

Judicial Development in Bangladesh

Mr. Chairman of the Session,
Distinguished Delegates, Ladies & Gentlemen

It is a matter of great pleasure for me to be amidst this seminar and session of legal professionals, academicians and Judges. My roots and, therefore, my heart lie in the legal profession. On this occasion, I take the privilege to give you a comprehensive picture about Judicial Development in Bangladesh.

The judiciary of Bangladesh has been facing lot of hurdles to achieve its independence, to maintain the rule of law and to ensure its Supremacy. It has crossed the 'Delinquency period' of four Martial Laws and other related rules. The glimpses of the judicial development in Bangladesh are depicted as under.

Colonial Period **Sources of English Legal History**

Anglo-Saxon Law

There are three groups which fall under this system

- (I) The Doms-They were largely written in Anglo-Saxon, Probably of the Norman period those are Code of Alfred who declared that he has not made many new laws of his own, but chosen those of his predecessors that seemed to him wisest-these dooms seem largely concerned with public law and give us minute tariffs of oaths regulating the methods of proof and the administration of justice.
- (II) the Diplomata-Law book with a few Saxon "wills".
- (III) the Ecclesiastical Documents-The Church and state were divided and the cleric was from his learning and clerical ability naturally the lawyer, and, so far as such existed, the historians of the time. From these monasteries have come documents which must be carefully weighed if the history of Anglo Saxon law is to be written-they saw the nature of property owned and the manner of life in those days.
- (IV)

Common Law

Principal Source are at present time statute and case laws-the most important are certain official records, such as the plea Rolls, and Professional literature, which includes text books and collection of precedents either of pleadings of non-litigious instruments.

The Common Law Courts **Courts of Assize**

The system of sending out justices from the king's council may have been instituted even before the conquest, and William-I exercised this prerogative right as least 1072-They sent out as occasion demanded and their duties were administrative rather than judicial-Henry

11 reorganized the system and divided England into circuits, which were regularly ridden for the purpose.

Commission of Assize

Henry 11 appointed the justices to take the assizes, and also introduced the earliest forms of commission Ad Omnia Placita.

Hierarchy-A ruler in holy thing-a chief priest.

Hierarchy-The collective body of angels.

Mayor's Courts-They derived their power direct from the crown, were established in the presidency towns of Calcutta, Madras and Bombay in 1728 under charter of September 24, 1726 by king George-I to the United Company of merchants of England trading to the East Indies. Their jurisdiction was confined to the Presidency towns or English factories Subordinate to them from the administration of justice among the English men. Those natives who submitted to their jurisdiction the law administered by them was English Common law together with statutory law then in force in England.

Supreme Court

The charter establishing in Supreme Court of Judicature at Fort William was issued on 26th March, 1774 in pursuance of Regulating Act 1773. The Mayor's court transferred all proceedings before it for the more speedy and effectual administration of justice in Civil cases, and for criminal offences-it was a court of record.

The Sadar Diwani Adalat and Nizamat Adalat

The battle of plassy gave the deathblow to Moslem rule-the overlodship of Bengal, Bihar, Orissa was taken over by the English. The grant of Diwani to the East India Company in 1765 was a cession to the East India Company of the military Government of the provinces, of the right of administration of civil justice, and of the complete control of the finances and to providing for the expenses of administering criminal justice, and the maintenance of police. The Nizamat, or administrator of criminal justice and police was at the same time, conferred upon the Nawab Nazm-ud-Daula.

Calcutta High Court

The Mutiny in 1857 necessitated rethinking on the administration of India and reorganization of the law Courts. The Supreme Court of Calcutta and the Sadar Courts ceased to exist on 30th June, 1862. Indian High Court Act, 1861 was passed and the charter of the Calcutta High Court was issued on 14th May 1862.

The consolidation of Supreme Court and the Sadar Court into one was made for the purpose of securing better administration of justice-the Supreme Court being represented by what is called the original side, and the Sadar Court by its Appellate side.

Codification of laws and Reforms

- a) In 1861 the third Law commission was appointed. The Commission submitted the following draft laws.
 - (i) Law of succession applicable to all except Hindus and Muslims.
 - (ii) Contract Act.
 - (iii) Law of Negotiable Instruments.

- (iv) Law of Evidence.
 - (v) Transfer of Property Act.
 - (vi) Code of Criminal Procedure.
- b) In 1879 the Fourth Law Commission was appointed and this commission recommended the amendment of some laws and enactment of some new laws. The following substantive laws were enacted after amendment.
- (i) The Contract Act, 1872.
 - (ii) The Transfer of Property Act, 1882.
 - (iii) Negotiable Instrument, Act, 1881.
 - (iv) Evidence Act, 1872.
 - (v) Code of Criminal Procedure, 1898.
 - (vi) Code of Civil Procedure, 1908.
 - (vii) Limitation Act, 1908.
 - (viii) The Civil Court Act, 1887 was enacted after repealing Act, 1871.
 - (ix)

Sub-Divisional Courts

- (i) During the British rule, each district was divided into several sub-divisions. In the Sub-Divisional head quarters Courts of Munsifs deciding Civil Suits up to valuation of Tk.1000.00. Junior Munsifs had jurisdiction up to Rs.500.00 such Munsifs were also vested with Magisterial Powers.
 - (ii) There were Magistrates in the sub-division head quarters.
 - (iii) Magistrates were divided into three Classes- (a) Magistrates of the 1st Class, (b) Magistrates of the 2nd Class, (c) Magistrates of the 3rd Class.
- A Sub-Divisional Magistrate with power of supervision over other Magistrates Subordinate to him was appointed.

