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Authors' Name	Article	Page
Tapos Kumar Das	Do Judges Make Law? A Scrutiny in the Context of the Decisions of the Supreme Court of Bangladesh	7
Dr Abdul Alim	The Fourth and Fifth Amendment Rights of the American Constitution: Protection of Rights during Search, Seizure and Interrogation	34
Dr. Shima Zaman	Trans-Border Movement of Natural Persons under The General Agreement on Trade in Services (GATS) and Right to Work	53
Nasrin Rahman Abu Naser Md Wahid Biswajit Chanda	Gender Equality and Its Impact on Domestic Violence Law: A Comparative Study of Australia and Bangladesh	75
Biswajit Chanda	Debates on Family Law Reform in Bangladesh with Special Reference to Muslim Law	93
Dr Shahin Zohora	Problems of Pirpul Estates: An Experience of Shah Mukhdum (Rh.) Pirpul Waqf Estate	119
Md Rafiqul Islam	The Mayor's Courts in British India and Their Influence on the Judiciary of Bangladesh	135
Dr Halima Khatun Mst Hamida Khatun	Law of Polygamy in Bangladesh: An Analysis in the Context of Islamic Law and Human Rights	149
Md Shahidul Islam Md Golam Moula	<i>Suo Moto</i> Jurisdiction of the High Court Division and Its Impact on the Promotion of Human Rights in Bangladesh	163

Suo Moto Jurisdiction of the High Court Division and its Impact on the Promotion of Human Rights in Bangladesh

Md Shahidul Islam *

Md Golam Moula^a

ABSTRACT *As per the preamble of the Constitution of Bangladesh, it is the fundamental aim of the state to establish a society free from exploitation where rule of law, fundamental human rights can be secured for all, through its three principal organs namely, executive, legislative and judiciary. The legislature makes law, the executive enforces law and the judiciary explains law. Among these three organs the greatest responsibility is on the judiciary especially on the apex court to realise the state's fundamental aim through its different mechanisms. People repose faith in the judiciary for complete administration of justice but seeking justice in our country through due process is too expensive where it is not always possible to provide the benefit of justice to the economically disadvantaged community. To address this situation, the legislature has empowered the High Court Division to exercise suo moto jurisdiction through ordinary and constitutional legislation. This paper consolidates the suo moto jurisdiction and its application by the High Court Division for promoting human rights in Bangladesh.*

KEYWORDS *High Court Division, human rights, inherent jurisdiction, public interest litigation, suo moto jurisdiction*

1. Introduction

The people of low income group have diminutive access to justice due to high litigation cost. They have limited option to approach the apex court to avail the constitutionally guaranteed fundamental rights. To manifest the constitutional

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commitment for rule of law and human rights it is crucial that an avenue must remain open for the poorest to avail justice without selling out all belonging to meet up the ever rising cost of the litigation process. A court is the place where justice is administered, keeping this view in mind, wide power is conferred on the High Court Division of the Supreme Court to do justice under various legislation which could be exercised even *suo moto* without indulging any litigation cost by any. In this backdrop, effective and regular utilisation of the *suo moto* jurisdiction of the High Court could be instrumental in promoting human rights of the disadvantaged and poor people.

2. *Suo Moto* Jurisdiction

Suo moto, meaning 'on its own motion,' is a Latin legal term equivalent to the English term *sua sponte*¹ and is used where a government agency acts on its own cognisance in any matter. Jurisdiction means the power or authority of a court to hear and determine a cause, to adjudicate and exercise any judicial power in relation to it. As per the decision of the case of *Official Trustee vs. Sachindra* (1969),² jurisdiction means 'authority' by which a court is to decide on matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. In the case of *Raja Soap Factory vs. S P Shantharaj* (1965)³ it is held that jurisdiction of a court means the extent of the authority of a court to administer justice prescribed with reference to the subject-matter, pecuniary value and local jurisdiction. In the case of *Official Trustee* (1969) the Indian Supreme Court observed:

[I]t is clear that before a court can be held to have jurisdiction to decide a particular matter it must not only have jurisdiction to try the suit brought but must also have the authority to pass the orders sought for. It is not sufficient that it has some jurisdiction in relation to the subject matter of the suit. Its jurisdiction must include the power to hear and decide the question at issue, the authority to hear and decide the particular controversy that has arisen between the parties.

