IN THE SUPREME COURT OF BANGLADESH

APPELLATE DIVISION

PRESENT:

Mr. Justice Surendra Kumar Sinha, Chief Justice

Mr. Justice Syed Mahmud Hossain

Mr. Justice Hasan Foez Siddique

Mr. Justice Mirza Hussain Haider

CIVIL APPEAL NO.53 OF 2004.

(From the judgment and order dated 07.04.2003 passed by the High Court Division in Writ Petition No.3806 of 1998.)

Bangladesh, represented by the Secretary, Ministry of Law, Justice and Parliamentary Affairs and others:	Appellants.
=Versus=	
Bangladesh Legal Aid and Services Trust (BLAST) represented by Dr. Shahdeen Malik and others:	Respondents.

For the Appellants:	Mr. Mahbubey Alam, Attorney General, (with Mr. Murad Reza, Additional Attorney General and Mr. Sheik Saifuzzaman, Deputy Attorney General, instructed by Mr. Ferozur Rahman, Advocate-on-Record.
For the Respondents:	Dr. Kamal Hossain, Senior Advocate, Mr. M. Amirul Islam, Senior Advocate, (with Mr. Idrisur Rahman, Advocate & Mrs. Sara Hossain Advocate,) instructed by Mrs. Sufia Khatun, Advocate-on-Record.

Date of hearing: 22nd March, 11th and 24th May, 2016.

Date of Judgment: 24th May, 2016.

J U D G M E N T

Surendra Kumar Sinha,CJ:

Historical Background of the Legal System of Bangladesh

Blackstone's Commentaries on the Laws of England has been termed as 'The bible of American

lawyers' which is the most influential book in English on the English legal system and has nourished the American renaissance of the common law ever since its publication (1765-69). Boorstin's great essay on the commentaries, show how Blackstone, employing eighteenth-century ideas of science, religion, history, aesthetics, and philosophy, made of the law both a conservative and a mysterious science. In his 'The Mysterious Science of the Law' Daniel J. Boorstin, in Chapter two under the caption 'The use of History', the author stated, "The conflict between Blackstone's Science of Law and his Mystery of Law was never to be entirely resolved. This was nothing less than the conflict between man's desire to understand all and his fear that he might discover too much. Yet eighteenth-century England was able to find a partial solution of the difficulty by appealing to experience. Since Locke had destroyed all innate ideas and made experience the primary source of ideas, the student

of society, like the philosopher, could abandon the *a priori* path for the path of experience. In practice, this meant that the eighteenth-century mind came to make every social science, as Blackstone made the study of law, simply a branch of the study of history. The accumulation of all experience, history became the whole study of man, and the entire practical aspect of philosophy. In 1735, Bolingbroke summed up this notion when he said that history was "philosophy teaching by examples."

By "philosophy" was meant not the abstruse distinctions of metaphysics, but the practical "science of human nature.." "Nature has done her part. She has opened this study to every man who can read and think; and what she has made the most agreeable, reason can make the most useful, application of our minds.'

Hume, in 1739, called his *Treatise* an attempt to write other *Principia* by applying the Newtonian method to philosophy. But how was this to be done?

Here he answered with the voice of Locke. "And as the science of man is the only solid foundation for the other sciences, so the only solid foundation we can give to this science itself must be laid on experience and observation." That he thought history the final and proper source of this finally turning from philosophy to the study of the past. But he was clear in defining the data and method of this science:

The laws of England were for Blackstone and body for studying the anatomy of laws in general. This understanding of laws in general was to be sought in the *Commentaries* by studying the English law historically, an approach which before the eighteenth century had not been seriously undertaken. Now the awakening historical consciousness of the Enlightenment was beginning to show itself in legal scholarship.

Hale, the first English legal historian, had most shaped Blackstone's general conception, and the

Commentaries themselves were in turn the inspiration for John Reeves' 'History of English Law'.

From ancient times in Bangladesh, there existed local assemblies in village known as Panchayets. They settled disputes and their decisions were in the nature of compromise between the parties. But at times, they pronounced regular judgments. The law in force then was tribal customary laws. By lapse of time, there was transition to centralised rule by the king who at the apex was recognised as the ultimate judicial authority. He held courts in person to decide cases assisted by Brahmins. In the latter period, a gradation of courts was set up in towns and cities. Appeals preferred from the decisions of these local courts to the Chief Court at the capital, from whose decisions appeals laid to the Royal Court presided over by the king. The laws applied by these courts were principally the customary laws, and shastric or canon laws, the sanctity of which was well recognized both by the

courts as well as the people. Besides, dicta emanating from religion were regarded as a major source of law. This system prevailed until the end of twelfth century. When the foundation of Muslim dominion was laid towards the beginning of the thirteenth century, the earlier system remained operative in the country with some modifications here and there until the advent of the Mughals. They set up courts throughout their empire with *Qazi* at the head. *Qazi* used to dispense justice both civil and criminal laws.

The Mughals established their rule in this part of the Sub-continent in the Sixteenth century. The main objects of their administration were to assess and collect revenue. Nonetheless, administration of justice was regarded throughout the Mughal period as a subject of great importance and they had introduced a well-organized system of law. For the purpose of overall administration, the areas now constituting Bangladesh, like other provinces (The

Province was comparable to a modern division) of the Mughal empire, was divided into districts, and districts into sub-divisions.

At lower tier it was the village where the Mughals retained the ancient system of getting petty disputes settled by the local *Panchayets.* In every town, there was a regular Town Court presided over by a *Qazi* known as *Qazi-e-Parganah*. This court generally dealt with both civil and criminal matters. There was Fauzdar, who as the name indicates, was a commander of and unit of armed force. He also discharged some general executive functions and was placed in charge of suitable sub-division. In the early period of the Mughal rule, the Fauzdars tried petty criminal matters, but as the system underwent some changes during the period between 1750 and 1857, in the latter period, Fauzdars maintained 'Fauzdari Court' for administration of criminal justice at the district level and dealt with most of the criminal cases

except capital sentences. The trace of its name still survives. Today's Criminal Courts or 'Fauzdari Adalat' as it is called in Bengali, are the improved version of Fauzdari Courts of those days.

There was existence of Kotwal who functioned as chief of town police, censor of morals and local chief of the intelligence system. He performed the functions of Police Magistrate and tried petty criminal cases. The office of Kotwal was known as Kotwali, which was the principal police station of a town. The nomenclature of Kotwali even survives today. In almost all important towns and cities in Bangladesh, there exist at least one police station called 'Kotwali' police. Kotwal system remained in force until the East India Company took up the administration of justice in the country through acquisition of Diwani. There were two other judicial functionaries, known as Amin and Qanungo. Amin, as it literally means, was an Umpire between the State demanding revenue and the individual raiyats paying

it. He was basically an officer of the town and his jurisdiction extended to the disposal of revenue cases. The Qanungo, as the name implies, was the Registrar of Public Records. He preserved all 'Qanuns' that is to say, all rules and practices and furnished information as to procedure, precedents and land history of the past. He used to dispose of petty cases connected with land and land-revenue.

The principal judicial authorities in the district level were, the District Judge, called District Qazi. He exercised appellate power to hear civil and criminal appeals against the decisions of the Qazi's Court in towns, called Qazi-e-Parganah. He also exercised criminal appellate power against the decisions of Police Magistrates at base level called Kotwals. Another noteworthy judicial authority in the district level was District Amalguzar. He heard appeals in revenue cases taken from the jurisdiction of Amin, the Revenue-Umpire and Qanungo, the Registrar of Public Records. In

province-level judiciary, there existed Provincial Governor's Court called Adalat-e- Nizam-e-Subah presided over by the Governor or Subadar. This Court had original, appellate and revisional jurisdiction. The original jurisdiction was for dealing with murder cases while in appellate jurisdiction, it decided appeals preferred from the decisions passed by the court of District Qazi and that of Fauzdar. Appeals from and against the decision by this court prefer to the Emperor's Court as well as to the Court of the Chief Justice at the imperial capital. There was another Court in this level known as the Governor's own court and this court possessed only an original jurisdiction. The Provincial Qazi held a court which was called the Court of Qazi-e-Subah, This court had original as well as appellate jurisdiction. Besides, Provincial Diwan presided over provincial Revenue Court and dealt with revenue appeals against the decision of District Amalguzar.

In the administration of justice within the structure depicted above, *Qazis* were the judges of the canon law while *Adils* were the judges of the common law. Mir-i-Adil, was the Lord Justice. *Qazi* conducted in the trial and stated the law. Mir-i-Adil or Lord Justice passed the judgment whose opinion could override that of his colleague. But as a rule, they conducted the affairs of the court quite harmoniously which has been clearly delineated by V.D. Kulshreshtha in his book titled "Landmarks in Indian Legal and Constitutional History".

The law which was applied in the administration of justice during the Mughal times was primarily the Holy law as given in the Quran being regarded as fountain-head and first authority of all laws, civil and criminal, and the traditions handed down from the prophet Muhammad (SM) called Sunna which was and is at present day held to be only second to the Quran itself in sanctity. The judges further depended upon the Codes prepared on analogical

deduction by the school of Imam Abu Hanifa (Abu Hanifa an Nu'man ibn Thabit, popularly known as Imam Abu Hanifa (A.D. 701 to 795) was the founder of Hanafi School of law. 'He was the first to give prominence to the doctrine of Qiyas or analogical deduction' and 'assigned a distinctive name and prominent position to the principle by which, in Muhammadan jurisprudence, the theory of Law is modified in its application to actual facts, calling it istihsan' 'which bears in many points remarkable resemblance to the doctrines of equity'. He constituted a committee consisting of forty men from among his disciples for the codification of the laws and it 'took thirty years for the Code to be completed, which has been clearly stated by C. F. Abdur Rahim in his Book “Muhammadan Jurisprudence (1958 Edn) P.L.D. Lahore, pp. 25-26”. Most of the Muslims living in Bangladesh belong to Hanafi School) as well as upon the literature of precedent of eminent jurists called Fatwas.

Besides, these sources, there were secular elements which were drawn upon by the judges to guide their opinions. The Ordinances known as "*Qanuns*" of various emperors were freely applied by the judges in deciding cases. Ancient customs also played an important part in the legal system of the Mughals who always accepted the sanctity of the customs under which the people of the country had been used to live. Apart from this, the judges had scope to make use of the *dictum* of equity, good conscience and justice i.e. sense of right and wrong. Matters on which no written authorities could be traced were decided by the judges in accordance with their own good conscience and discretion. They had to adjust application of the Holy law, which was of general character, to the individual cases which came up before them from time to time. This adjustment was generally the result of the decision of one man. Judges, therefore, exercised vast discretionary powers in their own spheres, has been

clearly spelt out by Rum Proshad Khosla authored the book “Mughal Kingship and Nobility, Reprint, 1976”.

The Mughal Emperor at the imperial capital was the Legislator on those occasions when the nature of the case necessitated the creation of new law or the modification of the old. Royal pronouncements superseded everything else, provided they did not go counter to any express injunction of the Holy law. These pronouncements were based on the Emperor's good sense and power of judgment rather than on any treatise of law. All ordinary rules and regulations depended upon the Royal will for their existence.

The judicial procedure under the Mughals was not a long drawn-out matter as it is at present. The decisions of cases were speedy. Basically, it was an adversary procedure with provision for pleadings, calling of evidence, followed by judgment. The court was, assisted by Mufti who was well-versed in canon and lay law to assist the court. He was in many respects a fore runner of the present day Attorney

General. Civil and Criminal laws were partly Muslim laws and partly customs and the royal decrees. Personal laws of Hindus and Muslims were applied in their respective field.

The system of law under the Mughals was effective and worked well for a long time. Its disintegration started when the Emperor's control over the provinces became less effective. The local Zamindars in course of time became powerful and gradually usurped to themselves the function of administration of justice. This was the state of affairs around the last quarter of the Eighteenth Century when in the province of Bengal justice was administered by Nawab, in his absence by the Chancellor of the Exchequer called Diwan, and in the absence of both, by a Deputy.

Earlier, on the last day of the year 1600, Queen Elizabeth I of England gave the East India Company, by the First Charter, a monopoly of eastern trade and the Charter contained the power and

authority to make, ordain and constitute such and so many laws, constitutions, orders and ordinances as may be necessary for the good government of the Company and for better administration of their trade and furthermore to impose "such pains, punishments and penalties, by imprisonment of body, or by fines and americaments, or by all or any of them" as might seem requisite and convenient for the observation of such laws, constitutions, orders and ordinances. In this connection it may be referred to Constitutional Documents, Vol. I, Government of Pakistan, Ministry of Law & Parliamentary Affairs (Law Div), at p 9. All these powers were placed on perpetual foundation by a fresh Charter granted by James I, in 1609, which was granted on May 31, 1609. After a few years, in 1613, the Company got permission from the Mughal Emperor to establish its first factory at Surat. The Charter of 1609 was followed by the British Crown's another grant made on the 14th December, 1615, authorising the Company to issue

commissions to their captains provided that in capital cases, a verdict must be given by a jury. The purpose behind this was maintenance of discipline on board ships that was granted on February 19, 1623.

James I extended the Company's power by authorizing it to punish its servants for offences committed by them on land. This Charter together with the earlier grant placed the Company to the advantage of governing all its servants both on land and high sea what has been clearly stated in the Book “A. Constitutional History of India” authored by Arthur Berriedale Keith 1600-1935 (Methuen's 2nd Edn) at pp 6-7. Its power to exercise judicial authority was enlarged a step further by a Charter of Charles II, in 1661 which was granted on April, 3, 1661. The Charter a landmark in the history of the legal system, granted the Governor-in-Council of the Company the authority to administer English Law in all civil and criminal cases on Company's

servants as well as on others who lived in the British settlement in India. A further Charter granted by Charles II, in 1683 (Granted on August 9, 1683.) provided for a court of judicature to be established at such places as the Company might appoint to decide cases according to equity and good conscience or by such means as the Judges should think fit.

In 1698, the Company by the purchase of villages in Bengal acquired the status of Zamindar which carried with it the scope for exercise of civil and criminal jurisdiction [Sir George Claus Rankin, Background to Indian Law, Cambridge University Press. (1946 Edn) at p 1]. Consequently, a Member of Council regularly held Zamindari Court to try civil and criminal cases. Earlier, the Company had constructed a fortified factory at Calcutta (Kolkata) and towards the close of 1699, the settlement in Bengal was declared Presidency. Their fort at Calcutta was named Fort William in

honour of King William of England and it became the seat of the Presidency.

By a Charter granted by King George I, on 24th September, 1726, a Court of Record in the name of Mayor's Court and a Court of Record in the nature of a *Court of Oyer and Terminer and Gaol Delivery* was established in Calcutta. The Mayor's Court was to try all civil cases with authority to frame rules of practice. The Court of *Oyer and Terminer* was constituted for trying all criminal cases (high treason only excepted). Both civil and criminal justice was required to be administered according to English Law. This was how the King's Courts were introduced in India though the King of England had no claim to sovereignty over Indian soil. Establishment of these courts raised the question of jurisdiction over Indians. Accordingly, by a new Charter of George II, issued in 1753, (The Charter dated January 8, 1753.) the Mayor's Court was forbidden to try action between Indians who did not

submit to its jurisdiction. Yet, the Charter established a Court of Request in each presidency for prompt decisions in litigations involving small monetary value.

In the year 1756, as the Company refused to move the fortifications it had erected in Calcutta (Fort Wiliam), the Nawab of Bengal, Bihar and Orrisa Serajuddaula captured the town, but in 1757, the Company under the command of Clive defeated Nawab in the battle of Palassy and recaptured it. Thus, the British people grasped the rein of power. De jure recognition followed with the Mughal Emperor's grant to the Company of the Diwani of Bengal, Bihar and Orrisa. The grant of Diwani included not only the right to administer revenue and civil justice, but virtually the Nizamat also i.e., the right to administer criminal justice. In this respect, it may be mentioned that Minutes of Sir Charles Grey C.J" October 2, 1829, Parliamentary Papas, 1831, Vol. VI, p 54.) Now as the British people were required to

govern the new land they naturally took over the Mughal system then prevailing, made in it only the most necessary changes and while retaining its old framework, they very slowly added new elements.

The Company exercised within the villages it had acquired judicial power appurtenant to its status of Zamindar, on the usual pattern then prevailing in the country. After the acquisition of Diwani in 1756, the Company introduced Adalat or Court System in 1772. In fact, it was introduced under Bengal Regulation II of 1772 by Warren Hastings after his appointment as Governor in Bengal. The Office of the Governor was styled 'Governor-General in Bengal from 1774 to 1833. The system is known as Adalat System for administration of justice in Mufassil beyond the presidency town of Calcutta and set up two types of Courts in each revenue district. For civil justice, Provincial Civil Court styled as Mufassil Diwani Adalat was established in each Collectorate with a Chief Civil

Court with appellate power at Calcutta called Sadar Diwani Adalat. The Collector of the district presided over the Provincial Civil Court or Mufassil Diwani Adalat whose jurisdiction extended to disputes concerning property, inheritance, claims of debts, contract, partnership and marriage. The Collector was assisted by two Law Officers, a Moulvi and a Pandit, who expounded respectively the rules of Muslim or Hindu law applicable to the cases. The Chief Civil Court or Sadar Diwani Adalat at the seat of the Government was presided over by the President with at least two other Members of the Council.

For criminal justice, Provincial Criminal Court styled Mufassil Fauzdari Adalat was also established in each district with a Chief Criminal Court with supervisory power called Sadar Nizamat Adalat. In the Provincial Criminal Courts sat the Qazi and Mufti of the district with two Moulvis to expound the law. These Provincial Criminal Courts were not permitted to pass death sentences and had to

transmit the evidence with their opinion to the Sadar Nizamat Adalat for decision. Besides, the proceedings of these criminal courts were supervised by the Sadar Nizamat Adalat, presided over by the Daroga Adalat representing Nawab in his capacity as Supreme Criminal Judge, with the aid of Chief Qazi, Chief Mufti and three Moulvis.

The criminal courts at first administered Muhammedan Law with some variations which had developed in Bengal, but innovations borrowed from English Law were also introduced. In civil courts, Hindus and Muslims were governed by their personal laws in cases dealing with marriage, succession and religious institution; in other matters in default of a statutory rule governing the case, the court applied 'justice, equity and good conscience'.

Soon after the acquisition of Diwani by the East India Company, the question arose whether the Company could alter the criminal law then in force in India. The first interference with the Mohammedan

Criminal Law came in 1772 when Warren Hastings changed the existing law regarding dacoity to suppress the robbers and dacoits. It was provided that the dacoits were to be executed in their villages, the villagers were to be fined, and the families of the dacoits were to become the slaves of the State. Warren Hastings in his letter to the Directors dated 10th July, 1773 maintained that the East India Company as the sovereign authority in the country could and should alter the rules of Mohammedan Law. He pointed out, in his letter,

> "The Mohammedan Law often obliges the Sovereign to interpose and to prevent the guilty from escaping with impunity and to strike at the root of such disorders as the law may not reach”

Hastings criticised the existing rules of Mohammedan Criminal Law boldly and attempted to introduce reforms in various ways. To regulate the machinery of justice in Bengal, Warren Hastings

prepared plans and introduced reforms in 1772, 1774 and 1780 respectively as well as suggested various reforms.

From 1772 to 1790 though steps were taken to reorganise and improve the machinery of justice no special effort was made to change the Mohammedan Criminal Law. The problem of law and order as well as to improve the defective state of the Mohammedan Law was seriously considered by Lord Cornwallis when he came to India in 1790. Lord Cornwallis, who succeeded Warren Hastings, concentrated his attention towards removing two main defects, namely (a) gross defects in Mohammedan Criminal Law and (b) defects in the constitution of courts.

Lord Cornwalli's reforms in the Mohammedan Criminal Law were introduced on 3rd December, 1790 by a Regulation of the Government of Bengal. The Regulation made the intention of the criminal as the main factor in determining the punishment. The intention was to be determined from the general

circumstances and proper evidence and from the nature of the instrument used in committing crime. To support this reform, Cornwallis proposed that the Doctrine of Yusuf and Mohammad must be the general rule 'in respect of trials for murder'. Abu Hanifa's doctrine laying emphasis on the instrument of murder was rejected. By another important provision of the Regulation, the discretion left to the next of kin of a murdered person to remit the penalty of death on the murderer, was taken away and it was provided that the law was to take its course upon all persons who were proved guilty for the crime. Cornwallis further maintained,

> "Where Mohammedan Criminal Law prescribes amputation of legs and arms or cruel mutilation, we ought to substitute temporary hard labour or fine and imprisonment".

It finds support from section 66 of the Resolution in the proceedings of the Governor-

General in Council dated 10th October, 1791. In this respect legislative steps were taken only in 1791.

Reforms were also introduced, by the Regulation of 3rd December, 1790, in the administration of justice in the Foujdari or criminal courts of Bengal, Bihar and Orissa. In 1791 a Regulation was passed which substituted the punishment of fine and hard labour for mutilation and amputation. The next important step was taken in 1792 when a Regulation provided that if the relations of a murdered person refused or neglected to prosecute the accused person, the Courts of Circuit were required to send the record of the cases to the Sadar Nizamat Adalat for passing final orders. In the same year it was also provided that in future the religious tenets of the witnesses were not to be considered as a bar to the conviction of an accused person. The Law Officers of the circuit Courts were required to declare what would have been their fotwa if the witnesses were Muslims and not in the case of

Hindus. Accordingly, this provision modified the Muslim Law of Evidence in 1792.

On 1st May, 1793, the Cornwallis Code a body of forty eight enactments-was passed. Regulation IX of 1793 in effect restated the enactments which provided for modification of the Mohammedan Criminal Law during the last three years. Thus, it laid down the general principles on which the administration of criminal justice was to proceed.

In order to make the law certain in 1793 it was also provided that the Regulations made by the Government were to be codified according to the prescribed form and they were to be published and translated in Indian languages. (Regulation XLI of 1793.)

The process of introducing reforms in the Mohammedan Criminal law which began first of all during Warren Hastings' tenure continued till 1832 when the application of Muslim Law as a general law was totally abolished- Various piecemeal reforms

which were introduced from 1797 to 1832 in the Mohammedan Criminal Law were as follows:

Regulation XIV of 1797 made certain reforms in the law relating to homicide where the persons were compelled to pay blood-money. The Regulation granted relief to those persons who were not in a position to pay blood-money and were put in prison by setting them free. It further provided that all fines imposed on criminals shall go to the Government and not to private persons. If the fine was not paid, a definite term of imprisonment was fixed for the accused. After the expiry of that fixed period of imprisonment the accused person was released from prison. In cases where the application of Mohammedan Criminal Law led to injustice, the Judges were empowered to recommend mitigation or pardon to the Governor-General-in Council.

Throughout his tenure as Governor-General, Warren Hastings was subject to two pressures, incompatible with each other, as regards the

administration of criminal justice. On the one hand, he was obsessed by the feeling that administration of criminal justice was the responsibility of the Nawab and not of the Company which was only the Diwan. On the other hand, he realised that criminal law needed to be drastically reformed. The criminal courts prior to 1772 were in a very decrepit condition. Realising that the government's interest in the maintenance of law and order could not be ensured without the administration of criminal justice but at the same time maintaining the facade of the Nawab's presence in this sphere, Warren Hastings had devised certain peripheral steps in 1772 in the area of criminal judicature, viz, leaving administration of criminal justice to the Muslim law officers, he had interposed supervision of English functionaries over them. Whatever the theoretical objections, the practical exigencies of the situation did not permit the government to adopt completely neutral stance towards the administration

of criminal justice. But government's freedom of action was very limited, or so it thought. Instead of taking over the administration of criminal justice also alone with civil justice, it retained Muslim law officers to decide criminal cases it fought shy of modifying Muslim criminal law even when some of its features were demonstrably not suited to the contemporary society and the notion of justice entertained by the British themselves. The criminal law itself promoted, to some extent, the commission of violent crimes because it provided ways and means of mitigating punishments. Even the British supervision over the administration of criminal justice introduced in 1772, could not be maintained for long. In 1775, the Sadar Nizamat Adalat was removed from Calcutta to Murshidabad and placed under the control and supervision of the Naib Nazim Mohammad Reza Khan. This, however, proved to be an unfortunate step for the administration of criminal justice which was thus cut-off from the

main currents of reform and improvement Reza Khan's supervision of the criminal judicature did not prove to be effective and efficient and, consequently, administration of criminal justice suffered. It came to be afflicted, with many vices; its condition became very precarious. Criminal Court became instruments of oppression and torture in the hands of unscrupulous officers; innocent persons were punished while the guilty escaped with impunity. There was no machinery for bringing the offenders to book. The criminal judicature ceased to provide any security to life or property of the people. Even though the state of affairs continually deteriorated, the Calcutta government did not give up its policy of non-interference in criminal judicature. Warren Hastings thought of taking only minimal steps to improve matters while keeping intact, as far as possible, the existing structure of criminal judicature to maintain the fiction that the Nizamat still belonged to the Nawab.

During the period from 1781 to 1793, there were certain other noteworthy reforms. Judges of the Mufassil Diwani Adalats were empowered to arrest the offenders and to bring them to the courts for trial and as such they were also designated as Magistrates. It was not for them to try the accused in their own court; rather as Magistrates, they were required to produce the offender for trial in the Mufassil Fauzdari Adalat. For supervision of works of the Magistrates and Provincial Criminal Courts called Mufassil Fauzdari Adalats, a criminal department was set up in Calcutta controlled by an Officer of the Company called Remembrance of Criminal Courts. In 1801, the Sadar Nizamat Adalat and the Sadar Diwani Adalat were united and in 1807, Magistrates' power to award sentence was raised to six months and a fine of two hundred rupees and in 1818, by enlarging these powers the Magistrates were empowered to pass sentence of imprisonment. By Regulation I of 1819, the Judges of the Provincial

Courts of Appeal and Provincial Courts of Circuit were divested of their power to try criminal cases and in their place Commissioners of Revenue and Circuit were appointed in each division. Superintendence and control of Police, Magistrates were placed under these officers with the responsibility of conducting sessions. They heard appeals against the orders passed by the Magistrates.

By 1861, it had proceeded far enough to justify the enactment of the Indian High Courts Act, 1861 (The Act was entitled East India (High Courts of Judicature) Act, 1861. (24 & 25 Vic. C 104)) by the British Parliament authorising creation by Letters Patent of High Courts in the several Presidencies in place of respective Supreme Courts and the Sadar Dawani Adalat and Sadar Nizamat Adalat were to be abolished on establishment of the High Courts. Under Letters Patent dated December 28, 1865, issued pursuant to the Indian High Courts Act, 1861, the

High Court of Judicature at Fort William (Calcutta) in Bengal was established replacing the Supreme Court and Chief Courts or Sadar Adalatss (Sec. 8 of the Act; The Adalat System was abolished.) The High Court thus established at Calcutta became the successor of the Supreme Court as well as of the Chief Courts or Sadar Adalats and combined in itself the jurisdiction of both set of old courts. All the jurisdictions of the Supreme Court, civil, criminal, admiralty, testamentary, intestate and matrimonial, original and appellate, and the appellate jurisdiction of Sadar Diwani Adalat and Sadar Nizamat Adalat became vested in the High Court at Calcutta, the original jurisdiction being exercisable by the original side of the High Court and the appellate jurisdiction being exercisable by the appellate side thereof (Sec. 9 of the Act). The Calcutta High Court continued to exercise its jurisdiction till partition of India in 1947. After establishment of the High Court in 1865, a regular

hierarchy of civil courts was established by Civil Courts Act, 1887. The Criminal Procedure Code of 1898 re-organised the criminal courts and the High Court exercised a general power of superintendence over all civil and criminal courts. In this respect, the book of Mr. Azizul Hoque on "The legal System of Bangladesh" may be referred to.

Criminal Judicature

When magisterial functions were vested in the collectors, it was understood that every collector in very district would have a deputy who would lighten the work of the collector-magistrate to some extent. But this hope was not fulfilled. Considerations of economy always stood in the way of the government ever doing anything necessary to improve the administration. In most of the districts, no deputy was appointed. The result of this was that the burden on the collector – magistrate was too heavy and he usually neglected his magisterial functions. On the plea that the

collectors neglected their magisterial duties, Government – General Lord Auckland in 1837, secured the approval of the Company's Directors to separate the two offices, and for the eight years following it was effected gradually. But, as small salaries were allowed to the magistrates, the office fell in the hands of junior servants, and its effect on the administration of justice did not prove to be very happy. But eventually the Offices of collector and magistrate were united again in 1859. About this, Keith points out that the demand for union of magisterial powers in the collector was made by Dalhousie in 1854, and Canning in 1857. "This preference for patriarchal rule unquestionably corresponded with the need of the time and received effect after the Mutiny.

After the abortive Indian Revolution of 1857 against the misrule of the East India Company, the Government of India Act, 1858 was passed providing for taking over the administration of India in the

hand of British Government. The Company's rule in India came to an end with the proclamation of Queen Victoria in 1858 by which the administration of the Company's Indian possessions was taken over by the British Government. Charter Act of 1833 made the Governor General of Bengal, Bihar and Orissa, the Governor General of India and Mr. Macaulay (afterwards Lord Macaulay) was appointed as the law member of the Governor General's Council and the said Council was empowered as the Indian Legislative Council to make laws by passing Acts instead of making Regulations. The First Law commission was constituted with Mr. Macaulay as its chairman in 1835. The second Law commission was appointed in 1853 headed by Sir John Romilly. Third Law Commission in 1861 was also headed by Sir John Romilly for preparing a body of substantive laws for India. Fourth Law Commission was appointed headed by Dr. Whitly Stokes in 1879. On the basis of the recommendation of this commission, the Code of Civil

Procedure, 1859, Limitation Act, 1859, Penal Code, 1860 and Code of Criminal Procedure, 1861 were enacted by the Indian Legislative Council.

Above Laws and other laws were enacted with the object of replacing the modified Islamic administration of justice in the Mufassil by the modified English Common Law system. Act XVII 1862, modified Islamic system of administration of justice. This change over made the posts of law officers such as Quazis, Muftis, Moulavis and Pundits redundant and after that those posts were abolished by Act II of 1864. (Kulshrestha).

Fourth Law Commission appointed in 1879 recommended for amendment of some laws and enactment of some new laws. On the recommendation of this commission the present Evidence Act, 1872, the Code of Criminal Procedures 1898, the Code of Civil Procedure 1908 and some other laws were enacted.

THE CRIMINAL PROCEDURE AMENDMENT ACT, 1923

The Criminal Procedure Amendment Act, 1923 made some improvement in this respect. The Europeans British subjects' right to be tried by the European judges and magistrates was entirely abrogated. The accused persons whether European or Indian were placed practically on an equal footing. The only privilege allowed to the British subjects was that they could be tried with the help of a jury consisting of a majority of Europeans or Americans. A reciprocal right was allowed to the Indians as they could claim jury consisting of a majority of the Indians. Colonial of the British came to an end in August, 1947. Under the provisions of the Indian Independence Act, 1947, British India was divided into India and Pakistan. Eastern part of the Province of Bengal formed the Province of East Pakistan. But unfortunately, within 3(three) years of partition Martial Law was plagued in Pakistan and Rule of Law had been buried and Colonial Rules

continued to the people of East Pakistan till independence in 1971. With the coming into operation of the constitution of the Islamic Republic of Pakistan in 1956, the Supreme Court of Pakistan was established in place of the Federal Court as the apex Court of the country. The apex Court was vested with the appellate jurisdiction from the decisions of the High Courts including Dacca High Court. The rule of law enshrined in the constitution was so transitory. In October 1958, Martial Law was promulgated and the constitution was abrogated. In 1962 another constitution was formulated by the Martial Law authorities to the country. This constitution was also abrogated in 1969 on the promulgation of the second Martial Law in the country.

Emergence of Bangladesh

Before stating anything about the judiciary of Bangladesh, it is necessary to know about the judicial system that was in existence in the country

on the emergence of Bangladesh and a pen picture of the same has been given above. Under the provisions of the Legal Frameworks Order, 1970 a general election was held from 7th December 1970 to 17th January, 1971 in Pakistan to form a National Assembly to frame a Constitution of the country and first meeting of the National Assembly called by the President and Chief Martial Law Administrator General Yahiya Khan to be held on 3rd of March 1971 was postponed by him on 1st of March 1971. This triggered off violent protest and non-cooperation movement by the people of the then East Pakistan. On 7th of March, 1971 Bangabandhu Sheikh Mujibur Rahman, leader of the Awami League Party which secured majority seats of the National Assembly (167 out of 300 seats) called for an all-out struggle for achieving complete autonomy of East Pakistan in a mammoth public meeting held in the Dacca Race Course Field (Presently Suhrawardy Uddyan). Thereafter, on the night following 25th of March, 1971 the Armed

Forces of Pakistan started armed attack on the Bangalee soldiers, policemen, riflemen and the people. Bangalee soldiers, policemen and riflemen revolted and war of liberation of Bangladesh was started. On 26th of March, 1971 independence of Bangladesh was declared and on 10th of April, 1971 elected representatives of the people of Bangladesh assembled in a meeting at Mujibnagar and issued the Proclamation of Independence confirming the declaration of Independence made by Bangabandhu Sheikh Mujibur Rahman on 26th March, 1971 and declaring and constituting Bangladesh to be a sovereign People's Republic. The Proclamation declared Bangabandhu Sheikh Mujibur Rahman as the President and Syed Nazrul Islam as the Vice-President of the Republic till framing of the Constitution. Under the said Proclamation the President was to be Supreme Commander of the Armed Forces with authority to exercise all the executive and legislative powers of the Republic including the

power to grant pardon and also to appoint a Prime Minister and other Ministers, to levy taxes and spend money, to summon and adjourn Constituent Assembly and to do all other things necessary and incidental. The Vice-President was authorised to exercise all the powers, duties and responsibilities of the President in his absence. On that very day, the Vice-President Syed Nazrul Islam, in the absence of the President Sheikh Mujibur Rahman who was confined in Pakistan jail, as Acting President promulgated the Laws Continuance Enforcement Order 1971. This Order provided, amongst others,

> "......all laws that were in force in Bangladesh on 25th March 1971 shall subject to the 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 the oath of allegiance to Bangladesh shall continue in their offices on terms and conditions of service so long enjoyed by them."

On the 17th day of April 1971 Bangladesh Government in exile was formed with Tajuddin Ahmed as Prime Minister and members of the Cabinet took oath of the office on that day at Mujibnagar.

On the 16th day of December, 1971 the occupation Forces of Pakistan in the territory of Bangladesh had surrendered to the joint command of India and Bangladesh and thus Bangladesh was liberated. Thereafter on 11th January, 1972, the Provisional Constitution Order 1972 was promulgated by the President. The said Order provided for a Constituent Assembly consisting of the members of the National Assembly and Provincial Assembly elected by the People of East Pakistan in the election held in December 1970, and January, 1971. The said Order

also provided for the High Court of Bangladesh consisting of a Chief Justice and other Judges, a Council of Ministers with the Prime Minister as the head and ordained the President to act on the advice of the Prime Minister, and empowered the Cabinet to appoint a President in the event of a vacancy occurring in the office of the President. (Administration of justice in Bangladesh, Justice Kazi Ebadul Hoque).

Debate in the Constituent Assembly regarding the maintenance of Rule of Law:

বঙ্গবন্ধু শেখ মুজিবুর রহমানঃ

আজ আমরা যে সংবিধান দেব, তাতে মানুষের অধিকারের কথা লেখা থাকবে, যাতে ভবিষ্যতে কেউ জনগণের জানমাল নিয়ে ছিনিমিনি খেলতে না পারে। এমন সংবিধানই জনগণের জন্য পেশ করতে হবে। আজ এখানে বসে চারটি স্তম্ভের উপর ভিত্তি করে আমাদের ভবিষ্যৎ বংশধরদের জন্য এমন সংবিধান রচনা করতে হবে, যাতে তাঁরা দুনিয়ার সভ্য দেশের মানুষের সামনে মাথা উঁচু করে দাঁড়াতে পারে।

দলমত নির্বিশেষে সকলের সঙ্গে আলোচনা করা হবে, জনগণকে যাতে তাদের ইচ্ছা অনুযায়ী একটা সুষ্ঠু সংবিধান দেওয়া যায়, এই উদ্দেশ্যে সকলের মতামত চাইব। এই সংবিধানে মানবিক অধিকার থাকবে, যে অধিকার মানুষ চিরজীবন ভোগ করতে পারে।

১২ই অক্টোবর, ১৯৭২

বঙ্গবন্ধু শেখ মুজিবুর রহমানঃ

শাসনতন্ত্র ছাড়া কোন দেশ- তার অর্থ হল মাঝিবিহীন নৌকা, হালবিহীন নৌকা। শাসনতন্ত্রে মানুষের অধিকার থাকবে, শাসনতন্ত্রে মানুষের অধিকারের সঙ্গে সঙ্গে কর্তব্যও থাকবে। এখানে free-style democracy চলতে পারে না। শাসনতন্ত্রে জনগণের অধিকার থাকবে, কর্তব্যও থাকবে। এবং যতদূর সম্ভব, যে শাসনতন্ত্র পেশ করা হয়েছে, সেটা যে জনগণের আশা-আকাঙ্খার মূর্ত প্রতীক হয়ে থাকবে, সে সম্বন্ধে আমার কোন সন্দেহ নেই।

ড. কামাল হোসেন (আইন ও সংসদীয় বিষয়াবলী এবং সংবিধান-প্রণয়ন-মন্ত্রী):

সংবিধানকে বলা হয় একটা দেশের মৌলিক আইন বা সর্বোচ্চ আইন। সংবিধান জনগণকে প্রেরণা দেবে এবং জনগণের অভিপ্রায় অনুযায়ী সমাজ গঠনের ভিত্তি সংস্থাপন করবে, এটা আশা করা যায়। আইনগত দৃষ্টিভঙ্গি থেকে বলা যায় যে, জনগণ যে ক্ষমতার মালিক, সেই ক্ষমতা আইনসঙ্গতভাবে প্রয়োগ করার জন্য কতকগুলো প্রধান অঙ্গ সংবিধানে প্রতিষ্ঠা করা হয়। যে দেশের এ রকম মৌলিক আইন আছে, সে দেশে কোন ব্যক্তি বা কোন রাষ্ট্রীয় অঙ্গ সেই আইনের উর্ধ্বে থাকতে পারে না। এইজন্যই বলা হয় যে, সাংবিধানিক সরকারে ব্যক্তির শাসন নয়, আইনের শাসন প্রবর্তিত হয়। ঠিক এই কারণেই ইংল্যান্ডের এক বিখ্যাত বিচারক এক সর্বময় ক্ষমতাসম্পন্ন রাজার বে-আইনী নির্দেশ মানতে অস্বীকার করে বলেছিলেন যে, তিনি শুধু আল্লাহ্ এবং আইনের অধীন, কোন মানুষের অধীন নন।

আইনের শাসন নিশ্চিত করার উদ্দেশ্যে স্বাধীন বিচারবিভাগ প্রতিষ্ঠার ব্যবস্থা করা হয়েছে। বিচারবিভাগের শীর্ষদেশে রয়েছে সুপ্রীম কোর্ট। সুপ্রীম কোর্টের দুইটি বিভাগ থাকবে। হাইকোর্ট বিভাগ এবং আপীল বিভাগ। এই আপীল বিভাগ হবে দেশের চূড়ান্ত আপীলের ক্ষেত্র। নির্বাহী বিভাগ থেকে বিচারবিভাগকে পৃথক করারও ব্যবস্থা করা হয়েছে।

নাগরিকদের অধিকার-রক্ষার পূর্ণ ক্ষমতা আদালতকে দেওয়া হয়েছে; কিন্তু সমাজতান্ত্রিক অর্থ-ব্যবস্থা প্রতিষ্ঠার জন্য প্রয়োজনীয় বলে ঘোষণা করে সম্পত্তি ও ব্যবসা সংক্রান্ত যে সব আইন সংসদ তৈরী করবেন, আদালত সেগুলো নাকচ করতে পারবেন না ।

চতুর্থ বৈঠক: ১৯শে অক্টোবর, ১৯৭২

সৈয়দ নজরুল ইসলাম (শিল্প-মন্ত্রী; পরিষদের উপ-নেতা):

মাননীয় স্পীকার সাহেব, গণতন্ত্রের সবচেয়ে বড় কথা হচ্ছে separation of judiciary from the executive, অর্থাৎ আইনের শাসন এমনভাবে প্রবর্তন করতে হবে, যেন আইনবিভাগ পরিপূর্ণভাবে নিরপেক্ষ থাকে এবং মর্যাদা এবং স্বাধীনতার সঙ্গে তার কর্তব্য পালন করতে পারে। এই শাসনতন্ত্রে আমাদের আইনবিভাগকে শুধু আলাদা করাই নয়, তাকে পরিপূর্ণ মর্যাদা দেওয়ার জন্য যে ব্যবস্থা গ্রহণ করা হয়েছে, তাতে আইনের শাসন সম্বন্ধে আমাদের মনে কোন সংশয় থাকা বাঞ্ছনীয় নয় ।

জনাব আসমত আলী শিকদার (এন. ই.-৭০: পটুয়াখালী-৩):

এই শাসনতন্ত্রে আর একটা কথা প্রতিফলিত হয়েছে, যেটা বৃটিশ আমল থেকে ছিল- নির্বাহী বিভাগ থেকে বিচারবিভাগকে পৃথকীকরণ । কারণ, অনেক সময় দেখা গেছে, তাদের যথেচ্ছাচার বিচারকের উপর হস্ত-ক্ষেপ করেছে। উল্লেখ করা যেতে পারে যে, মোনেম খানের সময় কোন সুবিচার ছিল না, টেলিফোনের মাধ্যমে বিচার হত। সেই বিচারবিভাগকে পৃথক করা হয়েছে। তাতে দেশের মানুষ বিচার পাবে, rule of law establish হবে। এ দেশ সোনার বাংলায় পরিণত হবে।

