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Jurisdiction of the Supreme Court of Bangladesh in Terms of Writ: An Appraisal

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1. INTRODUCTION

The Constitution of Bangladesh has conferred on the High Court Division (HCD) of the Supreme Court only original jurisdiction in the matter of writs. The basis of writ jurisdiction is the provision of Article 102 of the Constitution. The HCD on an application of any aggrieved person may pass appropriate order for enforcement of fundamental rights as enumerated in Part III of the Constitution.

Under Article 102(2), the HCD may make an order or directions or writs in the nature of *mandamus, prohibition, certiorari, habeas corpus* and *quo-warranto* whichever may be appropriate, for the enforcement of any of the rights conferred by this part. Finally the paper summarizes general conclusions making an overall assessment of the writ jurisdiction of the Supreme Court of Bangladesh.

1.1. Definition of Writ

Etymologically writ means a written document. But in legal terminology it has a restricted meaning. In Burton's legal thesaurus writ stands for bid, bidding, command, commandment, decree, decreetal, dictate, direction, directive, flat, mandate, order, ordinance, percept regulation and requirement. In law the word writ is used to indicate a particular type of order or judicial process.

According to Black's Law Dictionary, 'writ is a written order of the court, in the name of a state or other competent legal authority commanding the addressee to do or restrain from doing some specific act.' According to Ayar's

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Dictionary, writ is a judicial process by which anyone is summoned to do a certain act *e.g.*, a writ of habeas corpus, to produce a minor before court.

Article 226 of the Constitution of India has mentioned the writs in the nature of *habeas corpus, prohibition, co-warranto, certiorari,* or any of them for—

a) enforcement of fundamental rights;

b) redress of any injury of substantial nature from contravention of provisions of constitution or any enactment, ordinance, order, rule, regulation by law or other instrument;

c) redress of any injury by reason of any illegality in any proceeding by or before any authority where such illegality has resulted in failure of justice.

Historically writ originated and developed in British legal system. As defined Blackstone[1] in the words of AR Biswas, 'writ is an order or process issued by court or judicial officer asking a person to perform or refrain from performing any act. It is an extraordinary process of the court'.

Writ is a mandatory letter from the king in parliament, sealed with his great seals, and directed to the sheriff of the country wherein the injury is committed or supposed to be so, requiring him to command the wrongdoer or party caused either to do justice to the complainant to appear in court and answer the accusation against him. In fact, writ is a judicial process by which anyone is summoned by a legal instrument to enforce the orders and sentences of the court.

1.2. Scope and Application

The HCD can issue writ in the nature of prerogative writs as prevailing in England. The HCD can also issue directions and orders etc. by Article 44 of the Constitution of Bangladesh in accordance with the provision of Article 102(1) for the enforcement of rights conferred by part III is guaranteed.

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1 Blackstone Commentaries

The HCD's jurisdiction is still extraordinary and is governed by the *corpus juries* which have accumulated instances in England, India, Pakistan and Bangladesh in the form of judicial precedents. The Article further confers upon the HCD power to issue not only directions in the nature of various writs indicated in the Article without using their technical names but those writs themselves and further the Article goes on to state that those writs or orders can be issued not only for the enforcement of the fundamental rights but also for any other purpose.

1.3. Object of Writ

During the 19th and 20th centuries the minimal duties of the state progressively widened. New authorities with wide statutory powers have been created, giving new emphasis to the problem of reconciling powers of the state with the liberties of citizens. Many of the statutes relating to the new administrative authorities contain provision whereby the aggrieved citizens can secure redress from administrative tribunals.

2. EXERCISE OF WRIT JURISDICTION

2.1. Writ Jurisdiction

According to Blacks Law Dictionary, Jurisdiction means, "a government's general power to exercise authority over all persons and things within its territory and a power to create interests that will be recognized under common law principles as a valid in other states".

Under the Constitution of Bangladesh of 1972, there are two divisions of the Supreme Court of Bangladesh namely the High Court Division (HCD) and the Appellate Division (AD). The Writ Jurisdiction of the HCD is dealt within Article 102 while that of the AD is mentioned in Article 104 of the Constitution. Various types of orders which can be made by the HCD in the exercise of its writ jurisdiction are contained in Article 102 of the Constitution of Bangladesh in the following words: 102(2) the HCD may satisfied that no other equal remedy is provided by law-

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

i) directing any person performing any function with the affairs of the Republic or of a local authority to Met vain from doing that which in not permitted by law to do or to do that which is required by law to do or.

ii) declaring that any act done or proceeding taken by a person performing functions in connection with the affairs of the Republic or a local authority has been done or taken without lawful authority and is of on legal effect or

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

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

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

The paper reproduces usually the provisions contained in Article 98(2) of the Constitution of Pakistan of 1962, although the word writ has not been used anywhere in Article 102 the rules followed in practice are those of writs and the powers exercised under writ jurisdiction. Article 102 empowers the HCD to issue orders (which are substance writs) in the nature of *prohibition, mandamus, certiorari, habeas corpus* and *quo-qarranto.* Moreover, the word writ is specifically used in Article 104 while conferring powers on the AD of the Supreme Court. In this Article the two words writ and order will, however, be used interchangeably in an attempt to examine the nature and scope of the writs under the Constitution of Bangladesh of 1972.

2.2. Practice and Procedure of the Writ Jurisdiction

Under Article 107 of the Constitution of Bangladesh of1972, the Supreme Court may with the approval of the President, make rules, regulations, practices and procedures of each division of the Supreme Court. But no such rule has yet been made. In exercise of the powers under *High Court Order* 1947 certain rules were made regarding writ petitions under Article 170 of the Pakistan Constitution of 1956. By virtue of Section 24 of the *General Classes Act* 1897, those rules are so applicable in respect of writ petitions under Article 102 of the Constitution of Bangladesh of 1972.

Furthermore, in exercising the writ jurisdiction, the HCD of the Supreme Court of Bangladesh can apply certain principles to meet the exigencies of the situation on the ground of equity, justice and good conscience. There has also developed a practice in the HCD to apply, by analogy, the principles of the *Code of Civil Procedure* 1908 (CPC) as and when necessary to meet the need of the situation. For example in substituting the heirs of a deceased writ petitioner and in restoring for default, the HCD applies the principles laid down in the CPC for disposal of such situations under Article 102 of the Constitution. The matter examined in *Begum vs. Rajuk,* in which the question raised whether the provisions of Section 141 of the CPC, which provides that, the procedure provided in this Code regard to suits shall be followed as far it can be made applicable in all proceedings in the original constitutional jurisdiction of the HCD under Article 102 of the Constitution.

2.3. Where a Person can file Writ Petition

Under Article 102(1) of the Constitution for the enforcement of fundamental rights the HCD may provide necessary remedies. Fundamental rights are our legal and constitutional rights. Writ petition is possible or is allowable if there exists no other equally efficacious remedy in law.

2.4. Enforcement of Fundamental Rights

Article 102(1) of the Constitution[2] empowers the HCD to give appropriate directions or orders to any person or authority for the enforcement of any of

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[2] Article 102(1) of the Constitution provides, "The High Court Division on the application of any person aggrieved, may give such directions or orders to any person or authority, including any person performing functions in connection with the affairs of the Republic as

the fundamental rights. Persons performing functions in connection with the affairs of the Republic are also amenable to this jurisdiction of the HCD. However, there must be an application by an aggrieved person so that the HCD may pass an order or direction for the enforcement of a fundamental right. If any act or proceeding violates any of the 18 fundamental rights enumerated in the Constitution the order or direction will be issued to remedy the grievance. In the case of *Md. Shoaib vs. Bangladesh,*[3] the petitioner, one of the three partners of a partnership firm, filed a writ petition at the HCD challenging the validity of a government order staying a proceeding of release and handing over possession of the said partnership to the petitioners which affected their fundamental right to freedom of profession or occupation contained in Article 40 of the Constitution. While disposing of the writ petition DC Bhattacharya J observed:

> "Any person aggrieved by any order or act may move this court for relief against such order or act and the petitioner being very much affected by the impugned order has every right to move this Court for necessary orders. Therefore we think that the petition is quite maintainable."

If the infringement of fundamental right is established, the enforcement of the fundamental right becomes obligatory upon the HCD and exhaustion of all other equally efficacious remedy provided by law is not necessary. As in *Sarwari Begum vs. Bangladesh,*[4] in which the petitioner filed a writ petition for the enforcement of fundamental right guaranteed under Article 42(1) of the Constitution to hold her purchased house alleging that the illegal enlistment of the house as abandoned property has encroached on her fundamental right.

