by an act of a person performing functions in connection with the affairs of the Republic or any local authority, except in *habeas corpus* and *quo warranto* matters. He is, therefore, not an "aggrieved person".

Although this case was decided on the question of *locus Standi* it could as well be decided on the "case" or "controversy" yardstick. The Court is not, to be converted into a forum for expression of legal opinion without there being a concrete dispute between *bona fide* opposing contenders. The Court considered the question of standing in this case, because, it had, after all, given a decision on the merit the case.

Closely allied to the "case" or 'controversy" maxim is the maxim of "standing". The party or parties to a dispute must have "standing". In our Constitution, the question of "standing" is no longer a subjectmatter of judicial maxim. Judicial review is available to "any person aggrieved" under Article 102 and it is a matter of judicial interpretation of a constitutional provision, rather than application of a judicial maxim. The question of "standing" has assumed considerable importance in modern-day constitutional jurisprudence and this question will be dealt with separately later.

(ii) No Challenge on Legality after Reaping Benefits

The Court will not pronounce upon the constitutionality of a statute or of an official action at the instance of one who has availed himself of the benefits and then turns back to challenge its legality. In St. Louis vs. Prendergast Co., 260 U.S. 459, a company connected its premises with a new sewer and availed itself of its benefits. It then challenged the validity of the statute which provided for a tax levy against recipient of the services.

The U.S. Supreme Court unanimously held that by accepting and availing himself of the benefits of the construction and zoning involved the company was "stopped from maintaining a suit" on the grounds and under the circumstances. This is in effect an extension of the principle of not allowing anyone to blow hot and cold at the same time and to disallow approbation and reprobation. The Court looks askance at any attempt to have the judicial decision-cake and eat it too.

(iii) Rule of Exhaustion

The applicant must exhaust all statutory remedies available to him before he can maintain a writ petition. The rule of exhaustion was devised as a means for achieving orderly procedure which is the very essence of judicial process. In our Constitution, it is for the High Court Division to be satisfied, under Article 102(1), "that no other equally efficacious remedy is provided by law" before a writ is issued, and the meaning and content of these words have been the subjectmatter of a number of decisions which for reasons of their common knowledge will be kept out of purview of further discussion.

(iv) Unreasonable Delay

Also well-known and as such not worthy of a detailed consideration is the maxim that as an impugned law or action if left unchallenged without reasonable delay may alter the situation of others not involved in the dispute, the Courts insist that an applicant in a writ petition must come expeditiously after suffering a wrong and not make unreasonable delay. This is an extension of the equitable principle of "delay defeats equity".

(v) *No Determination of Disputed Qquestions of Fact*

Writ petitions are generally disposed of on affidavits and on facts admitted or accepted by opposing contenders. Hence if there

are disputed questions of fact which need determination by evidence, oral and documentary, the Court will not embark upon an investigation of the same in the writ jurisdiction. This is also well-known. Allied to this maxim is the maxim that judicial review is generally not available for a review of facts, but for a review of law emanating from accepted facts. But when *mala fide* is alleged on facts the Court has *per forece* to decide, if it is possible to decide without taking evidence, whether *mala fide* has been established on facts.

(vi) Not Mere Technicalities

Writ will not issue on mere technicalities. Issues raised must be substantial, not trivial – a known maxim.

(vii) Presumption of Validity of Statutes

The maxim *"utres magis valeat quam pareat"* (it is better for a thing to have effect than to be made void) applies both to statutes and to the Constitution. There is thus a presumption of validity of statutes (applied more recently in the case of Mujibur Rahman vs. Bangladesh, 44 DLR (AD) 111 (para 66)). The maxim applies even more strongly to a Constitution. Gwyer, C.J. said in Re CP Motor Spirit Taxation Act, AIR 1939 (FC), 1, "A Constitution of Government is a living and organic thing, which of all instruments has the greatest claim to be construed *utres magis valeat quam pareat*". "One of the cardinal principles of interpretation is that ... the Court will lean in favour of upholding the constitutionality of a law" (per Shahabuddin Ahmed, J. in Dr. Nurul Islam vs. Bangladesh, 1981 BLD (AD) 140, (para 129).

The onus to prove illegality or unconstitutionality is on the party who claims it.

(viii) Between two Interpretations, save the Act

"The cardinal principle of statutory construction", wrote Chief justice Hughes in United States vs. Carolene Products Co.,

304 U.S. 144 (1938), at pp. 152-53, ..." is to save and not to destroy. We have repeatedly held that as between two possible interpretations of a statute, by one of which it would be unconstitutional and the other valid, our plain duty is to adopt that which will save the act. Even to avoid a serious doubt the rule is the same." "One of the cardinal principles of interpretation is that a law should be interpreted in such a way that it should be rather saved than destroyed", (per Shahabuddin Ahmed, J. Dr. Nurul Islam vs. Bangladesh, 1981 DLR (AD) 140, para 129).

As a corollary, the Court will not normally formulate a rule of constitutional law broader than what is required by the facts of the case to which it is to be applied.

(ix) No Decision of a Constitutional Nature if the Issue can be Decided otherwise

If the decision of a case can rest on an independent and separate ground, the Court will not decide questions of a constitutional nature. As Justice Frankfurter said, "This Court (U.S. Supreme Court) reaches constitutional issues last, not first". Justice Brandeis succinctly put it, "(the) ... most important thing we do is not doing".

Thus K. Hossain, C.J. in the case of Dr. Nurul Islam vs. Bangladesh, 1981 BLD (AD) 140 said, "I do not propose to declare section 9(2) of Public Servants Retirement Act (Act XII of 1974) *ultra vires* the Constitution as the finding that the order under challenge is vitiated by malice in law is sufficient to dispose of the appeal. As regards the constitutionality of the section aforesaid, I like to adhere to the well-established self-set rule which says, the Court will not declare a law unconstitutional, if the case in which the question is raised can be properly disposed of in some other way", (Page 146). Shahabuddin Ahmed, J. concurred with this view, but the majority struck down

the impugned order as vitiated by malice in law and also declared the impugned section of the Act as *ultra vires* in the facts and circumstances of the case.

As a corollary it follows that the Court should refrain from answering "political questions", "if the validity or legality of the law could otherwise be decided", (per K. Hossain, C.J. in Dulichand Omraolal vs. Bangladesh, 33 DLR (AD) 30).

