

## “Judicial Control of Administrative Actions in Bangladesh: An Analysis and Evaluation”

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**Abstract:** Obviously, public administration is to play pivotal role, exercise a huge bulk of power and impact easily and deeply on every aspect of an individual's life and liberty so as to meet citizen's needs, maintain social order and attain the goals of human society in a modern democratic welfare state. Since it is today not concerned with only pure administrative functions, it occasionally also discharges a large volume of quasi-legislative and quasi-judicial functions. Consequently, they have numerous occasion to act arbitrarily or *ultra vires* or become master of the citizenry. Hence, it is inevitably indispensable to control the administrative authorities for not giving them even little latitude for transgressing limits legal, statutory or constitutional. And so is crucially momentous for a poor developing country like Bangladesh. Among the existing control mechanisms available in Bangladesh, this paper will trend to analyze and evaluate only judicial control over administrative actions. Additionally, it attempts to diaphanously unearth some potential defects or imperfections of such control through suggesting some effective and efficient measures that are badly needed to be employed so as to prevent misfeasance, nonfeasance; and protect and promote people's rights and liberty.

**Keywords:** Administration, Administrative Authority, Judiciary, *Ultra-vires*, Public Law Review, Private Law Review, Writs, Dilemmas

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### I. Introduction

It is always difficult, as it seems to me, for a man to decide between his duty and his interests; that is acknowledged upon all hands. [1] This aphorism vividly reveals the probabilities of possible risk of a power to be biased, prejudiced, one-sided or driven by self-interest, favoritism or arbitrariness when its duty and interest intermingle. Every government is indubitably under an obligation to respect the humanity of the others and to treat the citizens with respect.[2] But the matter of regret is that sometimes, even a modern bureaucratic state may vehemently "tends to treat individuals with reference to 'numbers' or 'files' rather than as human beings." [3] Therefore, efficient check to this power is indispensably sine quo non to dissipate such menaces from being practiced on the people. Hopefully, in Bangladesh, there are various mechanisms of controlling the administrative actions some of which include, inter alia, higher administrative authorities, Ombudsman, and Judiciary.

Albeit there is an explicit judicial deference to the executive that concerns pertaining to public order and national development policy in any jurisdiction; and administrative law stands at the intersection of law and politics, the specialists in administrative law in England and even South Asia mainly focus their attention on the multifarious aspects of judicial control of administrative decisions and actions. The justification for the same pragmatically bases on the premise that courts have already proved to be more effective and efficacious than the legislative or the administrative in the matter.

Judicial control [4] of administrative action [5] based on the doctrine of *ultra vires* that plays a significant role in protecting citizen's right. Two important aspects of administrative law are firstly, the control mechanism over the administration and secondly, reliefs when the legal right of an individual is infringed by any administrative action. To ensure control and relief, judiciary plays a significant role. Judicial control over administrative authorities prevents the exercise of arbitrariness and ensures the application of rule of law. In this paper, attempt has been made to explore a myriad of principles put forward by the courts for regulating the functions of the administrative bodies in different dimensions and it has greatly contributed to the growth of administrative law. Besides, various form of remedy have also been analyzed that encompasses the two types of remedies against the administrative wrongs – private law remedy of suit and public law remedy of judicial review through writs. In Bangladesh, public law review is exercised through writs under article 102 of the Constitution and private law review is exercised through injunction, suit for damages and declaratory action under statutory laws. Now a days, a large number of administrative actions are also being reviewed by the higher courts in the name of Public Interest Litigation (PIL) in the country.

## II. Why is the Judicial Control of Administrative Actions in Bangladesh So Significant? An Optimistic Scrutiny

There are various mechanisms of controlling the administrative actions in Bangladesh. They mainly encompass higher administrative authorities, Ombudsman, and Judiciary. Now undeniably, a closer look on the higher administrative authorities reveal that they are, in many sense, defective and bombarded with enormous indoor stimulants. Additionally, they have no adequate legal acumen and are not accommodative of legal representation. Most viciously, there is a great possibility for them of becoming biased because they are part of the same organ. Pessimistically, Bangladesh is a poverty stricken country having huge population with limited resources. Corruption is here at every corner of all forms of administration. So, there requires a viable check to them from a noncommittal wings.

In Bangladesh polity, there is a parliamentary form of government in which the executive are collectively responsible to the parliament. [6] Absence of direct responsibility of the executive to the Parliament encourages the generation of an attitude of individual ministerial or departmental unfair-means. The constitutions empowers the parliament to make provisions for the establishment of the office of Ombudsman. [7] The main sanction behind the Ombudsman is the backing he receives in his work from the legislature. He enjoys power to report to the legislature on the result of his investigations into individual's grievance. This is a power of consequence, for no departments want to adverse publicity in the press or be discussed in Parliament. Because of this, the recommendations made by him are invariably be accepted by the departments concerned and individual grievance redressed. Besides, the reality is that the law establishing the office of the Ombudsman in the country is yet to be implemented by the Government.

Now, one may contextually ask why judicial control is so significant, and not other organs or bodies. Bangladesh has a written constitutions and here, the supremacy lies in the constitution which invest the final authority in all sphere of legal question in the higher judiciary and thus, the later has strong form of judicial review [8] to check the test of constitutionality of any actions or decisions taken by any other organs or bodies as a guardian of the constitution. Moreover, a handful number of fundamental rights judicially enforceable has been enshrined in the constitution and the fundamental principles of state policy [9] as a social goals albeit not directly judicially enforceable operates as a guidance to the governance of Bangladesh or the interpretation of the Constitution and of the other laws of Bangladesh.