District Courts

In the District head quarters for disposal of Civil matters the following Judges were appointed.

- (i) District Judges.
 - (ii) Additional Judges.
 - (iii) Subordinate Judges.
- a) They were performing appellate jurisdiction except the subordinate judge who had jurisdiction and decided Civil Suits of any valuation.
 - b) Additional Judges had mainly appellate jurisdiction and limited original jurisdiction. When the valuation of the suits was up to Rs.5000/- the District Judge who could hear the same or transfer the same to the Additional Judge
 - c) Appeals from the decisions of the Munsifs were transferred to Subordinate Judges by the District Judge.
 - d) Judicial functions in the Districts of Chittagong Hill Districts were exercised by the Deputy Commissioner and his subordinate officers of Magistrates.
 - e) Divisional Commissioner functioned as the Sessions Judge under the Chittagong Hill Tracts Regulation 1900.

- f) District Judges, Additional District Judges and Subordinate Judges were empowered to try Criminal cases committed to them as Sessions Judges, Additional Sessions Judges, and Assistant Sessions Judges.
- g) Judges of the Courts of Session tried cases with the help of the Assessors. Jury-Verdict of the jury was binding on the courts of Sessions but that of the Assessors was not.
- h) District Magistrates, Joint Magistrates and Additional Magistrates, if empowered, could try cases punishable with imprisonment up to 7 years. They could hear appeals from the sentences passed by Magistrates of the 3rd Class.

Federal Court

Under the Provisions of the Government of India Act, 1935 a Federal Court was established in India in 1937 having power to hear appeals from the decisions of the High Courts. But the said appellate power was limited to the interpretation of laws vis-a-vis the Government of India Act and did not affect the jurisdiction of the Privy Council to hear appeals from the decisions of the High Courts on merit.

Privy Council

In England, the King in Council was regarded as the fountain of justice and this idea came into vogue after Norman Conquest of 1066. This was a Royal Prerogative which extended over the Kings dominions. The King in Council could thus hear appeals from the Courts in the Dominions. And this was "the inherent prerogative right, the duty of the Queen in Council to exercise an appellate jurisdiction to ensure the due administration of justice in the individual case and also to preserve the due course of procedure generally". Every subject had a right to petition the King for Justice if he could not get it from the Courts. And appeals from overseas dominions could only be to the King in Council. Besides, the Charter of 1726 issued to the East India Company by George I for the first time provided for appeal from India to the Privy Council in England and introduced English law by the establishment of the Mayor's Court. After the Judicial Committee Act, 1833, the Privy Council came to be called the Judicial Committee of the Privy Council.

Dhaka High Court

The High Court of Bengal (Order) 1947 promulgated under the Provisions of section 9 of the Indian Independence Act, 1947 providing for establishing a separate High Court for East Pakistan as the High Court of Judicature of East Bengal at Dhaka.

Federal Court of Pakistan

Under the provision of the Federal Courts Order 1947, Federal Court of Pakistan was established in Karachi under the provisions of the Privy Council (Abolition of Jurisdiction) Act, 1950. The jurisdiction of Privy Council to appeals was taken away and the same power was vested in the Federal Court of Pakistan.

Supreme Court of Pakistan

With the coming into operation of the Constitution of the Islamic Republic of Pakistan, 1956 the Supreme Court of Pakistan was established in place of Federal Court as Apex Court of the country. The Supreme Court was also vested with original jurisdiction in any dispute between the Federal Government and Provincial Governments, and between the Government of Provinces, and also jurisdiction to issue writs in the nature of Habeas Corpus, Mandamus, Prohibition, Quo Warrant and Certiorari for the enforcement of fundamental rights.

Post Independence Period

Laws

- a) The Acting President Promulgated the laws continuance Enforcement Order, 1971 providing "all laws that were in force in Bangladesh on 25th March, 1971 shall subject to proclamation aforesaid continue to be so in force with such consequential changes as may be necessary on account of the creation of the sovereign independent state of Bangladesh formed by the will of the people of Bangladesh and that the Government officials-Civil Military-judicial and diplomatic who take oath of allegiance to Bangladesh shall continue in their offices on terms and conditions of service so long enjoyed by them".
- b) On 11th January, 1972 the Provincial Constitution Order, 1972 was promulgated by the President providing amongst other.
 - (i) for a Constituent Assembly consisting of the members of the National Assembly and Provincial Assembly elected by the people in December 1970 and January 1971.
 - (ii) for the High Court of Bangladesh consisting of a Chief Justice and other Judges.

At present we have about 740 Acts, 507 Ordinances and some Regulations. The Acts and Ordinances, uniform Rules, which distill in a coherent manner the principles that have been developed over many years of practical operation of the previous legislation and Court Rules, identify the objects of case management as follows:

- The just determination of proceedings.
- The efficient disposal of the business of the Court.
- The efficient use of available judicial and administrative resources.
- The timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the parties.

The Acts also require the practice and procedure of the Courts to be implemented with the object of eliminating unnecessary delay, as defined. Furthermore, Court practices and procedures are required by the Acts to be implemented with the object of resolving issues, so that the cost to the parties is proportionate to the importance and complexity of the subject matter in dispute.

