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DISRESPECTING CONSTITUTIONAL SAFEGUARDS FOR FUNDAMENTAL RIGHTS IN BANGLADESH: A BIRD'S EYE VIEW FROM THE INDIAN CONTEXT

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I Introduction

EFFECTIVE IMPLEMENTATION of fundamental rights inevitably depends on the due process of law, good governance, an independent and strong judiciary, efficient law enforcing agencies, and above all, on the honest commitment of the government.[1] Transparent and accountable administration by state organs with a delicate balance of power is widely believed to provide and preserve rights. Quite consistent with this contention and to avoid excessive concentration of power on a single branch of the government, the original Constitution of Bangladesh, 1972 was premised on the principle of separation of powers between the three organs of the state: the legislature, the judiciary and the executive.

Yet, the central spirit of the Constitution was significantly overshadowed by numerous amendments soon after its adoption with a far-reaching negative impact on fundamental rights. The Constitution was frequently and unjustifiably amended to grant preventive detention, to proclaim state of emergency to suspend fundamental rights, to provide a stamp of validity to unconstitutional access to state power, to protect the perpetrators of genocide, and so on. The desperate desire for

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1. 'Legal rights do not operate in a vacuum where only law rules... rights are dependent upon and influenced by the wider political... context', see, R. Romkins, "Law as a Trojan Horse: Unintended Consequences of Rights-based Interventions to Support Battered Women" 13 *Yale Journal of Law and Feminism* 265 at 266 (2001); N. J. Udombana, "Toward the African Court on Human and People's Rights: Better Late than Never" 3 *Yale Human Rights and Development Law Journal* 45 at 47-49

'power' and the political intolerance that ensued over time in the wake of mutual disregard and confrontational behaviour of the two major political parties[2] resulted in a single-person centric strong executive in Bangladesh. Very often the arbitrary exercise of executive power undermined the democratic and independent entities of the legislature and the judiciary.[3] More fundamentally, the parliamentary majority of the executive was repeatedly misused to achieve its 'single-minded goal'. Pursuant thereto, a series of enactments of the Parliament eventually eroded the constitutional guarantees of fundamental rights enjoyed previously by the citizens.

On the other hand, all attempts to grant legal separation to the judiciary from the executive have been restrained in recent years in a coercive manner and judicial appointment became amalgamated with other civil services. In addition, the lower judiciary and the law enforcing agencies have created a very damaging image of their roles in implementing rights. The power of the police is often exercised beyond the lawful authority and, even then, has been unaccountable since the government itself condones their misuse to ensure its position.[4]

The paper argues that the overall political environment of Bangladesh and the government's attitude profoundly suffer from a lack of concern for a fair-democratic process and for fundament rights. This paper aims to critically examine the prevailing politico-legal situation of Bangladesh along with the government's behaviour to assess whether these are actually operating to the advantage of the governed and to what extent the political process of the country impacts on the meaningful exercise of fundamental rights. In so doing, it also offers an analysis of the Indian experiences in pertinent issues with a view to providing some guidelines for addressing a series of fundamental setbacks in Bangladesh's governance that engulf real lives of the common people. Before advancing with this discussion, however, it is important to

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2. The political scene of Bangladesh has been excessively 'opportunist' in nature where self-interest, corruption, and abuse of power remain dominant factors. Political opponents have usually been treated as personal enemies and became the target of harmful revenge of the government following changes of power. The political culture
in the country pursues irrational debate and the hostile and destructive modes of opposing each other's (political parties) stand, irrespective of merits or demerits of any national issues. The major political parties have been maintaining and patronizing even students to satisfy their narrow interests. See, *The US State Department Country Report on Human Rights Practices in Bangladesh 2005* (hereinafter *The US Dept Report*) *available at* http://www.state.gov/g/drl/rls/hrrpt/2005/61705.htm visited on 9 Mar 2006; S.J. Haider, "Politics, national crisis and the goal of emancipation" *The Independent* 10 Aug 2000.

3. H. Ahmed, "Governance vis-a-vis South Asian Perspective"*The Independent*

acknowledge that despite India's different progressive efforts, its overall rights record is still disappointing in many respects and the violation of fundamental rights is not unusual there as elsewhere in the world.[5] Yet, in regard to the legal and judicial advancements towards the protection of fundamental rights and awareness of that end India is far ahead of Bangladesh.[6]

The paper concludes that a free and fair exercise of constitutional 'power' by the relevant state functionaries is not only desirable but essential to promote and ensure fundamental rights.

II Good governance

The search and necessity for good governance have long been expressed in academic writings and become endorsed as a pre-condition to many foreign assistance programs in Bangladesh. The United Nations Development Program (UNDP) has set in place some operational strategies in favour of good governance. A UNDP paper defines governance as a set of mechanisms, processes and institutions through which people 'can articulate their interests, exercise their legal rights, meet their obligations and mediate their differences'.[7] In conformity with this concept an author maintains that '[good] governance accomplishes these objectives in a manner that is essentially free of abuse and corruption, and with due regard for the rule of law'.[8] In the present context, however, good governance for Bangladesh denotes a system where the three organs of the government - the executive, the

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5. See, for example, N. S. Ravikant, "Dowry Deaths: Proposing a Standard for Implementation of Domestic Legislation in Accordance with Human Rights Obligation" 6 *Michigan Journal of Gender & Law* 449 (2000); see also, R. Jethmalani & P.K. Dey, "Dowry Deaths and Access to Justice" in R Jethmalani (ed), *Kali's Yug-Empowerment, Law and Dowry Deaths* (1995).

6. See generally, A. Begum, "Judicial Activism v Judicial Restraint: Bangladesh's Experience with Women's Rights with Reference to the Indian Supreme Court" 14 *Journal of Judicial Administration* 220 at 220-221 (2005); *id.*, "Equality of Employment in Bangladesh: A Search for the Substantive Approach to Meet the Exceptional Experience of Women in the Contemporary Workplace" 47 *JILI* at 326-
350 (2005); *id.*, "Rape: A Deprivation of Women's Rights in Bangladesh" 5 *Asia-Pacific Journal on Human Rights and the Law* at 1-48 (2004).

7. "Good governance-and sustainable human development- UNDP Governance policy paper", *available at* http://magnet.undp.org/policy/chapter1.htm visited on 6 Jun 2002.

8. C.R. Kumar, "Corruption and Human Rights: The Hong Kong Experience of Promoting Transparency in Governance", this paper was presented at the 20th Annual Law and Society Conference on "Opening Law: Making Links—Crossing Boundaries",

legislature and the judiciary - function independently and transparently, and where their responsibilities are ultimately directed to the people.[9] It is one of the essentials for democracy as well as for the sound and effective exercise of fundamental rights. Unfortunately, Bangladesh, unlike India,[10] has developed an unhappy culture of governance since its inception as an independent state. Corruption, political violence, non-accountability of the government, incompetent exercise of law and the inept bureaucracy[11] has been chronic obstacles to good governance. 'Continued defiance of rule of law and [government] immunity have promoted a non-accountable, non-transparent administration in nearly all spheres of national life'.[12] Significantly enough, the executive's excessive domination over the autonomy and independent functions of the other two organs of the government, over the police and their random use are no exception to the same trend of maintaining a hostile environment counterproductive to fundamental rights.[13] The executive's inaction, sometimes to overlook police's failure, allegedly encourage them to routinely inflict physical and mental torture on people or to engage in other legal rights abuses in contravention of laws.[14] Ultimately, the overall effect is negation of lawful rights in Bangladesh.

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9. Rule of law, the level of political institutionalization, participation, transparency, consent of the governed, accountability and openness of all administrative activities of the government have been regarded as objective criteria of good governance. See, for details, W. P. Nagon and L. Atkins, "The International Law of Torture: From Universal Prescription to Effective Application and Enforcement" 14 *Harvard Human Rights Journal* 87 at 89 (2001); A. Rahman, "Challenges of Governance in Bangladesh"

14 *Bangladesh Institute of International and Strategic Studies Journal* 461 (1993).

10. See, D. Choudhury, *Constitutional Development in Bangladesh* 197-198 (1995); M. Rashiduzzaman, "Bangladesh: An Overpoliticised Democracy?" *The Daily Star* 16 May 1999; Z. Haider, "Parliamentary Democracy in Bangladesh from Crisis to Crisis" 42 *Journal of Asiatic Society of Bangladesh Hum* 69 at 74 (1997).

