WRIT JURISDICTION OF THE SUPREME COURT OF BANGLADESH

Md. Abdur Rob Howlader*

1. Introduction

The primary object of this article is to offer a systematic study of the "Writ Jurisdiction of the Supreme Court of Bangladesh" under the 1972 Constitution of the People's Republic of Bangladesh. An attempt has been made to examine the definition of writs, common types of writs, comparison of writs, different types of writs under the Constitution. The article portrays writ jurisdiction of the Supreme Court of Bangladesh, comprising of the High Court Division and the Appellate Division, to be given in the nature of orders under the 1972 Constitution and the Code of Criminal Procedure, 1898. Relevant cases have been cited. Finally, the article summarizes general conclusions making an overall assessment of the writ jurisdiction of the Supreme Court of Bangladesh.

2. Definition of Writs

Etymologically writ means a written document. As in Burton's Legal Thesaurus writ stands for bid, bidding, command, commandment, decree, decreetal, dictate, direction, directive, fiat, mandate, order, ordinance, precept, regulation and requirement[1]. But in legal terminology it has a restricted meaning. In law the word writ is used to indicate a particular type of order or judicial process. It has been defined by older authorities and modern authorities in different ways.

According to older authorities like Blackstone- "Writ is a mandatory Letter from the King in Parliament, sealed with His Great Seal, and directed to the Sheriff of the County wherein the injury is committed or supposed so to be, requiring him to command the wrongdoer or party accused, either to do justice to the complainant or else to appear in Court, and answer the accusation against him."[2] In the words of Carter, "It was the King' s order to his liege, written on parchment and sealed with the Royal Seal, and disobedience of the writ was contempt of the Royal Authority and punishable as such."[3] Stroud defined it as, "the process by

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* Md. Abdur Rob Howlader, Additional Secretary, Department of Immigration and Passport, Ministry of Home Affairs, GOB, Dhaka.

1 Burton, William C, Legal Thesaurus, London, 1979, p515.

2 Blackstone's Commentaries (iii) c. 18, Cited in Farani, M, The Law of Writs in Pakistan, Lahore, 1987.p.3.

3 Maitland, History of English Law, London p.25.

which civil proceedings in the High Court are generally commenced. There are many other kinds of writs, e.g. writ of execution, writ of error, writ for the election of a Member of Parliament, etc., issued in the name of the reigning Monarch, for the doing, of some act or thing."[4] According to modern authorities, "Writ is a documentary order issued in the name of a Court or of an executive officer, directing the person, to whom it is addressed, to do or refrain from doing a particular act described in the particular writ ."[5] ln the words of A. R. Biswas," Writ is an order or process issued by Court or judicial officer asking a person to perform or refrain from performing any act. It is an extraordinary process of the Court."[6] Earl Jowitt observed "writ as a document under the seal of the Crown, a Court or an officer of the Crown, commanding the person to whom it is addressed to do or forbear from doing some act[7]." Steven H. Grifis viewed it, as" a legal order issued by the authority and in the name of the state to compel a person to do something therein mentioned. It is issued by a competent court or other tribunal, and is directed to the Sheriff or other authority to execute it. In every case the Writ itself contains direction for doing what is required.[8]

From the above it is evident that a writ in the legal sense must have the following characteristics:

1) It must be an order or process;
2) It must be in writing;
3) It must be given by the Crown, Crown Officer, Court or Tribunal;
4) It must be in mandatory nature requiring the person to whom it is addressed to do or refrain from doing an act;
5) It must be issued against an inferior court, officer or a person;
6) It is an extraordinary process containing the direction for doing what is required; and
7) Disobedience to it is contempt of the Royal Authority and punishable as such.

3. Various Types of Common Writs.

In common parlance, writ means prerogative writs. They deserve special emphasis both for their historical interest and their practical

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4 The Encyclopedia Americana, Vol.29, 1986, p.557

5 Burke, John's Stroud's Judicial Dictionary of words and phrases, Vol. 4, London, 1953, p. 3344.

6 Biswas, A. R Encyclopaedia Law Dictionary, Calcutta, 1982, p. 688

7 William, Emlyn; Jowitt's Dictionary of English Law, London, 1985, P. 1914.

8 Grifis, Steven H., Dictionary of Legal Terms, New York, 1983, p. 475.

utility. They were extraordinary remedies issued upon cause shown in circumstances where the ordinary legal remedies were inadequate. According to Wharton: *"Prerogative writs are processes issued upon extraordinary occasions on proper cause shown."*[9]

There were writs brought by the King against the officers to compel them to exercise their functions properly or to prevent them from abusing their powers.[10] The very name prerogative indicates that it is a writ specially associated with the King. It is claimed at modern times that prerogative writs are writs which were originally issued only at the suit of the King but which were later made available to the subject. This view can be accepted with certain qualifications. For Prohibition and Habeas Corpus used to be issued on the application of subjects from the very beginning, and although writs of Certiorari and Mandamus were initially royal mandates issued for diverse purposes of Government, it seems that their earliest appearances in judicial proceedings were after the results of applications made by subjects.

They were usually issued from the Crown office side of the central office of the Supreme Court and in general they were not obtainable as a matter of course. Some probable cause required to be shown why such extraordinary remedies should be invoked. A rule nisi was issued in the first instance by the court calling upon the party to whom the writ was addressed to show cause why he should not comply with the writ. If sufficient cause was shown, the rule was discharged. Otherwise it was made absolute and the party was bound to obey the writ. But in urgent cases, in some of the writs the rule might be made absolute from the very beginning e.g. habeas corpus.

The prerogative writs were-prohibition, mandamus, certiorari, habeas corpus and quo warranto. The writ of prohibition forbade an ecclesiastical or inferior temporal court from continuing proceedings there in excess of jurisdiction or in contravention of the laws of the land. The writ of Mandamus directed a person or an inferior court to do a particular act which appertains to the office or duty of any one of them. The writ of certiorari proceeded from a Superior Court and directed an inferior court, civil or criminal, to transmit to the Superior Court the record of proceedings pending before the inferior court to be examined and dealt with in the Superior Court. The writ of habeas corpus provided for the personal freedom of the subject. The writ of

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9 Wharton's Law Lexicon,14th Ed.p.792

10 Philips, O. Hood Constitutional and Administrative Law, London 1987, p. 682.

quo warranto had been used by the Superior Courts to interfere whenever there had been a wrong usurpation of a public office of a substantive nature and declare it vacant.

4. Comparison of Different Writs

The five common types of writs differed from each other. Thus while mandamus was available against any public authority including administrative and local bodies, prohibition and certiorari would lie only against judicial and quasi-judicial authorities. Mandamus differed from certiorari and prohibition in that the latter writs were issued wherever an inferior tribunal had wrongly exercised or exceeded its jurisdiction, whereas mandamus would be issued only where the inferior tribunal or authority had declined to exercise its jurisdiction or discharge its duties. The object of certiorari was to review or control the action of the inferior tribunal or authority. But the object of mandamus was to compel such tribunal or authority to act. While mandamus demanded some activity, prohibition commanded inactivity; the object of prohibition being to prevent the inferior court from usurping jurisdiction which was not legally vested in it or from exceeding the limits of its jurisdiction. When it had been shown that the tribunal had declined to consider matters which it ought to have considered, or had not decided the case according to law, Mandamus would be granted commanding the tribunal to proceed according to law but certiorari would lie to quash or remove proceedings on the ground that the tribunal (having jurisdiction) had not taken into consideration matters which it ought to have taken into consideration .

While mandamus was a peremptory order of the Court commanding somebody to do that which it was under a clear legal duty to do, Quo warranto would lie against a person who had claimed or usurped an office, to enquire by what authority he supported his claim in order that the right to the office might be determined.

Mandamus differed from habeas corpus in that mandamus commanded a body or person to do an act which it or he was under a duty to do. Here the applicant must have sufficient interest in the performance of the duty and the duty must be a duty of a public nature. In habeas corpus the legality of the detention of any person would be examined and the person would be set at liberty if the detention was found to be illegal. Here the applicant was not required to be the person detained. Anyone on his behalf could apply. Habeas corpus is a more specialised writ with the object of safeguarding liberty of the person. By this writ the person illegally confined is able to regain his

liberty without which he could not put the additional modes of legal redress into action.