জনাব আলী আজমঃ

আমাদের অনেক দিনের একটা দাবী ছিল যে, আইনবিভাগকে নির্বাহী বিভাগ থেকে আলাদা করতে হবে, যাতে করে বিচারকরা পক্ষপাতশূন্য হয়ে বিচার করতে পারেন এবং নির্বাহী-বিভাগের যদি কোন অন্যায় হয়, তার প্রতিকার যাতে হতে পারে, তার ব্যবস্থা এই বিলের মধ্যে আছে। গণতন্ত্রকে রক্ষা করার জন্য এবং গণতান্ত্রিক পদ্ধতিকে কায়েম করার জন্য সর্বপ্রকার চেষ্টা এখানে করা হয়েছে।

পঞ্চম বৈঠকঃ ২০শে অক্টোবর, ১৯৭২

জনাব এম. মনসুর আলী (যোগাযোগ মন্ত্রী):

কাজেই গণতন্ত্র শুধু প্রতিষ্ঠার জন্য নয়- গণতন্ত্র সংরক্ষণ করা এবং এর পূর্ণ বিকাশের জন্য ব্যবস্থা অবলম্বন করা হয়েছে। গণতন্ত্র যাতে পূর্ণ বিকাশ লাভ করতে পারে, সেজন্য আইনের শাসন প্রবর্তন করা হয়েছে। আইনের শাসন যাতে বিকাশ লাভ করতে পারে, সেজন্য বিচারবিভাগকে শাসনবিভাগ হতে পৃথক করা হয়েছে এবং আদালতের বিচারক যাতে সমস্ত প্রভাব থেকে এবং ভয়, ভীতি, লোভের উর্ধ্বে থেকে আইনের শাসন কায়েম করতে পারেন, সেজন্য বিচারকের নিয়োগ এবং বিচারকের অপসারণ সম্বন্ধে বিশেষ বিধি-ব্যবস্থার কথা লিপিবদ্ধ করা হয়েছে।

সপ্তম বৈঠকঃ ২৩শে অক্টোবর, ১৯৭২

খোন্দকার আবদুল হাফিজ (এন. ই.-৪৯: যশোর-৭):

আমাদের দেশে যে সংবিধান হয়েছে, তার পূর্বে আমরা বহুবার বহু সাংবিধানিক ব্যবস্থা প্রবর্তিত হতে দেখেছি। ১৯৩৫ সালে ভারতীয় আইন পাশ করার পর থেকে তৎকালীন সমস্ত ভারতবর্ষে একটা আন্দোলনের সৃষ্টি হয়েছিল যে, বিচারবিভাগকে নির্বাহী বিভাগ থেকে পৃথক করতে হবে। এ দেশে বহু আইনজীবী, বহু মনীষী, সমস্ত ছাত্র-সমাজ প্রতিবাদে মুখর হয়ে উঠেছিল যে, বিচারবিভাগকে নির্বাহী বিভাগ

থেকে সম্পূর্ণভাবে পৃথক করতে হবে। আমরা তখন শুনেছি, কিন্তু তারা কিছুই করতে পারেনি। আর আজ যখন আমরা নিজেরাই সংবিধান তৈরী করতে যাচ্ছি, তখনই আমরা চেষ্টা করেছি বাংলাদেশের সংবিধানের মধ্যে বিচারবিভাগকে executive body থেকে সম্পূর্ণরূপে আলাদা করার জন্য।

স্যার, এ সম্পর্কে দুইটা উদাহরণ আমি দিতে চাই। আমাদের সংবিধানের ২২ এবং ১১৬ অনুচ্ছেদ। ২২ অনুচ্ছেদের অন্তর্গত মৌলিক অধিকারে বলা হয়েছে যে, বিচারবিভাগের পৃথকীকরণ রাষ্ট্র নিশ্চিত করবেন। আর, যাতে কোনদিন কোন মানুষের মনে সন্দেহের সৃষ্টি না হয়, সেই জন্য ১১৬ অনুচ্ছেদে বলা হয়েছে, বাংলাদেশের সুপ্রীম কোর্টের অধীনে হাইকোর্ট থাকবে। হাইকোর্টে নিযুক্ত ব্যক্তিদের এবং বিচারবিভাগীয় দায়িত্বপালনে রত ম্যাজিস্ট্রেটদের নিয়ন্ত্রণ, কর্মস্থল-নির্ধারণ, পদোন্নতিদান ও ছুটি-মঞ্জুরীসহ সকল বিষয় ও শৃঙ্খলা সুপ্রীম কোর্টের উপর ন্যস্ত থাকবে। সুতরাং এখানে এটা পরিষ্কার হয়ে গিয়েছে যে, বাংলাদেশে স্বাধীনতার মাত্র দশ মাস পরে যে একটা সংবিধান দেওয়া হচ্ছে, তাতে পরিষ্কারভাবে লিপিবদ্ধ করা হয়েছে যে, বিচারবিভাগ নির্বাহী বিভাগ থেকে এই সংবিধান কার্যকর হওয়ার পর থেকে সম্পূর্ণ পৃথক হয়ে যাবে। সুতরাং, এ ব্যাপারে আর কোন সন্দেহ থাকতে পারে না।

জনাব মোঃ হুমায়ূন খালিদ (এন. ই.-৭৩: টাঙ্গাইল-৩):

এই সংবিধানে আইনবিভাগ ও শাসন বিভাগকে এই প্রথম আলাদা করা হল এবং আলাদা করে জনগণের সত্যিকারের ন্যায়বিচারের ব্যবস্থা করা হল।

অষ্টম বৈঠক: ২৪শে অক্টোবর, ১৯৭২

জনাব আবদুল মালেক উকিল:

আইয়ুব খান ১৯৬২ সালে যে সংবিধান করেছিল, তার অনেক কথা বর্তমান সংবিধানে আছে। আমি তা মানি। যেমন সেখানে হাইকোর্ট ছিল এখানেও হাইকোর্টের কথা আছে। তবে আমি তাঁকে বলতে চাই যে, ঐ হাইকোর্ট এবং এখানকার উল্লেখিত হাইকোর্টের মধ্যে তফাৎ আছে। আইয়ুবের হাইকোর্টের মধ্যে যা

ছিল না equality before law, তা এখানে আছে। আইয়ুবের ডাইরেক্টিভ প্রিন্সিপল যা ছিল, আমাদের প্রিন্সিপলের সঙ্গে তার মিল নাই।

বুধবার, ২৫শে অক্টোবর, ১৯৭২

জনাব আছাদুজ্জমান খান (এন. ই-৯০: ময়মনসিংহ-১৫):

আরও একটি উদাহরণ দিতে গিয়ে বলা যায় যে, ২২ অনুচ্ছেদে মূলনীতি হিসাবে আমরা গ্রহণ করেছি যে,

"রাষ্ট্রের নির্বাহী অঙ্গসমূহ হইতে বিচার-বিভাগের পৃথকীকরণ রাষ্ট্র নিশ্চিত করিবেন।"

বিচার-বিভাগকে সম্পূর্ণভাবে নির্বাহী বিভাগ থেকে এই সংবিধানেই পৃথক করা হয়েছে।

বৃহস্পতিবার, ২৬শে অক্টোবর, ১৯৭২

জনাব মোঃ আজিজুর রহমানঃ

আইনের প্রতি শ্রদ্ধা থাকা দরকার। আমরা মনে করি, আমরা মানুষকে বলি, 'সবার উপরে মানুষ সত্য, তাহার উপরে নাই'। আইনের দ্বারা শাসন হবে। বিচার বিভাগ পৃথক হয়ে গেল। বহুদিনের আশা, নির্বাহী বিভাগ বিচার-বিভাগ থেকে পৃথক হবে এবং তা পৃথক হল। সেটায় আছে প্রধানমন্ত্রীর কথা। যদি কেউ ভুল করে ভেবে থাকেন যে, বঙ্গবন্ধু হবেন প্রধানমন্ত্রী এবং ডিক্টেটরশিপ চালিয়ে যাবেন, তাহলে তিনি অন্যায় করবেন। তিনি তাঁর স্নেহপুষ্ট আওয়ামী লীগকে বলেছেন, তোমরা এমন আইন করে দাও, যাতে আমি যেমন ভাবি, সেভাবে হবে- এটা সত্য নয়।

একাদশ বৈঠকঃ ২৭শে অক্টোবর, ১৯৭২

জনাব এম. শামসুল হকঃ

এখানে যাতে আইনের শাসন প্রতিষ্ঠিত হয়, তার জন্য নির্বাহী বিভাগকে বিচার-বিভাগ থেকে পৃথক করা হয়েছে। যাতে এ দেশে আইনের শাসন প্রতিষ্ঠিত হয় এবং যাঁরা বিচারক, তাঁরা যাতে সব রকম লোভ-

লালসার উর্ধ্বে থেকে ন্যায় ও আদর্শের প্রতিষ্ঠা করতে পারেন, তার জন্য এখানে বিধি-ব্যবস্থা গ্রহণ করা হয়েছে।

জনাব মীর হোসেন চৌধুরী, এ্যাডভোকেটঃ

আমাদের এই শাসনতন্ত্রে যে মৌলিক অধিকার দেওয়া হয়েছে, তাতে উল্লেখ রয়েছে যে, এই দেশে আইনের শাসন হবে এবং আইনের চোখে সবাই সমান। আমি বিশ্বাস করি, আইনের প্রতি শ্রদ্ধাবোধ থাকলে সংবিধান সুন্দর হতে পারে। আইনের প্রতি শ্রদ্ধা থাকলে সেই দেশও সুন্দর হয়।

এই সংবিধানে 'জুডিসিয়ারি'কে 'একজিকিউটিভ' থেকে আলাদা করে দেওয়া হয়েছে, যেন এই ব্যবস্থার মাধ্যমে যে কোন লোক অন্যায়ের প্রতিকার পেতে পারেন। এই যে সংবিধানে 'জুডিসিয়ারি'কে আলাদা করে দেওয়া হয়েছে, তাতে অনেকের মতে এই সংবিধান অনেক ভাল হয়েছে।

জনাব আহ্সান উল্লাহ্ (পি. ই.-৭৩: কুষ্টিয়া-৩):

বিচার-বিভাগ সম্বন্ধে বলা হয়েছে বিচারক কী ভাবে নিয়োগ করা হবে, কী তাঁর কাজ হবে। শাসনতন্ত্রে এ সব বিষয় নির্দিষ্ট করে দেওয়া হয়েছে। এ ভাবে প্রতিটি বিভাগ সম্বন্ধে এই শাসনতন্ত্রে সুনিদিষ্ট কর্মপন্থা নির্ধারণ করে দেওয়া হয়েছে।

কাজী সাহাবুদ্দিন (পি. ই.-১৯৬: ঢাকা-২৬):

আমি এই সংবিধানের আরও দু-একটি বৈশিষ্ট্যের কথা বলব। তার মধ্যে একটি হচ্ছে এই যে, দীর্ঘ পঁচিশ বছর যাবৎ 'এক্জিকিউটিভ' এবং 'জুডিসিয়ারী'কে পৃথক করা সম্ভব হয়নি। যার কুফল বিগত পঁচিশ বছর আমাদের ভুগতে হয়েছে। আমরা- আইনজীবীরা- বিভিন্ন সময়ে বিচার-বিভাগকে শাসন-বিভাগ হতে পৃথক করার জন্য জোরালো দাবী উত্থাপন করেছিলাম। স্বৈরাচারী শাসনআমলে আমাদের দাবী শুধু দাবীই রয়ে

গেল। আজ আমরা যে সংবিধান দিতে যাচ্ছি, সেই সংবিধানে বিচার-বিভাগকে শাসন-বিভাগ থেকে পৃথক করার ব্যবস্থা রয়েছে। এটা আমাদের জন্য অত্যন্ত আনন্দের বিষয়।

সোমবার, ৩০শে অক্টোবর, ১৯৭২

জনাব তাজউদ্দীন আহমদ (অর্থ ও পরিকল্পনাপ্রণয়ন-মন্ত্রী):

একটা অতিরিক্ত কথা সংযোজন করা হয়েছে যে, আদালত এই সংবিধানের কোন ধারার ব্যাখ্যা করতে গিয়ে যদি আইনের শূন্যতা দেখেন, তাহলে ব্যাখ্যা দিয়ে সেই শূন্যতা পূরণ করবেন। সেই ব্যাখ্যা দিতে গিয়ে আদালত যে নির্দেশ দেবেন, তা কার্যকর হবে এবং আদালতের সে রকম ক্ষমতা থাকবে। তার জন্য আমরা ব্যবস্থা রেখেছি। আইনের ব্যাখ্যায়, জজ সাহেব যে রকম উপযুক্ত বিবেচনা করবেন, সেই রকম রায় দিতে পারবেন।

আমরা একটা আইন করেছি, যে আইন বলে জমি জাতীয়করণ করা যাবে, শিল্প-কারখানা জাতীয়করণ করা যাবে। আমাদের এই ব্যবস্থার ফলে যদি কোন ক্ষেত্রে যে উদ্দেশ্যে আইনটি প্রণীত হয়েছে, সেই উদ্দেশ্য ব্যাহত হয় কিংবা জনসাধারণের স্বার্থের ক্ষতি হয়, তাহলে আজকে যাঁরা আইনটির সমালোচনা করছেন বা বিরোধিতা করছেন, জজ সাহেব তাঁদের সপক্ষে রায় দিলে আমাদের কিছুই করণীয় থাকবে না আবার এই সংবিধান সংশোধন করা ছাড়া। তাই এই সংবিধানে ব্যবস্থা রাখা হয়েছে যে, আইনের ব্যাখ্যা দেবার সময় জজ সাহেবকে এই যে মূলনীতি দেওয়া হয়েছে, তাকে সামনে রেখে তার সপক্ষে রায় দিতে হবে- তার বিপরীত কোন রায় দেওয়া যাবে না- যদিও শূন্যতার ক্ষেত্রে বিপরীত রায় দিতে পারতেন।

কাজেই আমাদের এই সংবিধানে অতিরিক্ত সুন্দর একটি ব্যবস্থা সংযোজিত হয়েছে। জজ সাহেব এই সংবিধান অনুযায়ী শপথ গ্রহণ করবেন। এই সংবিধানকে সামনে রেখে তিনি সিদ্ধান্ত গ্রহণ করবেন। প্রত্যেক মানুষ, প্রত্যেক কর্মচারী- তা তিনি জজ সাহেব হোন বা যেই হোন- এই সংবিধানকে সর্বোচ্চে তুলে

ধরবেন। যদি এই সংবিধান কেউ লঙ্ঘন করেন বা সেই ধরনের আশঙ্কা থাকে, তাহলে সেই পরিস্থিতি মোকাবেলার জন্য বিভিন্ন উপায়ে প্রস্তুত থাকতে হবে।

জনাব সিরাজুল হক, এ্যাডভোকেট (এন. ই.-১৩৪: কুমিল্লা-৪):

যে 'জুডিসিয়াল সিস্টেম' আমরা দিয়েছি, আমি গর্বের সঙ্গে বলতে পারি, বন্ধুরাষ্ট্র ভারতবর্ষও এখন পর্যন্ত তা দিতে পারেনি। কেননা, ভারতবর্ষে এখনও 'জুডিসিয়ারি'কে সম্পূর্ণ পৃথক করা সম্ভব হয়নি। আর, আমরা চেষ্টা করেছি, আলাদা করার। শুধু হাইকোর্ট নয়, সুপ্রীম কোর্ট নয়- আমাদের নিম্নতম 'জুডিসিয়ারি'কেও 'এক্সিকিউটিভ' থেকে আলাদা করবার জন্য আমাদের সংবিধানে ব্যবস্থা করেছি। সুতরাং অভিযোগ সত্য নয়।

জনাব আবদুল মুন্তাকীম চৌধুরী (এন. ই.-১২৪: সিলেট-৫):

এই সংবিধানে আমরা ২২ অনুচ্ছেদের মাধ্যমে নির্বাহী বিভাগ থেকে বিচার-বিভাগকে পৃথক করেছি। আমাদের প্রতিবেশী-রাষ্ট্র ভারত ২৩৫ অনুচ্ছেদের মাধ্যমে এটা করতে চেয়েছে; কিন্তু সুনির্দিষ্টভাবে তা করতে পারেনি। শুধু ভবিষ্যতের জন্য একটা ব্যবস্থা রেখেছে। কিন্তু আমরা আজকে এটাকে সম্পূর্ণরূপে পৃথক করে দিয়েছি।

জনাব আবদুল মমিন তালুকদার:

জনাব স্পীকার সাহেব, এই গণতন্ত্র বা সংসদীয় গণতন্ত্রে একটা জিনিষ আছে 'র‍্যল অব্ ল' বা আইনের শাসন। আইনের চোখে প্রত্যেক মানুষ সমান, প্রত্যেক নাগরিক সমান, প্রত্যেক নাগরিকের সমান অধিকার- তা তিনি প্রধানমন্ত্রীই হোন বা একজন কৃষক, মুটে, মজুর বা মেথর। আইনের চোখে সবাই সমান। এই 'র‍্যল অব্ ল' বা আইনের শাসন সকলের জন্য।

জনাব মোঃ আবদুল আজিজ চৌধুরীঃ

তাছাড়া, ৩৫ নম্বর অনুচ্ছেদে গোপনে বিচার করার ব্যবস্থা রাখা হয়েছে। এর ফলে সংবিধানে যে মৌলিক অধিকারটুকু দেওয়া হয়েছিল, তা আর থাকল না। গোপনে বিচারকার্য পরিচালনা করার শর্ত আরোপ করে দেওয়াতে প্রকাশ্য বিচার পাওয়ার অধিকার হরণ করা হল। এই ব্যবস্থা জনমতের প্রতিফলন নয় নিশ্চয়ই।

শুধু প্রেসিডেন্টের ৯ নম্বর আদেশই নয়- সেই সঙ্গে সংবিধানের ১৩৫ নম্বর অনুচ্ছেদের মাধ্যমেও মৌলিক অধিকার খর্ব করা হয়েছে। তাঁদের ব্যাপারে গৃহীত যে কোন ব্যবস্থার বিরূদ্ধে বিচার পাওয়ার অধিকার আদালতের মাধ্যমে প্রতিষ্ঠিত করার সুযোগ নাই এবং সে সম্পর্কে আইনগত মীমাংসা করার কোন ব্যবস্থাও নাই এই সংবিধানে। এতে করে স্বাভাবিকভাবেই সরকারী চাকুরিয়াদের মনে ক্ষোভ সৃষ্টি হয়েছে।

ড. কামাল হোসেন (আইন ও সংসদীয় বিষয়াবলী এবং সংবিধান-প্রণয়ন-মন্ত্রী):

আমাদের সংবিধানের মৌলিক অধিকারের ভাগটি যদি কেউ বিবেচনা করে দেখেন, তাহলে বোঝা যাবে যে, আমরা এই দ্বিতীয় ব্যবস্থাটিকে মৌলিক অধিকারের ক্ষেত্রে কাছে লাগিয়েছি। আইনের যুক্তিসঙ্গত বাধানিষেধ আরোপ করার একটা বিধান রয়েছে। যুক্তিসঙ্গত হল কি হল না, সেটা বিচার করার এখতিয়ার সুপ্রীম কোর্টের। এই অধিকার সুস্পষ্ট, সুনিশ্চিত। সংসদ্ এটা খর্ব করতে পারবেন না। তাঁরা কেবল বিচার করে দেখবেন। প্রত্যেক অধিকারের ব্যাপারে এই বিধান করা হয়েছে।

বিচার-বিভাগের স্বাধীনতা নিশ্চিত করার জন্য আমরা বিশেষ সতর্কতা অবলম্বন করেছি। সংবিধানে সুপ্রীম কোর্ট সম্পর্কে যে বিধান রাখা হয়েছে, সে সম্পর্কে কেউ কেউ প্রশ্ন তুলেছেন যে, একটা হাইকোর্ট আর একটা সুপ্রীম কোর্ট করা হল না কেন।

আমাদের সংবিধানের ৯৪ অনুচ্ছেদে বিধান করেছি যে, সুপ্রীম কোর্টের দুটি বিভাগ থাকবে। একটা হল আপীল বিভাগ, আর একটা হাইকোর্ট বিভাগ। এই দুইটির গঠন সম্পূর্ণ আলাদা। যে বিচারপতি এক বিভাগে বসবেন, তিনি অন্য বিভাগে বসতে পারবেন না।

তবে দুটো বিভাগকে একই সুপ্রীম কোর্টের অঙ্গ করে রাখার উদ্দেশ্য হল যে, দুটোই দেশের সর্বোচ্চ আদালতের সমান মর্যাদা পাবে। অনেক একক বা ইউনিটারী রাষ্ট্রে সর্বোচ্চ আদালতের দুটো অঙ্গ থাকে। একটা হল 'ফেডারাল এ্যাপেলেট কোর্ট' আর একটা 'হাইয়েস্ট অরিজিনাল জুডিসিয়াল'। কেননা, দুটোকে পৃথক করলে, দুটোকে আলাদা করলে অর্থাৎ একটা হাইকোর্ট এবং এর একটা সুপ্রীম কোর্ট রাখলে সুপ্রীম কোর্টই সর্বোচ্চ আদালত হয়ে যাবে। সে ক্ষেত্রে হাইকোর্টের মর্যাদা কমিয়ে দিতে হয় এবং সেটা দ্বিতীয় স্তরে চলে যায়।

আমাদের যে দৃষ্টিভঙ্গী থেকে আমরা এই বিষয়ে সিদ্ধান্ত নিয়েছি, সেটা হল যে, শতকরা ৯০ ভাগ লোকের জন্য হাইকোর্টই শেষ আদালত এবং হাইকোর্টকে বিশেষ অধিকার দেওয়া হয়েছে মৌলিক অধিকার রক্ষা করার ব্যাপারে।

৪৪ এবং ১০২ অনুচ্ছেদ দেখলে বোঝা যাবে যে, মৌলিক অধিকার রক্ষা করার যে বিশেষ ক্ষমতা দেওয়া হয়েছে, সেটা আগে হাইকোর্টেরই ছিল এবং সেটা এখনও হাইকোর্ট ডিভিশনেরই থাকবে।

ফেডারাল রাষ্ট্র একটা সুপ্রীম কোর্ট ছাড়া থাকতে পারে না। পাঁচটি প্রদেশে পাঁচটি হাইকোর্ট থাকলে একটি সুপ্রীম কোর্ট থাকতে হয় তাদের কাছ থেকে আপীল নেওয়ার জন্য কিন্তু 'ইউনিটারী' রাষ্ট্রে সর্বোচ্চ আদালতকে এইভাবে দুই ভাগে বিভিক্ত করলে যে হাইকোর্ট থাকে, তাকে দ্বিতীয়স্তরে নিয়ে আসা হয় এবং সেখানে শতকরা ৯০ ভাগ লোক যায়, তার মর্যাদা কমিয়ে দেওয়া হয়।

এই দৃষ্টিভঙ্গী থেকে আমরা বিষয়টিকে দেখেছিলাম। আমরা সুষ্ঠু বিচারের উদ্দেশ্যে এ ব্যবস্থা করেছি। কারণ, আমরা জানি, আপীল বিভাগে শতকরা ৫টা কেস্ যায় না এবং হাইকোর্ট বিভাগে শতকরা ৯০টা কেস্ যায়।

মৌলিক অধিকার রক্ষা করার জন্য যে 'রীট পিটিশন' হবে, সেটা 'রীটে'র এখতিয়ারে দেওয়া হয়েছে। এগুলিকে দিয়ে আমরা সুপ্রীম কোর্টের একটা বিধান করেছি। আমরা বিশ্বাস করি যে, কোর্টকে মৌলিক অধিকার রক্ষার যে ক্ষমতা, যে এখতিয়ার দেওয়া হয়েছে, সেটা সর্বোচ্চ আদালতের একটা অঙ্গ হিসাবে রাখা উচিত।

কেউ কেউ বলেছেন, কয়েকটা লাতিন শব্দ আমরা কেন ব্যবহার করিনি- যেমনঃ *Mandamus, habeas-corpus, quo warranto, certiorary?* যাঁরা এটা বলেছেন, তাঁদের বলার উদ্দেশ্য হল যেন আমরা কোন কিছু বাদ দিয়েছি।

কিন্তু ১০২ অনুচ্ছেদ যদি কেউ বিবেচনা করে দেখেন অর্থাৎ এখানে যে এখতিয়ার দেওয়া হয়েছে হাইকোর্টে বিভাগকে, তা যদি এক একটা করে কেউ দেখেন, তাহলে তিনি বুঝতে পারবেন যে, এর সবই দেওয়া হয়েছে।

যেমন, 'ম্যান্ডেমাসে'র যে 'স্কোপ', তার জন্য আমাদের সংবিধানে একটা উপদফা আছে। 'সার্টিওরারি'র যে 'স্কোপ', তার জন্য একটা উপদফা আছে। তেমনি 'কুও ওয়ারান্টো'র যে 'স্কোপ', তার জন্যও আমাদের একটা উপদফা আছে। হেবিয়াস-কর্পাসের জন্য একটা উপদফা আছে। 'প্রহিবিশনে'র উপর একটা উপদফা আছে।

আমরা কোন জায়গায় লাতিন শব্দ ব্যবহার করিনি। লাতিন শব্দ ব্যবহার করা যেত। কিন্তু আমরা দেখেছি, লাতিন শব্দ ব্যবহারে কিছু অসুবিধা আছে। সেটা হল, লাতিন শব্দের পেছনে একটা ইতিহাস

আছে সেটা অত্যন্ত 'টেকনিক্যাল'-ধরনের এবং বহু জটিল বিধি-বিধান তার সঙ্গে জড়িত। এই 'টেকনিকালিটি'র জন্য এগুলি এখানে দেওয়া হয়নি। এগুলি অনেকটা আমরা সেরে নিয়েছি।

তবে দেখা যায় যে, 'সার্টিওরারি'র যে ইতিহাস, সেটা বিচারবিভাগীয় এবং আধা- বিচারবিভাগীয় ট্রাইব্যুনালের মধ্যে সীমাবদ্ধ।

আমরা ১০২ অনুচ্ছেদে যেভাবে লিখেছি, সেই অনুযায়ী যদি কোন কর্তৃপক্ষ বা ব্যক্তি- যিনি সরকারী ক্ষমতা প্রয়োগ করেন- 'জুরিস্‌ডিকশনের বাইরে কিছু করেন এবং সেজন্য কেউ ক্ষতিগ্রস্থ হন, তাহলে উক্ত সংক্ষুব্ধ ব্যক্তি হাইকোর্টে আপীল করলে হাইকোর্টে সংশ্লিষ্ট কর্তৃপক্ষ বা ব্যক্তিকে নির্দেশ দিতে পারবেন। এই ব্যবস্থা গ্রহণ না করে আমরা যদি একটা লাতিন শব্দ রাখতাম, তাহলে সেই পরিমাণে হাইকোর্টের ক্ষমতা সীমাবদ্ধ করা হত।

আমার একজন আইনজীবী-বন্ধু বলেছিলেন, লাতিন শব্দ ভাল শোনায়, এগুলি রাখলেন না কেন? আমি বললাম, কোন কোন কেস্‌ লাতিন শব্দ দিয়ে 'কভার' হয় বটে, কিন্তু তাতে হাইকোর্টের ক্ষমতা সীমাবদ্ধ হয়ে যায়। আবার এমন কেস্‌ও রয়েছে, যা কেবল লাতিন শব্দ বসিয়ে দিলেই 'কভার' হয় না। যেমন, কোন প্রশাসনিক সংস্থার বিরূদ্ধে 'সার্টিওরারি' চলে না। তখন তিনি অবশ্য স্বীকার করলেন যে, লাতিন শব্দ ব্যবহার করলে আদালতের আওতা সীমাবদ্ধ হয়ে যায়।

তেমনি আমরা আরও দেখেছি যে, 'হেবিয়াস-কর্পাস্‌' শব্দ গ্রহণ করলে ঠিক সেই জিনিষ হয় না, যা আমরা চাই। কেননা, সেখানে 'হেরিয়াস-কর্পাস্‌' দিলে আদালতের যতটুকু এখতিয়ার, এই শব্দের ব্যাখ্যা তার চেয়ে অনেক ব্যাপক, আওতা অনেক প্রসারিত। তারপর 'হেবিয়াস-কর্পাস্‌'- এই লাতিন শব্দ ব্যবহার করলে হাইকোর্ট কে কিছু কম এখতিয়ার দেওয়া হয়। তার বদলে আমরা যেটা দিয়েছি, তাতে হাইকোর্টকে আরও বেশী এখতিয়ার দেওয়া হয়েছে।

আর একটা ব্যবস্থা আমরা করেছি। সেটা হল, কোন পক্ষ একসঙ্গে তিন-চার ধরনের মামলার আওতায় আসবে না। সেগুলি হল, আমরা বিশেষভাবে যে সব শিল্প-প্রতিষ্ঠান জাতীয়করণ করেছি সেগুলি; চাকরী সম্পর্কীয় মামলা; সরকারী কর্মচারীদের মামলা; এবং সরকারের উপর ন্যস্ত পরিত্যক্ত সম্পত্তি সম্পর্কীয় মামলা। তার কারণ, 'রীটে'র আওতা কিছুটা বেশী দরকার। 'রীটে' ঘটনার উপর নির্ভর করে বিচার করা যায় না- শুধু আইন নিয়ে বিচার হয়।

অনেক গণতান্ত্রিক দেশে সার্ভিসমূহকে হাইকোর্টের এখতিয়ারে দেওয়া হয় না। আমাদের বন্ধু-রাষ্ট্র ভারতেও এই নিয়ম। এগুলি হাইকোর্টে নিলে সুবিচার হয় না। কারন, এগুলি অত্যন্ত খুঁটিনাটি ব্যাপার এবং আসল যে অভিযোগ, তার সেখানে বিচার হয় না। অনেক দেশে তাই সার্ভিসের জন্য আলাদা ট্রাইব্যুনাল আছে। তাঁরা এ বিষয়ের বিচার করে থাকেন। তাঁরা এর 'টেকনিকাল' দিক্ দেখে বিস্তারিত ঘটনার বিচার করতে পারেন। এই সমস্ত ট্রাইব্যুনাল থেকে তাঁরা সুবিচারের নিশ্চয়তা পেয়ে থাকেন। হাইকোর্টে এই সব ব্যাপার নিয়ে 'রীট' করে অযথা ভীড় করে কেউ সুবিচার পান না। আসলে যে সব বিষয়ের জন্য 'রীট' করা প্রয়োজন, সেগুলিকে হাইকোর্টের এখতিয়ারভুক্ত করে বাকীগুলিকে অর্থাৎ চাকরী, সরকারী সম্পত্তি জাতীয়করণের বিষয়গুলিকে প্রশাসনিক ট্রাইব্যুনালের হাতে ছেড়ে দেওয়া হয়েছে। এগুলির বিধান ১১৭ অনুচ্ছেদে করা হয়েছে।

এ সম্পর্কে বলা হয়েছে যে, আমরা এক হাতে দিয়ে অন্য হাতে নিয়েছি। এটা ঠিক কথা নয়। আমরা পূর্ণ ক্ষমতা হাইকোর্টকে দিইনি- এ কথাও ঠিক নয়। হাইকোর্টের 'রীটে'র আওতা বলতে যেটা বোঝানো হয়, সেটা হাইকোর্টকে দেওয়া হয়েছে। কেবল এটার সীমাবদ্ধতার কথা বলা হয়েছে ১০২ অনুচ্ছেদের (৩) দফায়।

বিচারবিভাগ সম্বন্ধে আর একটা কথা বলতে হয়। নির্বাহী বিভাগ থেকে বিচারবিভাগকে পৃথক করার কাজটা সরাসরিভাবে আমরা করে দিয়েছি। প্রশ্ন তোলা হয়েছে যে, আমরা তা করিনি। কিন্তু আমরা প্রথম দিকে মূলনীতির মধ্যে তা করে দিয়েছি। তারপর, আবার যদি একটু কষ্ট করে ১১৪ এবং ১১৫ অনুচ্ছেদ তাঁরা দেখেন, তাহলে বুঝতে পারবেন যে, এটার বিধান করা হয়েছে।

দু' জায়গায় করলাম কেন, এ প্রশ্ন উঠতে পারে। ভবিষ্যতে যে আইন করা হবে, তা যেন এই বিধান অনুসারে করা হয়, সেজন্য এই ব্যবস্থা। অধস্তন আদালত এবং ফৌজদারী আদালতের ম্যাজিস্ট্রেটদেরকে আমরা সুপ্রীম কোর্টের আওতায় নিয়ে এসেছি।

নির্বাহী বিভাগ থেকে বিচারবিভাগকে পৃথক করার দাবী আমাদের বহুদিন আগের পুরনো দাবী। আমরা অতীতে দেখেছি, নির্বাহী বিভাগের অধীনে বিচারবিভাগ থাকার ফলে কীভাবে তাঁদের প্রভাবিত করা হয়েছে, কীভাবে ভয় দেখানো হয়েছে।

আইয়ুবের আমলে আমার মনে আছে, একজন জেলা-জজ সরকারের বিরুদ্ধে একটা 'ইনজাংশন' দিয়েছিলেন। সেজন্য তাঁকে সন্দ্বীপে বদলী করা হয়। কাজেই এ দেশের জাগ্রত জনতা নির্বাহী বিভাগ থেকে বিচারবিভাগের পৃথকীকরণের দাবী তুলেছেন।

কীভাবে অতীতে বিচারবিভাগের স্বাধীনতা খর্ব করা হয়েছে, তার বহু নজীর আছে। সেজন্য আইনজীবী ছাড়াও এ দেশের জনসাধারণ দিনের পর দিন বিচারবিভাগকে নির্বাহী বিভাগ থেকে পৃথক করার দাবী জানিয়ে এসেছেন। আমরাই সে দাবী করেছি এবং এখন যেহেতু সুযোগ পেয়েছি, তাই সে দাবী আমরা মেনে নিয়েছি। দাবী-দাওয়া আমরাই করতাম। তখন আমরা দাবী-দাওয়া মেনে নেওয়ার সুযোগ পাইনি। এতদিন পরে আমরা এ সব দাবী-দাওয়া পূরণ করার সুযোগ পেয়েছি। আমার মনে হয়,

কোন-না-কোন সদস্য এর উপর একটা-না-একটা প্রস্তাব পাস করেছেন। তাই আজকে আমরা মেনে নিলাম যে, নির্বাহী বিভাগ থেকে বিচারবিভাগকে পৃথক করা হোক।

সংবিধানের ১১৪ এবং ১১৫ অনুচ্ছেদে এটা করে দেওয়া হয়েছে। তা সত্ত্বেও কেউ কেউ বলেছেন যে এটা করা হয়নি। তাঁরা শুধু মূলনীতি দেখে এ কথা বলছেন। বাকীটুকু তাঁরা দেখেননি। সেটা ছাড়াও বিচারবিভাগের পরিচ্ছেদ দেখুন। সেখানেও আমরা সে ব্যবস্থা করে দিয়েছি।

এখানে আমি শুধু এটুকু বলতে চাই যে, কীভাবে আমরা এত অবিলম্বে এটা করতে পেরেছি, তাও বিচার করা দরকার। অন্যান্য দেশে এটা করতে অনেক সময় লেগেছে। ইন্ডিয়া যখন এটা গ্রহণ করে, তখন ২৩৫ এবং ২৩৭ অনুচ্ছেদে একটা বিধান করা হয়েছিল ম্যাজিস্ট্রেট সম্পর্কে। ১৯৭০ সাল পর্যন্ত সংশোধিত ভারতীয় সংবিধানের ২৩৭ অনুচ্ছেদ:

"Application of the provisions of this Chapter to certain class or classes of Magistrates.- The Governor may by public notification direct that the foregoing provisions of this Chapter and any rules made thereunder shall with effect from such dates as may be fixed by him in that behalf apply in relation to any class or classes of Magistrates in the States."

২৩৫ অনুচ্ছেদে আছে:

"Control over subordinate courts.- The control over district courts and courts subordinate thereto

including the posting and promotion of, and the grant of leave to, persons belonging to the judicial service of a State and holding any post inferior to the post of district judge shall be vested in the High Court."

ভারতে তাঁরা অধস্তন আদালতের ব্যাপারে এ কথা বলেছেন। কিন্তু 'ম্যাজিস্ট্রেসী'র ব্যাপারে তাঁরা ভবিষ্যৎ কোন সময়ে ব্যবস্থা গ্রহণ করবেন এবং তারিখ জানাবেন বলে উল্লেখ করেছেন।

আমাদের সংবিধানে ১১৪ এবং ১১৫ অনুচ্ছেদে পরিষ্কারভাবে বলা আছে যে, তাঁরা সুপ্রীম কোর্টের অধীন হবেন, তাঁদের নিয়োগ সুপ্রীম কোর্টের সুপারিশ-অনুযায়ী হবে। তাঁদের বদলী, পদোন্নতি, তাঁদের বিরুদ্ধে শৃঙ্খলামূলক ব্যবস্থা- সব কিছু থাকবে সুপ্রীম কোর্টের অধীন। নির্বাহী বিভাগ থেকে বিচারবিভাগকে পৃথক করার বিধান আমরা করেছি।

জনাব স্পীকার সাহেব, পাবর্ত্য চট্টগ্রাম থেকে নির্বাচিত মাননীয় সদস্য সেই এলাকা সম্পর্কে কিছু প্রশ্ন তুলেছেন। তিনি বলেছেন যে, বৃটিশ ও পাকিস্তানী ঔপনিবেশিক শাসনের সময় সে এলাকার যে একটা ইতিহাস ছিল, সংবিধানে তা উল্লেখ করা হয়নি। আগে সে এলাকার ব্যাপারে যে বিশেষ বিধান ছিল, এ সংবিধানে তা নেই।

আমি এ কথা স্বীকার করছি, কিন্তু সেই সঙ্গে আমি এ কথাও বলতে চাই যে, আগে সে এলাকার লোকদেরকে তৃতীয় শ্রেণীর নাগরিক করে রাখা হয়েছিল। এ সম্বন্ধে আমরা দেখতে পারি ভারত শাসন আইনের ৯২ ধারা। সে ইতিহাস আমরা সংবিধানে লিখিনি। ৯২ ধারায় এগুলোকে 'এক্সক্লুডেড এরিয়া' বলা হত। তাতে বলা আছে:

"The executive authority of a Province extends to excluded and partially excluded areas therein, but, notwithstanding anything in this Act, no Act of the Federal Legislature or of the Provincial Legislature, shall apply to an excluded area or a partially excluded area..."

আইনের কোন 'প্রটেকশন' তাঁদের ছিল না। কোন আইন তাঁদের সম্পর্কে করা যেত না। আরও আছে:

"Governor may make regulation for the peace and good government of any area in a Province which is for the time being an excluded area, or a partially excluded area,..."