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may be appropriate for the enforcement of any of the fundamental rights conferred by Part III of this Constitution".

3 (1975) 27 DLR (HD). 315

4 (1993) 45 DLR (HD). 571

The Constitution does not mention the relief which may be granted to redress the violation of fundamental rights. It has been left to the HCD to fashion the relief according to the circumstances of particular cases. It may be an injunctive relief preventing the infringement of fundamental right or it may be a direction or order including an order in the nature of various kinds of prerogative writs. In this context, the observations made by M A Jabir J, in *Bangladesh vs. Ahmed Nazir,*[5] are of direct relevance:

> "We have, accordingly; no doubt that the framers of the Constitution intended to empower the High Court Division to pass appropriate orders....and the power to do so is not at all fettered because of the absence of nomenclature of the nature of writ in the Constitution."

2.5. Limitations of High Court Division

The Constitution has imposed restriction on exercising writ jurisdiction of the HCD of the Supreme Court thus:

I) The HCD can not pass any interim or other order in relation to any law to which Article 47 applies.

II) When a writ petition of prohibition, mandamus, or certiorari is filed along with a prayer for an interim order which is likely to have the effect in prejudicing or interfering with any measure designed to implement any development programme, or any development work or be otherwise harmful to the public interest such interim order cannot be issued without notifying and hearing the attiring general as per provisions of the constitution and unless the HCD is satisfied that such interim order will not have any of the above mentioned effects.

III) The writ jurisdiction usually does not extend to authorities specifically excluded by the Constitution under Article 105(5), thus a court or tribunal established under a law relating to the Defence Service of Bangladesh or any disciplined force or a tribunal to which

[5] (1975) 27 DLR (AD), 48

Article 117 applies are beyond the purview of the writ jurisdiction of the Supreme Court.

3. CRITICAL ANALYSIS AND EVOLUTION OF VARIOUS WRITS

3.1. Various Types of Writ

Article 102(2) of the Constitution of Bangladesh confers power of judicial review on the HCD in the same language as used in Article 98 of the Pakistan Constitution of 1962 Article 102(2) (a) (i) empowering the HCD to issue orders in the nature of *prohibition* and *mandamus.* Article 102(2)(a)(i)(ii) empowers the HCD to issue orders in the nature of habeas corpus and art 102(2)(b)(ii) invests the HCD with the power to issue orders in the nature of *quo-warranto.* The codification of the remedies has affected considerable change, enlarging in some respects and narrowing in some other respects the scope of the remedies. For facility of reference the names of *certiorari, prohibition, mandamus, quo-warrant* and *habeas corpus* will be used.

3.2. Writ of Certiorari

According to Blacks Law Dictionary, "Writ of Certiorari is an extraordinary writ issued by an appellate court its discretion, directing a lower court to deliver the record in the case for review".

The writ of certiorari is used today in the United States (US) as a general vehicle of discretionary appeal historically; however, the writ had a much narrower function. It lies only to inferior court and be 'certified' and sent to the King's Bench to see if that court had exceeded its power in particular cases. It was most frequently used to review criminal indictments and local administrative orders, and was often used to examine the statutory authority for acts of administrative bodies created by statue.

The term certiorari means to be certified or to be more fully informed of. The writ of certiorari in so named because in its original form it required the king should be certified of the proceedings to be investigated. Initially at common law certiorari were used either from the King's Bench or the Chancery for the purpose of exercising superintending control over inferior courts. So certiorari was necessarily a judicial writ at its initial state. But gradually the jurisdiction was enlarged to include within its fold all authorities performing judicial, quasi judicial and even administrative functions. Thus, certiorari is no longer a writ. When a court or a tribunal or an authority as a person has already violated the principle of natural justice or misused the power or acted in excess of its jurisdiction, the higher court by issuing certiorari can quash that act i.e. can declare that act illegal, this is certiorari.

Clause 2(a) (ii) of Article 102 of the Constitution of Bangladesh organizes the HCD to make an order in the nature of *writ of certiorari*. It provides that the court may declare that any fact done or proceeding taken by a person performing functions in connection with the affairs of the republic or of a local authority has been done or taken without lawful authority and is of no legal effect.

The HCD may issue an order in the nature of certiorari only when a person or authority has committed and error which vitiates the act done or proceeding taken for lack of jurisdiction. Mere doing an act as taking a proceeding in an unsatisfactory manner is not enough to involve the jurisdiction. As in *Hosne Ara Begum vs. Court of Settlement,*[6] Mustafa Kamal J observed, "So long as the court of settlement acts within jurisdiction the HCD will be right in not intervening on the ground of mere unsatisfactory disposal of a case".

Certiorari is used by the High Court Division when (a) there is an application for the same by an aggrieved person (b) there is no other equally efficacious remedy provided by law and (c) the person to be proceeded against is a person performing functions in connection with the affairs of the republic or of a local authority. But unlike prohibition it is used after the completion of the act or proceeding to declare that such an act was done or proceeding taken without lawful authority and is of no legal effect. While prohibition is issued

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6 46 DLR (AD). 9

to prevent the act or proceeding when is not complete and there remains something to be prevented, certiorari is issued when the act or proceeding is completing.

The main function of writ of certiorari is to curb excess jurisdiction and to keep inferior courts and tribunals within their bounds. An essential feature of a writ of certiorari is the exercise of control over judicial, quasi judicial and other bodies where in no appeal is provided for this writ can be issued to correct any error of law when an administrative tribunal commits on the face of the record it can be corrected by issuing a writ of certiorari. The writ of certiorari an ashes the decision of judicial and quasi-judicial tribunal when a writ of certiorari in moved, the HCD may also call for the records, it necessary. Normally certiorari is used in the following circumstances-

1. The decision violates fundamental rights.
2. The decision violates the law without jurisdiction.
3. The jurisdiction is void.
4. The decision is against natural justice, malafide or based on non application of mind. But mere, misapplication of law is not a ground of certiorari.

Article 102 (2) (a) (ii) empowers the HCD to issue an order declaring an act done or proceeding taken to be without lawful authority and of no legal effect. In other words, the HCD can interfere only when the person proceeded against has committed an error of jurisdiction, that is, when the act done or proceeding taken is vitiated by lack of jurisdiction or by being in excess of jurisdiction.[7] This provision does not permit the HCD to interfere on the ground of error of law on the face of the record. In *Ayesha Saalauddin vs. Chairman of the Second Labour Court,*[8] the AD observed that, the HCD can

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7 *Hosne Ara Begum vs. Court of Settlement*, 46 DLR (AD). 9

8 32 DLR (AD) 68. 71 (this is a case of no evidence which is treated as an error of law)

issue a writ in the nature of *certiorari* "where there is an error apparent on the face of record". It is submitted that the observation is not correct.

3.2.1. Principles of Natural Justice

Procedural safeguards are essential elements of rule of law. According to Jackson J of the American Supreme Court, even severe substantive law can be endured if they are fairly and by common law procedures than under the common law enforced by Russian procedures.[9] The principles of natural justice are applied to administrative process to ensure procedural fairness and to free it from arbitrariness. Violation of these principles results in jurisdictional error. Thus in a sense violation of these principles constitutes procedural *ultra vires*. It is, however, impossible to give an exact connotation of these principles as its contents are flexible and variable depending on the circumstances of each case, i.e., the nature of the function of the public functionary, the rules under which he has to act and the subject matter he has to deal with.[10] These principles are classified into two categories — (i) a man cannot be condemned unheard *(audi alteram partem)* and (ii) a man cannot be the judge in his own cause *(nemo debet esse judes in propria causa)*. The contents of these principles vary circumstances and it "cannot with the varying be petrified or fitted in rigid moulds. They are flexible and turn on the facts and circumstances of each case".[11] In applying these principles, there is a need to balance the competing interests of administrative justice and the exigencies of efficient administration.[12] These principles were applied

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9 *Shaughnessy vs. US,* 345 US 206.