Therefore, the doctrine of separation of power is not expected to be a hindrance to judicial intervention into the administrative actions where the rights to life or property of the people are at jeopardy. In addition, since the parliamentary check to the executive is claimed to be not so efficacious nor so up to mark as much as desirable, judicial control is the only control in Bangladesh to save the aggrieved persons from the unlawful actions or encroachments of the administrative authority. [10] Hence suggestively, it can obviously be argued that it is the judiciary which can fill this gap in the existing controlling system.

## III. Historical Background of Judicial Control of Administrative Actions in Bangladesh

Historically, transmigration common law principle plays an important role regarding judicial control of administrative action which is based on the doctrine of *ultra vires* in Bangladesh[11].The law, regarding the judicial review or control of administrative action in this region ,was derived historically from the common law, the main features of which was the enforcement of control over the power of public authorities through the ordinary courts.[12] During two hundred years of British rule (1765-1947) the Indian Sub-continent received a number of experiments regarding judicial control over the administrative action. From the earliest time, the proceedings were also removable into the King's Court at Westminster. [13]

During the Pakistan regime (1947-1971) principle of jurisdiction was accepted as vital for the reviewability of cases. Bangladesh emerged as an independent nation in the world map in 1971. Article 102 of the Constitution of 1972 empowered the High Court Division of the Supreme Court to issue certain writs and remedies against Public authorities. Article 103 also empowered the Appellate Division of the Supreme Court to hear and determine appeals from the High Court Division in all cases including writ petitions. However, the judiciary lost its independence to entertain any challenges against governmental actions and there followed a series of military coup the latest one being staged on 24<sup>th</sup> March 1982. During these periods the constitution was suspended. Martial law of 1982 stated that “All Proceedings again out of and in connection with writ petitions under Article 102 Of the suspended constitution shall abate.”[14]

Sometimes the court also showed courage to employ remedy-expensive interpretation, particularly when the Martial Law was in weak position.[15] For example in *Sahar Ali vs. A. R. Chowdhury*,[16] case relating to sec.30 of the Special Powers Act 1947 that barred any court from reviewing any order or judgment of special tribunals established under this Act. In this case the court held that it's Constitutional supervisory or review power which could not be ousted. [17] In 1986 the constitution was revived by General Ershad. Consequently the jurisdiction of the Supreme Court to issue writ and orders in relation to unlawful administrative action of the

government and public bodies under Article 102 has been restored. Since those times the Supreme Court of Bangladesh is playing a meaningful role in developing a system of administrative law in connection with its Common Law tradition. The High Court Division can declare the parent Act or Ordinance unconstitutional on the ground of violation of fundamental rights under Article 102. The court considers whether the declared law is consistent with the provisions of the enabling Act on the ground of *ultra vires*. [18]

#### **IV. Administrative Authorities and Tribunals in Bangladesh**

Administration is a method for the fulfillment of ends laid down by political authorities. The administrative process is a seamless web of discretion and action, which involves the whole government organism, right from the people and parliament from the lowest employee at the base. It is process in which, the pattern of responsibility runs to public representative of many kinds and roles, to subordinates, to associates in the same unit, it runs outward to special public, outward from higher levels to others and larger publics, outwards and upward from executive agencies to the chief executive...to general people. [19]

#### **The Real Executive of Bangladesh**

The distinct and basic feature of the Bangladesh constitution is the introduction of the Cabinet or parliamentary form of government in the country. And under this system, the real executive [20] is the Prime Minister and the Cabinet,[21] because the Cabinet is the real policy making organ with the council of Ministers.[22] The Cabinet is the core of our present constitutional system.

#### **Administrative Tribunals**

Outside the ordinary courts of the law, there is a host of tribunals with jurisdiction to decide legal disputes in Bangladesh. It is to be clear that the ordinary courts and tribunals are not identical. “In *Bharat Bank Ltd v. Employees* [23] case the Supreme Court observed that ‘though the tribunals are clad in many of the trappings of a court and though they exercise quasi-judicial functions they are not full-fledged court.’ Thus, it is submitted that tribunal is an adjudicating body which decides controversies between the parties and exercise judicial powers as distinguished from purely administrative functions and thus, possesses some of the trappings of the court, but not all. M.H. Rahman, J. observed that an administrative tribunal may act judicially, but remain as administrative tribunal as distinguished from court, strictly so called. [24]

The two types of tribunals in Bangladesh are statutory tribunal and domestic tribunal. The former is that adjudicating body, which is constituted by, express provisions of the statute and derives powers and authority from the same beside disputes. [25] Labor appellate tribunal, administrative tribunal, administrative appellate tribunal, etc. are the examples of statutory tribunals of Bangladesh. The later refers to those administrative agencies which are designed to regulate professional conduct and to enforce discipline among the members by exercising investigatory and adjudicatory powers. [26] Bar council, chamber of commerce, social clubs, are the examples of such tribunals.

