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No Equity for Writ Petitioners?

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Introduction:

In *Government of Bangladesh and others vs. Zafar Brothers Limited and another*, reported in *69 DLR (AD) 52*, the Appellate Division considered the question whether the High Court Division under Article 102 of the Constitution "can act as a Court of equity or can pass an order for ends of justice." The Court briefly discusses the history of equity and distinguishes between a court of law and a court of equity thus:

> "... a Court of equity is authorized to apply the principle of equity as opposed to law to the cases brought before it. A Court of law must follow the black letters of the statute while a Court of equity has the ability to do what is fair and equal."

It goes on to declare:

> "While exercising the writ jurisdiction under Article 102 of the Constitution, the High Court Division is a Court of law and not a Court of equity and it also cannot pass any order for ends of justice. The High Court Division must act in terms of the letters of Article 102 of the Constitution and not beyond that taking into consideration what would be good or bad under the principles of equity."

This declaration raises a fundamental question whether seekers of writ remedies are disentitled from equitable reliefs.

The decision does not accord with the long tradition of the High Court Division, which has been granting equitable reliefs and applying equitable principles in writ jurisdiction since time immemorial. If the decision is meant to take away this power from the High Court Division, it has indeed attempted to redefine the scope of the writ remedies.

But the proposition that the High Court Division is not a court of equity but a court of law, and so it cannot apply the principles of equity in the judicial review proceedings, does not seem to take into account the historical fact of fusion of law and equity. It has also overlooked the scheme of Article 102 of our Constitution.

This essay discusses the evolution of common law and equity and the historical distinction between them, the development of 'writs', the origin of Court of Chancery and the eventual unification of courts of law and courts of equity, the judicial review proceedings in England and Bangladesh and the present status of equity. It goes on to argue that, contrary to the decision in the Zafar Brothers case, the High Court Division indeed has power to consider and apply tenets of equity and to pass suitable orders for ends of justice.[1]

Law and equity: historical overview:

Anglo-Saxon law

Before the Norman Conquest of 1066, the Anglo-Saxons had developed a body of rules, based mostly on local customs. Crimes were treated as wrongs for which compensation was paid to the victim. Much of England's laws were local and were enforced through local folk courts in the shires and hundreds.[2] Large landholders held their own manorial courts.[3] The Catholic Church had its own system of law known as canon law[4] which was enforced through its hierarchial authorities.

Curia Regis and three Royal Courts

Following the Conquest, the Norman kings used a council called the curia regis ('royal council' or 'king's court') to conduct much of the government's business. The curia regis was England's first central court, and its first central government body. It consisted of barons and high ecclesiastics. Gradually the curia regis began to branch off into other entities. Three common law courts emerged in the process: Common Pleas, Exchequer and King's Bench. The Court of Common Pleas adjudicated civil disputes between commoners in which the Crown had no interest. The Court of King's Bench heard actions over things affecting the Crown, and its jurisdiction covered criminal matters. The Court of Exchequer dealt with money and taxation. The courts kept records of their proceedings on rolls of parchment. The keeper of these rolls in the Court of Chancery (see below) was called the Master of the Rolls.[5]

Common law

'Common law' was so called because it meant general law common to the whole of England, as opposed to special law that had only local application.[6] From the 11^{th} century judges travelled all over the realm on 'circuits' and held 'assizes' (sessions) to hear cases locally. Over a period of time, this enabled the judges to gather the best of local laws and apply them throughout the country, thus creating law which was 'common' to the whole of the king's domain. Common law, which is thus a judge-made law, is contrasted with statutory law. Common law jurisdictions are now also juxtaposed with 'Civil law' jurisdictions, i.e. the legal traditions that prevail in the rest of Europe, where judges do not make law and the code/statute is the only law. Also, common law is distinguished from equity, as we shall see below.

Writs

The judges of the royal courts that evolved from curia regis developed the system of writs. A writ was initially a 'written order' issued by the monarch, requiring a specified person to undertake a specified action. Writs were earlier used by the Anglo-Saxon kings primarily for conveying land grants. The royal courts later developed writs as a method of initiating legal action in court. Writs were purchased from the court on payment of a fee. The aggrieved party applied to the court for the writ most appropriate for his complaint. Each writ was a 'form of action', a standard form document, which was issued by the court setting out the complaint and requiring the defendant to make amends or appear in court. In many instances they served much the same purpose as the modern summons.