(x) No Imputation of Improper Motive to Legislature

The Court will not ordinarily impute illegal motives to the lawmakers. In Barenblatt vs. United States, 360 U.S. 109 (1959) Justice Harlan observed, "the judiciary lacks authority to intervene on the basis of the motives which spurred the exercise of that power". In the case of Khandakar Moshtaque Ahmed vs. Bangladesh, 34 DLR (AD) 222, the Appellate Division did not strike down a Martial Law legislation as *mala fide,* but tracing the history of change in the legislation held that the proceedings were taken *mala fide* and set aside the order of conviction and the order on review as vitiated by *mala fide.*

It is quite permissible for the Court to trace legislative history ("... a page of history is worth a volume of logic", said Justice Frankfurter) to find out its intent or purpose behind a legislation.

3. Exceptions to Judicial Review

(i) Constitutional Limitations

To the extent that (1) Fundamental Rights are not available to any provision of a disciplinary law (Article 45), (2) certain laws are specifically excluded from the purview of judicial review (Article 47 and 47A), and (3) certain authorities are not amenable to judicial review (Article 102(5)), the power of judicial review is constitutionally restricted. These are examples of how an organ of the State – The Supreme Court – functions in terms of the

Constitution and not beyond it and how a Constitution delimits and circumscribes the powers of the organs of the State.

A. Article 45

Part III of the Constitution contains Fundamental Rights and "Article 102 provides a guaranteed remedy for the enforcement of the fundamental rights and this remedial right is itself made a fundamental right by being included in Part III of the Constitution. The Supreme Court is thus constituted, by the Constitution, the protector and guarantor of fundamental rights and so long as the fundamental rights specified under Part III remain in force, it is the constitutional responsibility of the Supreme Court to protect them when the right conferred under clause (1) of Article 44 of the Constitution, is invoked". (Per Muhammad. Abdullah Jabir, J. in Government of Bangladesh vs. Ahmed Nazir, 27 DLR (AD) 41 at para 38).

Article 45, however, modifies fundamental rights in respect of disciplinary law in the following terms :

> "45. Nothing in this Part shall apply to any provision of a disciplinary law relating to members of a disciplined force, being a provision limited to the purpose of ensuring the proper discharge of their duties or the maintenance of discipline in that force."

"Disciplinary law" is defined in Article 150 thus:

> " "disciplinary law" means a law regulating the discipline of any disciplined force;"

"Disciplined force" is defined in Article 150 thus :

> " "disciplined force" means
>
> (a) the army, navy or air force;

(b) the police force;

(c) any other force declared by law to be a disciplined force within the meaning of this definition;"

Article 45 is attracted only when fundamental right is invoked by a member of a disciplined force in an application under Article 102(1) of the Constitution for the enforcement of his fundamental rights. The bar in Article 45, it appears, is not in absolute terms. A member of a disciplined force has no fundamental rights when he is being dealt with by "any provision of a disciplinary law", meaning a "law regulating the discipline of any disciplined force". What provision of a disciplinary law regulate the discipline and what do not, remains a matter of construction of each disciplinary law. Article 45 restricts the bar further. The "provision" must be "limited to the purpose of ensuring the proper discharge of their duties or the maintenance of discipline in that force." It remains therefore a matter of construction of the provisions of a disciplinary law in each case. Whether the applicant invoking fundamental rights falls under the excepted "provisions" or not will be the key issue in each case. As it stands Article 45 has not been noticed in any intricate details so far.

B. Articles 47 and 47A

New laws or amendment of existing laws dealing with clauses (a) to (f) of Article 47(1), enacted by Parliament to give effect to any of the fundamental principles of state policy and expressly so declared in the statute, cannot be declared void on the ground of inconsistency with fundamental rights. No provision of any such law has yet been tested in the Supreme Court. No provision of any laws and their amendments specified in the First Schedule, nor anything done or omitted to be done under the authority of such law, shall be deemed void or unlawful on the ground of inconsistency with or repugnance to, any provision of this

Constitution (Article 47(2)). These laws, excepting one, are the laws promulgated by the Acting President and President before the Constitution came into force on 16-12-72, when legislation was made by Presidential decrees, without any reference to any Parliament. The rationale of Article 47(2) is discussed in A. T. Mridha vs. State, 25 DLR 335 (Judgment by Badrul Haider Chowdhury, J.) in the following terms :

> "Now in the First Schedule as many as 27 laws are included. A cursory glance of the Schedule will show that most of these laws by Presidential Orders were promulgated prior to the promulgation of the Constitution for the purpose of bringing social reform. The laws are on the subject of the Estate Acquisition, taking over of Control and Management of Industrial and Commercial concerns, laws on subject of restoration of Enemy Property, Abandoned Property, Restoration of Bank and Industrial Enterprises, on Insurance, on Jute Export, on regulating of Jute Export, on Hat and Bazars, on the Land Holding Limitations, on Bangladesh Biman, etc. All these laws were passed for establishing the society which had through an armed struggle established the new State. In order to achieve the social reform such laws were promulgated. The framers of the Constitution in their wisdom thought that some of the laws might be challenged on the ground of vires after the promulgation of the Constitution. Therefore the legislature in their wisdom gave a protective umbrella to these laws by placing them under the Schedule and protected by article 47. This was a constitutional device to save those laws from possible challenge ... ... Articles 31-A and 31-B of the Indian Constitution are similar in line with our article 47 with the difference that in the Indian Constitution Article 31-B has been inserted by way of abundant caution to save the particular acts included in the 9th Schedule of the Constitution on the ground that any of the acts is not void for contravention of any fundamental rights, notwithstanding any

decision of a Court, whereas, in our Constitution article 47(2) apparently is not confined only to contravention of fundamental rights."

"The whole object of article 47 is to achieve amongst other socio-economic reforms and President's Order No.50 of 1972 is included in the first Schedule thereby saving it from any challenge in a Court of law on the ground of inconsistency with the Constitution." (para 54)

Article 47(2) gives two kinds of protections to the protected laws : First, the legislative protection to the laws specified in the First Schedule, and the second, to the action taken under those protected laws (Kazi Mokarram Hossain vs. Secretary, Ministry of Cabinet Affairs, 31 DLR (AD) 64). The protection does not relate only to fundamental rights. It provides a protective shield over all the statutes specified in the First Schedule against anything contained otherwise anywhere in the Constitution (Md. Rezaul Haque vs. Bangladesh, 28 DLR 39).

It has not yet been decided, with specific reference to Article 47, whether the protection is available if the action complained of is without jurisdiction, *mala fide* or *coram non judice*.

Articles 47(3) and 47A protect legislation providing for detention, prosecution or punishment of persons accused of genocide, crimes against humanity or war crimes and denies them certain fundamental rights and bars "any of the remedies under this Constitution" to them.

C. Article 102(5)

The scope of operation of fundamental rights is wider in our Constitution than that of judicial review of administrative action and of acts and proceedings of subordinate Courts and tribunals. Article 102(1) empowers the High Court Division to enforce fundamental rights against "any person or authority, including

any person performing any function with the affairs of the Republic", but the judicial review under Article 102(2) applies to "a person performing any function with the affairs of the Republic or of a local authority", not to "any person or authority".