তখন তাঁরা সংসদের আওতা থেকে সম্পূর্ণ বাইরে ছিলেন। তাঁরা আইনের আশ্রয়ের বাইরে ছিলেন।

১৯৩৫ সালের ভারত শাসন আইনের ৯২ ধারায়, ১৯৫৬ সালের পাকিস্তানে সংবিধানের ১০৩ অনুচ্ছেদের (৪) দফায় এবং ১৯৬২ সালের সংবিধানের ২২১ অনুচ্ছেদে এটা দেখতে পাই। তাঁদেরকে আইনের আশ্রয় থেকে বঞ্চিত করে সেখানে গভর্নরের শাসন চালু রাখার বিধান করা হয়েছিল। সংসদ্ তাঁদের ব্যাপারে কোন আইন প্রণয়ন করতে পারতেন না। তাঁরা আদালতের আশ্রয় থেকে বঞ্চিত থাকতেন। হাইকোর্টে মামলা করতে পারতেন না। ফাঁসির অর্ডার হলেও হাইকোর্টে যেতে পারতেন না।

সচেতনভাবেই আমরা সেই ইতিহাসকে পেছনে ফেলে দিতে চাই। কারণ, এই সব বিধানের সাহায্যে তাঁদেরকে নানাভাবে শোষণ করা সম্ভব হয়েছিল। দুঃখজনক যে, তাঁরা শোষিত হয়েছেন, তাঁদেরকে শোষণ করা হয়েছে। মাননীয় সদস্য সেই শোষণের কথা বলেছেন। বিশেষ বিধান থাকার ফলেই শোষণ করা

সম্ভব হত। ঔপনিবেশিক শাসকরা অন্যায়ভাবে নাগরিকদের মধ্যে বিভেদ সৃষ্টি করত, এক অংশের বিরুদ্ধে অন্য অংশকে লেলিয়ে দিয়ে নিজেদের সুবিধা আদায় করত। দেশের অন্যান্য নাগরিকের সমান অধিকার তাঁদেরকে দেওয়া হয়নি। আমাদেরকে দ্বিতীয় শ্রেণীর নাগরিক এবং তাঁদেরকে তৃতীয় শ্রেণীর নাগরিক করে রেখেছিল এবং আমাদেরকে শাসন ও শোষণ করত। বিশেষ বিধান থাকার ফলেই আমাদেরকে শোষণ করা সম্ভব হত।

শেষ করার আগে আমি একটি কথা বলতে চাই। যাঁরা বলেন যে, এই সব অধিকার দেবার কোন মূল্য নেই, কারণ আদালতে বলবৎ করার ক্ষমতা দেওয়া হয়নি, তাঁদের আমি বলব যে, অন্ন, বস্ত্র, চিকিৎসা, কাজ করার অধিকার বলবৎ করার ব্যবস্থা কোন দেশে বিচারবিভাগের দায়িত্বে দেওয়া হয়েছে বলে আমার জানা নেই। শুধু বিভ্রান্তি-সৃষ্টির উদ্দেশ্যে বলা হচ্ছে যে, মৌলিক অধিকারের অধ্যায় বা মূলনীতির অধ্যায়ে এটা নেই। মৌলিক অধিকারকে আদালতের দ্বারা বলবৎ করার ব্যবস্থা কোন সমাজতান্ত্রিক বা কোন গণতান্ত্রিক দেশে দেখতে পাওয়া যায় না। এর দ্বারা অর্থনৈতিক অধিকার অর্জন করা যায় কিনা, তা আমার জানা নেই।

এই অধিকারকে যদি আদালতের মাধ্যমে বলবৎ করতে হয়, তাহলে আইন-পরিষদ্, নির্বাহী বিভাগ-সব কিছুকে আদালতের অধীনে করতে হয়।

অন্ন, বস্ত্র, চিকিৎসা, সামাজিক নিরাপত্তা ইত্যাদি প্রশ্নে নির্বাহী বিভাগের ব্যাপারে সংসদের উপর সাংবিধানিক নির্দেশ লিপিবদ্ধ করা হয়েছে। এই সব ব্যবস্থা আইন-পরিষদ্ গ্রহণ না করলে কে করবে। আইন-পরিষদ্ অর্থ জনগণের নির্বাচিত প্রতিনিধিদের দ্বারা গঠিত সংসদ্। আমি বুঝতে পারছি না, আইন-পরিষদের উপর বা সংসদের উপর সন্দেহ কেন! আইন-পরিষদ্ মন্ত্রিসভাকে কোন দায়িত্ব দিলে তাঁরা তা পালন করবেন না কেন, তা আমি বুঝতে পারছি না।

আর এটাকে আদালতে বলবৎ করলেই যদি কাজ হয়, তাহলে এর দ্বারা সংসদের অপমান করা হবে না কি? জনগণের প্রতিনিধিদের দ্বারা গঠিত যে পরিষদ্, তাকে দায়িত্ব দেওয়া যাবে না, দায়িত্ব দেওয়া যাবে আদালতকে- এর দ্বারা কি প্রমাণিত হবে না যে, জনগণের প্রতিনিধিদের চেয়ে আদালতের বা জজ সাহেবদের উপর বেশী আস্থা প্রকাশ করা হচ্ছে? এই ধরনের সমাজতন্ত্রের কথা আমি বুঝতে অক্ষম।

অনেক কথা শুনেছি। বলা হয়েছে, এটাকে আদালতে বলবৎযোগ্য না করা হলে এটা হবে ভাঁওতা। অন্ন, বস্ত্র, চিকিৎসা, শোষণ থেকে মুক্তি- এ সব দায়িত্ব যদি গণপরিষদের বা জনগণের নির্বাচিত প্রতিনিধিদের না দেওয়া হয়, তাহলে তাঁদের অপমান করা হয় এবং তাঁদের প্রতি অবিশ্বাস পোষণ করা হয়।

যে জাগ্রত জনগণ চিরদিন তাঁদের অধিকার সম্পর্কে সচেতন, যাঁরা নিজের রক্ত দিয়ে স্বাধীনতা অর্জন করেছেন, তাঁরা জনপ্রতিনিধিদের অপমান করতে পারেন না। জনগণের প্রতিনিধিদের উপরে দায়িত্ব না দিয়ে অপমান করা হলে তাঁরা তা সহ্য করবেন না।

তারপর, মাননীয় স্পীকার সাহেব, বিচারবিভাগকে অর্থনৈতিক অধিকার দিলে তাঁরা তা বলবৎ করতে পারবেন না। অন্ন, বস্ত্র, চিকিৎসা, শিক্ষা ইত্যাদির জন্য পরিকল্পনার প্রয়োজন হয়, আইন করতে হয়, অর্থ বরাদ্দ করতে হয়, সম্পদ্ 'মবিলাইজ' করতে হয়, অনেক সময় কাঠামো পরিবর্তন করতে হয়। এ সব কি আদালতের দ্বারা সম্ভব? কোন দেশের আদালত পাঁচসালা পরিকল্পনা প্রস্তুত করেছেন বলে কি কেউ কোনদিন শুনেছেন? কোন সমাজতান্ত্রিক দেশে কি আদালতে এই সব করে থাকেন?

জনাব স্পীকার, স্যার, শিক্ষা-ব্যবস্থা কোন সমাজতান্ত্রিক দেশে আদালত করে থাকেন বলে আমার জানা নেই। সামাজিক নিরাপত্তার ব্যবস্থা কোনদিন কোন সমাজতান্ত্রিক দেশে আদালতের দ্বারা করা হয় বলে আমি জানি না।

নির্বাহী বিভাগ সম্পর্কে সুস্পষ্টভাবে আমরা বলেছি। অর্থনৈতিক অধিকার বলবৎ করার কথা বলা হয়েছে। নির্বাহী বিভাগে নাগরিক স্বাধীনতা আর অর্থনৈতিক অধিকার- এ দুটার আলাদা 'কনসেপ্ট' দেওয়া আছে। চলাফেরার অধিকারের কথা আছে, চলা ফেরার স্বাধীনতার কথা আছে। বাক্-স্বাধীনতার কথা আছে। কোন বাধা নেই। কয়েকটি বিষয় ছাড়া আদালতের উপর সরকারের কিছু 'পজিটিভ ডিউটি' এবং কিছু 'নিগেটিভ ডিউটি' আছে। এ সব ক্ষেত্রে আদালতের উপর অধিকার দিলে নাগরিক অধিকার খর্ব করা হবে।

মৌলিক অকিারসমূহের মধ্যে অর্থনৈতিক অধিকার অন্যতম এবং যাতে জনসাধারণ তা ভোগ করতে পারেন, সংবিধানে তার যথেষ্ট ব্যবস্থা রয়েছে। সংসদে আইন করে আমদানী-নীতি ঠিক করা হবে। এটাকে বলবৎ করার ব্যাপারে বা এর প্রয়োগের ব্যাপারে আদালত 'ইনজাংশন' জারী করতে পারবেন না।

ষোড়শ বৈঠকঃ ৩রা-৪ঠা নভেম্বর, ১৯৭২

শ্রীসুরঞ্জিৎ সেনগুপ্তঃ

মাননীয় স্পীকার সাহেব, আমার নিবেদন হচ্ছে, আমাদের দেশে চাকরীর একটা বিধি আছে, তার একটা নিয়ম আছে| Service Rule বলে যে একটা কথা আছে- আমি এই constitutional appointment-এর কথা বলছি, এখানে যাঁরা চাকুরী করতে আসেন- যেমন একজন লোক বিচার-বিভাগের মুন্সেফ হয়ে আসেন- তিনি নিশ্চয় আশা করেন Service Rule অনুযায়ী বিভিন্ন পরীক্ষার মাধ্যমে সেই প্রতিষ্ঠানের উন্নতির সর্বোচ্চ স্তরে গিয়ে তিনি উঠবেন, একদিন জজ-কোর্টের জজ হবেন, হাইকোর্টের বিচারপতি হবেন। ঠিক তেমনি ইঞ্জিনিয়ারও আশা করেন, তিনি তাঁর বিভিন্ন পরীক্ষার মাধ্যমে চাকুরীর বিভিন্ন পর্যায়ে মেধার পরিচয় দিয়ে উন্নতির সর্বোচ্চ স্থানে গিয়ে পৌঁছাবেন।

কিন্তু একজন ভাল ইঞ্জিনিয়ার হলেই তাঁকে এক্সিকিউটিভ ইঞ্জিনিয়ার বা সুপারিন্টেন্ডিং ইঞ্জিনিয়ার করে দেওয়া হয় না। ঠিক তেমনি একজন ডাক্তার যদি বাইরে ভাল practice করে থাকেন, তাহলেই তাঁকে civil surgeon করে দেওয়া হয় না বা সেই রকম উচ্চপদে অধিষ্ঠিত করা হয় না।

ঠিক সেইভাবে আমি নিজে একজন advocate হয়ে আজকে দুঃসাহসের সঙ্গে এই প্রস্তাব এনেছি যে, যদি সুপ্রীম কোর্টে অন্যূন ১০ বৎসর প্র্যাক্টিস করলে কোন একজন হাইকোর্টের জজ হয়ে যান, তাহলে স্বাভাবিক কারণেই যাঁরা দীর্ঘদিন ঐ বিচার-বিভাগে চাকুরী করেন, তাঁদের যে অধিকার, সেই অধিকারকে ক্ষুণ্ন করে সেই অধিকারের স্থানে তাঁরা স্থান করে নেন।

তাই আপনার মাধ্যমে আইন-মন্ত্রীর কাছে তথা আমাদের পরিষদের সামনে আমার বক্তব্য, অন্ততঃ বিচার-বিভাগকে যদি সত্যিকারভাবে আমাদের স্বাধীন করতে হয় এবং বিচার-বিভাগের প্রতি যদি সত্যিকারভাবে আমাদের দেশের সেই সকল মেধাসম্পন্ন প্রতিভাবান ছেলেদের আকর্ষণ করতে হয়, তাহলে নিশ্চয়ই এই বিধানের মাধ্যমে তাঁদেরকে আনতে হবে- যেন এর মধ্যে তাঁরা তাঁদের উন্নতির পথ বেছে নিতে পারেন, মধ্যপথে অন্যেরা এসে যেন তাঁদের অধিকার ছিনিয়ে নিতে না পারে।

এ ব্যাপারে হয়তো আমাদের আইন-মন্ত্রী অনেক precedent আনতে পারেন, সেটা আমি স্বীকার করি। অনেক সংবিধানেও এই precedent থাকতে পারে। এমন কি, আইন-মন্ত্রী ৭০ নম্বর অনুচ্ছেদ আমাদের দেশের পক্ষে উপযোগী মনে করেছেন। আমি মনে করি, এটাকেও আমাদের দেশের উপযোগী বলে মনে করে এটাকে বর্জন করবেন। [বাংলাদেশ গণপরিষদ বিতর্ক, সংকলন ও সম্পাদনা - ব্যারিস্টার মোঃ আবদুল হালিম]

Our Founding Fathers dreamt of a society free from exploitation and oppression. This has been the

core of the entire war of liberation struggle that the nation had to withstand in 1971. This pledge is well depicted in the Proclamation of the Independence dated 10th April, 1971, where it has been unequivocally stated that we are establishing Bangladesh "in order to ensure for the people of Bangladesh equality, human dignity and social justice," and not to speak our Founding Fathers had to pay the extreme price for that dream. The preamble of our constitution says that "it shall be a fundamental aim of the State to realize through the democratic process a socialist society, free from exploitation a society in which he rule of law, fundamental human rights and freedom, equality and justice, political, economic and social, will be secured for all citizens. In *A.T. Mridha v. State 25 DLR 353*, Badrul Haider Chowdhury, J. echoed the fundamental aim of this country in the following language: "In order to build up an egalitarian society for which tremendous sacrifice was made by

the youth of this country in the national liberation movement, the Constitution emphasizes for building up society free from exploitation of man by man so that people may find the meaning of life. After all, the aim of the Constitution is the aim of human happiness. The Constitution is the supreme law and all laws are to be tested in the touch stone of the Constitution (vide article 7). It is the supreme law because it exists; it exists because the will of the people is reflected in it."

The sole and noblest purposes of our Founding Fathers were to establish a State where no one will be subjected to any maltreatment and humiliation so that everyone's fundamental human rights and freedoms and respect for the dignity and worthy of the human person are guaranteed. This is only possible where all powers of the Republic belong to the people and the people only. And all this lofty ideals can only be materialized in a State where rights of the people given through the constitution

and laws are absolutely guaranteed and protected by a free, fair and independent judiciary.

In the above Parliamentary debates, Bangabandu Sheikh Mujibur Rahman stressed upon the rights of the people to be secured so that our next generation could claim that they are living in a civilized country. He also highlighted the human rights which would be secured to the citizens, meaning thereby on the question of rule of law there cannot be any compromise. The father of the nation hinted that in our constitution, the people’s right with their participation in the affairs of the Republic and their hopes and aspirations would be enshrined. Participating in the debate, Dr. Kamal Hossain, one of the Founding Fathers of the constitution clearly expressed that the fundamental rights of the citizens would get priority; that this constitution would inspire the citizens and all powers of the Republic belong to the people and their exercise on behalf of the people shall be effected only under

and by the authority of the constitution. He also assured that the independence of the judiciary shall be protected. Syed Nazrul Islam pointed out that the foremost precondition of Democracy is separation of judiciary from the executive, that is to say, the rule of law should be established in such a way that the judiciary shall be independent in true sense and that the judiciary can perform its responsibilities independently. M/S Asmat Ali Shikder, Ali Azam, M. Monsur Ali, Khandaker Abdul Hafiz, Abdul Malek Ukil, Asaduzzaman Khan, Md. Azizur Rahman, M. Shamsul Hoque, Mir Hossain Chowdhury, Ahsan Ullah, Taj Uddin Ahmed, Sirajaul Huq, Abdul Muttaquim Chowdhury, Abdul Momin Talukder, Md. Abdul Aziz Chowdhury, Suranjit Sen Gupta and Enayet Hossain Khan expressed their opinions in same voice with the above leaders. Their advice, proposals, opinions and aspiration have been reflected in the preamble, article 7 and Part III of the constitution. Therefore, the impugned provisions of the Code of Criminal

Procedure have to be looked into and interpreted in the light of the deliberations and historical background as well the constitution of the People's Republic of Bangladesh.

Facts leading to the appeal

On 23rd July 1998, Shamim Reza Rubel, 20, a BBA student of Independent University, died in police custody after being arrested under section 54 of the Code of Criminal Procedure, hereinafter shortly referred to as the Code and being declared dead on arrival at the Dhaka Medical College Hospital. A public outcry occurred with protests by members of the public, political parties, lawyers, teachers, students and human rights activists. His father a retired government official demanded a judicial inquiry. Sheikh Hasina, the incumbent Prime Minister, the then leader of the Opposition, Khaleda Zia, visited the bereaved family members. Within three days, on 27th July 1998, the government through the Ministry of Home Affairs established a one-person Judicial Inquiry Commission under Justice Habibur

Rahman Khan, pursuant to the Commissions of Inquiry Act, 1956 by a gazette notification stating that it was doing so in relation to the 'matter of public importance' in order to among others "inquire into the incident involving Shamim Reza Rubel, find out the perpetrators and make recommendations on how to prevent such incidents in the future" within 15 days.

The writ petitioners and others appeared before the Commission of Inquiry and made submissions and recommendations based on their experience of providing legal aid and advice to individual victims of torture and ill-treatment. The Commission made a set of recommendations for the prevention of custodial torture but no action was taken by the government in the light of the recommendations. The recommendations of the Commission were as under:

(a) The police personnel carrying out the arrest should bear accurate, visible and clear identification and name tags

with their designations. The particulars of all such police personnel who handle interrogation of the arrestee must be recorded in a register.

(b) That the police officer carrying out the arrestee shall prepare a memo of arrest at the time of arrest and such memo shall be attested by at least one witness, who may either be a member of the family of the arrestee or a respectable person of the locality from where the arrest is made. It shall also be countersigned by the arrestee and shall contain the time and date of arrest.

(c) A person who has been arrested or detained and is being held in custody in a police station or interrogation centre or other lock-up, shall be

entitled to have one friend or relative or other person known to him or having interest in his welfare being informed, as soon as practicable, that he has been arrested and is being detained at the particular place, unless the attesting witness of the memo of arrest is himself such a friend or a relative of the arrestee.

(d) The time, place of arrest and venue of custody of an arrestee must be notified by the police where the next friend or relative of the arrestee lives outside the district or town through the Legal Aid Organisation in the District and the police station of the area concerned telegraphically within a period of 8 to 12 hours after the arrest.

(e) The person arrested must be made aware of this right to have someone informed of his arrest or detention as soon as he is put under arrest or is detained.

(f) An entry must be made in the dairy at the place of detention regarding the arrest of the person which shall also disclose the name of the next friend of the person who has been informed of the arrest and the names and particulars of the police officials in whose custody the arrestee is.

(g) The arrestee should, where he so requests, be also examined at the time of his arrest and major and minor injuries, if any, present on his/her body, must be recorded at that time. The “Inspection Memo” must be signed both by the arrestee and the police

officer effecting the arrest and its copy provided to the arrestee.

(h) The arrestee should be subjected to medical examination by a trained doctor every 48 hours during his detention in custody by a doctor on the panel of approved doctors appointed by Director, Health service of the State or Union Territory concerned. Director, Health Services should prepare such a panel for all tehsils and districts as well.

(i) Copies of all the documents including the memo of arrest, referred to above, should be sent to the Illaqa Magistrate for his record.

(j) The arrestee may be permitted to meet his lawyer during interrogation, though not throughout the interrogation.

(k) The police control room should be provided at all district headquarters, where information regarding the arrest and the place of custody of the arrestee shall be communicated by the officer causing the arrest, within 12 hours of effecting the arrest and at the police control room it should be displayed on a conspicuous notice board.

Writ Petitioner No.2 Ain-O-Salish Kendra submitted a chart (after a survey throughout the Bangladesh) wherein it ascertained during the period between January, 1997 and December, 1997, several custodial deaths and torture had taken place. For better appreciation and evaluation the Chart is appended below:

Ain O Salish Kendra (ASK)
Death in Police Custody/Violence in Bangladesh
Duration:January, 1997 to December, 1997

Sl.No.	Particulars of Victims	Detenue's/Victim's Details	Concerned P/S or Jail	Type & Cause of Death	Date of Occurrence	Source	Remarks
01.	Death in Jail Custody						
02.	Nabir Hossain (45)	Under trial prisoner	Jessore C/J	Mysterious	13.1.97	Ittefaq 14.1.97	
03.	Hafizur Rahman (28)	Under trial prisoner	Rajshahi C/J	Illness	24.1.97	Ittefaq 27.1.97	
04.	Makbul (42)	Under trial prisoner	Rajshahi C/J	Mysterious	1.2.97	Ittefaq 3.1.97	
05.	Shima Chawdhury (17)	Safe Custody	Chittagong C/J	Lacking of treatment.	7.2.97	Janakantha 13.2.97	
06.	Md. Faruque (23)	Convicted	Chittagong C/J	Mysterious	27.1.97	Ajker Kagoj 6.2.97	
07.	Badol Malo (32)	Under trial prisoner	Faridpur D/J	Illness	6.2.97	Ittefaq 7.2.97	
08.	Abdur Rahman (60)	Convicted	Jessore C/J	Illness		Inqilab 7.2.97	
09.	Abul Hossain (46)	Under trial prisoner	Jessore C/J	Illness	12.1.97	Inqilab 14.2.97	
10.	Mayenuddin		Rajshahi C/J			Inqilab	

						20.2.97	
11.	Forkan Munshi (40)	Convicted	Patuakhali D/J	Illness	21.3.97	Ittefaq 2.3.97	
12.	Meraz Mia (55)	Under trial prisoner	Kishorganj D/J		5.3.97	Janakantha 8.3.97	
13.	Jatindranath Mandal		Jessore D/J	Illness	16.3.97	Inqilab 18.3.97	
14.	Delip Kumar Biswas (32)	Under trial prisoner	Narshindi D/J	Illness	16.97	Ittefaq 19.3.97	
15.	Abdul Latif	Convicted	Rajshahi C/J	Illness	19.3.97	Inqilab 20.3.97	
16.	Hamidur Rahman (43)	Convicted	Dinajpur D/J	Illness	13.4.97	DK 21.4.97	
17.	Lal Kha	Under trial prisoner	Hobiganj D/J	public assault & police torture.	27.4.97	Janakantha 29.4.97	
18.	Majid Howlader (60)	Under trial prisoner	Jhalakathi D/J	Illness	9.6.97	BB 11.6.97	
19.	Mang A (Barmiz) (32)	Under trial prisoner	Chittagong C/J	Unknown	13.6.97	Ittefaq 14.6.97	
20.	Hashem Ali (42)	Under trial prisoner	Shirajganj D/J	Illness		Inqilab 25.6.97	
21.	Abdul Majed (50)	Under trial prisoner	Jessore C/J	Illness	26.6.97	Janakantha 29.6.97	
22.	Sawpan (24)	Under trial prisoner	Chandpur S/J	Suicide	3.7.97	Ittefaq 5.7.97	
23.	Kuddus Kaabiraj (40)	Under trial prisoner	Dhaka C/J	Illness	14.7.97	BB 15.7.97	

24.	Ali Fakir (45)	Under trial prisoner	Jhalokathi D/J	Unknown	20.7.97	Bhorer Kagoj 21.9.97	
25.	Golap Khan (60)	Under trial prisoner	Brahmanbaria D/J	Illness	20.9.97	Bhorer Kagoj 21.9.97	
26.	Abdul Hai	Under trial prisoner	Mymensingha D/J	Illness	22.9.97	SB 6.10.97	
27.	Golam Kuddus Molla (45)	Under trial prisoner	Nrial D/J	Mysterious	5.10.97	SB 6.7.97	
28.	Wazed (35)	Under trial prisoner	Kishorganj D/J	Illness	16.10.97	Inqilab 17.10.97	
29.	Anser (41)	Convicted	Rajshahi C/J	Illness	25.11.97	Inqilab 27.11.97	
30.	Kamruzzaman	Convicted	Rajshahi C/J	Illness	25.11.97	Inqilab 27.11.97	
31.	Majharul Islam Tuhin (27)	Under trial prisoner	Narayanganj D/J	Lacking of treatment	6.12.97	SB 7.12.97	
32.	Mainal Abedin Janu (41)	Under trial prisoner	Narayanganj D/J	Torture	8.12.97	Janakantha 9.12.97	

Death in Police/Jail Custody in Bangladesh
Duration: January to October '98 may be stated below for better understanding and appreciation

Sl. No.	Name	Detenues Position	Concerned Jail or Police Station	Cause of Death	Date of death	Source
01.	Abu Taher (42)	Convicted	Dhaka Central Jail	Illness	31.12.97	1.1.98 Sangbad
02.	Zakir Hossain(22)	Under Trial Prisoner	Dhaka Central Jail	Illness	8.1.98	9.1.98 Muktakantha
03.	Shahed Ali (60)	Convicted	Dhaka Central Jail	Illness	2.2.98	3.2.98 Muktakantha
04.	Nasir(32)	Under trial Prisoner	Jessore Central Jail	Unnatural death	2.2.98	3.2.98 Janakantha
05.	Harun Shekh(25)	Under Trial Prisoner	Khulna District Jail	Public assault & Police Torture	6.2.98	9.2.98 Janakantha
06.	Halim (28)	Under Trial Prisoner	Dhaka Central Jail		17.2.98	18.2.98 Sangbad
07.	Dulal (30)	Under Trial Prisoner	Dhaka Central Jail	Suicide	7.3.98	8.3.98 Bhorer Kagoj
08.	Dowlat Khan (30)	Convicted	Dhaka Central Jail	Conflict between two detenue	9.3.98	10.3.98 Bhorer Kagoj
09.	Emranur Rashid Jitu (26)	Under Trial Prisoner	Chittagong District Jail	Illness	9.3.98	10.3.98 Sangbad
10.	Amar Biswas (50)	Under Trial Prisoner	Khulna District Jail	Illness	16.3.98	19.3.98 Ittefaq
11.	Abdul Mannan Babu	Under Trial Prisoner	Jessore Central Jail	killed by police	17.3.98	19.3.98 Ittefaq
12.	Jalil Khan	Convicted	Dhaka Central Jail	Illness	22.3.98	23.3.98 Ittefaq
13.	Abbasuddin (42)	Under Trial Prisoner	Chittagong District Jail	Illness	22.3.98	24.3.98 Sangbad
14.	Unknown	Under Trial Prisoner	Chittagong District Jail	Illness	21.3.98	24.3.98 Sangbad
15.	Yusuf Ali (46)	Under Trial Prisoner	Gajipur Central Jail	Illness	20.3.98	31.3.98 Ittefaq
16.	Ramendranath Mandal (25)	Under Trial Prisoner	Khulna District Jail	Illness	19.3.98	21.3.98 Bhorer Kagoj

17.	Ali Hossain (50)	Under Trial Prisoner	Dhaka Central Jail	Beating	30.3.98	21.3.98 Bhorer Kagoj
18.	Jainal Abedin (60)	Under Trial Prisoner	Bhola District Jail	Mysterious	14.4.98	16.4.98 Janakantha
19.	Alam (30)	Under Trial Prisoner	Chittagong District Jail	killed by another detenue	9.5.98	10.5.98 Ittefaq
20.	Hamid (30)	Under Trial Prisoner	Dhaka Central Jail	Mysterious	13.5.98	14.5.98 Ittefaq
21.	Unknown (Barmij)	Under Trial Prisoner	Chittagong Central Jail	Diarrhea	10.5.98	145.98 Ittefaq
22.	Jamsher Uddin (50)	Convicted	Netrokona District Jail	Illness	13.5.98	15.5.98 Sangbad
23.	Abul Kalam Azad (45)	Under Trial Prisoner	Nator District Jail	Torture	17.5.98	20.5.98 Janakantha
24.	Ghelu Mia (55)	Under Trial Prisoner	B.Baria District Jail	-	-	24.5.98 Bhorer Kagoj
25.	Sirajuddin (30)	Under Trial Prisoner	Sylhet District Jail	Torture	23.5.98	26.5.98 Sangbad
26.	Iasin Ali (60)	Under Trial Prisoner	Thakurgaon District Jail	Illness	27.5.98	30.5.98 Janakantha
27.	Abdullah (50)	Convicted	Dhaka Central Jail	Mysterious	7.6.98	9.6.98 Ittefaq
28.	Jewel Patwary (24)	Convicted	Comilla Central Jail	Illness	5.6.98	10.6.98 Inqilab
29.	Abdul Quddus (60)	Convicted	Gaibandha District Jail	Mysterious	6.6.98	12.6.98 Bhorer Kagoj
30.	Abdur Rahim	Under Trial Prisoner	Manikgonj Sub Jail	Illness	18.6.98	19.6.98 Bhorer Kagoj
31.	Baby (1.5 years)	Under Trial Prisoner	Dhaka Central Jail	Illness/negligence	1.7.98	2.7.98 Bhorer Kagoj
32.	Moazzen Hossain (48)	Convicted	Dhaka Central Jail	Illness	10.7.98	11.7.98 Bhorer Kagoj
33.	Md. Alamgir Hossain (15)	Under Trial Prisoner	Dhaka Central Jail	Torture	6.8.98	7.8.98 Bhorer Kagoj
34.	Majur Ali (32)	Under Trial Prisoner	Chuadanga District Jail	Torture	6.8.98	7.8.98 Bhorer Kagoj
35.	Md. Musa (45)	Under Trial Prisoner	Dhaka Central Jail	Torture	5.8.98	9.8.98 Janakantha
36.	Md. Ali (32)	Under Trial Prisoner	Joypurhut District Jail	public assault	9.8.98	12.8.98 Banglabazar
37.	Md. Mohiuddin (45)	Under Trial Prisoner	Noakhali District Jail	Illness	17.8.98	19.8.98 Ittefaq

38.	Md. Hossain (35)	Under Trial Prisoner	Dhaka Central Jail	Illness	28.8.98	29.8.98 Muktakantha
39.	Nuru Mia (42)	Convicted	Comilla Central Jail	Illness	12.9.98	15.9.98 Ittefaq
40.	Ilias (a minor boy)	Convicted	Narsingdi District Jail	Illness	16.9.98	19.9.98 Janakantha
41.	Abdul Baten (30)	Under Trial Prisoner	Dhaka Central Jail	Illness	22.9.98	23.9.98 Bhorer Kagoj
42.	Mosle Uddin (60)	Convicted	Dhaka Central Jail	Illness	26.9.98	28.9.98 Muktakantha
43.	Tara Mia (49)	Convicted	Dhaka Central Jail	Illness	28.9.98	15.9.98 Ittefaq
44.	(Nurul Hoque (55)	Under Trial Prisoner	Noakhali District Jail	Illness	04.10.98	5.10.98 Ittefaq
45.	Joinuddin (41)	Convicted	Sylhet District Jail	Illness	06.10.98	10.10.98 Inqilab
46.	Anisur Rahman (27)	Under Trial Prisoner	Dhaka Central Jail	Illness	15.10.98	16.10.98 Inqilab
	Death by Police					
47.	Arun Chakravarty		Detective Branch (Dhaka)	Mysterious	23.2.98	23.2.98
48.	Abdul Mannan (40)		Rajapur PS Jhalakathi	Torture	5.1.98	6.1.98 Bangla Bazar
49.	Nurul Islam (37)	Arrested	Gafargaw P.S Mymensingh	Torture	20.4.98	21.4.98 Inqilab
50.	Shariful (40)	Arrested	Jessore Sadar P.S.	Mysterious	19.6.98	21.6.98 Ittefaq
51.	Amirul	Under custody	VDP Panchagarh Sadar	Mysterious	26.8.98	29.8.98 Ittefaq
52.	Matial		Roumari, Kurigram	Torture	24.8.98	Inqilab
53.	Golam Mostafa (30)		Sonergaon P.S.	Public assault	3.9.98	5.9.98 Bhorer Kagoj
54.	Nirmal (45)		Dinajpur Police Line Dinajpur	Torture	20.9.98	22.9.98 Bhorer Kagoj
	Court custody					
55.	Ismail Hossain(60)	Convicted	Tangail 1st Class Magistrate Court	Shock	8.1.98	9.1.98 Ittefaq
56.	Joy Kumar Biswas (30)	Under Trial Prisoner	Kurigram Judge Court	Illness	12.10.98	13.10.98 Bhorer Kagoj

1994

Sl.No.	Name	Place	Date
01.	Mahmuduzzaman Borun	Magura	29 January
02.	Wajed Ali	Munshiganj (River Police)	9 February
03.	Mannaf	Bogra	4 March
04.	Rokonuddin	Dhaka Cantonment	10 March
05.	Abu Baker	Jhalokathi Court	5 April
06.	Hashem Mia	Habiganj Court	17 April
07.	Ejahar Ali	Paikgachha Court	23 April
08.	Ahmed Hossain	Gowainghat	16 May
09.	Anwar Hossain	Sandwip	8 June
10.	Aftabuddin	Singra	28 July
11.	Abdul Khaleque	Tejgaon	19 August
12.	Arup Kumar	Bagher Para	21 October
13.	Abdus Salam	Sundarganj	16 December
14.	Sanaullah @ Sanaul Haq	Mirpur	26 December
15.	Akbar Hossain	Alamdanga	29 December

1995

Sl.No.	Name	Place	Date
01.	Tuhin	Rajshahi	13 January
02.	Abdul Bari	Netrakona Court	19 February
03.	Munna	Khulna	9 March
04.	Abdul Hye	Bagerhat Court	14 May
05.	Enamul Haq	Lohagora	28 July
06.	Rafiqul Islam	Rangpur	4 August
07.	Mafizul Islam	Kashba	29 August
08.	Rahmat	Tala	15 September
09.	Abul Kalam	Brahmanbaria Court	7 October
10.	Ziauddin	Pabna	26 November
11.	Rayeb Ali	Moulivibazar	12 December
12.	Abul Hossain	Kalganj	12 December
13.	Shukur Mollah	Faridpur	29 December

1996

Sl.No.	Name	Place	Date
01.	Khalil Sikder	Maradipur Court	24 January
02.	Shahabuddin Shaju	Narsingdi	27 January
03.	Habiluddin	Lalpur	3 February
04.	Nurul Amin	Moheshkhali	12 February
05.	Abul Hossain	Kaliganj	13 February
06.	Nur Islam	Jhenidah Court	2 March
07.	Fazlur Rahman	Chapai Nababgonj	6 March
08.	Shamim	Brahmanbaria	19 April
09.	Ferdous Alam Shaheen	Tejgaon	1 July
10.	Sheikh Farid	Manikchhari	7 July
11.	Akhter Ali	Bogra	23 August
12.	Abdul Hamid	Nandail	30 August
13.	Nitai Baori	Moulvibazar	4 October
14.	Shahabuddin	Doara	16 October
15.	Sohail Mahmud Tuhin	Motijheel	17 October
16.	Abdul Hannan Opu	Shonadanga	5 November
17.	Joynal Bepari	Shibalay	26 November
18.	Momeja Khatun	Dinajpur	2 December

January to December
Duration: 2000

Sl No.	Source	Date of Incident	Name	Nature of Death	Kinds of Detenues	Place of Death
01.	Bhorer Kagoj 14.1.2000	8.1.2000	Md. Ali Bhuiyan	Torture	Under Trial Prisoner	Kotwali P.S. Chittagong
02.	Muktakntho 9.2.2000	8.2.200	Farid Uddin (30)	Murder		MDpur P.S. (DB police) Dhaka
03.	Prothom Alo 10.2.2000	9.2.2000	Ahmed Hossain Suman (23)	Murder		Shyampur P.S. (DB Police) Dhaka.
04.	Muktha Kantha 3.3.2000	2.3.2000	Suman	Torture		Sutrapur P.S. Dhaka.
05.	Bhorer Kagoj 26.3.2000	24.3.2000	Wang Schuci Marma	Torture		Khagrachhari Guimara Army Camp
06.	Ittegaq 13.4.2000	12.4.2000	Kabir (25)	Torture		Lalbagh P.S.
07.	Sangbad 19.4.2000	18.4.2000	Kalim (28)	Torture	Under trial Prisoner	Ramna P.S. Dhaka.
08.	Prothom Alo 17.6.2000	14.6.2000	Saiful Islam (25)	Sospctptive		Tongi, P.S. Gazipur.
09.	Bhorer Kagoj 30.7.2000	28.7.2000	Shukkurj Ali (20)	Torture		Khansama, P.S. Dinajpur.
10.	Bhorer Kagoj 20.9.2000	18.9.2000	Mahbub Hossain Oli (27)	Murder		Khilgaon P.S. Dhaka.

11.	Janakantha 6.10.2000	5.10.2000	Abul Kalam Azad	Torture		Nandail P.S. Mymensing.
12.	Dinkal 16.10.2000	13.10.2000	Akkas Ali (40)	Torture		Mongla (Khulna)
13.	DS, 6.12.2000	5.12.2000	Faruque (30)	Murder		Mongla (Khulna)
14.	DS, 6.12.2000	5.12.2000	Avi (20)	Murder		Mongla (Khulna)
15.	DS, 6.12.2000	5.12.2000	Nasir (30)	Murder		Mongla (Khulna)
16.	DS, 6.12.2000	5.12.2000	Ripon (25)	Murder		Mongla (Khulna)
17.	Janakantha 23.12.2000	21.12.2000	Abdul Khaleque (32)	Murder		Rajbari (Faridpur)
18.	Bhorer Kagoj 26.12.2000	21.12.2000	Shafiqul Islam	Torture (Army)		Jamalpur

আইন ও সালিশ কেন্দ্র (আসক)
পুলিশ হেফাজতে নির্যাতন/মৃত্যু
জানুয়ারী - ডিসেম্বর ২০০১

ক্রমিক নং	উৎস	মৃত্যুর তারিখ	মৃত্যুর কারণ	নাম ও বয়স	বিচারাধীন/সাজাপ্রাপ্ত	থানা/জেলা
০১.	ইনকিলাব ১৩.২.২০০১	১২.২.২০০১	আত্মহত্যা	মানিক	বিচারাধীন	মতিঝিল (ঢাকা)
০২.	যুগান্তর ৭.২.২০০১	৮.২.২০০১	গুলিতে হত্যা			ব্রাহ্মন বাড়িয়া
০৩.	বাংলাবাজার ২৮.৩.২০০১	২৫.৩.২০০১	আত্মহত্যা	ওলিদ মিয়া	বিচারাধীন	কুলাউড়া (সিলেট)

০৪.	ভোরের কাগজ ১৭.৩.২০০১	১৫.৩.২০০১	পুলিশের তাড়া	মনির্র ল ইসলাম মনি (২৮)	আসামী	মিরপুর (ঢাকা)
০৫.	দিনকাল ২২.৩.২০০১		নির্যাতন	বশির উদ্দীন (৬০)	বিচারাধীন	চৌগাছা (যশোর)
০৬.	ইত্তেফাক ৩১.৩.২০০১	২৯.৩.২০০১	নির্যাতন	মোজাহার আলী (৪৫)	পুলিশ হেফাজতে	কোতোয়ালী (যশোর)
০৭.	প্রথম আলো ২৫.২.২০০১	২৩.২.২০০১	গুলিতে হত্যা	আবদুল হান্নান (২০)		কালিগঞ্জ (সাতক্ষিরা)
০৮.	ইওঁফাক ২৫.৪.২০০১	২৩.৩.২০০১	হত্যা	কাজী দেলোয়ার হোসেন (৩০)	হরতাল পিকটিং	ঢাকা (শনির আখড়া)
০৯.	ভোরের কাগজ ১৯.৫.২০০১	১৭.৫.২০০১	নির্যাতন	হারিস খান (১৫)	পুলিশ হেফাজতে	টঙ্গী (গাজীপুর)
১০.	প্রথম আলো৫.৫.২০০১	৪.৫.২০০১	গুলিতে হত্যা	মামুন	ছিনতাইকারী	ঢাকা
১১.	জনকণ্ঠ ১৫.৫.২০০১	১২.৫.২০০১	নির্যাতন	মোসলেম আলী (৩৮)	পুলিশ সোর্স/থানা হাজতে	সাতক্ষীরা (যশোর)
১২.	সংবাদ ২৬.৫.২০০১	২৩.৫.২০০১	হত্যা		ছিনতাইকারী	পাহাড়তলী (চট্টগ্রাম)
১৩.	জনকণ্ঠ ১৫.৫.২০০১	১৩.৫.২০০১	নির্যাতন	সোহাগ (২২)	চুরি মামলা/পুলিশ হেফাজতে	সাতক্ষীরা (যশোর)
১৪.	প্রথম আলো ৮.৭.২০০১	৭.৭.২০০১	হত্যা	ইসমাইল গাজী (৫৫)	গ্রমাবাসীর সাথে সংঘর্ষ	শ্রীনগর, (মুন্সীগঞ্জ
১৫.	ইত্তেফাক ১০.৭.২০০১	৮.৭.২০০১	নির্যাতন	জুলহাস উদ্দিন (৪৫)	জুয়ারী (ডিবি)	নালিতাবাড়ী (শেরপুর)
১৬.	ইত্তেফাক ১৭.৭.২০০১	১৬.৭.২০০১	হত্যা	খুরশীদ আলম (১৩)		মুন্সীর হাট (ফেনী)
১৭.	ভোরের কাগজ ১৭.৭.২০০১	১৫.৭.২০০১	হত্যা	নূর আলম (১৬)		মুন্সীরহাট (ফেনী)
১৮.	যুগান্ত র ১.৮.২০০১	৩০.৭.২০০১	নির্যাতন	বিশ্বনাথ মন্ডল (২৭)		কালিগঞ্জ (সাতক্ষীরা)
১৯.	জনকণ্ঠ ৯.৯.২০০১	২৬.৪.২০০১	হত্যা	ছাদেক আলী (২৪)		র পগঞ্জ (সাতক্ষীরা)
২০.	যুগান্ত র ৮.৮.২০০১	৭.৮.২০০১	হত্যা	আবুল কালাম		মেঘনা নদীতে (নোয়াখালী)
২১.	যুগান্ত র ৮.৮.২০০১	৭.৮.২০০১	হত্যা	মোঃ সেলিম		মেঘনা নদীতে (নোয়াখালী)
২২.	যুগান্ত র ৮.৮.২০০১	৭.৮.২০০১	হত্যা	মোঃ ফার্র ক		মেঘনা নদীতে (নোয়াখালী)

২৩.	যুগান্তর ৮.৮.২০০১	৭.৮.২০০১	হত্যা	ওমর আলী		মেঘনা নদীতে (নোয়াখালী)
২৪.	ইনকিলাব ১১.৮.২০০১	১০.৮.২০০১	নির্যাতন	শাহজাহান		সূত্রাপুর (ঢাকা)
২৫.	ইনকিলাব ১১.৮.২০০১	৫.৮.২০০১	হত্যা	আউয়াল		সূত্রাপুর (ঢাকা)
২৬.	ভোরের কাগজ ২৮.৭.২০০১	২৭.৭.২০০১	পানিতে ডুবে	মানিক (২৮)		বোয়ালখালী (চট্টগ্রাম)
২৭.	জনকণ্ঠ ১১.৮.২০০১	১০.৮.২০০১	হত্যা	বাবুল		সূত্রাপুর (ঢাকা)
২৮.	ইত্তেফাক ৪.৮.২০০১	৩.৮.২০০১	নির্যাতন	মোঃ আলী (৩৫)		বরূ ড়া (কুমিল্লা)
২৯.	জনকণ্ঠ ১৫.৮.২০০১	৯.৮.২০০১	হত্যা	কাউসার		শ্যামলী (ঢাকা)
৩০.	জনকণ্ঠ ১৫.৮.২০০১	৯.৮.২০০১	হত্যা	অজ্ঞাত		শ্যামলী (ঢাকা)
৩১.	ইনকিলাব ২৪.৮.২০০১	১৯.৮.২০০১	হত্যা	আফসার আলী (৫০)		শ্যামলী (ঢাকা)
৩২.	দিনকাল ১১.৯.২০০১	৯.৯.২০০১	নির্যাতন	আলাউদ্দিন (২৮)		নারায়নগঞ্জ
৩৩.	সংবাদ ১১.৯.২০০১	৯.৯.২০০১	হত্যা	আল আমিন (২০)		লালমোহন (ভোলা)
৩৪.	সংবাদ ১১.৯.২০০১	৯.৯.২০০১	হত্যা	নমু (৩৫)		লালমোহন (ভোলা)
৩৫.	সংবাদ ১১.৯.২০০১	৯.৯.২০০১	হত্যা	শহিদুল ইসলাম মুকুল (২৩)		লালমোহন (ভোলা)
৩৬.	যুগান্তর ১৫.৯.২০০১	১৩.৯.২০০১	হত্যা	জসিম (২৩)		সূত্রাপুর (ঢাকা)
৩৭.	যুগান্তর ২৯.৯.২০০১	২৮.৯.২০০১	হত্যা (বিডিআর)	মনা (১৮)		রামগর (ফিটকছড়ি)