In order to serve the overriding purpose, and to meet the other objectives specified, the Courts are given a comprehensive range of powers including:

- Power to direct parties to take specified steps and to comply with timetables and otherwise to conduct proceedings as directed, with respect to discovery, admissions,

inspection of documents or property, pleadings, particulars, cross-claims, affidavits or statements, time place and mode of hearing.

- Powers with respect to the conduct of the hearing, including limiting the time that may be taken in cross-examination, limiting the number of witnesses, limiting the number of documents that may be tendered, limiting the time that may be taken by a party in presenting its case or in making submissions.
- The exercise of such powers may identify certain matters required to be taken into account including the subject matter, complexity or simplicity of the case and the efficient administration of Court lists.
- Powers have also been conferred to direct a lawyer for a party to provide to his or her client a memorandum stating the estimated length of the trial and estimated costs of legal representation.

Courts

High Court of Bangladesh

In pursuance of the High Court of Bangladesh Order, 1972 (President's Order 5 of 1972) promulgated on 17th January, 1972, the High Court which existed on 26th March, 1971 started functioning with almost all powers exercised by the then High Court of judicature at Dacca in East Pakistan.

Subordinate Judiciary

Under the laws continuance Enforcement Order, 1972, the Subordinate Judiciary and Magistracy continued to function after taking oath of allegiance to Bangladesh.

Constitution of Bangladesh

The Constituent Assembly of Bangladesh framed and passed the Constitution of Bangladesh within a short span of time after independence on 4th November, 1972 and it came into force on 16th December, 1972.

Supreme Court of Bangladesh

In exercise of powers conferred under Article 94 the Apex Court of the country was established which consists of:

- (a) The Appellate Division.
- (b) The High Court Division.

The powers and jurisdiction of the Appellate Division

(1) The Appellate Division shall have jurisdiction to hear and determine appeals from judgments, decrees, orders or sentences of the High court Division.

(2) An appeal to the Appellate Division from a judgment, decree, order or sentence of the High Court Division shall lie as of right where the High Court Division-

- (a) Certifies that the case involves a substantial question of law as to the interpretation of the Constitution; or
- (b) has sentenced a person to death or to imprisonment for life; or

(c) has imposed punishment on a person for contempt of that division;

and in such other cases as may be provided for by Act of Parliament.

(3) Appeals from the judgments, decrees, orders or sentences of the High Court Division in a case to which clause (2) does not apply shall lie only if the Appellate Division grants leave to appeal.

(4) Appeals from the judgments and orders of the Administrative Appellate Tribunal only if the Appellate Division grants leave.

(5) If at any time it appears to the President that question of law has arisen, or is likely to arise, which is of such a nature and of such public importance that it is expedient to obtain the opinion of the Supreme Court upon it, he may refer the question to the Appellate Division for consideration and the Division may after such hearing as it thinks fit, report its opinion thereon to the President.

The law declared by the Appellate Division shall be binding on the High Court Division and all Courts Subordinate to it.

The Jurisdiction of the High Court Division

1. The High Court Division has original, appellate and other jurisdictions, powers and functions as are conferred by the Constitution and other laws-

(a) Original jurisdictions are writ, company, Admiralty matters

(b) The appellate and revisional powers are from the judgments and orders of the District Judges, Joint District Judges, Sessions Judges etc, Special Tribunals, Special Judges, Artha Rin Adalats, Dhruva Bichar Tribunals, and Bankruptcy Courts etc.

(c) Contempt matters.

The law declared by the High Court Division shall be binding on all Courts Subordinate to it.

Subordinate Courts

Civil Courts

- (i) The District Judges.
- (ii) The Additional District Judges.
- (iii) The Joint District Judges.
- (iv) The Assistant Judges.

Criminal Courts

- (i) **Courts of Session**

(a) Session Judges

(b) Additional Session Judges

(c) Assistant Session Judges

Administration of justice in the Subordinate Courts

- A. **The Assistant Judge** - when the valuation of the civil suit, valued according to the provisions of Suit valuation Act 1887, is up to Tk.2,00,000/- the plaint is to be presented in that Court of the local area.

- B. **Senior Assistant Judge** – when the valuation is above that amount and up to 4,00,000 the plaint is to be presented in the Court of Senior Assistant Judge of the local area.
- C. **Joint District Judge** – when the valuation is above that amount, the plaint is to be presented in the Court of Joint District Judge of the local area.
- D. **Small cause Courts** – A small cause Courts have jurisdiction to dispose of suits for eviction of tenants and realisation of arrear rents etc. are to be filed in the local area according to the valuation of the local area vested with small cause power.
- E. **Family Courts** – A plaint under the Family Court Ordinance, 1985 in a matrimonial dispute is to be presented in the Court of Assistant Judges of the local area.
- F. **Pre-emption Cases** – In application (Suit) for getting any immovable property by pre-emption of the sale is to be filed in the Court of Assistant Judges or Joint District Judges of the respective local areas according to the value of the sale deed.
- G. **Rent Control Cases** – An application for fixation of standard rent or other reliefs by a tenant in respect of any house/shop is to be filed in the Court of Assistant Judge of the local area appointed as Rent Controller.
- H. **Probate/succession cases** – An application for Probate or Letters of Administration of a will of a deceased person or an application for Succession Certificate for collection of debts and securities due to the deceased is to be filed in the Court of Joint District Judge of the local area vested with the power of District Delegate. If such proceeding is contested the case is sent to the District Judge for disposal.
- I. **Bank loan suits** – A suit for recovery of loan of financial institutions including banks is to be filed in the Court of Joint District Judges of the local area vested with the power of Artha Rin Adalat.
- J. **Bankruptcy suits** – A bankruptcy suit is to be filed in the Court of the District Judge or Additional District Judge of the local area vested with the power of Deulia Adalat. (Bankruptcy Court)