Article 102(5), includes and excludes from the operations of Article 102(1) and 102(2), certain kinds of authorities in the following words :

> "(5). In this article, unless the context otherwise requires, "person" includes a Statutory public authority and any court or tribunal, other than a court or tribunal established under a law relating to the defence services of Bangladesh or any disciplined force or a tribunal to which article 117 applies."

The inclusionary provision brings within the ambit of Article 102(1) and (2) both "a statutory public authority" and "any court or tribunal", not just a court or tribunal subordinate to the High Court Division under Article 109. It enlarges the area of judicial review.

But the exclusionary provision qualifies the words "any court or tribunal". A court or tribunal established under a law relating to the defence services of Bangladesh or any disciplined force or a tribunal to which Article 117 applies will not be amenable to the jurisdiction of the High Court Division under Article 102(1) and (2). This exclusionary provision in Article 102(5) has been noticed in a number of decisions of the High Court Division and Appellate Division.

Thus, Bangladesh Rifles is a disciplined force within the meaning of Article 152 of the Constitution and the Riflemen are governed by the Bangladesh Rifles Order 1972, P.O. No.148 of 1972 and Bangladesh Rifles (Special Provisions) Ordinance, Ordinance No. LXXXV of 1976. If the Riflemen are discharged

from service by an order of an individual officer and not by a court or tribunal constituted by P.O. No.148 of 1972, they can maintain a writ petition and the embargo of Article 102(5) does not apply in their case. (Fazlur Rahman vs. Secretary of Home Affairs, 41 DLR (HCD) 459) (judgment by Mustafa Kamal, J.)

In Bangladesh vs. Md. Abdur Rab (33 DLR (AD) 143, decided on January 31, 1979) an Inspector of Police was dismissed from service on the recommendation of the Second Screening Board, Dhaka, constituted under the Government of Bangladesh (Services Screening) Ordinance, 1972, P.O. No.67 of 1972. The High Court Division declared the order of dismissal to have been passed without lawful authority in a writ petition. On appeal by the Government, the Appellate Division (majority judgment by Fazle Munim, J.) by a majority rejected the respondent officer's contention that as the Screening Board cannot be termed a Court or a tribunal set up under a law relating to any disciplined force, it does not come under the expression 'person' used in Article 102(5). It held, "As the law which has set up the Screening Board permits it to exercise jurisdiction in relation to a member of any disciplined force, it must be considered a court or tribunal under a law in relation to a disciplined force, though such law is not meant exclusively for it."

The majority decision does not rest here. It seems to deny the member of a disciplined force the right to invoke the writ jurisdiction "for the redress of any grievance against the administration." It says :

> "Quite understandably, a member of the disciplined force cannot, for the very reason that he has assumed a kind of responsibility which is not expected of any other person in the service of Bangladesh, hope to have all the rights which the Constitution have conferred on the latter. One of such rights being the power to invoke the special jurisdiction of the High Court Division

under Article 102 for the redress of any grievance against the administration. Needless to say, extension of such right to a member of the defence services of Bangladesh or to a member of any disciplined force would militate against the very essence and reality of the special role which he is called upon to discharge. One of the most elementary assumptions upon which a person proceeded to join the armed or police force is that if he is punished by the authority under whose command he has been placed for any infraction of duty or responsibility, he cannot seek remedy from any ordinary civil authority. Any interference by such authority other than in a case where lack of jurisdiction of the military or police authority is challenged, would undermine its discipline and efficiency. No ordinary court can give protection to a member of the defence services or of any disciplined force in case he challenges the decision of the authority under which he serves." (Para 13)

In Bangladesh vs. Zahangir Hossain, 34 DLR (AD) 173, decided on October 31, 1981, the Appellate Division in the majority appears to have moved away from this somewhat wide formulation. The Full Court held that a member of a disciplined force is debarred invoking the writ jurisdiction if aggrieved by an order of a court or tribunal established under a law relating to the disciplined force, subject to the rule laid down by the Court in the case of Khandker Ehteshamuddin Ahmed @ Iqbal vs. State, 33 DLR (AD) 154, in that the order is *coram non judice* or *mala fide*. But the Court split on the question as to whether the 'authorities' mentioned in the Schedule to the Police Officers (Special Provision) Ordinance, 1976, Ordinance No. LXXXIV of 1976, competent to dismiss, remove, discharge, compulsorily retire or reduce in rank a police officer of the rank of Inspector and below and competent to dispose of appeals thereform, are 'tribunals' as contemplated in Article 102(5). The minority (judgment by K. Hossain, C. J. with whom Fazle Munim, J.

concurred) held that the 'authority' mentioned in the said Ordinance is a tribunal. The reasoning is as follows :

> "A reference to the language of Article 102(5) of our Constitution, will reveal that 'tribunal' has been used first ony with Court, then as Court or tribunal established under a law relating to Defence Services of Bangladesh or any disciplined force and then again as a tribunal under Article 117. The context in which tribunal has been used so far as disciplined force is concerned, has been used in juxtaposition with that of Court or tribunal relating to Defence Services or disciplined force. The word tribunal has been used more in the nature of an administrative tribunal than in the nature of a Court. Looked at from any standpoint, mere absence of the word 'tribunal' in the Police Officers Ordinance, 1976, when basic conditions have been satisfied, namely, it is an authority established by a law to deal with certain officers of police force, the component of disciplined force to punish them for offences after following a procedure prescribed by the Ordinance, and the Ordinance confers no other function on the prescribed authority. It is an Ordinance which is protected under Article 45 of the Constitution." (Para 31)

The majority (judgment by Ruhul Islam, J.) held otherwise. The reasonings are, first, that the said Ordinance was not consciously promulgated with the object of applying the bar against invoking the writ jurisdiction by some categories of the police force, implying thereby that a statute purporting to attract the constitutional bar under Article 102(5) against a persons remedy under the Constitution must be consciously promulgated. Secondly, a member of a police force holds a civil post in the service of the Republic and, if aggrieved by an illegal order of dismissal. discharge etc., has the constitutional right to invoke the writ jurisdiction, clothed as he is with certain constitutional

guarantees under Article 135 of the Constitution. Thirdly. When an administrative tribunal is required to decide a matter in issue after hearing the parties objectively and according to the evidence led by the parties, then it may be said to have exercised the power quasi-judicially. But when an administrative tribunal is not required to hear the parties and decide the case on evidence or objectively on evidence, it cannot be said to decide the matter quasi-judicially. The 'authority' specified in the Schedule practically play the role of prosecutor and merely on consideration of the charge framed and the cause shown by the delinquent police officer imposes penalty. They do not decide the cases objectively, but act in conformity with some administrative policy. The authority exercising the power is very much a party to the proceeding itself. It has not been conferred with the judicial power of the State.