Thus, *suo moto* jurisdiction means to initiate a judicial proceeding by the court itself without any application by any person interested in the subject matter of such judicial proceeding.

¹ Available at <en.wikipedia.org/wiki/Sua_sponte>. Accessed 12 March 2012.

² AIR 1969 SC 823.

³ AIR 1965 SC 1449.

3. *Suo Moto* Power of the High Court Division under Ordinary Legislation

There are two sources of powers and jurisdiction of the High Court Division—the Constitution and ordinary laws.⁴ Ordinary legislation means such legislation which could be amended by ordinary law making procedure. Ordinary law making procedure means law making by simple majority vote of the members present and voting in the parliament. Under few ordinary legislation the High Court Division has got ample power to exercise jurisdiction *suo moto*.

3.1 Power of revision

As per sections 435 and 439 of the Code of Criminal Procedure 1898 (hereinafter mentioned as CrPC) the High Court Division may call for the record of any proceeding of the inferior court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence of order passed or recorded and as to the regularity of any proceedings of such inferior court. The object of the legislation is to confer a kind of paternal and supervisory power in order to correct miscarriage of justice arising from misconception of law, irregularity of procedure, neglect of proper precautions and apparent harassment of treatment. It is the extraordinary power which must be exercised with due regard to the circumstances of each particular case. A private person, who has no right of appeal, can come in revision where the government fails to exercise the right of appeal.

Numerous judicial decisions held that the High Court Division can exercise the power *suo moto* as provided under sections 435 and 439 of the CrPC. For instance, in the case of *Abdul Hafez Sardar vs. the State* (1976)⁵ it was held that the High Court can *suo moto* set aside a conviction even when the accused did not prefer an appeal. Similarly, in the case of *Rehaman Gul vs. the State* (1971)⁶ it was decided that if jail appeal was filed beyond time, the High Court could *suo moto* condone the delay and admit the appeal to prevent miscarriage of justice.

⁴ Article 101 of the Constitution of Bangladesh.

⁵ 28 DLR 253.

⁶ 23 DLR 12(WP).

Likewise in the case of *Reazuddin Ahmed vs. State* (1996)⁷ it was also held that the High Court Division may *suo moto* call for the record of the courts subordinate to it and set aside order passed by such courts in any legal proceedings causing miscarriage of justice. But section 439 of the CrPC does not empower the High Court to convert a finding of acquittal into one of conviction and it was confirmed in the case of *Jalaluddin vs. Mrs Bilkis Rahman* (1989).⁸

In civil cases the High Court Division can also exercise similar revisional jurisdiction under section 115 of the Code of Civil Procedure 1908.

3.2 Power in the nature of *habeas corpus*

The High Court can exercise *suo moto* power under section 491 of the CrPC. This section is widely worded and empowered the court to inquire whether a person is illegally or improperly detained in public or private custody. The object of this section is to safeguard the personal freedom against the abuse of power and to enable the court to inquire into and determine the legality of the detention of the person who is restrained of his liberty. This right is also guaranteed by the Constitution of Bangladesh.

3.3 Transfer of cases

The High Court Division may transfer a particular criminal case or appeal from one criminal court to another criminal court or to itself on its own initiative on the grounds stipulated in section 526 of the CrPC. This provision is intended to promote fair and impartial inquiry or trial, legal interpretation, local inspection, convenience of the witnesses and parties and ends of justice. In the case of *Md Khalequzzaman vs. Md Illias* (1996)⁹ it was held that under specified conditions the High Court Division has power to transfer on its own motion any criminal case from any subordinate court to any other court or to itself even without issuing any notice upon the parties.

In civil cases the High Court has been given the similar power under section 24 of the Code of Civil Procedure 1908.

⁷ 49 DLR (AD) 64.

⁸ 42 DLR 107.

⁹ 16 BLD (AD) 24.

3.4 Inherent power

The High Court Division can exercise its *suo moto* power under section 561A of the CrPC to make such order as may be necessary to give effect to any order or to prevent abuse of the process of any court or otherwise to secure the ends of justice. Similar jurisdiction is provided by section 151 of the Code Civil Procedure.

The inherent power can be exercised only for any of the three purposes mentioned in the section, but the power conferred by these sections is undefined and indefinite and therefore be exercised with great caution. In exercising this power the paramount consideration is to prevent abuse of the process of any court or to secure ends of justice.