Magistracy

Metropolitan Areas

(a) Chief Metropolitan Magistrates

(b) Metropolitan Magistrates

All over the country other than Metropolitan Areas

(a) District Magistrates (Executive)

(b) Chief Judicial Magistrates

- (c) **Additional Chief Judicial Magistrates**
- (d) **Magistrates of the first Class**
- (e) **Magistrates of the Second Class**
- (f) **Magistrates of the Third Class**

Power of Criminal Courts

- a) Offences under the Penal Code and some other laws are tried by the Courts of Session, Metropolitan Magistrates in Metropolitan areas and other Magistrates in whole of Bangladesh other than Metropolitan areas.
- b) The offences under the Anti Corruption Act, 1957 and the Criminal Laws Amendment Act, 1958 are tried by Special Judges appointed under the Criminal laws Amendment Act, 1958. The Special Judges are also holding trials in respect of offences under the Anti-Corruption Commission Act, 2004.
- c)

Labour Court

This Court has been established to adjudicate disputes regarding employment of commercial or Industrial disputes. Each Labour Court consists of a chairman and two members, one is appointed in consultation with the employers and the other in consultation with the employees. This Court adjudicates industrial disputes, implementation or violation of settlements complaints made by employers and employees/workers in respect of retrenchment, Lay off, termination and dismissal from service, non-payment of wages, compensation disabled in course of service, offences in respect of unfair labour practices, breach of or failure to implement settlement, illegal strike or lock out and non-compliance of Labour Court's order.

Tribunals

- d) The offences under the Nari-O-Shishu Nirjatan Daman Ain-2000 are being tried by Tribunals constituted under the said Ain (Act).
- e) The offences under the Ain Shrinkhola Bignakari Aparad (Dhruta Bichar) Ain, 2002 are tried by Dhruta Bichar Adalats.
- f) The offences under the Dhruta Bichar Tribunal Ain, 2002 are tried by Dhruta Bichar Tribunal. (Speedy Tribunal in respect of specific offences)
- g) The offences under the Acid Aparad Daman Ain, 2002 are tried by Acid Aparad Daman Tribunal. These are relating to acid burn cases.
- h) The offences under the Special Powers Act, 1974 are tried by the Special Tribunals constituted under the Act. Offences relating to smuggling, Black Marketing, Arms and Ammunition etc.
- i) Administrative Tribunal – This Tribunal has exclusive jurisdiction to hear and determine applications made by any person in the service of Government excluding a person in the defence service and organisations such as Bangladesh Bank etc. in respect of terms and conditions of his service.
- j) Administrative Appellate Tribunal – An appeal lies from the decision of the Administrative Tribunal consisting of a chairman and two members.
- k) **Labour Appellate Tribunal** – Any person aggrieved by an award of the Labour Court may prefer an appeal to the appellate tribunal.
- l) **Taxes Appellate Tribunal**

- 1) Any person aggrieved by an order of the Deputy Commissioner of Taxes may prefer an appeal to the Appellate Joint Commissioner or an order of the Inspecting Joint Commissioner to the commissioner (Appeal)
- 2) If an assessee is aggrieved by an order of the Appellate Joint Commissioner or Commissioner (Appeal), he may prefer an appeal to the Taxes Appellate Tribunal.

L) Customs, Excise and value Added Tax Appellate Tribunal

Any person aggrieved by a decision or order of any officer of Customs, Excise and VAT may prefer appeal to the commissioner (Appeal)

- (i) Any person aggrieved by an order or decision of the commissioner or commissioner (Appeal) may prefer an appeal to the Customs, Excise and VAT Appellate Tribunal.

M) Election Tribunals

- (a) Election disputes under the Representation of the Peoples Order, 1972 in respect of the election of Members of Parliament are being adjudicated by the High Court Division. The election disputes of the Chairmen, Commissioners, Members of local bodies such as Union Parishads in the rural areas, Pourashavas in Urban areas, Mayor and Commissioners of City Corporations are disposed of Election Tribunals appointed by the Election Commission which is entrusted with the function of organising, holding and conducting the elections.

N) The International Crimes Tribunal-

This Tribunal was constituted by the Government in exercise of powers under section 6 of the International Crimes (Tribunal) Act, 1973 consisting of a Chairman and two members. The chairman and one member are Judges of the High Court Division and another member is a Senior Judicial officer in the rank of a District and Sessions Judge. This Tribunal was constituted for the purpose of trial of offences mentioned in Section 3, such as (a) Crimes against Humanity, (b) Crimes against peace, (c) Genocide, (d) war crimes, (e) Violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva conventions, 1949, (f) Any other crimes under the International Law.