11. See, M.R. Islam, "The Separation of Powers and the Checks and Balances Between the President and Parliament of Bangladesh" *LAWASIA* at 177-189 (1987); G. Quader, "The Challenges of Security and Development: A View from Bangladesh"

15 *Bangladesh Institute of International and Strategic Studies Journal* at 205-214 (1994); A.K.M. Enayet Kabir, "Institutionalising democracy: case for good governance"*The Independent* 19 Dec 2000; M.H. Khan, 'Bangladesh experience of Parliamentary democracy' *The Independent* 7 Aug 2000.

12. M.R. Islam, 'Good Governance and the Rule of Law in Bangladesh: Challenges and Prospects in the New Millennium'-this paper was presented in a conference hosted by the Department of Economics, University of Queensland on January 2002; A.M.Q.Islam, "The Nature of the Bangladesh State in the Post–1975 Period" 2.3 *Contemporary South Asia* 311 at 316 (1993).

13. See,Amnesty International "Bangladesh: Institutional failures protect alleged rapists", *available at*

The discussion, however, primarily focuses on the inefficient and corrupt practices of the successive governments in Bangladesh in administering state affairs which contributed in substantial part to the continuation of gross denial of fundamental rights to the citizens. The abusive exercise of state power along with the government's attitude towards the enactment and implementation of laws, justice and the overall protection of rights could partly be understood from the following discussion:

i) Inappropriate interaction between the executive and the Parliament

ii) Executive's undue influence over the judiciary

iii) Gross abuse of arrest-power and the police's virtual impunity.

Inappropriate interaction between the executive and the Parliament

Executive's position under the Constitution

Bangladesh has a parliamentary form of government. The President is the constitutional head of the state and exercises all of his functions, subject to two exceptions,[15] in accordance with the advice of the prime minister.[16] Article 48 requires the President to be elected by the Members of Parliament.[17] There is a cabinet for Bangladesh comprising the prime minister at its head and such other ministers as the prime minister may from time to time designate.[18] The President appoints the prime minister, who has the support of the majority of the Members of Parliament.[19] Under article 55 of the Constitution, the prime minister is the chief executive of the country, and accordingly, the executive power of the Republic is exercised by or on the authority of the prime minister.

The Constitution: its amendment process and its improper use

The Constitution of Bangladesh is the supreme law of the land. Article 7 provides that '... if any other law is inconsistent with this Constitution that other law *shall*, to the extent of the inconsistency, be void'.[20] A two-thirds-majority vote in the Parliament is required to

15. *The Constitution of the People's Republic of Bangladesh*, 1972, Art. 48 (3) of the Constitution empowers the President to appoint the Prime Minister pursuant to clause (3) of art. 56 and the Chief Justice pursuant to clause (1) of art. 95.

16. *Id*., art 48 (2) & (3).

17. *Id*., art 48 (1).

18. *Id.*, art 55 (1).

19. *Id*., art 56 (3).

20. *Id*., art 7 (2) [Emphasis added].

amend the Constitution.[21]

Given the necessity of ensuring proper checks and balances of state power, the Constitution vividly describes the separate functions and limits of the three organs of government. It clearly prohibits the Parliament from making any law inconsistent with the Constitution and explains the extent of its legislative power.[22] Similarly, a range of provisions enshrined in part IV of the Constitution confine the executive's authority in exercising its power. The central spirit of the Constitution essentially stands for the people, providing that '[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'.[23] Further, article 26 provides that 'all existing laws inconsistent with the fundamental rights shall... to the extent of inconsistency become void, and the state shall not make any law inconsistent with the fundamental rights, if made void.'

Nevertheless, the basic structure of the Constitution was frequently amended for the cause of political gains.[24] Despite the requirement for a two-thirds majority in the Parliament to amend the Constitution, the political culture of the country in the last three decades has created circumstances permitting constitutional amendments. As the following discussion will demonstrate Bangladesh experienced 15 years of military rule and a presidential form of governance. During that period general elections were held under martial law decrees and ordinances. Eventually, military dictators became the all powerful executive through 'rigged elections, purged turncoat politicians and pliable parliaments....'[25]

Notwithstanding the change in the form of government in 1991, 'the legacy of lopsided power relationship continues unabated'. The following account of a few amendments to the Constitution and recent incidents that occurred after the 2001 election portray only a minimal picture of the executive's autocratic manner in handling state affairs in Bangladesh.

The amendment process of the Constitution began soon after its entering into force. The Constitution came into effect on 16 December 1972 and the 1st amendment was made in 1973. The 2nd amendment made on 22 September 1973 provided the government with special powers to arrest and detain any person without trial and introduced provisions for the proclamation of an emergency with the effect of

21. *Ibid.*

22. *Id.*, art. 80-81.

23. *Id.*, art. 142 [Emphasis added].

24. M.R. Islam, "Constitutionalism and Governance in Bangladesh" in M. Alauddin *et al* (ed), *Development, Governance and the Environment in South Asia* 161-180. (1999)

25. M.R. Islam 2002 *supra* note 12.

suspending fundamental rights. Accordingly, a state of emergency was proclaimed on 28 December 1974 debarring certain fundamental rights from the review of the high court,[26] and this state of affairs continued until 27 November 1979.[27] The 4th amendment in 1974 established one-party politics in place of the original multi-party democracy and made a significant change to the structure of the judiciary by bringing it under the direct control of the executive.[28] Two army generals captured state power twice through military coups and ruled Bangladesh for one and a half decades (1975-1990). The Parliament was suspended from August 1975 to February 1979 and again from March 1982 to November 1986.[29] Pursuant thereto, the special courts and tribunals set up under martial law[30] exercised judicial powers, and the judiciary became subordinate to martial law.[31] To escape legislative scrutiny, 'law-making' proceeded through the proclamation of President's ordinances, bypassing the ordinary course of enacting state laws.[32] Perhaps, the underlying reason was that the ordinance, compared to the bill, easily took effect without going through the long and complex legislative procedures.[33] Obviously, this law-making process diminished the Parliament's authority to examine laws and diluted the core concept of separation of power incorporated in the Constitution.

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26. See, M. Kamal, *Bangladesh Constitution: Trends and Issues* vii (1994).

27. Although a proclamation of emergency is not unusual in other countries, the provision and practices in Bangladesh deviate considerably from that required under the international standard. For example, art. 4A of the ICCPR stands for the declaration of public emergency on grounds that threaten the life of the whole nation up 'to the extent strictly required by the exigencies of the situation'. Under the original provisions of the Constitution of India, 'internal disturbance' was necessary
to proclaim emergency. However, in an attempt to restrict the power to declare emergency '"internal disturbance" [was] replaced by the term "armed rebellion".' While in Bangladesh, such a proclamation may happen, even if it affects 'any part'
of the security or economic life of the country. For a detailed discussion about emergency powers and judicial review under the Constitution of India see generally, I. Omar, *Emergency Powers and the Courts in India and Pakistan* (2002); see, *The Constitution supra* note 15 arts. 141A, 141B & 141C; M. H. Joarder, "Emergency Provisions in Bangladesh Constitution and International Standard" 1 *The Islamic University Studies* at 67-80 (1993).

28. The Constitution (Fourth Amendment) Act 1975 (Act II of 1974) arts 117A, 115 & 19.

29. M. Islam, *Constitutional Law of Bangladesh* 18-20 (1995).

30. M.R. Islam 2002 *supra* note 12.

31. Q.R. Hoque, *Preventive Detention Legislation and Judicial Intervention in Bangladesh* 301-307 (1999).

32. K.M. Subhan, "Human Rights: Bangladesh Perspective" 2 *Journal of*

The 5th amendment validated the Indemnity Ordinance, 1975, indemnifying the self-confessed killers of the then President, Sheikh Mujibur Rahman and his 21 family members (all were assassinated in a military coup on 15 August 1975) by inserting a new article 3A under the fourth schedule to the Constitution on 6 April 1979.[34] The Indemnity Ordinance 1975 was proclaimed in the wake of a military coup on 26 September 1975, aiming to prohibit all legal proceedings against, and scrutiny of, those killers. It seems logical, therefore, to assert here that the 5th amendment provided security to the killers at the expense of fundamental right to legal protection (art 31 of the Constitution) and the right to life (article 32). Such a trend of using state power is not only a blatant violation of fundamental rights of the aggrieved relatives, but all the civilized norms for administration of justice as well.[35] Most significantly, both the 5th and 7th amendments legitimised, beyond constitutional authority[36] the two army generals' unconstitutional access to state power by means of saving clauses, providing that all acts and orders during the military period '*shall* be deemed to have been validly made and, *shall not* be called in question in or before any Court or Tribunal on any ground whatsoever'.[37]

Hence, it appears realistic to suggest that the above amendments, which were made in deviation of the constitutional authority of the Parliament, cannot survive the test of the Constitution, especially under its articles 7 and 26, and in clear disregard of a number of judicial decisions.[38] In *Nurul Islam* v. *Bangladesh*,[39] for example, the court held that 'the Government or the Legislature cannot by framing a Rule or by enacting a law, evade the guarantees provided under the Fundamental Rights and the Protections provided under article 135 of the Constitution.'