These writs became a set of cubbyholes into which a complainant had to fit his complaint. For example, the Writ of Naifty allowed landowners to get their runaway serfs back. The Writ of Ejectment was used to recover land. The Writ of Attachment was an order to seize a debtor's property. The Writ of Certiorari was an order to the lower court to send the record of a case to the higher court. The Writ of Habeas Corpus was used to bring a prisoner to court to testify in a pending trial. By the end of the thirteenth century there were more than 400 such writs.

In course of time the writ system became extremely formal and beset with technicalities. Claims would only be allowed if they could fit into an existing writ. 'No writ, no remedy' was the rule. Creation of new writs virtually stopped after 1258[7], and the forms of writ became static. Success of an action depended on the initial choice of correct writ for the proposed legal action. If wrong writ was chosen by the complainant's solicitor, the action would fail. Even if the correct writ was obtained, the judges would often spend more time examining the validity of the writ than the merits of the claim.

In civil cases the relief available was largely limited to payment of damages, which was often proved inadequate. The court refused to extend and diversify types of relief so as to meet the needs of new situations. In their insistence on the letter of the law, the courts often failed to deal fairly and justly. Secret trusts and informal contracts were not recognised. The strict rules of proof began to cause hardship. Moreover, the courts used juries which could be intimidated and corrupted.

Evolution of equity

As the common law became increasingly rigid and inflexible, dissatisfied litigants began to petition the king directly. The king started to pass these petitions on to the Chancellor. Until that time the Lord Chancellor had been the king's secretary in secular matters, as well as the keeper of the royal seal. All of the secretarial work of the royal household was handled by him and his staff of chaplains. In due course, the petitions of the aggrieved litigants began to be addressed to the Lord Chancellor directly. His office in the Chancery developed its own name: the Court of Chancery.

The Chancellor dealt with these petitions on the basis of his conscience. He would give or withhold relief, not according to precedent, but by the effect produced upon his own sense of right and wrong by the merits of the particular case before him. As a result, the decisions of the Court of Chancery were often widely diverse. Justice was seen to vary according to 'the Chancellor's foot', said John Selden, a 17th century jurist. He remarked: "Equity is a roguish thing: for law we have a measure, know what to trust to; equity is according to the conscience of him that is Chancellor, and as that is larger or narrower, so is equity. 'Tis all one as if they should make the standard for the measure we call a foot, a Chancellor's foot; what an uncertain measure would this be? One Chancellor has a long foot, another a short foot, a third an indifferent foot: 'tis the same thing in a Chancellor's conscience."

Equity applied where a litigant was not well-versed in the procedures of the law, but had a realistic complaint. Where common law had given no remedy, equity did. So equity courts softened the 'black letter law' of the common law or statutes. Lord Denning gives an interesting example: under a statute of King Edward III one could not give alms to a beggar who was able-bodied, but the Chancellor ruled that one could, if the weather were cold and the beggar's clothing so light that he was likely to die.[8]

The Court of Chancery brought in new remedies which were unheard of in the writs system of common law courts. Most significant of the new remedies were trust, injunction and specific performance of contract. Previously common law courts did not recognise trusts. If one party transfers property to another (trustee), directing him to hold the property in his own name but to administer it for the benefit of someone else, e.g. a child, at common law the holder is the owner for all purposes. The trustee could simply ignore the 'trust' relationship. But the court of equity looked behind the legal ownership of the trustee and acknowledged the real, beneficial ownership of the person intended to have the property. The court ruled that the trustee simply held the land in favour of the beneficiary.

As we have seen, the common law courts only awarded damages. But the court of equity began to grant injunctions (orders requiring the defendant to do or not to do something) and order specific performance of contract (requiring the defendant to mandatorily perform his obligations under the contract instead of simply awarding damages to the plaintiff). These remedies often proved more effective than damages.