In Bangladesh, there is a constitutional institution dealing with it. That is the Administrative Tribunal. According to Article 117 (1) [27], Parliament may by law establish one or more administrative tribunals to exercise jurisdiction in respect of matters relating to or arising out of:

- i. The terms and conditions of persons in the service of the republic including the matter provided for in part IX [28] and the award of penalties or punishments.
- ii. The acquisition, administration, management and disposal of any property vested in or managed by the government by or under any law, including the operation and management of, and service in any nationalized enterprise or statutory public authority.
- iii. Any law to which clause (3) of Article 102 applies.

In pursuant to these provisions, the Administrative Tribunal Act, 1980 was passed by the parliament. An administrative tribunal consists of one member appointed by the government from among persons who are or have been District Judge. [29] The first administrative tribunal was established at Dhaka in 1982, second tribunal established at Bogra in 1992. It is widely believed that they are one of the by-products of an age of intensive form of government.

It is also provided that when any administrative tribunal is established, no court shall entertain any proceedings or make any order in respect of any matter falling within the jurisdiction of such tribunal provided that Parliament may by law, provide for appeals from, or the review of, decision of any tribunal. [30] So, it envisages that ‘no court shall entertain any proceedings or make any order in respect of any matter falling within the jurisdiction of such tribunal.’ [31]

A question, however, arises whether this proviso takes away the jurisdiction of the High Court Division to issue an order, in the nature of writ under art. 102. In the case of *Mujibur Rahman vs. Bangladesh*, [32] it was held that the tribunals are not meant to be like the High Court Division of the Supreme Court or the subordinate court over which the High Court Division of the Supreme Court exercises both judicial review and

superintendence. The tribunals are not in addition to the courts described.....they are set a part, as *sui generis*, in a separate chapter. With regard to the jurisdiction of this tribunal, M.H. Rahman j. observed that 'within its jurisdiction, the tribunal can strike down an order for violation of Principles of natural Justice as well as for infringement of fundamental rights, guaranteed by the Constitution, or any other law, in respect of matters relating to or arising of sub-clause (a), but such tribunal cannot, like the Indian Administrative Tribunal in exercise of a more comprehensive Jurisdiction under article 323 [33] strike down any law or rule on the ground of its constitutionality. [34] He further puts that 'a person in the service of Republic who intends to invoke fundamental right to challenge the Vires of law will seek his remedy Under Article 102 (1), but in all other case he will be required to seek remedy under Article 117 (2).' [35]

In another occasion, Shahabuddin Ahmed, C.J. with reference to the very case [36] held that from the facts of this case that the question of fundamental right invoked therein has been so mixed up with the facts and statutory rules that the question of fundamental right cannot be extricated for exclusive consideration. In another episode, [37] a question was raised as to whether civilian employees in the Defense Services can file a case before the Administrative Tribunal. The Administrative Tribunal held that it had no jurisdiction to entertain the case. This contention was rejected in the higher judiciary wherein Mustafa Kamal, J. argued in the judgment that 'they are civilian employees in the defense services. The administrative Tribunal was obviously not correct in holding in the cases filed by the petitioners that they belonged to defense services. Against the said mistaken order of the administrative tribunal, the petitioners were at liberty to prefer appeals before the administrative Appellate Tribunal within two months from the date of making of the orders.

In explaining the power of 'rehearing' by the tribunal, it was held that "as the decision pronounced on June 12, 1989 was not made as per sub-rule (9) of rule 6 of the Rules, it did not reach any finality. The Appellate Tribunal did not become *functus officio* on that date and it had the jurisdiction as an adjudicating body to recall that decision subsequently and order for rehearing." [38] However, these administrative tribunals have some innate incompetence, 'the Administrative Tribunal.....got no jurisdiction to declare invalid any legislation on the ground of its inconsistency with any provision of the constitution, in particular Articles 27 and 29 relating to fundamental rights; which the writ petitioners allege to have violated.' [39]

Moreover, there is an administrative appellate tribunal in Bangladesh. This tribunal hears and determines from any order or decision of the administrative tribunal. It consists of 1 chairman and two members. Here the chairman shall be a person who is qualified to be judge of Supreme Court and of the two other members; one shall be the person who is an officer in the service of republic not below the rank of joint secretary to the government and the other a person who is a district judge. Only the Appellate Division of the Supreme Court can modify, vary or set aside the decisions of the administrative appellate tribunal. [40] However these tribunals are also to some extent overloaded and the rate of disposal of cases is very low. [41] The disposal rate of the Appellate Tribunal is also not high. [42]

## V. Judicial Control of Administrative Actions in Bangladesh

In Bangladesh, there are two types of remedies against the administrative wrongs. They are public law remedy of judicial review through writs and private law remedy of suits. In this part of the paper, an analytical enquiry will be resorted to dig into the means and ways of access to administrative justice of the country.

### (a) Public Law Review of the Administrative Actions through Writs

In Bangladesh, public law review of administrative action is exercised through writs under Article 102 of the constitution. However, these writs are possible only when there is no other efficacious remedy provided by the law. [43] Writ means "A court's written order, in the name of the state or other competent legal authority, commanding the addressee to do or refrain from doing some specified acts." [44] However, Article 102 of the constitution has conferred the HCD original jurisdiction to issue certain writs in the nature of *habeas corpus*, *mandamus*, *certiorari*, *quo-warranto* and prohibition.