10 *Russell vs. Duke of Norfolk,* (1949) 1 All ER 109; *India vs. PK Roy,* AIR 1968 SC 850, 858

11 *Shrikrisna Tikara vs. M.P.,* AIR 1977 SC 1691, Para 8

12 *Helaluddin vs. Bangladesh,* 45 DLR (AD) 1 (where the decision of a proceeding is subject to review and the aggrieved party was given hearing in the main proceeding, fresh hearing at the time of review need not be given). *The Chairman, Board of Milling Examination vs. Ramjee,* AIR 1977 SC 965 (An accident in coal-mine resulted in an injury. In the inquiry held by the Regional Inspector in which the shot firer admitted that he allowed an unauthorized person to do the risky job. On the recommendation of the Regional Inspector the Board cancelled the certificate of the shot firer. As the Board did not give notice and

originally to court of justice and now extend to any person or body deciding issues affecting the rights or interests of individual where a reasonable citizen would have legitimate expectation that the decision-making process would be subject to some rules of fair procedure.[13] These rules apply even though there may be no positive words in the statute requiring application of these rules.[14] Lord Atkin in *R vs. Electricity Commissioners*[15] observed that the rules of natural justice applied to anybody of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially. The expression having duty to act judicially was used in England to limit the application of the rules to decision-making bodies similar in nature to a court of law. Lord Reid, however, freed these rules from the bondage in the land-mark case of *Ridge vs. Baldwin.*[16] But even before this decision the rules of natural justice were being applied in our country to administrative proceedings which might affect the person, property or other rights of the parties concerned in the dispute.[17] In all proceedings by whosoever held, whether judicial or administrative, the principles of natural justice have to be observed if the proceedings might result in consequences affecting the person

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hearing tot he shot firer, plea of violation of natural justice was accepted by the High Court. In neversing the decision of the High Court, the Supreme Court observed. "Natural justice is no unruly horse, no lurking land mine, nor a judicial cure all. If fairness is shown by the decision-maker to the man proceeded against, the form, features and the fundamentals of such essential processual propriety being conditioned by the facts an circumstances of each situation. no breach of natural justice can be complained of)

13 SA de Smith, *Constitutional and Administrative Law,* 4th ed. p. 569; Wade & Bradley, *Constitutional and Administrative Law,* 10th ed., p. 644; *Ridge vs. Baldwin,* (1964) AC 40; *University of Dacca vs. Zakir Ahmed,* 16 DLR (Sc) 722; *Faridsons Ltd. vs. Pakistan,* 13 DLR (SC) 233; *Est Pakistan vs. Nur Ahmed,* 16 DRL (Sc) 375; *Abul A'la Moudoodi vs. West Pakistan,* 17 DLR (SC) 309; *Kraipak vs. India,* AIR 1970 SC 150.

14 *CIT vs. Fazlur Rahman,* 16 DLR (SC) 506; *Abdur Rahman vs. Collector and Deputy Commissioner,* 16 DLR (SC) 470

15 (1924) IKB 171, 205

16 (1964) AC 40

17 *Faridsons Ltd. vs. Pakistan,* 13 DLR (SC) 233 (Even if therefore the proceedings before the Chief Controller were neither strictly judicial, nor even quasi-judicial in character the principle of natural justice could be called in aid by the appellants, 248

or property other right of the parties concerned.[38] These principles have no application in the case of legislative functions.[39] But because of proliferation of delegated legislation the distinction between legislative and administrative functions is fast coding. Even then the distinction has to be kept in mind for application of the principles of natural justice and the Indian Supreme Court laid down the following text:

> Legislation is the process of formulating general rule of conduct without reference to particular cases and usually operating in future administration is the process of performing particular acts of issuing particular orders or of making decision which apply general rules to particular cases.[40]

3.2.2. Fair Procedure

The basic principle of fair procedure is that before taking any action against a man the authority should give him notice of the case, fair opportunity to

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38 *University of Dacca vs. Zakir Ahmed,* 16 DLR (SC) 722 (student's discipline); *Sk. Ali Ahmed vs. Secretary, Ministry of Home Affairs,* 40 DLR (AD) 170 (cancellation of gun license). *Habibullah Khan vs. S. Azharuddin,* 35 DLR (AD) 72 (awarding of cost against a stranger to the proceeding); *Hamidul Haq Chowdhury vs. Bangladesh,* 33 DLR 381 (taking over of printing establishment); *Farzana Haque vs. Dhaka University,* 42 DLR 262; *Bangladesh vs. Comptroller and Auditor General,* 21 DLR 526 (unfairness in departmental examination); *Raghupati vs. Bihar,* AIR 1989 SC 620; *Southern Painters vs. F & CT Ltd.,* AIR 1994 SC 1277 (black-listing of contractor). But see, *State vs. Joynal Abedin,* 32 DLR (AD) 110, where even though the exercise of the power of transfer of a case deprived the accused of the right of as appeal, R. Islam J speaking for the majority held, "Since the power of the government to transfer a case is neither judicial nor quasi judicial, the question of contravention of the principle of natural justice does not arise". The observation does not square with the consistent view of the courts of this subcontinent

39 Fixation of price under statutory provision is legislative function, *India vs. Cynamide India Ltd.,* AIR 1987 SC 1802; *U.P. vs. Remusagar Power Co,* AIR 1988 SC 1737; *Bi-Metallic Co. vs. Colorado,* 239 US 441 (State Board of Equalization increased the value of all taxable property in Denver without giving opportunity of hearing to tax-payers. The court rejected the due process challenge holding the action to be a legislative act) Contrast the case with *Londoner vs. Denver,* 210 US 373 (Tax authorities in Denver ordered paving of a street and assessed the cost upon the abutting landowners. The court required due process hearing).

40 *India vs. Cynamide India Ltd.,* AIR 1987 SC 1802

answer the case against him and to put his own case.[41] The person sought to be affected must know the allegation and the materials to be used against him and must be given a fair opportunity to correct or contradict them.[42] The right to a fair hearing is now of universal application whenever a decision affecting the rights or interest of a man is made. But such a notice is not required where the action does not affect the parties in complaining.

3.2.3. Exercise of Discretion

"Parliament constantly confers upon public authority powers which on their face might seem to be absolute and arbitrary. But arbitrary power and unfettered discretion are what the courts refuse to let continue.[43] Douglas J of the American Supreme Court observed in *US vs. Wunderlich,*[44] "Law has reached its finest moment when it has freed man from the unlimited discretion of some ruler....where discretion is absolute, man has always suffered". When Parliament granted discretionary power without any limitation, the House of Lords refused to accept the conferment of power as unfettered. Refuting the claim of unfettered discretion of the Minster, Lord Upjohn observed:

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41 S. A. de Smith, *Constitutional and Administrative Law,* 4th ed., 572; *Sk. Ali Ahmed vs. Secretary of the Ministry of Home Affairs,* 40 DLR (AD) 170; *Bangladesh Telecom Ltd. vs. BTTB,* CA 73 of 1992 (unreported) (facts which constitute the valid basis of cancellation have to be alleged in the show cause notice and cannot be supplemented in affidavit filed in the proceeding challenging the action.); *Tariq Transport vs. Sargoda Bus Service,* 11 DLR (SC) 140; *Chief Commissioner of Karachi vs. Dina Sohrab,* 11 DLR (SC) 113; *Faridsons Ltd. vs. Pakistan,* 13 DLR (SC) 223; *Abdul Latif vs. West Pakistan,* 14 DLR (SC) 300; *Sk. Abdur Rahman vs. Collector,* 16 DLR (SC) 470; *CIT vs. Fazlur Rahman,* 16 DLR (SC) 506; *University of Dacca vs. Zakir Ahmed,* 16 DLR (SC) 722; *Abul Ala Moudoodi vs. West Pakistan,* 17 DLR (Sc) 209; *Abdus Sabur Khan vs. Karachi University,* 16 DLR (SC) 422

42 *Lamda vs. Government of Malaya,* (1962) AC 322; *Chief Constable of the North Wales Police vs. Evans,* (1982) 3 All E.R. 141 (the police authority required a police probationer to resign on account of allegation about his private life but the authority neither informed the police probationer the allegations on which he based his decision nor did he offer him an opportunity to give explanation and the court found violation of the rules of natural justice).

43 H.W.R. Wade, *Administrative Law,* 6th ed., 388

44 342 US 98

> My Lords, I believe that the introduction of the adjective 'unfettered' and its reliance thereon as an answer to the appellants' claim in one of the fundamental matters confounding the Ministry of attitude, bona fide though it be .... But the use of that adjective even in an Act of Parliament, can do nothing to unfetter the control which the Judiciary have over the Executive, namely, that in exercising their powers the latter must act lawfully, and that is a matter to be determined by looking at the Act and its scope and object in conferring a discretion on the Minister rather than by the use of adjectives.[45]

Under the Constitutional of Bangladesh dispensation unfettered discretion granted by a statue is violative of Article 27[46] and it may also in certain circumstances be found to be violative of Article 31 as being unreasonable and arbitrary.