Mediation in Bangladesh (ADR)

Key Legislative provisions relating to types of mediation of disputes in Bangladesh are as under:

Status of Mediation	Relevant Legislation	Relevant Sections	Key Actors
Judicial or Formal	The Code of Civil Procedure (Amendment) Act, 2003	Section 89A2	The court itself or a third party mediator.
	Artha Rin Adalat Ain, 2003	Sections 21 & 22	The court itself or a third party mediator
	The Family Courts Ordinance, 1985	Sections 10(3), 10(4) & 13	The court itself
Informal or Non- Formal	Village Court Act, 2006	Sections 4, 5, 6 & 7	Local Government Representatives (Up & Pouroshova) and respective representative of each party.
	Conciliation Of Disputes In Municipal Area, 2004	Sections 3(1); 4 & 7	
	Criminal Procedure Code, 1898 [Withdrawal of Complaints in	Section 345	compounding offences mentioned in the chart.

	compoundable offences]	
	Arbitration Act, 2001	Section 22

Code of Civil Procedure, 1908

Sections 89A and 89B of the Code of Civil Procedure, 1908 deals the provision for mediation. The application for mediation may be submitted by the both parties at any stage after filing the written statement that they will mediate the dispute. Then the court would adjourn the proceeding for mediation. The Judge itself can mediate the dispute under this section. The fee of the mediator shall be fixed by the parties and if the court mediates the dispute itself, the judge can not claim any fee or charge for it. Within ten days of order for mediation the both parties will serve notice in writing to the court about the progress of initiation for mediation and the mediation procedure will have to be completed with in 60 days. If it is not completed with in 60 days another 30 days can be extended. If the mediation becomes successful, the mediator will draft an agreement on such terms and conditions as the parties agreed upon. The parties will sign on it and then the lawyers and representatives will sign as witnesses. This agreement will be submitted in the court and the court will pass a decree. If the Judge mediates the dispute he will also follow the same procedure as enumerated above. If the mediation procedure fails the proceedings of the suit will start from the stage it has been stopped before mediation. If the mediation fails no statement, evidence or other statements made at the time of mediation can be used at the time of trial of the suit.

Artha Rin Adalat Ain, 2003

Sections 21 and 22 of the Artha Rin Adalat Ain, 2003 provide for Settlement Conference after the filing of written statement. The Judge may request the parties and their lawyers to remain present in Court to resolve the dispute. The Judge will convene the meeting and fix up the venue, procedure and function. The conference shall be in camera. The Judge will explain the matter in dispute before the parties or representatives identifying their issues in dispute. If the parties or their representatives agree to resolve the dispute, the parties or their representatives will sign the agreement and the lawyers and others will sign as witnesses. Thereafter that the Judge will pass a decree on the basis of the agreement. No appeal or revision can be filed from the decree passed on the settlement conference.

The Family Court Ordinance, 1985:

When the written statement is filed, the Family Court Shall fix a date ordinarily not more than thirty days from the date of filing written statement for a pre-trial hearing of the suit. On the date fixed for pre-trial hearing, the Court shall examine the plaint, the written statement and documents filed by the parties and shall ascertain the points in issue between the parties. If no compromise or reconciliation is possible, the Court shall frame the issues in the suit and fix a date for recording evidence.

Constitution Fifth Amendment Case

By the Martial Law declared on 15th August, the judicial power of reviewing Proclamations, Martial Law Regulations and Orders and actions taken by the Martial Law Authority were restricted. The fundamental rights were curtailed. The Constitution was

amended by changing its basic features. The secular status of the country was converted into a fanatic country. One Pak Italian Marble Works Company owns a cinema hall under the name 'Moon Cinema'. The Cinema hall was placed under the disposal of Bangladesh (Freedom Fighters) Welfare Trust in 1971. The Company moved a writ petition against the taking over of the Cinema hall. The High Court Division directed the Government to release the Cinema hall. Despite such direction the Government did not release the cinema hall and maintained that in view of the Martial Law Regulation No.VII of 1977, the judgment of the High Court Division was not binding upon them and that they were not legally bound to hand over the possession. Thereafter the owner of the cinema hall moved a writ petition challenging the "ratification and confirmation" of the Abandoned Properties (Supplementary Provision) Regulation, 1977, Martial Law Regulation VII of 1977 and Proclamations Amendment Order, 1977 with regard to insertion of paragraph 3A in the Fourth Schedule of the Constitution by paragraph 18 therein. The High Court Division by judgment and order dated 29th August, 2005 declared "all Proclamations, Martial Law Regulations and Martial Law Orders made during the period from 15th August, 1975 to 9th April, 1979 were illegal, void and non-est because those were made by persons without lawful authority and the Constitution was made subordinate and subservient to the Martial Law Proclamations, Martial Law Regulations and Martial Law Orders by proclamations".

Some political activists challenged the said judgment in the Appellate Division of the Supreme Court of Bangladesh. The Appellate Division by judgment and order dated 19th November, 2009 maintained the judgment of the High Court Division observing that "since the Constitution is the Supreme law of the land and the Martial Law Proclamations, Regulations and Orders promulgated by the usurpers being illegal, void and non-est in the eye of law, could not be ratified and confirmed by the Second Parliament by the Fifth Amendment, as it itself had no such power to enact such laws as made by the Proclamations". Moreover, it is observed, "the Fifth Amendment ratifying and validating Martial Law Proclamations, Regulations and Orders not only violated the supremacy of the Constitution but also rule of law and by preventing judicial review of the legislative and administrative actions, also violated two other more basic features of the Constitution, namely, independence of judiciary and its power of judicial review".