Broadly speaking, there had been no difference in principle between the writ of certiorari and that of prohibition except that the latter might be issued at an earlier stage, the object of both was to control the judicial or quasi-judicial bodies. But though closely akin to each other, there were points of difference between prohibition and certiorari. Certiorari would lie to quash a proceeding after trial, prohibition would not be issued after trial except in a clear case, apparent on the face of the proceedings, that the Court or Tribunal was acting without jurisdiction and there remained something to be prevented. Prohibition restrained the tribunal from proceeding further in excess of jurisdiction; certiorari required the record or the order of the court to be sent up to the Superior Court to have its legality enquired into, and if necessary, to have the order quashed. The object of prohibition was prevention, while certiorari might serve the dual purpose of prevention and cure. In short, prohibition would lie if the proceedings establish that the body complained of was exceeding its jurisdiction by entertaining matters which would result in its final decision subject to be brought up and quashed on certiorari. Certiorari would lie where the usurpation of jurisdiction was a *fait accompli*, while prohibition would lie when usurpation of jurisdiction had not yet taken place but was merely proposed and there was still something to operate upon.

5. Writ Jurisdiction of the Supreme Court under the Constitution of Bangladesh

Under the 1972 Constitution of Bangladesh there are two Divisions of the Supreme Court of Bangladesh namely the High Court Division and the Appellate Division. The writ Jurisdiction of the High Court Division is dealt with in Article 102 while that of the Appellate Division is mentioned in Article 104 of the Constitution. Various types of orders which can be made by the High Court Division in the exercise of its writ jurisdiction are contained in Article 102 of the Bangladesh Constitution in the following words:

"102 (2) the High Court Division may, if satisfied that no other equally efficacious remedy is provided by law-

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

(i) directing any person performing any function with the affairs of the Republic or of a local authority to refrain from doing that which he is not permitted by law to do or to do that which he is required by law to do; or

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

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

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

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

The Article virtually reproduces the provisions contained in Article 98 (2) of the 1962 Constitution of Pakistan. Although the word writ has not been used anywhere in Article 102 the Rules[11] followed in practice are those of writs and the powers exercised under that Article are virtually the powers which used to be exercised under writ jurisdiction. Article 102 empowers the High Court Division to issue orders (which are in substance writs) in the nature of prohibition and mandamus[12] certiorari[13] habeas corpus[14] and quo warranto[15]. Moreover the word writ is specifically used in Article 104 while conferring powers on the Appellate Division of the Supreme Court. In this article the two words writ and order will, however, be used interchangeably in an attempt to examine the nature and scope of the writs under the 1972 Constitution of Bangladesh.

5.1 Nature and Scope of the Writ Jurisdiction of the High Court Division

5.1.1 Prohibition

In the first part of Clause (2) of Article 102 of the Constitution of the People's Republic of Bangladesh 1972 the High Court Division is empowered on application of any person aggrieved, to direct a person performing any functions in connection with the affairs of the Republic or of a local authority to refrain from doing that which he is not permitted by law to do[16]. Therefore, it deals with the writ of prohibition which is issued to refrain a person from doing an act if the following conditions are fulfilled:

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11 The Rules of the High Court of East Pakistan in Dhaka to govern the Writs under the 1956 Constitution of the Islamic Republic of Pakistan.

12 Article 102 (2) (a) (i) of the Constitution of the People's Republic of Bangladesh, 1972.

13 Ibid Article 102 (2) (a) (ii).

14 Ibid Article 102 (2) (b) (i).

15 Ibid Article 102 (2) (b) (ii).

16 Supra note 12 above.

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

(b) The High Court Division is satisfied that there is no other equally efficacious remedy provided by law; and

(c) The act is not permitted by law and

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

(a) Application by Aggrieved Person

The writ of prohibition may be issued only on the application filed by an aggrieved person. The expression aggrieved person is not defined in the Constitution. The Court has determined the meaning of the expression in different cases having regard to the facts and circumstances of each particular case. As a general rule a person is regarded as an aggrieved person if he has a direct personal interest in the subject matter in respect of which the writ is sought for. This rule has been applied to individuals as well as to body of persons. As in ***Bangladesh Sangbad Patra Parishad vs. Bangladesh***[17] in which the association of newspaper owners challenged an award given by the Wage Board, the High Court Division in dismissing the petition held that "The association had no direct personal interest in the act in the implementation of the Wage Board award. It is not liable to pay anything to any body under the award in question but it is the owners of the individual newspapers who are to pay and they are actually aggrieved."

The Appellate Division upheld the above decision of the High Court Division. Mustafa Kamal J. while delivering the judgment of the Appellate Division, observed:

> *"The real question in the case is, whether the petitioner has the right to move the writ petition in a representative capacity. That is the crux of the matter and the High Court Division has in our opinion rightly relied upon the case of* ***Dhaka Match Workers Union vs. Government of Bangladesh***[18] *in which the question has been answered comprehensively in the negative after considering a number of cases from various jurisdictions. It is quite clear that the petitioner may represent the employers in the Wage Board and may even have capacity to act as the employers' in various other forums but its locus standi to act on behalf of its members in an application under Article 102 of the Constitution is just not there..... This is, however , not to say that the petitioner can never file a writ petition It can and it may, if it has a personal interest in the subject matter "*

But where the association has an interest in common welfare and ventilating the common grievance of all its members, it is regarded as

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17 43 (1991) DLR (AD), at p. 126.

18 29 DLR 188

having a legal right to file a writ petition to remedy grievances of its members. Thus in a case in which the petitioner claimed pension to be calculated on the basis of presumptive pay of the existing pay as on 1.6.85 of the posts from which they respectively retired it was held[19], *"Since the association has an interest in ventilating the common grievance of all its members who are retired government employees, to our view, this association is a person aggrieved "*

If a person is directly and personally affected by the act of a person performing functions in connection with the affairs of the Republic or of a local authority or he has sufficient interest in the matter in respect of which the writ is sought for he will be viewed as a person aggrieved. Under the Constitution of Bangladesh, there is no scope for filing a writ petition of prohibition or mandamus or certiorari, by public- spirited persons for espousing the cause of others. In the case of ***Chairman, Civil Aviation Authority vs. K.A. Rouf*** [20] the Appellate Division denied standing to a Head Master of a school to challenge the order of the Education Board regarding the formation of the Managing Committee of the school. In delivering the judgment of the Appellate Division setting aside the finding of the High Court Division, Mustafa Kamal, J., observed: *"the High Court Division should have asked itself as to what interest the writ petitioner had in establishing the character of the school. How is he affected?"*

However, it should be mentioned here that unlike the 1950 Indian Constitution, which has empowered the Supreme Court and the High Courts to issue directions or orders or writs including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari whichever may be appropriate and has not said anything about the person who can apply for such a remedy, the Bangladesh Constitution specifically provides that only an aggrieved person can apply for orders in the nature of the writs of prohibition, mandamus and certiorari.

However, in exceptional circumstances, the condition that the applicant must be an aggrieved person, as contained in Article 102 of the 1972 Constitution of Bangladesh, may be done away with. The fulfillment of this condition may not be insisted upon in cases in which constitutional questions of grave importance or imminent threat to any fundamental right of the

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[19] Bangladesh Retired Government Employees Welfare Association vs Bangladesh, 46 (1994) DLR, at p. 426.

[20] 46 (1994) DLR (AD), at p. 126.

applicant guaranteed by the Constitution is involved. As in ***Kazi Mokhlesur Rahman vs. Bangladesh***[21] ASM Sayem, C. J., observed:

> *"The fact that the applicant is not a resident of South Berubari Union No.12 or of the adjacent enclaves involved in the Delhi Treaty need not stand in the way of his claim to be heard in this case. We heard him in view of the constitutional issue of grave importance raised in the instant case involving an international treaty affecting the territory of Bangladesh and his complaint as to an impending threat to his certain fundamental rights ....."*

Moreover, subsequently, in ***Dr. Mohiuddin Farooque vs Bangladesh***[22] the Supreme Court of Bangladesh has taken a more liberal view of the term 'any person aggrieved' so as to enable a person (including an indigenous association)to invoke the writ jurisdiction of the High Court Division under Article 102 of the Bangladesh Constitution of 1972 even though the person is not directly and personally affected in cases commonly known as 'Public Interest Litigation', Thus if a person or an association espouses a public cause involving a public wrong or public injury or violation of fundamental rights affecting an indefinite number of people and the person or association is a member of the public and not a local component of a foreign organization, he is entitled to invoke the writ jurisdiction of the High Court Division of the Supreme Court of Bangladesh subject to the fulfillment of certain conditions. In this case the legality of implementation of FAP-20 by the respondents with its apprehended ill-effect on the life, property, livelihood, vocation and environmental security of more than a million people of the district of Tangail was challenged, Mustafa Kamal, J., while allowing the appeal observed:

> *"The traditional view remains true, valid and effective till today in so far as individual rights and individual infraction thereof are concerned. But when a public injury or public wrong or infraction of a fundamental right affecting an indeterminate number of people is involved it is not necessary, in the scheme of our Constitution, that the multitude of individuals who have been collectively wronged or injured or whose collective fundamental rights have been invaded are to invoke the jurisdiction under Article 102 in a multitude of individual writ petitions, each representing his own portion of concern. In so far as it concerns public wrong or public injury or invasion of fundamental rights of an indeterminate number of people, any member of the public, being a citizen, suffering the common injury or common invasion in common with others or any citizen or an indigenous association, as distinguished from a local component of a foreign organization, espousing that particular cause, is a person aggrieved and has the right to invoke the jurisdiction under Article 102.*
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> *It is, therefore, the cause that the citizen- applicant or the indigenous and native association espouses which will determine whether the applicant has the competency to claim a hearing or not. If he espouses a purely individual cause, he is a person aggrieved if his own interests are affected. If he espouses a public cause involving public wrong or public injury, he need not be personally affected."*

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21 26 (1974) DLR (AD), at p. 44.