4.3. Writ of Mandamus

According to Blacks Law Dictionary, 'A writ issued by a superior court to compel a lower court or a government officer to perform mandatory or purely ministerial duties correctly'. Mandamus is a public law remedies and will not be therefore, be available in respect of duties of private nature. In other words, writ of mandamus issued for securing performance of public duties, performance of which has been wrongfully refused. This writ is a most extensive remedial nature. It is to be remembered that condition precedent for issue of this mandamus is the presence of statutory right. The public officials or public body will be compelled to perform public duty which they failed to perform. Mandamus is normally issued in case of infringement of fundamental rights, statutory order and executive order (non-statutory).

Literally the term 'Mandamus' means we command and reminds one of the times when the king of England "as the autocratic head of vast administrative

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45 *Padfield vs. Minister of Agriculture*, (1968) 1 All ER 694, 718

46 *Dr. Nurul Islam vs. Bangladesh*, 33 DLR (AD) 201 (Government's claim to absolute discretion in compulsorily retiring a public servant was emphatical projects.

system had occasion to mandamus his subjects many time in the course of the day". In Halsbury's Laws of England, *mandamus* is described as follows:

> The orders of mandamus is an order of a most remedial nature and is in form, a command issuing from the High Court of justice directed to any person, co-operation or interior tribunal, requiring him or them to do some particular thing there in specified which pertaining to this or their office and is in the nature of public duty.

Thus it is clear that when a court or tribunal or an authority or a person has refused or failed to perform his statutory obligation, it is the writ of mandamus by which the higher court can compel the authority or court or person to do his statutory obligation. So mandamus is a positive remedy.

The second part of clause (2)(a)(i) of Article 102 confers power on the HCD to issue writs in the nature of mandamus to compel a person performing functions in connection with the affairs of the Republic or a local authority to do something that he is required by law to do.

According to Ferris, "Generally speaking, it may be said that mandamus is a summary writ, issuing from the proper court commanding the official or board to which it is addressed to perform some specific legal duty to which the party applying for the writ is entitled of legal right to have performed".[53] The difference between mandamus and prohibition is that mandamus commands a public functionary to do what he is under legal duty to do, while prohibition is issued to prevent him from doing what he is not permitted by law to do.

Mandamus may be issued on any person performing functions in connection with the affairs of the Republic or of a local authority. Such a person must hold office of a public nature[54] that is an office under the constitution or a law relating to the affairs of the Republic or of a local authority. It will be issued only when that public functionary has a public duty under a law and he

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53 *The Law of Extra-ordinary Legal Remedies*, Para 187

54 *Zainul Abedin vs. Co-operative Bank*, 18 DLR (SC) 482

refused to perform his legal duty; the duty may be judicial, quasi-judicial or purely administrative. The duty sought to be enforced must be a duty of a public nature, *i.e.*, a duty created by the provisions of the Constitution or a statute or some other rule of common law or some rules or orders or notifications having the force of law.[55] The public duty need not however, be always a statutory duty.[56] No *mandamus* can be issued to compel the government to implement its policy.[57]

A writ of mandamus cannot be issued on Parliament to prevent it from considering a bill which is alleged to be in violation of the Constitution[58] nor can the court issue a mandate to Parliament to enact a particular law. In the same way, a court cannot direct a subordinate legislative authority to make or not to make a rule which it is competent to make.[59] No court can give a direction to the executive government to refrain from enforcing a provision of law.[60]

4.3.1. Discretionary Power

If a statute has given discretion to a public functionary to exercise some power, no mandamus can be issued to compel him to exercise the power since the existence of an obligatory duty is a precondition to the issuance of mandamus.[61] However, a duty to exercise discretion may be implicit in the grant of power. In *Julius vs. Lord Bishop of Oxford,* Lord Cairns observed,

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55 *See,* the definition of law in Article 152, *Bihar E.G.F Co-operative Society vs. Sipahi,* (Manual not framed under the authority of law has no statutory force and no mandamus can issue to compel compliance with the requirements of Purchase Manual).

56 *Anadi Mukta Sadguru Trust vs. Rudani,* AIR 1989 SC 1607

57 *Yunus Mia vs. Secy. Ministry of Public Works,* 45 DLR 498

58 *Chotey Lal vs. U.P.,* AIR 1951 All 228

59 *J & K vs. Zakki,* AIR 1992 SC 1546

60 *Marinder vs. Li Governor,* AIR 1971 SC 2399

61 *AK Roy vs. Union of India,* AIR 1982 SC 710; *Mysore vs. Syed Mohammad,* AIR 1968 SC 1113; *Mysore vs. Sheshadri,* AIR 1974 SC 460.

> .... there may be something in the nature of the thing empowered to be done, something in the object for which it is done, something in the title of the person or persons for whose benefit the power is to be exercised, which may couple the power with a duty, and make it the duty of the person in whom the power is reposed, to exercise that power when called upon to do so.

Thus if the discretion granted is of such nature that it can be said to be a discretion coupled with a duty, the court may compel the authority clothed with the discretion to exercise the discretion.[62] Section 10 of the *Industrial Relations Ordinance* 1969 provides that "the Registrar of Trade Unions may cancel the registration of a trade union if it has obtained registration by fraud or by misrepresentation". The Registrar registered a second trade union in one establishment. The first trade union applied to the Registrar for cancellation of registration of the second trade union complaining that the second trade union did not have 30% of the workers of the establishment as its members and had obtained registration by misrepresentation. On the application of the first trade union the HCD found that the Registrar had discretion coupled with duty to take action and directed the Registrar to hold enquiry.[63] The court cannot, however, dictate how or in which manner the authority is to exercise the discretion.[64] But where the authority having the discretion exercised it on irrelevant or wrong grounds or in exercising the discretion has left any relevant fact or circumstance not of consideration vitiating the exercise of the discretion or otherwise abused the discretion,[65] the court may treat it as a failure to exercise discretion and direct the authority to exercise the discretion

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62 *Commissioner of Police, Bombay vs. Gordhandas*, AIR 1952 SC 16

63 *Titas Gas Karmachari Union vs. Registrar of Trade Unions*, WP No. 621 of 1990 (Unreported)

64 *Ahmed vs. Secretary Ministry of Health*, 44 DLR 385; *Orissa vs. Chandrasekhara*, AIR 1965 SC 532

65 For discussion on abuse of discretion, *see* Para 5.75-5.80

on consideration of the proper grounds.[66] When the discretion has been exercised properly in good faith the court will not issue mandamus to control the exercise of discretion.[67]

4.3.2. Notice demanding Justice

An application for mandamus has to be preceded by a demand made to the public functionary concerned for performance of the public duty sought to be conformed. It is only when the public functionary refused to perform or the refusal to perform may be inferred from the conduct of the public functionary, the application will be maintainable.[68] It has however, been held in some cases that though it is the normal requirement to make a demand before filing an application, such a demand will not be necessary to maintain an application when in the facts and circumstances of a case it appears that making a demand and waiting for reply may seriously affect the interest of the applicant or that such a demand will serve no useful purpose and will be a mere idle ceremony.[69]

4.3.3. Enforcement of the Writ of Mandamus

Article 112 of the Constitution mandates that all authorities *i.e.,* executive and judicial, in the Republic shall act in aid of the Supreme Court. Thus it is the obligation of the executive government to comply with the direction given by the HCD. If it does not comply with the direction given by the HCD, the usual method of enforcing the judgment granting a writ of mandamus is by committing the concerned authority for contempt. But in order to commit for

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66 *Authorized Officer vs. AW Mallick,* 20 DLR (SC); *Presiding Officer vs. Sadaruddin,* 19 DLR (SC) 516; *Ghulam Mostafa vs. Pakistan,* PLD 1966 SC 268

67 *Vice Chancellor vs. S.K. Ghose,* AIR 1954 SC 217

68 *Queen vs. Mayor & Justices of Bodin,* (1892) 2 QB 21; *D.M. Lahore vs. Raza Kazim,* 13 DLR (SC) 66.

69 *Zamiruddin Ahmed vs. Bangladesh,* 1981 BLD 304; *Thari Sobani vs. East Pakistan,* 15 DLR 65; *Abdul Karim vs. Deputy Commissioner,* 15 DLR 483

contempt, the direction must be of an absolute nature and not one allowing any discretion or option on the part of the concerned authority.[70]

4.4. Writ of Prohibition

According to Blacks Law Dictionary, 'Prohibition means, (1) A law or an order that forbids a certain action, (2) An extra ordinary writ issued by an appellate court to prevent a lower court from exceeding its jurisdiction or to prevent a non judicial officer or entity from exercising a power'.