The Court of Chancery sometimes issued injunctions to stop a litigant who successfully obtained an order from a common law court from enforcing that order, because the Lord Chancellor thought it would do injustice to the other party. Soon rivalry developed between the two courts, and the matter came to a head in the Earl of Oxford's Case in 1615.[9] Lord Ellesmere, the then Lord Chancellor, granted injunction from the Court of Chancery prohibiting enforcement of a common law order, allegedly obtained by fraud, passed by Sir Edward Coke, the Chief Justice of the King's Bench. The Court of Chancery defended itself: "The Cause why there is Chancery is, for that Men[']s Actions are so divers[e] and infinite, That it is impossible to make any general law which may aptly meet with every particular Act, and not fail in some Circumstances." Chief Justice Coke, on his part, retorted: "Mr Chancellor, go fly your own kite." A deadlock ensued, and Lord Ellesmere appealed to King James I, who referred the matter to Sir Francis Bacon, the Attorney General (who later became the Lord Chancellor (1618-1621). On his recommendation, the king decided in favour of the use of injunction. It was declared that in case of conflict between common law and equity, equity was to prevail. From then on the equitable jurisdiction of the Court of Chancery was undisputed.

Records of proceedings in the Courts of Chancery began to be kept, and over time equity developed a system of precedent much like common law. By the 19th century, equity too had become as rigid as the common law. Delays were caused by the painfully slow procedures of the Court of Chancery. Cases took many years to come to fruition. More often than not they would come to a disgraceful end as lawyers' fees dissipated whatever 'equity' remained in the case. Procedural dysfunction and corruption plagued the Court of Chancery. This prompted Charles Dickens to mock English judiciary and legal profession in his novel Bleak House (1852) by depicting a fictional case *Jarndyce v Jarndyce* involving wills, which went on for a very long time.[10] The effect of Bleak House and other factors eventually resulted in an extensive reform of the English legal system, culminating in the Judicature Acts of 1873 and 1875.

Fusion of common law and equity

The Judicature Acts of 1873 of 1875 unified the courts system and fused law and equity. It was the first modern attempt to reduce the muddle – and the consequent ineptitude – of the courts. The old Courts of Common Pleas, King's Bench, Exchequer and Chancery were abolished, and a single High Court of Justice, with its several Divisions, was established. Each Division began exercising both legal and equitable jurisdictions. Any issue could be adjudicated in any Division, and any point of law or equity can be raised and determined in any Division. Thus the court "is now not a Court of Law or a Court of Equity, it is a Court of complete jurisdiction."[11] Equity continued to prevail over law, by dint of section 25 of the Judicature Act 1873.

Equitable reliefs in Bangladesh:

Immediately after the Judicature Acts of 1873 and 1875, a statute called Specific Relief Act was enacted for British India in 1877. It codified the following equitable remedies: (1) recovery of possession of property (2) specific performance of contracts (3) rescission of contracts (4) rectification of instruments (5) cancellation of instruments (6) declaratory decrees (7) appointment of receivers (8) enforcement of public duties and (9) injunctions.

India later repealed this 1877 Act and a new Specific Relief Act 1963 is now in place, retaining, however, most of the earlier provisions. The 1877 Act still prevails in Bangladesh and Pakistan, though the provisions relating to enforcement of public duties was omitted in Bangladesh in 1973.

With this codification the equitable reliefs no longer remained discretionary but became enforceable statutory rights, subject to fulfilment of the conditions of the Act. This is not to say, however, that the traditional rules of equity went extinct. "The working principles called the maxims invented by the equity courts ... are operative in the exercise of powers by the courts under the Specific Relief Act, 1877."[12] That this is so is displayed in every civil action in the plaintiff's prayer for "any other relief(s) that the plaintiff is entitled to at law and in equity."

Apart from this, the courts in Bangladesh continue to exercise their inherent powers in accordance with section 151 of the Code of Civil Procedure 1908, which applies to all civil courts in Bangladesh. Under this provision of law a court has power to make any necessary order to secure ends of justice and to prevent abuse of process of court.