The parliamentary system was revived in 1990. A caretaker government (to conduct a national election) was established in 1991.

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34. Constitution (Fifth Amendment) Act, 1979 (Act of 1979) Paragraph 18; Fourth Schedule of the Constitution art 3A.

35. M.R. Islam 2002 *supra* note 12.

36. There exists no provision in the Constitution of Bangladesh through which state power can be captured by an army general and/or thereby validated in any form or under any circumstances. The Constitution requires the change of government power only in pursuance of part IV of the Constitution. See, *The Constitution supra* note 15 at part IV, especially art 48; see also, Alauddin *supra* note 24 at 170.

37. Appendix-X, Constitution (Seventh Amendment) Act, 1986 (Act 1 of 1986) para 19 (2) in *The Constitution supra* note 15 at 115 [Emphasis added].

38. *Khan* v. *Bangladesh*, (1982) 34 DLR (AD) 321; *Islam* v. *Bangladesh*, (1981) 33 DLR (AD) 201; *Kudrati-i-Elahi Panir* v. *Bangladesh*, (1992) 44 DLR (AD) 319; *Rahman* v. *Bangladesh*, (1992) 44 DLR (AD) 111. All of these cases pointed out the limitations of exercising legislative power of the Parliament to enact laws.

Since then, government power has been transferred thrice. In the last parliamentary election held on 1 October 2001, the Bangladesh Nationalist Party (BNP)-led coalition with Jamaat-i-Islami formed the government; yet the legal-rights situation of the country remained unchanged. Rather, in the backdrop of the election, systematic violations of fundamental rights in severe forms such as killing, severing body parts, gang-rape, minority torture, police arrest without any charge and custodial torture increased to an unprecedented scale that generated even international concern.[40] A clear picture of violation of fundamental rights in the country could be learned from the incidents in only one month following the election. By the end of October 2001, a total of 122 people had been killed, 2430 injured, 505 arrested for political reasons, four people killed in police custody, 27 women became victims of acid attacks and 61 were raped, nine housewives were killed and two injured for dowry.[41]

In an alleged effort to restore peace and stability, the government enacted a law on 9 April 2002 entitled the Law and Order Disruption Crimes (Speedy Trial) Act, 2002. There are convincing academic arguments on the issue that the new Act is devoid of an honest intention on the part of the government and is being used to harass the opposition.[42] Its strong adverse effects on fundamental rights apart, the Act is repugnant to the Constitution because the Parliament treated the Act as a money bill to evade presidential authority.[43] The Act shows disrespect for a number of judicial decisions as well.[44]

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40. M.R. Islam 2002 *supra* note 12; *Amnesty International Report on Bangladesh* 2002, *The US Dept Report supra* note 2 at 11; *The Daily Star* 16 Nov 2001, 6 Jan 2002, 26 May 2002; *The Daily Janakantha* (National Bengali Daily) Dhaka 26 May 2002; *The Daily Jugantar* (Bengali) Dhaka 26 May 2002; see also, *Far Eastern Economic Review*, "Bangladesh: A Cocoon of Terror", *available at* http://www.feer.com/articles/2002/0204-04/p014region.html; "Persecution of Hindu Minorities in Bangladesh A Critical Review" *The Daily Star* 21 Jan 2002.

41. *The Daily Star available at* < http://www.dailystarnews.com/200111/01/n1110110.htm# BODY1>.

42. M.R. Islam and S.M. Solaiman, "The New Speedy Trial Law to Maintain Order in Bangladesh: Its Constitutional and Human Rights Implications" 46 *JILI* 79-98 (2004).

43. Under art. 80 (3) of the Constitution, the President is bound to consent to a money bill. However, the Act, in no way can be considered under art. 81(1) & (2) as money bill since it does not deal with any of the listed matters (mentioned therein) essential to qualify to be a money bill.

44. The preceding government enacted a law titled the Public Safety (Special Provision) Act 2000 (PSA) of almost similar nature. Nearly 500 writ petitions were lodged with the High Court Division (HCD). A spilt HC verdict was delivered on 12
July 2001. The presiding judge held that the PSA was entirely *ultra vires* to the

In particular, this new Act which authorizes four metropolitan magistrates to adjudicate cases, also suffers from legal flaws and is unprecedented and is against the conventional practice of the country. Apart from legal flaws in appointing magistrates, the two major concerns of the inherent aim of the Act raised confusion about the credibility of this law. One is the direct supervision by the government of magistrates[45] and the other is the alleged involvement of magistrates in corruption.[46]

Inevitably, the foregoing reflects the impression that the enactment of laws and their implementation were driven to meet almost a 'self-centric' goal of the executive, rather than accommodating public needs and aspirations. Also, all these examples appear to indicate that the Parliament was forced to become a 'rubber stamp', which virtually lost its ability to exert any control. The situation is further exacerbated by the unconstructive and negative roles of the members of the Parliament which added to the executive's unlawful authority.[47] Over the last three decades, as Bangladesh's contemporary experience shows that the political culture has created 'turncoat politicians' in the country, and their 'ideas, ideologies, even party affiliations vary with and are dependent upon the incumbent government'.[48] After getting elected as Member of Parliament, politicians are reportedly and deeply moved by their 'self-interest', and demonstrate very little interest in any proposed legislation.[49] Successive governments have used them as a 'convenient tool' for running state's affairs. Another disappointing blow on the parliamentary democracy is the frequent boycott of the opposition

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details, "Split High Court Verdict on PSA" *The New Nation*, Dhaka 13 Jul 2001; *The New Nation* 25 Jul 2001. In a landmark judgment in the constitutional history of Bangladesh, the court held that the basic structure of the Constitution cannot be altered by the legislature and any legislation beyond the purview of constitutional

limitation will be regarded as unconstitutional. See, *Chowdhury and Others* v. *Bangladesh*, (1989) IX (A) BLD 1 at 3-5.

45. Magistrates are appointed from administrative cadres, and their job related benefits are directly under the control of the executive according to the 4th amendment (art. 115) of the Constitution.

46. See, *Amnesty International Report 2002*; "Corruption in Bangladesh: An Overview" *available at* http://www.ti-bangladesh.org/docs/survey/overview.htm; and "Corruption in Bangladesh: An Overview" *available at* http://www.ca/Readings/TI- FO1.htm; M. Hasan, "Making Anti- Corruption actions Work: Enlisting Media, NGOs and Aid" *available at* <http://www.ti-bangladesh.org>.

47. See, for details, M.R. Islam 2002 *supra* note 12.

48. M.R. Islam, "The seventh Amendment to the Constitution of Bangladesh: A Constitutional Appraisal" 58 *Political Quarterly* 312 at 328-329 (1987).

parties[50] from the session (Parliament) and the lack of their commitment to public mandate, which further truncated the Parliament's accountability.