Prohibition is an original remedial writ, as old as the common law itself. Originally the primary purpose of prohibition was to limit the jurisdiction of the *eccliastical cowits*. Prohibition as a writ means one which prevents a tribunal possessing judicial or quasi-judicial powers from exercising jurisdiction on matters not within its cognizance. Thus prohibition is originally a judicial writ since it can be used against a judicial or quasi-judicial body and not against an administrative body or public corporation or body.

Under Article 102 (2)(a)(i) of the Constitution of Bangladesh of 1972 the HCD has been empowered, upon application of any person-aggrieved, to direct a person performing any function in connection with the affairs of the Republic or of a local authority to refrain from doing that which he in not permitted by law to do. Therefore it deals with the writ of prohibition which is issued to refrain a person from doing an act if the following conditions are fulfilled.

(a) There is an application for the issue of the writ filed by an aggrieved person;

(b) The HCD in satisfied that there is not other equally officious remedy provided by law;

(c) The act in not permitted by law; and

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70 *Pakistan vs. Mehrajuddin*, 11 DLR (SC) 260; *Pakistan vs. Md. Sayeed*, 13 DLR (SC) 94; *Masood Raza vs. MA Faiz and Anr.*, Contempt Petition no. 4 of 1977 (unreported).

(d) It is done by a person performing functions in connection with the affairs of the republic or of a local authority.

Prohibition prevents an order or decision being made. There are instances that when an action has been done in violation of statutory provisions or has no statutory basis writ of prohibition has been issued.

The writ of prohibition may be issued only on the application filed by an aggrieved person. The expression of aggrieved person is not defined in the constitution. The court has determined the meaning of the expression in different cases having regard to the facts and circumstances of each particular case. As a general mode, a person is regarded as an aggrieved person it he has a direct personal interest in the subject matter in respect of which the writ is sought for this rule has been applied to individuals as well as to body of persons as in *Bangladesh Shangbad Patra Parishad vs. Bangladesh.*[18]

If a person is directly and personally affected by the act of a person performing functions in connection with the affairs of the Republic or of a local authority or he has sufficient interest in the matter in respect of which the writ is sought for he will be viewed as a person aggrieved. Under the Constitution of Bangladesh, there is no scope for filing a writ petition of prohibition or mandamus or certiorari by public spirited persons for espousing the cause of others. In the case of *Chairman of Civil Aviation Authority vs. KA Rouf,*[71] the AD denied standing to a head master of a school to challenge the order of the Education Board regarding the formation of the managing committee of the school. Mustafa Kamal J. observed, "The HCD should have asked itself as to what interest the writ petitioner had in establishing the character of the school". It should be mentioned here that unlike the 1950 Indian Constitution, which has empowered the Supreme Court and the High Court to issue directions or orders or writs including writs in the nature of

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18 43 (1991) DLR

71 46 (1994) DLR (AD).126

habeas corpus, mandamus, prohibition, quo-warranto, certiorari which ever may be appropriate and has not said anything about the person who can apply for such a remedy, the Bangladesh constitution specifically provides that only an aggrieved person can apply for orders in the nature of the writs of prohibition, mandamus and certiorari.

However, in exceptional circumstances, the condition that the applicant must be an aggrieved person, as contained in Article 102 of the Constitution of Bangladesh of 1972, may be done away from the fulfilment of this condition may not be insisted upon in cases in which constitutional questions of grave importance or imminent threat to any fundamental right of the applicant guaranteed by the constitution is involved. As in *Kazi Moklesur Rahman vs Bangladesh,*[72] ASM Sayem, C J observed,

> The fact that the applicant's is not a resident 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 in this case. We beard 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 rights ... .

Moreover, subsequently in *Dr. Mohiuddin Farooque vs Bangladesh,*[73] the Supreme Court of Bangladesh has taken a more liberal view of the term any person aggrieved so as to enable a person (including an indigenous association) to involve the writ jurisdiction of the HCD under Article 102 of the Constitution of Bangladesh of 1972 even though the person is not directly and personally affected in cases commonly known as "Public Interest Litigation". Thus if a person or an association espouses a public cause involving a public wrong or public injury or violation of fundamental rights affecting an indefinite number of people and the person or association is a member of the public not a local component of a foreign organization, he is

72 26 (1974) DLR (AD), 44

73 49 (1997) DLR (AD), 1

entitled to involve the writ jurisdiction of the HCD of the Supreme Court of Bangladesh subject to the fulfilment of certain conditions.

The above stated liberal interpretation of the term "any aggrieved person" is now ever subjected to certain preconditions ordained as measures of care and cautions. In this connection Mustafa Kamal J further observed:

> the High Court Division may exercise same rules of caution in each case. It may see that the applicant is in fact espousing a public case, that him interest in the subject matter is real and not in the interest of granting some publicity for himself to create more public sensation that he is acting bonafide, that he is not a busy body or interloper, that it is in the public interest to grant him standing that he is not acting for a collateral purpose to achieve a dubious goal, including serving a foreign interest.

Therefore, it is evident that the expression "aggrieved person" has been given a liberal interpretation in the context of the scheme and objectives of the constitution and in the light of the purpose behind the grant of the right to the individuals and the power of the court.

Clause (2)(a)(i) of Article 102 confer a jurisdiction roughly corresponding to the jurisdiction of issuing writs of prohibition. The jurisdiction is "primarily supervisory, having for its objects the confinement of courts of peculiar, limited or inferior jurisdiction within their bounds; to prevent them from encroaching upon the jurisdiction of other tribunals; to refrain them from exercising jurisdiction where they do not properly possess jurisdiction at all, or else to prevent them from exceeding their limits in matters in which they have their cognizance.[74] The writ in the nature of prohibition lies where a tribunal proceeds to act (a) without or in excess of jurisdiction[75], (b) in

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74 Ferris, *The Law of Extra-ordinary Legal Remedies*, Published by Law Publishing Co. Karachi, Para 305)

75 *East India Commercial Co. vs. Collector of Customs*, AIR 1962 SC 1893: *Sewpujanrai vs. Collector of Customs*, AIR 1958 SC 845

contravention of some statute or the principles of common law[76], (c) in violation of the principles of natural justice[77], (d) under a law which itself is *ultra vires* or unconstitutional[78], or (e) in contravention of fundamental rights[79]. Writ of prohibition lies against judicial and quasi-judicial bodies. But because of the formulation of the jurisdiction in Article 102(2) a writ in the nature of prohibition under our constitutional dispensation lies against any person (other than those mentioned in clause (5) "performing any function in connection with the affairs of the Republic or of a local authority", whether or not he performs a judicial or quasi-judicial function. When a public officer of the kind mentioned in Article 102(2) (a)(i) is doing an act without or in excess of jurisdiction given by law, a writ may be issued without any enquiry as to whether he is acting judicially or quasi-judicially.[80] If want or excess of jurisdiction is found not valid objection can be taken that the officer is acting in executive or administrative capacity.[81] No such writ will be available where the officer has jurisdiction, but exercises it irregularly or erroneously as distinguished from illegally.[82] Under our Constitution if the error is one of law it goes to jurisdiction and the writ will issue. The jurisdiction to issue a writ in the nature of prohibition is different from the jurisdiction to issue an injunction. Injunction is issued against any party in a proceeding, but a writ in the nature of prohibition is addressed to the tribunal or public officer whose jurisdiction is challenged.[83]

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76 *Muhammad Tofail vs. Abdul Ghafoor,* PLD 1958 SC 201

77 *Commissioner, H.R.E vs. Swamiar,* AIR 1954 SC 282; *Carl Still Ginbil vs. Bihar,* AIR 1961 SC 1615

78 *Ibid; Bidi Supply Co. vs. India,* AIR 1956 SC 479; *A.G. of Australia vs. The Queen,* PLD 1957 PC 115