22 49 (1997) DLR (AD), at p. 1.

The above stated liberal interpretation of the term 'any aggrieved person' is, however, subjected to certain preconditions ordained as measures of care and cautions. In this connection Justice Mustafa Kamal further observed:

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

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

(b) Exhaustion of other equally efficacious remedy

Like the Constitution of the Islamic Republic of Pakistan, 1962 the Constitution of the People's Republic of Bangladesh, 1972 has made the non-availability of' other equally efficacious remedy a precondition for issuing any of the writs including prohibition. This is no longer a self-imposed rule of prudence applied by the Courts. It is a Constitutional requirement that the Supreme Court of Bangladesh must be satisfied before issuing any prerogative writs (to be given in the form of various kinds of orders under Article 102 of the Constitution) that the other equally efficacious remedies provided by law have been exhausted by the aggrieved person. If the alternative remedy is not preferred by the aggrieved person and there is no satisfactory explanation for not so doing, the person will not be entitled to the extraordinary remedies to be given by the High Court Division in the exercise of its writ jurisdiction. As in ***Badrunessa vs. Vice Chancellor, D.U. & Others***[23] in which the petitioner approached the High Court Division for a writ under Article 102 of the Constitution against the University of Dhaka alleging certain irregularities in the publication of the result of Master's Examination, A.T.M. Afzal, J., dismissing the petition held:

> *"..... the alleged infraction of rules pertaining to courses of study and holding of examinations should be determined by the highest authority in that field, namely the Chancellor, and the petitioner not having pursued her relief under Article 52 of the Dhaka University Order, 1973 (by way of an appeal to the Chancellor of the University)and there*

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[23] 30 (1978), DLR at p. 268.

being no explanation for not so doing ,we should refrain from exercising our discretionary jurisdiction in granting the declaration sought for."

Similarly, Ahsanuddin Chowdhury, J., In ***Shafiqur Rahman vs. Certificate Officer***[24] observed:

"In the Constitution of Bangladesh the rules as to alternative remedy has been made a part of the positive law of the country and it has been so laid down in the constitutional provision under which the court has been given power of issuing appropriate writs. So if the alternative remedy is adequate and equally efficacious, in that case such an alternative remedy is a positive bar to the exercise of the writ jurisdiction."

Therefore, if the alternative remedy is not provided by the law on the basis of which the writ jurisdiction is invoked, then the court will exercise its writ jurisdiction to give appropriate remedy. As in Bangladesh Telecom (Pvt.) Ltd. V. BT& T Board[25] Mustafa Kamal, J., observed: *"If there is no other equally efficacious remedy provided by law" then writ jurisdiction may be invoked. 'Provided by law' means...provided in the statute in invocation of which the impugned order was passed."*

But availability of other alternative remedy e.g. appeal or revision may not always be an adequate remedy to bar the exercise of writ jurisdiction by the High Court Division. It is particularly so when pure questions of law or interpretation of Constitution or statute or statutory rules are involved. Thus in ***M. A. Hai vs. Trading Corporation of Bangladesh***[26] a writ petition was filed for the determination of the question whether the Government Servants (Discipline and Appeal) Rules were applicable to the servants of TCB. The petition was found maintainable. Shahabuddin ahmed, J., observed: *"Availability of alternative remedy by way of appeal or revision will not stand in the way of invoking writ jurisdiction raising purely a question of law or interpretation of statute."*

Similarly, in ***Assessing Officer vs. Burma Eastern***[27] Choudhury ATM Masud, J., held: *"if an action is wholly without jurisdiction in the sense of not being authorized by the statute or is in violation of a constitutional provision, a writ petition will be maintainable without exhaustion of statutory remedy."*

However, the rule of exhaustion of other equally efficacious remedy provided by law will not be applicable where there is an alternative remedy provided by law but for circumstances beyond the control of the petitioner he is unable to apply for the alternative remedy. This has been illustrated

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24 29 (1977) DLR (Supreme Court) at p. 233.

25 48 (1996) DLR (AD) at p. 21.

26 40 (1988) DLR (AD) at p. 206.

27 Bangladesh Legal Decisions, Appellate Division,Vol.I,1981,p.451

in the case of ***Farzana Hoque vs. Dhaka University***.[28] in this case, the High Court Division held a writ petition maintainable inspite of non-exhaustion of the remedy of appeal. Farzana could not avail of the remedy of appeal because the University did not supply her relevant papers which where necessary for filing the appeal. N. Ahmed J. Held:

> *"the discretionary powers with which this Court is vested under Article 102 of the Constitution will not be exercised if an alternative remedy is available and the aggrieved person has not tried to avail of the same remedy before approaching this court.... we are of the opinion that the said principle can not be applied in the present case, because it can not be said that the petitioner did not try to avail of the alternative remedy of appealing to the Chancellor... the petitioner tried to file an appeal before the Chancellor against the impugned order but for circumstances beyond her control could not succeed. Admittedly the appeal could not be filed for non-availability of relevant papers from the University. So we are of opinion that the alternative remedy was not available to the petitioner when she filed the writ petition."*

In practice, there are many other situations in which the rule of non exhaustion of alternative remedy may be inapplicable. For example, a writ petition will be maintainable inspite of non exhaustion of alternative remedy if the validity of a law or legal provision is challenged, if the alternative remedy is not efficacious and sufficient or the wrong complained of is of such a nature that it should be entertained in the interest of public justice. The matter was examined by the Appellate Division in ***Dhaka Warehouse vs. Assistant Collector of Customs***.[29] M. H. Rahman J. delivering the judgment of the Appellate Division observed:

> *"In principle, where an alternative statutory remedy is available, an application under Article 102 may not be entertained to circumvent a statutory procedure. There are however exceptions to the rule... Inspite of an alternative statutory remedy an aggrieved person may take recourse to Article 102 of the Constitution where the vires of a statute or the statutory provision is challenged, where the alternative remedy is not efficacious or adequate; and where the wrong complained of is so inextricably mixed up that the High Court Division may, for the prevention of public injury and the vindication of public justice, examine that complain."*

(b) Acts not permitted by law

An act not permitted by law may fall under two categories namely (i) Acts without Jurisdiction and (ii) Acts in excess of jurisdiction.

(i) Acts without jurisdiction

No Authority can exceed the jurisdiction given to it by the statute. Any action taken by an authority beyond the jurisdiction conferred on it is invalid and ***ultra vires***. This is so even when part of the act is within

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[28] 42 (1990) DLR (High Court Division)at p.262.