Judicial review proceedings in England:

The old system of writ as a method of initiating legal action was discontinued in England. It is now replaced by a 'claim form' through which a claimant commences action.[13] The word 'writ' is hardly used now.[14] Orders of mandamus, certiorari and prohibition are still in use in judicial review proceedings[15] – they are simply called orders, not writs. Even the terms 'certiorari' and 'mandamus' are now simplified and called 'quashing order' and 'mandatory order' respectively.[16] Habeas corpus is still there but it is rarely used and has little practical significance today. It no longer plays a role in regard to detention by the police as it has been superseded by the much more detailed and workable provisions of the Police and Criminal Evidence Act 1984. Similarly, the Writ of Quo Warranto has become obsolete and has now been replaced by "Information in the nature of a quo warranto", which is an extraordinary remedy by which a prosecuting attorney challenges someone who has usurped a public office or someone who, through abuse or neglect, has forfeited an office to which he was entitled.[17]

Judicial review proceedings are governed by Supreme Court Act 1981 and Civil Procedure Rules 1998. On an application by an aggrieved person, the lawfulness of an enactment or of a decision, action or failure to act in relation to the exercise of a public function can be reviewed.[18] England being a country of parliamentary supremacy, the Court cannot declare a statute null and void as being unconstitutional, although it can strike down secondary legislation. Under the Human Rights Act 1998 the High Court or above can at best issue a 'declaration of incompatibility' if a statutory provision causes breach of rights guaranteed under the European Convention on Human Rights.[19]

In a judicial review proceeding the High Court can issue a mandatory order, a prohibiting order or a quashing order.[20] Private law remedies of injunctions and declarations may also be granted.[21] These are equitable remedies. Even damages may be awarded in appropriate cases in conjunction with one of the other remedies. Section 49 of the Supreme Court Act 1981 provides that every court exercising jurisdiction in England or Wales in any civil cause or matter shall continue to administer law and equity, and wherever there is any conflict between the rules of equity and the rules of the common law, the rules of equity shall prevail. Thus the High Court exercising judicial review jurisdiction has power to administer equity.

Judicial review in Bangladesh: equity and 'ends of justice':

In Bangladesh, Article 102 of the Constitution gives the High Court Division power to issue 'directions' or 'orders' to a public functionary on the application of an aggrieved person. Though it does not mention 'writs'[22], the five types of orders mentioned in the Article correspond to the old writs of prohibition, mandamus, certiorari, habeas corpus and quo warranto. Thus the orders or directions are issued under Article 102 upon 'writ petitions' being filed by the petitioners. These proceedings are akin to judicial review proceedings of England. In Bangladesh writ petitions may be filed for enforcement of fundamental rights (Article 102(1)), or for challenging actions of public functionaries (Article 102(2)). Bangladesh being a country of constitutional supremacy the Court can strike down an Act of Parliament if it causes breach of fundamental rights enshrined in Part III of the Constitution.[23]

Implicit in the scheme of Article 102 is the power of the High Court Division to grant interim injunctions or stay orders. Also, the High Court Division can issue declarations of illegality. Since injunctive reliefs and declarations are equitable remedies, it is apparent that equity is available for the judicial review seekers, contrary to the decision of the Zafar Brothers case.

In the case of *Oriental Bank Ltd. vs. A B Siddiq* decided in 2008[24] our Appellate Division declared: "The remedy in the writ jurisdiction is an equitable one and to seek the same one must come with clean hands ..." It is not clear if the Zafar Brothers case has overturned that decision, as no mention has been made of the earlier decision. But the conduct of the petitioner in a writ proceeding has always been relevant, and the writ courts usually demand that the petitioner come with clean hands. This equitable principle had its origin in two ancient maxims of equity: "He who comes to equity must come with clean hands" and "He who seeks equity must do equity." Thus there is no doubt that the norms of equity are in operation in writ applications.

In his book Constitutional Law of Bangladesh eminent jurist Mahmudul Islam observed, "...[writ] jurisdiction being essentially an equitable jurisdiction, the court is not debarred from making consequential order to do justice."[25] In practice the High Court Division exercises wide powers/discretions in arriving at a just decision in a given case. It may hear any person opposing the writ petition notwithstanding that he was not served with a notice,[26] take oral evidence in court,[27] issue commission for ascertaining facts as provided by Order XXVI of the Code of Civil Procedure,[28] order payment of compensation/damages to any person,[29] give appropriate direction to any person, and generally pass any consequential order it deems fit within the bounds of law and precedent. Indeed, the final prayer in a writ petition is always to "pass such other order(s) as [the Court] may deem fit and proper." The High Court Division can even issue Suo motu Rule on the basis of a newspaper report.[30]