Constitution Eight Amendment Case

Another Landmark case is commonly known as Eight Amendment case. A writ petition was filed in the High Court Division challenging the Constitution (Eight Amendment) in which the Government amended Article 100 of the Constitution. By this amendment, six permanent Benches of the High Court Division were created at head quarters of different districts. One Anwar Hossain challenged the said amendment on the ground that the said amendment was in violation of provisions of the Constitution. The Appellate Division declared that the impugned amendment of Article 100 along with consequential amendment of Article 107 of the Constitution is ultravires the Constitution. It was observed that the said amendment is ultravires because it has destroyed the essential limb of the judiciary namely, the Supreme Court of Bangladesh by setting up rival courts to the High

Court Division in the name of permanent Benches. This said amendment was also ultravires to Articles 44, 94, 101, 102 of the Constitution, because

- "(1) All powers in the Republic belong to the people-this a concept of sovereignty of the people. Sovereignty lies with the people not with executive, legislature or judiciary-all these three are creations of the Constitution itself.
- 3) They are exercised on behalf of the people shall be effected only, under, and by the authority of the Constitution. This is the concept of limited Government based on theory of separation of powers and then Article 7(2) says significantly that this Constitution is, as the solemn expression of the will of the people, the supreme law of the Republic-This is the supreme law not in theory because it says "if any other law is inconsistent with this Constitution that other law shall, to the extent of the inconsistency, be void."

Environmental Protection Litigation

A public interest writ petition was filed in the High Court Division by a Non-Government Organisation for protection from pollution and also to preserve the original territories of the rivers flowing in or around the Dhaka City namely Buriganga, Turag, Balu and Shitalakya. The High Court Division upon hearing made the rule absolute and issued the following directions upon the concerned Deputy Commissioners of the four districts and also the Government.

- a) to declare the rivers as ecologically critical area.
- b) to make a survey of these four rivers delineating the area of encroachment by encroachers.
- c) the walkway and pavement be constructed on the banks of the rivers besides trees to be planted thereon.
- d) all encroachments inside the rivers must be removed by 30th November, 2010.
- e) to establish a National River Protection Commission within three months.

2009(XVII) BLT(HCD)455

These directions have been approved by the Appellate Division.

Independence of Judiciary & Rule of Law

Judicial Activism

Indemnity Ordinance Case

After the brutal murder of the father of the nation Bangabandhu Sheikh Mujibur Rahman and his family members including his youngest son, a child of ten years by some aberrated army officers on 15th August, 1975 Khandaker Moshtaque Ahmed, who was set up by the killers declared Martial Law on 20th August, 1975 with retrospective effect from 15th August, 1975. In the Proclamation amongst others, it was provided in clause (g) that "no court, including the Supreme Court, or Tribunal or Authority shall have any power to call in question in any manner whatsoever or declare illegal or void this Proclamation or any Martial Law Regulation or Order -----". Thereafter on 26th September, 1975 Khandaker Moshtaque Ahmed promulgated the Indemnity Ordinance, 1975 providing therein as under:

"Restrictions on the taking of any legal or other proceedings against persons in respect of certain acts and things.-(1) Notwithstanding anything contained in any law, including a law relating to any defence service, for the time being in force, no suit, prosecution or other proceedings, legal or disciplinary, shall lie, or be taken in, before or by any court, including the Supreme Court and Court Martial, or other authority against any person, including a person who is or has, at any time, been subject to any law relating to any defence service, for or on account of or in respect of any act, matter or thing done or step taken by such person in connection with, or in preparation or execution of any plan for, or as necessary step toward, the change of Government of the People's Republic of Bangladesh and the Proclamation of Martial Law on the morning of the 15th August, 1975."

This Ordinance was promulgated with a view to save killers of Bangabandhu Sheikh Mujibur Rahman from prosecution. After the Awami League came in power in 1996, the Government repealed the Ordinance. One Mohitul Islam, then worked as Assistant of Bangabandhu Sheikh Mujibur Rahaman thereafter instituted a criminal case against the persons involved in the carnage being Dhanmondi P.S. Case No.10(10)96 dated 2nd October, 1996. Shahriar Rashid Khan and Syed Faruque Rahman, two accused persons filed writ petitions in the High Court Division challenging the institution of the case on the ground that all acts relating to the occurrence of 15 August, 1975 were indemnified by the Indemnity Ordinance the entire subject matter which has been ratified and validated by Proclamation Order No.1 of 1977 and the Constitution Fifth Amendment, and thus their prosecution is without jurisdiction. The High Court Division discharged the rule.

The accused persons thereupon challenged the judgment of the High Court Division in the Appellate Division of the Supreme Court of Bangladesh. The Appellate Division upheld the judgment of the High Court Division observing that the effect of repeal of a law is that as if it never existed and it is obliterated completely from the records of the Parliament except for the purpose of those actions which were taken under it. That being the position in law, the Indemnity Ordinance was not in existence after the passing of the Repeal Act.

The accused persons who were involved in the carnage were tried and convicted by the learned Sessions Judge by the judgment and order dated 8th November, 1998 under sections 120B and 302/34 of the Penal Code and sentenced 15 of them to death. The High Court Division maintained the conviction and sentence in respect of 12 accused persons. Some of the convicts moved the Appellate Division of the Supreme Court of Bangladesh against the said conviction and sentence and the conviction was upheld by six member Bench of the Appellate Division by judgment and order dated 19th November, 2009. (ADC. Vo.VI(A)). The trial was held after 21 years of the incident. In the context of the matter the Appellate Division observed "The basic elements of a criminal Justice system are an impartial fact-finding process and a fair and equitable resolution. The ethical and moral duties of those who work within the system are typically consistent with the concept of Justice. The criminal Justice system in a country is designed to protect the citizens of the country from the

onslaught of criminal activities of a section of people who indulge in such acts. The state as a guardian of fundamental rights of its citizens is duty bound to ensure the administration of Justice and the rule of law. It is in the interest of the people that the guilt of the offender who has indulged in criminal activity is tried as early as possible”.