[29] Bangladesh Legal Decisions, Apellate Division, Vol-XI, 1991, p. 227.

jurisdiction and the other part of the act is without jurisdiction. And the part which is within jurisdiction can not be separated from the other part without prejudice to anyone. As in ***Abdul Khaleque vs. Court of Settlement***[30] Kazi Shafiuddin, J. observed:

> *"There can be no doubt that if a Tribunal or Court acts wholly without jurisdiction, its action would be a nullity ... if the actions done with jurisdiction and without jurisdiction are so inextricably mixed up, and action done with jurisdiction can not be separated without causing prejudice to either party, then the whole action may be declared null and void."*

If a tribunal wrongly proceeds upon an assumption that it has jurisdiction, its acts will be ultra vires and void abinitio. This was examined in ***Anisul Islam Mahmud vs. Bangladesh***.[31] The fact of the case is that the petitioner was being prosecuted under section 7 of the Special Powers Act. for the offence of absconding and failing to surrender pursuant to a detention order passed against him. The High Court Division issued a writ of prohibition as the detention order having been found to be without lawful authority, the special tribunal had no jurisdiction to proceed with the trial. AFM Habibur Rahman J. held:

> *" When the order of detention is a nullity and void abinitio, the subsequent notification under section 7(b) of the Special Power Act also becomes a nullity and void abinitio and the consequential proceeding before the special tribunal under the said section 7(b) for non compliance of such null and void order becomes illegal and without lawful authority".*

(ii) Acts in excess of jurisdiction:

Excess of jurisdiction implies that the authority has initial jurisdiction to do the act or start the proceeding and is alleged to have stepped out of jurisdiction thereafter by doing certain things. Jurisdiction may be exceeded in many ways. Most important of them are as follows:

(1) Commission of errors and omissions,

(2) Non compliance with statutory conditions,

(3) Violation of the principles of natural justice,

(1) Commission of Errors and Omissions.

Errors committed in determining pure questions of law is an act in excess of jurisdiction and as such not permitted by law. Such an act may be interfered with by the Court in the exercise of writ jurisdiction. But in the exercise of that jurisdiction the Court will not assume the function of an appellate Court so as to interfere with pure questions of fact unless the impugned act is based on total dearth of evidence i.e. no evidence at all. As in Bangladesh **Machines Tools**

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30 46 (1994) DLR (High Court Division)at p. 273.

31 44 (1992) DLR (High Court Division) at p.1

Factory vs. Chairman, 2nd Labour Court[32] in which the service of the respondent was terminated in malafide exercise of power by the employer and the Labour Court ordered for reinstatement of the respondent setting aside the order of termination after due consideration of the relevant evidence, while delivering the judgment of the Appellate Division ATM Afzal, J. observed: *".....The matter seems to be concluded by findings of fact...The High Court Division rightly held that the findings of fact made by the Labour Court could not be upset in writ jurisdiction. It was not a case of no evidence at all."*

Similarly, in ***Mostofa Kamal vs. First Court of Settlement*** while delivering the judgment of the Appellate Division Abdur Rouf, J. Observed:

> *"The learned judges of the High Court Division upon taking into consideration of such clear finding of facts of the Court of Settlement refused rightly to interfere with the judgment of that Court upon a correct appreciation of the legal principle that the High Court Division, in exercise of its writ jurisdiction, can not sit as a Court of Appeal over the judgment of the Court of Settlement for resettling questions of fact."*

The matter was examined more comprehensively in ***Bangladesh vs. Md. Abdul Jalil***[33] by ATM Afzal, C. J. in which he held:

> *"The High Court Division was not a Court of Appeal required to make determination of facts on its own. It could interfere with the findings of a tribunal of fact under its extraordinary jurisdiction under Article 102, only if it could be shown that the tribunal had acted without jurisdiction or made a finding upon no evidence or without considering any material evidence/facts causing prejudice to the complaining party or that it had acted malafide or in violaition of any principle of natural justice."*

But a finding of fact may be reviewed if otherwise there will be manifest illegality in arriving at the decision. A finding of fact based on no evidence is treated as an error of law. On questions of fact the Court adopts the test of reasonableness and the Court inquires whether on consideration of facts, a reasonable man would have come to the finding arrived at by the authority. If on the facts brought on record two alternative conclusions are equally possible, the Court will not interfere with the finding of facts of the authority concerned even though the court would have come to the other finding had it acted as the trier of facts. A conclusion of fact is reviewable when some relevant and material evidence has been excluded from consideration. In this context the observation of M.H. Rahaman J. in ***Chittagong Commercial Complex vs. Labour Court***[34] is worthy of note: *"Before passing a judgment exparte, the Labour Court*

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32 44 (1992) DLR (AD) at p. 272.

33 48 (1996) DLR (AD) at p. 13.

34 …….....

ought to have examined the employee's papers to see whether his case was proved. The judgment, having not shown this irreducible minimum care, is declared to have been passed without lawful authority."

(2) Non-compliance with statutory conditions.

Statutes conferring powers on public functionaries often impose conditions relating to procedure for exercise of the power e. g. notice, hearing, time limit etc. But the consequence of non-compliance with such conditions is not always stipulated. It has been consistently held by the Supreme Court that non-compliance with the mandatory conditions, primarily meant for benefit of persons sought to be affected by exercise of the power is fatal to the validity of the action taken by a public functionary. But non-observance of directory conditions does not affect the validity of the action. In ***State vs. Zahir***[35] 5 accused persons were charged and convicted for dacoity without supplying them copies of statements recorded under section 161 of the Code of Criminal Procedure, 1898. Badrul Haider Chowdhury J., held: *"the court can declare that the conviction of the accused was recorded without lawful authority, if the accused's trial is vitiated by irregularities in procedure causing him prejudice".*

Similarly in ***Emdadul Hoque vs. Bangladesh***[36] suspension of Chairman of Upazila Parishad without holding inquiry mandated by law was set aside. It was observed by H. Rahman Khan, J., *"The order of suspension having been passed against the petitioner without holding inquiry which is mandatory according to statute, the impugned order can not be sustained".*

(3) Violation of the principles of natural justice.

An act of a person performing functions in connection with the affairs of the Republic or of a local authority to be permitted by law must be in consonance with the basic principles of natural justice. According to these principles, before taking any action against a man, the authority has to give him notice of the case, a fair opportunity to answer the case against him and to put his own case.

A notice is the minimum obligatory condition where a statute requires notice to be given. Any action without service of the notice to the party concerned is not permitted by law. Even when a statute is silent, notice is to be given if any person is sought to be affected in his right, interest, property or character. Thus in ***Abdur Rouf vs. Ministry of LGRD***[37] the Chief

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35 45 (1993) DLR (AD) at p. 163.

36 42 (1990) DLR (High Court Division) at p.110.

37 43 (1991) DLR (High Court Division) at p.22.

Election Commissioner ordered for the recounting of votes without giving to the candidate securing the highest number of votes any notice and opportunity of hearing, Kazi Ebadul Haque J., Held:

> *"When an administrative authority decides a matter brought before it, such authority has to act fairly and justly. If a person is likely to be affected by such order or decision of such administrative authority, the person to be affected is to be given an opportunity of being heard...otherwise the order will be without jurisdiction and void. In this case we find that the Election Commissioner neither notified the respondent No.10 who secured the highest number of votes nor he was heard...As such the order passed by the Chief Election Commissioner for recounting of votes is wholly without jurisdiction and void".*

But failure to issue notice may not be fatal where the person complaining was aware of the proceeding and did not take step to file his objection. This point may be illustrated by the facts of ***Abidur Rahman vs. Sultan***[38] wherein the person complaining knew of holding of local investigation by Advocate Commissioner, but did not take any step to file objection against the report. Badrul Haider Chowdhury J., Observed: *"Equity aids the vigilant, when the two parties are litigating over a matter, equity will not come to the aid of an indolent party who does not keep track of the course of proceeding".*

Another requirement of natural justice is that the person likely to be affected by the act of the person performing functions in connection with the affairs of the Republic or of a local authority must be given an opportunity of hearing. A hearing to be fair, the authority should (a) receive all relevant materials which the person concerned produces, (b) disclose all information, evidence or materials which the authority wants to use against the person in arriving at his decision, and (c) afford opportunity to the person to controvert the information or material sought to be used against him. In this context, Ruhul Islam J. while delivering judgment of the appellate Division in ***M A Hai vs. TCB***.[39] held: *"When an employee is sought to be punished on a charge of misconduct, examination of witnesses in support of the charge should be in the presence of the employee and the employee should be given the opportunity of cross examining the witness".*

Another principle of natural justice requires that a biased act is not permitted by law. It has been dealt with in ***Murari Mohan Das vs. Bangladesh***[40]. The fact of the case was that the same person who was a witness to the incident that the accused Ticket examiner took fare from the ticket less travelers also acted as the Inquiry Officer and his decision was

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38 35 (1983) DLR (AD) at p.5.

39 32 (1980) DLR (AD) at p. 46.

40 29 (1977) DLR (High Court Division) at p. 53.

influenced by his own knowledge about the matter in issue. When no evidence was available against the petitioner, the Inquiry Officer supplied the deficiency by his personal knowledge violating the principles of natural justice. It was held by Shahabuddin Ahmed, J., *"Same person can not be judge and a witness at the same time"*.