Though Article 102 states the 'forms' of relief, it does not specify the kinds of relief which may be granted: it is the High Court Division that is left with the discretion to fashion a remedy suitable in a given situation. After scrutinizing Article 226 of the Indian Constitution and Article 98 of the Pakistan Constitution, our Appellate Division held long ago, in a habeas corpus case: "We have, accordingly, no doubt that the framers of the Constitution intended to empower the High Court Division to pass appropriate orders in the case of illegal or improper deprivation of liberty of a person and the power to do is not at all fettered because of the absence of nomenclature of the nature of the writ in the Constitution."[31]

Of course, the High Court Division cannot exercise unfettered discretion; it is bound by the rules of precedent. But in the absence of any guiding precedent the High Court Division, apart from applying the law to the facts, considers many variables, including the consequences of its decision. It considers, for example, whether its decision will open the 'flood gate' and pave the way for innumerable proceedings, whether the decision would be best for the community as a precedent, whether the detriment is likely to outweigh the benefit, whether it would be a fair solution for the parties concerned, or whether the decision would be otherwise logical. Also, the statutory texts are sometimes imprecise or opaque, admitting multiple interpretations. Hence the judge's role is not simply to 'call balls and strikes' like umpires in a baseball game,[32] but he rather has a certain extent of choice. The High Court Division does and should consider "what would be good or bad" in a given situation.

Indian courts routinely apply maxims of equity in judicial review proceedings. The case of *Mohammed Gazi v. State of M.P.*[33] is an example. The appellant, Mohammed Gazi, was awarded a contract by the State for disposal of Tendu leaves, and he deposited an earnest money. But he was prevented from collecting Tendu leaves because of a stay order granted by the High Court in a writ petition filed by another tenderer. By lapse of time the leaves, being perishable, were becoming useless. Despite that the State passed an order directing the appellant to execute the contract by collecting leaves and deposit the balance contract price. The appellant moved the High Court. The High Court held that the appellant could not be held responsible for not lifting the Tendu leaves and thereby had not committed breach of any condition of the tender. As the State also could not be held responsible for the fault, the Court directed that a sum of Rs.30,000/- be deducted from the earnest money of the appellant. On appeal, the Supreme Court brought to play two maxims of equity, namely, actus curiae neminem gravabit (an act of the Court shall prejudice no man) and lex non cogit ad impossibilia (the law does not compel a man to do which he cannot possibly perform). The Supreme Court consequently held that the High Court was not justified in directing the deduction of the sum of Rs.30,000/- from the security amount deposited by the appellant.[34]

As mentioned above, section 151 of the Code of Civil Procedure confirms the civil courts' power to pass any order to secure ends of justice. It "lengthens the hands of the court to pass any order to do justice when there is no other remedy open to the really aggrieved litigant."[35] This brings up the question why, if any civil court, even a court at the lowest tier in the hierarchy, has the power to pass any order for ends of justice, can the High Court Division not possess this power while exercising writ jurisdiction? It is submitted that so long 'any order' does not mean an order in violation of law or established precedent, or is not a whimsical order reflecting the idiosyncratic views of the individual judge passing the order, the High Court Division should have the power to pass any order for ends of justice.

Similar question was discussed in India, in the context of the Supreme Court's power to do complete justice under Article 142 of the Indian Constitution. In this regard, the observations made by the Indian Supreme Court in *B.C. Chaturvedi vs Union Of India And Ors*[36] are illuminating: "...the mere fact that there is no provision parallel to Article 142 relating to the High Courts can be no ground to think that they have not to do complete justice between the parties ...". The Court went on to declare: "...power to do complete justice also inheres in every court, not to speak of a court of plenary jurisdiction like a High Court."[37]

Article 104 of our Constitution confers similar power on 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". Like in India, this power to do 'complete justice' has not been specifically bestowed on the High Court Division.[38] But it can be argued, in the same vein, that the mere fact that there is no equivalent provision with regard to the High Court Division is no ground to conclude that the High Court Division cannot do complete justice. It would be paradoxical if the High Court Division is held to have the power to do justice but not complete justice.

Conclusion:

From the foregoing discussion it is also clear that the writ jurisdiction is essentially an equitable jurisdiction, and the High Court Division has the power to grant equitable remedies like injunctions/stay orders and declarations. It also routinely applies equitable principles and maxims of equity in suitable cases. It can exercise a considerable degree of discretion in moulding an appropriate remedy, and can pass any functional order for ends of justice within the parameters of law and precedent.