79 *Bidi Supply Co. vs. India,* AIR 1956 SC 479

80 *Muhammad Khan vs. Additional Commissioner,* PLD 1964 Lah 401

81 *Inayetullah vs. M.A. Khan,* PLD 1964 (SC) 126

82 *Narayan vs. ITO,* AIR 1959 SC 213

83 *Hong Kong & Shanghai Banking vs. Bhaidas,* AIR 1951 Bom 158

This writ lies both for excess of jurisdiction and absence of jurisdiction.[84] *In R. vs. County of London Quarter Sessions*[85] one Arthur was bound over by the magistrate and was directed to execute personal recognizance bond for good behaviour. Arthur gave notice of appeal to the Quarter Sessions against the order. An application was moved to prohibit the Quarter Sessions from hearing the appeal and as the law did not provide for the appeal, a writ of prohibition was issued.[86] Where the petitioner was being prosecuted under Section 7 of the Special Powers Act, 1974 (SPA) for the offence of absconding and failing to surrender pursuant to a detention order passed against him, the HCD issued a writ of prohibition as the detention order having been found to be without lawful authority, the Special Tribunal had no jurisdiction to proceed with the trial.[87] A writ in the nature of prohibition issued on the same grounds on which a writ in the nature of certiorari is issued; the only difference between the two is in the stage of the proceeding. A writ of certiorari will be issued when the proceeding is closed, while an order of prohibition can be issued only so long as the proceeding remains pending. It cannot be issued after the authority has ceased to exist or becomes *functus officio.*[88] But if a tribunal after becoming *functus officio* assumes jurisdiction to do something further the writ will lie.[89] Where a proceeding is partly within and partly without jurisdiction, the *prohibitio* will lie against doing what is in excess of jurisdiction. Thus when a Collector of Customs imposed an invalid condition for the release of gold on payment of fine in lieu of confiscation, a writ was issued prohibiting the customs authorities from

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84 *Gobinda Menon vs. India,* AIR 1967 SC 1274; *Assistant Collector vs. National Tobacco,* AIR 1972 SC 2563

85 (1948) All FR 72

86 *See* also, *R vs. West Kent,* (1951) 2 All E.R. 726

87 *Anisul Islam Mahmud vs. Bangladesh,* 44 DLR 1

88 *Hari Vishnu Kamath vs. Ahmed Ishaque,* AIR 1955 SC 233

89 *R v. Camphell,* (1953) 1 All E.R. 684

enforcing the invalid condition.[90] An application for an order of prohibition is never too late so long as there is something left for it to operate upon.[91] As regards the use of the remedy, Lord Goddard observed,

> It would not be at all desirable to lay down a definite rule when a person should go to the tribunal or when he should come here for prohibition where the objection is that the tribunal has no jurisdiction... For myself I should say that where there is a clear question of law not depending upon particular facts ... there is no reason why the applicant should not come direct to this court for prohibition rather than wait to see if the decision goes against him, in which case he has to move for a certiorari.[92]

Thus it is clear that when a court or a tribunal or an authority or a person is about to violate the principles of natural justice or is about to abuse the power or is about to act in excess of its jurisdiction, the higher court by issuing a writ of prohibition can prohibit the tribunal, court or authority from doing such act.

4.5. Writ of Habeas Corpus

The term *Habeas Corpus* literally means 'have the body' *i.e.,* to have the body before the court. So it is a kind of order of the court that commands the authorities holding an individual in custody to bring that person into court.

According to Blacks Law Dictionary, "Law Latin that you have the body" A writ employed to bring a person before a court, most frequently to ensure that the party's imprisonment or detention is not illegal. In addition to being used to test the legality of an arrest or commitment, the writ may be used to obtain review of (1) the regularity of the extradition process. (2) the right to or amount of bill or (3) the jurisdiction of a court that has imposed a criminal sentence.

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90 *Sewpujanrai vs. Collector of Customs,* AIR 1958 SC 845

91 *Estate Trust vs. Singapore I.T.,* 1937 A.C., 898

92 *R vs. Tottenham District Tribunal,* (1956) 2 All E.R. 863, 864, 865

The writ of habeas corpus is issued to have the body of detained person before the court or judge. Calling upon the person by whom that person is detained to explain and to court know by what authority he has detained that person. Halsbury in *Law of England*[19] says as follows:

"The writ of *habeas corpus* and *subjectendum* which is commonly known as the writ of habeas corpus, as a prerogative process for securing the liberty of the subject by a holding an effective means of immediate release from unlawful of unjustifiable detention whether in prison or in private custody". As regards jurisdiction, it is stated in Article 45 of the same volume[20] that: "The right to the writ is a right which exists at common law independently of any statute, though the sight has been confirmed and regulated by statue".

The writ of habeas corpus thus provides a powerful and effective safeguard for personal liberty against unwarranted and arbitrary encroachment therein. Article 102(2)(b)(i) invests the HCD with power and obligation to issue a writ in the nature of habeas corpus when a case of unlawful detention is made out. It provides that on the application of any person the court may direct the person having custody of another to bring the latter before it so that it can satisfy itself that the detenu is not being held in custody without lawful authority or in an unlawful manner. The expression 'custody' is not confined to executive custody[93] and includes custody of private person also.[94] The HCD has power to issue the order of release of a detenu under Section 491 of the *Code of Criminal Procedure* 1898 (Cr.P.C.) and this power can be exercised *suo motu.*[95] But this power is hedged with limitations and can be taken away or curtailed by ordinary legislation. In codifying the writ of habeas

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19 Article 40 (third edition, volume), 24

20 Article 45 (third edition, volume), 27

93 *Bangladesh vs. Ahmed Nazir,* 27 DLR (AD) 41

94 *Ayesha Khatun vs. Major Shabbir,* 1993 BLD 186

95 *State vs. D.C. Saikhira,* 45 DLR 643 (High Court Division took action of the basis of news published in a newspaper).

corpus, the framers of the Constitution have freed the jurisdiction from the limitations and have conferred wide power of judicial review[96] which can in no way be curtailed by any legislative device.[97] All illegal detentions by public functionaries involve infringement of fundamental rights guaranteed by Articles 31, 32 or 33 of the Constitution and as such the jurisdiction to issue the writ of habeas corpus shall have to be understood with particular reference to these Articles. Speaking about this constitutional power DC Bhattacharya J observed,

> The constitution having highlighted the rule of law and the fundamental human rights and freedom in the preamble of the Constitution and personal liberty being the subject of more than one fundamental right as guaranteed under the constitution, a heavy onus is cast onus is cast by the Constitution itself upon the authority, seeking to take away the said liberty on the avowed basis of legal sanction, to justify such action strictly according to law and the Constitution.[98]

The formulation of this power under Article 102(2)(b)(i) is the same as that of Article 98 of the Constitution of Pakistan of 1962 and the decisions of the Pakistan Supreme Court.[21]

It has been seen that in order to obviate the difficulty, the detaining authority often cancelled the initial detention order and passed another legal order claiming that the subsequent order of detention was an independent detention order and the question turned on whether the subsequent order was at all an independent detention order or not. In *Abdul Latif Mirza vs. Bangladesh*, the period of detention ordered by the Deputy Commissioner expired and two days thereafter a fresh order by the government was served. The detention of the intervening two days was illegal. The government claimed that the

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96 *Arima Seu vs. Bangladesh*, 27 DLR 122, 142; *Abdul Latif Mirza vs. Bangladesh*, 31 DLR (AD) 1; *West Pakistan vs. Begum Shorish Kashmiri*, 21 DLR (SC) 1

97 *West Pakistan vs. Shorish Kashmirt*, 21 DLR (SC) 1

98 *Aruna Son vs. Bangladesh*, 27 DLR 122.33

21 Court are apposite in interpreting the provision of Article 102(2)(b)(i)

subsequent detention order was an independent one. But the court rejected the plea stating that, "We cannot take a too technical and legalistic view on one of the most cherished fundamental human rights, that of liberty of an individual ... We, therefore find that an illegal order of detention cannot he continued by a subsequent order of detention even though the latter is otherwise valid. An illegal detention equally cannot be continued by an alleged independent valid order of detention, if it, in effect, continues an illegal detention ... The order of the Government is no doubt an independent order, but it purported to continue the earlier detention. The detenu was not released on the expiry of thirty days of the order of the Deputy Commissioner. He continued in detention without any order whatsoever and so his detention became an illegal detention after the expiry of the thirtieth day. The government continued this illegal detention by its order of 24.5.74. The order is independent but detention is not. There is no correlation between an independent order and the fact of independent detention. The order of detention purporting to continue an illegal detention cannot be sustained".[99]