Finally, the financial misappropriation of public money has been another unfair facet of the executive in Bangladesh. Most parliamentary committees (PCs), especially financial committees, are chaired by the ruling parties and their procedures display a serious neglect of transparency. The rules of procedure for PCs, for example, require meetings to be held in camera and much of the functions of the PCs remain unknown and unnoticed by the public.[51] Unbelievably, in regard to the transparency, in an international survey 'Bangladesh was ranked as the most corrupt country among 133 nations' for the fifth successive year'.[52] Most strikingly, despite a series of legislative rules and the constitutional provision,[53] an ombudsman's office is yet to be functional in Bangladesh to oversee the issue. Instead, the government has become the ultimate authority to decide financial policies and ways of expending by virtue of some amendments to the Constitution.[54]

Executive's undue influence over the judiciary

The independence of the judiciary is one of the essential components of ensuring fundamental rights.[55] It broadly reflects an ideal

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50. The present government party while in opposition was absent in Parliament from 1999 to 2001 and the present opposition parties after 9-months abstention went back to the Parliament in June 2002. See, "Opposition boycott renders parliament less effective" *The Independent* 25 Feb 2000; *The US State Dept Report supra* note 2.

51. The World Bank, *Bangladesh: Financial Accountability for Good Governance* 67-69 (2002).

52. See, Amnesty International Bangladesh 2005 *available at* http:// web.amnesty.org/web/web.nsf/print/8F276D4ADE368E118025162003B347 8 visited on 7 Feb 2006; Transparency International (TI) has used 15 surveys from nine independent institutions and at least 3 surveys from the concerned country. The number of countries surveyed by the TI was 91, 102 and 133 respectively in 2001, 2002 and 2003. 'In its corruption perception index (CPI) 2003, Bangladesh was rated 1.3 on a scale of 10'. See Staff Correspondent, TI corruption index; Bangladesh hits the bottom for third time' *The Daily Star* 10 Aug 2003; see also, "Transparency International, Corruption Perceptions Index" 2002, Berlin *available at* <http:www.transparency.org/cpi/2002.en.html> ; 'TIB Report: Bangladesh Stays Most Corrupt Country for Second year' *The Bangladesh Observer*. Dhaka 29 Aug 2002.

53. Art. 77 of the Constitution provides provisions for the establishment of the office of ombudsman.

54. M.R. Islam 2002 *supra* note 12.

55. M. Dakolias and K. Thachuk, "The Problem of Eradicating Corruption

encompassing two distinct qualities: decisional independence and institutional independence.[56] The former entails the ability of judges to render justice exclusively based on relevant laws and free from all extra-legal factors.[57] The latter signifies a thorough separation of the judiciary from the executive or legislature. The achievement of these two qualities warrants a fair mode and manner through which the appointment, promotion and removal of the judges are conducted.[58] Although there is no uniform standard for assessing the independence of the judiciary, certain well accepted criteria are found in a number of judicial decisions and international documents. The Supreme Court of Canada in *Walter Valente* v. *Her Majesty the Queen*,[59] for example, regarded security of tenure as 'the first of the essential conditions of judicial independence'. The Supreme Court of New South Wales, Australia, recommends the 'freedom from executive control and all appearance thereof, and reasonable security of tenure.'[60] The UN formulated 20 basic principles; the foremost of which requires the state to grant, respect and observe the independence of the judiciary.[61]

By now, it is well recognized that an independent judiciary free of all forms of interference and unfairness is imperative for ensuring fair administration of justice.[62] Considering the importance of the issue, the original Constitution of Bangladesh incorporated a number of provisions guaranteeing the independence and the separation of the judiciary. Yet, in contravention of the Constitution, the executive in Bangladesh enjoyed an unfettered control over the lower judiciary, which was held to be unconstitutional by the Supreme Court in several

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56. J.C.Wallace, "Resolving Judicial Corruption while Preserving Judicial Independence: Comparative Perspectives" 28 *California Western International Law Journal* 341 at 342-344 (1998).

57. M.P. Singh, "Securing the Independence of the Judiciary-The Indian Experience" 10 *Indiana International and Comparative Law Review* 245 at 245- 249 (2000). It is observed that 'a judiciary that gives greater weight to the political consequences of a case than to a fair application of the law "will soon become another political body, which will mark the end of the rule of law."

58. See, for example, *North Australian Aboriginal Legal Aid Service Inc* v. *Bradley* [2002] D 28 of 2001 BC200205677 (unreported case) at 7 & 8; S.A. Akkas, "Appointment of Supreme Court Judges in Bangladesh: A Study of Law and Practice" 11 *Journal of Judicial Administration* 146 (2002).

59. (1985)2SCR673[4.27] *available at* http://www.lexum.umontreal.ca/csc-scc/en/pub/1985/vol2/html/1985scr2_0673.html.

60. *Macrae and Others* v. *Attorney-General for State of New South Wales*, 7 ALD 97.

61. *Seventh National Congress on the Prevention of Crime and the Treatment of Offenders* 1985,UN Doc A/CONF121/22/Rev 1 at 59 (1985).

62. S.N. Sanker, "Disciplining the Professional Judge" 88 *California Law Review* 1233 at 1275-76 (2000).

instances (considered in following sections). Also, the higher courts, although they display a significant degree of independence in delivering verdicts, have often had their processes interfered with by the executive. Despite constitutional imperatives and recurring election pledges, the judiciary is not separate from the executive; rather it is integrated into the civil administration in terms of appointing judges.[63] The following discussion examines briefly the executive's role in ensuring or rather, undermining judicial independence.

Executive's domination over the highest court

Article 95 (1) of the original Constitution authorised the President to appoint the chief justice (CJ), but for the appointment of other judges the President was required to consult with the CJ. Regrettably, the 4th amendment omitted the consultation requirement and made the President an exclusive authority to appoint and remove the judges of the judiciary. The restoration of parliamentary democracy in 1990 did not make any difference; the President being the 'titular head' of the government has to act on the advice of the Prime Minister. Nevertheless, having considered the competence and views of the CJ the most relevant and appropriate in determining the suitability of the judges, this practice has been followed since the British rule in India, even beyond formal laws,[64] however, in Bangladesh this conventional requirement was seriously impaired by the executive in a series of instances.[65]

Consultation with the CJ is also a constitutional imperative in our neighboring countries, India and Pakistan. Both countries have developed very persuasive and authoritative precedents in this regard. For example,

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63. Bangladesh Civil Service (Re-organisation) Order, 1980, para 2 (X) has amalgamated judicial service with the other 13 cadre services.

64. A. Ahmed, *Theory & Practice of Bangladesh Constitution* 137 (1998); see also, M. Islam "Constitutional Law of Bangladesh" *Journal of Bangladesh Institute of Law and International Affairs* at 361 (1996).

65. For example, in Feb 1994, the government, for the first time, appointed nine additional judges to the HCD without consultation with the CJ. In subsequent case, the President neither consulted with, nor followed the recommendation of, the CJ in appointing two additional judges to the HC. In 2001, the recommendation of CJ was again turned down in relation to regularizing the appointment of additional judges by the President as permanent judges of the HCD. The President confirmed only one out of four, while others had to relinquish the job. See for details, M.R. Islam and
S. M. Solaiman, "The Enforcement of Rulings of the Supreme Court on Judicial Independence in Bangladesh: When Enforcer Becomes Violator" 4 *Australian Journal of Asian Law* 108 at 111-112 (2002); M.R. Islam and S.M. Solaiman, "Public confidence crisis in the judiciary and judicial accountability in Bangladesh" 13 *Journal*

in *S.C. Advocates-on-Record Assocn.* v. *Union of India*[66] the Supreme Court of India, beyond mere consultation, placed significant importance on the opinion of the CJ. By observing that no appointments can be made without the initiation process by the CJ, or without compliance with the opinion of the CJ, the court (in the event of conflict between opinions) not only upheld the opinions of the CJ but also provided a powerful guidance for the future.[67]

Security of tenure of judges represents a basic strength for exercising independent decisions, which was also grossly hindered in Bangladesh by the executive on a number of occasions. For example, in 1982 the seat of the CJ was declared vacant with retrospective effect and three senior judges of the high court division (HCD) were removed by executive orders without prior notice or assigning any reason.[68] In 2002, the incumbent government, immediately after assuming power, ignored the recommendation of the CJ and extended the term, for one year, of three additional judges of the HCD instead of confirming their appointments.[69] In particular, a good number of judges were then waiting for confirmation (all judges are regularized after completing their two-year service as additional judges). To remedy the logjam of cases, the preceding government (now the opposition party) appointed 39 additional judges.[70] The media revealed that the then current government was planning to appoint more judges by relieving the in-service judges, since 39 judges, being appointed by the opposition party, might not serve the purposes of the present executive.[71] Needless to say, such an approach essentially illustrates a destructive threat for the fair administration of justice. This approach not only undermines judicial independence, but certainly inserts an extra-legal element into judicial consideration as well. Judges may not perform their duty independently, particularly when the government or its allies are one party to the suit.