Another Landmark judgment in the judicial history is the case of Masdar Hossain. In that case some judicial officers serving in the subordinate judiciary filed a writ petition in the High Court Division challenging the Bangladesh Civil Service (Reorganization) Order, 1980 purporting to incorporate “judicial service” within the Bangladesh Civil Services as one of the cadre services as ultravires the Constitution and violative of Articles 27 and 29 of the Constitution. The matter ultimately went to the Appellate Division and the Appellate Division in (20 BLD(AD)104) declared as under:

- "1) It is declared that the judicial service is a service of the Republic within the meaning of Article 152(1) of the Constitution, but it is a functionally and structurally distinct and separate service from the civil executive and administrative services of the Republic with which the judicial service cannot be placed on par on any account and that it cannot be amalgamated, abolished, replaced, mixed up and tied together with the civil executive and administrative services.
- 2) It is declared that the word "appointments" in Article 115 means that it is the President who under Article 115 can create and establish a judicial service and also a magistracy exercising judicial functions, make recruitment rules and all pre-appointment rules in that behalf, make rules regulating their suspension and dismissal but Article 115 does not contain any rule-making authority with regard to other terms and conditions of service and that Article 133 and Article 136 of the Constitution and the Services (Reorganization and Conditions) Act, 1975 have no application to the above matters in respect of the judicial functions.
- 3) It is declared that the creation of B.C.S. (Judicial) cadre along with other B.C.S. executive and administrative cadres by Bangladesh Civil Services (Reorganisation) Order, 1980 with amendment of 1986 is ultra vires the Constitution. It is also declared that Bangladesh Civil Service Recruitment Rules, 1981 are inapplicable to the judicial service.
- 4) The appellant and the other respondents to the writ petition are directed that necessary steps be taken forthwith for the President to make Rules under Article 115 to implement its provisions which is a constitutional mandate and not a mere enabling power. It is directed that the nomenclature of the judicial service shall follow the language of the constitution and shall be designated as the Judicial Service of Bangladesh or Bangladesh Judicial Service. They are further directed that either by legislation or by framing Rules under Article 115 or by executive Order having the force of Rules a

Judicial Services Commission be established forthwith with majority of members from the Senior Judiciary of the Supreme Court and the Subordinate Courts for recruitment to the judicial services on merit with the objective of achieving equality between men and women in the recruitment.

- 5) It is directed that under Article 133 law or rules or executive orders having the force of Rules relating to posting, promotion, grant of leave, discipline (except suspension and removal), pay, allowances, pension (as a matter of rights, not favour) and other terms and conditions of service, consistent with Article 116 and 116A, as interpreted by us, be enacted or framed or made separately for the judicial service and magistrates exercising judicial functions keeping in view the constitutional status of the said service.
- 6) The impugned orders in the writ petition dated 28.2.1994 and 2.11.1995 are declared to be ultra vires the Constitution for the reasons stated in the judgment. The appellant and the other respondents to the writ petition are directed to establish a separate Judicial Pay Commission forthwith as a part of the Rules to be framed under Article 115 to review the pay, allowances and other privileges of the judicial service which shall convene at stated intervals to keep the process of review a continued one. The pay etc, of the judicial service shall follow the recommendations of the Commission.
- 7) It is declared that in exercising control and discipline of persons employed in the judicial service and magistrates exercising judicial functions under Article 116 the views and opinion of the Supreme Court shall have primacy over those of the Executive.
- 8) The essential conditions of judicial independence in Article 116A, elaborated in the judgment, namely, (1) Security of tenure, (2) security of salary and other benefits and pension and (3) institutional independence from the Parliament and the Executive shall be secured in the law or rules made under Article 133 or in the executive orders having the force of Rules.
- 9) It is declared that the executive Government shall not require the Supreme Court of Bangladesh to seek their approval to incur any expenditure on any item from the funds allocated to the Supreme Court in the annual budgets, provided the expenditure incurred falls within the limit of the sanctioned budgets, as more fully explained in the body of the judgment. Necessary administrative instructions and financial delegations to ensure compliance with this direction shall be issued by the Government to all concerned including the appellant and other respondents to the writ petition by 31.5.2000.

- 10) It is declared that the members of the judicial service are within the jurisdiction of the administrative tribunal. The declaration of the High Court Division to the opposite effect is set aside.
- 11) The declaration by the High Court Division that for separation of the subordinate judiciary from the executive no further constitutional amendment is necessary is set aside. If the Parliament so wishes it can amend the Constitution to make the separation more meaningful, pronounced, effective and complete.
- 12) It is declared that until the Judicial Pay Commission gives its first recommendation the salary of Judges in the judicial service will continue to be governed by *status quo ante* as on 8.1.94 vide paragraph 3 the Order of the same date and also by the further directions of the High Court Division in respect of Assistant Judges and Senior Assistant Judges. If pay increases are effected in respect of other services of the Republic before the Judicial Pay Commission gives its first recommendation the members of the judicial service will get increases in pay etc. commensurate with their special status in the Constitution and in conformity with the pay etc. that they are presently receiving."