#### *Writ of Habeas Corpus*

The phrase '*Habeas Corpus*' means 'has his body' i.e. to have the body before the court. It is a judicial process by which a person who is confined without legal justification may secure a release from his confinement. Thus, the writ of '*Habeas Corpus*' is a process of securing personal liberty by releasing a person from unlawful detention of any higher administrative authority, whether in prison or 'executive custody' [45] or 'private custody'. [46] Article 102(2)(b)(I) of the constitution of Bangladesh invests the High Court division with power and obligation to issue a writ in the nature of *habeas corpus* when a case of unlawful detention is made out. So, the writ will not be allowed if there is no illegal confinement. It also provides that on the application of any person, the court may direct the person having custody of another to bring latter before it so that it can satisfy itself that the detention is not being held in custody without lawful authority or in an unlawful manner. It is submitted that the

High Court Division is empowered to issue the order of release of a person in custody under s. 491 of the 1898 Code of Criminal Procedure. Additionally, this power can also be exercised *suo moto*. [47]

Bangladesh has constitutional and statutory provisions [48] for preventive detention in which it is clear that the communication of grounds by the detaining authority to the *detenu* is 'not mere formality but intended as a *post facto* compliance of the principle of natural justice'. [49] Most importantly, it is aptly argued that if the initial detention is illegal, the illegal detention cannot be continued by a subsequent valid and legal detention order. [50] Supportively, it was held that the reasons state in the initial detention order cannot be a substitute of the ground required to be communicated. [51]

This remedy is intended to protect the liberty and freedom of people which is one of the core concepts of Bangladesh polity. By virtue of this instrument, law enforcement agencies or other such statutory authorities are empowered to bring the custody of the person who has been wrongfully detained by what so ever in order to let court know on what ground he has been confined; and to set him free if there is no legal justification for the confinement. It is also to be made lucid that this remedy in case of illegal detention culminate in the payment of monetary compensation.

Actually, it is widely thought that '*habeas corpus* writ has been favored as most effective weapon for the release of detenu detained under illegal order of the executive authority.' [52] In this respect, in Indian jurisdiction, the Court's sensitivity is clear in the manner of allowing it even on the letter of a co-prisoner about the torture of the other prisoner and it opened new vistas of the issuance of the writ of *habeas corpus*. [53] Besides, there is no hard and fast rule for making an application for a writ of *habeas corpus*. But in general acceptance, that the detenu himself should be the petitioner. Thus in Bangladesh, a mother was allowed to apply for her son, [54] and a wife for her husband [55] in the absence of a relation a friend is allowed to apply. However, the High Court Division will not have any jurisdiction to issue a writ of '*habeas Corpus*' for the production or release of any member of the Defense Service if he has been detained by a Court-martial or a tribunal to which article 117 of the Constitution applies. [56]

#### ***Writ of Mandamus***

The term '*mandamus*' means 'we command'. It is a judicial remedy issued in the form of an order to any constitutional, statutory or non- statutory agency to do that which is required by law to do. This writ is issued to the administrative authority also for keeping that authority within its scope and legal bounds. The second part of clause (2) (a) (1) of Article 102 of the constitution is the constitutional basis of the writ of *mandamus*. It confers the powers on the High Court Division to issue writs in the nature of *mandamus* to compel a person performing public function or statutory duty or a public authority to do something that he or that authority is required by law to do.

Generally, this form of judicial remedy orders the Government, any Court, Corporation or public authority to do or forbear from doing some specific act which that body is obliged under law to do or refrain from doing. It can, therefore, be invoked when these authorities entrusted with the public duties fail to discharge its obligatory duty. Purposively, it may even be applied when the government authorities vested with absolute powers fail to perform their administrative and statutory duties. Basically, *mandamus* is a summery writ issued from the proper court commanding the public authorities to which it is addressed to perform some specific legal duties and to which the party applying for the writ is entitled of legal right to have performed. [57] It is submitted that art. 102 of the constitution does not require that the applicant for mandamus must have a specific legal right; the only requirement is that he must be an aggrieved party. [58] Accordingly, under art. 31, any person being affected by the failure of public functionary to do a legal duty has a specific legal right to claim performance of that duty.

This writ can also be issued against the public officials like police if they exercise their power *mala fide* and arbitrarily. [59] In this regard, what is mandatory is that such a person must hold office of a public nature. [60] However, an alternate remedy is dissuasive to the courts while issuing *mandamus*. Besides, it is not issuable against a private individual or person working in ministerial capacity. The court will not enquire into the merit of the administrative discretionary decisions until and unless they are made without or excess of jurisdiction or are *mala fide* or based on extraneous consideration. Moreover, it is apt to state that albeit somewhat digressively that *Mandamus* cannot lie against legislature to enact certain laws or not to enact for which it is competent to enact.

#### ***Writ of Quo-Warranto***

The term '*quo-warrantor*' means by what warrantor or authority. A writ of *quo-warranto* can be filled by any person to challenge the appointment of a person to a public office, whether or not he has a personal interest in it. It is a judicial remedy against an occupier or usurper of an independent substantive public office of franchise or liberty. It was observed that such a office must be a public office of a substantive character created by the constitution, statute or statutory power. [61] By the writ, a usurper is asked 'by what authority' (*quo-warrantor*) he is in such office, franchise or liberty. If the answer is not satisfactory to the court, the usurper can be ousted by an

order of *quo-warranto*.