The court, tribunal or administrative authority must exercise power honestly and reasonably to achieve the purpose of the law conferring powers on it. If the authority's action is found to have been malicious, or directed to achieve some other purpose, or for some ulterior motive, the action will not be permitted by law. In this context, the case of ***Dr. Nurul Islam vs. Bangladesh***[41] may be cited. The facts of the case was that the appellant was appointed as the Director and Professor of Medicine at the Institute of Post Graduate Medicine and Research in 1972. Subsequently, in 1978, the Government, by a notification, relieved him of his duties as Professor of Mdeicine; he was to continue as the Director of the Institute. The post of Director was made a non-practising administrative post. This notification was declared to be without lawful authority by the High Court Division in writ Petition No. 571 of 1979 filed by the appellant. Soon thereafter, the appellant was compulsorily retired by the Government. The order of compulsory retirement passed by the Government was challenged by the appellant in the present case. While allowing the petition challenging the order of compulsory retirement filed by the appellant F. Munim J., held:

> *"In the present case the appellant has asserted that the Government had no reason to retire him (Appellant) from service other than to frustrate or circumvent the effect of the judgment of the High Court Division in Writ Petition No.571 of 1979. Failing to deprive the appellant of the rank and designation of Professor of Medicine resort was taken to the provisions of S,9(2) of the [Public Servants Retirement]Act, thereby to get rid of the appellant..... the contention has substance thus leading to the conclusion that the impugned order of retirement is not justified..... the impugned action was taken to circumvent the judgment of the High Court Division passed in writ petition No.571 of 1979,and also liable to be struck down on the ground of malice in law which form the basis of the action".*

A malafide action is always illegal and ***ultra vires***. As in ***Nurul Huda Mia vs. Dhaka WASA***[42] , in which the petitioner was suspended and ultimately compulsorily retired with an ulterior motive, it was held by Kazi Ebadul Hoque, J., *"The impugned order is vitiated by malafide and being for ulterior purpose can not stand"*.

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41 33 (1981) DLR (AD) at p. 205.

42 42 (1992) DLR (High Court Division) at p. 527.

d) Persons performing functions in connection with the affairs of the Republic.

The writ of prohibition may be issued not only against judicial and quasi-judicial bodies but also against administrative authorities. Like mandamus and certiorari (to be dealt with later) it may be issued against any authority, irrespective of the nature of the function, if he is performing the functions in connection with the affairs of the Republic or of any local authority.

The term 'Local Authority' implies a body or person authorised by law or by the Government to carry on some administrative functions. It is entrusted with some portion of the sovereign function of the Government. It must perform such functions for the benefit of the public. It must be a person performing functions in connection with the affairs of the Republic. A local Authority is usually empowered with functions of self-government, imposing taxes and maintaining and administering local funds.

However,' Local Authority' has not been defined in the Constitution. Article 152 having made General Clauses Act.1897 applicable in respect of interpretation of the Constitution, we may refer to the definition of 'Local Authority 'given in Section 3(31) of that Act and which runs thus; *"Local Authority shall mean and include a Purashava, Zilla Parishad, Union Panchayet, Board of Trustees of a Port or other authority, legally entitled to, or entrusted by the Government, with the control or management of a Municipal or Local Fund, or any Corporation or other body or authority constituted or established by the Government under any law."*

While defining 'Local Authority' in ***B.S.I Corporation vs. Mahbub Hossain***[43], Mahmud Hussain, C. J., held:

> *"The term local authority has not been defined in the Constitution but according to the definition as given in Section 3(31) of the General Clauses Act it is clear that such term implies a public duty authorized by law or by the Government to carry on some administrative functions. A public corporation is entrusted with some portion of the sovereign function of the Government which is to be performed by the corporation for the benefit of the public and such a corporation is undoubtedly a person performing functions in relation to the affairs of the Republic within the meaning of Article 102 of the Constitution".*

But if the person is not performing any function in connection with the affairs of the Republic or of a Local authority no writ will be issued against him. As in ***Abdur Rahman vs. Bangladesh***[44] Kazi Ebadul Haque J., Observed: *"No writ petition lies against the officer of a company as he was not performing functions in connection with the affairs of the Republic or of a Local Authority."*

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43 29 (1977), DLR (SC), p. 41.

44 48 (1996) DLR (High Court Division) at p.431.

5.1.2. Mandamus

The second part of clause(2) (a)(i) of Article 102 empowers the High Court Division to issue orders in the nature of writs of mandamus to compel a person performing functions in connection with the affairs of the Republic or of a Local Authority to do something that he is required by law to do. The difference between mandamus and prohibition is that mandamus commands the public functionary to do what he is under a legal duty to do, while prohibition is issued to prevent him from doing what he is not permitted by law to do.

Like prohibition, mandamus will also not be issued if there is no application from an aggrieved person or if there is any other equally efficacious remedy provided by law. Mandamus may issue upon any person performing functions in connection with the affairs of the Republic or of a local authority. Such a person must hold office of a public nature. An office of a public nature means an office under the Constitution or a law relating to the affairs of the Republic or of a local authority. It will be issued only when the public functionary has a public duty under a law and refused to perform his duty. The duty may be judicial, quasi-judicial or administrative. As in ***Radha Kanta vs. Deputy Commissioner, Rangpur***[45] in which mandamus was sought to implement an order rightly passed by the predecessor of the D.C. Rangpur Abdur Rahman, J., observed:

> *"We are firmly of the view that the only duty of the Deputy Commissioner was to implement the order dated 23.2.70 which was rightly passed by his predecessor.....We accordingly direct the Deputy Commissioner, to take all necessary steps to enforce the order dated 23.2.70 and restore possession of the properties in question to the petitioner within one month from the date of this order."*

But if there is no such legal duty conferred by the Constitution, statute or statutory rules the authority can not be compelled by mandamus. As in Chevron Lines V. BOGMC[46] in which the appellant being aggrieved by the lawful refusal of tender work filed a writ petition referring to the Purchase Manual in support of his claim to get the tender work. Habibul Islam Bhuiyan J., Held: *"Petro Bangla neither violated the rules of purchase Manual nor committed any illegality. The bidder petitioner has no remedy, therefore, under writ jurisdiction of the Court."*

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45 30 (1978) DLR (High Court Division) at p.352.

46 43 (1991) DLR (High Court Division) at p.28.

It may be noted here that public authorities are often vested with discretionary powers by statutes and statutory rules. Mandamus can not be granted to compel them to exercise their discretion in a particular manner. In Qabil Ahmed V. Bangladesh[47] in which the refusal to recognize, Rajbari Homeopathic College by the Government was challenged, B. B. Roy Chowdhury J., Held: *"A writ in the nature of mandamus can in no case be issued to compel the manner in which the discretion is to be exercised. In that view the contention that the Government is under an obligation to accord the approval in question can not be sustained."*

Neither a public policy nor any thing short of a public duty can be enforced by mandamus. The petitioner must have a legal right to have the public duty performed in order that he may be entitled to a writ of mandamus. In the case of ***Telekhal Progressive Fisherman vs.. Bangladesh***[48] the petitioner challenged the settlement of two fisheries on the ground that the settlement was made contrary to Government policy as contained in Government memoranda. The Government memorandum was the ventilation of a Government policy without any statutory force attached to it. The concerned public functionaries were, therefore, under no legal duty for the performance of which they could be compelled by issuing a mandamus. In rejecting the writ petition Badrul Haider Chowdhury J., delivering the judgment of the Appellate Division observed: *The petitioner could not point out to any such specific legal right which inheres in him for which he claims the performance of the statutory duties conferred upon the public functionaries".*

Similarly, in ***National Engineers vs. Ministry of Defence***[49] Mustafa Kamal, J., delivering the majority judgment observed: *"in order to enforce the performance by public bodies of any public duty by mandamus, the applicant must have a specific legal right to insist upon such performance".*

The public authority must have public duty and the applicant must have a specific legal right or he must be aggrieved by non performance of such public duty. A government policy does not create any such right or duty and hence it can not be enforced by mandamus. In ***Yunus Mia vs. Secretary Ministry of Public Works***[50] the petitioners, being aggrieved by an order of eviction without providing him an alternative plot for rehabilitation as per government policy, filed a petition for the writ of mandamus to direct the Government to

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47 44 (1992) DLR (High Court Division) at p.385.

48 Bangladesh Legal Decisions, Appellate Division,Vol.1,1981,p.103.

49 44 (1992) DLR (AD) at p.179.