The Appellate Division decided by a majority that the authorities mentioned in the Schedule to the said Ordinance are not 'tribunals' as contemplated in Article 102(5), so as to deny the remedy of writ, to an aggrieved member of the police force. The remedy of a writ in an appropriate case, may be invoked by a member of the said 'disciplined force', if he has been illegally dismissed, removed, discharged, reduced in rank or compulsorily retired.

In Jamil Huq vs. Bangladesh, 34 DLR (AD) 125, the Appellate Division clarified the "true construction of the *ratio decidendi* of the cases of Abdur Rab and Zahangir Hossain (supra)" observing that "the order or action of the excepted authority mentioned in sub-article (5) of Article 102, is immune from challenge in writ jurisdiction, subject to the rule laid down in Khandaker Ehteshamuddin @ Iqbal (supra), in that the order is *coram non judice* or *mala fide*.

As to the function of the Court while exercising jurisdiction with regard to the excepted authorities under Article 102(5), the Appeellate Division says :

> " ... it is for the court to see the character of the authority which is exercising the power, the purpose for which the power is exercised, and also the intention of the legislative authority to grant immunity from judicial review of the action of such authority. Some reasons have been given in the aforesaid two cases, we can gather other reasons from the Constitution." (*Ibid.* para 12)

In Jamil Huq's case (supra), the conviction and sentence of death passed by a court Martial on a charge of mutiny under the Army Act, 1952 was challenged. The Appellate Division observed :

> "When such a question is agitated before the Court, the Court is first to see the provisions of the law as well as the provisions of the Constitution. The nature of the proceeding and the purpose of the Act are to be considered to see the jurisdictional infirmity of the order complained of. When the challenge is from an order of a Court Martial set up under the Army Act to enforce the Military law, the jurisdiction to interfere is more narrow than in the case of other Court or Tribunal. It is consistent not only maintenance of strict discipline demanded from the Defence Force, but also to the Constitutional protection given to the laws relating to the disciplined force, and also their action from any challenge in the Court. The first protection is given under Article 45, and the second in Article 102(5). Under the former, the law is protected, and under the latter the action under the law is protected. Keeping all these factors in view, all that can be said is, the ground on which a decision of a Court Martial set up on the Army Act can be challenged by *habeas corpus* petition will be analogous to one we have already conceded to be available under sub-article (5) of Article 102 of the Constitution and so this point need not be dwelt on any further." (Para 25)

The bar of judicial review is also applicable to "a tribunal to which Article 117 applies". In the case of Mujibur Rahman vs.

Bangladesh, 44 DLR (AD) 111, it has been held that an Administrative Appellate Tribunal is also a tribunal to which Article 117 applies and so no writ petition lies against a judgment of the Administrative Appellate Tribunal. On 22-7-91 the Administrative Tribunals (Amenment) Act, 1991, Act No. XXIII of 1991, introduced section 6A to the Act, providing in effect that a person aggrieved by a decision of the Administrative Appellate Tribunal can prefer a petition for leave to appeal before the Appellate Division.

(ii) Interpretative Limitation

Sometimes, even having jurisdiction, the High Court Division may decline any relief to the aggrieved person in view of the nature of the statute under which he is governed and under which he seeks remedy.

This is exemplified by the case of Major Hafizur Rahman vs. Government of Bangladesh, 29 DLR (HCD) 34, decided on January 21, 1977, in which a Major in the Army officiated as a Judge Advocate General in which capacity he served till his retirement. But after his retirement the order of officiating appointment was cancelled altogether. His vested right to the status and financial benefits of an officiating Judge Advocate General was affected thereby and his representation against the order having borne no fruit he challenged the said order in a writ petition. The High Court Division (judgement by Shahabuddin Ahmed, J.) held that his writ petition was maintainable. The learned Judge says :

> "Under Article 102 of the Constitution this Court got jurisdiction to entertain an application questioning the legality of any orders of Military Authorities other than a Court Martial, provided the orders are not in respect of conditions of service of military personnels. For example, illegal orders of military authorities seizing properties of citizens or arresting or detaining them are

amenable to court's jurisdiction and that is why the absolute bar to the court's jurisdiction under Article 98(3) of the late Constitution has been done away with in the present Constitution." (Para 21)

But, having conceded that the writ petition is maintainable, it was held that "the petitioner got no legal right to be enforced by this Court. In other words, the petitioner got no cause of action. Absence of cause of action in a particular case should not be confused with the absence of the Court's jurisdiction."

The absence of cause of action was attributed to the nature of service of the petitioner in which he was in. Under Article 134 of the Constitution every person in the service of the Republic, whether in a civil or military capacity, holds office "during the pleasure of the President". Whereas a person who holds a civil post in the service of the Republic enjoys certain constitutional protection under Article 135, a person holding a military post shall hold office during the pleasure of the President, not subject to or controlled by any rules or regulations. "They therefore got no right to be enforced by a court in respect of their service". It is public policy that creates a distinction between military service and civil service, maintained also by clause (J) of sub-section (1) of section 60 of the Civil Procedure Code, 1908.

As K. Hossain, C.J. said in the case of Jamil Huq (supra), "... ... our military law is a system of law or jurisprudence which exists separate and apart from the law which governs our Judiciary in its ordinary and general jurisdiction".

Chapter 9

ISSUES KNOCKING AT THE DOOR

1. An overview

Each generation of lawyers and Judges grapple with specific issues confronting them. The entire Constitution is not thrown up for legal dissection all at a time. A Constitution unfolds itself in its beauties and deficiencies as time unfolds. The last twenty-one years (1972-93) have not afforded the Supreme Court an uninterrupted opportunity to examine the Constitution. It was an on again, off again halting inquisition. Within the vagaries of its own existence the range of work done in interpreting the Constitution has not been negligible.

But certain issues are looming large in the legal horizon and one expects that the next generation of lawyers and Judges will probe deep into these issues and leave their contributions towards settling them. The impending issues, as I see them, are the following.

(i) The issue of "standing"

Whenever someone complains of another's action, the first question asked is "what's it to you?" In a pedestrian sense, that is the issue of standing.

Article 102 of the Constitution gives the right to "any person aggrieved" to enforce his fundamental rights or to seek judicial review in the High Court Division. But what is "any person aggrieved ?"