In Bangladesh, art.102 (2) (b) (I) of the constitution is the constitutional basis of the writ of *quo-warranto*. It provides that on the application of any person the High Court Division may inquire whether a person holding or purporting to hold any public office is holding it under a legal authority. Any person can challenge the validity of an appointment to a public office, whether any fundamental right of that person has violated or not. [62] But it has to be satisfied that the application is made bona fide. It was observed that 'if the appointment of an officer is illegal, every day that he acts in that office, a fresh cause of action arises and there can be therefore no question of delay in presenting a petition for *quo-warranto* in which his very, right to act in such a responsible post has been questioned.' [63]

#### ***Writ of Prohibition***

Prohibition is another kinds of writ intended to prevent any person or authority from doing the unlawful activities. It is a judicial order issuable to any constitutional, statutory or non- statutory agency to prevent these agencies from continuing their proceedings in excess of their jurisdiction or in contravention of the law of the land. [64]

Article 2 (a) (1) of the constitution of Bangladesh confers a jurisdiction roughly corresponding to the jurisdiction of issuing writs of prohibition. It is an efficacious and speedy remedy where a person does not desire any other relief except to stop the administrative agency. An alternative remedy does not bar the issue of this writ. It can be issued even when the matter is decided to stop the authority from enforcing its decision. The writ in the nature of prohibition lies where a tribunal proceeds to act without or in excess of jurisdiction, in contravention of some statute or the principles of common law, In violation of the principles of natural justice, under a law which itself is *ultra vires* or unconstitutional, and in contravention of fundamental rights.

#### ***Writ of Certiorari***

The term '*certiorari*' means 'to be certified' or to be more fully informed of. Wherever anybody of persons having legal authority to determine questions affecting the rights of subjects and having the duty to act judicially, act in excess of their legal authority, they are subjected to the controlling jurisdiction of the HCD exercised in this writs. So, although a writ of *certiorari* can be issued only when the action is judicial or quasi-judicial and is no more valid, *Certiorari* can also be issued to quash actions which are administrative in nature. [65]

Art. 102 (2) (a) (ii) of the Constitution is the basis of writ of *certiorari*. According to this Art., the HCD may, if satisfied that no other efficacious remedy is provided by law, on the application of any person aggrieved, make an order declaring that any act done or proceeding taken by a person performing any function in connection with the Republic or of a local authority has been done or taken without lawful authority and is of no legal effect. A writ of *certiorari* can be issued on the grounds of defect of jurisdiction, violation of principles of natural justice, error of law, vires of the statute and abuse of discretionary power etc. So issuing a writ of *certiorari* unlawful administrative actions are declared illegal. It is the judicial remedy which may, on certain grounds, declare a legislative enactment or delegated legislation unconstitutional or void.

The grounds for which *certiorari* lies are more or less the grounds for the case of *mandamus*. They include, *inter alia*, the defect, access, abuse, misuse or lack of jurisdiction, violation of principles of natural justice, error of law, vires of the statute etc. However, certain limitations are placed on the issue of writ of *certiorari*. In respect of substitution for a new order, Indian Supreme Court held that 'the court issuing *certiorari* to quash, however, could not substitute its own decision on the merits or give directions to be complied with by the court or tribunal. Its' work was destructive, it simply wiped out the order passed without jurisdiction, and left the matter there.' [66]

*Certiorari* is usually maintainable against inferior courts and not against equal or higher courts. In elucidating the ambit of it, one of the most crucial things ought to be un-equivocated that the authority against whom a *Certiorari* order is made must exercise judicial or quasi-judicial functions, not purely administrative functions. Since today's administrative bodies are conferred with a large bulk of quasi- judicial functions, it basically operates as a check to the power of such public functionaries.

#### **(b) Public Law Review of Administrative Actions through Judicial Principles:**

##### ***Doctrine of Legitimate Expectation***

The doctrine of legitimate expectation operates as a control over the exercise of discretionary powers conferred upon a public authority and gives 'sufficient *locus standi*' [67] to a claimant for judicial review. Accordingly, 'the doctrine in essence imposes a duty on the authority to act fairly.' [68] The doctrine belongs to the domain of public law and is designed to give relief to the people 'when they are not able to justify their claims on the basis of law in the strict sense of the term though they had suffered a civil consequence because their legitimate

expectation had been violated.' [69] The instances where such expectations arise include, *inter alia*, a result of a promise, representation, practice or policy made, adopted or announced by or on behalf of government or a public authority. On this premise, Islam, a leading constitutional law commentator in Bangladesh, gave an epitomic episode like that a promise made in the shape of a statement of policy or a procedure regularly adopted by the authority may give rise to what is called legitimate expectation. [70]

Lord Denning first coined the epithet 'legitimate expectation' [71] in 1969 and since then, this doctrine is being followed by a number of South Asian jurisdictions and has become a principle having worldwide recognition. [72] In Bangladesh, this doctrine is an emerging judicial principle and thought as a new tool- a 'latest recruit' -to prevent administrative anomalies. The law on it is 'still developing on a case-by-case basis both in the context of reasonableness and in that of natural justice.' [73] So, where the executive undertakes, expressly or by past practice, to behave in a particular way, the subject may expect that undertaking to be complied with.