The High Court issued a *suo moto* rule against hartal on the basis of newspaper reporting under section 561A of the CrPC. But in the case of *Abdul Mannan Bhuiyan vs. State* (2008)¹⁰ the Appellate Division observed that, unless there is a proceeding pending before a court inferior to the High Court Division its inherent power cannot be invoked and High Court Division had no authority to issue *suo moto* rule under section 561A CrPC on the basis of newspaper reports since there was no proceeding pending before any court in relation to hartal.

Therefore, the High Court can exercise its inherent power *ex debito justitiae* i.e., as of right only for three purposes provided that there is a proceeding pending before any inferior court.

4. *Suo Moto* Power of the High Court Division under the Constitution of Bangladesh

By amending article 101 the 15th amendment of the Constitution has limited the 'functions' of the High Court Division, yet it has wide power to secure fundamental rights of citizen, to prevent the abuse of the process of the Court and to ensure rule of law through *suo moto* jurisdiction.

4.1 Writ jurisdiction: enforcement of fundamental rights

The Constitution of Bangladesh ensures the right of the citizen to move to the HCD in accordance with article 102(1) for the enforcement of fundamental

¹⁰ 60 DLR (AD) 49.

rights.¹¹ Although article 102 does not expressly empowers the High Court Division to enforce such rights of a citizen without any application from an aggrieved person, now the court exercises this power on its own initiative expanding the constitutional spirit as a forum to do complete justice.

4.2 Supervisory power

The Constitution of Bangladesh confers a constitutional power on the High Court Division for superintendence and control over all the courts and tribunals subordinate to it.¹² The High Court can use the power to ensure that the court or tribunal functions within the ambits of its authority, and thus the High Court will interfere on the ground of want or excess of jurisdiction, failure to exercise jurisdiction, procedural irregularity or violation of principle of natural justice and in cases where findings based on no materials or any order results in manifest injustice (Islam 1995: 522-523). In the case of *Fazl-E-Haq vs. State* (1960)¹³ the court observed that the High Court can exercise this power even without any application. The power is to be exercised most sparingly and only in appropriate cases in order to keep the subordinate courts or tribunals within the bounds of their authority and not to correct mere functional errors.¹⁴

This power is comparable with the revisional power under section 115 of the Code of Civil Procedure and section 439 of the CrPC as mentioned earlier. The difference between these two powers was articulated in the case of *A T Mrida vs. State* (1973)¹⁵ by holding that statutory supervisory power applies to judicial but not to administrative matters, while the constitutional supervisory power applies to both judicial and administrative matters. The statutory supervisory power extends only to court, but article 109 extends to courts as well as tribunals subordinate to the High Court Division.

¹¹ Article 44(1) of the Constitution of Bangladesh.

¹² Article 109 of the Constitution of Bangladesh.

¹³ 12 DLR (SC) 254.

¹⁴ 3 BLC 430.

¹⁵ 25 DLR 335.

4.3 Transfer of cases

The High Court Division has been given the power of transfer of civil suits and criminal cases under the ordinary legislation of the country which has been mentioned earlier. On to this power article 110 of the Constitution confers power of transfer to the High Court in respect of constitutional questions and questions of general public importance in order to avoid conflict of decisions and uncertainty. Thus, if the High Court is satisfied that a substantial question of law as to the interpretation of the Constitution or a point of general public importance is involved and determination of such a question is necessary for disposal of a case, the High Court may intervene *suo moto*.

5. Power of the High Court Division to Initiate a Public Interest Litigation *Suo Moto*

Public interest litigation (hereinafter mentioned as PIL), is a term very frequently used when there comes the question of implementation of common people's rights. PIL, in simple words, means litigation filed in a court of law for the protection of 'public interest'. Although the main and only focus of the PIL is 'public interest' it could be an useful mechanism in cases of violation of basic human rights of the poor, content or conduct of government policy, compelling municipal authorities to perform a public duty, violation of religious rights or other basic fundamental rights etc.

In the case of *People's Union of Democratic Rights vs. Union of India* (1982)¹⁶ Bhagwati J, one of the pioneers of PIL in India observed that:

Public interest litigation is essentially a co-operative effort on the part of the petitioner, the state or public authority and the court to secure observance of the constitutional or legal rights, benefits and privileges conferred upon the vulnerable section of the community and to reach social justice to them.