In Bangladesh Sangbadpatra Parisad vs. Bangladesh, 43 DLR (AD) 126, it has been observed (judgment by Mustafa Kamal, J.):

"In England, various tests were applied. Sometimes it was said that a person must be "aggrieved" or he must have "a specific legal right" or he must have a "sufficient interest". Now, after the introduction of the new Rules of the Supreme Court, Order 53, Rule 3, any person can apply for "judicial review" in England under the Supreme Court Act, 1981, if he has a "sufficient interest". (Para 9)

It is further observed,

"In our Constitution the petitioner seeking enforcement of a fundamental right or constitutional remedies must be a "person aggrieved". Our Constitution is not at *pari materia* with the Indian Constitution on this point. The Indian constitution, either in Article 32 or in Article 226, has not mentioned who can apply for enforcement of fundamental rights and constitutional remedies. The Indian Courts only honoured a tradition in requiring that the petitioner must be an "aggrieved person". The emergence in India of *pro bono publico* litigation, that is litigation at the instance of a public-spirited citizen espousing causes of others, has been facilitated by the absence of any constitutional provision as to who can apply for a writ." (Para 9)

... ... "Therefore the decisions of the Indian jurisdiction on public interest litigation are hardly apt in our situation. We must confine ourselves to asking whether the petitioner is an "aggrieved person", a phrase which has received a meaning and a dimension over the years." (Para 10)

Over the years, the Supreme Court of Bangladesh has maintained that the petitioner must have some right in the subjectmatter of the dispute so that he can possibly claim that such right must be determined in accordance with law. There are far too many decisions on this well-known position of the Supreme Court to merit any mention.

But the emerging trend of constitutional litigation is that it is not only the person whose interest is adversely affected by an order of a public official who is coming to the Court to seek a redress, but also other persons, voluntary societies, representative organisations, trade unions etc., which are coming in increasing numbers to test the validity of a law or an action of a public official in which their own direct personal interests are not involved, but in which they have a sufficient interest. It is these groups of new generation of constitutional litigants who are knocking at the door of the Supreme Court to gain entry into the threshold point. Constitutional lawyers, Judges and Courts all over the world are now facing them and providing adequate response to their loudly raised voice for access to justice. It will be interesting to see how the Supreme Court of Bangladesh finds its own answer to this issue.

How the new pressure has been met by the Courts in U.K. dealing with prerogative writs has been graphically presented by Lord Denning in his book "The Discipline of Law", (Butterworths, 1979). He observes :

> "Now I come to a matter of moment. When there is an abuse or misuse of power, who can bring a case before the Court ? Can any member of the public come ? Or must he have some private right of his own ?"
>
> "During the 19th century the Courts were reluctant to let anyone come unless he had a particular grievance of his own. He had usually to show that he had some legal right of his own that had been infringed or some property of his own that had been injuriously affected. It was not enough that he was one of the public who was complaining in company with hundreds or thousands of others. But during the 20th century the position has been much altered. In most cases now the ordinary individual can come to the Courts. He will be heard if he has a "sufficient interest" in the matter in hand." (P. 113)

Lord Denning then describes what is known as The Blackburn cases. He says that Mr. Raymond Blackburn, once a Member of Parliament and a fluent speaker, came to the Court with as many as four cases with issues not of his own but involving the general public. In each of these cases invariably his *locus standi* was challenged and in each of these cases his *locus standi* was upheld. In Blackburn vs. Attorney-General, [1972] 1 WLR 1037, Mr. Blackburn challenged the Government's right to join the Common Market contending that by signing the Treaty of Rome, Her Majesty's Government would be surrendering in part the sovereignty of the Crown in Parliament and that it had no right to do so. The Court of Appeal hearing him in person, rejected the argument but on the question of *locus standi* to claim a declaration the Court did not rule him out on the ground of standing because he said that he felt strongly and that it was a matter in which many people in England are concerned. (*Ibid.* p. 118)

In another case, R vs. Commissioner of Police of the Metropolis, *ex parte* Blackburn, [1968] 2 QB 118, Mr. Blackburn complained that big gambling clubs of London were openly breaking the law and the police were failing to prosecute because of a policy decision issued to them. He applied to the Court as a private citizen for a *mandamus* to compel the Commissioner of Police to do his duty. The Queen's Bench heard him, the policy decision was revoked and the law was enforced. It was held that every responsible citizen has an interest in seeing that the law is enforced and that is sufficient interest in itself to apply for *certiorari* or *mandamus*. (*Ibid.* pp. 119-122).

Mr. Blackburn again came to the Court in person and complained that laws against pornography were not being enforced. He had no interest except that his children might see the publications – just as anyone else's children. In that case, R vs. Police Commissioner, *ex parte* Blackburn [1973] QB 241 it was

held that Mr. Blackburn has served a useful purpose in drawing the matter to the Court's attention but the Court did not think it was a case for *mandamus*. (*Ibid*. pp. 122-125)

Mr. Blackburn complained again in person that pornographic films were being exhibited in London and that the Greater London Council were doing nothing to stop them. He applied for a writ of prohibition and he succeeded. In that case R vs. GLC *ex parte* Blackburn [1976] 1 WLR 550, Lord Denning held that Mr. Blackburn had sufficient interest to bring this proceeding against GLC. He held, "On this point, I would ask: Who then can bring proceedings when a public authority is guilty of misuse of power? Mr. Blackburn is a citizen of London. His wife is a ratepayer. He has children who may be harmed by the exhibition of pornographic film. If he has no sufficient interest no other citizen has`. (*Ibid*. pp. 125-126)

These Blackburn cases extended the scope of *locus standi* in prerogative writs. Finally, Lord Denning says about *locus standi* :

> "The Court will not listen to a busybody who is interfering in things which do not concern him, but it will listen to an ordinary citizen who comes asking that the law should he declared and enforced, even though he is only one of a hundred, or one of a thousand or one of a million who are affected by it." (Ibid. p. 133)

In England new Rules of Court were brought into force in January, 1978. Order 53 introduced a comprehensive system of judicial review. By Rules 1(1) and 1(2) it enables an application to cover, under one umbrella, all the remedies of *certiorari*, *mandamus* and prohibition and also a declaration and injunction. In Order 53, Rule 3(5) it was laid down that the applicant must have "a sufficient interest" in the matter to which the application relates. Section 31 of the Supreme Court Act, 1981 reproduced in statutory form the provisions of Order 53 of the Rules of the Supreme Court which were introduced pursuant to the Law

Commission's Report on Remedies in Administrative Law pubished in 1976.

In India "standing" has been liberalised to a great extent. The jurisprudential mould of this expansion is highlighted by Krishna Ayer, J. in A.B.S.K. Sangh (Rly) vs. Union of India, AIR 1981 (SC) 298, as follows :

> "Our current processual jurisprudence is not of individualistic Anglo-Indian mould. It is broad-based and people-oriented, and envisions access to justice through 'class actions', 'public interest litigation', and 'representative proceedings'. Indeed, little Indians in large numbers seeking remedies in Courts through collective proceedings, instead of being driven to an expensive plurality of litigations, is an affirmation of participative justice in our democracy. We have no hesitation in holding that the narrow concept of 'cause of action' and 'person aggrieved' and individual litigation is becoming obsolescent in some jurisdictions."