Likewise, it is poignantly argued that 'it acts in Bangladesh as a deterrent factor for the administrative authority to take any whimsical decision or action detrimental to the interest of the people even though the people concerned do not have any legal right in this respect'. [74] This concept was first outspokenly exhibited in the supreme judiciary of the country in *North South Property Ltd. vs. Ministry of Land and another* [75] but the court missed the opportunity to internalize same in its judicial history. However, immediately after one year, the scenario turn into a successful reference to the doctrine in *Bangladesh Soya-Protein Project Ltd. vs. Secretary, Ministry of ministry of disaster management and Relief, Bangladesh*. On the very occasion, it was held that discontinuance of school feeding programme violating its own policy decision was a gross violation of legitimate expectation.

In the same line of thinking, the court elsewhere observed that once privilege given to a person on conditional act and that act is done, cannot be taken away or cancelled without giving him an opportunity of being heard. [76] Arguably, it is submitted that there seems that the doctrine of legitimate expectation in Bangladesh has been developed mainly covering the contractual obligation of the government. [77] However, in pointing out the purview of the doctrine, the court pre-cautioned that legitimate expectation to be enforceable shall have some legal basis. Mere wishful expectation without legal basis is not sustainable in the eye of law. When the action of the government is taken fairly showing reasons, it cannot be struck down' [78]

### ***Doctrine of Public Interest Litigation***

Public Interest Litigation is a name for judicial process in which the traditional doctrine of *locus standi* has been enlarged and enriched with liberal construction of procedural requirements going beyond legal formalism and mere textualism. This type of law-suit was first introduced and truly successful PIL case in Bangladesh in the historic case of *Mohiuddin Farooque v. Bangladesh*. [79] Where the fundamental rights of any person or group of persons are violated by the administrative authorities but they cannot have resort to the court on account of their poverty, disability, or who are socially and economically in disadvantageous position, any individual or a group of people of the state can move to the Supreme Court. Now a day's almost every day the Supreme Court hear PIL case in Bangladesh.

### ***Other Judicial Doctrines***

One of the most important emerging facets of administrative law is the doctrine of public accountability which is intended 'to check the growing misuse of power by administration and to provide speedy relief to the victims of such exercise of power'. [80] The essence of the doctrine counsels that the power conferred on administrative authorities is a 'public trust' which 'must be exercised in the best interest' of the people. Therefore, the trustee who enriches himself by corrupt means holds the property acquired by him as a constructive trustee. A court of Indian jurisdiction held that if the harm is caused due to handling of hazardous material, the liability of the State or its instrumentality would be absolutely strict. [81] Although in India the scope of public accountability has been further strengthened by developing the principle 'polluter must pay' in case of environmental pollution, [82] the Judiciary of Bangladesh are not with the same pace in this matter.

Another potential judicial engine is the doctrine of proportionality rooted in the jurisprudence of the United States of America. In administrative law, the doctrine is, however, not a fully and finally settled issue. It is aptly propounded that the doctrine requires a striker scrutiny of the reasonableness of an administrative action in which the court plays a primary role of finding out whether the action taken is disproportionate in relation to the purpose for which the power is conferred. [83] In Indian jurisdiction, it was held that this doctrine is a part of the concept of judicial review.....irrationality and perversity are recognized grounds of it. [84] In our jurisdiction, since fundamental rights form a part of the Constitution, the courts have always sufficient leverage to use the doctrine of proportionality in judging the reasonableness of a restriction on the exercise of fundamental rights.

Although there is no ambiguity that no estoppel should operate against the constitution and statute, the doctrine of promissory estoppel empowers the courts to direct the government on a writ petition to carry out the promise made. This doctrine is applicable in the case where the promise will suffer due to non fulfilment of the

promise of the promisor.

**(c) Private Law Review of Administrative Actions in Bangladesh**

Apart from the public law review, administrative actions in Bangladesh is also controlled by the private law review. Through injunction, suit for damage and declaratory action private law review is also exercised in Bangladesh. By means of injunction an individual is required to do or restraint from doing something, by a suit for damage an aggrieved person can claim damage from the administrative authority who caused damage to him and a declaratory action can be taken to establish one's right.

***Injunctions:***

Injunction can be defined as an ordinary judicial process that operates in *personam* by which any person or an authority is ordered to do or to restraint from doing a particular act which such person or authority is obliged to do or to refrain from doing under any law. [85]

Historically, the injunction has been as wide as prohibition in the functions in English law. In Bangladesh permanent and temporary injunctions are still regulated by the Specific relief act, 1877 and CPC, 1908, respectively. Sections 52-57 of the Specific Relief Act, 1877, deal with the provisions of injunction. Where a public authority threatens to do or to continue to do some unlawful acts, an action may be brought for an injunction to restrain the authority from doing or continuing to do so. An act done by a public authority generally affects the public in general as well as individuals. The power to grant injunction is at the discretion of the court. This discretion, however, should be exercised reasonably, judiciously on the sound legal principles.