Judicial Ethics

1. **A JUDGE SHOULD UPHOLD THE INTEGRITY AND INDEPENDENCE OF THE JUDICIARY.**
 An independent judiciary is indispensable to the justice system in Bangladesh. A judge should participate in establishing, maintaining, and enforcing high standards of conduct, and should personally observe those standards, so that the integrity and independence of the judiciary may be preserved. The provisions of this Code should be construed and applied to further that objective.
2. **A JUDGE SHOULD AVOID IMPROPRIETY AND THE APPEARANCE OF IMPROPRIETY IN ALL ACTIVITIES**
 - A) A judge should respect and comply with the law and should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.
 - B) A Judge should not allow family, social, or other relationships to influence judicial conduct or judgment. A judge should not lend the prestige of the judicial office to advance the private interest of others; nor convey or permit others to convey the impression that they are in a special position to influence the judge.
 - C) A Judge should not hold membership in any organization that practices invidious discrimination on the basis of race, sex, cast, religion, or place of birth.

3. A JUDGE SHOULD PERFORM THE DUTIES OF THE OFFICE IMPARTIALLY AND DILIGENTLY.

The judicial duties of a judge take precedence over all other activities. In performing the duties prescribed by law, the judge should adhere to the following standards:

- (1) A judge should be faithful to and maintain professional competence in the law, and should not be swayed by partisan interests, public clamor, or fear of criticism.
- (2) A judge should hear and decide matters assigned, unless disqualified, and should maintain order and decorum in all judicial proceedings.
- (3) A judge should be patient, dignified, respectful, and courteous to litigants, lawyers, and others with whom the judge deals in an official capacity, and should require similar conduct of those officers to the judge's control, including lawyers to the extent consistent with their role in adversarial system.
- (4) A judge should accord to every person who is legally interested in a proceeding, or the person's lawyer, full right to be heard according to law, and, except as authorized by law, neither initiate nor consider ex- parte communications on the merits, or procedures affecting the merits of a pending or impending proceeding.
- (5) A judge should dispose promptly the business of the Court including avoiding inordinate delay in delivering judgments/orders.
- (6) A judge should avoid public comment on the merits of a pending or impending court case.

GENERAL DISQUALIFICATIONS TO HEAR AND MATTER:

- (a) The judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned.
- (b) The judge shall disqualify to hear a matter/cause where he severed as lawyer in the matter in controversy, or a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness.
- (c) The judge knows that, individually or as a fiduciary, the judge or the judge's spouse or minor child residing in the judge's household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be affected substantially by the outcome of the proceeding.
- (d) The judge or the judge's spouse, or a person related either to the Judge or the spouse:
 - i) is a party to the proceeding, or an officer, director, or trustee of a party;
 - ii) is acting as a lawyer in the proceeding;
 - iii) is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding; or
 - iv) is to the judge's knowledge likely to be a material witness in the proceeding.

- (e) The Judge has served in governmental employment and in such capacity participated as counsel, advisor, or material witness concerning the proceeding or has expressed an opinion concerning the merits of the particular case in controversy.
- 4. A judge must not enter into public debate or express his views in public on political matters or on matters that are pending or are likely to arise for judicial determination before him.
- 5. A judge is expected to let his judgments speak for themselves. He will not give interviews to the media.
- 6. A judge will not accept gifts or hospitality except from his family, close relatives and friends.
- 7. A judge should not engage directly or indirectly in trade or business, either by himself or in association with any other person. (Publication of legal treatise or any activity in the nature of a hobby will not be construed as trade or business).
- 8. A judge should not ask for, accept contributions or otherwise actively associate himself with the raising of any fund.
- 9. Every judge must at all times be conscious that he is under the public gaze and there should be no act or omission by him which is unbecoming of his office.
- 10. A judge shall disclose his assets and liabilities if, asked for, by the Chief Justice.

Judicial Development Programme

The Judicial Development Programme in Bangladesh is a multi-lateral project to build the capacity of Judges and Magistrates. This programme has a very significant training focus as under:

- a) It has undertaken training for Judges of the Subordinate Courts and Magistrates.
- b) It has supported the development and strengthening of a system of national coordination for judicial training.
- c) It has been conducting training on Court rules, Procedures and a range of technical specialties, including juvenile Justice and Court practice.
- d) It has developed a monitoring and evaluating strategy to evaluate the impact and effectiveness of project activities and training within the participating judiciaries.

Conclusion

To Summarise, the essential requirements for the efficient and expeditious administration of justice are now well known:

- (1) A Court must monitor and manage both its caseload and individual cases.
- (2) Management cannot be successful without judicial leadership and commitment.
- (3) Procedures must be clearly established in legislation, Court rules and written practices.
- (4) Cases must be brought under Court management soon after their commencement.
- (5) Different kinds of cases require different kinds of management.
- (6) The degree and intensity of management must be proportionate to what is in dispute and to the complexity of the matter.
- (7) The number of Court appearances must be minimised.

- (8) Realistic but expeditious timetables must be set and unless there is good reason, must be adhered to.
- (9) A key objective is to identify the issues really in dispute early in the proceedings.
- (10) Trial dates must be established as soon as practicable and must be definite, so as to ensure compliance with timetables.
- (11) Alternative dispute resolution should be encouraged and sometimes mandated.
- (12) Monitoring of the caseload must provide timely and comprehensive information to judges and Court officers involved in management. Time standards may be useful in focusing the attention of all those involved.
- (13) Communication and consultation within the Court and with others involved in the litigation process is an ongoing process.

Of all the requirements, one is overriding. Unless there is judicial commitment to the process, it will not work.

Thanking you all and wish you all a happy life and sound health.

Dated
12th September, 2010

(Justice S.K.Sinha)
Appellate Division
Supreme Court of Bangladesh.