50 45 (1993) DLR (High Court Division) at p.498.

provide such a plot. A.M. Mahmudur Rahman, J., held: *"The Court can not issue prerogative writ directing the government to implement its policy".*

But the writ of mandamus will be issued if the matter relates to the implementation of a decision (and not merely a policy) of the Government taken in exercise of its powers given to it by law. As in ***Bangladesh vs.ATM Amir Hossain***[51] in which a writ petition was filed for directing the Government to implement its decision to remove the anomaly in the matter of absorption of teachers (like the respondent) in the nationalized Colleges and the petition was allowed by the High Court Division. A.T.M. Afzal, C. J., while delivering the judgment of the Appellate Division observed:

> *"It can not be said that the High Court Division has given a direction upon the Government which it was not required by law to carry out. The High Court Division was not laying down any legislative policy but merely asking the Government to implement its own decision which was taken in exercise of its power under the law.....We do not find any reason to interfere with the direction given by the High Court Division."*

An application for mandamus has to be preceded by a demand made to the public functionary concerned for performance of the public duty sought to be enforced. When the public functionary refuses to perform or the refusal to perform may be inferred from the conduct of the public functionary, the application for mandamus will be maintainable. But such a demand will not be necessary if from the facts and circumstances of the particular case it appears that making a demand and waiting for reply may seriously affect the interest of the applicant or that such a demand will serve no useful purpose and will be a mere idle ceremony. As in ***Zamiruddin Ahmed vs. Bangladesh***[52] in which the respondent Government contended that the notice for writ of mandamus should have been preceded by a notice demanding justice. Amirul Islam Chowdhury, J., relying on the decision given in ***Dacca National Medical Institute vs. Province of East Pakistan***[53] held:

> *"It is now well settled that before issuing a discretionary writ of mandamus, courts insist that the petitioner should make a demand for justice and the same should be refused. This is the general and normal practice of the court and it is only in exceptional cases that a departure from this practice is allowed. An exception is made only when that court is of opinion that such a demand for justice and its refusal would be futile."*

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51 48 (1996) DLR (AD) at p. 75.

52 Bangladesh Legal Decisions,Vol.1,1981,p.304.

53 All Pakistan Legal Decisions,Dacca,Vol.XIV,1963,p.741.

His Lordship further observed:

> *"In the instant case Towab is living abroad and from the facts and circumstances of the case it can be said that there are special circumstances in this case which would justify a departure from a well established practice. A demand for justice and its refusal would be futile. For this reason we do not think that the application should be rejected for not serving the demand of justice notice on the respondent."*

5.1.3. Certiorari

Clause (2)(a)(ii) of Article 102 of the Bangladesh Constitution,1972 authorizes the High Court Division to make an order in the nature of writ of certiorari. It provides that the court may declare that any act done or proceeding taken by a person performing functions in connection with the affairs of the Republic or of a local authority has been done or taken without lawful authority and is of no legal effect.

Like prohibition, certiorari is issued by the High Court Division when (a) there is an application for the same by an aggrieved person, (b) there is no other equally efficacious remedy provided by law and (c) the person to be proceeded against is a person performing functions in connection with the affairs of the Republic or of a local authority. But unlike prohibition it is issued after the completion of the act or proceeding to declare that such an act was done or proceeding taken without lawful authority and is of no legal effect. While prohibition is issued to prevent the act or proceeding when it is not complete and there remains something to be prevented, certiorari is issued when the act or proceeding is complete.

The High Court Division may issue an order in the nature of certiorari only when a person or authority has committed an error which vitiates the act done or proceeding taken by lack of jurisdiction or excess of jurisdiction. Mere doing an act as taking a proceeding in an unsatisfactory manner is not enough to invoke the jurisdiction. As in ***Hosne Ara Begum vs. Court of Settlement***[54] Mustafa Kamal, J., observed: *"So long as the Court of Settlement acts within jurisdiction and dose not commit any exeess of jurisdiction the High Court Division will be right in not interfering on the ground of mere unsatisfactory disposal of a case".*

5.1.4. Habeas Corpus.

(a) Habeas Corpus under the Constitution.

The High Court Division is empowered under clause (2) (b) (i) of Article 102 of the Bangladesh Constitution, 1972 to direct that a person in custody be brought before it so that it may satisfy itself that he is not being held in custody without lawful authority or in an unlawful manner.

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54 …….....

Evidently this is an order in the nature of the writ of habeas corpus given by the High Court Division to ensure liberty of the person from unlawful detention. Like other writs this writ will be issued when there is an application for the issue of the writ and the Court is satisfied that there is no other equally efficacious remedy provided by law. But unlike other writs discussed earlier the application need not be filed by the aggrieved person, and it is obligatory on the High Court Division to be satisfied that a person is not detained without lawful authority or in an unlawful manner. If it is not so satisfied, the issue of the writ of habeas corpus also becomes obligatory while the issue of any other writ is discretionary.

Thus the writ of habeas corpus lies whenever a person is detained without lawful authority or in an unlawful manner. It will be issued if the law providing for the detention is unconstitutional or invalid or though the law is valid the order is unlawful or ultra vires. An action will be unlawful if it is malafide, a colourable exercise of power or if it is taken upon irrelevant or extraneous consideration or grounds, or without application of mind of the detaining authority. ***Abdul Latif Mirza vs. Bangladesh***[55] in which the period of detention ordered by the Deputy Commissioner expired and two days thereafter a fresh order of detention passed by the government was served on the detenu, while declaring the detention for the intervening two days illegal Kemaluddin Hossain J., said:

> *"it is a constitutional obligation on the High Court Division to satisfy itself that a person is held in detention under authority of law or in lawful manner and this satisfaction is that of a judicial authority. An action which is malafide colourable exercise of statutory powers, action taken upon extraneous or irrelevant considerations, actions taken upon no ground or without application of mind of the detaining authority are actions which do not qualify as actions in accordance with law and would be struck down as an action taken in an unlawful manner"*

The detention order will be invalid and an order in the nature of habeas corpus will be issued if (a) the order does not refer to the law under which it has been made , or if (b) the law referred to does not authorize the detention ,or if (c) there is no statement in the order about compliance of certain matters which the law requires to be stated in the detention order or if (d) the grounds are vague or (e) there is material irregularity in passing order . Thus in ***Anwar vs. Bangladesh***[56] the Court found the detention order unlawful as the detention order was irregular and stated ground was vague as it did not indicate the nature of the prejudicial activity. Ruhul Islam, C. J., held:

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55 31 (1979) DLR (AD) at p 1

56 38 (1976) DLR (High Court Division) at p 428

"The order of detention shows a total disregard regarding the prevision of law. The detention order was made by the Additional Deputy Commissioner (Rev). He has got no business with general administration including preventive detention matters. The authority passing the order of detention having no jurisdiction either directly or by delegation, acted without jurisdiction in passing the order under the Special Powers Act. The order itself is vague and indefinite, because it does not indicate even the nature of prejudicial activities which the detenu were indulging in"

A preventive detention law authorizes public functionaries to order detention of a person on being satisfied or on having formed an opinion that the detention is necessary to prevent the person from doing certain acts specified in the law. This satisfaction or opinion must be based on materials. If it is found that the detaining authority has acted mechanically without applying its mind and without complying with the provision of the relevant law the detention will be without lawful authority. As in ***Rama Rani vs. Bangladesh***[57] Aminur Rahman Khan, J., held:

"Five different kinds of prejudicial acts were mentioned in the order without being sure as to which exact kind of prejudicial act the detenu is sought to be fastened with. The Government which passed an independent detention order omitted all other grounds of prejudicial acts except the one defined in section 2(f)(iii)of the Act in the original detention order passed by the ADM.....This shows non-application of mind-we find that the grounds served upon the detenu being absolutely vague, service of such grounds was no compliance to the provisions of section 8 of the Special Powers Act. In the result the detention of the detenu is held to be illegal and without any lawful authority".

The writ of habeas corpus is available against any wrongful detention whether by a public functionary or by a private person. thus in ***Ayesha Khatun vs. Major Shabbir Ahmed***[58] a writ petition was filed against the father of the child who forcibly took away the child from the mother and detained the child Anwarul Haque Choudhury, J., held the writ petition maintainable and the detention unlawful. His lordship observed:

"The provisions of Article 102 (2) (b) of the Constitution is very wide in nature as it provided that any person.....can take to the notice of the court that somebody is illegally detained by any person, and pray for a declaration that the person is so detained illegally and without lawful authority and the court shall after being so satisfied, direct the person to be set at liberty at once."