জানুয়ারি টু ডিসেম্বর ২০০২ ইং

ক্রমিক নং	উৎস	মৃত্যুর তারিখ	মৃত্যুর কারণ	নাম ও বয়স	বিচারাধীন/সাজাপ্রাপ্ত	থানা/জেলা
০১.	ভোঃ কাঃ ৯.১.২০০২	৭.১.২০০২	রহস্যজনক	দীপক বিশ্বাস (৩৫)	বিচারাধীন (থানা হেফাজতে)	নড়াইল
০২.	জনঃ ৩১.১.২০০২	২৯.১.২০০২	নির্যাতন (বিডিআর)	আবদুস সালাম (২৪)	সিমান্ত	টেকনাফ (কক্সবাজার)

০৩.	বাঃ বাঃ ১২.২.২০০২	১১.২.২০০২	নির্যাতন	আলী হায়দার (৩৮)	(থানা হাজতে)	শাল্লা (সুনামগঞ্জ)
০৪.	প্রঃ আঃ ১৬.২.২০০২	১৪.২.২০০২	নির্যাতন	কাউসার	(থানা হাজতে)	মোহাম্মদপুর (ঢাকা)
০৫.	ভোঃ কাঃ ২১.২.২০০২	১৯.২.২০০২	পানিতে ডুবে	নিয়াতক হোসেন (২২)	পুলিশের ধাওয়া	দৌলতপুর (খুলনা)
০৬.	যুগাঃ ১৭.৩.২০০২	১৬.৩.২০০২	হত্যা (আনসার)	বেলাল (৩৫)		গুলশান (ঢাকা)
০৭.	ইনঃ ২২.৩.২০০২	২১.৩.২০০২	হত্যা	শিমুল (২২)		সুনামগঞ্জ (সিলেট)
০৮.	যুগাঃ ২.৪.২০০৩	১.৪.২০০২	হত্যা (বিডিআর)	শাহাদত (৪২)		হিলি (দিনাজপুর)
০৯.	প্রঃ আঃ / জনঃ ২৪.৪.২০০২	২২.৪.২০০২	নির্যাতন	শফিউল্যা (৬০)	(থানা হেফাজতে)	সোনাগাজী (ফেনী)
১০.	ভোঃ কাঃ ২.৬.২০০২	১.৬.২০০২	নির্যাতন (বিডিআর)	সোহেল (২২)	অভিযান চালিয়ে গ্রেফতার	সোয়ারীঘাট (ঢাকা)
১১.	জনঃ ৩.৬.২০০২	২.৬.২০০২	হত্যা (সেনাবাহিনী)	লেলিন চাকমা		ৰ্ব মা (বান্দরবন)
১২.	জনঃ ৩.৬.২০০২	২.৬.২০০২	হত্যা (সানাবাহিনী)	চাপাং চাকমা		ৰ্ব মা (বান্দরবন)
১৩.	ইত্তেঃ ২৪.৬.২০০২	২০.৬.২০০২	হত্যা	রাজন (২০)		ভাটপাড়া (সিলেট)
১৪.	ভোঃ কাঃ ১৩.৭.২০০২	১২.৭.২০০২	পুকুরে ডুবে	মনির (৩৫)	পুলিশের তাড়ায়	নারায়গঞ্জ (সিদ্দিরগঞ্জ থানা)
১৫.	ভোঃ কাঃ ২৮.৭.২০০২	২৭.৭.২০০২	৫ তলা থেকে পড়ে	বাবুল (২৫)	পুলিশের তাড়া খেয়ে	শেওড়া পাড়া (ঢাকা)
১৬.	যুগাঃ ৫.৮.২০০২	৩.৮.২০০২	পানিতে ডুবে	আলমগীর হোসেন (২০)	পুলিশের তাড়া খেয়ে	গাজীপুর
১৭.	যুগাঃ ১৬.৮.২০০২	১৫.৮.২০০২	হত্যা (আনসার)	আবুল বাশার (১৯)	গুলি করে হত্যা	মালিবাগ (ঢাকা)
১৮.	যুগাঃ ১৬.৮.২০০২	১৫.৮.২০০২	হত্যা (আনসার)	রেজাউল করিম (২৫)	গুলি করে হত্যা	মালিবাগ (ঢাকা)
১৯.	যুগাঃ ১৬.৮.২০০২	১৫.৮.২০০২	হত্যা (আনসার)	ইয়াহিয়া (২০)	গুলি করে হত্যা	মালিবাগ (ঢাকা)
২০.	যুগাঃ ১৬.৮.২০০২	১৫.৮.২০০২	হত্যা (আনসার)	আল আমিন (৩৮)	গুলি করে হত্যা	মালিবাগ (ঢাকা)
২১.	যুগাঃ ১৭.৮.২০০২	১৫.৮.২০০২	নির্যাতন	বেলাল হোসেন পাপ্পু (৩০)	সন্দেহ জনক গ্রেফতার	মতিঝিল (ঢাকা)
২২.	প্রঃ আঃ ২৪.৮.২০০২	২৩.৮.২০০২	নদীতে ডুবে	আরিফ (২০)	গুলি করে হত্যা	কুষ্টিয়া
২৩.	ভোঃ কাঃ ১১.৯.২০০২	৯.৯.২০০২	হত্যা (বিডিআর)	আহসান (৩৫)	বিডিআর এর গুলিতে হত্যা	শার্শা (সীমান্ত)
২৪.	জনঃ ১১.৯.২০০২	৯.৯.২০০২	হত্যা	আব্দুল কাশেম	পুলিশের গুলিতে হত্যা	ঢাকা (রায়ের বাজার)
২৫.	যুগাঃ ১৪.৯.২০০২	১৩.৯.২০০২	হত্যা	আইজ উদ্দিন (২৫)	পুলিশের গুলিতে হত্যা	শেরেবাংলা নগর (ঢাকা)
২৬.	যুগাঃ ২২.৯.২০০২	২১.৯.২০০২	হত্যা	হানিফ	পুলিশের গুলিতে হত্যা	ধানমন্ডি (ঢাকা)
২৭.	জনঃ ২৬.৯.২০০২	১৫.৯.২০০২	পিটিয়ে মেরেছে	শাহআলম (২৪)	পুলিশের গুলিতে হত্যা	কাফৰ্ ল (ঢাকা)

২৮.	প্রঃ আঃ ২১.৯.২০০২	১৯.৯.২০০২	হত্যা	সোহাগ (২২)	ছিনতাইকারী সন্দেহে পুলিশের গুলিতে হত্যা	আগারগাঁও (ঢাকা)
৩০.	প্রঃ আঃ ১.৯.২০০২	৩০.৮.২০০২	হত্যা	নাসির	পুলিশের গুলিতে হত্যা	চুয়াডাঙ্গা (কাশিপুর)
৩১.	প্রঃ আঃ ২২.৮.২০০২	২০.৮.২০০২	হত্যা	সৈয়দ হাবলু (২২)	পুলিশের গুলিতে হত্যা	ছয়দানা (গাজিপুর)
৩২.	প্রঃ আঃ ৩.১০.২০০২	৬.১০.২০০২	(সি.আই.ডি) নির্যাতন	আক্কাস আলী (৪২)	সিআইডি পুলিশের মানসিক নির্যাতনের মৃত্যু	চট্টগ্রাম
৩৩.	ইত্তেঃ ৭.১০.২০০২	৬.১০.২০০২	হত্যা	মমিন উল্লাহ (৫২)	অসতর্ক পুলিশের গুলিতে মৃত্যু	সায়েদাবাদ (ঢাকা)
৩৪.	প্রঃ আঃ ২৭.১০.২০০২	২৫.১০.২০০২	নির্যাতন	জুলহাস বেপারী (৫৭)	পুলিশ হেফাজতে	মুন্সিগঞ্জ
৩৫.	ইত্তেঃ ২৩.১০.২০০২	২২.১০.২০০২	গুলিতে	আমির হোসেন সোহেল (২৫)	পুলিশের গুলিতে	মোহাম্মদপুর ঢাকা
৩৬.	ইত্তেঃ ৭.১১.২০০২	৬.১১.২০০২	ভয়ে	সোহরাব	পুলিশের ভয়ে পলাতক	বকশীগঞ্জ (জামালপুর)
৩৭.		৯.১১.২০০২	নির্যাতন	ওয়াজকুর নী		খুলনা
৩৮.	প্রঃ আঃ ৫.১১.২০০২	৫.১১.২০০২	গুলিতে	কালা ফার ক	পুলিশের গুলিতে	তেজগাঁ (ঢাকা)

In the affidavit-in-opposition no denial was made or any statement that the above survey reports is false or that the figures have been shown by exaggeration. Even after the inquiry report the deaths in the hands of law enforcing agency, abusive exercise of them, torture and other violation of fundamental rights are increasing day by day. The recommendations made by Habibur Rahman Khan,J. had not been implemented and the government treated the said report in the similar manner as the Munim Commission on Jail Reform, Aminur Rahman Khan's Commission on Police Reform and the Commission established to inquire into individual cases including women such as the rape of Yasmin of Dinajpur, the abduction of Kalpana Chakma of the Chittagong Hill Districts and some of which had not even seen the light of the day. Government did not pay heed to the report of Habibur Rahman Commission and kept the same unimplemented. Under such juncture 3(three) organizations, Bangladesh Aid and Services

Trust (BLAST), Ain-O-Salish Kendra, Shomilito Shamajik Andolon and 5(five) individuals, namely; Sabita Rani Chakraborti, Al-Haj Syed Anwarul Haque, Sultan-uz Zaman Khan, Ummun Naser alias Ratna Rahmatullah and Moniruzzaman Hayet Mahmud filed Writ Petition No.3806 of 1998 in the public interest seeking direction upon the writ respondents to refrain from unwarranted and abusive exercise of powers under section 54 of the Code or to seek remand under section 167 of the Code and to strictly exercise powers of arrest and remand within the limits established by law and the constitution on the ground that the exercise of abusive powers by the law enforcing agencies is violative to 27, 31, 33 and 35 of the Constitution. Writ petitioners prayed the following reliefs:

(A) (i) to issue a Rule Nisi calling upon the Respondents to show cause as to why they shall not be directed to refrain from unwarranted and

abusive exercise of powers under Section 54 of the Code of Criminal Procedure or to seek remand under Section 167 or the Code of Criminal Procedure and to strictly exercise powers of arrest and investigation within the limits established by law and the Constitution and in particular the constitutional safeguards contained in Articles 27, 31, 33 and 35 of the Constitution.

(ii) to show cause as to why the respondents should not be required to comply with the guidelines such as those set out in paragraph 21 of the petition and in Annexure “C” to the petition.

(iii) to show cause as to why the respondent No.4 shall not be

directed to compile and make a report from 1972 to date of persons who died in custody or jail or in police lock up.

(iv) as to why the respondents shall not be directed to make monetary compensation to the families of victims of custodial death, torture and custodial rape and as to why the respondents should not be directed to present before this Hon'ble Court reports of the Jail Reform Commission and the judicial inquiry commission relating to custodial death of Rubel and other relevant judicial inquiry commissions.

Writ respondent No.2, the Secretary Ministry of Home Affairs filed an affidavit-in-opposition stating that the allegations as to torture and death

in police custody are vague and indefinite; that the police applied section 54 of the Code to arrest any person who has been concerned in any cognizable offence or against whom reasonable complaint has been received or a reasonable suspicion exists of his having been so concerned; that justice Habibur Rahman Khan's recommendations are under consideration of the government; that police perform duties in uniform and plain clothes for detection and prevention of crimes and uniformed police normally bear their identification with name batch and designation while on duty, and plain clothes police carried their identity cards along with them, but those cannot be made conspicuous for obvious operational reasons; that plain clothes police are also deputed for collection of security and crime related intelligence, that is why, they do not display their identity cards in a visible manner; that every police station maintains general diary in the prescribed form vide section 377 of PRB and the

Police Act, 1861 and one duty officer is deputed by the officer-in-charge to perform routine works in everyday in such police station; that the duty officer generally makes regular entry in the general dairy stating all facts; that in most cases persons who are not resident of police station are arrested at dead hours of night, and therefore, the presence of witness cannot be ensured at the time of arrest; that many of the arrestees specially in city areas are floating individuals and they do not have any specific address; that the object of interrogation of the arrestees is to find out the facts or otherwise of the incident and also the verification of the evidence forth coming against him; that if a friend of the accused in custody is being informed about his arrest there will be every chance of disclosure of other information prejudicial to the detection of case frustrating the investigation; that for want of correct name and address, the arrests cannot be done properly but if arrestees

furnishes their correct address it may be possible to communicate through usual official channel whenever possible; that all the arrestees are made aware of their right to have someone informed of their arrest; that after securing arrest of any person and before putting him in lockup every arrestee is examined to ascertain whether he has any major or minor injuries; that normally in police custody nobody is detained more than 24 hours; that it is not possible to allow physical presence of a lawyer in course of interrogation, inasmuch as, that will adversely affect investigation; that every district headquarters as well as all metropolitan police areas have one central police control room and everyday a report regarding the arrests and other important incidents are being communicated to the central room by different police units and that since number of arrestees is large in the metropolitan areas, it is not always possible to

display the names and particulars of the arrestees on a notice board regularly.

Though writ respondent No.2 denied any police abuse, torture and deaths in police and jail custody the writ petitioners have annexed some newspaper clippings highlighting the deaths and police torture as under:

The issue of ভোরের কাগজ তারিখ ২৬/৭/১৯৯৮ under the heading রুবেল হত্যার বিচার বিভাগীয় তদন্ত ও বিশেষ ট্যাইব্যুনাল গঠনে রাষ্ট্রপতির হস্তক্ষেপ কামনা; the issue of The Daily Star dated 26/7/1998 under the heading "Police can't probe misdeeds of other policemen; Rubel's father"; the issue of মুক্ত কণ্ঠ তারিখ ২৯/৭/১৯৯৮ under the heading 'মৃত্যুর পরও রুবেলকে পেটানো হয়'; the issue of সংবাদ তারিখ ২৭/৭/১৯৯৮ under the heading পুলিশ কেন নিষ্ঠুর আচরণ করে?; the issue of সংবাদ তারিখ ২৭/৭/১৯৯৮ under the heading রুবেল হত্যাঃ বিচার বিভাগীয় তদন্ত কমিশন হচ্ছে; the issue of সংবাদ তারিখ ২৭/৭/১৯৯৮ under the heading সিআইডি'র হাতে তদন্ত এসি আকরাম ক্লোজড; the issue of সংবাদ তারিখ ২৭/৭/১৯৯৮ under the heading শোকসন্তপ্ত প্রধানমন্ত্রী রুবেলের হত্যাকারীরা দৃষ্টান্তমূলক শাস্তি পাবে; the issue of ভোরের কাগজ তারিখ ২৭/৭/১৯৯৮ under the heading রুবেল হত্যাকান্ড ঢেলে সাজানো হচ্ছে ডিবি; the

issue of ভোরের কাগজ তারিখ ২৭/৭/১৯৯৮ under the heading পুলিশের হাতে ফৌজদারি কার্যবিধির ৫৪ ধারার ব্যাপক অপব্যবহার হচ্ছে; the issue of ভোরের কাগজ তারিখ ২৭/৭/১৯৯৮ under the heading একজন ভাল ছাত্রের সব গুনই ছিল রুবেলের; the issue of দৈনিক ইত্তেফাক তারিখ ২৭/৭/১৯৯৮ under the heading পুলিশ হেফাজতে মৃত্যু (এডিটরিয়াল); the issue of ভোরের কাগজ তারিখ ২৮/৭/১৯৯৮ under the heading এজাহারে আসামিদের নাম অন্তর্ভুক্তির জন্য আদালতে রুবেলের বাবার আবেদন; the issue of ভোরের কাগজ তারিখ ২৮/৭/১৯৯৮ under the heading আসামিদের সিআইডি জিজ্ঞাসাবাদ করেছে; the issue of মানব জমিন তারিখ ০৭/১০/১৯৯৮ under the heading স্বীকারোক্তির জন্য রিমান্ড চাওয়া যাবে না (তদন্ত কমিশন প্রতিবেদন-১); the issue of মানব জমিন তারিখ ০৮/১০/১৯৯৮ under the heading ৫৪ ধারায় গ্রেফতারকৃতদের ৮৮ ভাগ নিরপরাধ। অপপ্রয়োগ বন্ধ না হলে বাংলাদেশ পুলিশি রাষ্ট্র হবে (তদন্ত কমিশন প্রতিবেদন-২); the issue of মানব জমিন তারিখ ০৯/১০/১৯৯৮ under the heading পুলিশের অপরাধ তদন্তে এফবিআই বা সিবিআই'র মতো স্বতন্ত্র বিভাগ দরকার (তদন্ত কমিশন প্রতিবেদন-৩)।

The issue of মানব জমিন তারিখ ১০/১০/১৯৯৮ under the heading ডিবি'র হাজতখানা অবৈধ; the issue of দৈনিক জনকণ্ঠ তারিখ ২৭/০৬/২০০০ under the heading ৬ মাসে পুলিশের বিরুদ্ধে ৭ হাজার অভিযোগ, তদন্ত হচ্ছে; the issue of দৈনিক ইত্তেফাক তারিখ ২৫/১১/১৯৯৯ under the heading পুলিশের বিরুদ্ধে আসামী নির্যাতনসহ ১০ মাসে তিনশত মামলা দায়ের; the issue of মুক্তকণ্ঠ তারিখ ১৯/০৪/১৯৯৯ under the heading ডিবি অফিসে লাশ গুম তদন্তে সিআইডি'র কার্যকলাপ

নিয়ে জনমনে প্রশ্ন; the issue of দৈনিক ইত্তেফাক তারিখ ০৮/০৭/১৯৯৯ under the heading গোয়েন্দা পুলিশের বিরুদ্ধে নিরীহ মানুষকে ব্লাকমেইল করার অভিযোগ; the issue of দৈনিক ইত্তেফাক তারিখ ২১/০৮/১৯৯৯ under the heading পুলিশ হেফাজতে ট্রাক চালকের মৃত্যু।। লাশ লইয়া মিছিল।। রাস্তায় ব্যারিকেড; the issue of মুক্তকণ্ঠ তারিখ ০৪/০৭/১৯৯৯ under the heading পুলিশের বিরুদ্ধে আরও এক তরুনকে হত্যার অভিযোগ; the issue of The Daily Star dated 05/09/1999 under the heading "confidence in the police" (Editorial); the issue of মুক্তকণ্ঠ তারিখ ১০/০৩/১৯৯৯ under the heading বিচারাধীন বন্দীর মৃত্যু পুলিশী নির্যাতনের অভিযোগ; the issue of মুক্তকণ্ঠ তারিখ ১৬/০৯/১৯৯৯ under the heading টঙ্গাইল ভুয়াপুর থানায় তরুণী ধর্ষণ। কনস্টেবল বরখাস্ত; the issue of মুক্তকণ্ঠ তারিখ ২৬/১১/১৯৯৯ under the heading সিলেটে রক্ষক পুলিশ এখন ভক্ষকের ভূমিকায়; the issue of দৈনিক প্রথম আলো তারিখ ২১/১২/১৯৯৯ under the heading রাজশাহীর অভিযুক্ত পুলিশ; the issue of মুক্তকণ্ঠ তারিখ ১৫/১১/১৯৯৯ under the heading গুলিস্তান-মতিঝিলের ফুটপাত চাঁদাবাজ ও পুলিশের অবৈধ আয়ের উৎস; the issue of মুক্তকণ্ঠ তারিখ ১০/০৪/১৯৯৯ under the heading পুলিশ হেফাজনে আসামীর মৃত্যু; the issue of দৈনিক জনকণ্ঠ তারিখ ০৩/১১/১৯৯৯ under the heading পুলিশি নির্যাতনের বিচার দাবিতে কক্সবাজার উত্তপ্ত; the issue of দৈনিক প্রথম আলো তারিখ ০২/০৪/২০০০ under the heading বিনা বিচারে আড়াই বছর জেল খেটেছে দরিদ্র কিশোর তপন; the issue of দৈনিক ইনকিলাব

তারিখ ২০/০৪/২০০০ under the heading পুলিশী নির্যাতনে অসুস্থ কালিম হাসপাতালে গিয়েও সঠিক চিকিৎসা পায়নি।

The issue of দৈনিক ভোরের কাগজ তারিখ ০৫/০৪/২০০০ under the heading ঝিকরগাছায় দারোগার কান্ড; স্ত্রীর মর্যাদা দাবি করায় মহিলাকে ফেন্সিডিলসহ পুলিশে সোপর্দ; the issue of দৈনিক ভোরের কাগজ তারিখ ১৪/০৫/২০০০ under the heading পুলিশ যখন ছিনতাইকারী; the issue of দৈনিক ইনকিলাব তারিখ ০১/০৭/২০০০ under the heading হাজতী স্বামীর খোঁজ নিতে এসে স্ত্রী পুলিশের হাতে লাঞ্ছিত; the issue of দৈনিক প্রথম আলো তারিখ ২৪/০৭/২০০০ under the heading কনস্টেবলের বিরুদ্ধে মহিলাকে বিবস্ত্র করে প্রহারের অভিযোগ; the issue of দৈনিক প্রথম আলো তারিখ ০২/০৭/২০০০ under the heading পুলিশ হেফাজতে ও কারাগারে ৬ মাসে ২৬ জনের মৃত্যু; the issue of দৈনিক বাংলা বাজার তারিখ ২৮/০৬/২০০০ under the heading মাদকাসক্ত কন্যাকে পুলিশে সোপর্দ। চাল লুট, হাজতির মৃত্যু; the issue of দৈনিক সংবাদ তারিখ ০৬/০৬/২০০০ under the heading গনপিটুনি ও জননিরাপত্তা আইনে মামলা; এক কিশোর এখন মৃত্যুর মুখে; the issue of দৈনিক বাংলা বাজার তারিখ ১৯/০৬/২০০০ under the heading মাকে দেখতে এসে হাজতে ভারতীয় নাগরিকের মৃত্যু; the issue of দৈনিক বাংলা বাজার তারিখ ১৩/০৬/২০০০ under the heading থানা পুলিশের খামখেয়ালী; the issue of দৈনিক ভোরের কাগজ তারিখ ২৫/০৬/২০০০ under the heading টঙ্গী থানা হাজতে যুবকের মৃত্যু; মা ও ভাইয়ের অভিযোগ পুলিশ হত্যা করেছে; the issue of দৈনিক ইনকিলাব তারিখ ০৬/০৬/২০০০ under the heading রাজধানীতে বিনা কারনে থানায় এনে কিশোরকে প্রচন্ড প্রহার ও ৫০

হাজার টাকা নিয়ে মুক্তিদান; the issue of দৈনিক ইনকিলাব তারিখ ১৯/০৪/২০০০ under the heading ১০ হাজার টাকা না দেয়ায় এক দারোগার নির্মম নির্যাতনে প্রাণ হারালো যুবক কালিম; the issue of দৈনিক সংবাদ তারিখ ১৯/০৪/২০০০ under the heading পুলিশি নির্যাতনের অভিযোগ ৫৪ ধারায় আটক হাজতির মৃত্যু; the issue of দৈনিক সংবাদ তারিখ ৩০/০৩/২০০০ under the heading পুলিশ হেফাজতে বিশ্ব মারমার মৃত্যু; the issue of দৈনিক প্রথম আলো তারিখ ২৮/০৫/২০০০ under the heading দারোগরা নির্যাতনে; the issue of দৈনিক সংবাদ তারিখ ০২/০৭/২০০০ under the heading পুলিশের বর্বরতা; the issue of The Daily Star dated 21/08/2000 under the heading "Cases against cops: Court orders go unheeded"; the issue of The Daily Star dated 18/09/1999 under the heading "Law & order in a sorry state".

In the newspaper clippings which are national dailies vividly focused the abusive powers of the law enforcing agencies. In some reports the authority admitted those incidents and assured to take legal actions against those violators. In the affidavit in opposition, the writ respondent no.2 simply stated that 'the offences committed against the body of the persons in custody are cognizable

offences and the victim/any person on his behalf may go for legal action under the existing laws of the land and none is above law including the police.' So, the Ministry of Home Affairs has admitted those incidents but simply avoided its responsibility of curbing the abusive powers and thereby encouraged them to resort to violative acts. It failed to comprehend that the poor and illiterate people who are victims cannot take legal actions against those organised, trained and disciplined armed forces unless they are compelled to abide by the tenets of law and respect the fundamental rights of the citizen.

Findings of the High Court Division

a) To safeguard the life and liberty of the citizens and to limit the power of the police the word 'concerned' used in section 54 of the Code is to be substituted by any other appropriate word- Despite specific interpretation given to the words "reasonable", "credible", the abusive exercise of

power by the police could not be checked, and therefore, any interpretation will not be served the purpose. The said provision should be amended in such a manner that the safeguard will be found in the provision itself.

b) There should be some restrictions so that the police officers will be bound to exercise the power within some limits and the police officers will not be able to justify the arrest without warrant.

c) If the police officer receives any information from a person who works as “source” of the police, the police officer, before arresting the persons named by the ‘source’ should try to verify the information on perusal of the diary kept with the police station about the criminals to ascertain whether there is any record of any past criminal activities against the person named by the ‘source’.

d) If a person is arrested on 'reasonable' suspicion the police officer must record the reasons on which his suspicion is based.

e) The power given to the police officer under section 54 of the Code to a large extent is inconsistent with the provisions of Part III of the Constitution-such inconsistency is liable to be removed.

f) While producing a person arrested without warrant before a Magistrate, the police officer must state the reasons as to why the investigation could not be completed within 24 hours and what are the grounds for believing that the accusation or the information received against the person is well founded.

g) The case diary used in section 172 is the diary which is meant in section 167(1).

h) The police officer shall be bound to transmit a copy of the entries of the case diary to the Magistrate at the time when accused is produced.

i) The Magistrate cannot pass any police remand of an accused person unless the requirements of sub-section (1) of section 167 are fulfilled.

j) In the absence of any guidelines to authorize a Magistrate the detention in police custody he passes a 'parrot like' order authorizing detention in police custody which ultimately results in so many custodial deaths.

k) If the Magistrate before whom an accused person is produced under sub-section (1) of section 167, there are materials for further detention of the accused the Magistrate may pass an order for further detention otherwise he shall release the accused person forthwith.

l) The detention of an accused person in police custody is an evil necessity, inasmuch as, unless some force is not applied, no clue can be find out from hard core criminals and such use is unauthorised.

m) Any torture for extracting clue from the accused is contrary to articles 27, 30, 31, 32, 33 and 35 of the constitution.

n) Any statement of an accused made to a police officer relating to discovery of any fact may be used against him at the time of trial-if the purpose of interrogation is so limited. It is not understandable why there will be any necessity of taking the accused in the custody of the police. Such interrogation may be made while the accused is in jail custody.

o) If an accused person is taken in police custody for the purpose of interrogation for extortion of information from him, neither any law of the country nor the constitution given any authority to the police to torture that person or to subject him to cruel, inhuman and degrading treatment.

p) Any torture to an accused person is totally against the spirit and explicit provisions of the constitution.

q) Whenever a person is arrested he must know the reasons for his arrest. The words as soon as may be, used in article 33 of the Constitution implies that the grounds shall be furnished after the person is brought to the police station and entries are made in the diary about the arrest.

r) Immediately after furnishing the grounds for arrest to the person, the police shall be bound to provide the facility to the person to consult his lawyer if he desires so.

s) The person arrested shall be allowed to enjoy constitutional rights after his arrest.

t) If an accused's right is denied this will amount to confining him in custody beyond the authority of the constitution.

u) Besides section 54, some other related sections are also required to be amended namely

section 176 of the Code, Section 44 to the Police Act, sections 220, 330 and 348 of the Penal Code, inasmuch as, those are inconsistent with clauses 4 and 5 of article 35 and in general the provision of articles 27, 31 and 32 of the constitution.

v) A police officer cannot arrest a person under section 54 of the Code with a view to detain him under section 3 of the Special Powers Act, 1974.

w) Torture or cruel, inhuman or degrading treatment in police custody or jail custody **is** unconstitutional and unlawful.

x) If the fundamental rights of individuals are infringed by colourable exercise of power by police compensation may be given by the High Court Division when it is found that the confinement is not legal and the death resulted due to failure of the State to protect the life.

With the above findings the High Court Division recommended for amendment of sections 54, 167, 176 and 202 of the Code of Criminal Procedure in the

following manner on the reasoning that the existing provisions are inconsistent with Part III of the constitution in the manner mentioned in the judgment.

Recommendation-A

"(1) 'any person against whom there is a definite knowledge about his involvement in any cognizable offence or against whom a reasonable complaint has been made or credible information has been received or a reasonable suspicion exists of his having been so involved' may be amended.

(2) The seventh condition may be also amended by adding clauses:

(a) Whenever a person is arrested by a police officer under sub-section (1) he shall disclose his identity to that person and if the person arrested from any place of residence or place of business, he shall disclose his

identity to the inmates or the persons present and shall show his official identity card if so demanded.

(b) Immediately after bringing the person arrested to the police station, the police officer shall record the reasons for the arrest including the knowledge which he has about the involvement of the person in a cognizable offence, particulars of the offence, circumstances under which arrest was made, the source of information and the reasons for believing the information, description of the place, note the date and time of arrest, name and address of the persons, if any, present at the time of arrest in a diary kept in the police station for that purpose.

(c) The particulars as referred to in clause (b) shall be recorded in a

special diary kept in the police station for recording such particulars in respect of persons arrested under this section.

(d) If at the time of arrest, the police officer finds any mark of injury on the body of the person arrested, he shall record the reasons for such injury and shall take the person to the nearest hospital or to a Government doctor for treatment and shall obtain a certificate from the attending doctor about the injuries.

(e) When the person arrested is brought to the police station, after recording the reasons for the arrest and other particulars as mentioned in clause (b), the police officer shall furnish a copy of the entries made by him relating to the grounds of the arrest to the person

arrested by him. Such grounds shall be furnished not later than three hours from the time of bringing him in the police station.

(f) If the person is not arrested from his residence and not from his place of business or not in presence of any person known to the accused, the police officer shall inform the nearest relation of the person over phone, if any, or through a messenger within one hour of bringing him in the police station.

(g) The police officer shall allow the person arrested to consult a lawyer, if the person so desires. Such consultation shall be allowed before the person is produced to the nearest Magistrate under section 61 of the Code. "

In respect of section 167 it also made the following recommendations:

Recommendation-B

"(1) Existing sub-section (2) be renumbered as sub-section (3) and a new sub-section (2) may be added with the following provisions;

Sub-section (2) – (a) If the Magistrate, after considering the forwarding of the Investigating officer and the entries in the diary relating to the case is satisfied that there are grounds for believing that the accusation or information about the accused is well-founded, he shall pass an order for detaining the accused in the jail. If the Magistrate is not so satisfied, he shall forthwith release the accused. If in the forwarding of the Investigating Officer the grounds for believing that the accused or information

is well founded are not mentioned and if the copy of the entries in the diary is not produced the Magistrate shall also release the accused forthwith.

(b) If the Investigating Officer prays for time to complete the investigation the Magistrate may allow time not exceeding seven days and if no specific case about the involvement of the accused in a cognizable offence can be filed within that period the accused shall be released by the Magistrate after expiry of that period.

(c) If the accused is released under clause (a) and (b) above, the Magistrate may proceed for committing offence under section 220 of the Penal Code *suo motu* against the police officer who arrested the person without warrant even if no petition of complaint is filed before him.

(2) Sub-section (2) be substituted by a new sub-section (3) with the following provisions:

(a) If a specific case has been filed against the accused by the Investigating officer within the time as specified in sub-section (2)(b) the Magistrate may authorize further detention of the accused in jail custody.(b) If no order for police custody is made under clause. (c) the Investigating Officer shall interrogate the accused, if necessary for the purpose of investigation in a room specially made for the purpose with glass wall and grill in one side, within the view but not within hearing of a close relation or lawyer of the accused.

(c) If the Investigating officer files any application for taking any accused to custody for interrogation, he shall state

in detail the grounds for taking the accused in custody and shall produce the case diary for consideration of the Magistrate. If the Magistrate is satisfied that the accused be sent back to police custody for a period not exceeding three days, after recording reasons, he may authorized detention in police custody for that period.

(d) Before passing an order under clause (c), the Magistrate shall ascertain whether the grounds for the arrest were furnished to the accused and the accused was given opportunity to consult lawyer of his choice. The Magistrate shall also hear the accused or his lawyer.

(3) Sub-section (4) be substituted as follows:

(a) If the order under clause (c) is made by a Metropolitan Magistrate or any other Magistrate he shall forward a copy of the

order to the Metropolitan Sessions Judge or the Sessions Judge as the case may be for approval. The Metropolitan Sessions Judge or the Sessions Judge shall pass order within fifteen days from the date of the receipt of the copy.

(b) If the order of the Magistrate is approved under clause (a), the accused, before he is taken custody by the Investigating Officer, shall be examined by a doctor designated or by a Medical Board constituted for the purpose and the report shall be submitted to the Magistrate concerned.

(c) After taking the accused into custody, only the Investigating officer shall be entitled to interrogate the accused and after expiry of the period, the investigating officer shall produce him before the Magistrate. If the accused makes

any allegation of any torture, the Magistrate shall at once send the accused to the same doctor or Medical Board for examination.

(d) If the Magistrate finds from the report of the doctor or Medical Board that the accused sustained injury during the period under police custody, he shall proceed under section 190(1)(c) of the Code against the Investigating Officer for committing offence under section 330 of the Penal Code without filing of any petition of any petition of complaint by the accused.

(e) When any person dies in police custody or in jail, the Investigating officer or the Jailor shall at once inform the nearest Magistrate of such death."

Recommendation-C

"(1) Existing sub-section (2) of section 176 of the Code be renumbered as sub-section (3)

and the following be added as sub-section (2).

(2) When any information of death of a person in the custody of the police or in jail is received by the Magistrate under section 167(4)(e) of the Code (as recommended by us), he shall proceed to the place, make an investigation, draw up a report of the cause of the death describing marks of injuries found on the body stating in what manner or by what weapon the injuries appear to have been inflicted. The Magistrate shall then send the body for post mortem examination. The report of such examination shall be forwarded to the same examination shall be forwarded to the same Magistrate immediately after such examination."

Recommendation – D

"(1) A new sub-section (3) be added with the following provisions:

(3) (a) The Magistrate on receipt of the post mortem report under section 176(2) of the Code (as recommended by us) shall hold inquiry into the case and if necessary may take evidence of witnesses on oath.

(b) After completion of the inquiry the Magistrate shall transmit the record of the case along with the report drawn up under section 176(2) (as recommended by us) the post mortem report his inquiry report and a list of the witnesses to the Sessions Judge or Metropolitan Sessions Judge, as the case may be and shall also send the accused to such judge.

(c) In case of death in police custody, after a person taken in such custody on the prayer of the Investigating Officer, the

Magistrate may proceed against the Investigating Officer, without holding any inquiry as provided in clause (a) above and may send the Investigating Officer to the Sessions Judge of the Metropolitan Sessions as provided in clause (b) along with his own report under subsection (2) of section 176 and post mortem report."

It has been observed that under the present section 202 of the Code, there is no scope on the part of the Magistrate to proceed *suo moto* to hold an inquiry even if the post-mortem report of the victim is found that the death is culpable homicide. Therefore, it is recommended that the Magistrate shall be empowered by law by adding an enabling provision to section 202 to proceed with the case by holding inquiry himself or by any order competent Magistrate.

In the Penal Code a separate penal section may be added after section 302 of the Penal Code.

"(a) One provision be added in section 330 (Penal Code) providing enhanced punishment up to ten years imprisonment with minimum punishment of sentence of seven years if hurt is caused while in police custody or in jail including payment of compensation to the victim.

(b) 2nd proviso for causing grievous hurt while in such custody providing minimum punishment of sentence of ten years imprisonment including payment of compensation to the victim.

(c) A new section be added as section 302A providing punishment for causing death in police custody or in jail including payment of compensation to the nearest relation of the victim.

(d) A new section be added after section 348 providing for punishment for unlawful confinement by police officer for extorting

information etc. as provided in section 348 with minimum punishment imprisonment for three years and with imprisonment which may extend to seven years."

The High Court Division also noticed that in sections 330 and 348 of the Penal Code, nothing have been mentioned of causing hurt to a person while he is in police custody or in jail custody and the punishment provided in the section is inadequate. Accordingly, it recommended to make the following amendment to sections 330 and 348 and addition of some provisions as under:

Recommendation E

(a) One proviso be added in section 330(1) providing enhanced punishment up to ten years imprisonment with minimum punishment of sentence of seven years if hurt is caused while in police custody or in jail including payment of compensation to the victim.

(b) Second proviso for causing grievous hurt while in such custody providing minimum punishment of sentence of ten years imprisonment including payment of compensation to the victim.

(c) A new section be added as section 302A providing punishment for causing death in police custody or in jail including payment of compensation to the nearest relation of the victim.

(d) A new section be added after section 348 providing for punishment for unlawful confinement by police officer for extorting information etc. as provided in section 348 with minimum punishment of imprisonment for three years and with imprisonment which may extend to seven years.

The High Court Division also was of the view that a new section should be added after section 44

of the Police Act keeping the same inconformity with the recommendation made in section 54 of the Code. The High Court Division has given to the following directions to be complied with by the authority:

(1) No police officer shall arrest a person under section 54 of the Code for the purpose of detaining him under section 3 of the Special Powers Act, 1974.

(2) A police officer shall disclose his identity and if demanded, shall show his identity card to the person arrested and to the persons present at the time of arrest.

(3) He shall record the reasons for the arrest and other particulars as mentioned in recommendation in a separate register till a special diary is prescribed.

(4) If he finds any marks of injury on the person arrested, he shall record the reasons for such injury and shall take the person to the nearest hospital or government doctor for treatment and shall obtain a certificate from the attending doctor.

(5) He shall furnish the reasons for arrest to the person arrested within three hours of bringing him in the police station.

(6) If the person is not arrested from his residence or place of business, he shall inform the nearest relation of the person over phone, if any, or through a messenger within one hour of bringing him in the police station.

(7) He shall allow the person arrested to consult a lawyer of his choice if he so desires or to meet any of his nearest relation.

(8) When such person is produced before the nearest Magistrate under section 61, the police officer shall state in his forwarding letter under section 167(1) of the Code as to why the investigation could not be completed within twenty four hours, whey he considers that the accusation or the information against that person is well founded. He shall also transmit copy of the relevant entries in the case diary B.P. Form 38 to the same Magistrate.

(9) If the Magistrate is satisfied on consideration of the reasons stated in the forwarding letter as to whether the accusation or the information is well founded and that there are materials in the case diary for detaining the person in custody, the Magistrate shall pass an order for further detention in jail. Otherwise, he shall release the person forthwith.

(10) If the Magistrate release a person on the ground that the accusation or the information against the person produced before him is not well founded and there are no materials in the case diary against that person, he shall proceed under section 190(1)(a) of

the Code against the police officer who arrested the person without warrant for committing offence under section 220 of the Penal Code.

(11) If the Magistrate passes an order for further detention in jail, the investigating officer shall interrogate the accused if necessary for the purpose investigation in a room in the jail till the room.

(12) In the application for taking the accused in police custody for interrogation, the investigating officer shall state reasons.

(13) If the Magistrate pass an order of detention in police custody, he shall follow the recommendations.

(14) The police officer of the police station who arrests a person under section 54, or the investigating officer who takes a person in police custody or the jailor of the jail, as the case may be, shall at once inform the nearest Magistrate as per recommendation about the death of any person who dies in custody.

(15) A Magistrate shall inquire into the death of a person in police custody or in jail as per recommendation immediately after receiving information of such death.

Leave was granted to consider:

(i) Whether the High Court Division without proper scrutiny of the provisions of sections 54 and 167 of the Code found those provisions to some

extent repugnant to constitutional provisions only on consideration of police excess in failing to consider that there is no fault in law but there may be improper or illegal application of the process of law, the remedy of which is available in the appellate and revisional jurisdiction.

(ii) Whether the police power of arrest without warrant under specified circumstances are not confined alone under section 54, there are various other provisions in the Code empowering the police to arrest and that a safeguard against improper exercise of power is not a remedy in law but that effective and due judicial interference is the proper remedy in cases brought to the notice of the court.

(iii) Whether the High Court Division without due application of mind found sections 54 and 167 to some extent repugnant to the constitutional provisions enshrined in articles 27, 30, 31, 32, 33

and 35 and thereby illegally directed to remove the inconsistency.

While granting leave this court directed the writ respondents to observe the law in its letters and spirit and to implement the direction given by the High Court Division within 6(six) months from date.

Learned Counsel appearing for the writ petitioners submits that since the government did not implement the directions made by this court at the time of granting leave, this appeal is liable to be dismissed on this ground alone without wasting court’s valuable time. The court queried to the learned Attorney General whether or not the directions given by this court have been complied with in this intervening period of more than 12(twelve) years. Learned Attorney General took several times to intimate this court on consultation with the government about the implementation, but failed to give any satisfactory reply. In fact the

government has not complied with any of the directions given by the highest court to the country. Though we find substance in the submission of the learned Counsel for the writ petitioners that this appeal is liable to be dismissed on this ground alone, since some intricate constitutional points of law are involved, this court opted to hear the matter in detail on merit despite such non-compliance with the directions. This Court is at loss only to observe that this non-implementation of the directions of the highest court of the country is nothing but travesty to irony.

Submissions

In his submission, learned Attorney General renewed the points agitated at the time of leave granting order. He adds that the directions given by the High Court Division is unconstitutional, inasmuch as, the High Court Division usurped the power of legislature. According to the learned Attorney General, there are three organs of the

State and one of the organs is the legislature which enacts law and the power of the court is to interpret the said law and to apply the said law in the facts of a given case but it has no power to direct the government to legislate the law. In this connection the learned Attorney General has referred to an unreported case of the Supreme Court of India in *Subramaniam Swami v. Union of India*, W.P. No.8 of 2015.

Mr. Murad Reza learned Additional Attorney General makes the following arguments:-

(1) In Article 112 the word 'Parliament' has not been mentioned, and therefore, the direction given by the High Court Division is a futile direction, inasmuch as, the executive does not legislate law.