A. *The implication of the case of Kazi Mukhlesur Rahman* vs. *Bangladesh, 26 DLR (AD) 44, decided on September 3, 1974*

In Bangladesh, the first such challenge to the old concept of *locus stand,* was thrown in the case of Kazi Mukhlesur Rahman vs. Bangladesh, 26 DLR (AD) 44 in 1974, before public interest litigation gained a foothold in India. The implications of this decision, I am afraid, have not yet been fully grasped, for there has been no follow-up of the decision, either from the Bar or from the Bench, blossoming the decision in varied directions.

The petitioner challenged the Delhi Treaty between the Governments of the People's Republic of Bangladesh and the Republic of India signed on the 16th May, 1974 by the Prime Ministers of the two countries providing in Article I clause 14 thereof that India will retain the southern half of south Berubari

Union No. 12 and the adjacent enclaves and in exchange Bangladesh will retain the Dahagram and Angarpota enclaves. The ground of challenge was that the agreement involved cession of Bangladesh territory and therefore it was entered into without lawful authority and of no legal effect. The High Court Division summarily dismissed the writ petition holding that the petitioner had no *locus standi*.

At the hearing of the certificated appeal before the Appellate Division the question of *locus standi* of the appellant came up for consideration. It is surprising that even though by that time (September 1974) three Blackburn cases had already been decided and reported, only one of them namely, that of Blackburn vs. Attorney-General [1971] 1 W.L.R. 1037 was brought to the notice of the Court. The Appellate Division however (judgment by A.M. Sayem, C.J.) took into consideration a number of American and Indian decisions of the time and a lone Australian decision and held as follows:

> "The fact that the appellant is not a resident of the southern half of South Berubari Union No.12 or of the adjacent enclaves involved in the Delhi Treaty need not stand in the way of his claim to be heard in this case. We heard him in view of the constitutional issue of grave importance raised in the instant case involving an international treaty affecting the territory of Bangladesh and his complaint as to an impending threat to his certain fundamental rights guaranteed by the constitution, namely, to move freely throughout the territory of Bangladesh, to reside and settled in any place therein as well as his right of franchise. Evidently, these rights attached to a citizen are not local. They pervade and extend to every inch of the territory of Bangladesh stretching upto the continental shelf." (Para 18)

The Court further observed :

> "It appears to us that the question of *locus standi* does not involve the Court's jurisdiction to hear a person but of the

competency of the person to claim a hearing, so that the question is one of discretion which the Court exercises upon due consideration of the facts and circumstances of each case. The appellant has complained that he is under an impending threat of deprivation of his fundamental rights under Article 36 of the Constitution and his right of franchise. Because of this as well as of the exceptional and extraordinary constitutional issue raised in this case involving consideration of an international agreement between this country and the friendly Republic of India, we decided to hear the appellant." (Para 17)

It has perhaps been missed by both the Bar and the Bench ever since that the *ratio decidendi* of this case is that "the question of *locus standi* does not involve the Courts' jurisdiction to hear a persons but of the Competency of the person to claim a hearing, so that the question is one of discretion which the Court exercises upon due consideration of the facts and circumstances of each case."

In each case, therefore, it is for the petitioner to establish his competence to claim a hearing and to prevail upon the Court to exercise the discretion in his favour. He cannot establish his competence incompetently. A competent claim can gain recognition only by a competent effort. The granting of standing, discretion as it is, has to be pleaded with all the mastery of facts and law as the facts and circumstances of each case demand. As the Bar expands its horizon of advocacy, so the Bench expands. Ultimately, it is a two-way traffic, never one-way.

(ii) The Issue of Procedure

The Preamble to our Constitution declares "that it shall be a fundamental aim of the State to realise through the democratic process a socialist society, free from exploitation – a society in which the rule of law, fundamental human rights and freedom,

equality and justice, political, economic and social, will be secured for all citizens".

The Fundamental Principles of State Policy contain *inter alia* the principle that the Republic shall be a democracy in which fundamental human rights and freedom and respect for the dignity and worth of human persons shall be guaranteed. The Constitution contains a number of fundamental rights, it ensures the observance of rule of law and it promises political, economic and social equality and justice to all the citizens.

But how to enforce these rights and guarantees ? Article 102 of the Constitution only says that the High Court Division on the application of any person aggrieved may give directions to secure fundamental rights and may issue certain orders and directions in the nature of writs.

What is the procedure to be followed in granting these remedies?

Following the adoption of the Pakistan Constitution of 1956 the erstwhile High Court of East Pakistan framed Rules to govern the procedure in applications for directions, orders and writs under Article 170 of the said Constitution. These Rules still govern the procedure to be followed in filing an application to the High Court Division under Article 102 of the Constitution. Anyone can look up for these Rules in the Rules of the High Court of Judicature for East Pakistan at Vol. I, p. 253.

The High Court Division has stuck to those Rules. any application or affidavit which does not conform to these Rules will not be entertained by it.

Yet all around us, especially in India and Pakistan, the procedural Rules have been informally relaxed so as to be within the reach of the ordinary man and woman to enable him or her to avail of the constitutional remedies. In India there has come to be

developed what is known as "public interest litigation" since the last part of the seventies. The Supreme Court of India started the practice of entertaining telegrams addressed to it, converting them into writ petitions and acting on them. Plenty of legal literature is available on public interest litigation in India and I shall not dwell on them.

In 1993, I attended a conference on "Law as an Instrument of Social Justice" organised by the SAARC Law, Pakistan. The Chief Justice of the High Court of Sindh, Mr. Justice Nasir Aslam Zahid, mentioned a few interesting cases on procedure. All these cases were not from writ jurisdiction proper, but emanated from other proceedings. He told the audience about a gang rape case which was heard and disposed of by him in which a young woman was raped by four men in the satellite town of Mirpur Khas. It was brought for trial on the complaint of an organization called the W.A.R. (War against Rape). SHO, the local police officer, denied any knowledge of the incident although it was the talk of the town. The successor police officer also denied any knowledge although there were four witnesses who appeared in open Court to testify about the incident. The rape victim herself appeared before the Chief Justice with an infant in her arms and denied all charges against the alleged rapists. She had appeared before the Court without any notice being served on her and she told the Court that the local police officers had not prompted her to testify in their favour, but the Chief Justice ordered the transfer of both the local police officers to places 200 miles away from the place of incident so that they should not he able to influence the investigations. The administration went a step forward and suspended them from service. When fresh investigation started, not by the regular police but by the Criminal Investigation Agency, the CIA, the truth and the whole truth came out, not only from the rape victim, but also from the residents and others. The result was that the accused were charged with the offences they had committed.