Executive's interference with the lower courts' administration

Article 115 of the Constitution, as substituted by the 4th amendment, requires the President to make rules for the appointment of the judges of lower courts, and their independence in exercising judicial powers is unequivocally and repeatedly affirmed in articles 109, 116 and 116A of

66. AIR 1994 SC 268.
67. *Ibid.*
68. M.R. Islam 2002 *supra* note 12.
69. *Ibid.*
70. UNB, "Moudud Tells JS: Steps for Separation of Judiciary Soon" *The Daily Star* 2 Apr 2002.
71. *The Daily Star* 30 Apr 2002.

the Constitution. In relation to the control (including posting, promotion and grant of leave) and discipline of the lower court judges, the President is obliged under article 116 to consult the CJ. Nevertheless, no rule has so far been made in this regard[72] and the government, in violation of the Constitution, continues to appoint judges. The validity of such an appointment was first challenged in the case of *Aftabuddin* v. *Bangladesh*[73] in which the consultation with the CJ was declared mandatory for posting and promotion of magistrates. The issue was again dealt with in *Rahman* v. *Ahmed* [74] when the government appointed a metropolitan magistrate without consultation. In this case, the HCD observed that the President is under a legal obligation to consult with the CJ and declared the appointment of the magistrate illegal and without jurisdiction.[75]

Adjournment of pending cases by executive orders has been another mode of interference with the judicial function. Legally, only the concerned court is empowered to issue an adjournment, not the executive. Yet, the home ministry took a decision on 12 April 2002 to withdraw 38 criminal cases exempting over 500 people from legal charges of killing, bombing and terrorism, since they all belonged to the ruling party.[76] The Bureau of Anti-corruption Department lodged well over 100 cases against the incumbent prime minister (PM), home minister (HM) and other MPs for their official malfeasance when they were in power (1991-1996).[77] In 2002, soon after the coming to power of the incumbent government, all cases against PM and HM were withdrawn.[78] Also, in a very recent incident the government has withdrawn 'one and a half dozen of cases hanging over the former military despot [after he accepted] the BNP's invitation to join the four-party alliance.'[79] National eminent jurists and the Transparency International expressed serious concern about the fairness of this withdrawal without any investigations and proper hearing.[80]

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72. *Secretary, Ministry of Finance* v. *Mazdar Hossain (hereinafter Mazdar Case)* (2000) 52 DLR (AD) 82 at 113.

73. (1996) 48 DLR 1.

74. (1999) 19 BLD 291 at 295-296.

75. *Id*. at 295-296 & 298.

76. "38 cases against BNP: Jamaat men to be withdrawn" *The Daily Star* 13 Apr 2002.

77. 'Corruption cases against Khaleda Zia' *The Dawn* Pakistan 24 Jul 2002.

78. *The Daily Star* 19 Apr 2002.

79. See for details 'Ershad's Head still on block' *available at* http://www.southasianmedia.net/index_story.cfm?id=313491&category=Frontend & Country=BANGLADESH visited on 4th August 2006.

80. UNB, Dhaka, "Jurists oppose withdrawal of cases against Ershad" *available at* http://nation.ittefaq.com/artman/publish/article_29548.shtml visited on 4 August 2006; The *Daily Jugantar*, Dhaka 19 Apr 2002; *The Daily Star* 19 Apr 2002.

Separation of the judiciary from the executive

The separation of the judiciary lies at the heart of judicial independence. Article 22 of the Constitution imposes an obligation upon the state to ensure the separation of the judiciary from the executive. Successive governments in Bangladesh recurrently made public pledges before elections to effect the constitutional requirements but did not fulfil their pledges throughout their tenures. Amid such government passivity and after some unsuccessful attempts,[81] the issue of the separation of the judiciary received strong recognition in *Mazdar case*.[82] In May 1997, the HCD issued a unanimous verdict (as a part of its judgment) outlining specific guidelines for the separation of the judiciary. The decision was upheld on appeal in December 1999 and reconfirmed upon review in June 2001. The appellate division took a strong stand on the separation issue, formulating a 12-point directive for judicial independence to be enforced forthwith that would result in virtual separation from the executive. The caretaker government, however, after completing all formalities, at the last moment left the issue open for the executive.[83] Unbelievably, the executive, until October 2005, sought and received extensions on 20 occasions without any plausible reasons, instead of complying with the decision.[84] On 1 February 2006, the Supreme Court of Bangladesh, 'rejected the government's 21st appeal to extend the deadline for separation of the judiciary, expressing its disgust at the 'government's doing nothing' to this end …' in the last six and a half years since the *Mazdar* unanimous verdict.[85] By contrast, the Government of India in a similar situation constituted the First National Judicial Pay Commission, and is going to establish a separate Judicial Service Commission for subordinate judiciary all over the country in accordance with the decision of the Supreme Court in

81. For example, the first attempt to separate the judiciary was made by an opposition MP in 1991 by submitting a bill to the Parliament. The bill was scrutinized duly by a special committee, but in the end failed to secure the Parliament's approval due to the unwillingness of the ruling party.

82. A good number of judges of the subordinate judiciary filed a writ with the HCD in 1995. The issue of amalgamation of judicial service with other cadre cervices was challenged in this case. The court held that the judicial service is functionally
and structurally distinct and separate service from the civil executive and administrative services and cannot be amalgamated or tied together with the civil services. See *Mazdar case supra* note 72 at 82-84.

83. 'Asia Human Rights News' *available at* <http://www.ahrchk.net/news/mainfile.php/ahrnews-200201/2307.

84. Islam 2003 *supra* note 65.

85. See generally, "Separation of Judiciary in Bangladesh: Supreme Court Rejects Government's Plea for Extension" *available at* http://www.voanews.com/bangla/

the case of *All India Judges' Association* v. *Union of India*.[86]

Nevertheless, the executive government of Bangladesh is bound under articles 102 and 112 of the Constitution to implement the verdict of the Supreme Court. In such a situation, whether the executive's acts would amount to contempt of court is another issue, currently pending under the Supreme Court in Bangladesh.[87] The essence of the Contempt of Court Act, 1926 (as adopted in Bangladesh), however, is to uphold the dignity of the court and to preserve public confidence, and this obligation is primarily upon the executive.[88] Also, a number of cases have supported the view.[89] Regardless of these legal and judicial agreements, however, for some obvious reasons the executive's 20th time extension without any reasonable ground for its non-compliance with the judgment could logically be termed as intentional, and such act was held as contempt of court in *Sikder* v. *Sikder* and *Edward Snelson* v. *Judges, High Court of Lahore*.[90] It is clear that the government 'has much to lose by the creation of an independent judiciary'[91] and this is the only reason behind its reluctance to separate the judiciary from the executive.

Gross abuse of arrest power and the police's impunity

Legally, police enjoy qualified powers under a number of state laws[92] to maintain law and order, yet the reality stands in sharp contrast

86. AIR 1992 SC 165; see also, "Report of the National Judicial Pay Commission" (1999) paragraph 1.8, *available at* http://www.kar.nic.in/fnjpc/introduc.html; "National commission to review the working of the Constitution: A consultation Paper on All Judicial Service Commission" (2001) Vigyan Bhavan New Delhi, *available at* ncrwc@nic.in.

87. *Supra* note 85.

88 *State* v. *Abdur Rashid*, (1964) PLD 241 (DB).

89. *Hossain* v. *State*, (1983) 35 DLR 290; *Southern Fisheries Ranong Coprs* v. *Kingfisheries Ind Ltd*, (1982) 34 DLR 23, *Sarkar* v. *The State*, (1986) 38 DLR (AD) 188.

90. (1983) 35 DLR (AD) 203; (1964) 16 DLR SC 535.

91. Islam 2002 *supra* note 12.

92. The police administration is regulated by the Police Regulations, 1861; Police Act, 1861; Police Metropolitan Ordinances for Dhaka, 1976; Chittagong 1978 and Khulna 1985; and Code of Criminal Procedure, 1898. S. 33 (b) of the Police Regulations, 1861 empowers senior officers to take action against subordinates who are deemed to have acted with rudeness, cruelty or anger towards the general public.