Generally, before granting injunction the applicant must make the court satisfied that he has a prima facie case in his favor, [86] he shall suffer irreparable loss or injury not commensurable with monetary terms unless other party is restraint, [87] and he has balance of inconvenience in his favor. Apart from the statutory provisions discussed above, section 151 of the CPC provides that nothing in the code shall be deemed to limit or otherwise effect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the court, has invoked by the courts for purpose of issuing injunctions. However, if the court exercises its judicial discretion, the HC is not to interfere under section 115 of the CPC. [88]

***Suit for Declarations:***

Declaratory action may be defined as a judicial remedy which conclusively determines the rights and obligations of public and private persons and authorities without the addition of any coercive or directory decree. The declaratory judgment is basically a judicial remedy and has come to be sued for a great variety of purposes in public and private law. [89] Declaration can be awarded in almost every situation where an injunction will lie-the most important exception is that interim relief cannot be granted by way of a declaration-and they extend to a number of situations where an injunction would be inappropriate or could not be obtained for other reasons.

The history of declaratory action in Bangladesh begins with the Act of 1854 by which the provisions of the Chancery procedure Act, 1852, relating to the grand of declaratory relief were made applicable to the SC in India at the presidency towns. In 1977 the declaratory relief was transferred to section 42 of the specific relief Act, 1877. However, no court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration title, omits to do so. [90] Not only a person or any administrative authority entitled to legal character but also any person entitled to any right as to any property can institute a suit for declaration. [91] Regarding administrative actions the court in a case held that suit for declaration that the appointment of plaintiff in a lower rank is illegal and inoperative with consequential relief, suit under section 42 would lie even though prayer for consequential relief will be negative and the civil court cannot restore any officer to his post if he is removed wherefrom. [92] However, declaration absence of consequential relief by way of mandatory direction for re- instatement is ineffective and infructuous. [93]

***Suit for Damages:***

Administrative action can also be reviewed by a suit for damages. Whenever any person has been wronged by the action of an administrative authority, he can file a suit for damage against such authority. [94] Article 31 of the Constitution of Bangladesh similarly provides for a right to the protection of law. This ought to preclude as in Pakistan a plea of sovereign immunity or act of state against its own citizen. Thus the law has been rehabilitated on a sound plane and doctrine of sovereign immunity has been put in its proper place. The court should not find it difficult to apply the rule of liability of the state in actions for damages to acts professedly done under statutory powers. However, some requirements are followed for suit be instituted against the government or against a public officer in respect of any act purporting to be done by such public official's capacity. [95]



## VI. Existing Dilemmas and the Way-out

The judicial reliefs and remedies already pointed out in this paper is optimally expected to provide an effective control against administrative prodigality of exercise, misuse or abuse of power in protecting the liberties and rights of the citizens. But judicial control has certain inherent shortcomings and limitations. Of them, the cardinal one is that all administrative actions are not subject to judicial control. There are many genera of administrative actions which cannot be reviewed by the law courts. [96] For instance, under article 45 & 102 (5) of the Constitution of Bangladesh, the High Court Division has no jurisdiction to interfere with the decision of Court Martial convened under the Army Act, 1952 except on limited grounds of *coram non judice* and *mala fide*. [97] Therefore, there is a growing tendency on the part of the legislature also to exclude by law certain administrative acts from the jurisdiction of the judiciary.

Owing to some conditionality, the judiciary itself cannot directly take cognizance of excesses on the part of officials. It can intervene only on the request of somebody who has been affected or is likely to be affected by an official action. [98] On the other hand, the judicial process is overly dilly-dally and cumbersome. The courts follow certain set technical pattern of procedure beyond the comprehension of a layman and then, the procedure is so lengthy that it cannot be known as to when the final judgment shall be given. There have been instances when cases have been pending with the courts for years together. Contrarily, inordinate and undue procrastination in filling a writ petition may bar the remedy under Article 102 of the Constitution.[99]

Very often, the remedies offered by the court of law are inadequate and inefficacious. In many cases, especially relating to business activities, mere announcement of an administrative action or even a reminder concerning a proposed action may cause an injury to the individual who cannot file even a law-suit in the court. Besides, the government may deprive the person of the remedy granted to him by the court by the way of changing the law or rules thereof. Sometimes, it is, for example, seen that Courts order the petitioners to be promoted to the senior posts. The Government did promote the petitioners and thereby, instead of giving effect to the judgment of the court, after some time, these posts were withdrawn on the ground of financial austerity; and later on, that persons were reverted to their earlier posts.

Cost efficient judicial system is the pre-requisite for the availability of easy access to justice. But regrettably, invocation of judicial remedy is incredibly expensive; and many cannot, therefore, be taken advantage of expeditious justice dispensation. Filing a suit means paying the court fee, fee of the lawyer engaged and cost of producing witnesses and undergoing all inconveniences which only those who can afford can bear. This keeps many people away from the court who rather prefer to suffer from. On account of heavy cost and great inconvenience, it is quite obvious that the judicial remedies are of little advantage. Last but one of the most intricate setbacks to get justice is perhaps the highly technical nature of most of the administrative actions that saps the force of judicial review. The judges are only legal experts and they may have little knowledge of the technicalities and complexities of administrative problems. Moreover, the court cannot issue progressive writ directing the government to implement its policies which are directory in nature. [100]

Albeit these dilemmas and limitations seem to be chronic or protracted, it is opportune to submit some suggestive guidelines and possible way-out for the exercise of judicial control over administrative actions in Bangladesh. The Constitutional change ought to be brought about some provisions enabling any person to move to the Supreme Court for writs on the grounds of *pro bono publico* for the common good in order to defend people's rights and interests and thereby, to meet the ends of justice. And all the decisions taken by the administration have to have opportunity to judicial review.