(2) There cannot be presumption of misuse of power and the High Court Division has exceeded its jurisdiction in giving

unsolicited advice as to what the Parliament should or should not do. The court cannot direct the President to make rules because the rule making power of the President is identical with that of the Parliament.

(3) Wisdom of Parliament cannot be subject of judicial review.

(4) There is presumption as to the constitutionality of the statute.

(5) The writ petition is not maintainable, inasmuch as, the writ petitioners have no *locus-standi* to make the petition in the nature of public interest litigation.

In support of his contention he has referred to the cases of Novva Das v. Secretary, Department of Municipal Administration and Water Supply, (2008) 8 SCC 42; *Sheikh Abdur Sabur v. Returning Officer, 41 DLR(AD)30; Bangladesh v. Shafiuddin Ahmed, 50*

DLR(AD)27; Kesavananda Bharti v. Kerala, AIR 1973 SC 1461; Siddique Ahmed v. Bangladesh, 33 DLR(AD)129; Kudrat-E-Elahi Panir v. Bangladesh; 44 DLR(AD)319, Khondker Delwar Hossain v. Italian Marble Works Ltd.; 62 DLR(AD)298, National Board of Revenue v. Abu Saeed Khan, 18 BLC(AD)116.

On behalf of the respondent Dr. Kamal Hossain and Mr. M. Amirul Islam make the following submissions:-

A) I) The law enforcement agencies have failed to comply and to report compliance of 15 directions given by the High Court, and such failure has resulted in continuing incidents of custodial violence.

II) Existing legal measures, including revision or appeal, or individual prosecution for culpable homicide, are not adequate remedy to prevent custodial death, torture or ill-treatment.

III) The Supreme Court has the authority to issue directions and to make recommendations regarding amendment of the law to uphold the rule of law, and as guardian of the Constitution, it has power to guidelines to ensure compliance with constitutional safeguards on arrest and detention and the constitutional prohibition on torture.

B) Under the present scheme of the Code there is no adequate remedy to prevent custodial death, torture, rape or ill-treatment of an offender.

C) Legal action is not possible in cases of any offences against body of persons as well as departmental action.

D) Punitive action does not serve the same purpose as the guidelines which are preventive in nature.

E) Supreme Court may in appropriate case issue directions and recommendations to amend the law to fill up legislative vacuum until a suitable law is enacted in order to ensure that constitutional and statutory safeguards on arrest without warrant and ill treatment of persons in police custody are curbed.

F) The Supreme Court as the protector of the Constitution is competent to direct the government to take such legislative measures as are required to implement the constitutional safeguards.

G) When constitutional arrangements are interfered with and altered by the Parliament and the government, the Supreme Court is within its jurisdiction to bring back the Parliament and Executive from constitutional derailment

and give necessary directions to follow the constitutional course.

H) In India the Supreme Court gave directions as preventive measures in cases of arrest and detention and the government had amended the Code of Criminal Procedure in 2008 and 2010 to incorporate those requirements into the law. Guidelines and norms to provide for effective enforcement of basic human rights to gender equality and protection against sexual harassment to be observed at all workplaces until law is enacted for that purpose.

I) Where there is inaction by the executive for whatever reason the judiciary must step in exercise of its constitutional obligations to provide a solution till such time the legislature acts to perform

its role by enacting proper legislation to cover the field.

J) It is the duty of the Supreme Court to uphold the constitution in particular the protection of the right to life, the safeguards on arrest and detention and the express prohibition on torture or cruel, degrading or inhuman treatment or punishment, which are set out in articles 32, 33 and 35(5) of the Constitution.

K) The rule of law symbolizes the quest of civilized democratic societies, be they eastern or western, to combine that degree of liberty without which law is tyranny with that degree of law without which liberty becomes license.

L) Courts in other jurisdictions in south Asia have issued directions from time to time to ensure protection against

custodial violence and have also made recommendations to reform the law.

M) Custodial violence, including torture and death in the lock up strikes a blow at the rule of law, which demands that the powers of the executive should not only be derived from law but also that the same should be limited.

N) The directions given by the High Court Division are essentially to ensure that constitutional promises to citizens are kept and that pre-constitutional laws such as the Police Act, the Code of Criminal Procedure, the Police Regulations of Bengal are read, interpreted and applied in line with the constitutional promises, and that they may be reframed and revised to ensure the fullest protection of each person who faces arrest or is taken into custody in

order to ensure human dignity and a society based on rule of law.

In support of their contentions, they have referred to the cases of *Secretary Ministry of Finance v. Masdar Hossain, 20 BLD(AD)104; Kudrat-Elahi Panir v. Bangladesh, 44 DLR(AD)319; D.K. Basu v. State of West Bengal, (1997) 1 SCC 416; Vishaka v. State of Rajastan, AIR 1997 SC 3011; Union of India v. Association for Democratic Reforms, 2002(5)SC 294; Joginder Kumar v. State of UP, AIR 1994 SC 1349; Nandini Sathapathy v. PL Dhani, AIR 1978 SC 1025; Raj Narayan v. Superintendent of Central Jail, AIR 1971 SC 178; Abhinandan Jha v. Dinesh Mishra, AIR 1968 SC117; Saifuzzaman (Md) v. State, 56 DLR 324.*

Rule of Law

There is no doubt that the present the Code has been promulgated about 118 years ago by an imperialist government which used the subcontinent as its colony. If the scheme of the law is looked

into there will be doubt in inferring that the colonial power made this law with an object to suppress their subjects by a unified law so that different religious systems of administration of justice are brought in a unified system. This would be easier to them to rule the country peacefully so that it could realize the revenues from the subject by means oppressive measures. Therefore, there is no gain saying that the penal laws and procedural laws which were promulgated by them were oppressive and against the rule of law and the administration of criminal justice. The executives were given the power to administer justice in the Magistracy level and in trial of sessions cases to the Session Judges, having no power to take cognizance of an offence triable by them unless and until the accused is committed by Executive Magistrates under Chapter XVIII of the Code. Even the evidence of a witness recorded in the presence of an accused person by a Magistrate in a session triable case can be used in

the subsequent trial i.e. such evidence is put in under section 288 of the Code and under section 37 of the Evidence Act. There were three Chapters, Chapter XX, XXI and XXII under which different offences were triable by Executive Magistrates. Chapter XXI has been deleted, Chapter XX has been substantially amended and Chapter XXII which empowers the trial before the High Courts and Courts of session has also been substantially amended recently. There are corresponding amendments in each and every Chapter of the Code apart from deleting some Chapters. There is no doubt that excessive powers have been given to the police officers and Executive Magistrates. Though the power of the Executive Magistrates has been taken away pursuant to the direction given by this court in Mazdar Hossain case, the powers of the police officers which are being exercised from the period of colonial rule have not been amended at all with the result that the police officers are using excess

abusive powers against the peace loving people taking advantage of the language used in the Code. As a result, rule of law which is the foundation of our constitution, which we achieved by the sacrifice of three million martyrs and molestation of two hundred thousand women and girls, is being violated every sphere of lives.

The Universal Declaration of Human Rights was drafted by the Human Rights Commission after receiving a detailed report on the prosecution evidence at the Nuremberg trials. The killing of ‘useless eaters’, the Einsatzgruppen orders to kill indiscriminately, the gas chambers, Mengele experiments, ‘night and fog’ decrees and the extermination projects after Kristallnacht were at the forefront of their minds and provided the examples to which they addressed their drafts [Johannes Morsink, ‘world war Two and the universal Declaration’, HRQ 15(1993) P.357]. Democracy cannot be isolated from rule of law. It has nexus with rule

of law. Unless democracy is established in all fields of a country rule of law cannot be established.

The rule of law is the foundation of a democratic society. Judiciary is the guardian of the rule of law. If the judiciary is to perform its duties and functions effectively and remain true to the spirit with dignity and authority, the courts to be respectful and protected at all costs. Today, Dicey's theory of rule of law cannot be accepted in its totality. Rather Davis (Administrative Law (1959), P.24-27) gives seven principal meanings of the term 'rule of law': a) law and order; b) fixed rules; c) elimination of discretion; d) due process of law or fairness; e) natural law or observance of the principles of natural justice; f) preference for judges or ordinary courts of law to execute authorities and administrative tribunals; g) judicial review of administrative actions.

It has been said that no contemporary analysis of rule of law can ignore the vast expansion of government functions which has occurred as a result of both of the growing complexity to modern life, and of the minimum postulates of social justice, which are now part of the established public philosophy in all civilized countries.

Over the recent years, recognition of the importance of the rule of law and the significance of the independence of the judiciary has been increased remarkably. The prime responsibility of the judiciary is to uphold the rule of law and it is the rule of law which prevents the ruler from abusing its power. By the same time we should keep in mind that the judiciary alone does not possess a magic wand to establish rule of law in the country. Rule of law means all organs of a State shall maintain the rule of law, that is to say, in all spheres of the executive and administrative branches, the government, its officers including law

enforcing agencies, as well as legislative have to protect, preserve and maintain the rule of law. If there is aberration of one branch of the government it will reflect in the judiciary as well. To discharge its onerous responsibility of protecting and enforcing the rights of the citizens of a country, the judiciary has to be and seen to be impartial and independent. Unless the public accepts that the judiciary is an independent entity, they would have no confidence even in an unerring decision taken by a court exercising its jurisdiction fairly. Unless the rule of law is established the citizens of a country will be deprived of the fruits of justice.

The concept of the rule of law has different facets and has meant different things to different people at different times. Professor Brian Tamanaha has described the rule of law as "an exceedingly elusive notion giving rise to a rampant divergence of understandings and analogous to the notion of the

food in the sense that everyone is for it, but have contrasting convictions about what it is ”[Tamanaha, Brian Z., on the Rule of Law; History, Politics, Theory, Cambridge university Press, 2004].

It is an essential principle of the rule of law that “every executive action, if it is to operate to the prejudice of any person must have legislative authority to support it”. *[Entick v. Carringtion, (1765) EWHC KB J98:95 ER 807: [1558-1774] All ER Rep 41].*

Lord Atkin in Eshugbayi Eleko (*Eshugbayi Eleko V. Officer Administering the Government of Nigeria, Chief Secretary of the Government of Nigeria, (1913) Appeal No.42 of 1930*) opined that “no member of the executive can interfere with the liberty or property of a British subject except on the condition that he can support the legality of his action before a Court of Justice”. It has been stated by Soli,J. Sorabjee in a lecture delivered at NL SIU, Bangalore on 5th April, 2014 that ‘the rule of law; a moral

imperative for the civilized world' that it needs to be emphasized that there is nothing western or eastern or northern or southern about the underlying principle of the rule of law. It has a global reach and dimension. The rule of law symbolizes the quest of civilized democratic societies, be they eastern or western, to combine that degree or liberty without which law is tyranny with that degree of law without which liberty becomes license. In the words of the great Justice Vivian Bose of our Supreme Court, the rule of law "is the heritage of all mankind because its underlying rationale is belief in the human rights and human dignity of all individuals everywhere in the world".

The rule of law provides a potent antidote to executive lawlessness. It is a salutary reminder that wherever law ends, tyranny begins. In the developed as well as developing countries due to the prevalence of the rule of law, no administrator or official can arrest or detain a person unless there

is legislative authority for such action. In those countries a Police Commissioner or any other public functionary cannot ban a meeting or the staging of a play or the screening of a movie by passing a departmental order or circular which is not backed by law. The rule of law ensures certainty and predictability as opposed to whimsicality and arbitrariness so that people are able to regulate their behaviour according to a published standard against which to measure and judge the legality of official action. Experience testifies that absence of the rule of law leads to executive high-handedness and arbitrariness.

In the constitution Eight Amendment case, *Anwar Hossain Chowdhury v. Bangladesh 41 DLR(AD) 165* and also *Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225*, the apex courts of these two countries held that the rule of law is one of the basic features of the constitution. In *I.R. Coelho v. State of T.N. (2007) 2 SCC 1*, it is stated that the

rule of law is regarded as part of the basic structure of the Constitution. Consequently the rule of law cannot be abolished even by a constitutional amendment. This manifests the high status accorded to the rule of law in Indian constitutional jurisprudence. The apex courts of this subcontinent do not hesitate to make such orders or directions whenever necessary when it comes to its notice that the rule of law is violated and vigorously enforced the rule of law in practice. In *Indira Nehru Gandhi v. Raj Narain, AIR 1975 S.C.C. 2299*, a five member Bench of the Supreme Court in strong language once again made observations when it notice that the rule of law was violated as under:

> "Leaving aside these extravagant versions of rule of law there is a genuine concept of rule of law and that concept implies equality before the law or equal subjection of all classes to the ordinary law. But, if role of law is to be a basic structure of the

Constitution one must find specific provisions in the Constitution embodying the constituent elements of the concept. I cannot conceive of rule of law as a twinkling star up above the Constitution. To be a basic structure, it must be a terrestrial concept having its habitat within the four corners of the Constitution. The provisions of the Constitution were enacted with a view to ensuring the rule of law. Even if I assume that rule of law is a basic structure, it seems to me that the meaning and the constituent elements of the concept must be gathered from the enacting provisions of the Constitution. The equality aspect of the rule of law and of democratic republicanism is provided in Article 14. May be, the other articles referred to do the same duty."

The basic tenets of the rule of law articulated by the poet Thomas Fuller and adopted by court is

'Be you ever so high the law is above you' (Thomas Fuller (1733).

The Supreme Court of India in *S.G. Jaisinghani v. Union of India, (1976) 2 SCR 703: AIR 1967 SC 1427* ruled that "The first essential of the rule of law upon which our whole constitutional system is based is that discretion, when conferred upon executive authorities, must be confined within clearly defined limits'. This view has been reaffirmed in *Khudiram Das v. State of W.B., (1975) 2 SCC 81* observing that "in a government under law, there can be no such thing as unfettered unreviewable discretion". There is thus no ambiguity in the opinions of the apex Court that the rule of law is a dynamic concept, which takes within its ambit all human rights which are indivisible and are independent.

The rule of law must not be confused with rule by law. Otherwise rule of law would become an instrument of oppression and give legitimacy to laws

grossly violation of the basic human rights. There is a certain core component in respect of the basic human rights of the people and for human dignity. Otherwise, commission of atrocities and gross violation of human rights could be justified by pointing to the mere existence of a law' (*ibid-Soli,J. Sorabjee*).

Andrew Le Sueur, Maurice Sunkin and Jo Murkens, Public Law, Text, Cases, and Materials (2013), 2nd Edn., Oxford University Press, have aptly summarized the main ideas associated with the rule of law as follows:

Compliance with the law: "Like citizens, the Government and public bodies must act in accordance with the law and must have legal authority for actions which impinge on the rights of others.

The requirement of rationality: The rule of law implies rule by reason rather than arbitrary power or whim. In order to comply with the rule of law,

decisions must be properly and logically reasoned in accordance with sound argument.

The rule of law and fundamental rights: The rule of law requires the protection of the fundamental rights of the citizens against the Government. If we summarize the above treatise on public law we find, whenever one speaks of law, it must satisfy at least the prerequisite that it guarantees basic human rights and human dignity and ensures their implementation by due process through an independent judiciary exercising power of judicial review. Absent of these requirements the rule of law would become a shallow slogan. Lord Justice Stephen Sedley of the Court of Appeal in UK observed, "the irreducible content of the rule of law is a safety net of human rights protected by an independent legal system" (quoted from Soli,J. Sorabjee).

In this connection it is apt to quote the words of Justice Brandeis in *Olmstead v. United States,*

277 US 438 "Crime is contagious. If the Government becomes a law-breaker, it breeds contempt for law; it invites anarchy. To declare that in the administration of the criminal law the ends justifies the means is to declare that the Government may commit crimes in order to secure the conviction of a criminal would bring terrible retribution".

In *D.K. Basu v. State of W.B., (1997) 1 SCC 416*, The Indian Supreme Court observed:

> "Custodial violence, including torture and death in the lock-ups, strikes a blow at the rule of law, which demands that the powers of the executive should not only be derived from law but also that the same should be limited by law. Custodial violence is a matter of concern. It is aggravated by the fact that it is committed by persons who are supposed to be protectors of the citizens. It is committed under the shield of uniform and authority in

the four walls of a police station or lock-up, the victim being totally helpless.... It cannot be said that a citizen 'sheds off' his fundamental right to life the moment a policeman arrests him. Nor can it be said that the right to life of a citizen can be put in 'abeyance' on his arrest. ... If the functionaries of the Government become law-breakers, it is bound to breed contempt for law and would encourage lawlessness and every man would have the tendency to become law unto himself thereby leading to anarchy. No civilised nation can permit that to happen. The Supreme Court as the custodian and protector of the fundamental and the basic human rights of the citizens cannot wish away the problem. ... State terrorism is no answer to combat terrorism. State terrorism would only provide legitimacy to terrorism. That would be bad for

the State, the community and above all for the rule of law."

The preamble of our constitution states 'rule of law' as one of the objectives to be attained. The expression 'rule of law' has various shades of meaning and of all constitutional concepts, the rule of law is the most subjective and value laden. The concept is intended to imply not only that the powers exercised by State functionaries must be based on authority conferred by law, but also that the law should conform to certain minimum standards of justice, both substantive and procedural. Rule of law is the subordination of all authorities, legislative, executive and others to certain principles which would generally be accepted as characteristic of law, such as the ideas of the fundamental principles of justice, moral principles, fairness and due process. It implies respect for the supreme value and dignity of the individual. The minimum content of the concept is that the law

affecting individual liberty ought to be reasonably certain or predictable; where the law confers wide discretionary powers there should be adequate safeguards against their abuse; and unfair discrimination must not be sanctioned by law. A person ought not to be deprived of his liberty, status or any other substantial interest unless he is given the opportunity of a fair hearing before an impartial tribunal; and so forth.

The rule of law demands that power is to be exercised in a manner which is just, fair and reasonable and not in an unreasonable, capricious or arbitrary manner leaving room for discrimination. Absence of arbitrary power is the first essential of the rule of law upon which our constitutional system is based. Discretion conferred on the executive must be confined within the defined limits and decisions should be made by the application of known principles and rules and in general, such decisions should be predictable and the citizen should know

where he stands. A decision without any principle or rule is unpredictable and is the antithesis of a decision in accordance with the rule of law.

Rule of law contemplated in the constitution concerns the certainty and publicity of law and its uniform enforceability and has no reference to the quality of the law. The framers of the constitution, after mentioning 'rule of law' in the preamble, took care to mention the other concepts touching the qualitative aspects of 'law', thereby showing their adherence to the concept of rule of law. If the preamble of the constitution is read as a whole in its proper perspective, there remains no doubt that the framers of the constitution intended to achieve 'rule of law'. To attain this fundamental aim of the State, the constitution has made substantive provisions for the establishment of a polity where every functionary of the State must justify his action with reference to law. 'Law' does not mean anything that Parliament may pass. Articles 27, 31

and 32 have taken care of the qualitative aspects of law. Article 27 forbids discrimination in law or in State actions, which article 31 and 32 imported the concept of due process, both substantive and procedural, and thus prohibit arbitrary or unreasonable law or State action. The Constitution further guarantees in Part III certain rights including freedom of thought, speech and expression to ensure respect for the supreme value of human dignity. [Constitutional Law of Bangladesh, Third Edition Mahmudul Islam].

Though the constitution contains provisions to ensure rule of law, the actual governance has nullified rule of law in the country. No right can compare with the right to life without which all other rights are meaningless and rule of law can play its most significant role in this aspect. But the tolerant and rather approving attitude of the successive governments in respect of extra-judicial killings by the law enforcing agency in the name of

’cross fire’ and ‘shoot out’ has seriously dented the operation of rule of law so much so that it will not be a misstatement to say that rule of law for the common men in the country exists only in the pages of the constitution. (Ibid)

It must be remembered that the rule of law is not a one-way traffic. It places restraints both on the government and individuals. If the underlying principles of the rule of law are to become a reality in governance as also in our lives no doubt laws are necessary but they alone are not sufficient. In addition fostering of the rule of law culture is imperative. The only true foundation on which the rule of law can rest is its willing acceptance by the people until it becomes part of their own way of life. Therefore we should strive to instill the rule of law temperament, the rule of law culture at home, in schools, colleges, public places, utility service locations, parks even mosques, temples and other holy places. We must

respect each other holy places. We should strive for the universalisation of its basic principle. Our effort should be to constantly aim at the expansion of the rule of law to make it a dynamic concept which not merely places constraints on exercise of official power but facilitates and empowers progressive measures in the area of socio-economic rights of the people. That indeed is the moral imperative for the civilised world.

Justice Vivian Bose made a very remarkable observation by posing a question why it should be respected by all segments of citizenery. "Because we believe in human worth and dignity. Because, on analysis and reflection, it is the only sane way to live at peace and amity with our neighbours in this complex world. Because it is the only sane way to live in an ordered society."[N.R. Madhava Menon, Rule of Law in a Free Society (2008), Oxford University Press, p. 11.]

We eagerly look forward to the day when the quintessential principles of the rule of law, namely, the protection and promotion of all human rights and human dignity of all human beings is universally accepted. One hopes that in a world torn by violent sectarian and religious strife the rule of law with its capacious dynamic content becomes the secular religion of all nations based on tolerance and mutual respect. It should be borne in mind that progress is the realisation of utopia. We must earnestly strive to realise this utopia which is a moral imperative for the civilised world.

Unjust Laws

There are examples of the existence of Anglo-American legal sources that support the common law judicial authority (i.e. the judges) to refuse to enforce unjust laws, even where those laws do not necessarily violate a written constitution. This proposition has been stated in the cases of Bonham, Omychund, Ham, Bowman, Lindsay, Jones, Calder,

Chisholm, Mcllvaine and Feltcher. On an analysis of these cases Douglas E. Edlin in his book 'Judges and Unjust Laws' observed that their views should be appreciated for what they are: a discrete, coherent and cohesive line of reported case law articulating a common law principle and a body of legal thought that reflect the distinctive authority and responsibility of common law judges to develop the law by eliminating instances of injustice from the law, a principle and a conception that have endured throughout Anglo-American common law history. This is the legal basis, derived from legal sources, for judges to refuse to enforce unjust laws (emphasis supplied).

As it turns out this what Coke had in mind all along:

"In this stand for the right to give the Common Law Priority in general principles...Parliament must not go beyond the general principles of the Common Law or beyond its general reasonableness. This would

place statute law in a subordinate place to the Common Law if pressed to its logical conclusion, and give at least to the Common Law courts a superior position as the interpreter of statute law. It would in many cases result in the will of the framers of statutes being set aside or at least modified by the judges of the Common Law courts. It would, in short, create a practice of judicial criticism or judicial review or statutes by the Common Law judges.... In Bonham's case he (Coke) contended there was a legal, not an extra-legal, power in the courts to do this very thing." [Judges and Unjust Laws: Common Law Constitutionalism and Foundation of Judicial Review. Douglas E.Edlin]

Now the question may logically arise as to what happens as the consequences of judicial failure to develop the law by refusing to enforce unjust laws. There could be three consequences, such as: legitimation of the unlawful, social and legal harm

caused by that and complicity & accountability generated from the undue inaction.

Therefore, it the duties of the courts and judges to see if the law is sound enough to pass the test of justiciability. The following features might help one to test the justiciability of an Act or legal provision:

Firstly, the epistemic threshold applicable to common law review sets exacting standards of certainty and gravity, which ensure that no judge can properly invoke common law review unless she is as certain as she can be that a mistake was made by a prior court or a legislature and that this mistake concerns a matter of grave social importance that violates the judge’s deepest convictions.

Secondly, the convictions with which common law review is concerned are the judge’s own, not the judge’s assessment of society’s prevailing beliefs.

Thirdly, the judge alone must determine, with reference to her personal beliefs and ideals, when the epistemic threshold has been crossed.

Fourthly, the judge must undertake careful and comprehensive reflection and analysis before concluding that a particular law meets the epistemic threshold and triggers common law review.

Fifthly, if the judge finally concludes that the exercise of common law review is warranted, this authority overrides any conflicting legal principle, including *stare decisis* and legislative supremacy, and requires the judge to develop the law by refusing to enforce the law deemed to be unjust.

Sixthly: common law review empowers judges to refuse to enforce an unjust law only in particular case;

Seventhly, common law review is consistent with judicial respect for doctrines of legal stability, such as *stare decisis* and legislative supremacy, which are overridden only in the most drastic circumstances.

Finally, common law review allows the courts to resist threats to its institutional integrity and reinforces the judiciary's institutional obligation to maintain constitutional restrictions on the government and to ensure the legality of all government action. (Ibid).....

Unjust laws have troubled lawyers, political scientists, Judges, Civil Society and philosophers since they first reflected on the legal standards by which people govern themselves. Unjust laws raise difficult questions about our understanding of law, our aspirations for our laws, our obligations to one another, and our government's responsibilities to each of us. From Aristotle and Aquinas to Hart and Fuller, the debate about these questions has continued for millennia, and it will endure for as long as people need law to order their societies and to guide their lives.

There are several ways that a law might be unjust. It might prohibit or curtail conduct that

should be permitted. It might permit conduct that should be prohibited. It might apply or enforce unfairly and otherwise unobjectionable law. People can and will disagree about whether and in what way a particular law is unjust. Suppose a particular law is unjust and then the question may arise by what legal basis, if any, a Judge can resist and attempt to correct that injustice. It seemed that it might help clarify discussion to have a specific example of an unjust law in mind. The example of an unjust law is that one permitting government-sanctioned racial discrimination or violation of human rights. If a defence is needed, that racially discriminatory laws are unjust. Of course, someone might imagine a polity in which racially discriminatory laws are not necessarily unjust by definition. Racially discriminatory laws are paradigmatically unjust refers to the related experiences of common law nations regarding, for example, treatment of indigenous populations and the political and

constitutional history of the United States with respect to slavery and legalized racial segregation and subjugation. (Ibid).....

In addition to overtly or substantively unjust laws, certain laws also attempt, in various ways, to undermine the institutional position or constitutional obligations of common law courts. We may highlight specific fundamental common law principles that operate through judicial decisions to maintain the constitutional relationship of government organs and to enforce legal limitations on government action. Despite the long history of interest in problems presented by unjust laws, relatively little has been written about the particular difficulties these laws raise for Judges called on to enforce them. What little has been written tends to oversimplify or misconceive the genuine nature of the conflict unjust laws pose for Judges.

If we carefully scrutinize the subject matter of this case then this aspects becomes obvious that there is strong chain of judicial tradition practiced and followed by the courts under common law scheme (UK, America, Australia, India etc.) that courts have a solemn obligation to test any law to see if the law is *just* and therefore capable of being called a law in the truest sense of the word, if not then there is no option left with a judge but to declare that law an unjust law. Because a judge is under no obligation to work as a mere instrument of implementing and explaining law like a machine, if he does so then this would be the highest form of injustice one can imagine of in a democratic polity. And to understand this subtle level of injustice done by unjust law the judges must have the moral compass and sensitivity to recognize injustice and feel its sting; and they must have the strength of character and will to act on their convictions, even when they must act alone. (emphasis supplied).

And as a final point, the role of the judges in a situation when they are confronted with in a paradox of expounding a law as unjust law is best described in the following paragraph:

> "As long as people need laws to govern themselves and as long as these laws are made by people, some of these laws will be unjust. As long as the threat of unjust laws persists, people will and should consider how judges ought best to address that threat and its occasional actualization. To this point, consideration of these problems has left judges with three possibilities. But mendacity, abnegation, or acquiescence are not the only options. The common law tradition and legal principles permit and require more of judges. Judges must develop the law. That, too, is a fundamental aspect of their legal obligations. Sometimes, as in cases involving unjust laws, development demands that judges subject government action to the rule of law. This should not elicit fear or frustration. The common law has always functioned this way, and common law judges have

always, in one form or another, fulfilled this function. The common law tradition recognized long ago what we sometimes still lose sight of today: only when the waters are pure can we hope to see down to the riverbed" (Ibid).....

Natural law or observance of Principle of Natural Justice

Sir Henry Maine says "Seen in the light of Stoical doctrine the Law of nations came to be identified with the law of nature; that is to say, with a number of suppose principles of conduct which man in society obeys simply because he is a man. Thus the Law of Nature is simply the Law of Nations seen in the light of a peculiar theory. A passage in the Roman Institutes shows that the expressions were practically convertible," and again: "The Law of Nations so far as it is founded not the principles of Natural Law are equally binding in every age and upon all mankind".

It has been said by some that the principle of *audi alteram partem* was upheld in Magna Charta, and Lord Coke appears to have subscribed to that view

when he said (Co.Inst. IV, 37) "....by the statutes of Mag. Cart. ca. 29, 5 E 3 Cap. 9 and 28 E 3 Cap. 5 no man ought to be condemned without answer, etc." This is, however, a paraphrase of the actual words of ca. 29 of Magna Charta, which reads:

"The body of no free man shall be taken, nor imprisoned, nor disseized, nor outlawed, nor banished, nor destroyed in any way and the King shall not got or send against him by force except by the judgment of his peers and by the law of the land".

Coke regarded it as a rule not only fundamental but divine. He said:

"And the poet (Virgil, Aeneid, vi, 566), in describing the iniquity of Ramamanthus, that cruel judge of Hell, saith, '*Castigatque, auditque dolos subigitque fateri*'. First he punished before he heard; and when he had heard his deniall, be compelled the party accused by torture to confess it. But far otherwise doth Almighty God proceed,

postquam reus diffamatus est-1 vocat, 2 interogat, 3 judicat”.

Some inalienable natural rights expanded by Cooley, Dilon and others had a threefold aspect:

> “(1) On the lines previously foreshadowed by Marshall, Kent and others, vested property interests were held to be inalienable rights and immune from legislative interference.
>
> (2) The power to impose taxes was restricted to "public purposes" and public purposes were what the judges understood them to be. Under the influence of Cooley's doctrines, taxes for the purpose of purchasing railway stock" or for granting aid to private enterprises or for the development of the natural advantages of a city for manufacturing purposes'" were held invalid.
>
> (3) Under clauses in most American constitutions the inviolability of private property was mitigated by the power of expropriation for public purposes, by virtue of

"eminent domain." Here the court imposed, in the name of natural justice, a similar limitation. Eminent domain can only be exercised for public purposes, and with adequate compensation."

Our constitution empowers the courts to act and administer justice according to justice, equity and good conscience where no indigenous are properly applicable. In *Waghela Rajsanji v. Sheikh Masludin, (1887) LR 14 I.A. 89(96)*, the Judicial Committee of the Privy Council pointed out that there was not in Indian law any rule which gave a guardian greater power to bind the infant ward by a personal covenant than existed in English law. Lord Hobhouse said:

> 'In point of fact, the matter must be decided by equity and good conscience, generally interpreted to mean the rules of English law if found applicable to Indian society and circumstances.'

The expressions, the laws of God, natural law, natural justice, equity and good conscience were in early times synonymous terms. It would appear probable, therefore, when the expressions “natural justice, equity and good conscience”, and “natural justice and morality” and “natural justice and humanity” and “general principles of humanity” these phrases leave a wide discretion to the Judges to decide questions in accordance with their own ideas of fair play. Where a procedural law is silent on certain aspects of natural justice or may deprive the subject expressly or impliedly of their protection altogether, the courts will be anxious to ensure that so far as is compatible with the provisions of the statute, the principles of natural justice shall be upheld and rendered available for the protection of the citizen.

This protection has to be afforded not only when the statute is wholly or partially silent as to the procedure to be adopted, but also when a

procedure has been prescribed by statute and the statutory authority has made an attempt to carry out its functions according to such procedure, but in doing so has violated the principles of natural justice. The courts are jealous to ensure that when an authority trips into a pitfall the citizen does not suffer as a result of arbitrary act of the authority.

International Covenants and treaties

There are several international treaties for safeguarding civil and political rights, torture and cruel, human degradation treatment or punishment. Our country is a signatory almost all treaties, and some of those rights and freedoms have been enshrined in Part III of our constitution, some of them have not been included. However, the fundamental freedom of speech, freedom of association, freedom of movement, freedom of thought, prohibition of force labour, protection in respect of trial and punishment, protection of right

to life and personal liberty, safeguard as to arrest and detention, discrimination on the ground of religion, equality before law etc. are enshrined radiantly in the firmament of Part III. We must take legitimate right that these charished freedoms are grown from strength to strength in the post independent arena. It has been consistently nourished and saved to new dimension with the contemporary needs by the constitutional court. Some of the Intentional treaties and safeguards are mentioned below.

International Covenant of Civil and Political Rights, 1966

Article 9 (liberty and security of persons)

Notice of reason in arrest and criminal charges

Judicial control of detention in connection with criminal charges.

The right to take proceedings for release from unlawful and arbitrary detention

The right ----- to compensation for unlawful and arbitrary arrest or detention

Body of Principles for the Protection of All Persons under any form of Detention or Imprisonment Adopted by General Assembly resolution 43/173 of 9 December, 1988

Principle 1

All persons under any form of detention or imprisonment shall be treated in a humane manner and with respect for the inherent dignity of the human person.

Principle 2

Arrest, detention or imprisonment shall only be carried out strictly in accordance with the provisions of the law and by competent officials or persons authorized for that purpose.

Principle 3

There shall be no restriction upon or derogation from any of the human rights of persons under any form of detention or imprisonment recognized or existing in any State pursuant to law, conventions, regulations or custom on the pretext that this Body of Principles does not recognize such

rights or that it recognizes them to a lesser extent.

Principle 4

Any form of detention or imprisonment and all measures affecting the human rights of a person under any form of detention or imprisonment shall be ordered by, or be subject to the effective control of, a judicial or other authority.

Principle 5

1. These principles shall be applied to all persons within the territory of any given State, without distinction of any kind, such as race, colour, sex, language, religion or religious belief, political or other opinion, national, ethnic or social origin, property, birth or other status.

2. Measures applied under the law and designed solely to protect the rights and special status of women, especially pregnant women and nursing mothers, children and juveniles, aged, sick or handicapped persons shall not be deemed to be

discriminatory. The need for, and the application of, such measures shall always be subject to review by a judicial or other authority.

Principle 6

No person under any form of detention or imprisonment shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

Principle 7

1. States should prohibit by law any act contrary to the rights and duties contained in these principles, make any such act subject to appropriate sanctions and conduct impartial investigations upon complaints.

2. Officials who have reason to believe that a violation of this Body of Principles has occurred or is about to occur shall report the matter to their superior authorities and, where necessary, to other appropriate authorities or organs vested with reviewing or remedial powers.

3. Any other person who has ground to believe that a violation of this Body of Principles has occurred or is about to occur shall have the right to report the matter to the superiors of the officials involved as well as to other appropriate authorities or organs vested with reviewing or remedial powers.

Principle 8

Persons in detention shall be subject to treatment appropriate to their unconvicted status. Accordingly, they shall, whenever possible, be kept separate from imprisoned persons.

Principle 9

The authorities which arrest a person, keep him under detention or investigate the case shall exercise only the powers granted to them under the law and the exercise of these powers shall be subject to recourse to a judicial or other authority.

Principle 10

Anyone who is arrested shall be informed at the time of his arrest of the reason for his arrest and shall be promptly informed of any charges against him.

Principle ll

1. A person shall not be kept in detention without being given an effective opportunity to be heard promptly by a judicial or other authority. A detained person shall have the right to defend himself or to be assisted by counsel as prescribed by law.

2. A detained person and his counsel, if any, shall receive prompt and full communication of any order of detention, together with the reasons therefor.

3. A judicial or other authority shall be empowered to review as appropriate the continuance of detention.

Principle 13

Any person shall, at the moment of arrest and at the commencement of detention or imprisonment, or promptly thereafter, be provided by the authority responsible for his arrest, detention or imprisonment, respectively, with information on and an explanation of his rights and how to avail himself of such rights.

Principle 14

A person who does not adequately understand or speak the language used by the authorities responsible for his arrest, detention or imprisonment is entitled to receive promptly in a language which he understands the information referred to in principle 10, principle 11, paragraph 2,principle 12, paragraph 1, and principle 13 and to have the assistance, free of charge, if necessary, of an interpreter in connection with legal proceedings subsequent to his arrest.

Principle 16

1. Promptly after arrest and after each transfer from one place of detention or imprisonment to another, a detained or imprisoned person shall be entitled to notify or to require the competent authority to notify members of his family or other appropriate persons of his choice of his arrest, detention or imprisonment or of the transfer and of the place where he is kept in custody.

2. If a detained or imprisoned person is a foreigner, he shall also be promptly informed of his right to communicate by appropriate means with a consular post or the diplomatic mission of the State of which he is a national or which is otherwise entitled to receive such communication in accordance with international law or with the representative of the competent international organization, if he is a refugee or is otherwise under the protection of an intergovernmental organization.

3. If a detained or imprisoned person is a juvenile or is incapable of understanding his entitlement, the competent authority shall on its own initiative undertake the notification referred to in the present principle. Special attention shall be given to notifying parents or guardians.

4. Any notification referred to in the present principle shall be made or permitted to be made without delay. The competent authority may however delay a notification for a reasonable period where exceptional needs of the investigation so require.

Principle 18

1. A detained or imprisoned person shall be entitled to communicate and consult with his legal counsel.

2. A detained or imprisoned person shall be allowed adequate time and facilities for consultations with his legal counsel.

3. The right of a detained or imprisoned person to be visited by and to consult and communicate, without delay or censorship and in full

confidentiality, with his legal counsel may not be suspended or restricted save in exceptional circumstances, to be specified by law or lawful regulations, when it is considered indispensable by a judicial or other authority in order to maintain security and good order.

4. Interviews between a detained or imprisoned person and his legal counsel may be within sight, but not within the hearing, of a law enforcement official.

5. Communications between a detained or imprisoned person and his legal counsel mentioned in the present principle shall be inadmissible as evidence against the detained or imprisoned person unless they are connected with a continuing or contemplated crime.

Principle 19

A detained or imprisoned person shall have the right to be visited by and to correspond with, in particular, members of his family and shall be given

adequate opportunity to communicate with the outside world, subject to reasonable conditions and restrictions as specified by law or lawful regulations.

Principle 20

If a detained or imprisoned person so requests, he shall if possible be kept in a place of detention or imprisonment reasonably near his usual place of residence.

Principle 21

1. It shall be prohibited to take undue advantage of the situation of a detained or imprisoned person for the purpose of compelling him to confess, to incriminate himself otherwise or to testify against any other person.

2. No detained person while being interrogated shall be subject to violence, threats or methods of interrogation which impair his capacity of decision or his judgment.

Principle 22

No detained or imprisoned person shall, even with his consent, be subjected to any medical or scientific experimentation which may be detrimental to his health.

Principle 23

1. The duration of any interrogation of a detained or imprisoned person and of the intervals between interrogations as well as the identity of the officials who conducted the interrogations and other persons present shall be recorded and certified in such form as may be prescribed by law.

2. A detained or imprisoned person, or his counsel when provided by law, shall have access to the information described in paragraph 1 of the present principle.

Principle 24

A proper medical examination shall be offered to a detained or imprisoned person as promptly as possible after his admission to the place of

detention or imprisonment, and thereafter medical care and treatment shall be provided whenever necessary. This care and treatment shall be provided free of charge.

Principle 25

A detained or imprisoned person or his counsel shall, subject only to reasonable conditions to ensure security and good order in the place of detention or imprisonment, have the right to request or petition a judicial or other authority for a second medical examination or opinion.

Principle 26

The fact that a detained or imprisoned person underwent a medical examination, the name of the physician and the results of such an examination shall be duly recorded. Access to such records shall be ensured. Modalities therefor shall be in accordance with relevant rules of domestic law.

Principle 27

Non-compliance with these principles in obtaining evidence shall be taken into account in determining the admissibility of such evidence against a detained or imprisoned person.

Principle 31

The appropriate authorities shall endeavour to ensure, according to domestic law, assistance when needed to dependent and, in particular, minor members of the families of detained or imprisoned persons and shall devote a particular measure of care to the appropriate custody of children left without supervision.

Principle 32

1. A detained person or his counsel shall be entitled at any time to take proceedings according to domestic law before a judicial or other authority to challenge the lawfulness of his detention in order to obtain his release without delay, if it is unlawful.

2. The proceedings referred to in paragraph 1 of the present principle shall be simple and expeditious and at no cost for detained persons without adequate means. The detaining authority shall produce without unreasonable delay the detained person before the reviewing authority.

Principle 33

1. A detained or imprisoned person or his counsel shall have the right to make a request or complaint regarding his treatment, in particular in case of torture or other cruel, inhuman or degrading treatment, to the authorities responsible for the administration of the place of detention and to higher authorities and, when necessary, to appropriate authorities vested with reviewing or remedial powers.

2. In those cases where neither the detained or imprisoned person nor his counsel has the possibility to exercise his rights under paragraph 1 of the present principle, a member of the family of

the detained or imprisoned person or any other person who has knowledge of the case may exercise such rights.

3. Confidentiality concerning the request or complaint shall be maintained if so requested by the complainant.

4. Every request or complaint shall be promptly dealt with and replied to without undue delay. If the request or complaint is rejected or, in case of inordinate delay, the complainant shall be entitled to bring it before a judicial or other authority. Neither the detained or imprisoned person nor any complainant under paragraph 1 of the present principle shall suffer prejudice for making a request or complaint.

Principle 34

Whenever the death or disappearance of a detained or imprisoned person occurs during his detention or imprisonment, an inquiry into the cause of death or disappearance shall be held by a judicial or other authority, either on its own

motion or at the instance of a member of the family of such a person or any person who has knowledge of the case. When circumstances so warrant, such an inquiry shall be held on the same procedural basis whenever the death or disappearance occurs shortly after the termination of the detention or imprisonment. The findings of such inquiry or a report thereon shall be made available upon request, unless doing so would jeopardize an ongoing criminal investigation.

Principle 35

1. Damage incurred because of acts or omissions by a public official contrary to the rights contained in these principles shall be compensated according to the applicable rules on liability provided by domestic law.

2. Information required to be recorded under these principles shall be available in accordance with procedures provided by domestic law for use in claiming compensation under the present principle.