Now the question is whether the High Court can initiate such litigation *suo moto*? In the case of *Kumar vs. Union of India* (1992)¹⁷ the issue was raised before a three-judge bench of the Indian Supreme Court. But the court avoided giving a direct answer to this question by holding, on the fact of the case, that although the High Court shall have power to issue *suo moto* rule in the nature

¹⁶ AIR 1982 (SC) 1473.

¹⁷ AIR 1992 (SC) 1213.

of *quo-warranto* against administrative authority under article 226 of the Indian Constitution, it cannot assume any proceeding against such authority which is exclusively within the jurisdiction of the Supreme Court.¹⁸

The question remains, what should be the position relating to a judicial matter, affecting the public. In the cases of *Simranjit vs. Union of India* (1993) and *Janata Dal vs. Chowdhury* (1991)¹⁹ the Indian Supreme Court held that no person other than the accused or his representative could move to the court for setting aside the conviction. It follows that this principle cannot be overridden by a High Court judge acting *suo moto* in the guise of PIL. Though all aspects of this question so far have not been explored, it should be mentioned that the broad principle which stands in the way of a High Court judge initiating a PIL proceeding *suo moto* is that he cannot act both as a prosecutor and a judge except in the solitary case of contempt of Court.

In the case of *T.L.N.C. vs. High Court of Andhra Pradesh* (1996),²⁰ the Indian Supreme Court has distinguished between the administrative and judicial functions of the High Court and held that the High Court, in its administrative capacity, may bring a writ petition under article 226 of the Indian Constitution, before itself while acting as a writ court. If so, a PIL may also be brought in the same manner. In the *T.L.N.C.* (1996), case the High Court of Andhra Pradesh filed a writ under article 226 before itself in its judicial capacity for quashing an order of the Governor by which the Governor set aside an administrative order of the High Court on the ground that it was without jurisdiction.

Bangladesh and India both are common law countries and judges frequently exchange their judicial views in making decisions. So, if judicial precedent of the Indian Supreme Court is taken as a prescription, then a PIL proceeding may also be brought by the High Court Division *suo moto* under article 102 of the Constitution of Bangladesh.

In recent times the civil society movements to avail constitutional rights have taken a new dimension with the judiciary being increasingly occupied with public interest cases seeking relief against administrative anarchy and ignorance. It is interesting to note that the concept of PIL is developing in

¹⁸ In India both the Supreme Court and Provincial High Court can exercise writ jurisdiction.

¹⁹ (1993) Cr LJ 46 and (1991) 3 SCC 756.

²⁰ 2 UJSC 300.

Bangladesh as a performance of public duty by civil society groups advocating in support of progressive ideologies.

In Bangladesh the concept of PIL started with *Mohiuddin Faruque vs. Bangladesh* (1997)²¹ and developed through *ETV Ltd vs. Dr Chowdhury Mahmood Hasan* (2002),²² *Engineer Mahmudul Islam & others vs. Govt. of Bangladesh* (2003),²³ *BLAST v Bangladesh* (2005)²⁴ and other cases. It is found that PIL and *suo moto* jurisdiction has an adjacent relation. These helped to create a new regime of human rights and environmental cases by expanding the meaning of fundamental right to equality, life and personal liberty and freedom. These new reconceptualised procedures provide legal resources to activate the courts for the enforcement of rights through PIL.

6. Upholding Human Rights

Even in absence of any constitutional acknowledgement of *suo moto* jurisdiction the High Court of Bangladesh did not sit idle when called on to exercise its inherent jurisdiction *suo moto* to uphold the human rights. First in its kind in Bangladesh is the case of *Dr Fustina Pereira vs. State* (2001)²⁵ which was initiated by Advocate Dr Fustina Pereira through sending letter to the then Chief Justice Mahmudul Amin Chowdhury. Wherein she upon annexing a newspaper report published in daily 'Prothom Alo' prayed for taking appropriate step against the illegal detention of 29 foreign nationals in Dhaka central jail for years together even after expiry of terms of sentence. The Chief Justice sent the letter to the High Court Division with a direction for taking appropriate step in the matter and their lordships Hamidul Hoque J and Nazmun Ara Sultana J, issued *suo moto* rule in criminal miscellaneous case no. 2737 of 2001. After hearing the rule on 22 May 2001 not only the 29 foreign nationals but also 822 such detainee were directed to be released from different jails of Bangladesh whose term of sentence expired earlier.

²¹ 17 BLD (AD) 1-33.

²² 54 DLR (AD) 130.