S. 190 empowers a magistrate to take legal action if an officer performed in an inappropriate manner as defined under s. 33 (b). Regarding arrest, s. 23 of the Police Act permits a police officer to apprehend all persons whom he is legally authorised

with that of legal provisions. Widespread abuse of the process of law in arresting persons, and custodial torture in barbarous forms are pervasive phenomena in Bangladesh. Only during 1996-2001, for example, a total of 63 women were reportedly raped by members of the enforcing agencies and 286 people died in jail and *thana* (police station) custody.[93] The government's inaction and partisan behaviour are believed to contribute to the unchecked power and impunity of the police. In the last twenty years, there has been only one successful criminal prosecution for custodial death, in which an officer in charge was sentenced to ten years imprisonment; nonetheless, the period of imprisonment was later reduced to five years and after serving only about two years, he was pardoned and released.[94] Between the October 2001 election and May 2002, 105 persons were reportedly tortured by the law enforcing agencies, of whom 54 have died in police custody, but no one has been prosecuted so far.[95] *Human Rights in Bangladesh 1998*, a report published by the Ain O Salish Kendra, a leading NGO in Bangladesh, revealed: '[since] the country became independent, 18,911 deaths have been reported in police custody. Cases were filed against police officers for only 321 deaths, and only three of these cases went to trial.'[96] These mere facts can be enough to substantiate the government's culpable passivity regarding the issue.

Sections 54 and 164-167 of the Criminal Procedure Code 1898 (Cr PC) and the Special Powers Act, 1974 (SPA) are the most misused laws in Bangladesh by the police. These are addressed below.

(i) Arrest as entrenched in section 54 of the CrPC and its practical application;

(ii) Remand under section 167 of the CrPC and its implication for fundamental rights;

(iii) The damaging impact of 'prejudicial act' under the SPA.

(i) Arrest as entrenched in section 54 of the CrPC and its practical application: Section 54 of the CrPC empowers police to arrest any

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with fine or both for 'personal violence... threat or promise not warranted by law'. S. 163 of the Criminal Procedure Code, 1898 prohibits the police from making any inducement, threat or promise during the period of investigation.

93. See "Human Rights Violation" *The Daily Star* 29 Jul 2001.

94. *Islam* v.*Bangladesh*, (1991) 43 DLR 336; S. Malik, *Towards a Framework for Balancing Individual Liberty and the Security Needs of the State* (hereinafter Balancing Liberty) A Report prepared for USIS (United States Information Service) Dhaka 73 (1998).

95. S.K. Dey, "Murder after arrest of innocents under s 54: tortures exceed all records" *The Daily Janakantha* 23 May 2002.

96. Ain O Salish Kendra, *Human Rights in Bangladesh:1998* (hereinafter ASK Report 1998) 60 (1999).

person without a warrant on nine specific grounds. It provides for arresting a person against whom a reasonable complaint has been made or reasonable suspicion exists.[97] Accordingly, credible information is required to establish the rationale before arresting a person. In practice, however, the provision has often been misused by political influence and as a means of making money for the police. It is an open secret in Bangladesh that the successive governments have frequently used section 54 to harass and intimidate members of its political opposition.[98] Arguably, terrorists belonging to the ruling party were guarded and, on some occasions, asked by the police to leave their home before taking any supposed move to arrest them.[99] Alternatively, innocents, who constitute 70% of the arrested persons, become victims and are forced to pay bribes for release.[100] Frequently, the failure to comply with the bribe-demand of the police invites a false criminal charge[101] or horrifying torture using third-degree methods in repeated remands In only one month (13 May–12 June, 2002), a total of 10,077 people were reportedly arrested, 7305 merely on suspicion.[102] It is also reported that the majority of the suspects were from poor economic background,[103] and among them women were more vulnerable. Women, including sex workers, who are left destitute either by desertion, death or migration of husbands, are often picked off the streets and charged under section 54. In jail, they experience further abuse by the jailer and police.[104]

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97. Criminal Procedure Code 1898, s. 54 (1).

98. *The US Dept Report supra* note 2 at 4; see also, K.A. Hamid and M.A. Zahid, "Preventive Detention and Liberty: Bangladesh as a Case Study" 41 *Journal of Asiatic Society of Bangladesh Hum* 221 at 226 (1996).

99. See for example, *Editorial The Prothom Alo* (National Bengali Daily) Dhaka 26 Apr 2002; T. Blanchet, *Lost Innocence, Stolen Childhoods* 1888 (1996).

100. M.A. Rahman, "Frustrating Joint Special Drive" *The Daily Star* 26 May 2002.

101. For example, Noor Hossain was released on bail in a case of mistaken identity after 10 months of his detention. After that the police charged his brother in a case and demanded a bribe to settle the case. As he declined to pay the bribe, police arrested Hossain on June 2000, for details see *The US Dept Report, supra* note 2 at 4.

102. *The Ittefaq*, 13 Jun 2002.

103. An investigation conducted during the period between July 2000 and December 2001 by Odhikar (NGO), Bangladesh, reveals that most of the persons arrested on suspicion 'are either homeless persons, rickshaw pullers striving to make ends meet, small-scale vegetable and fruit vendors, street children, destitute women who, being abandoned by their husbands, turn to the streets to try and support their children and also professional sex workers'- Odhikar Report, "Reasonable suspicion Vs unreasonable impunity" *The Daily Star* 8 December 2001.

104. "The condition of women in Bangladesh prisons"—An investigation report (from December 2000 to November 2001) prepared by Odhikar.

Section 54 of CrPC was introduced by the British more than a century ago to establish a peaceful colony; however, in England, in order to limit the power of the police and to effect the object [105] of arrest without warrant, a new section was inserted in the Police and Criminal Evidence Act, 1984.[106] To that end, India also provides some positive precedents of how different judicial and administrative initiatives recognised and redressed this problem way back in the 1980s. Emphasising the magnitude of the problem, the Supreme Court (SC) of India in *Joginder Kumar* v. *State of UP*[107] issued a rule prohibiting any arrest 'without reasonable satisfaction reached after some investigation as to the genuineness and bonafides of a complaint.' In numerous instances, the apex court has attempted to link the concept of 'human dignity' to the fundamental rights and advanced in many ways the ideal and values of life by granting favourable remedies to the disadvantaged. In *Olga Tellis*, [108] for example, the court maintained that 'life' means something more than mere animal existence and right to life implies 'the right to live with human dignity and all that goes along with it, namely, ...freely moving about and mixing and co mingling with fellow human beings.'[109] Certainly, by drawing a powerful link between 'human dignity' and fundamental rights and by extending the meaning and significance of 'life' the apex court of India not only conveyed a strong signal for outlawing unfair practices but also facilitated the growth of a culture congenial to developing contemporary human rights concepts.

In particular, the National Police Commission (NPC) of India has been monitoring arrest, detention in custody, interrogation of women and delays in investigation that lead to undue detention in custody.[110]

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105. The objectives are to prevent the suspect from destroying evidence, or influencing a witness or warning accomplices who have not yet been arrested, see the Report of the Royal Commission on Criminal Procedure, Command Papers 8092 of 1981 as mentioned in *D.K. Basu* v. *State of West Bengal* (hereinafter *Basu Case)* AIR 1997 SC 610 at 616.

106. S. 46A of the Police and Criminal Evidence Act, 1984 (UK) provides, *interalia*, that (i) '[a] constable may arrest without a warrant any person who, having been released on bail under this part of this Act subject to a duty to attend at a police station, fails to attend at the police station at the time appointed for him to do so'. (ii) 'A person who has been released on bail...may be arrested without warrant by a constable if the constable has reasonable grounds for suspecting that the person has broken any of the conditions of bail.'

107. AIR 1994 SC 1349.

108. *Olga Tellis* v. *Bombay Municipal Corporation*, AIR 1986 SC 180 at 193.

109. *Francis Coralie* v. *Administration , Union Territory of Delhi*, AIR 1981 SC 746 at 747.

110. *Behind Prison Walls: Police, Prisons and Human Rights* (hereinafter Behind Prison wall) A Report on a workshop held by the non-governmental Commonwealth Human Rights Initiative, 1995, New Delhi at 6.