Principle 36

1. A detained person suspected of or charged with a criminal offence shall be presumed innocent and shall be treated as such until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.

2. The arrest or detention of such a person pending investigation and trial shall be carried out only for the purposes of the administration of justice on grounds and under conditions and procedures specified by law. The imposition of restrictions upon such a person which are not strictly required for the purpose of the detention or to prevent hindrance to the process of investigation or the administration of justice, or for the maintenance of security and good order in the place of detention shall be forbidden.

Principle 37

A person detained on a criminal charge shall be brought before a judicial or other authority

provided by law promptly after his arrest. Such authority shall decide without delay upon the lawfulness and necessity of detention. No person may be kept under detention pending investigation or trial except upon the written order of such an authority. A detained person shall, when brought before such an authority, have the right to make a statement on the treatment received by him while in custody.

Principle 38

A person detained on a criminal charge shall be entitled to trial within a reasonable time or to release pending trial.

Principle 39

Except in special cases provided for by law, a person detained on a criminal charge shall be entitled, unless a judicial or other authority decides otherwise in the interest of the administration of justice, to release pending trial subject to the conditions that may be imposed in

accordance with the law. Such authority shall keep the necessity of detention under review.

Code of Conduct for Law Enforcement Officials Adopted by General Assembly resolution 34/169 of 17 December 1979 may be summarised for better appreciation

Article 1

Law enforcement officials shall at all times fulfill the duty imposed upon them by law, by serving the community and by protecting all persons against illegal acts, consistent with the high degree of responsibility required by their profession.

Article 2

In the performance of their duty, law enforcement officials shall respect and protect human dignity and maintain and uphold the human rights of all persons.

Article 3

Law enforcement officials may use force only when strictly necessary and to the extent required for the performance of their duty.

Article 4

Matters of a confidential nature in the possession of law enforcement officials shall be kept

confidential, unless the performance of duty or the needs of justice strictly require otherwise.

Article 5

No law enforcement official may inflict, instigate or tolerate any act of torture or other cruel, inhuman or degrading treatment or punishment, nor may any law enforcement official invoke superior orders or exceptional circumstances such as a state of war or a threat of war, a threat to national security, internal political instability or any other public emergency as a justification of torture or other cruel, inhuman or degrading treatment or punishment.

Article 6

Law enforcement officials shall ensure the full protection of the health of persons in their custody and, in particular, shall take immediate action to secure medical attention whenever required.

Article 7

Law enforcement officials shall not commit any act of corruption. They shall also rigorously oppose and combat all such acts.

Article 8

Law enforcement officials shall respect the law and the present Code. They shall also, to the best of their capability, prevent and rigorously oppose any violations of them.

Law enforcement officials who have reason to believe that a violation of the present Code has occurred or is about to occur shall report the matter to their superior authorities and, where necessary, to other appropriate authorities or organs vested with reviewing or remedial power.

International Covenant on Civil and Political Rights

Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966
entry into force 23 March 1976, in accordance with Article 49

PART I

Article 1

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

Article 3

The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant.

Article 6

1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgment rendered by a competent court.

3. When deprivation of life constitutes the crime of genocide, it is understood that nothing in this article shall authorize any State Party to the present Covenant to derogate in any way from any obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide.

4. .....

5. .....

6. .....

Article 7

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his

free consent to medical or scientific experimentation.

Article 9

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.

3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgment.

4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings

before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

Article 10

1. All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

2.(a) Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvict persons;

(b) Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication.

3. The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status.

Article 14

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgment rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: (a)

To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

(b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

(c) To be tried without undue delay;

(d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;

(e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;

(g) Not to be compelled to testify against himself or to confess guilt.

4. In the case of juvenile persons, the procedure shall be such which will take account of their age and the desirability of promoting their rehabilitation.

5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

Article 15

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.

2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.

Article 17

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

2. Everyone has the right to the protection of the law against such interference or attacks.

Article 18

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.

3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

Article 19

1. Everyone shall have the right to hold opinions without interference.

2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others;

(b) For the protection of national security or of public order, or of public health or morals.

Article 21

The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic

society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others.

Article 22

1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.

2. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.

3. Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or to

apply the law in such a manner as to prejudice, the guarantees provided for in that Convention.

Article 24

1. Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.

2. Every child shall be registered immediately after birth and shall have a name.

3. Every child has the right to acquire a nationality.

Article 25

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

(a) To take part in the conduct of public affairs, directly or through freely chosen representatives;

(b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot,

guaranteeing the free expression of the will of the electors;

(c) To have access, on general terms of equality, to public service in his country.

Article 26

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 27

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.

Provisions of Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment which is shortly called CAT convention 1984 may be

stated hereunder for better understanding intricate issues raised in this case.

Article 1

1. For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

2. This article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application.

Article 2

1. Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.

2. No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.

3. An order from a superior officer or a public authority may not be invoked as a justification of torture.

Article 4

1. Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture.

2. Each State Party shall make these offences punishable by appropriate penalties which take into account their grave nature.

Article 8

1. The offences referred to in article 4 shall be deemed to be included as extraditable offences in any extradition treaty existing between States Parties. States Parties undertake to include

such offences as extraditable offences in every extradition treaty to be concluded between them.

2. If a State Party which makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, it may consider this Convention as the legal basis for extradition in respect of such offences. Extradition shall be subject to the other conditions provided by the law of the requested State.

3. States Parties which do not make extradition conditional on the existence of a treaty shall recognize such offences as extraditable offences between themselves subject to the conditions provided by the law of the requested State.

4. Such offences shall be treated, for the purpose of extradition between States Parties, as if they had been committed not only in the place in which they occurred but also in the territories of the States required to establish their jurisdiction in accordance with article 5, paragraph 1.

Article 10

1. Each State Party shall ensure that education and information regarding the prohibition

against torture are fully included in the training of law enforcement personnel, civil or military, medical personnel, public officials and other persons who may be involved in the custody, interrogation or treatment of any individual subjected to any form of arrest, detention or imprisonment.

2. Each State Party shall include this prohibition in the rules or instructions issued in regard to the duties and functions of any such persons.

Article 11

Each State Party shall keep under systematic review interrogation rules, instructions, methods and practices as well as arrangements for the custody and treatment of persons subjected to any form of arrest, detention or imprisonment in any territory under its jurisdiction, with a view to preventing any cases of torture.

Article 12

Each State Party shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction.

Article 13

Each State Party shall ensure that any individual who alleges he has been subjected to torture in any territory under its jurisdiction has the right to complain to, and to have his case promptly and impartially examined by, its competent authorities. Steps shall be taken to ensure that the complainant and witnesses are protected against all ill-treatment or intimidation as a consequence of his complaint or any evidence given.

Article 14

1. Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependents shall be entitled to compensation.

2. Nothing in this article shall affect any right of the victim or other persons to compensation which may exist under national law.

Article 15

Each State Party shall ensure that any statement which is established to have been made as

a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made.

Article 16

1. Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. In particular, the obligations contained in articles 10, 11, 12 and 13 shall apply with the substitution for references to torture of references to other forms of cruel, inhuman or degrading treatment or punishment.

2. The provisions of this Convention are without prejudice to the provisions of any other international instrument or national law which prohibits cruel, inhuman or degrading treatment or punishment or which relates to extradition or expulsion.

PART II

Article 17

1. There shall be established a Committee against Torture (hereinafter referred to as the Committee) which shall carry out the functions hereinafter provided. The Committee shall consist of ten experts of high moral standing and recognized competence in the field of human rights, who shall serve in their personal capacity. The experts shall be elected by the States Parties, consideration being given to equitable geographical distribution and to the usefulness of the participation of some persons having legal experience.

2. The members of the Committee shall be elected by secret ballot from a list of persons nominated by States Parties. Each State Party may nominate one person from among its own nationals. States Parties shall bear in mind the usefulness of nominating persons who are also members of the Human Rights Committee established under the International Covenant on Civil and Political Rights and who are willing to serve on the Committee against Torture.

3. Elections of the members of the Committee shall be held at biennial meetings of States Parties convened by the Secretary-General of the United Nations. At those meetings, for which two thirds of

the States Parties shall constitute a quorum, the persons elected to the Committee shall be those who obtain the largest number of votes and an absolute majority of the votes of the representatives of States Parties present and voting.

4. The initial election shall be held no later than six months after the date of the entry into force of this Convention. At least four months before the date of each election, the Secretary-General of the United Nations shall address a letter to the States Parties inviting them to submit their nominations within three months. The Secretary-General shall prepare a list in alphabetical order of all persons thus nominated, indicating the States Parties which have nominated them, and shall submit it to the States Parties.

5. The members of the Committee shall be elected for a term of four years. They shall be eligible for re-election if re-nominated. However, the term of five of the members elected at the first election shall expire at the end of two years; immediately after the first election the names of these five members shall be chosen by lot by the chairman of the meeting referred to in paragraph 3 of this article.

6. If a member of the Committee dies or resigns or for any other cause can no longer perform his Committee duties, the State Party which nominated him shall appoint another expert from among its nationals to serve for the remainder of his term, subject to the approval of the majority of the States Parties. The approval shall be considered given unless half or more of the States Parties respond negatively within six weeks after having been informed by the Secretary-General of the United Nations of the proposed appointment.

7. States Parties shall be responsible for the expenses of the members of the Committee while they are in performance of Committee duties.

Laws Safeguarding Human Rights as per constitution of the People's Republic of Bangladesh may be stated below for making the complicated issues crystal clear

Articles 7, 26, 27, 28, 29, 30, 31, 32, 33, 35, 37 and 39 are as under:

"7. (1) All powers in the Republic belong to the people, and their exercise on behalf of the people shall be effected only under, and by the authority of, this Constitution.

(2) This Constitution is, as the solemn expression of the will of the people, the supreme law of the Republic, and if any other law is inconsistent with this Constitution that other law shall, to the extent of the inconsistency, be void.

26. (1) All existing law inconsistent with the provisions of this Part shall, to the extent of such inconsistency, become void on the commencement of this Constitution.

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

(3) Nothing in this article shall apply to any amendment of this Constitution made under article 142.

27. All citizens are equal before law and are entitled to equal protection of law.

28. (1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex or place of birth.

(2) Women shall have equal rights with men in all spheres of the State and of public life.

(3) No citizen shall, on grounds only of religion, race, caste, sex or place of birth be subjected to any disability, liability, restriction or condition with regard to access to any place of public entertainment or resort, or admission to any educational institution.

(4) Nothing in this article shall prevent the State from making special provision in favour of women or children or for the advancement of any backward section of citizens.

29. (1) There shall be equality of opportunity for all citizens in respect of employment or office in the service of the Republic.

(2) No citizen shall, on grounds only of religion, race, caste, sex or place of birth, be ineligible for, or discriminated against in respect of, any employment or office in the service of the Republic.

(3) Nothing in this article shall prevent the State from –

(a) making special provision in favour of any backward section of citizens for the purpose of securing their adequate representation in the service of the Republic;

(b) giving effect to any law which makes provision for reserving appointments relating to any religious or denominational institution to persons of that religion or denomination;

(c) reserving for members of one sex any class of employment or office on

the ground that it is considered by its nature to be unsuited to members of the opposite sex.

30. No citizen shall, without the prior approval of the President, accept any title, honour, award or decoration from any foreign state.

31. To enjoy the protection of the law, and to be treated in accordance with law, and only in accordance with law, is the inalienable right of every citizen, wherever he may be, and of every other person for the time being within Bangladesh, and in particular no action detrimental to the life, liberty, body, reputation or property of any person shall be taken except in accordance with law.

32. No person shall be deprived of life or personal liberty save in accordance with law.

33. (1) No person who is arrested shall be detained in custody without being informed, as

soon as may be, of the grounds for such arrest, nor shall he be denied the right to consult and be defended by a legal practitioner of his choice.

(2) Every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of twenty four hours of such arrest, excluding the time necessary for the journey from the place of arrest to the Court of the magistrate, and no such person shall be detained in custody beyond the said period without the authority of a magistrate.

(3) Nothing in clauses (1) and (2) shall apply to any person–

(a) who for the time being is an enemy alien; or

(b) who is arrested or detained under any law providing for preventive detention.

(4) No law providing for preventive detention shall authorise the detention of a person for a period exceeding six months unless an Advisory Board consisting of three persons, of whom two shall be persons who are, or have been, or are qualified to be appointed as, Judges of the Supreme Court and the other shall be a person who is a senior officer in the service of the Republic, has, after affording him an opportunity of being heard in person, reported before the expiration of the said period of six months that there is, in its opinion, sufficient cause for such detention.

(5) When any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, as soon as may be, communicate to such person the grounds on which the order has been made, and shall

afford him the earliest opportunity of making a representation against the order:

Provided that the authority making any such order may refuse to disclose facts which such authority considers to be against the public interest to disclose.

(6) Parliament may by law prescribe the procedure to be followed by an Advisory Board in an inquiry under clause (4).

35. (1) No person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than, or different from, that which might have been inflicted under the law in force at the time of the commission of the offence.

(2) No person shall be prosecuted and punished for the same offence more than once.

(3) Every person accused of a criminal offence shall have the right to a speedy and public trial by an independent and impartial Court or tribunal established by law.

(4) No person accused of any offence shall be compelled to be a witness against himself.

(5) No person shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment.

(6) Nothing in clause (3) or clause (5) shall affect the operation of any existing law which prescribes any punishment or procedure for trial.

37. Every citizen shall have the right to assemble and to participate in public meetings and processions peacefully and without arms, subject to any reasonable restrictions imposed by law in the interests of public order or public health.

39. (1) Freedom of thought and conscience is guaranteed.

(2) Subject to any reasonable restrictions imposed by law in the interests of the security of the State, friendly relations with foreign states, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence–

(a) the right of every citizen to freedom of speech and expression; and

(b) freedom of the press, are guaranteed."

Almost all international safeguards on unlawful detention, torture, violation of fundamental rights, protection of human rights and dignity are recognised in Part III of our constitution. These fundamental rights are not absolute. There are some restrictions and limitations. Some of the rights may be harmful if there is free exercise of such rights by one may be destructive of similar rights of

others and such fundamental rights would be a hindrance to governmental measures for the welfare of the community. But as regards the life, liberty, body, regulation, dignity and property there cannot be any limitation except by or in accordance with law. 'Life' within the meaning of article 31 means something more than animal existence. (*Munn v. People of Illinois, 94 US 113.*) It includes the right to live consistently with human dignity and decency. (*Vikram v. Bihar, AIR 1988 S.C 1782*). Liberty signifies the right of an individual to be free in the enjoyment of all his faculties. No right is so basic and fundamental as the right to life and personal liberty and exercise of all other rights is dependent on the existence of the right to life and liberty.

We have reproduced the debate of the Constituent Assembly before the adoption of the constitution with a view to showing that the framers of the constitution intended application of a

stricter scrutiny of reasonableness and maintenance of the rule of law. A law providing for deprivation of life and personal liberty must be objectively reasonable and the court will examine whether in the opinion of a prudent man the law is reasonable having regard to the compelling and not merely legitimate, governmental interest. Except for the security of the State or the security of the ordered society deprivation of life and liberty cannot be restricted. A law providing for deprivation of personal liberty must subserve a compelling State interest and if the mischief sought to be remedied can be remedied by any other reasonable means, deprivation of personal liberty will be unreasonable in terms of article 32.

নির্যাতন এবং হেফাজতে মৃত্যু (নিবারণ) আইন, ২০১৩

In the definition clause the word নির্যাতন means suffering physical or mental torture-

(ক) কোন ব্যক্তি বা অপর কোনো ব্যক্তির নিকট হইতে তথ্য অথবা স্বীকারোক্তি আদায়ে;

(খ) সন্দেহভাজন অথবা অপরাধী কোনো ব্যক্তিকে শাস্তি প্রদানে;

(গ) কোনো ব্যক্তি অথবা তাহার মাধ্যমে অপর কোনো ব্যক্তিকে ভয়ভীতি দেখানো ;

(ঘ) বৈষম্যের ভিত্তিতে কারো প্ররোচনা বা উস্কানি, কারো সম্মতিক্রমে অথবা নিজ ক্ষমতাবলে কোনো সরকারী কর্মকর্তা অথবা সরকারি ক্ষমতাবলে-

The expression হেফাজতে মৃত্যু means-হেফাজতে মৃত্যু অর্থ সরকারি কোনো কর্মকর্তার হেফাজতে কোনো ব্যক্তির মৃত্যু; ইহাছাড়াও হেফাজতে মৃত্যু বলিতে অবৈধ আটকাদেশ, আইন প্রয়োগকারী সংস্থা কর্তৃক গ্রেপ্তারকালে কোনো ব্যক্তির মৃত্যুকেও নির্দেশ করিবে; কোনো মামলায় সাক্ষী হউক বা না হউক জিজ্ঞাসবাদকালে মৃত্যুও হেফাজতে মৃত্যুর অন্তর্ভুক্ত হইবে।

A non-obstante clause has been provided in section 4 of the Ain providing that notwithstanding anything contained in the court if any person makes a complaint relating to torture the court at once record his statement-

ক) তাৎক্ষণিকভাবে ঐ ব্যক্তির বিবৃতি লিপিবদ্ধ করিবেন;

খ) একজন রেজিস্টার্ড চিকিৎসক দ্বারা অবিলম্বে তাহার দেহ পরীক্ষার আদেশ দিবেন;

গ) অভিযোগকারী মহিলা হইলে রেজিস্টার্ড মহিলা চিকিৎসক দ্বারা পরীক্ষা করিবার ব্যবস্থা করিবেন।

২) চিকিৎসক অভিযোগকারীর ব্যক্তির দেহের জখম ও নির্যাতনের চিহ্ন এবং নির্যাতনের সম্ভাব্য সময় উল্লেখপূর্বক ২৪ ঘন্টার মধ্যে উহার একটি রিপোর্ট তৈরী করিবেন।

৩) উপ-ধারা (২) অনুযায়ী সংশ্লিষ্ট চিকিৎসক প্রস্তুতকৃত রিপোর্টের একটি কপি অভিযোগকারী অথবা তাহার মনোনীত ব্যক্তিকে এবং আদালতে পেশ করিবেন।

৪) চিকিৎসক যদি এমন পরামর্শ দেন যে পরীক্ষাকৃত ব্যক্তির চিকিৎসা প্রয়োজন তাহা হইলে আদালত ঐ ব্যক্তিকে হাসাপতালে ভর্তি করিবার নির্দেশ প্রদান করিবেন।

Besides the court will direct to examine the detainee bay a registered physician. The physician shall prepare a report within twenty for hours specifying the time and the injury on the person, and shall hand over a copy to the victim and another to be submitted in court. These requirements are not charity but for taking legal action against the Police Officer in accordance with the Ain. Previously there was no safeguard of a detainee but now it is an offence punishable under the Ain. The court should not take such violation of human rights lightly and no leniency should be shown to such Officer.

Section 5 provides the procedure for filing the case, section 9 has provided that the provisions of the Code shall be applicable for lodging a complaint, inquiry and trial of the cases. Though there is a provision for security of the person

making complaint as provided in section 11, no such security is given to any victim as yet. Section 12 is very relevant which provides:-

‘এই আইনের অধীনে কৃত কোন অপরাধ যুদ্ধাবস্থা, যুদ্ধের হুমকি, আভ্যন্তরীণ রাজনৈতিক অস্থিতিশীলতা অথবা জরুরি অবস্থায়; অথবা উর্ধ্বতন কর্মকর্তা বা সরকারি কর্তৃপক্ষের আদেশে করা হইয়াছে এইরূপ অজুহাত অগ্রহণযোগ্য হইবে।’

It says if any person commits any offence under the said Ain during the period of preparation of war, threat of war, internal political stability, or emergency or orders of superior authority or government shall not be acceptable. The court is under no obligation to accept any sort of excuse and the offender shall be dealt with according to law. This provision is very important but practically we find no application of this section. Section 15 provides the punishment which shall not be less than five years and the maximum sentence is imprisonment for life with fine.

This is one of the finest piece of legislation so far promulgated after the independence of the

country. It reflects the aims, aspirations and objects of our Founding Fathers while framing the constitution. By this law the safeguards of human dignity, personal liberty, undue harassment and torture of a detainee in the hands of law enforcing agency, deprivation life and liberty, honour and dignity, and also payment of compensation to the victim's family has been protected. It is in conformity with the international treaties particularly 'Code of Conduct of Law Enforcement Officials' adopted by the General Assembly Resolution dated 17th December, 1979. The Ain has been promulgated in consonance with the said Resolution and also in accordance with article 9 of 'International Covenant on Civil and Political Rights' adopted by resolution No.2200A (XXI) dated 16th December, 1966. Now the question is its application in true letters and spirit. It is only the Magistrates who can ensure its enforceability and see that this piece of legislation does not

remain in the statute only. The Magistrates shall not remain as silent spectator whenever they find infringement of this law and shall take legal steps against errant officers.

Legal Points

The first question to be considered is whether the High Court Division has illegally presumed the misuse of power by the police while using the power under sections 54 and 167 of the Code.

Sections 54, 60, 61, 167 and 176 of the Code are relevant for our consideration which read as follows:

"54.(1) Any police-officer may, without an order from a Magistrate and without a warrant, arrest-

firstly , any person who has been concerned in any cognizable offence or against whom a reasonable complaint has been made or credible information has been received, or a reasonable suspicion exists of his having been so concerned;

secondly, any person having in his possession without lawful excuse, the burden of proving which excuse shall lie on such person, any implement of house breaking;

thirdly, any person who has been proclaimed as an offender either under this Code or by order of the Government;

fourthly, any person in whose possession anything is found which may reasonably be suspected to be stolen property and who may reasonably be suspected of having committed an offence with reference to such thing;

fifthly, any person who obstructs a police-officer while in the execution of his duty, or who has escaped, or attempts to escape, from lawful custody;

sixthly, any person reasonably suspected of being a deserter from the armed forces of Bangladesh;

seventhly , any person who has been concerned in, or against whom a reasonable complaint has been made or credible information has been received or a

reasonable suspicion exists of his having been concerned in, any act committed at any place out of Bangladesh, which, if committed in Bangladesh, would have been punishable as an offence, and for which he is, under any law relating to extradition or under the Fugitive Offenders Act, 1881, or otherwise, liable to be apprehended or detained in custody in Bangladesh;

eighthly , any released convict committing a breach of any rule made under section 565, sub-section (3);

ninthly, any person for whose arrest a requisition has been received from another police-officer, provided that the requisition specifies the person to be arrested and the offence or other cause for which the arrest is to be made and it appears therefrom that the person might lawfully be arrested without a warrant by the officer who issued the requisition.

This section gives the police wide powers of arresting persons without warrant. It is however not

a matter of caprice, limited only by the police officers' own view as to what persons they may arrest without warrant. Their powers are strictly defined by the Code, and being an encroachment on the liberty of the subject, an arrest purporting to be under the section would be illegal unless the circumstances specified in the various clauses of the section exist. Where a police officer purported to act under a warrant which was found to be invalid and there was nothing to show that he proceeded under this section and the arrest could not be supported under this section.

A police officer's power to arrest under this section is discretionary and notwithstanding the existence of the conditions specified in the section, it may be desirable in the circumstances of the particular case to simply make a report to the Magistrate instead of arresting the suspected persons.

A police officer can act under clause one only when the offence for which a person is to be arrested is a cognizable offence. Such person, must, as a fact, have been concerned in such offence or there must have been a reasonable complaint made or credible information received that he has been so concerned. If the person arrested is a child under 9 years of age, who cannot under section 82 of the Penal Code commit an offence, the arrest is illegal. Where, a complaint is made to a police officer of the commission of a cognizable offence, but there are circumstances in the case which lead him to suspect the information, he should refrain from arresting persons of respectable position and leave the complainant to go to Magistrate and convince him that the information justifies the serious step of the issue of warrants of arrest.

There was no provision in the Codes of 1861 and 1872, enabling an arrest without warrant on credible information as to the person to be arrested being

concerned in a cognizable offence. Such a provision was introduced for the first time in the Code of 1882. The words “credible information” include any information which, in the judgment of the officer to whom it is given appears entitled to credit in the particular instance. It need not be sworn information. The words “credible” and “reasonable” have reference to the mind of the person receiving the information. A bare assertion without anything more cannot form the material for the exercise of an independent judgment and will not therefore amount to “credible information”. The “reasonable suspicion” and “credible information” must relate to definite averments which must be considered by the police officer himself before he arrests a person under this section.

A complaint of a cognizable offence recorded by a Magistrate and sent by him to the police for investigation and report is sufficient information justifying arrest under section 54 of the Code.

Similarly, information that a warrant of arrest has been issued against a person in respect of a cognizable offence, may justify action being taken under the said section. Where, from a report of a Chowkider that certain persons were dacoits the police officer called them to surrender, but the latter resisted and fired shots at the officer, the latter was justified in arresting those persons.

Where a police officer suspecting that certain pieces of cloth which a man was carrying early morning, was stolen property, went to him and questioned him and having received unsatisfactory answers, arrested him, he was entitled to arrest him because reasonable suspicion exists of his being concerned of a cognizable offence. Where a person was found armed lurking at midnight in a village inhabited by persons well known to the police as professional dacoits, there was a reasonable suspicion against the person of his being concerned in a cognizable offence. But this does not mean that

the police are limited only by their own discretion as to what persons they may arrest without warrant. Their powers in this respect are strictly defined by the Code. In order to act under the first clause, there must be a reasonable complaint or reasonable suspicion of the person to be arrested having been concerned in a cognizable offence. What is a 'reasonable' complaint or suspicion must depend upon the circumstances of each particular case; but it should be at least founded on some definite fact tending to throw suspicion on the person arrested, and not on a mere vague surmise.

Section 60 of the Code states that a police-officer making an arrest without warrant shall, without unnecessary delay and subject to the provisions herein contained as to bail, take or send the person arrested before a Magistrate having jurisdiction in the case, or before the officer in charge of a police-station.

Section 61 of the Code states that no police-officer shall detain in custody a person arrested without warrant for a longer period than under all the circumstances of the case is reasonable, and such period shall not, in the absence of a special order of a Magistrate under section 167, exceed twenty-four hours exclusive of the time necessary for the journey from the place of arrest to the Magistrate's Court.

These provisions of the above two sections have been reproduced in article 33 of the constitution. The framers were conscious that despite such safeguards are ensured, this provision should be retained as integral part of fundamental rights. So the police officers must not deprive of the fundamental rights recognised to a citizen.

Section 167(1) of the Code provides that whenever any person is arrested and detained in custody, and it appears that the investigation cannot be completed within the period of twenty-four

hours fixed by section 61, and there are grounds for believing that the accusation or information is well-founded, the officer in charge of the police-station or the police-officer making the investigation if he is not below the rank of sub-inspector shall forthwith transmit to the nearest Judicial Magistrate a copy of the entries in the diary hereinafter prescribed relating to the case, and shall at the same time forward the accused to such Magistrate.

(2) The Magistrate to whom an accused person is forwarded under this section may, whether he has or has no jurisdiction to try the case from time to time authorize the detention of the accused in such custody as such Magistrate thinks fit, for a term not exceeding fifteen days in the whole. If he has no jurisdiction to try the case or send it for trial, and considers further detention unnecessary, he may order the accused to be forwarded to a Magistrate having such jurisdiction:

Provided that no Magistrate of the third class, and no Magistrate of the second class not specially empowered in this behalf by the Government shall authorize detention in the custody of the police.

(3) A Magistrate authorizing under this section detention in the custody of the police shall record his reasons for so doing.

(4) If such order is given by a Magistrate other than the Chief Metropolitan Magistrate or the Chief Judicial Magistrate, he shall forward a copy of his order, with his reasons for making it to the Chief Metropolitan Magistrate or to the Chief Judicial Magistrate to whom he is subordinate.

(4A) If such order is given by a Chief Metropolitan Magistrate or a Chief Judicial Magistrate, he shall forward a copy of his order, with reasons for making it to the Chief Metropolitan Sessions Judge or to the Sessions Judge to whom he is subordinate.

(5) If the investigation is not concluded within one hundred and twenty days from the date of receipt of the information relating to the commission of the offence or the order of the Magistrate for such investigation-

(a) the Magistrate empowered to take cognizance of such offence or making the order for investigation may, if the offence to which the investigation relates is not punishable with death, imprisonment for life or imprisonment exceeding ten years, release the accused on bail to the satisfaction of such Magistrate; and

(b) the Court of Session may, if the offence to which the investigation relates is punishable with death, imprisonment for life or imprisonment exceeding ten years, release the accused on bail to the satisfaction of such Court:

Provided that if an accused is not released on bail under this sub-section, the Magistrate or, as the case may be, the Court of Session shall record the reasons for it:

Provided further that in cases in which sanction of appropriate authority is required to be obtained under the provisions of the relevant law for prosecution of the accused, the time taken for obtaining such sanction shall be excluded from the period specified in this sub-section.

Explanation-The time taken for obtaining sanction shall commence from the day the case, with all necessary documents, is submitted for consideration of the appropriate authority and be deemed to end on the day of the receipt of the sanction order of the authority.]

(6)-(7A) [Omitted by section 2 of the Criminal Procedure (Second Amendment) Act, 1992 (Act No. XLII of 1992).]

(8) The provisions of sub-section (5) shall not apply to the investigation of an offence under section 400 or section 401 of the Penal Code, 1860 (Act XLV of 1860).]

The word "accused" used in section 167 and in sections 169, 170 and 173 of the Code denote the suspected offender who has not yet come under the cognizance of court. It does not rest in the discretion of the Police-officer to keep such person in custody where and as long as he pleases. Under no circumstances, can he be retained for more than 24 hours without the special leave of the Magistrate under this section. Any longer detention is absolutely unlawful. The accused should actually be sent before the Magistrate; the police cannot have the accused in their custody and merely write for and obtain the special leave under this section for such detention.

The Magistrate exercising his jurisdiction under section 167 performs judicial functions and

not executive power, and therefore, the Magistrate should not make any order on the asking of the police officer. The object of requiring an accused to be produced before a Magistrate is to enable him to see that a police remand or a judicial remand is necessary and also to enable the accused to make a representation he may wish to make. Since a remand order is judicial order, the Magistrate has to exercise this power in accordance with the well settled norms of making a judicial order. The norms are that he is to see as to whether there is report of cognizable offence and whether there are allegations constituting the offence which is cognizable. Non-disclosure of the grounds of satisfaction by a police officer should not be accepted. Whenever, a person is arrested by a police during investigation he is required to ascertain his complicity in respect of an cognizable offence.

The entries in the diary afford to the Magistrate the information upon which he can decide

whether or not he should authorise the detention of the accused person in custody or upon which he can form an opinion as to whether or not further detention is necessary. The longest period for which an accused can be ordered to be detained in police custody by one or more such orders is only 15 days. Where even within the 15 days time allowed under this section the investigation is not completed, the police may release the accused under section 169.

Sub-section (3) of section 167 requires that when the Magistrate authorises detention in police custody, he should record his reasons for so doing. The object of this provision is to see that the Magistrate takes the trouble to study the police diaries and to ascertain the actual conditions under which such detention is asked for. The law is jealous of the liberty of the subject and does not allow detention unless there is a legal sanction for it. So in every case where a detention in police custody is ordered the Magistrate should state his

reasons clearly. He should satisfy himself (a) that the accusation is well-founded, and (b) that the presence of the accused is necessary while the police investigation is being held. The mere fact that the police state that the presence of the accused is necessary to finish the investigation, is not sufficient to order detention. To order a detention of the accused in order to get from him a confessional statement or that he may be forced to give a clue to stolen property is not justified. Similarly it is improper to order detention in police custody on a mere expectation that time will show his guilt or for the reason that the accused promised to tell the truth or for verifying a confession recorded under section 164 or for the reason that though repeatedly asked the accused will not give any clue to the property.

Section 167 is supplementary to section 61 of the Code. These provisions have been provided with the object to see that the arrested person is

brought before a Magistrate within least possible delay in order to enable him to judge if such person has to be kept further in the police custody and also to enable such person to make representation in the matter. The section refers to the transmission of the case diary to the Magistrate along with the arrested person. The object of the production of the arrested person with a copy of the diary before a Magistrate within 24 hours fixed by section 61 when investigation cannot be completed within such period so that the Magistrate can take further course of action as contemplated under sub-section (2) of section 167. Secondly, the Magistrate is to see whether or not the arrest of the accused person has been made on the basis of a reasonable complaint or credible information has been received or a reasonable suspicion exist of the arrested persons having been concerned in any cognizable offence. Therefore, while making an order under sub-section (2) the Magistrate must be satisfied with the

requirements of sections 54 and 61 have been complied with otherwise the Magistrate is not bound to forward the accused either in the judicial custody or in the police custody.

The 'diary' referred to in sub-section (1) is a special diary referred to in section 172 of the Code read with regulation 68 of Police Regulations, Bengal. Regulation 68 provides the custody of case diary as under:

"68. Custody of case diaries.

(a) Only the following police officers may see case diaries:—

(i) the investigating officer;

(ii) the officer in-charge of the police-station:

(iii) any police officer superior to such officer in-charge;

(iv) the Court officer;

(v) the officer or clerk in the Superintendent‘s office specially authorized to deal with such diaries; and

(vi) any other officer authorized by the Superintendent.

(b) The Superintendent may authorize any person other than a police officer to see a case diary.

(c) Every police officer is responsible for the safe custody of any case diary which is in his possession.

(d) Every case diary shall be treated as confidential until the final disposal of the case, including the appeal, if any, or until the expiry of the appeal period.

(e) A case diary shall be kept under lock and key, and, when sent by one officer to another, whether by post or otherwise, shall be sent in a closed cover directed to the addressee by name and superscripted —Case diary. A case

diary sent to the Court office shall be addressed to the senior Court officer by name.

(f) A cover containing a case diary shall be opened only by the officer to whom it is addressed, except as prescribed in clauses (g) and (h) if such officer is absent, the date of receipt shall be stamped upon the cover by the officer left in charge during his absence and the cover shall be kept till his return or forwarded to him.

(g) Covers containing case diaries received in the Superintendent‘s office shall be opened as prescribed in regulation 1073, and made over directly to the officer or clerk specially authorized to deal with case diaries. Such officer or clerk shall take action under clause (i) and personally place the diaries before the Superintendent or other officer dealing with the case.

(h) Covers containing case diaries received in the Court office may be opened by any officer specially authorized in writing by the Court officer or by a superior officer.

(i) When an officer opens a cover containing a case diary, he shall stamp or write on the diary the date, if any, which has been stamped on the cover under clause (f) or, if there is no such date on the cover, the date on which he received it, and shall, after perusing the diary, file it with any other diaries relating to the same case which are in his possession.

A Circle Inspector and a Court officer shall stamp or write such date on every page of the diary and on every enclosure received with it, such as statements recorded under section 161, Code of Criminal Procedure, maps and the brief.

(j) Every Investigating Officer shall be provided with a deed box, and every Circle Inspector, Sub-divisional Police Officer and

Court officer with a suitable receptacle, in which to keep case diaries under lock and key.

Learned Attorney General submits that the High Court Division has not considered the Police Regulations of Bengal while making observations relating to case diary and submits that under the Police Regulations of Bengal the court or any other person is not authorized to look into the case diary in view of G.O. No.P.8C-5/60(III) 34PI, dated 16th January, 1961 which read as follows:

It has been said in PRB No.68(b) that a person not being a Police-Officer can also go through the case diary on being empowered by the Superintendent of Police Every Police Officer shall keep his case-diary in proper care and custody and shall consider it a very secret and confidential document till final disposal of an appeal or a revision pending before Courts.

The Code clearly provides that the police officer is bound to transmit to the nearest

Magistrate a copy of the entries in the diary in relation to the case, whenever, any person is arrested and detained in custody and produce before a Magistrate within a period of 24 hours.

A perusal of regulation 68 makes it clear that the diary should contain full unabridged statement of persons examined by the police so as to give the Magistrate a satisfactory and complete source of information which would enable him to decide whether or not the accused person should be detained in custody. Section 167(1) requires that copies of entries of the diary should be sent to the Magistrate with the object to prevent any abuse of power by the police officer.

The object of use of special diary under section 172 of the Code has been well explained by Edge,CJ. in Mannu, ILR 19 All 390 “the early stages of investigation which follows on the commission of a crime must necessarily in the vast majority of cases to be left to the police and until the

honesty, the capacity, the discretion and the judgment of the police can be thoroughly trusted, it is necessary for the protection of the public against criminals for the vindication of the law and for the protection of those who are charged with having committed a criminal offence that the Magistrate or Judge before whom the case is for investigation or for trial should have the means of ascertaining what was the information, true, false or misleading, which was obtained from day to day by the police officer who investigating the case and what were the lines of investigation upon which the police officer acted.'

Section 172 relates to the police diary made in respect of a case under inquiry or trial by the court which calls for it. It is incumbent upon a police officer who investigates the case under Chapter XIV to keep a diary as provided by section 172 and the omission to keep the diary deprives the

court of the very valuable assistance which such diary can give.

Section 44 of the Police Act and regulations Nos.263 and 264 of the Police Regulations of Bangal are relevant for our consideration which read as follows:

"263. (a) section 172, Code of Criminal Procedure, prescribes the case diary which an investigating officer is bound by law to keep of his proceedings in connection with the investigation of each case. The law requires the diary to show—

(i) the time at which the information reached him;

(ii) the time at which he began and closed his investigation;

(iii) the place or places visited by him.

(iv) a statement of the circumstances ascertained through his investigation.

Nothing which does not fall under one of the above heads need be entered, but all assistance

rendered by members of Union Parishads shall be noted. When the information given by a member of a Union Parishad is of a confidential nature, his name shall not be entered in the case diary, but the investigating officer shall communicate his name and the same time note briefly in the case diary that this has been done. This is an obsolete provision and in the present circumstances, the assistance as mentioned above is redundant because of political rivalry.

"Heads (iii) and (iv) shall be noted regarding the particulars of the house searched made with the names of witnesses in whose presence search was made (section 103 of the Code) by whom, at what hour, and in what place arrests were made; in what place property was found, and of what description; the facts ascertained; on what points further evidence is necessary, and what further steps are being taken with a view to completing the investigation. The diary shall mention every clue obtained even though

at the time it seems unprofitable, and every step taken by the investigating officer, but it shall be as concise as possible. It shall also contain the statements of witnesses recorded under section 161 of the Code."

"264.(a) Case diaries (B.P. Form No. 38) shall be written up as the enquiry progresses, and not at the end of each day. The hour of each entry and name of place at which written shall be given in the column on the extreme left. A note shall be made at the end of each diary of the place from, the hour at, and the means by which, it is dispatched. The place where the investigation officer halts for the night shall also be mentioned.

(b) A case diary shall be submitted in every case investigated. The diary relating to two or more days shall never be written on one sheet or dispatched together. Two or more cases should never be reported in one diary; a separate diary shall be submitted in each case daily until the enquiry is

completed. But it is not necessary to send one on any day on which the investigation, though pending, is not proceeded with.

(c) The diary shall be written in duplicate with carbon paper and at the close of the day the carbon copy, along with copies of any statement which may have been recorded under section 161 Code of Criminal Procedure and the list of property recovered under section 103 or 165 of that Code, shall be sent to the Circle Inspector. ..... When an investigation is controlled by an Inspector of the Criminal Investigation Department, the investigating officers shall forward the Circle Inspector's copy of the case diary through that officer who shall stamp or write on the diary the date of receipt by him and, after perusal, forward it to the Circle Inspector.

(d) In special report cases an extra carbon copy shall be prepared of the diaries, statements of witnesses recorded and lists of property recovered

and sent direct to the Superintendent and a further carbon copy to the (Sub-divisional) Police Officer where there is one.

(e) Each form shall have a separate printed number running consecutively throughout the book so that no two forms shall bear the same number. On the conclusion of an investigation the sheets of the original diary shall be removed from the book and filed together. Every file shall be docketed with the number, month and year of the first information report, the final form submitted and the name of the complainant, the accused and the investigating officer. The orders regarding preservation and destruction of these papers shall also be noted.

(f) When sending charge-sheet to the Court Officer, the investigating officer shall send all his original case diaries which shall be returned by the Court Officer on the case being finally disposed of (vide regulation 772).

(g) Case diaries shall be written in English by those officers competent to do so. Other officers shall write either diaries in the vernacular. Statements recorded under section 161 of the Code of Criminal Procedure, shall, however, always be recorded in the language of the witness. In the investigation officer is unable to do so, he should write it in English.

(h) Instructions for the custody and dispatch of case diaries are given in regulation 68.

By efflux of time, some of the provisions became outdated and it is difficult to say whether or not those provisions have been amended. If no amendment is made it is hoped that the police administration shall take step to update the Regulations. Case diary is a very important document for the investigation officers because it is written in every stage of the investigation of the case. The case diary is prepared by the responsible police officer in course of investigation. It helps the

senior police officers in supervising the conduct of the subordinate police officers in relation to any investigation. The case diary carries relevant entries about the time of investigation, place visited by the investigation officer, people met by him, people interrogated by him, evidence collected during investigation, time and place of meeting with the witnesses, time and place of meeting with the informant and so on.

The investigation officers do not have any discretion to take decision as to whether he will or will not record the events during investigation in the case diary. This is a compulsory statutory duty for every officer to record all the events in the case diary. This is the duty of the Officer-in-Charge to make sure that officers subordinate to him shall record necessary entries in the case diary properly. A case diary is an indicator how good and intellectual a police officer is.

It is however, to be noted that the case diary is a confidential document. So, it may not be claimed by the accused person at any time for the purpose of assessing and scrutinizing its entries. A criminal court is free to ask for the case diary at any stage of the proceedings. But, the case diary cannot be used as evidence in the trial.

A case diary is written as the investigation progresses. It is, therefore, obligatory to record the case diary every day when investigation is taken place. The writing up of the case diary must not be held up at the end of the day. It is always wise to write up the case diary in the place where investigation is conducted. The quick and immediate writing up of case diary helps recording every little detail of the investigation properly. This sort of case diary truly reflects the nitty-gritty of the police investigation. The case diary needs to be recorded as the case advances during the course of investigation.