DC Bhattacharya J disagreed with the majority on this point and observed. ".... if the subsequent order of detention is completely an independent order and does not purport to continue the previous detention such an order, if otherwise unexceptionable, shall not be bad only because the previous detention was in fact illegal".[100] It is submitted that the majority view is correct and rightly points out that a technical and legalistic view cannot be taken in respect of one of the most cherished fundamental rights. In a habeas corpus proceeding, the court is concerned with the detention and looks at the detention order only to determine the validity of the detention as has been

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99 *Ibid*, Para 23 & 24 (the decision in *Khair Ahmed vs. Ministry of Home*, 40 DLR 353, apparently seems to be in conflict with *Abdul Latif Mirza* but the two cases are distinguishable in that in *Khair Ahmed* there was no gap between the earlier and latter orders of detention to render the detention unlawful); *Monwara Begum vs. Secretary of the Ministry of Home*, 41 DLR 35

100 *Ibid*, Para 67

very clearly found by the court in *Sajeda Parvin vs. Bangladesh.*[101] Unless the detenu is released actually and to merely on paper, a subsequent order of detention howsoever independent in fact continues the detention which is found illegal. The minority view, it is submitted, is not in consonance with the provisions of Article 31. If the minority view is adopted a citizen can be treated otherwise than in accordance with law and the illegal detention can be continued in fact by terming the latter order to be an order independent of the illegal order and the rule of law will be undermined. When a person is detained under a law providing for detention without trial, a writ of habeas corpus will be issued if the law is unconstitutional or the law being valid, the detention order is *ultra vires* the law. The law relating to preventive detention may be found unconstitutional for infringement of fundamental rights. When the law is not alleged or found to be violative of any provision of the Constitution, the enquiry regarding legality of the detention is limited to the following-

1. Whether the detention order is on the face of it invalid.
2. Whether the authority acting under the law is a competent authority in terms of that law.
3. Whether the authority in acting violated any provision of the constitution.

In making the enquiry it is to be remembered that every detention without trial and conviction is *prima facie* unlawful and the onus is upon the detaining authority to justify the detention by establishing the legality of its action according to the principles of law.[102]

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[101] 40 DLR (AD) 178, ("the fact of detention and not the date of order of detention is the material point. In case of continued detention the aggrieved party has got a running grievance"— M.H. Rahman J)

[102] *Liversidge vs. Anderson,* (1942) AC 206: *West Pakistan vs. Begum Shorish Kashmiri,* 21 DLR (SC) 1, 15: *Aruna Sen vs. Bangladesh,* 27 DLR 122: 134

The first enquiry is whether on the face of it the detention order is valid. The detention order will be invalid if it does not refer to the law under which it has been made or if the law referred to does not authorize the detention or if there is no statement in the order about compliance of certain matters which the law requires to be stated in the detention order.[103] The second enquiry is whether the authority which made the detention order its authorized under the relevant law to make the order. In rare cases it will be found that the detention order has been made by a person competent to pass it. The detention will also be invalid if the matter has not been referred to the Advisory Board or the Advisory Board has not approved the detention within the time stipulated in the law and at any rate within six months as prescribed by Article 33 of the Constitution.[104]

The next enquiry is as to whether the detaining authority acted within the limits fulfilling the conditions of the law. A preventive detention law authorizes public functionaries to order detention of a person necessary to prevent the person from doing certain acts specified in the law. This satisfaction or opinion must be based on materials. If it is found that the detaining authority has acted mechanically without applying its mind to the question, the detention will be found invalid.[105] When the detention order did not mention that the detention of the detenu was necessary to prevent him from doing any prejudicial act, the detention wad hold without any legal authority.[106] The facts and materials must co-exist with the order of detention and the satisfaction or the opinion of the detaining authority must be based on

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103 *Anwar vs. Bangladesh*, 28 DLR 428 (the Court found the detention unlawful as the detention order did not indicate the nature of the prejudicial activity).

104 *Mansur Ali vs. Secretary of the Ministry of Home*, 42 DLR 272

105 *Rama Rani vs. Bangladesh*, 40 DLR 364 (the detention order was in cyclostyled form in which the name of the detenu was put) mentioning five different kind of prejudicial activities, the detaining authority not being sure about the exact kind of prejudicial activity for which the detenu was sought to detained.

106 *Tahera Islam vs. Secretary of Home*, 40 DLR 193

such facts and materials. Thus absence of nexus between some of the reasons shown in the detention order and the facts and reasons disclosed in the grounds supplied may lead to the conclusion of non application of mind by the detaining authority.[107] Where the grounds of detention merely repeat the language of the law and nothing else, it betrays non application of mind by the detaining authority.[108] In the same way, if the detention order mentions particular provisions of that law, the detention is held illegal.[109] Article 33(4) requires that, the detenu will have to be supplied with the grounds of detention and when no grounds are supplied to the detenu the detention shall be unlawful. Where the detention order mentioned five different kind of prejudicial acts and the grounds supplied did not cover one of such prejudicial acts, the detention was held to be unlawful.[110] If the law prescribes that the grounds are to be supplied within a certain period, supply of the grounds within the specified time is mandatory and failure to supply the grounds within the specified period renders the detention unlawful.[111] If the detention law does not prescribe any time for serving the grounds, the requirement of Article 33(4) of the constitution of Bangladesh writ is fulfilled if the grounds are supplied within a reasonable time. What time will be reasonable will depend on the facts and circumstances of each case, but as the facts and materials must co-exist with the order of detention and as one detention law prescribes 15 days time, the court may not be inclined to hold more than 15

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107 *Khair Ahmed vs. Ministry of Home*, 40 DLR 353

108 *Amaresh Chandra vs. Bangladesh*, 31 DLR (AD) 240

109 *Ranabir DAs vs. Ministry of Home*, 28 DLR 48; *Tahera Islam vs. Secretary of Home*, 40 DLR 193

110 *Rana Rani vs. Bangladesh*, 40 DLR 364

111 *Abdul Latif Mirza vs. Bangladesh*, 31 DLR (AD) 1, 14, *Farida Rahman vs. Bangladesh*, 33 DLR 130; *Shyam Sunder Rajgharia vs. M.A. Salam*, 1988 BLD 127; *Khair Ahmed vs. Ministry of Home*, 40 DLR 353; *Sayedur Rahman vs. Secretary of Home Affairs*, 1986 BLD 272

days time to be reasonable under any circumstance.[112] It may be argued that even 15 days is too long having regard to the fact that the grounds must co-exist.

The grounds having been supplied, the enquiry of the court will whether the grounds are related to the provisions of the detention law. For failure to procure sufficient quantity of paddy from the Union, its Chairman was detained under the SPA, but the court held that any activity which may prejudice the supply and services essential to the community did not include the failure to procure paddy and declared the detention to be unlawful.[113] Criticism of an ideology, namely, Mujibbad, cannot be a prejudicial act within the meaning of the SPA and detention on the ground and on the grounds that the detenu was a critic of the then ruling party was held unlawful.[114] The court will enquire whether the satisfaction of the detaining authority was based on materials[115] and for that matter shall examine the ground of detention. If necessary, the court may require the detaining authority to produce the material support of the grounds before the court.[116] The court shall examine whether the materials are such that a reasonable man could have come to the conclusion reached by the detaining authority.[117] Where the detenu was detained for making prejudicial speech on a particular day as the District General Secretary of Jatya Samajtantrik Dal (JSD), but no supporting

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112 *See*, the observation of the court in *Dr. Habibullah vs. Secretary of Ministry of Home Affairs*, 41 DLR 160

113 *Naderuzzaman vs. Bangladesh*, 27 DLR 304

114 *Md. Anwar vs. State*, 29 DLR 15; *Shamsuddin vs. Bangladesh*, 28 DLR 117 (collection of money for construction of *Ananda Bazar* (a daily) may under certain circumstances make the detenu liable for breach of trust of fraud, but cannot constitute a ground for preventive detention under special Powers (act).

115 *Md. Asmatullah vs. Bangladesh*, 28 DLR 22; *Faisal Mahtab vs. Bangladesh*, 44 DLR 168.

116 *Abdul Latif Mirza vs. Bangladesh*, 31 DLR (AD) 1; *Ahmed Nazir vs. Bangladesh*, 27 DLR 199; *Faisal Mahtab vs. Bangladesh*, 44 DLR 168

117 *Abdul Latif Mirza vs. Bangladesh*, 31 DLR (AD) 1; *Aruna Sen vs. Bangladesh*, 27 DLR 122; *Khair Ahmed vs. Ministry of Home*, 40 DLR 353; *Habiba Mahmud vs. Bangladesh*, 45 DLR (AD) 89; *Farzana Haq vs. Bangladesh*, 1991 BLD 533

materials were placed before the court by furnishing the extract of the speech, the court declared the detention to be unlawful.[118] In some cases it has been held that when specific case has been started on certain facts, those facts, and those facts cannot be the basis of preventive detention.[119] The principle is too broadly stated. This may be a correct proposition when it involves minor offences. But where the specific case involves a serious offence and the nature of the act is such that the detaining authority acting reasonably may form an opinion that it is necessary to detain the person to prevent him from doing prejudicial acts, the detention may not be unlawful.