The NPC recommended (3rd Report) specified grounds[111] for the justification of arrest during the investigation of a cognizable case. The recommendation includes a broad range of suggestions for amendments to the law and procedure, and periodic visits to inspect and report on police lock-ups.

(ii) Remand under section 167 of the CrPC: Section 167 of the CrPC provides for remand of an arrested person. The magistrate empowered to give the remand order is required under this section to examine a copy of the police diary in order to ascertain the justification for the order, and also to record his reasons thereof. There is no law in Bangladesh supporting torture or coerced

confession, rather the Constitution and other statutes are, subject to a few exceptions,[112] very clear and supportive in favour of a detainee. The Constitution prohibits torture and cruelty, and entitles arrested person to be informed as soon as possible about the grounds of arrest, provide access to a lawyer and appearance before a magistrate within 24 hours from the arrest.[113] Sections 324-331, 335, 339, 352, 355 and 358 of the penal code are concerned with the protection of all persons from torture and other cruel, inhuman or degrading treatment. Section 164 of the CrPC obligates a magistrate, before recording a confession, to make the detainee aware that he/she is not bound to make any confession, and that only a voluntary confession may be regarded as evidence. In line with domestic safeguards, a number of international human rights instruments such as the Universal Declaration of Human Rights, 1948 (UDHR), the International Covenant on Civil and Political Rights, 1966 (ICCPR) and the Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment, 1984 to which Bangladesh is a party, guarantee persons freedom from torture and arbitrary arrest,

111. The grounds are: among others, an arrest may be made where the accused: (i) is involved in a grave offence such as murder, rape, dacoity and it is necessary to restrain his/her movement; (ii) appears likely to abscond and evade the process of law; (iii) demonstrates a violent behaviour that help apprehend commit further offences
if his/her behaviour is not brought under control.

112. Torture and coerced confession are prohibited under all prevailing laws in Bangladesh. Nevertheless, the arrested person under the Special Powers Act, 1974 cannot enjoy the constitutional safeguards with regard to arrest and related trial. See ss. 3 & 11 of the SPA and arts. 33 (3), 47A (1) & (2) of the Constitution *supra* note

Despite these legal safeguards, several studies[114] and judicial decisions[115] have found that magistrates (being well aware of police torture) randomly allow remand without checking the police diary or assigning any reason. Subsequently, in remand, the police indiscriminately torture the detainee in defiance of law and also on some occasions, of the order of the court,[116] in heinous ways in the name of extracting a confession. One study confirmed that the 'various techniques of brutalities[117] [employed] by the law enforcing agencies go beyond the imagination of any sound human being'.[118]

A number of foreign jurisdictions have attempted to respond to the problem through enacting legislations. The criminal law of India, for example, prohibits magistrates from passing any order of remand where the victim is not willing to make a confession.[119] In particular, the Supreme Court of India in a landmark verdict in the *Basu* case[120]

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114. A.H.M. Kabir, "Police remand and the need for judicial activism" *The Daily Star* 7 Apr 2002.

115. *Ali* v. *The State*, (1999) 19 BLD (HCD) 268. In *Khatun* v. *State* (1986) 38 DLR 348 at 349 the court observed that 'the Magistrate in taking cognisance should be extremely careful before being satisfied that there is a prima facie case; in *Pathan and Others* v. *The State* (1999) 19 BLD (HCD) 74 the court found that the magistrate recorded a confessional statement in white sheets of paper without observing of, or complying with, the legal formalities as enjoined by s. 164.

116. Dr M K Alamgir, a former minister and a university teacher was arrested on 15 Mar 2002 without any charge. In defiance of the remand order of the magistrate he was taken to an unidentified place for seven-days remand and tortured inhumanly but no police have been held accountable for this. See, Z. Ahsan, "Arrested people being denied fundamental rights" *The Daily Star* 6 Apr 2002.

117. S. Kabir, a writer and freedom fighter of the liberation war of Bangladesh in 1971 was arrested on his way back from India. During his stay in jail he conducted interviews with a number of prisoners awaiting trial. The interview unwraps that the modes of torture includes, *inter alia*, inserting boiled egg, hot-water filled bottles into the anal passage, forcing to drink urine, non-allowance to respond to nature's call on time and electric shock on different sensitive parts (breast nipple, ear lobe, and other private parts). The other forms include suspending the detainee from a ceiling fan or tree up side down, pokers or bicycle spokes into the fingers and toe nails, pulling nails from the root as enumerated by recent victims; see, Kabir, "Torture in Remand: Gross Violation of Human Rights" *The Daily Janakantha* 24 May 2002; see also, ASK Report 1998 *supra* note 100 at 58; 'The Decomposed DB and the Demoralised Police' *The Daily Star* 4 Apr 1999.

118. *Ibid*; see also S.M. Solaiman, 'Confession During Police Remand in Bangladesh: A Legal Appraisal 2 *The Chittagong University Journal of Law* 45 at 45-58 (1997).

119. Despite that fact, India's practice of taking people (who have failed to confess) in remand may be continued, but the point here is that the law recognised the situation and was amended to prohibit such a practice. See B.B. Mitra, *Code of Criminal Procedure* 828 (1987).

120. In *Basu* the Court treated a letter addressed to the chief justice as a writ petition and provided significant insights into the issue of police arrest and

addressed this issue by issuing specific directives to be followed by the police during the investigation of a case, and held the state liable for the breach of public trust. The decision has made police or the concerned person liable for the departmental action as well as for the contempt of court when they fail to comply with the instructions of the court. The court also ruled that the proceedings for contempt of court may be instituted in any high court of the country, and the citizen tortured is entitled to receive compensation from the state.[121] At a time when there was a growing national and international concern for ensuring people's right to freedom from torture perhaps the most powerful impetus was the court's recognition of that end which successfully convinced and bound the state to pay regard for fundamental rights and to compensate for their violation. Most significantly, the court in a series of instances, even by moving beyond domestic legislation, endeavoured to address and remedy contemporary problems that restrict fundamental rights of the underprivileged.[122]

With a similar objective, the Supreme Court of the US in the 1960s, introduced the *Miranda* warnings in a landmark ruling in *Miranda* v. *Arizona*.[123] These warnings require law-enforcing officials to warn suspects of their constitutional right to remain silent and consult a lawyer prior to making any self-confession. The implication of the failure of police to maintain this formality automatically bars the court from using a confession as evidence in trial.[124] It has become a part of national culture in the US.[125] In Bangladesh, however, the practice of

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until legal provisions are made. These are, among others: (i) the police personnel carrying out the arrest and interrogation must bear accurate, visible and clear identification and name tag; (ii) the police should prepare a memo of arrest at the time of arrest and that shall be attested by at least one witness who may be either a family-member of arrestee or a respectable person of the locality.

121. *Basu* case *id*. at 611.

122. See for example, *Vishaka & Other* v. *State of Rajastan*, AIR 1997 SC 3011 at 3017.

123. The *Miranda* case was about the admissibility of statements obtained from the defendant who was subjected to custodial police interrogation. The court observed that the statements made by the defendant were constitutionally inadmissible as the police denied his request to speak to his attorney. It was decided that the person must be warned before any questioning by police that he has a right to remain silent and right to the presence of an attorney, either retained or appointed. The court further held that '...[at] any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning.' See *Miranda* v. *Arizona* 384
US 436 (1966) at 440 & 444-445.

124. *Ibid*.

125. Although in *Charl T Dickerson* a controversy arose as to whether the confession could be used against the accused despite the absence of a *Miranda* warning. See, "1966 Miranda rule serves cause of American justice", *available at* http://www.masslive.com/news/pcommunity/editmira.html -online,

suing for compensation for custodial torture is yet to develop. In more than three decades since independence, Bangladesh's judiciary neither issued any directives on the government to remedy wrongful acts and omissions of its officials and nor did promote any proactive or dynamic approach to combat negative politico-social environment which are not supportive of fundamental rights.