The frontier of functions to be discharged by the administrative authorities must clearly be demarcated. If the law enacted by the Parliament lucidly fixes their boundaries of works, they may not be indulged in unduly using their discretionary powers or misuse or abuse powers. Besides, more stringent check should be placed on the delegated legislation. These delegated powers must be made exercise reasonably in good faith. Delegated legislation which are manifestly unjust or oppressive or outrageous must be declared *ultra vires* by the courts.

In Bangladesh, human rights are most frequently infringed by the executive order in the form of indiscriminate-arbitrary arrest and detention. This kind of application of power by the executive should be made with clear-cut explanation of the terms and situations. Therefore, the respective provisions of the Criminal Procedure Code of 1898, the Penal Code of 1860, the Special Powers Act of 1974 and the Constitution of 1972 need to harmoniously be made compatible and congruent with the international standard of human rights protection. Moreover, many repressive laws still remain on a wide number of statutes and these are easily applied in cases of executive impatience with political liberties, and provide impunity to law enforcement agencies. So steps should be taken to ensure the fundamental human rights through ratifying and recognizing mechanism of international human rights instruments.

The judiciary of Bangladesh may follow the principle of true interpretation of statute, as the courts of India and Pakistan has developed their trend of review based on a true interpretation. By reviewing administrative actions' on a true interpretation of the statute' the courts may review as well as uphold

administrative orders, just as in a statutory appeal. Additionally, Like United Kingdom and other countries including India, the courts of Bangladesh may follow for judicial review the doctrine of proportionality and doctrine of legitimate expectations more comprehensively than it is now. In such cases, the court may be able to give reliefs by invoking principles analogous to natural justice and fair play in action.

Presently, writs of any kind can only be sought in the High Court division of the Supreme Court. For people's sake and in order to maintaining respect to the right of individuals, the opportunity of filing writ petition in the district court may be created with amending necessary procedural laws of the country so that the people may have an easy access to justice in the remedy of writ. Lastly, it is, of course, now clear that in case of private law remedy, the declaratory remedy being declaratory only is not executable unless it is combined with such other remedies as injunctions. The proceeding under section 42 is not to be limited to a negative declaration that a particular administrative action is invalid, but it should be extended to the positive determination of the rights of the plaintiff for granting him the relief thus determined.

## VII. Conclusions

At the end, it is obvious that the paradoxical-prolific growth of administrative powers and functions in Bangladesh is a necessary evil for the smooth functioning of state and ultimately, the promotion of social welfare and human freedom. On the other hand, it puts potential threats to jeopardize functional coherence and congruity with people's rights and dignity. Therefore, an impartial checking set-up is highly needed to strike a balance in the matrix of public authorities.

Optimistically, a viable judicial control mechanism would provide an effective check on bureaucratic adventurism and encourage administrative instrumentalities to act as legally valid and socially wise and just. Such a condition would optimally help the society grow with liberty and dignity. However, since the judiciary of Bangladesh is not substantially independent and also not free from any defects and thus, some plausible measures are badly needed to be employed, it is expected that the findings and the way out suggested in this paper would helpfully be handfull guidance for any attempt to make pro-people administration and goal-oriented judiciary.

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- [3]. P. Berger, B. Berger & H. Kellner. *The Homeless Mind, Modernization and Consciousness* (1973) 41-62.
- [4]. The phrase “Judicial control” means a control which is maintained by the judiciary. Generally, judicial control over administration means the powers of the courts to examine the legality of official acts and thereby, safeguard the rights of an aggrieved citizen to bring a civil or criminal suit in a court of law against a public servant for wrong done to him in the course of discharge of his public duty.
- [5]. Administrative actions are, in their ultimate analysis, legal procedure equally binding upon both the public servants as well as the citizens. In *A.K. Kraipak v Union of India* [1969] 2 SCC 262, the court was of the opinion that in order to determine whether an action is administrative or not, one has to see the nature of the power conferred, to whom the power is given, the framework within which the power is conferred and the consequences.
- [6]. Art. 55(3) of Bangladesh Constitution runs as 'The Cabinet shall be collectively responsible to Parliament.
- [7]. Art. 77(1) puts as 'Parliament may, by law, provide for the establishment of the office of Ombudsman. (2) The Ombudsman shall exercise such powers and perform such functions as Parliament may, by law, determine, including the power to investigate any action taken by a Ministry, a public officer or a statutory public authority. (3) The Ombudsman shall prepare an annual report concerning the discharge of his functions, and such report shall be laid before Parliament.
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- [9]. Art. 8. runs as (1) the principles of nationalism, socialism, democracy and secularism, together with the principles derived from those as set out in this Part, shall constitute the fundamental principles of state policy.] (2) The principles set out in this Part shall be fundamental to the governance of Bangladesh, shall be applied by the State in the making of laws, shall be a guide to the interpretation of the Constitution and of the other laws of Bangladesh, and shall form the basis of the work of the State and of its citizens, but shall not be judicially enforceable.
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- pursuant to clause (3) of article 56 and the Chief Justice pursuant to clause (1) of article 95, the President shall act in accordance with the advice of the Prime Minister.
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- [25]. *ibid.* p.65.
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