4.5.1. Procedure in Habeas Corpus Proceedings

An application of writ must be supported by affidavit upon which the court is able to exercise its discretion as to whether the writ should be issued or not.

The applicant has a right in English law to apply successively to every court competent to issue the writ, and such tribunal must determine such an application on such an application on its merits interfered by the decision of any other tribunal of cordinal jurisdiction, ever though the grounds urged are exactly the same. This however, is not allowable under Article 102.

The person to whom the writ is directed is under legal obligation to produce the body of the person alleged to have been lawfully detained before the court on the day satisfied and to make a formal return to the writ. The end of the writ to return the cause of the imprisonment or detention, so that it may be examined in court whether the party ought to be discharged or not. The return must contain a copy of all the causes of prisoners endorsed on the writ on a separate schedule annexed thereto. It should state the facts relied on as

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118 *Selina Begum vs. Bangladesh,* 27 DLR 291; *Md. Asmatullah vs. Bangladesh,* 28 DLR 22 (though the Court was speaking about sufficient materials, the discussion shows that the court was applying the reasonableness test)

119 *Sayedur Rahman vs. Secretary of Ministry of Home,* 1986 BLD 272; *Shamsuddin vs. Bangladesh,* 28 DLR 117; *Shahidul Haq vs. East Pakistan,* 20 DLR 1005; *Mansur Ali vs. Secy. Ministry of Home,* 42 DLR 273; *Azizul Haq vs. Bangladesh,* 42 DLR 189

constituting a valid and sufficient ground for detention of the person alleged to be illegally detained.

The object being remedial and not punitive, it is a sufficient return if is stated that the person to whom the writ is directed has already parted with the custody of the person. In habeas corpus proceeding the court is to have regard to the legality or otherwise of the detention at the time of return and not with reference to the institution of proceedings (!) the court will not decide the question whether allegations against the petitioner are true or false. For purpose of petition court has to assume that allegations may be true. A return to the writ of habeas corpus as stated above has to be unambiguous and settorts with sufficient particulars the facts and the cause of petitions. All the facts and all the grounds of detention of the person have to be stated.

4.5.2. Who can apply for the Writ?

The general rule is that an application can be made by person who is illegally detained. But in certain cases, an application of habeas corpus can be made by any person on behalf of the detained person *i.e.*, a friend or a relation variable, by person who is close to the detenu and knows all facts and circumstances of the case.

In an application for a writ of habeas corpus the supreme court of India does not follow strict rules of pleading nor place under emphasis as to the question on which the burden of proof lies. Even a post card written by detenu from jail would be sufficient to activate the court into examining the legality of the detention. The Supreme Court of India has shown great anxiety for personal liberty and refused to throw out a petition merely on the ground that it does not disclose a *prima facie* case. In view of the undeveloped socio-economic conditions prevailing in India the court has adopted a liberal approach. Where large masses of the people are poor, illiterate and ignorant and the access to the courts is not easy on account of lack of financial resources it is most unreasonable to insist that the petitioner should set out clearly and specifically the grounds on which he challenges the order of detention. The burden of proof to justify detention has always been placed on the detaining authority.

Technicalities and legal necessities are no impediment to the court entertaining even an informal communication as a proceeding for habeas corpus if the basic facts are found. The writ of habeas corpus can not only be used for releasing a person illegally detained but it will be also used for protecting him from inhuman treatment inside jails.

4.5.3. When it will lie

The writ of habeas corpus will lie if the power of detention vested in an authority was exercised *malafide* and is made in collateral or ulterior purposes.

However the power under the section is subject to the limitation that it can not be exercised with respect to persons detained under any law providing for preventive detention. This Section may be amended by ordinary legislation. But the constitutional power of the high court division is free from those limitations.

4.6. The Writ of Quo-warranto

Quo-warranto means "what in your authority". The term 'quo-warranto' means "by what warrant or authority". Quo-warranto is a writ by which any person who occupies or usurps an independent substantive public office or franchise or liberty, is asked to show by what authority he claims it, that the title to the office, franchise or liberty may be settled or unauthorized occupants be ousted by judicial order. When a person illegally holds a public office created by law, the higher court may, on the application of any person, by issuing quo-warranto, ask the person to show on what authority he holds the office and can make him not to hold such office further.

Quo-warranto means by what warrants or authority and was a proceeding to inquire whether authority existed to justify or authorise certain acts of a public character or interest. Originally the proceeding of *quo-warranto* was a criminal one instituted by the crown the purpose of which was to find out, in the course of a formal inquiry, whether or not persons or corporation are exercising a privilege or franchise illegally or if a person who had no right to do so were occupying some public office. If it were found that the person or corporation was in fact doing some other illegal act, it was ousted from the illegal practice or office. Accordingly, it can be seen it once, that the proceeding on *quo- warranto* was not one to be used by private parties in the conduct of ordinary litigation.

4.6.1 Object of Quo-warranto

Judicial pronouncement to the effect that *quo-warranto* lies in respect of an office are,

(a) it created by crown, statute or constitution;

(b) the duties of the office are public;

(c) the office is permanent and (d) the respondent is in possession and uses.

4.6.2. Critical analysis of Quo-warranto

Writ of Quo-warranto was used against usurpers of franchises but long before that it had been issued at the instance of private persons. The authority of the crown as visitor of religious and charitable endowment was extended by the courts to municipal corporations and this could be exercised by *quo-warranto*. In the 16th century it was replaced by information filed by the attorney general, in 1938, it was replaced by the injunction, which will restrain any person acting in an office that he is not entitled and if necessary, declare the office vacant.

In order that a *quo-warranto* may issue, the office must be a public office of a substantive character created by the constitution, statute or statutory power. A public office is a right authority and duty, created and conferred by law,[22] by

[22] *Administration of Justice Act* 1938, Section 9

which an individual is vested with some portion of the sovereign functions of the government to be exercised by him for the benefit of the public for the term prescribed by law.

A petition for the writ of *quo-warranto* will be maintainable only when the person actually holds the public office as in the case of *Farid Mia vs. Amjad Ali.* In which the applicant preferred an appeal against the HCD judgment and order passed in a writ petition to the effect that the act of declaration of the appellant as elected chairman by the returning officer, has been done without lawful authority and is of no legal effect.

The writ of quo-warranto is in its nature an information against a person claiming and usurping an office of franchise for determining his right to the office provided it is a substantive corporate possession and the use of the office in question in other words it is necessary for the issue of the writ and that the office should be one created by the state, by charts or by statute and that the duty to the office could be of a public nature. It is necessary also that the respondent should be in possession of the office. It was never a writ of right. If the court determines that the incumbent is holding the office in question illegally it would pass an order of ouster which must be obeyed by him.

In the writ of *quo-warranto,* the petitioner does not necessarily seek to enforce his right but challenges the validity of the claim of the holder of a public office and as such this writ can be sought by any person whether he has any personal interest or not. Thus where in a proceeding for the writ of mandamus, it appeared that the respondents were holding public posts to which they were appointed contrary to the relevant law, the court could not refuse to issue *quo-warranto* merely on the ground that no prayer for quo-warranto was made.

5. CONCLUDING REMARKS

Judicial review of fundamental rights as enumerated in the Constitution is a safe guard of liberty and property. After the emergence of Bangladesh in 1971, Article 102 of the Constitution of Bangladesh of 1972 empowered the

HCD of the Supreme Court of Bangladesh to exercise writ jurisdiction similar to that which had been conferred on the High Courts of Pakistan under Article 98 of the Constitution of Pakistan of 1962. Although the contents the writ have been embodied in the constitution it is basically a legacy of the English writs and still the judges of the Supreme Court of Bangladesh look back to the English and sub-continental case laws while exercising the writ jurisdiction.

Furthermore, the Constitution of Bangladesh under Article 105 has only empowered the Appellate Division of the Supreme Court to review any judgment pronounced or order made by it. No power has been given to the HCD to review any judgment or order passed by it in exercise of its writ jurisdiction.

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