(iii) Damaging impacts of 'prejudicial acts' under the Special Powers Act (SPA): Unlike the ordinary process of law, a person in Bangladesh can be arrested under the SPA without committing an offence if the government suspects that he may have committed a 'prejudicial act'. Accordingly, the initial period of detention is one month and may extend to such period as the government wishes.[126] The prejudicial acts, dealing with eight varieties of issues as enumerated in section 2(f) of the SPA, signify activities, which are detrimental to the state. In reality, however, the prejudicial acts encompass too many interpretations and provide scope for abuse of the process of law. For example, in *Mrs Islam* v. *Secretary, Ministry of Home Affairs*[127] the non-payment of a loan was regarded as a prejudicial act. Over the course of time, the 'broad formulation enables government to construe a wide variety of activities, particularly criticism of the government or its policies, as prejudicial acts and to use the SPA to detain critics'.[128] In most cases, the grounds of police-arrest were observed to be vague, frivolous and petty in nature such as the allegation of cattle-theft, or unsubstantiated allegation of minor offences that, even if true, cannot be considered a threat to the security of the state.[129] The report of the US Department of State reveals that 98.8% of the 69,010 SPA detainees during the last 26 years were released (for want of proper reasons) on orders from the high court.[130] Numerous judicial decisions[131] of the HCD also

126. Special Powers Act, 1974, ss. 3 & 12.

127. (1988) BLD 262.

128. *Hossain* v. *State*, (1976) 28 DLR .

129. See, K.M. Subhan, "Human Rights: Bangladesh Perspective" 2 *Journal of International Affairs* 1 at 5 (1995).

130. *The US Dept Report*, *supra* note 2.

131. In the following cases, the court set aside detention orders due to vague and insufficient grounds, and found nothing specific about the detainee's prejudicial activities. It has been maintained that the court has to balance between the state's need to prevent prejudicial activities and the citizen's right to enjoy personal liberty,
see *Mahmud* v. *Bangladesh* (1993) 45 DLR (AD) 89 at 90 & 93; in another case, *Siddiqui* v. *Bangladesh* (1992) 44 DLR (AD) 16 at 17 the court observed that the detainee had not been treated in accordance with law that the Constitution guarantees, and declared the detention order of the district magistrate fully illegal and without jurisdiction. In *Begum* v. *Bangladesh* (1988) BLD 288 the court

exist in Bangladesh that declared SPA detentions illegal for either being vague or for the lack of sufficient and concrete grounds necessary for detention. Conversely, police have repeatedly failed to arrest alleged criminals against whom specific charges for serious offences have already been lodged.[132]

The detainees who are arrested through the abuse of power of police under the SPA, apart from undue breach of their fundamental rights there is undue harassment otherwise also. Firstly, in order to get release from the jail he/she has to access the HCD situated in the capital city by engaging a solicitor. A detainee under the SPA cannot seek bail as a remedy since no criminal charge applies to him/her; the only possible remedy is a writ under the HCD. In Bangladesh, most arrested victims are poor and lack the financial ability to initiate the process after coming to Dhaka (if he/she resides in a remote area, economically disadvantaged people usually cannot afford city life) and engage a lawyer to go to the highest court of the country. Secondly, such arrests often result in prolonged confinement and innumerable sufferings for the detainees in the jail. One study uncovered that most prison inmates were never convicted but were awaiting trial.[133] According to the government's official statistics, the period between detention and trial is, on average, 6 months but according to the press and NGO reports, it is several years.[134] Beyond NGO reports, a range of judicial decisions[135] also refute the government's above assertion. In *Mrs Wahed* v. *Bangladesh*[136], for example, the court found that the detaining authority took more than two and half years to grant a detention order. On some occasions, the period of this confinement was extended to over 12 and even 23 years.[137] In some instances, the awaiting trial period was longer than the maximum sentence applicable if he/she were convicted.[138]

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the detention. See also, *Sen* v. *Government of Bangladesh*, (1975) 27 DLR (HCD); *Basak* v. *Bangladesh* (1988) 40 DLR (HCD); *Hoque* v. *Government of Bangladesh*, (1990) 42 DLR (HCD).

132. Balancing Liberty *supra* note 94 at 15 & 62..

133. *Supra* note 117.

134. *The US Dept Report supra* note 2 at 4.

135. *Nurunnahar Begum* v. *Government of Bangladesh*, (1977) 29 DLR; *Mariam* v. *State*, (1987) 39 DLR (HCD); *Wahed* v. *Bangladesh*, (1990) BLD 19.

136. (1990) BLD 19.

137. One Falu Mia was arrested under s. 54 of the CrPC, but the authorities forgot to proceed with his case. For 23 years Falu Mia had to live in the jail. However, he could not know why he had to stay in the jail for such a long period of time. When he came out of the jail, he wanted his youth back. *Supra* note 110 at 5.

138. For example, one bank officer spent altogether 15 years in prison on a corruption charge. The maximum period of penalty for the charge would have been

The above instances apart, there is no separate place for pre-trial detainees under the SPA in Bangladesh. The pre-trial detainees under the SPA have to share food and other facilities with the convicted and hardcore criminals, and in some cases, are even denied life-saving drugs.[139] In the absence of any separate prison they are forced to remain in general prisons with other criminals. At present, as available statistics show that 75,000 people are staying in 81 prisons throughout the country with accommodation facilities for only about 25,000.[140] This figure alone is enough to present the obvious subhuman and marginal condition of detainees in general and pre-trial detainees in particular in Bangladesh. Yet, Bangladesh assumes affirmative obligation to respect and ensure a minimum standard of the right to life and liberty under a series of national and international legal instruments. The ICCPR, for example, unequivocally requires states to keep the pre-trial person in a separate place with an acceptable level of physical care in respect of accommodation, food and medical care.[141] And the departure from this minimum standard is regarded as a criminal offence under international law.[142]

India could be a leading example of effectively dealing with the issue. The Supreme Court of India in *Rudul Shah* v. *State of Bihar*,[143] for example, in regard to the illegal detention, advised the high court to release prisoners who are in unlawful detention in jails and to bind the state government to take steps for their rehabilitation by payment of adequate compensation wherever necessary. In this case, the court granted the victim a sum of Rs 35,000 as compensation.[144] The court's bold commitment for the disadvantaged is further reflected in *Saheli* v. *Commissioner of Police, Delhi*[145] in which the court held that it is well settled now that the state is responsible for the torturous acts of its employees and ordered the state to pay Rs 75,000 to the mother of deceased victim Naresh within a period of four weeks from the date of judgment.

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139. Dr Alamgir, a university teacher as mentioned before, after the expiry of his remand period told before the court that he, being a diabetic and a patient of high blood pressure was not supplied any medicine despite doctor's advice and his repeated request. After getting bail, he had to admit into the hospital. See, *The Janakhanta* 23
Sep 2002.

140. 'Prisons and Prisoners' *The New Nation* 23 May 2002.

141. ICCPR 1966, adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 Dec 1966, entry into force 23 Mar 1976, in accordance with art. 49, art. 10.

142. C.M. Upadhyay, *Human Rights in Pre-Trial Detention* 162 (1999).

143. AIR 1983 SC 1086.

144. *Id.* at 1089.

III Conclusion

A transparent and accountable government, an independent judiciary, effective law enforcing agencies are primary components for ensuring fundamental rights. The above discussion demonstrates that none of these components exist in Bangladesh. Instead, each existing factor erodes the respect for law, leaving a devastating impact on fundamental rights, and the constitutional obligations are repeatedly and unjustifiably compromised to suit political expediency. Pursuant thereto, the political culture of the country promoted an all-powerful executive and provided very little scope for challenging its unrestricted authority. The political necessity and influence fueled the enactment and enforcement of laws often at the cost of the fundamental rights of the governed. Eventually, this trend of using political 'power' incapacitated the two major organs to exert any effective check on the executive's gain. The one-party dominated Parliament has become transformed into a dependent and subservient institution of the executive. The same is applicable to the judiciary; there is no precedent in Bangladesh to suggest that the judiciary either recognized an obligation to compensate for the disadvantaged experiences of the ordinary people or imposed any affirmative obligation on the government to mitigate inappropriate application of the constitutional provisions. Quite in contrast, the situation in India, being a country of almost similar socio-economic background, is different in a number of ways as already referred to. The prevailing situation in Bangladesh could have been largely escaped should the two branches of the government strive to gain their independent strength and individuality to discipline the abusive power of the executive. To borrow an important comment from Wallace: 'limitations on government can be preserved in practice to no other way than through the medium of courts of justice.... Without this, all the reservations of particular rights or privileges would amount to nothing.'[146]

146. Wallace 1998 *supra* note 56 at 343.