²³ 23 BLD (HCD) 80.

²⁴ 57 DLR 11.

²⁵ 53 DLR 414.

Similarly, in the case of *State vs. Deputy Commissioner, Satkhira* (1993)²⁶ a Division bench of the High Court comprising Md Mozammel Haque J and Mahfuzur Rahman J issued a *suo moto* rule on the basis of a report of the *Daily Ittefaq* concerning a person Nazrul Islam who had been languishing in jail for long 12 years ever since he was 5 years old. As a 5 year old boy he was implicated in a few gang dacoity cases from which he was acquitted and yet he was kept in wrongful imprisonment. He was put under bar fettered (*danda-beri*) ever since he was taken to custody and was put under that condition throughout. The court found that the proceeding 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 at liberty and the court issued various directions to the Ministry of Home affairs in respect of other accused or persons like Nazrul who may be in any other jail in Bangladesh.

Again, a High Court bench issued the first ever *suo moto* rule against any RAB action following a report published in the *Daily Janakantha* on 24 July 2006 under the headline: *No whereabouts of the youth for four days after arrest by RAB in Jessore*. Kishore Kumar Das, who was a workshop mechanic, was arrested from his house by RAB on 20 July 2006. The RAB did not disclose any information regarding Kishore for three days since his arrest. When his family members and journalists contacted the RAB office on the Jessore Police line, they reportedly denied the arrest of Kishore. They neither handed over Kishore to the police nor produced him before the court until 93 hours later on 23 July 2006. The arrest and production of Kishore before the court clearly violated the constitutional time limit of 24 hours as enshrined in article 33(2) of the Constitution. In such backdrop, on 27 July 2006 the High Court issued *suo moto* rule against the government, police and RAB asking them to explain in two weeks why they should not be directed to produce Kishore before the court to prove that he was not being held unlawfully.²⁷

This is another instance where *suo moto* power of the High Court Division played significant role in securing constitutional right of a citizen.

²⁶ 45 DLR (HCD) 643.

²⁷ *The Daily Janakantha*, dated 30 August 2006.

7. A New Strategy

Suo moto jurisdiction has been proved to be an effective judicial instrument in dispensing justice among the sufferers who are unable to approach the High Court Division. Since the High Court Division is too busy with its regular business in many occasions it fails to take into notice of the injustices the disadvantaged people are going through. Again, there is another concern that too much judicial intervention may jeopardise ordinary course of public administration and judicial administration as well. Therefore, to make the *suo moto* jurisdiction more effective the following approaches need to be adopted:

- (i) To bring the injustices into notice of the High Court a public distress monitoring cell with the task of fact finding should be established in the Supreme Court.
- (ii) At present the *suo moto* jurisdiction of the High Court Division is scattered under various statutes, an encompassing Act accommodating all provisions of *suo moto* jurisdiction should be much appreciable.
- (iii) Article 102(2) of the Constitution of Bangladesh limits the *suo moto* power of the High Court in respect of writ of *mandamus*, *prohibition* and *certiorari* using the word 'on the application of person aggrieved'. The wording needs to be amended replacing with the word 'on the application of person aggrieved or *suo moto*'.
- (iv) When the court initiates a proceeding *suo moto*, it should appoint *amicus curiae* for expert legal opinion.
- (v) If any of the judges desires to act *suo moto* on any information published in the newspaper, he must act through the Chief Justice in order to avoid misuse of such power.
- (vi) While exercising such power over subordinate courts, the High Court should be cautious so as not to interfere with the independent character of such court and not to cause any unnecessary delay in any judicial proceeding.

8. Conclusion

Constitutionally, all human being are equal and are entitled to equal legal protection without any discrimination or distinction. The Constitution of Bangladesh has empowered the higher judiciary to enforce the fundamental rights of the citizen. Litigation being costly- down trodden and marginalised sections of the community find it difficult, and at times impossible, to seek redress from the upper court against injustices. Such injustices could be redressed if their case is espoused to the High Court by any public spirited person or organisation. In these regards, all through the history the High Court Division in Bangladesh *suo moto* has demonstrated pivotal role to promote human rights and rule of law, to cure miscarriage of justice arising from misconception of law, irregularity of procedure and maladministration. To hear the voiceless and to get them justice, the *suo moto* jurisdiction of the High Court Division should continue in its present form in the designated area taking care of the functional independence and speedy performance of other institutions.

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