His Lordship further observed:

"A petition in the nature of habeas corpus for the custody of a minor would also be equally competent without sending the petitioner to exhaust his or her remedy before the Family

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57 40 (1988) DLR (High Court Division) at p.364.

58 …….....

Court or under the Guardians and Wards Act or other Criminal Court which is neither expedient nor an equally efficacious remedy in situations like the one in the instant case."

An application for habeas corpus may be made by any person. The applicant need not be an aggrieved person. But as a rule of practice and prudence, near relatives and friends acquainted with the facts of the case are insisted upon by the courts. Thus in ***Haji Joynal Abedin vs. State***[59] a petition for habeas corpus filed by a relation of the detenu was held to be maintainable. Badrul Haider Chowdhury, J., observed: *"In the present case, the Vokalatnama could not be obtained from the jail and the petition was filed by the father of one of the condemned prisoners who is also the uncle of other three prisoners. The opinion is that he is an aggrieved party within the meaning of Article 102 of the Constitution."*

(b) Habeas Corpus under the Cr. P. C: Writ of Habeas Corpus and direction under the Code of Criminal Procedure, 1898.

Section 491 of the Code of Criminal Procedure empowers the High Court Division to issue direction similar to an order made by it under Article 102(2)(b)(i)in respect of a detenu. In exercising both the powers, the Court deals with persons held under detention and follows the same High Court Rules.

But while an application is necessary for the exercise of power under the Constitution, No such application is necessary for the exercise of power under the Section. Thus in ***State vs. Deputy Commissioner, Satkhira***,[60] the High Court Division took action on the basis of a news published in a newspaper. Under the Section there is no requirement of exhaustion of alternative remedy. But this is a constitutional requirement for the issue of the writ of habeas corpus. Under the Section, the Court can direct for the production of the detenu not only before itself to be dealt with according to law and to set him at liberty if improperly detained or to examine him as a witness but also to produce him before a Court-Martial or Commissioner in order that he may be examined as a witness. It may also direct for the removal of the detenu from one custody to another. But these provisions are not specifically mentioned in the Constitution.

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

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59 30 (1978) DLR (High Court Division) at p.371.

60 45 (1993) DLR (HCD), AT 643.

5.1.5. Quo Warranto

Clause (2)(b)(ii) of Article 102 of the Bangladesh Constitution, 1972 empowers the High Court Division to make an order in the nature of quo warranto. The order may require a person holding or purporting to hold a public office to show under what authority he claims to hold that office. This writ may be issued if there is an application praying for the same and there is no other equally efficacious remedy provided by law. It should be stressed here that like habeas corpus, the application for quo warranato need not be filed by an aggrieved person. But unlike habeas corpus, it is discretionary while the former is obligatory in nature.

It confers jurisdiction and authority on the judiciary to control executive action in the matters of making appointments to public officers against the relevant statutory provisions. A person will be found to hold the public office without lawful authority if he is not qualified to hold the office or some mandatory provisions of law has been violated in making the appointment or entering the office. The writ of quo warranto also protects a citizen from being deprived of a public office to which he may have a right.

In order that a quo warranto may issue, the office must be a public office of a substantive character created by the Constitution, Statute or Statutory power. A public office is a right, authority and duty, created and conferred by law, by which an individual is vested with some portion of the sovereign functions of the Government to be exercised by him for the benefit of the public for the term prescribed by law.

A petition for the writ of quo warranto will be maintainable only when the person actually holds the public office. As in ***Farid Mia vs. Amjad Ali***[61] in which the appellant preferred an appeal against the High Court Division's judgment and order passed in a writ petition to the effect" that the act of declaration of the appellant as elected Chairman by the Returning Officer, has been done without lawful authority and is of no legal effect" ATM Afzal, J., of the Appellate Division allowing the appeal held;

> *"The election of a candidate could not be challenged under Article 102 of the Constitution. But when the candidate after being elected assumes the office of Chairman or other public office then any person can invoke the provision of sub article (2)(b)(ii)of Article 102. Article 102 can be invoked to require a person to show under what authority he claims to hold any public office only when the said person actually assumes that office or purports to do the same".*

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[61] 42 (1990) DLR (AD), , AT 13.

6. Enforcement of Fundamental Rights.

Article 102 (1) of the Constitution[62] empowers the High Court Division to give appropriate directions or orders to any person or authority for the enforcement of any of the fundamental rights. Persons performing functions in connection with the affairs of the Republic are also amenable to this jurisdiction of the High Court Division.

However, there must be an application by an aggrieved person so that the High Court Division may pass an order or direction for the enforcement of a fundamental right. If any act or proceeding violates any of the 18 fundamental rights enumerated in the Constitution the order or direction will be issued to remedy the grievance. In the case of ***Md. Shoib vs. Bangladesh***[63] the petitioner, one of the three partners of a partnership firm, filed a writ petition at the High Court Division challenging the validity of a government order staying a proceeding for release and handing over possession of the said partnership to the petitioners which affected the petitioners' fundamental right to freedom of profession or occupation contained in Article 40 of the Constitution. While disposing of the writ petition D. C. Bhattacharya J. observed:

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

If the infringement of fundamental right is established, the enforcement of the fundamental right becomes obligatory upon the High Court Division and exhaustion of all other equally efficacious remedy provided by law is not necessary. As in ***Sarwari Begum vs. Bangladesh***[64] in which the petitioner filed a writ petition for the enforcement of fundamental right guaranteed under Article 42 (1) of the Constitution to hold her purchased house alleging that the illegal enlistment of the house as abandoned property has encroached on her fundamental right, Naimuddin Ahmed, J., observed:

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62 Art. 102 (1) of the Constitution provides. "The High Court Division on the application of any person aggrieved, may give such directions or orders to any person or authority, including any person performing functions in connection with the affairs of the Republic, as may be appropriate for the enforcement of any of the fundamental rights conferred by Part III of this Constitution,"

63 27 (1975) DLR (High Court Division) at p. 315.

64 45 (1993) DLR (High court Division) at p. 571.

"Since the petitioner has sought remedy by enforcing Clause (1) of Article 42 of the Constitution which is a fundamental right guaranteed under the Constitution, this application can also be treated as an application under Clause (1) of Article 102 of the Constitution for enforcement of a fundamental right guaranteed to the petitioner under Article 42 of the Constitution, and as such, the petitioner being a 'person aggrieved' by enlistment of the disputed house as abandoned property can maintain an application before this Court irrespective of whether she has other equally efficacious remedy or not."

The Constitution does not mention the relief which may be granted to redress the violation of fundamental rights. It has been left to the High Court Division to fashion the relief according to the circumstances of particular cases. It may be one injunctive relief preventing the infringement of fundamental right or it may be a direction or order including an order in the nature of various kinds of prerogative writs. In this context, the observations made by M. A. Jabir, J., in ***Bangladesh vs. Ahmed Nazir***[65] are of direct relevance: *"We have, accordingly, no doubt that the framers of the Constitution intended to empower the High Court Division to pass appropriate orders ..... and the power to do so is not at all fettered because of the absence of nomenclature of the nature of writ in the Constitution."*

7. Curtailment of writ jurisdiction

However, the Constitution has imposed restrictions on the exercise of the writ jurisdiction of the High Court Division of the Supreme Court thus:

(i) The High Court Division can not pass any interim or other order in relation to any law to which Article 47 applies.

(ii) When a writ petition praying for prohibition, mandamus or certiorari is filed along with a prayer for an interim order which is likely to have the effect of prejudicing or interfering with any measure designed to implement any development program, or any development work or be otherwise harmful to the public interest, such interim order can not be issued without notifying and hearing the Attorney General as per provisions of the Constitution and unless the High Court Division is satisfied that such interim order will not have any of the above mentioned effects.

(iii) The writ jurisdiction usually does not extend to authorities specifically excluded by the Constitution under Article 105 (5). Thus a court or tribunal established under a law relating to the Defence Services of Bangladesh or any disciplined force or a tribunal to which Article 117 applies are beyond the purview of the writ jurisdiction of the Supreme Court.

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65 27 (1975) DLR (AD) at p. 48.