In most cases, the police officers have developed a bad habit of writing case diary long after conclusion of investigation or after a few days of the investigation. It is not at all a promising approach when the police officers follow such procedure. This is a compulsory requirement for an investigation officer to record the case diary without any apparent failure. The case diary must refer to the proceedings in investigation of an alleged offence. Section 172 of the Code clearly states:-

> "Every police officer making an investigation under this chapter shall day by day enter his proceedings in the investigation in a diary....."

The language used is day by day and therefore, it is mandatory duty for such officer to record every day's progress of the investigation. The case diary must include entries of necessary information for each of the days when investigation is in

progress. Sometimes the investigation officers neglect the examination of the witnesses on the first day of the visit of the place of occurrence and after consuming days together record the statements in a single day. This process is totally unauthorised. In every case the investigation officers must record the statements of the witnesses present expeditiously on the first day or the following day if the FIR discloses the names of the witnesses who are acquainted with the facts of the case. Section 157 of the Evidence Act in an unambiguous language stated that the admissibility of a previous statement that should have been made before an authority legally competent to the fact 'at or about the time', when the fact to which the statement relates took place. The object of this section is to admit statements made at a time when the mind of the witness is still so connected with the events as to make it probable that his description of them is accurate. But if time for

reflection passes between the event and the subsequent statement it not only can be of little value but may be actually dangerous and as such statement can be easily brought into being.

Every detail in connection with the investigation into the offence must clearly be recorded without fail. It is to be noted that in section 172(1) of the Code the word “Shall” has been used which definitely indicates “mandatory”. So, a case diary must be recorded and all the details as mentioned in the section 172(1) of the Code must be recorded without any failure by the police officer in charge of investigation of an offence.

The entries of case diary may not be referred to the court at the instance of the accused person. The accused in such a case can seek permission to use the case diary to show contradiction in the prosecution case. The police officer, therefore, has scope to see the case diary during his examination-in-chief for the purpose of refreshing memory. If

the police officer thinks that his case diary can be helpful in giving appropriate testimony, he may request the court to permit him to use case diary for refreshing memory. Sections 159 – 161 of the Evidence Act deal with the extent to which, and mode in which, a witness may refer to a writing in order to refresh his memory while giving evidence. Section 159 of the Evidence Act may be quoted below to clear the point as under:

> *"159. A witness may, while under examination, refresh his memory by referring to any writing made by himself at the time of the transaction concerning which he is questioned, or so soon afterwards that the Court considers it likely that the transaction was at the time fresh in his memory. The witness may also refer to any such writing made by any other person, and read by the witness within the*

time aforesaid, if when he read it he knew it to be correct."

When witness may use copy of document to refresh memory – Whenever a witness may refresh his memory by reference to any document, he may, with the permission of the Court, refer to a copy of such document:

Provided the Court be satisfied that there is sufficient reason for the non-production of the original.

An expert may refresh his memory by reference to professional treatises."

Keeping case diary under safe custody is an important task. The case diary is the picture of the entire result of the investigation and other particulars regarding the topography of the place of occurrence, the probability of approach of the offender to the scene and the direction of retreating and the location of the probable witnesses etc. The activities of the police

investigation officer can very well be looked after by the senior police officers going through the records of the case diary.

When any person dies while in the custody of the police, the nearest Magistrate empowered to hold inquests shall, and, in any other case mentioned in section 174, clauses (a), (b) and (c) of sub-section (1), any Magistrate so empowered may hold an inquiry into the cause of death either instead of, or in addition to, the investigation held by the police-officer, and if he does so, he shall have all the powers in conducting it which he would have in holding an inquiry into an offence. The Magistrate holding such an inquiry shall record the evidence taken by him in connection therewith in any of the manners hereinafter prescribed according to the circumstances of the case.

Section 176 of the Code enables a Magistrate to hold inquiry into a suspicious death. The language used in this section does not depend merely upon the

opinion of the police officer but that there should be a further check by a Magistrate to hold an independent inquiry. The object of holding inquiry is to elucidate the facts of unnatural death before there is any reasonable suspicion of the commission of any offence and when such grounds exist, the inquiry comes under Ain of 2013.

The case referred to by *Mr. Murad Reza, Novva Das V. Secretary, Department of Municipal Administration and Water Supply, (2008) 8 SCC 42* is not at all applicable to the facts and circumstances of the instant case and we failed to understand why he has referred to this case. In that case the validity of sections 326-A to 326-J of the Chennai City Municipal Corporation Act, 1919 and the Chennai City Municipal Corporation (licensing of Hoardings and Levy and Collection of advertisement Tax) Rules, 2003 have been challenged. The High Court dismissed the writ petitions but a committee was constituted for identifying the places of historical importance

of aesthetic value and popular places of worship in and around the city of Chennai. The Supreme Court dismissed the appeals.

In the case of Sheikh Abdus Sabur, (supra) the appellant's nomination paper of a Union Parishad was rejected by the Returning Officer on the ground that he was disqualified from seeking election. His writ petition was dismissed. Leave was granted to consider the question whether section 7(2)(g) of the Union Parishad Ordinance is hit by the equality provision contained in article 27 of the constitution. This court dismissed the appeal. A.T.M. Afzal,J. while concurring his views added few words observing that "this court has (no) duty under the constitution to offer unsolicited advice as to what Parliament should or should not do. As long as the law enacted by it is within the bounce of the constitution it will be upheld by this court but if the law is otherwise open to criticism, it is for

the Parliament itself to respond in the manner it thinks best."

In that case the issue is whether the defaulters can be debarred in contesting the local election. In the context of the matter this court upheld the action. This case does not help the government. The observations of ATM Afzal, J. are not application in view of the fact that the High Court Division has not given any unsolicited suggestion/advice to the government in this case on the question of amendment of laws.

In the case of Shafiuddin Ahmed,(supra) the writ petition was filed challenging the promotions of the writ respondents on the ground that without consultation with the Public Service Commission in respect of the promotions, the constitutionality of the constitution of two committees for promotion, and the procedure and criteria for promotion followed by this committees and also the final notifications effecting promotions. The High Court

Division made the rule absolute. In this court on behalf of the writ petitioner the question raised was whether the terms and conditions of service of persons in the service of the Republic including the procedure and criteria of promotion have to be embodied in an enactment as provided in article 133 of the constitution and also whether in the absence of any law the vacuum can be filled up by executive order. This court on construction of article 133 observed that this provision is an enabling provision which confers certain power but does not impose any duty to legislate, and it is not obligatory for the Parliament to make laws, and therefore, the court cannot direct the Parliament to make laws nor is it obligatory on the part of the President to make Rules. We failed to understand why this case has been referred to. Similarly, the other cases referred to by the learned Additional Attorney General have no relevance at all.

As regards the unreported decision referred to by learned Attorney General, the case of Subramanian Swami, several writ petitions were filed in the Supreme Court on the ground that the right to freedom of speech and expression of an individual should not be controlled by the State by assuming power of reasonableness ingrained in the statutory provisions relating to criminal law and uphold ones reputation. It relates to justification to keep the provisions of the defamation in the criminal law. The Supreme Court after considering the authorities observed that before taking cognizance of such offences a heavy burden lies upon the Magistrate in matters of criminal defamation to scrutinize the complaint and must be satisfied that the ingredients of section 499 of the Code of Criminal Procedure are satisfied. However, the court was of the opinion that sections 499 and 500 of the Indian Penal Code and section 199 of the Code of Criminal Procedure are *intra vires* the constitution.

The vital issue to be decided in this case is whether the High Court Division is justified by issuing the directions and making the recommendations as mentioned above. Learned Attorney General raised a question that the judiciary cannot direct the Parliament to adopt legislative measures or to the President to frame Rules under the proviso to article 133 of the constitution. In *Secretary, Ministry of Finance, Government of Bangladesh v. Md. Masdar Hossain, 20 BLD(AD)104*, this court noticed that there were constitutional deviations and that the constitutional arrangements have been interfered with and altered by the Parliament as well as the government by issuing various orders in respect of the judicial service and that it further noticed that sub-paragraph (6) of paragraph 6 of the Forth Schedule of the constitution had not been implemented. Accordingly, this court observed "when Parliament and the executive, instead of implementing the provisions of Chapter II of Part VI

followed a different course not sanctioned by the constitution, the higher judiciary is within its jurisdiction to bring back the Parliament and the executive from constitutional derailment and give necessary directions to follow the constitutional course". In that case this court has given 12 guidelines to be followed by the government. The government has implemented almost all the guidelines leaving a few guidelines.

Similarly *the Supreme Court of Pakistan in Government of Sindh v. Sharaf Faridi, PLD 1994 SC 105* noticed inconsistencies in the provisions of the Code with the mandate contained in article 175 of Pakistan Constitution and directed the government to secure the separation of the judiciary from the executive and issued directions in the nature of adoption of legislative and executive measures. Pursuant thereto the government of Pakistan followed all the directions and separated the judiciary from the executive.

In *Kudrat-E-Elahi Panir v. Bangladesh, 44 DLR(AD)319*, some writ petitions were filed challenging the constitutional validity of the Bangladesh Local Government (Upazila Pairshad and Upazila Administration Reorganization) (Repeal) Ordinance, 1991 on the ground that this Ordinance was inconsistent with articles 9, 11, 59 and 60 of the constitution. Under this amendment the government abolished the Upazila Parishad. This court held that the abolition of the Upazial Parishad violates no provision of the Constitution. It, however, observed that –

> "Article 59 and 60 prescribe manner and method of establishing local government, its composition, powers and functions including power of local taxation, the plenary legislative power of Parliament to enact laws on local government is restricted *pro tanto*. The learned Attorney General submits that the plenary power still remains unaffected. I cannot conceive of a local government existing in terms of Articles 59 and 60 and another

> outside of it. That will make a mockery of Articles 59 and 60 and will be in direct conflict with Article 7(1) of the Constitution, namely, "All powers in the Republic belong to the people, and their exercise on behalf of the people shall be effected only under, and by the authority of, this Constitution". If Parliament has to pass a local government legislation, it has to conform to Articles 59 and 60 in the Constitution. Local government legislation became very much a subject matter of legislation within the terms of the Constitution. Parliament is not free to legislate on local government ignoring Articles 59 and 60."

In the case of *Khandaker Delwar Hossain v. Munshi Ahsan Kabir, Bangladesh*, the Constitution (Fifth Amendment) case, this court observed that the provisions of the constitution is the basis on which the vires of all other existing laws and those passed by the legislature as well as the actions of the executive, are to be judged by the Supreme Court under its power of judicial review. The Supreme

Court being the creation of the constitution and the Judges have taken oath to preserve, protect and defend the constitution, they are duty bound to declare and strike down any provision of law which is inconsistent with the constitution. In this regard this court approved the views taken by *the Supreme Court of Pakistan in State v. Zia-ur-Rahman, PLD 1973 SC 49*, *Kudrat-Elahi Panir v. Bangladesh (Supra)*, *Secretary, Ministry of Finance v. Masdar Hossain case (Supra)*.

In the case of *D.K. Basu v. State of W.B.*(supra) a letter has been written by the executive chairman of an organization addressing the Chief Justice of India drawing his attention to certain news items published in the news of the Telegraphs, the Statements and the Indian Express regarding deaths in police lock-ups and custody. The executive chairman after reproducing the news items submitted that it was imperative to examine the issue in depth and to develop "custody

jurisprudence" and formulate modalities for forwarding compensation to the victims and/or family members of the victims for atrocities of the deaths caused in police custody and to provide it for accountability of the officers concerned. It was also stated that efforts were often made to hush up the matter in lock-up deaths and thus crime goes unpunished and 'flourishes'. Considering the importance of the issue raised in the letter and being concerned by frequent complaints regarding custodial violence in police lock-up, the letter was treated as a writ petition by the Supreme Court and issued notice upon the Government of West Bengal. In that case the Supreme Court upon hearing the matter deemed it appropriate to issue the following requirements to be followed in all cases arrest or detention till legal provisions are made in that behalf as preventive measures:

1. "The police personnel carrying out the arrest and handling the interrogation of the arrestee

should bear accurate, visible and clear identification and name clear identification and name tags with their designations. The particulars of all such police personnel who handle interrogation of the arrestee must be recorded in a register.

2. That the police officer carrying out the arrest of the arrestee shall prepare a memo of arrest at the time of arrest and such memo shall be attested by at least one witness, who may either be a member of the family of the arrestee or a respectable person of the locality from where the arrest is made. It shall also be countersigned by the arrestee and shall contain the time and date of arrest.

3. A person who has been arrested or detained and is being held in custody in a police station or interrogation centre or other lock- up, shall be entitled to have one friend or relative or other person know to him or having interest in

his welfare being informed, as soon as practicable, that he has been arrested and is being detained at the particular place, unless the attesting witness of the memo of arrest is himself such a friend or a relative of the arrestee.

4. The time, place of arrest and venue of custody of an arrestee must be notified by the police where the next friend or relative of the arrestee lives outside the district or town through the Legal Aid Organisation in the District and the police station of the area concerned telegraphically within a period of 8 to 12 hours after the arrest.

5. The person arrested must be made aware of this right to have someone informed of his arrest or detention as soon as he is put under arrest or is detained.

6. An entry must be made in the diary at the place of detention regarding the arrest of the person

which shall also disclose the name of the next fried of the person who has been informed of the arrest and the names and particulars of the police officials in whose custody the arrestee is.

7. The arrestee should, where he so requests, be also examined at the time of his arrest and major and minor injuries, if any present on his/her body, must be recorded at that time. The "Inspection Memo" must be signed both by the arrestee and the police officer effecting the arrest and its copy provided to the arrestee and the police officer effecting the arrest and its copy provided to the arrestee.

8. The arrestee should be subjected to medical examination by a trained doctor every 48 hours during his detention in custody by a doctor on the panel of approved doctors appointed by Director, Health Services of the State or Union Territory concerned. Director, Health Services

should prepare such a penal for all tehsils and districts as well.

9. Copies of all the documents including the memo of arrest, referred to above, should be sent to the Magistrate for his record.

10. The arrestee may be permitted to meet his lawyer during interrogation, though not throughout the interrogation.

11. A police control room should be provided at all district and State headquarters, where information regarding the arrest and the place of custody of the arrestee shall be communicated by the officer causing the arrest, within 12 hours of effecting the arrest and at the police control room it should be displayed on a conspicuous notice board."

The Supreme Court thereupon forwarded the requirements to the Director General of Police and the Home Secretary of every State/Union Territory observing that it shall be “their obligation to

circulate the same to every police station under their charge and get the same notified in every police station at a conspicuous place. It would also be useful and serve larger interest to broadcast the *requirements* on All India Radio besides being shown on the national Network of Doordarshan". After the issuance of the guidelines, the State Governments and Union Territory issued the police officers to follow those requirements. It is reported that after such directions the police is now following them.

In *Vishaka v. State of Rajastan, AIR 1997 SC 3011*, the Supreme Court held as under:

> "The meaning and content of the fundamental rights guaranteed in the Constitution of India are of sufficient amplitude to encompass all the facts of gender equality including prevention of sexual harassment or abuse. Independence of judiciary forms a part of our constitutional scheme. The international conventions and norms are to be read into them

in the absence of enacted domestic law occupying the field when there is no inconsistency between them. It is now an accepted rule of judicial construction that regard must be had to international conventions and norms for construing domestic law when there is no inconsistency between them and there is a void in the domestic law. The High Court of Australia in Minister for *Immigration and Ethnic Affairs v. Teoh, 128 AIR 353*, has recognised the concept of legitimate expectation of its observance in the absence of a contrary legislative provision, even in the absence of a Bill of Rights in the Constitution of Australia."

It relates to an incident of brutal gang rape of a social worker in a village of Rajastan and over the incident criminal action was also taken. The writ petition was filed by certain social activists, NGOs with the aim of focusing attention towards this

social aberration, and to assist in finding suitable methods for realization of the true concept of 'gender equality' and to prevent sexual harassment of working women in all work places through judicial process, to fill the vacuum in existing legislation. The Supreme Court noticed that there was no adequate law to cover the issue, and therefore, it noticed the international conventions and norms observing that in the absence of law to cover the field there is no legal bar to follow the international convention and norms for construing the fundamental rights expressly guaranteed in the constitution, which embody the basic concept of gender equality in all spares of human activity. It was also noticed that any international convention not inconsistent with the fundamental rights and is in harmony with the sprit must be read into the provisions of articles 14, 15, 19 and 21 of the Indian Constitution.

In *Vineet Narain v. Union of India, (1998) 1 SCC 226*, the Supreme Court in a public interest litigation in which the question was whether it was within the domain of the judicial review and effective instrument for activating the investigative process which was under the control of the executives. The question raised in the matter was whether any judicial remedy is available in such a situation. A terrorist was arrested by Delhi police and consequent upon his interrogation, raids were conducted by the Central Bureau of Investigation (CBI) in the premises of one Surendra Kumar Join. The CBI seized foreign currency, diaries and other incriminating materials containing accounts of vast payments made to persons identified by police. The initials corresponded to the initials of various high ranking politicians. As nothing has been done in the matter of investigation a public interest litigation was filed. In the background of the case, the Supreme Court was of the view that by

virtue of article 141 which provides "the law declared by the Supreme Court shall be binding on all courts within the territory of India" read with Article 144 which provides that "all authorities, civil and judicial, in the territory of India shall act in aid of the Supreme Court", which provisions are in *pari materia* with articles 111 and 112 of our constitution, it is the duty of all authorities, civil and judicial in the territory of India to act in aid of the Supreme Court. Where there is inaction by the executive for whatever reason, the judiciary must step in, in exercise of its constitutional obligations to provide a solution till such time as the legislature acts to perform its role by enacting proper legislation to fill up the vacuum.

In that case the court noticed that a large number of cases without monitoring by the court the CBI formed opinion that no case was made out for the prosecution and did not file charge-sheet in those cases. This, according to the court, indicated that

the inaction of the CBI was unjustified. Accordingly, it directed that "a suitable machinery for prosecution of the cases filed in the court by the CBI is also essential to ensure discharge of its full responsibility by the CBI".

In *People's Union for Civil Liberties v. Union of India, 2003 (4)SCC 399*, a writ petition was filed challenging the validity of the Representation of the people (Amendment) Ordinance 2002. The court was of the view that the voters should know the bio-data of their 'would be rulers, law makers or destine makers of the nation.' The Supreme Court directed the Election Commission to call for information by affidavit from each candidates seeking election to Parliament or State Legislature on their personal antecedents as to whether the candidate was convicted, whether he was accused or any criminal case, the assets of the candidate, liabilities and the educational qualifications etc. Thereafter the President Promulgated an Ordinance. Before the writ

petition was disposed of the Ordinance was repealed by the government and the Representation of the peoples Act was amended by inserting a new section with retrospective effect. The court, thereupon, made the following guidelines:

(A) The legislature can remove the basis of a decision rendered by a competent court thereby rendering that decision ineffective but the legislature has no power to ask the instrumentalities of the State to disobey or disregard the decisions given by the court. A declaration that an order made by a Court of law is void is normally a part of the judicial function. The legislature cannot declare that decision rendered by the Court is not binding or is of no effect.

It is true that the legislature is entitled to change the law with retrospective effect which forms the basis

of a judicial decision. This exercise of power is subject to constitutional provision, therefore, it cannot enact a law which is violative of fundamental right.

(B) Section 33-B which provides that notwithstanding anything contained in the judgment of any court or directions issued by the Election Commission, no candidate shall be liable to disclose or furnish any such information in respect of his election which is not required to be disclosed or furnished under the Act or the rules made thereunder, is on the face of it beyond the legislative competence, as this Court has held that the voter has a fundamental right under Article 19(1) (a) to know the antecedents of a candidate for various reasons recorded in the earlier judgment as well as in this judgment.

.....

(C) .....

(D) The contention that as there is no specific fundamental right conferred on a voter by any statutory provision to know the antecedents of a candidate, the directions given by this Court are against the statutory provisions is, on the face of it, without any substance. In an election petition challenging the validity of an election of a particular candidate, the statutory provisions would govern respective rights of the parties. However, voters fundamental right to know the antecedents of a candidate is independent of statutory rights under the election law. A voter is first citizen of this country and apart from statutory rights he is having fundamental rights conferred by the Constitution. Members of a democratic society should be sufficiently informed so

that they may cast their votes intelligently in favour of persons who are to govern them. Right to vote would be meaningless unless the citizens are well informed about the antecedents of a candidate. There can be little doubt that exposure to public gaze and scrutiny is one of the surest means to cleanse our democratic governing system and to have competent legislatures.

(E) It is established that fundamental rights themselves have no fixed contents, most of them are empty vessels into which each generation must pour its content in the light of its experience. The attempt of the Court should be to expand the reach and ambit of the fundamental rights by process of judicial interpretation. During the last more than half a decade, it has been so done by this Court consistently. There

cannot be any distinction between the fundamental rights mentioned in Chapter III of the Constitution and the declaration of such rights on the basis of the judgments rendered by this Court.

Besides those cases, the Supreme Court of India in exercise of powers under article 142 formulated guidelines and gave directions in many cases in the similar manner. In *Erch Sam Kanga v. Union of India, W.P.No.2632 of 1978*, judgment delivered on 20.3.1979, it laid down certain guidelines relating to Emigration Act. In *Lakshmi Kanti Pandey v. Union of India, (1984) 2 SCC 244*, guidelines for adoption of minor children by foreigners were formulated. In *State of W.B. v. Sampat Lal, (1985) 1 SCC 317; K. Veeraswami v. Union of India, (1991) 3 SCC 655; Union Carbide Corporation v. Union of India, (1991) 4 SCC 584; Delhi Judicial Service Association v. State of Gujrat, (1991) 4 SCC 406; Delhi Development Authority v. Skipper Construction Co. Ltd., (1996) 4*

SCC 622 and Dinesh Trivedi v. Union of India, (1997) 4 SCC 306 laying down guidelines having the effect of law, requiring rigid compliance. This has become a constitutional jurisprudence in India and this exercise, it was viewed, was essential to fill the void in the absence of suitable legislation to cover the field.

From the above authorities it is now settled that the apex courts in appropriate cases issued directions, recommendations and guidelines if there is vacuum in the law until a suitable law is enacted to ensure that the constitutional and statutory safeguards of the citizens are protected. In pursuance of some guidelines, the Government of Bangladesh, India and Pakistan have implemented, and a new constitutional jurisprudence has developed in these countries. This court being the guardian of the constitution cannot keep blindfolded condition despite rampant violation of fundamental rights of the citizens. In view of the above, we find no

substance in the contention made by the learned Attorney General that in presence of specific provisions contained in sections 54 and 167 regarding the arrest and remand of an accused person the court cannot give any direction or guideline.

It was argued on behalf of the respondent that this court has a duty to uphold the rule of law and the constitutional safeguards on arrest and prevention of torture and ill-treatment of the suspected offenders. In this connection our attention has been drawn to articles 32, 33 and 35(5) of the constitution.

We have already discussed above exhaustively on the said issue and, therefore, they don’t require any repetition.

Article 32 is couched in the similar language of article 21 of the Indian Constitution. Article 22 of the Indian Constitution relates to protection of arrest and detention in certain cases. The Supreme Court of India dealing with a petition by a victim

who has been detained in police custody and his whereabouts could not be located, subsequently it was detected that he was detained by the police without producing before the Magistrate. The Supreme Court relying upon some previous decisions on the subject and on construction of articles 21 and 22 of the constitution held in *Jagindra Kumar v. State of U.P., (1994) 4 SCC 260* that the police officer must justify the arrest and detention in police lockup of a person and no arrest can be made in a routine manner on a mere allegation of commission of an offence. It would be prudent, it was observed, for a police officer in the interest of protection of the constitutional rights of a citizen and perhaps in his own interest that no arrest should be made without a reasonable satisfaction reached after some investigation as to the genuineness and bona fides of a complaint and a reasonable belief both as to the person’s complicity and even so as to the need to effect arrest. Denying a person of his liberty is

a serious matter. Accordingly, for effective enforcement of fundamental rights it issued the following requirements to be complied with whenever accused is arrested:

> "1. An arrested person being held in custody is entitled, if he so requests to have one friend, relative or other person who is known to him or likely to take an interest in his welfare told as far as is practicable that he has been arrested and where he is being detained.
>
> 2. The police officer shall inform the arrested person when he is brought to the police station of this right.
>
> 3. An entry shall be required to be made in the diary as to who was informed of the arrest. These protections from power must be held to flow from Articles 21 and 22(1) and enforced strictly."

In *Smt. Nandini Satpatty v. PL Dhani, AIR 1978 S.C. 1025*, the former Chief Minister of Orissa and one time Minister at national level. She was directed to appear at the police station, Cuttack for interrogation in connection with a case registered against her under the Prevention of Corruption Act in which the investigation was commenced against her son and others. During investigation she was interrogated with reference to a long string of questions, given to her in writing. . A Magistrate took cognizance of the offence and issued summons. Thereupon she moved a writ petition challenging the validity of the Magisterial proceedings. The question arose whether the very act of directing a woman to appear before the police station is in conformity with the provisions of section 160 of the Code. Another point was raised as to whether an accused is entitled to the sanctuary of silence of any offence and secondly, whether the bar against self-incrimination operate merely with

reference to a particular accusation in regard to which the police interrogates or does it extent also to other pending accusations outside the investigation which has led to the questioning. The court directed the appellant to answer all questions which do not materially incriminate her in the pending investigations or prosecutions. The Court however observed that-

> "The police officer shall not summon her (appellant) to the police station but examine her in terms of the proviso to S.160(1) of the Criminal Procedure Code."

In *Raj Narain v. Superintendent, Central Jail, New Delhi, AIR 1971 SC 178*, Raj Narain was put on detention. He challenged his detention on various grounds questioning the legality of his custody, remand order and detention. He did not pray for bail but he was not produced before the Magistrate after the order of detention. He also prayed for striking down certain sections of the Code as violative to

the constitution. The Supreme Court in exercise of powers under sections 61, 167 and 344 of the Code and article 22(2) of the constitution held that an order of remand will have to be passed in the presence of the accused, otherwise the order of remand to be passed by the Magistrate will be deemed to have been issued mechanically without having heard the detenu. If the accused is before the Magistrate when a remand order is being passed, he can make representation that no remand order should be passed and also oppose any move for a further remand. He may rely upon the inordinate delay that is being caused by the state in the matter and he can attempt to satisfy the court that no further remand should be allowed. It may be that an accused, on a former occasion may have declined to execute a bond for getting himself released; but on a later occasion when a further remand is being considered, the accused may have reconsidered the position and may be willing to execute bond in which case a

remand order will be totally unnecessary. The Court concluded its opinion as under:

> "............in cases where a person is sought to be proceeded against under Chapter VIII of the Criminal Procedure Code, it would be open to him to represent that circumstances have materially changed and a further remand has become unnecessary. Such an opportunity to make a representation is denied to a person concerned by his not being produced before the Magistrate. As the Magistrate has to apply his judicial mind, he himself can take note of all relevant circumstances when the person detained is produced before him and decide whether a further remand is necessary. All these opportunities will be denied to an accused person if he is not produced before the Magistrate or the Court when orders of remand are being passed."

Both the parties have relied upon the case of *Saifuzzaman (Md.) v. State, 56 DLR 324*. Facts of the case are that Liakat Sikder and Md. Rafiqual Islam, the president and vice president of Bangladesh Chatta League were arrested on 25th February, 2002 under section 54 of the Code when they were coming out of 'Sudha Sadan', the residential house of the president of Bangladesh Awami League Sheikh Hasina and put on detention. On a habeas-corpus petition moved on their behalf, the order of detention was declared without lawful authority by the High Court Division. Thereafter, they were shown arrested in 12 different cases one after another whenever they were enlarged on bail in one case. This process continued and this way they could not come out from the jail custody for a considerable time because of showing them arrested in one after another cases. Finding no other alternative, they moved another *habeas corpus* petition in the High Court Division (the present Chief Justice, as he was then). The

High Court Division noticed that the victims were shown arrested without producing them before the learned Magistrate and the Magistrates were passing mechanical orders on the asking of the police officers. The High Court Division on consideration of sections 54, 60, 61, 167, 344 and articles 27, 31, 32 and 33 quashed all the proceedings and gave the following directions:

(i) the police officer making the arrest of any person shall prepare a memorandum of arrest immediately after the arrest and such officer shall obtain the signature of the arrestee with the date and time of arrest in the said memorandum.

(ii) The police officer who arrested the person must intimate to a nearest relative of the arrestee and in the absence of the relative, to a friend to be suggested by the arrestee, as soon

as practicable but not later than 6(six) hours of such arrest notifying the time and place of arrest and the place of custody.

(iii) An entry must be made in the diary as to the ground of arrest and name of the person who informed the police to arrest the person or made the complaint along with his address and shall also disclose the names and particulars of the relative or the friend, as the case may be, to whom information is given about the arrest and the particulars of the police officer in whose custody the arrestee is staying.

(iv) Copies of all the documents including the memorandum of arrest, a copy of the information or complaint relating to the commission of cognizable

offence and a copy of the entries in the diary should be sent to the magistrate at the time of production of the arrestee for making the order of the magistrate under section 167 of the Code.

(v) If the arrested person is taken on police remand, he must be produced before the Magistrate after the expiry of the period of such remand and in no case he shall be sent to the judicial custody after the period of such remand without producing him before the Magistrate.

(vi) Registration of a case against the arrested person is sine-qua-non for seeking the detention of the arrestee either to the police custody or in the judicial custody under section 167(2) of the Code.

(vii) If a person is produced before a magistrate with a prayer for his detention in any custody, without producing a copy of the entries in the diary as per item no.(iv) above, the Magistrate shall release him in accordance with section 169 of the Code on taking a bond from him.

(viii) If a police officer seeks an arrested person to be shown arrested in a particular case who is already in custody, the Magistrate shall not allow such prayer unless the accused/arrestee is produced before him with a copy of the entries in the diary relating to such case.

(ix) On the fulfillments of the above conditions, if the investigation of the case cannot be concluded within 15 days of the detention of the accused under

section 167(2), the Magistrate having jurisdiction to take cognizance of the case or with the prior permission of the Judge or Tribunal having such power can send such accused person on remand under section 344 of the Code for a term not exceeding 15 days at a time.

(x) The Magistrate shall not make an order of detention of a person in the judicial custody if the police forwarding report discloses that the arrest has been made for the purpose of putting the arrestee in the preventive detention.

(xi) It shall be the duty of the Magistrate, before whom the accused person is produced, to satisfy that these requirements have been complied with before making any order relating

to such accused under section 167 of the Code."

In Joginder Kumar (supra) the Supreme Court of India issued instructions for compliance for protecting the dignity and fundamental rights of a citizen as under:

a) An arrested person being held in custody is entitled, if he so requests, to have one friend, relative or other person who is known to him or likely to take an interest in his welfare told, as far as is practicable, that he has been arrested and where he is being detained.

b) The Police Officer shall inform the arrested person when he is brought to the police station, of this right.

c) An entry shall be required to be made in the Diary as to who was informed of the arrest.

d) It shall be the duty of the Magistrate, before whom the arrested person is produced, to

satisfy himself that these requirements have been complied with.

The High Court Division directed the requirement Nos.1, 2, 3, 4, 5 and 6 to be forwarded to the Secretary, Ministry of Home Affairs with an observation that it was its obligation to circulate and get the same notified in every police station for compliance within three months from date. It also directed that the requirement Nos.5, 7, 8, 9, 10 and 11 to be forwarded to the Chief Metropolitan Magistrates and District Magistrates with a directions to circulate them to every Metropolitan Magistrates and the Magistrates who have power to take cognizance of offence for compliance. The Registrar, Supreme Court of Bangladesh was also directed to circulate the requirements as per direction made above. It is unfortunate to note that the police officers did not obey the directions given by the apex court of the country.

In the present case the High Court Division was of the view that with a view to curbing the violation of fundamental rights, besides section 54, 167, 176 and 202 of the Code, sections 220, 330, 348 of the Penal Code and section 44 of the Police Act should also be amended. Reasons assigned by it are that the existing section 176 of the Code is not sufficient to take effective action against custodial death. Accordingly, it is recommended to amend this section. In view of the promulgation of new Ain in 2013 covering the field we find it not relevant to follow the recommendation. Similarly section 202 of the Code is also not required to be amended as per recommendation in view of the said Ain, 2013. Similarly the recommendations made regarding section 330 and 348 of the Penal Code are also redundant on the same ground.

A wide power has been given to a police officer to arrest a person out of suspicion. As observed above, section 54 was included in the Code by the

colonial rulers and this provision cannot co-exist with Part III of the constitution. A police officer should not exercise his power of arrest on the basis of his whims and caprice merely saying that he has received information of his being involved in a cognizable offence. He is required to exercise his power depending upon the nature of the information, seriousness of the offence and the circumstance unfurled not only in the complaint but also after investigation on the basis of information or complaint. To make the point more clear, the police officer shall not exercise the power arbitrarily violating the dignity, honour, liberty and fundamental rights of a citizen. These rights are inherent and inalienable, and enshrined in articles 32 and 33 of the constitution so that no one can curtail the same. These rights are required to be scrupulously protected and safeguarded because the effective enforcement of fundamental rights will prevail over subordinate laws.

In clause 'Firstly' of section 54 the words 'credible information' and 'reasonable suspicion' have been used relying upon which an arrest can be made by a police officer. These two expressions are so vague that there is chance for misuse of the power by a police officer, and accordingly, we hold the view that a police officer while exercising such power, his satisfaction must be based upon definite facts and materials placed before him and basing upon which the officer must consider for himself before he takes any action. It will not be enough for him to arrest a person under this clause that there is likelihood of cognizable offence being committed. Before arresting a person out of suspicion the police officer must carry out investigation on the basis of the facts and materials placed before him without unnecessary delay. If any police officer produces any suspected person in exercise of the powers conferred by this clause, the Magistrate is required to be watchful

that the police officer has arrested the person following the directions given below by this court and if the Magistrate finds that the police officer has abused his power, he shall at once release the accused person on bail. In case of arresting of a female person in exercise of this power, the police officer shall make all efforts to keep a lady constable present. If it is not possible by securing the presence of a lady constable which might impede the course of arrest or investigation, the police officer for reasons to be recorded either before arrest or immediately after the arrest by assigning lawful reasons.

Sub-sections (1) and (2) of section 167 of the Code are identical with Indian provisions. In India, however, a proviso with explanations 1, 2 and sub-section (2A) have been added by Act 45 of 1978 which are as under:

"Provided that -

(a) the Magistrate may authorize the detention of the accused person, otherwise than in the custody of the police, beyond the period of fifteen days, if he is satisfied that adequate grounds exist for doing so, but no Magistrate shall authorize the detention of the accused person in custody under this paragraph for a total period exceeding, –

(i) ninety days, where the investigation relates to an offence punishable with death, imprisonment for life or imprisonment for a term of not less than ten years;

(ii) sixty days, where the investigation relates to any other offence, and, on the expiry of the said period of ninety days, or sixty days, as the case may be, the accused person shall be released on bail if he is prepared to and does furnish bail, and every person

released bail under this sub-section shall be deemed to be so released under the provisions of Chapter XXXIII for the purposes of that Chapter;

(b) no Magistrate shall authorize detention in any custody under this section unless the accused is produced before him;

(c) no Magistrate of the second class, not specially empowered in this behalf by the High Court, shall authorize detention in the custody of the police.

Explanation I. – For the avoidance of doubts, it is hereby declare that, notwithstanding the expiry of the period specified in paragraph (a), the accused shall be detained in custody so long as he does not furnish bail.

Explanation II.–If any question arises whether an accused person was produced before the Magistrate as enquired under paragraph (b), the production of the accused person may be proved

by his signature on the order authorising detention.

(2A) Notwithstanding anything contained in sub-section (1) or sub-section (2), the officer in charge of the police station or the police officer making the investigation, if he is not below the rank of a sub-inspector, may, where a Judicial Magistrate is not available, transmit to the nearest Executive Magistrate, on whom the powers of a Judicial Magistrate or Metropolitan Magistrate have been conferred, a copy of the entry in the diary hereinafter prescribed relating to the case, and shall, at the same time, forward the accused to such Executive Magistrate, and thereupon such Executive Magistrate may, for reasons to be recorded in writing, authorize the detention of the accused person in such custody as he may think fit for a term not exceeding seven days in the aggregate; and, on the expiry of the

period of detention so authorized, the accused person shall be released on bail except where an order for further detention of the accused person has been made by a Magistrate competent to make such order; and where an order for such further detention is made, the period during which the accused person was detained in custody under the orders made by an Executive Magistrate under this sub-section, shall be taken into account in computing the period specified in paragraph (a) of the proviso to sub-section (2):

Provided that before the expiry of the period aforesaid, the Executive Magistrate shall transmit to the nearest Judicial Magistrate the records of the case together with a copy of the entries in the diary relating to the case which was transmitted to him by the officer in charge of the police

station or the police officer making the investigation, as the case may be."

This addition by way of amendment is very much relevant and to safeguard from unnecessary harassment of a citizen who is a suspected offender in respect of a cognizable offence. Sub-section (2) of section 167 has given the power of a Magistrate to keep a suspected offender either in the judicial custody or in the police custody for a term not exceeding fifteen days in the whole. Under our present scheme of the Code a Magistrate has no power to detain such an offender beyond fifteen days. Under the proviso to sub-section (1) of section 344 of the Code the court has power to remand (judicial remand) from time to time but such remand shall not be for a period exceeding fifteen days at a time. This section empowered the court to pass such order when Chapter XVIII of the Code was in existence but after the deletion of this Chapter, the Magistrate can pass such order. Because the language used in

this sub-section (i) is that the court if it thinks fit may postpone/adjourn 'any inquiry or trial.' The power of inquiry under Chapter XVIII by a Magistrate in respect of an offence exclusively triable by a Court of Sessions has been deleted. If the trial of an offence commences in the court of sessions, the Magistrate does not possess any power to remand an accused person. It is the trial court which will pass necessary orders if it thinks fit. But before the trial commences and after expiry of fifteen days time provided in sub-section (2) of section 167, the law does not permit the Magistrate to direct a suspected accused person to be detained in judicial custody.

In India to cover up this inconsistency the proviso to sub-section (2) of section 167 has been added providing that the Magistrate may direct an offender in judicial custody beyond fifteen days if he is satisfied that detention is necessary but not beyond ninety days in respect of an offence which

relates to imprisonment for life or an imprisonment for a term not less than ten years. However, after the expiry of the period, if the investigation continues beyond ninety days, the accused shall be released on bail. It has been observed in *Aslam v. State (1992) 4 S.C.C 272* that this provision must be construed strictly in favour of individual's liberty since ever the law expects early completion of the investigation. The delay in completion of the investigation can be on pain of the accused being released on bail.

Under our provisions though sub-section (5) has been substituted by Act XLII of 1992 for the previous provisions added by Ordinance No. XXIV of 1982, there is no nexus between sub-section (2) and (5). Under Sub-section (2) the Magistrate may authorise the detention of an accused person for a period not exceeding fifteen days if the investigation cannot be completed within twenty-four ours. Sub-section (5) states that if the

investigation is not completed within one hundred twenty days the Magistrate may release the accused person on bail if the case is not triable by a court of Sessions. If the case is triable by a court of Sessions, the Session Judge may release the accused on bail on assigning reasons and therefore, the language used in clauses (a) and (b) of sub-section (5) is 'may'. Nothing has been mentioned what would be the fate of the accused person after the expiry of fifteen days who has been arrested out of suspicion if the investigation cannot be concluded within the said period.

Recommendations of the Supreme Court should be respected

The apex Court of a country being the arbiter of State and guardian of the constitution in exercise of its right to review any legislative action can declare void any law and executive act and therefore, it is the duty of the executive to respect the law and the constitution. This power is exercised under articles 7, 26, 104 and 112 of the

constitution. It has been held by Earl Warren, CJ. in *Cooper v. Aron, 358 US 1(1958) 18* "The federal judiciary is supreme in the exposition of the law of the constitution". In three cases the US Supreme Court, such as, *Fletcher v. Peck, 10 U.S. 87(1810); Dartmouth College v. Woodward, 17 U.S. 518 (1819); and Cohens v. Virginia, 19 U.S. 264(1821)* ensured individual citizens and private institutions 'inalienable rights' promised by the 'Declaration of Independence and Bill or Rights'. John Marshall defined them as life, liberty, and property rather than pursuit of happiness. After the decision in *Marbury v. Madison, 5 U.S. 137 (1803)*, President Jefferson was impatient and said "Nothing in the Constitution has given them the right ... to decide what laws are constitutional and what not", ... such powers "would make the judiciary a despotic branch' (Thomas Jefferson to Adams September 11, 1884).

In *Marbury v. Madison (1803) 5 US 137*, John Marshall, CJ. did not give any direction upon the government. There were three parts in the decision, two of them restricting presidential and congressional powers and a third that expanded Supreme Court's power to put it on an even footing with the other two branches of government. In the first part of the decision Marshall declared that the President had violated the constitution by withholding Marbury's commission. Marshall rejected Jefferson's argument that 'delivery is one of the essentials to the validity of the deed'. The transmission of the commission is a practice directed by convenience not by law.'..... It cannot therefore constitute the appointment.' In signing Marbury's commission and affixing the Great Seal of the United States, then President Adams and his Secretary of State had 'vested in the office Marbury's legal rights which are protected by the laws of his country. To withhold his commission ....

is an act deemed by the court not warranted by law, but a violation of a vested legal right'. John Marshall, declined to give any direction or issue the writ forcing the Secretary of the State to deliver the commission observing that 'cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be party. ....It is the essential criterion of appellate jurisdiction,' Marshall explained, 'that it revises and corrects proceedings in a cause already instituted and does not create that cause. ..... The authority .... given to the Supreme Court by the act of Congress .... to issue writs of *mandamus* .... appears not to be warranted by the constitution. The particular phraseology of the constitution of the United States confirms and strengthens the principle... that a law repugnant to the Constitution is void; and that courts as well as other departments are bound by that instrument.' Despite declining the writ of mandamus, this

declaration is the foundation of the independence of the judiciary in the United States and since then the judiciary has been taken and treated co-equal branch of the government and one of the pillars of the State. So, any observation of the apex court of the country as 'Supreme in the exposition of the law of the constitution' as Marshall phrased it cannot be doubted at all and we fully endorse the same. All the decisions of the Supreme Court and observations by the US Supreme Court transformed 'the Supreme Law of the land'.