Surely, I thought, there were some twisting of procedure somewhere to achieve this result.

The Chief Justice also referred to a case in which the complainant calling himself a social worker challenged the chalking and writing off of slogans on the walls of houses, buildings and other places. The Chief Justice called for a detailed report from the Commissioner of Karachi and all the deputy commissioners stating whether there were any such orders or instructions banning such writings on walls.

One more case cited by him was decided by another Bench in which a resident of Karachi challenged the construction of a 13-storied building around his house which he said would choke all his service like water and sewerage and would create conditions in which he will not be free to breathe. The result of the petition was that the building was allowed to be constructed on ground plus one storey and the rest was ordered to be demolished.

The Chief Justice also disclosed that he led a team of all the Judges of his Court for the inspection of the Karachi Central Prison and according to him one Judge reported that there were three prisoners in a two feet space.

In another case he heard, a man spent 10 years in a false case. On a normal conviction on the charges brought against him he could not have been in jail for more than 9 years. When he ordered his release and to send him home to Hyderabad his fetters could not be removed because they were rivetted and they could only be removed in Karachi jail. When the prisoner was asked if he had any money on him to go home he answered in the negative hearing which a person sitting in the Court room took out Rs. 1000/- and gave it to him.

The Chief Justice said that when he narrated this incident to his wife she objected as to why the accused was allowed to go with Rs. 1000/- in the police custody.

The Chief Justice said the Courts took all the actions to preserve and protect the Constitution under which Judges had taken oath to act according to law and he read out the Preamble to the Constitution, which had given the people freedom, equality, protection to minorities, fundamental rights, equality of status, freedom of expression, belief and faith and the State had also ensured to protect the dignity of man.

During the Conference, I found the Chief Justice sorting out numerous telegrams and letters seeking the Court's interference, treating some as regular constitutional petitions and sending others to authorities for redress. He said he received 50 telegrams a day complaining of human rights violations. He planned to institutionalise the handling of such letters and telegrams.

From the procedural point of view the Supreme Court of Bangladesh has not yet developed these informal practices, except for some stray cases. Last year a Division Bench of the High Court Division comprising Md. Mozammel Haque, J. and Mahfuzur Rahman, J. issued a *suo motu* Rule on the basis of a report in a vernacular daily (Daily Ittefaq) concerning a person Nazrul Islan who had been languishing in jail for long 12 years ever since he was 12 years old. As a 5-year old boy he was implicated in a few gang and dacoity cases from which he was acquitted and yet he was kept in wrongful imprisonment. He was put under bar-fetters *(danda-beri)* ever since he was taken to custody and was put under that condition althroughout. The Court was shocked to see him in bar-fetters when he was brought before it. The Court found that the proceedings in the criminal cases were void *ab initio* as he was tried in contravention of the Children Act, 1974. The Court found that the fundamental rights of the boy were violated for many years last past. He was literally in shackles wrongfully and illegally without any cause or case. He was set free and the Court issued various directions to the

Ministry of Home Affairs in respect of other accused or persons like Nazrul Islam who may be in any other jail in Bangladesh.

A somewhat rare almost extinct procedure was followed by the High Court Division in the case of Alam Ara Huq vs. Govt. of Bangladesh, 42 DLR (HCD) 98, decided on July 9, 1989. A detenue was ordered to be released by the High Court Division on two successive *habeas corpus* petitions in the past. But each time fresh orders of detention were served upon the detenue within the jail compound without complying with the Court's orders. Mustafa Kamal, J. and Md. Mozammel Hoque, J. comprising the Division Bench, ordered that the corpus of the detenue be brought before the Court in order to ensure that the Court's order is carried out forthwith if it is decided that the detenue was being detained illegally. On the date of hearing the detenue was brought in person before the Court and after hearing it was held by the Court that the detention was illegal and the Rule was made absolute. The Court ordered that the detenue be released immediately from the Court premises itself. The order was carried out immediately.

Article 107 of our Constitution empowers the Supreme Court to make Rules for regulating the practice and procedure of each division of the Supreme Court and of any court subordinate to it. No doubt the old Rules framed under the Constitution of Pakistan, 1956 are being followed, but some thoughts may now be given as to whether the procedural Rules, of which the Judges are their own masters, can be relaxed and enlarged so that the deprived, backward, illiterate, ignorant and terrorised section of our teeming millions may obtain a fair and meaningful opportunity to approach the Supreme Court for redress of legal and constitutional wrong done to them. If the procedure stands between them and the Court then the Constitution loses its validity to this vast multitude.

I realise the complexity of this problem. Lawyers, especially constitutional lawyers, legal aid societies, Court administration and Judges have all to play a concerted role in this respect and I leave the details advisedly for their consideration.

C. Indemnities galore and unexplored

Our Constitution started with indemnities. Paragraph 3(1) of the Fourth Schedule to the Constitution, an original provision, Provides :

> "3.(1) All laws made or purported to have been made in the period between the 26th day of March, 1971 and the commencement of this Constitution, all powers exercised and all things done during that period, under authority derived or purported to have been derived from the Proclamation of Independence or any law, are hereby ratified and confirmed and are declared to have been duly made, exercised and done according to law."

These are what Article 150 called "the transitional and temporary provisions" which "shall have effect notwithstanding any other provisions of this Constitution".

Article 46 of the Constitution grants powers to Parliament to provide indemnity in the following terms :

> "46. Notwithstanding anything in the foregoing provisions of this Part, Parliament may by law make provision for indemnifying any person in the service of the Republic or any other person in respect of any act done by him in connection with the national liberation struggle or the maintenance or restoration of order in any area in Bangladesh or validate any sentence passed, punishment inflicted, forfeiture ordered, or other act done in any such area."

Since the original Constitution was thus enacted, fresh provisions have joined the rank of indemnities, fattening the

Fourth Schedule. The First Martial Law in Bangladesh indemnified itself in Paragraphs 3A and 18, and the Second in Paragraph 19. The latest entrant in the procession of indemnities has taken refuge in Paragraphs 21 and 22. The Constitution (Eleventh) Amendment Act, 1991 and the Constitution (Twelfth) Amendment Act, 1991 give constitutional cover to the appointment of Chief justice as Vice-President on the 6th December, 1990 and seeks to give the general election that followed validity. Even the Chief Justice needed an indemnity.

Such a steady stream of intermittent indemnities mark out the Constitution of Bangladesh as a unique one, leaving one to wonder whether indemnities are a basic feature of the Constitution or not.