The curtailment of the writ jurisdiction of the High Court Division of the Supreme Court was examined in the case of ***Jamal Huq vs. Bangladesh***[66], in which the twelve petitioners, who were tried and convicted by a Court Martial on a charge of mutiny that resulted in the killing of President Ziaur Rahman in May 1981, challenged the order of conviction before the High Court Division. the petition was dismissed under Article 102 (5) of the Constitution. An appeal was preferred before the Appellate Division. On consideration of the facts and circumstances of the case the appeal was again dismissed by the Appellate Division on the ground that the appeal was not maintainable in view of the provisions contained in Article 102 (5) of the constitution. Kemaluddin Hossain C J., held:

> *"Curtailment of writ jurisdiction of the High court Division with regard to matters coming under sub-article (5) of Article 102 of the Constitution has been made by the same instrument namely, the Constitution itself, and so we are only to see how far the language by once conferring the jurisdiction on the High Court Division has taken away or restricted its exercise with regard to the matter coming within the excepted part of the sub-article".*

His Lordship further observed:

> *"Any order or action of the excepted authority mentioned in sub-article (5) of Article 102 is immune from challenge in writ jurisdiction, subject to the rule laid down by this Division in the case of* ***Khondokar Ehteshamuddin Ahmed alias Iqbal vs. State***[67]*, in that the order is quorum onon-judice or malafide".*

In the case of Kondker Ehteshamuddin Ahmed vs. State, the decision in which has been referred to by Kemaluddin Hossain, the power of the High court Division to examine the proceedings of Special Martial Law Court was challenged although the Martial Law Regulation 4 (9) excluded the jurisdiction of any court including the High Court Division and the Appellate Division, to call in question any judgment or sentence of the Martial Law Court. Ruhul Islam J., of the Appellate Division observed in that case:

> *"The moment any Martial Law Court is found to have acted without jurisdiction ... or the Martial Law Court is not properly constituted, the Superior Court's power to declare the proceedings wholly illegal and without any lawful authority in exercise of its power under Article 102 of the Constitution can not be denied. The power of the Superior Court can be extended to examine jurisdiction of Martial Law Court when it is found that it is coram nonjudice".*

8. Practice and procedure

Under Article 107 of the 1972 Constitution of Bangladesh, the Supreme Court may, with the approval of the President, make rules for regulating the practice and procedure of each Division of the Supreme

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66 34 (1982) DLR (AD) at p. 125.

67 33 (1981), DLR (AD) 154,

Court. But no such rule has yet been made. In exercise of the powers under the High Courts (Bengal) Order, 1947, certain rules[68] were made regarding writ petitions under Article 170 of the Pakistan Constitution of 1956. By virtue of section 24 of the General Clauses Act, 1897, those rules are also applicable in respect of writ petitions under Article 102 of the 1972 Constitution of Bangladesh.

Furthermore, in exercising the writ jurisdiction, the High Court Division of the Supreme court of Bangladesh can apply certain principles to meet the exigencies of the situation on the ground of equity, justice and good conscience. There has also developed a practice in the High Court Division to apply, by analogy, the principles of the Code of Civil Procedure as and when necessary to meet the need of the situation. For example, in substituting the heirs of a deceased writ petitioner and in restoring a writ petition dismissed for default, the High Court Division, by analogy, applies the principles laid down in the Code of Civil Procedure, 1908 in the absence of any specific rules governing the procedure for disposal of such situations under Article 102 of the Constitution. The matter was examined in ***Moni Begum vs. RAJUK***[69]in which the question raised was whether the provisions of Section 141 of the Code of Civil Procedure, which provides that "the procedure provided in this Code in regard to suits shall be followed as far as it can be made applicable in all proceedings in any Court of civil jurisdiction", apply in respect of writ proceedings in the original constitutional jurisdiction of the High Court Division under Article 102 of the Constitution. In this context Mustafa Kamal, J., of the Appellate Division observed:

> *"Section 141 of the Code of Civil Procedure does not in terms apply to proceedings in writ in the High court Division under Article 102 of the Constitution. But the Court in its discretion can apply the principles as distinguished from the technical provisions of the Code of Civil Procedure to meet the exigencies of the situation in appropriate cases on the ground of justice, equity and good conscience. In what situations the principles of the Code of Civil Procedure will be applied and to what extent, may perhaps be left to the wise discretion of the Court itself. In other words, barring what is specifically provided for in the Rules themselves, the Court is the master of its own procedure and it will exercise both its procedural and substantive discretion only on the ground of justice, equity and good conscience".*

It may be mentioned here that, under Article 105 of the 1972 Constitution of Bangladesh, the Appellate Division of the Supreme Court of Bangladesh is empowered to review any judgment pronounced or order made by it. But the High court Division has not been given any such

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68 Appendix

69 46 (1994) DLR (AD) at p. 154.

power either by the Constitution or by any other law to review any judgment pronounced or order made by it in exercise of its writ jurisdiction under Article 102 of the Constitution. As in ***Azra Zaman Chowdhury vs. Bangladesh***[70] A. M. Husain J., observed:

> *"In a proceeding under Article 102 of the Constitution (1972 Constitution of Bangladesh), there is no provision either in the Constitution itself or in any other law providing for any such review of any judgment passed by the High Court Division exercising its jurisdiction under Article 102 of the Constitution".*

But the Supreme Court of Pakistan held a different view while interpreting the corresponding provisions contained in Article 98 of the 1962 Constitution of Pakistan. As in ***Hussain Baksh vs. Settlement commissioner***[71] M. R. Khan, J., Observed:

> *"A proceeding under Article 98 of the Constitution concerning a civil matter being a civil proceeding relating to the High Court's original civil jurisdiction and section 114 of the Code conferring power of review not having been made inapplicable to the High Court in the exercise of its original civil jurisdiction, the power to review of an order made by the High Court in its writ jurisdiction will be available to it under the said section 114, if that section is otherwise applicable".*

Similarly, while interpreting the corresponding provisions of the 1950 Constitution of India in ***Shivdeo Sing vs. Punjub***[72] Mudhodar, J., of the Supreme Court of India observed: *"There is nothing in Article 226 of the Constitution to preclude a High Court from exercising the power of review which inheres in every Court of plenary jurisdiction to prevent miscarriage of justice to correct grave and palpable errors if committed by it".*

Therefore, it may be suggested that the power of the High Court Division to review the judgments pronounced and orders passed by it in exercise of its writ jurisdiction should be considered as inherent in it to help preventing miscarriage of justice.

9. Writ jurisdiction of the Appellate Division

Article 104 of the 1972 Constitution of Bangladesh empowers the Appellate Division to issue such directions, orders, decrees or writs as may be necessary for doing complete justice in any cause or matter pending before it. In exercising its appellate jurisdiction only, the Appellate Division can interfere if it can be shown that the exercise of the writ jurisdiction under Article 102 of the Bangladesh Constitution by the High court Division is plainly arbitrary or

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70 34 (1982) DLR (High court Division) at p. 247.

71 21 (1969) DLR (Supreme court) at p. 456.

72 All India Reports, Supreme Court, vol. L, 1963, p. 1909.

unreasonable or is not in accord with the accepted principles governing its exercise. As in ***Controller of Examinations, D. U. vs. Mahimuddin***[73], the Appellate Division set aside the judgment of the High Court Division as discretion was exercised upon misconception of law relating to availability of efficacious remedy. In this case on an allegation of adoption of unfair means in the examination, the Appellant Controller withheld the results of 425 examinees. Inspite of availability of alternative remedy by way of appeal to the Chancellor, the examinees filed a writ petition which was allowed by the High Court Division. In allowing the appeal filed by the Controller of Examinations, D. U., Shahabuddin, C. J., held: *"High Court Division is found to have wrongly decided the maintainability of the writ petition"*.

10. Conclusions

After the emergence of Bangladesh in 1971, Article 102 of the Constitution of the Peoples Republic of Bangladesh, 1972 empowered the High Court Division of the Supreme Court of Bangladesh to exercise writ jurisdiction similar to that which had been conferred on the High Courts of Pakistan under Article 98 of the Constitution of Pakistan 1962. Although the contents of the writ have been embodied in the Constitution it is basically a legacy of the English Writs and still the Judges of the Supreme Court of Bangladesh look back to the English and sub continental case laws while exercising the writ jurisdiction. Like other Superior Courts of the subcontinent the Supreme Court of Bangladesh has been able to fashion a writ system tailored to meet the needs of the present era.

However, it should be stressed here that even after the lapse of a quarter of a century no rules have been framed for the exercise of writ jurisdiction by the High Court Division under Article 107 of the 1972 Constitution of Bangladesh. Rules regarding writ petitions framed under Article 170 of 1956 Constitution of the Islamic Republic of Pakistan are still followed by the Supreme Court of Bangladesh to deal with writ petitions filed under Article 102 of the Constitution of the People's Republic of Bangladesh, 1972.

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

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[73] 44 (1992) DLR (AD) at p. 305.