Dr. Hossain submits that in India the guidelines and the recommendations made by Supreme Court in different cases as mentioned above have been fully complied with by the police officers and the executive, and there is no allegation at all that any one has violated the directions. On our query, the learned Attorney General fails to reply whether the submission of Dr. Hossain is correct or not. India practice democracy since 1935 and the

rule of law is one of the pillars of Indian democracy which is vigorously maintained and we have not come across any sort of non-compliance with any of the directions or guidelines so far given by the Supreme Court of India. Rather the above citations clearly indicate that all guidelines have been respected by the executive. In another case the Supreme Court of Indian in *Delhi Judicial Service Association v. State of Gujarat, AIR 1991 SC 2176* gave the following directions:

> "(A) If a Judicial Officer is to be arrested for some offence, it should be done under intimation to the District Judge or the High Court as the case may be.
>
> (B) If facts and circumstances necessitate the immediate arrest of a Judicial Officer of the subordinate judiciary, a technical or formal arrest may be effected.
>
> (C) The fact of such arrest should be immediately communicated to the District

and Sessions Judge of the concerned District and the Chief Justice of the High Court.

(D) The Judicial Officer so arrested shall not be taken to a police station, without the prior order or directions of the District Judge, if available.

(E) Immediate facilities shall be provided to the Judicial Officer for Communication with his family members, legal advisers and Judicial Officers, including the District and Sessions Judge.

(F) No statement of a Judicial Officer, who is under arrest be recorded nor any panchanama be drawn up nor any medical tests be conducted except in the presence of the Legal Adviser or the Judicial Officer of equal or higher rank, if available.

(G) There should be no handcuffing of a Judicial Officer. If, however, violent

resistance to arrest is offered or there is imminent need to effect physical arrest in order to avert danger to life and limb, the person resisting arrest may be over-powered and handcuffed. In such case, immediate report shall be made to the District & Sessions Judge concerned and also to the Chief Justice of the High Court. But the burden would be on the police to establish the necessity for effecting physical arrest and handcuffing the Judicial Officer and if it be established that the physical arrest and handcuffing of the Judicial Officer was unjustified, the Police Officers causing or responsible for such arrest and handcuffing would be guilty of misconduct and would also be personally liable for compensation and, or damages, as may be summarily determined by the High Court."

It has been observed that the safeguards in respect of a judicial officer are not exhaustive and they are minimum safeguards which must be observed in case of arrest of a judicial officer. We cannot take any exception or contrary view on consideration of the office a judicial officer holds. In Masdar Hossain, this court held "while the function of the civil administrative executive services is to assist the political executive in formulation of policy and in execution of the policy decisions of the Government of the day, the function of the judicial service is neither of them. It is an independent arm of the Republic which sits on judgment over parliamentary, executive and quasi-judicial actions, decisions and orders.... Article 116A of the Constitution was also lost sight of and it was conveniently forgotten that all persons employed in the judicial service and all magistrates are independent in the exercise of their judicial functions while the civil administrative executive

services are not ..... the Courts and Tribunals will be under the superintendents and control of the High Court Division, being subordinate to it but the control and discipline of persons employed in the judicial service and magistrates exercising judicial functions is vested in the President". Therefore, we cannot undermine the status and dignity of a judicial officer and endorse the views taken in Delhi Judicial Service Association by the Supreme Court of India so far as it relates to arresting a judicial officer in connection with an offence.

Under the scheme of the Code as stands now, a Magistrate/Judge having power to take cognizance of an offence has no power to direct the detention of an accused person in the judicial custody, if he thinks fit, beyond a period of fifteen days from the date of production in court after arrest by a police officer in respect of a cognizable offence. The Code is totally silent to deal with an accused person who is allegedly involved in a cognizable offence if the

police officer fails to conclude the investigation of the case within this period. If the Magistrate has no power to direct such accused person to be detained in judicial custody, he will be left with no option other than to release him on bail till the date of submission of police report. Normally in most cases the police officers cannot complete the investigation within the stipulated period sanctioned by law and normally they take years together. The detention/remand of an accused person beyond fifteen days by order of the Magistrate is not only an exercise of power not sanctioned by law but also violative of article 32 of the constitution. It is, therefore, necessary to take legislative measures authorising the judicial Magistrate to direct such offenders in judicial custody if the investigation cannot be concluded within the stipulated time. If no legislative measure is taken as per observation within a period of three months from the date of publication of this

judgment, the State cannot take any exception if the Magistrates/Courts direct the release such accused persons irrespective of the nature of their complicity in the incidents under investigation. We allow three months moratorium period for the interest of justice and to maintain the law and order in the country, but in presence of specific constitutional provision protecting right of a citizen the court cannot remain a silent spectator for indefinite period.

More so, the present Code was promulgated by the colonial ruler to consolidate their power through the exercise of abusive powers by the police. There was no existence of constitution at that time and the fundamental rights of a citizen was a far cry which is being not at all recognised. After driving out two colonial powers, one of course by negotiation and the other by the sacrifice of three million martyrs, we cannot detain and prosecute an offender with a draconian law. Firstly,

the object of the Code for which it was implemented on this soil is non-existed. The present procedures for holding trials by the Magistrates and courts of session are inadequate and conflicting. Secondly, some of the provisions, particularly, sections 54, 167, Chapters VII, XX, XXII, some provisions in chapters XV, XVI and XXXII are inconsistent with the constitution and the judgment in Masder Hossain case. In fact the present Code is not at all suitable for the administration of criminal justice after so many changes made in the meantime and it is high time to promulgate a new Code.

Learned Attorney General submits that if the power of the police officer to arrest an offender out of suspicion who appears to him or against whom credible information has been received or a reasonable suspicion exist of his having been concerned in any cognizable offence, considering the present trend of rise of terrorist activities in the country is curtailed the law and order situation

will deteriorate and the citizens lives will be at stake. According to him, the terrorists are so trained that it will be difficult for the law enforcing agencies to collect information unless he is interrogated after receipt of information regarding his complicity in a cognizable offence.

The Sixth Amendment of the United States constitution provides "In all criminal prosecutions, the accused shall enjoy the right .... to have the assistance of counsel for his defense." This amendment was adopted in response to English law, which, until 1836 did not provide felony offenders the right even to have retained counsel to assist them in presenting a defense at trial. After the American Revolution, most of the States rejected the English law, and some even granted unrepresented offenders a right to appoint counsel-something England did not provide until 1903.

It wasn't until 1938, in *Johnson v. Zerbst, 304 U.S. 458(1938)* the U.S. Supreme Court held that the

Sixth Amendment afforded indigent defendants a right to appoint counsel in the Federal Courts. And it wasn't until 1963 that the U.S. Supreme Court held, in *Gideon v. Wainwright* Gideon, *372 U.S. 335 (1963)* that the Sixth and Fourteenth Amendments required such appointment of counsel for indigent offenders in felony cases in the State Courts.

Prior to 1958, the U.S. Supreme Court had never indicated that a denial of counsel to a suspect was sufficient by itself to render a confession inadmissible. It had consistently held that lack of Counsel was merely a factor in determining voluntariness. But in 1964 that changed. In *Massiah v. United States*, *377 U.S. 201(1964)*, the U.S. Supreme Court held that once a person has been indicted or formally charged, he has a right to counsel. Unless that person voluntarily and knowingly waives that right, any incriminating statement he makes in the absence of his attorney must be excluded-if the statement has been

deliberately elicited from him by a government agent.

Winston Massiah (supra) along with two of his shipmates, involved in the cocaine trade, obtaining the cocaine in Valparaiso, Chile, concealing it on the ship, and bringing it to New York. In New York, they passed the cocaine along to two other men who distributed it. In May 1958, customs agents boarded Massiah's ship when it docked in New York and found five packages of cocaine. Massiah was arrested for possessing drugs and later on he was released on bail. In 1959, Massiah was again indicted together with Jesse Colson, one of his New York distributors, and charged with conspiracy. Colson decided to cooperate with the government and wore a taping device during a prearranged meeting with Massiah. On November 19, 1959 Massiah entered Colson's car on West 146th Street between Seventh and Eighth Avenues. As the two men sat together in the car, Massiah made statements to Colson that fully

implicated him and left no doubt of his guilt. Massiah ultimately was convicted in 1964, the Supreme Court reversed Massiah conviction.

The court held that Massiah was denied of his counsel when at his trial his incriminating words, which federal agents had “deliberately elicited” from him after indictment and in the absence of counsel, were used against him. This rule, the court said, applies to ‘indirect and surreptitious interrogations’ as well as those conducted at a police station or in a jail. The court’s dissenters feared that the ruling would jeopardize all police interrogation and make it virtually impossible for the police to do their job. Justice Byron White observed “A civilized society must maintain its capacity to discover transgressions of the law and to identify those who flout it,” It is, therefore, a rather ‘portentous occasion when a constitutional rule is established barring the use of evidence which is relevant, reliable, and highly probative of

the issue which the trial court has before it- whether the accused committed the act. Without the evidence, the quest for truth may be seriously impeded; Justice Byron White observed'.

This decision was given in 1964 and since then the police officers are bound to follow the guidelines given in Massiah (supra). We are now in 2016 and 52 years elapsed from the date of deliberation made by the Supreme Court United States. We achieved our independence in 1971 and got the constitution in 1972. We have also crossed 45 years in the meantime. If we cannot maintain the fundamental rights of the citizens of the country and allow police officers use abusive power it will be difficult to establish constitutional law and the rule of law in this country at any point of time. Even conditions prevailing in India about the terrorist acts is much higher than ours. The police officers in India are not allowed to use their power transgressing the law and the constitution and the

guidelines given by the Supreme Court. This will be evident from the following charts:

List of terrorist incidents in India

Date	Incident & Description	Location	Fatalities	Injured	Status of case
August 2, 1984	Meenambakkam bomb blast[1]	Tamil Nadu	30	25	Verdict given
July 7, 1987	1987 Punjab killings[2]	Punjab	36	60	N/A
June 15, 1991	1991 Punjab killings[3]	Punjab	90	200	N/A
March 12, 1993	1993 Bombay bombings[4][5]	Mumbai	350[6]	713	verdict given
December 30, 1996	Brahmaputra Mail train bombing		33	150	N/A
February 14, 1998	1998 Coimbatore bombings	Tamil Nadu	58	200+	verdict given
December 22, 2000	2000 terrorist attack on Red Fort [7]	Delhi	3	14	verdict given
October 1, 2001	2001 Jammu and Kashmir legislative assembly attack	Jammu and Kashmir	38		
December 13, 2001	2001 Indian Parliament attack in New Delhi	Delhi	7		verdict given
May 13, 2002	2002 Jaunpur train crash[8]	N/A	12	80	

December 6, 2002	2002 Mumbai bus bombing[9]	Mumbai	2	14	
December 21, 2002	Kurnool train crash	Andhra Pradesh	20	80	
September 10, 2002	Rafiganj train disaster	Bihar	130	300	
September 24, 2002	Terrorists attack the Akshardham temple in Gujarat	Gujarat	31		
January 27, 2003	2003 Mumbai bombing[10]	Mumbai	1		
March 13, 2003	2003 Mumbai train bombing[11]	Mumbai	11		
July 28, 2003	2003 Mumbai bus bombing [12]	Mumbai	4	32	
August 25, 2003	25 August 2003 Mumbai bombings	Mumbai	52		
August 15, 2004	2004 Dhemaji school bombing	Assam	18	40	
July 28, 2005	2005 Jaunpur train bombing[13]	N/A	13	50	
October 29, 2005	29 October 2005 Delhi bombings: Three powerful serial blasts in New Delhi at different places [14]	Delhi	70	250	
March 7, 2006	2006 Varanasi bombings: Three synchronized terrorist attacks in Varanasi in Shri Sankatmochan Mandir and Varanasi Cantonment Railway Station[15]	Varanasi	21		
July 11,	2006 Mumbai train	Mumbai	209	500	

2006	bombings: Series of 7 train bombing during the evening rush hour in Mumbai				
September 8, 2006	2006 Malegaon bombings: Series of bomb blasts in the vicinity of a mosque in Malegaon, Maharashtra	Maharashtra	37	125	
February 18, 2007	2007 Samjhauta Express bombings	Haryana	68		
May 18, 2007	Mecca Masjid bombing: At least 13 people were killed, including 4 killed by the Indian police in the rioting that followed, in the bombing at Mecca Masjid, Hyderabad that took place during the Friday prayers	Hyderabad	13		
August 25, 2007	25 August 2007 Hyderabad bombings - Two blasts in Hyderabad's Lumbini park and Gokul Chat.	Hyderabad	42		
October 11, 2007	One blast at a shrine of a Sufi Muslim saint in the town of Ajmer[16]	Rajasthan	3		
October 14, 2007	One blast in a movie theatre in the town of Ludhiana on the Muslim holy day of Eid ul-Fitr[16]	Ludhiana	6		
November 24, 2007	A series of near-simultaneous explosions at courthouse complexes in the cities of Lucknow, Varanasi, andFaizabad[16]	Uttar Pradesh	16	70	
January 1, 2008	Terror attack on CRPF camp in Rampur, Uttar Pradesh by Lashkar-e-Taiba,[17]	Uttar Pradesh	8	5	
May 13, 2008	Jaipur bombings: 9 bomb blasts along 6 areas in Jaipur	Jaipur	63	200	
July 25, 2008	2008 Bangalore serial blasts: 8 low intensity bomb blasts in Bangalore	Bangalore	2	20	arrests made
July 26, 2008	2008 Ahmedabad blasts: 17 serial bomb blasts in Ahmedabad	Gujarat	29	110	arrests made
September 13, 2008	13 September 2008 Delhi bombings: 5 bomb blasts in Delhi markets	Delhi	33	130	

September 27, 2008	27 September 2008 Delhi blast: Bombings at Mehrauli area, 2 bomb blasts in Delhi flower market	Delhi	3	21	
September 29, 2008	29 September 2008 western India bombings: 10 killed and 80 injured in bombings in Maharashtra (including Malegaon) and Gujarat bomb blasts	Maharashtra	10	80	
October 1, 2008	2008 Agartala bombings	Agartala	4	100	
October 21, 2008	2008 Imphal bombing	Imphal	17	40	
October 30, 2008	2008 Assam bombings	Assam	77	300	
November 26, 2008	2008 Mumbai attacks[18][19]	Mumbai	171	239	verdict given
January 1, 2009	2009 Guwahati bombings[20]	Assam	6	67	
April 6, 2009	2009 Assam bombings[21]	Assam	7	62	
February 13, 2010	2010 Pune bombing[22]	Pune	17	60	
December 7, 2010	2010 Varanasi bombing[23]	Varanasi	1	20	
July 13, 2011	2011 Mumbai bombings	Mumbai	26	130	
September 7, 2011	2011 Delhi bombing[24]	Delhi	19	76	
February 13, 2012	2012 attacks on Israeli diplomats	Delhi	0	4	
August 1, 2012	2012 Pune bombings	Pune	0	1	
February 21, 2013	2013 Hyderabad blasts	Hyderabad	16	119	
March 13, 2013	March 2013 Srinagar attack	Jammu and Kashmir	7	10	
17 April 2013	2013 Bangalore blast	Bengaluru	0	16	
25 May 2013	2013 Naxal attack in Darbha valley	Chhattisgarh	28	32	
24 June 2013	June 2013 Srinagar attack	Jammu and Kashmir	8	19	
7 July 2013	July 2013 Maoist attack in Dumka	Chhattisgarh	5		
7 July 2013	Bodh Gaya bombings	Bihar	0	5	

27 October 2013	2013 Patna bombings	Bihar	5	66	
25 April 2014	Blast in Jharkhand[25]	Jharkhand	8	4-5	
28 April 2014	Blast in Budgam District[26]	Jammu and Kashmir	0	18	
1 May 2014	2014 Chennai train bombing	Tamil Nadu	1	14	
12 May 2014	Maoist blast in Gadchiroli District[27]	Jharkhand	7	2	
28 December 2014	Bomb blast at Church Street, Bangalore[28]	Bengaluru	1	5	
20 March 2015	2015 Jammu attack[29]	Jammu and Kashmir	6	10	
27 July 2015	2015 Gurdaspur attack in Dina Nagar, Gurdaspur district	Punjab	10	15	
02 January 2016	2016 Pathankot attack in Pathankot IAF base, Pathankot	Punjab	7		

Year	Fatalities	No.of incidents
1984	30	1
1987	36	1
1991	90	1
1993	259	1
1996	33	1
1998	58	1
2000	3	1
2001	45	2

2002	202	5
2003	68	4
2004	18	1
2005	83	2
2006	267	3
2007	148	6
2008	409	11
2009	13	2
2010	18	2
2011	38	2
2012	0	2
2013	69	8
2014	17	5
2015	16	2
Total	1920	64

(Source: From Wikipedia, the free encyclopedia; *Main article: Terrorism in India)*

A look at the chart speaks for itself. It is apparent that India is the most affected country on

the globe regarding terrorism. Two dreaded incidents stunned the country, one to the Legislative Assembly killing 38 persons and other to the National Assembly killing six police men and three Parliament staff. In Mumbai in three attacks 257 persons died and 713 persons injured in 1993 and in the second attack 166 persons died and 293 persons injured and on the three occasions 200 persons died and 715 persons injured. In the temple in Gujrat there was an attack in 2002 killing 31 persons and injuring 80 persons. In Delhi in 2005 sixty three persons died and 210 persons were injured on bomb blasting. In Joypur in 2008 there was synchronized bomb attack killing 63 persons and injuring 200 persons. In Asham in 2008 there was serial bomb blast killing 81 persons and injuring 470 persons. In Coimbatore bombings in 1998 Islamic Fundamentalist conducted series of bomb blast killing sixty people. These are a few incidents. These terrorist attacks started since 1998 and it continues till today. There is

constant threat by Naxalist (Maoist) in Chhattisgarah, and other States, and terrorists in Jommu and Kashmir. Every alternate day such terrorist attacks are implemented killing innumerable number of people. We have not experienced such terrorist attacks in our country except in 2005, there were 60 terrorist attacks in the district headquarters killing only a few persons.

Despite such constant terrorist attacks and killing huge number of people in India, the apex court of the country did not hesitate to give guidelines keeping in mind the fundamental rights of the citizens cannot be compromised on the plea of terrorism. It is consistent view that the fundamental rights, people’s life and liberty and their security should be given primacy over other terrorism. Therefore, on the plea of terrorism we cannot give a blank cheque to the law enforcing agencies to transgressing the fundamental rights of

the citizens of the country. It should be borne in mind that a terrorist does not lose his fundamental rights even after commission of terrorist activities and there are laws for punishment of his crime, but he should not be deprived of his precious rights preserved in the constitution.

If we deny the rule of law and the right of the people, we will surely disrespect our long cherished independence- it will also be denying Bangabandhu's life long political sacrifice for this nation. The architect of Bangladesh had a dream to have a country where the rule of law will be established, the independence of judiciary be secured, and oppressed, destitute and indigent people will get justice entailing minimum time and money.

Our constitution was enacted with the dynamic leadership of Founding Father of the nation clearly depicted the importance of rule of law and independence of judiciary. Therefore, we all have to

strive to implement the dream of the Father of the Nation. Otherwise, the independence which we have achieved sacrificing the lives of 30 lac martyrs will be meaningless and the struggle against the British colonial occupation for about 200 years and 24 years long struggle against the Pakistani autocratic rulers and our 9 months sanguinary fight against occupation army will render it ineffective and useless. The guidelines embodied in the historical speech of 7th March, 1971 delivered by Bangabandhu Sheikh Mujibur Rahman will also diminish its spirit. The long cherished independence achieved after huge sacrifice should not be frustrated only for a few members of law enforcing agencies. If we do so it will be preposterous for us to continue as an independent sovereign State in the world with dignity and self-respect. It will not be out of place to mention here that the image of a State is dependent upon the way as to how its judiciary administers justice for the common people.

It should be kept in mind that the very nature of the job of law enforcing agencies is to respect the law even their lives are at stake, conflict resolution, problems solving through the organization, and provision of services as well as other activities. Crime control remains an important function to them. They entered into the job knowing the responsibilities reposed on them. It is known to them the object and purpose of raising a police force or equivalent force in a country and even then it is appropriate in the context to remind them their responsibilities.

We think it will be profitable to discuss here, Sir Robert Peel's Principles of Law Enforcement 1829.

1. The basic mission for which police exist is to prevent crime and disorder as an alternative to the repression of crime and disorder by military force and severity of legal punishment.
2. The ability of the police to perform their duties is dependent upon *public approval* of police

existence, actions, behavior and the ability of the police to secure and maintain *public respect*.

3. The police must secure the willing cooperation of the public in voluntary observance of the law to be able to secure and maintain public respect.

4. The degree of cooperation of the public that can be secured diminishes, proportionately, to the necessity for the use of physical force and compulsion in achieving police objectives.

5. The police seek and preserve public favor, not by catering to public opinion, but by constantly demonstrating absolutely impartial service to the law, in complete independence of policy, and without regard to the justice or injustice of the substance of individual laws; by ready offering of individual service and friendship to all members of society without regard to their race or social standing, by ready exercise of courtesy and friendly good humor; and by ready offering of

individual sacrifice in protecting and preserving life.

6. The police should use physical force to the extent necessary to secure observance of the law or to restore order only when the exercise of *persuasion, advice and warning* is found to be insufficient to achieve police objectives; and police should use only the minimum degree of physical force which is necessary on any particular occasion for achieving a police objective.

7. The police at all times should maintain a relationship with the public that gives reality to the historic tradition that *the police are the public* and *the public are the police;* the police are the only members of the public who are paid to give full-time attention to duties which are incumbent on every citizen in the intent of the community welfare.

8. The police should always direct their actions toward their functions and never appear to usurp the powers of the judiciary by avenging individuals or the state, or authoritatively judging guilt or punishing the guilty.
9. The test of police efficiency is the *absence* of crime and disorder, not the *visible evidence* of police action in dealing with them.

The Role of Police

The role of policing has been dynamic since it became a profession in 1829 under Sir Robert Peel in London, England. The relationship between police and citizens in a society is generally understood as a progression from the *political era*, when police were introduced in American cities in the 1840s to the early 1900s; to the *reform era*, stretching across the middle part of the 20th century from the 1930s to the 1970s; and then to the *community era* of modern policing since the 1970s.

The Police Culture

The "culture" of a police department reflects what that department believes in as an organization. These beliefs are reflected in the department's recruiting and selection practices, policies and procedures, training and development, and ultimately, in the actions of its officers in law enforcement situations. Clearly, all police departments have a culture. The key question is whether that culture has been carefully developed or simply allowed to develop without benefit of thought or guidance. There are police agencies, for example, where police use of force is viewed as abnormal. Thus, when it is used, the event receives a great deal of administrative attention. Such a response reflects the culture of that department: the use of force is viewed and responded to as an atypical occurrence. Contrast such a department with one which does not view the use of force as abnormal. And, most importantly, the culture of the department

is such that officers come to view the use of force as an acceptable way of resolving conflict.

It is clear that the culture of a police department, to a large degree, determines the organization's effectiveness. That culture determines the way officers view not only their role, but also the people they serve. The key concern is the nature of that culture and whether it reflects a system of beliefs conducive to the nonviolent resolution of conflict. It is also important to recognize that the culture of a police department, once established, is difficult to change. Organizational change within a police agency does not occur in a revolutionary fashion. Rather, it is evolutionary.

Developing a Set of Values

The beginning point in establishing a departmental culture is to develop a set of values. Values serve a variety of purposes, including:

(a) Set forth a department's philosophy of policing

(b) State in clear terms what a department believes in

(c) Articulate in broad terms the overall goals of the department

(d) Reflect the community's expectations of the department

(e) Serve as a basis for developing policies and procedures

(f) Serve as the parameters for organizational flexibility

(g) Provide the basis for operational strategies

(h) Provide the framework for officer performance

(i) Serve as a framework from which the department can be evaluated

Finally, an essential role of the police chief is to ensure that the values of the department are

well articulated throughout the organization. To accomplish this, the chief as leader must ensure that there is a system to facilitate effective communication of the values. This includes recognizing and using the organization's informal structure. This is important because, in addition to the formal structure, values are transmitted through its informal process as well as its myths, legends, metaphors, and the chief's own personality.

Each police department should develop a set of policing values that reflects its own community. A police executive should first clearly explain what values are to those in uniform. Then the executive should ask each member of the department to list what he or she considers the five most important values for the department. What follows is the previously mentioned general set of values of good policing, which can be the springboard for a department's own formulation:

(i) The police department must preserve and advance the principles of democracy. All societies must have a system for maintaining order. Police officers in this country, however, must not only know how to maintain order, but must do so in a manner consistent with our democratic form of government. Therefore, it is incumbent upon the police to enforce the law and deliver a variety of other services in a manner that not only preserves, but also extends precious American values. It is in this context that the police become the living expression of the meaning and potential of a democratic form of government. The police must not only respect, but also protect the rights guaranteed to each citizen by the Constitution. To the extent each officer considers his or her responsibility to include protection of the constitutionally

guaranteed rights of all individuals, the police become the most important employees in the vast structure of government.

(ii) **The police department place its highest value on the preservation of human life.** Above all, the police department must believe that human life is our most precious resource. Therefore, the department, in all aspects of its operations, will place its highest priority on the protection of life. This belief must be manifested in at least two ways. First, the allocation of resources and the response to demands for service must give top priority to those situations that threaten life. Second, even though society authorizes the police to use deadly force, the use of such force must not only be justified under the law, but must also be

consistent with the philosophy of rational and humane social control.

(iii) **The police department believe that the prevention of crime is its number one operational priority.** The department's primary mission must be the prevention of crime. Logic makes it clear that it is better to prevent a crime than to put the resources of the department into motion after a crime has been committed. Such an operational response should result in an improved quality of life for citizens, and a reduction in the fear that is generated by both the reality and perception of crime.

(iv) **The police department will involve the community in the delivery of its services.** It is clear that the police cannot be successful in achieving their mission without the support and involvement of the

people they serve. Crime is not solely a police problem, and it should not be considered as such. Rather, crime must be responded to as a community problem. Thus, it is important for the police department to involve the community in its operations. This sharing of responsibility involves providing a mechanism for the community to collaborate with the police both in the identification of community problems and determining the most appropriate strategies for resolving them. It is counterproductive for the police to isolate themselves from the community and not allow citizens the opportunity to work with them.

(v) The police department believe it must be accountable to the community it serves. The police department also is not an entity unto itself. Rather, it is a part of government and exists only for the purpose

of serving the public to which it must be accountable. An important element of accountability is openness. Secrecy in police work is not only undesirable but unwarranted. Accountability means being responsive to the problems and needs of citizens. It also means managing police resources in the most cost-effective manner. It must be remembered that the power to police comes from the consent of those being policed.

(vi) **The police department is committed to professionalism in all aspects of its operations.** The role of the professional organization is to serve its clients. The police department must view its role as serving the citizens of the community. A professional organization also adheres to a code of ethics. The police department must be guided by the Law Enforcement Code of

Ethics. The police department must ensure that it maintains a system designed to promote the highest level of discipline among its members.

(vii) The police department will maintain the highest standards of integrity. The society invests in its police the highest level of trust. The police, in turn, enter into a contractual arrangement with society to uphold that trust. The police must always be mindful of this contractual arrangement and never violate that trust. Each member of the police department must recognize that he or she is held to a higher standard than the private citizen. They must recognize that, in addition to representing the department, they also represent the law enforcement profession and government. They are the personifications of the law. Their conduct, both on and off duty, must be

> beyond reproach. There must not be even a perception in the public's mind that the department's ethics are open to question. [Source- Principles of Good Policing: Avoiding Violence Between Police and Citizens, Revised September, 2003- www.usdoj.gov/crs; Sir Robert Peel's Principles of Policing, The Basics of Policing Can Restore Trust and Repair Relationships & The History of Modern Policing, How the Modern Police Force Evolved, http://criminologycareers.about.com/od/Criminology_Basics/a/The-History-Of-Modern-Policing.htm]

In our country we find no concern of the police administration about the abusive powers being exercised by its officers and personnel. This department has failed to maintain required standard of integrity and professionalism. There is aberration in other departments as well but these

departments should not be compared with law enforcing agencies because of the philosophy basing upon which the responsibility reposed upon them. Their duties, actins are deponent upon the public approval at all times particularly during crisis period. They must secure and maintain public respect and this will decrease the crime in the country.

On a look into the law and order situation, we have reason to believe that it has forgotten its core value that it is accountable to the community it serves and by the same time the prevention of crime is its prime operational priority. Conversely it is seen that the rate of crime is on the rise. It is not known whether the department has adopted any policy to develop a set of values so that the people have faith and confidence in it. Most of the time it is noticed that the force is following the old principles and policies that were followed during the colonial period. It must be borne in mind that we have a constitution which has been achieved after

sacrifying millions of martyrs and all human values which are recognised by international communities enshrined in it. Their behavioural attitude must be developed in conformity with those values and rights. Even after the Constitution is in operation, its attitude towards the citizenry has not charged. The police administration, particularly its Chief must oversee training for recruits to reduce the use of coercive force. He should strive to rebuild mutual trust and respect between its force and the citizenry especially in communities that has been subjected to heavy stop-and-frisk techniques. The department's head must keep in mind the remark of his precursor Robert Peel, who founded first police force in 1829; 'Police-should maintain a relationship with the public that gives reality to the historic tradition that the police are the public and the public are the police.' If he forgets this prime philosophy and leaves behind a

demoralised force, it will be much harder for successor to combat crimes and human values.

Conclusion

On a close look into the judgment of the High Court Division it cannot be said that it has directed the government to legislate and/or amend the existing sections 54, 167, 176, 202 of the Code and some other provisions of the Penal Code. It noticed that the police officers taking the advantage of the language used in section 54 are arresting innocent citizens rampantly without any complaint being filed or making any investigation on the basis of complaint if filed and thereby the fundamental rights guaranteed to a citizen under articles 27, 30, 31, 32, 33 and 35 of the constitution are violated. It has observed that no person shall be subjected to torture or to cruel, inhuman, dignity or degrading punishment or treatment. So, if an offender is taken in the police custody for the purpose of interrogation for

extortion of information from him the law does not give any authority to the law enforcing agencies to torture him or behave him in degradation of his human value. It further observed that it is the basic human rights that whenever a person is arrested he must know the reasons for his arrest. The constitution provides that a person arrested by the police shall be informed of the grounds of his arrest and also that the person arrested shall not be denied of his right to consult or defend himself/herself by a legal practitioner of his/her choice. But it is seen that these rights are always denied and the police officers do not inform the nearest or close relations of the arrested persons and as a result, there is violation of fundamental rights guaranteed in the constitution. Accordingly, the High Court Division made some recommendations to amend sections 54, 167 of the Code and other provisions.

On perusal of the recommendations it is to be noted that most of the recommendations are in conformity with Part III of the constitution but some of the recommendations are redundant, some of them are not practically viable and some of them are exaggeration. As for example, a Magistrate cannot decide any case relying upon the post-mortem report of a victim. It is only if a case is filed whether it is a UD case or complaint, the police find that the death is unnatural, it can send the dead-body to the morgue for ascertaining the cause of death. In respect of UD case, a police officer compulsorily sends the dead body to the morgue for ascertaining the cause of death with an inquest report. After receipt of the report, if the police officer finds that the death is homicidal in nature, the police officer is under obligation to register a regular case. Even if after investigation the police officer does not find any complicity of accused person, the Magistrate is not bound to accept the police report.

It may direct further inquiry or further investigation over the death of the victim if he finds that the death is homicidal in nature. The power of the Magistrate is not circumscribed by any condition. The Magistrate is not bound to accept the police report.

In most criminal matters, the burden of proof lies upon the prosecution to prove a charge against an offender, but in respect of spouse killing case, it has been established that the burden shifts upon the accused person. It is the responsibility of the accused to explain the cause for the death of his/her spouse if it is found that he or she died while in his/her custody or that they were staying jointly before the death. The High Court Division is of the view that with a view to giving legal safeguard in respect of such offences, sections 106 or 114 of the Evidence Act may be amended. Since the law is settled on the said issue, there is no reason for any amendment of the law. On the doctrine *stare*

decisis if a decision has been followed for a long period of time, and has been acted upon by persons in the formation of contracts or in the disposition of their property, or in the general conduct of affairs, or in legal procedure or in other ways, will generally be followed by courts. This doctrine is explained in *Corpus Juris Secundum*: 'Under the *stare decisis* rule, a principle of law which has become settled by a series of decisions generally is binding on the courts and should be followed on similar cases. This rule is based on expediency and public policy, and, although generally it should be strictly adhered to by the courts it is not universally applicable.' So, there is no need for amendment to section 106 or 114 of the Evidence Act.

The High Court Division also directed to add a new section after section 44 of the Police Act. It observed that if a person dies in police custody or jail the police officer who has arrested the person or the police officer who has taken him in custody

for the purpose of interrogation or the jail authority in which jail the death took place shall explain the reasons for death and shall prove the relevant facts to substantiate their explanation. Accordingly, it observed that in case of such incidents there is no provision for maintaining any diary for recording reason for arrest of any person without any warrant and other necessary particulars. As observed above, the government has promulgated a law covering the field namely নির্যাতন এবং হেফাজতে মৃত্যু (নিবারণ) আইন, ২০১৩. In the preamble it is stated that as the Bangladesh is a signatory of the New York's Declaration on 10th December, 1984 towards cruel, inhuman, disgraceful behaviour; and as Bangladesh is a partner in the Treatise signed on 5th October, 1998; as in article 35(5) of the constitution prohibits torture and cruel, inhuman, degrading treatment and punishment; and as in articles 2(1) and 3 of the United Nations charter demanded to promulgate a law by the countries which signed the

charter treating the torture, cruel, inhuman and degrading treatment of a citizen is an offence; and therefore, in order to implement the charter the law has been promulgated. This piece of legislation covers all the above inhuman acts. In presence of specific legislation, we find it not necessary to add any provision in other laws in this regard.

Considering the facts and circumstances of the matter we find no merit in the contentions of the learned Attorney General and the learned Additional Attorney General. However, we are of the view that all the recommendations are not relevant under the changed circumstances. We formulate the responsibilities of the law enforcing agencies which are basic norms for them to be observed by them at all level. We also formulate guide lines to be followed by every member of law enforcing agencies in case of arrest and detention of a person out of suspicion who is or has been suspected to have involved in a cognizable offence. In order to ensure

the observance of those guide lines we also direct the Magistrates, Tribunals, Courts and Judges who have power to take cognizance of an offence as a court of original jurisdiction.

Responsibilities of Law Enforcing Agencies

(I) Law enforcement agencies shall at all times fulfill the duty imposed upon them by law, by serving the community and by protecting all persons against illegal acts, consistent with the high degree of responsibility required by their profession.

(II)In the performance of their duty, law enforcement agencies shall respect and protect human dignity and maintain and uphold the human rights of all persons.

(III) Law enforcement agencies may use force only when strictly necessary and to the extent required for the performance of their duty.

(IV) No law enforcement agencies shall inflict, instigate or tolerate any act of torture or other

cruel, inhuman or degrading treatment or punishment, nor shall any law enforcement agencies invoke superior orders or exceptional circumstances such as a state of war or a threat of war, a threat to national security, internal political instability or any other public emergency as a justification of torture or other cruel, inhuman or degrading treatment or punishment.

(V) The law enforcing agencies must not only respect but also protect the rights guaranteed to each citizen by the constitution.

(VI) Human life being the most precious resource, the law enforcing agencies will place its highest priority on the protection of human life and dignity.

(VII) The Primary mission of the law enforcing agencies being the prevention of crime, it is better to prevent a crime than to the resources into motion after a crime has been committed.

Guide lines for the Law Enforcement Agencies

(i) A member law enforcement officer making the arrest of any person shall prepare a memorandum of arrest immediately after the arrest and such officer shall obtain the signature of the arrestee with the date and time of arrest in the said memorandum.

(ii) A member law enforcement officer who arrests a person must intimate to a nearest relative of the arrestee and in the absence of his relative, to a friend to be suggested by the arrestee, as soon as practicable but not later than 12(twelve) hours of such arrest notifying the time and place of arrest and the place in custody.

(iii) An entry must be made in the diary as to the ground of arrest and name of the person who informed the law enforcing officer to arrest the person or made the complaint along with his address and shall also disclose the names and particulars of the relative or the friend, as the case may be, to whom information is given about the arrest and the

particulars of the law enforcing officer in whose custody the arrestee is staying.

(iv)Registration of a case against the arrested person is *sine-qua-non* for seeking the detention of the arrestee either to the law enforcing officer's custody or in the judicial custody under section 167(2) of the Code.

(v) No law enforcing officer shall arrest a person under section 54 of the Code for the purpose of detaining him under section 3 of the Special Powers Act, 1974.

(vi) A law enforcing officer shall disclose his identity and if demanded, shall show his identity card to the person arrested and to the persons present at the time of arrest.

(vii) If the law enforcing officer find, any marks of injury on the person arrested, he shall record the reasons for such injury and shall take the person to the nearest hospital for treatment and

shall obtain a certificate from the attending doctor.

(viii) If the person is not arrested from his residence or place of business, the law enforcing officer shall inform the nearest relation of the person in writing within 12 (twelve) hours of bringing the arrestee in the police station.

(ix) The law enforcing officer shall allow the person arrested to consult a lawyer of his choice if he so desires or to meet any of his nearest relation.

(x) When any person is produced before the nearest Magistrate under section 61 of the Code, the law enforcing officer shall state in his forwarding letter under section 167(1) of the Code as to why the investigation cannot be completed within twenty four hours, why he considers that the accusation or the information against that person is well founded. He shall also transmit copy of the relevant entries in the case diary B.P.Form 38 to the Magistrate.

Guidelines to the Magistrates, Judges and Tribunals having power to take cognizance of an offence.

(a) If a person is produced by the law enforcing agency with a prayer for his detention in any custody, without producing a copy of the entries in the diary as per section 167(2) of the Code, the Magistrate or the Court, Tribunal, as the case may be, shall release him in accordance with section 169 of the Code on taking a bond from him.

(b) If a law enforcing officer seeks an arrested person to be shown arrested in a particular case, who is already in custody, such Magistrate or Judge or Tribunal shall not allow such prayer unless the accused/arrestee is produced before him with a copy of the entries in the diary relating to such case and if that the prayer for shown arrested is not well founded and baseless, he shall reject the prayer.

(c) On the fulfillment of the above conditions, if the investigation of the case cannot be concluded within 15 days of the detention of

the arrested person as required under section 167(2) and if the case is exclusively triable by a court of Sessions or Tribunal, the Magistrate may send such accused person on remand under section 344 of the Code for a term not exceeding 15 days at a time.

(d) If the Magistrate is satisfied on consideration of the reasons stated in the forwarding letter and the case diary that the accusation or the information is well founded and that there are materials in the case diary for detaining the person in custody, the Magistrate shall pass an order for further detention in such custody as he deems fit and proper, until legislative measure is taken as mentioned above.

(e) The Magistrate shall not make an order of detention of a person in the judicial custody if the police forwarding report disclose that the arrest has been made for the purpose of putting the arrestee in the preventive detention.

(f) It shall be the duty of the Magistrate/Tribunal, before whom the accused person is produced, to satisfy that these

requirements have been complied with before making any order relating to such accused person under section 167 of the Code.

(g) If the Magistrate has reason to believe that any member of law enforcing agency or any officer who has legal authority to commit a person in confinement has acted contrary to law the Magistrate shall proceed against such officer under section 220 of the Penal Code.

(h) Whenever a law enforcing officer takes an accused person in his custody on remand, it is his responsibility to produce such accused person in court upon expiry of the period of remand and if it is found from the police report or otherwise that the arrested person is dead, the Magistrate shall direct for the examination of the victim by a medical board, and in the event of burial of the victim, he shall direct exhumation of the dead body for fresh medical examination by a medical board, and if the report of the board reveals that the death is homicidal in nature, he shall take cognizance of the offence punishable under section 15 of Hefajate Mrittu (Nibaran) Ain, 2013 against such officer and the officer in-

charge of the respective police station or commanding officer of such officer in whose custody the death of the accused person took place.

(i) If there are materials or information to a Magistrate that a person has been subjected to 'Nirjatan' or died in custody within the meaning of section 2 of the Nirjatan and Hefajate Mrittu (Nibaran) Ain, 2013, shall refer the victim to the nearest doctor in case of 'Nirjatan' and to a medical board in case of death for ascertaining the injury or the cause of death, as the case may be, and if the medical evidence reveals that the person detained has been tortured or died due to torture, the Magistrate shall take cognizance of the offence *suo-moto* under section 190(1)(c) of the Code without awaiting the filing of a case under sections 4 and 5 and proceed in accordance with law.

The appeal is dismissed with the above recommendation and guidelines without any order as to costs. The Inspector General of Police is directed to circulate the above guidelines to all

police stations for compliance forthwith to the letter and spirit. Similarly the Director General, Rapid Action Battalion is also directed circulate them for compliance of its units and officers. The Registrar General is also directed to circulate for compliance by the Magistrate forthwith. The Registrar General is further directed to transmit copy of the Judgment to the Secretary, Legislative and Parliamentary Affairs Division; Ministry of Law, Justice and Parliamentary Affairs; Secretary, Ministry of Home Affairs; IGP Police; DG RAB for taking necessary step as per the recommendations, observations and guidelines made in the body of the Judgment.

C.J.

J.

J.

J.

The 24th May, 2016
Md. Mahbub Hossain

APPROVED FOR REPORTING