Yet, apart from some bald generalisations, the nature, scope, extent and applicability of these provisions in the Fourth Schedule and in Article 46 have not received an in-depth treatment so far. My own intention is not to provoke a speculative litigation, but to point out that in view of the recurrence of indemnities, the subject merits a searching consideration. As it stands, it remains an unexplored one.

KAMINI KUMAR DUTTA (1879 - 1959) : A PROFILE

Kamini Kumar Dutta, a giant and dedicated lawyer of his time, was born in 1879 (on the 25th Ashar, 1285 B.S.) at Srikail Village, P.S. Muradnagar, Comilla North Sub-Division. His father Krishna Kumar Dutta was an educationist with profound erudition in Sanskrit language, literature and *Shastras*. Krishna Kumar Dutta retired as a teacher of Chittagong High School and lived in his village home and breathed his last at his son's house at Comilla town where he spent his last days. Eldest son of his parents, Kamini Kumar Dutta was brilliant student having passed B.A. Examination with distinction. On obtaining B.L. degree he served as a Munsif in his early career. His next brother Surendra Nath Dutta was also a B.A., B.L. but he did not take to advocacy. He joined the teaching profession, later on became a roving *Sannyasi* and died at Comilla. His next brother Captain Narendra Nath Dutta is a household name in the field of herbal medicine. He established the famous Bengal Immunity Company, a pioneer pharmaceutical industry in herbal medicine with the co-operation of Dr. Bidhan Chandra Roy which remains one of the foremost industries of its kind in India. His youngest brother Debendra Nath Dutta was a high official in the Forest Department but he left the job and established himself in business. All of them are dead and gone now.

Upon the death of his father, Kamini Kumar had to bear the educational expenses of his three brothers in circumstances of privacy and hardship. But his response to the situation was heroic. He left the secure job of Munsif and embraced the glorious uncertainties of the legal profession in which he established himself in no time as a brilliant and towering Advocate, both in civil and criminal cases.

Kamini Kumar was attracted to politics from his early student life when he associated himself with the *Jugantar* revolutionary group. Later he played an active part in the non-cooperation movement of the Indian National Congress and became a devout follower of *Deshbandhu* Chittaranjan Das. He left legal practice for a year on the call of *Deshbandhu* and suffered imprisonment in the cause of freedom movement.

His political life is characterised by three distinctive features. First, he brought to bear a thoroughly liberal and totally non-communal approach to politics which earned him the faith, trust and love of both the Hindu and Muslim communities. Secondly, he was one of the pioneers of peasant movement in Bengal. He helped the peasant workers all over Bengal with money almost lavishly and his house was an open house for them. Thirdly, he maintained his earlier link with revolutionary politics and politicians and helped them during their periods of distress financially and by rendering legal assistence. His Ford car was used during the Chittagong Armoury Raid for which he was arrested but on release he spumed the displeasure and threats of the authorities and defended the accused in the Chittagong Armoury Raid case and helped them financially. He even sheltered Anant Singh, one of the accused in that case, in his own house at Comilla and spirited him away to Calcutta where the fugitive stayed in the house of his younger brother Captain Narendra Nath Dutta for a long time

Whatever be the political persuasions of political workers Kamini Kumar was broad-hearted enough to shelter and finance them and appear as their defender in political cases. Wealth came to him in abundance as a legal practitioner and his practice extended to the whole of Bengal, Bihar and Assam. Very few lawyers of his time became a legend in the profession that he was in his own lifetime. People used to engage Akhil Dutta, another

giant lawyer, for cross-examination and Kamini Kumar Dutta for argument and advocacy. Mr. Simpson an I.C.S. District Judge of the then Tipperah District once said of him :

> "If I would have ever been made an accused in a murder case I would have felt like engaging Kamini Babu in defending me properly. If I was ever impleaded in a civil suit with a complicated question of civil law I would have felt engaging Kamini Babu to represent me."

Kamini Kumar was a member of the Bengal Legislative Council and upon partition of India refused to leave his motherland for India and decided to dedicate his life to the service of his people at home. His son, late Ajit Kumar Dutta, also an Advocate, built up a huge practice in Calcutta and later became the Advocate-General of West Bengal and a Judge of the West Bengal High Court, but Kamini Kumar clung to his motherland and dedicated himself to the service of the country upto the last.

Legislators and Constitutionalists will recall the immense contribution that Kamini Kumar made in the framing of the Pakistan Constitution of 1956 as a member of the Constituent Assembly. Upon the adoption of that Constitution he addressed a meeting at Comilla Town Hall and analysed, Article by Article, for long three hours the Pakistan Constitution of 1956 and the Indian Constitution of 1950 to bring home his contention that the Pakistan Constitution of 1956 was immeasurably superior to the Indian Constitution in all aspects. Kamini Kumar led the dissident Congress group in the Assembly, while Basanta Kumar Das and Monoranjan Dhar led the Congress group. Later Kamini Kumar was appointed Health Minister in the Pakistan Cabinet of Chowdhury Mohammad Ali. He was universally respected for his ability, quality and honesty.

Kamini Kumar was the President of the Comilla District Bar Association in 1955. His end came on the 19th Poush, 1365

B.S. corresponding to the 4th January, 1959. He was so well-loved and respected by all that his *Sradh* ceremony became a meeting ground for Hindus and Muslims of all ages. Even Ayub Khan, the then President of Pakistan, gave him an award posthumously and presented a medal to his widow Mrinalini Dutta in recognition of his dedicated and honest service to the country at a *Durbar* held at Dhaka.

A prolific earner, Kamini Kumar led a simple and unostentatious life himself, giving away his huge income to charities and making his home at Comilla a veritable *Ashram* for the helpless. He extended his total support, moral and financial, to the noble founders of Comilla *Abhoy Ashram* with whom he maintained a close connection till his death.

As in life, so in death, Kamini Kumar remains charity personified. Following his wishes, his entire moveable and immoveable properties, those of his brother Capt. Narendra Nath Dutta and those of his ancestors were dedicated after his death to the cause of education and welfare of the people of the then East Bengal irrespective of caste, creed or religion under a Deed of Trust executed by his widow Mrinalini Dutta and their children. The Dutta Family established Srikail School and College at their ancestral village which are still functioning. The ancestral home is being used for education. The residential house of Kamini Kumar Dutta at Comilla town is being used as Mrinalini Dutta Hostel for School and College girls. Kamini Kumar Dutta Memorial Law Lecture is also a part of that Trust Scheme. *

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* For information on Kamini Kumar Dutta, my thanks are due to Mr. Mujibur Rahman, Senior Advocate and one-time colleague of Kamini Kumar Dutta in the legal profession, and to Syed Mahmud Hossain, Advocate.