Turning again to the case of Zafar Brothers, the Appellate Division in that case gave the following history of courts of law and equity: "According to legend, there were literally two different Courts in England depending on the nature of your issue. Apparently, there used to be two different Court houses: One of the Courts of law (King's Court) and one of equity (the Church's Court). In the Court of law cases, the facts are what they are, and you win or lose; in equity cases, the Court will fashion almost any remedy it seems fit so that both parties win or both parties lose." It is submitted that this is not an accurate description of the early English courts. Firstly, the existence of separate courts for law and equity is not a legend but a historical fact. Secondly, equity was administered by the Court of Chancery, as we have seen above, not the "Church's Court". The Catholic Church administered canon law, not equity. Thirdly, this description does not take into account the subsequent unification of the courts of law and the courts of equity.

It therefore appears that the Appellate Division depicted an inaccurate view of the history of law and equity, and consequently, it is submitted, arrived at an incorrect conclusion. The Court ignored the fact that law and equity were no longer administered separately. The Court was also forgetful of the fact that granting equitable reliefs like injunctions or stay orders is within the design of Article 102 of the Constitution.

Referring to the analogy of the decisions of an umpire in a baseball game, as used by the U.S. Chief Justice John Roberts,[39] it may be pointed out that though the umpire's power is limited to calling balls and strikes only, he too has a certain extent of discretion: what one umpire calls a ball today may be called a strike tomorrow by another umpire.

(Endnotes)

1 There is no difficulty with the ratio of the case: it is the culmination of a long line of cases which decided that writ jurisdiction is not available for breach of commercial contracts. But it is the suggestion that the High Court Division has no power to apply equitable principles that the author takes issue with in this essay.

2 A shire is an ancient term for an area of land in England. It is now commonly known as county. The shires were divided into hundreds which had their own hundred court.

3 A court dealing with matters over which the "Lord of the Manor" had jurisdiction, e.g. torts, local contracts and land tenure, and their powers only extended to those who lived within the lands of the manor.

4 The word 'canon' means rule, and canon law dictates how the Churches organise and govern themselves.

5 The Keeper or Master of the Rolls and Records of the Chancery of England, known as the Master of the Rolls, presides over the Civil Division of the Court of Appeal. Lord Denning was the best-known MR.

6 Definition of Black's Law Dictionary - Common law (10th ed.), 2014, p. 334.

7 In 1258 the Provisions of Oxford, an agreement between the English barons and King Henry III, forbade the issue of new writs without the permission of the King in Council.

8 Lord Denning, Landmarks in the Law, Butterworths, 1984, page 63.

9 (1615) 21 ER 485; (1615) 1 Ch Rep 1.

10 Dickens worked at the law office of Ellis and Blackmore of Holborn Court, Gray's Inn, as a junior clerk for more than a year and had the opportunity to watch the legal profession closely. Jarndyce v Jarndyce (referred to in the novel as Jarndyce and Jarndyce) has become a catchphrase for seemingly endless legal proceedings.

11 Pugh v Heath (1882) 7 App Case 235, per Lord Cairns.

12 Probir Neogi, Law of Specific Relief, Mullick Brothers, 2013, p.26.

13 Rule 7.2, Civil Procedure Rules 1998. The term 'plaintiff' has been replaced by the plain English term 'claimant'.

14 Except for Writ of Election, which is not a judicial order, but is issued by the monarch ordering holding of election of House of Commons.

15 Section 29, Supreme Court Act 1981

16 Civil Procedure Rules 1998, rule 54.2

17 Though the remedy is pursued by prosecuting attorney, it is ordinarily regarded as a civil rather than criminal action.

18 Civil Procedure Rules 1998, rule 54.1.

19 Human Rights Act 1998, section 4

20 Civil Procedure Rules 1998, rule 54.2

21 Section 31, Supreme Court Act 1981

22 The word 'writ' is not mentioned in Article 102, but Article 104 mentions 'directions, orders, decrees or writs' which the Appellate Division has power to issue for doing complete justice. The 'writ' here is not the same as the writ remedies mentioned in Article 102.

23 Article 26 of the Constitution.

24 13 BLC (AD) (2008) 144

25 Mahmudul Islam, Constitutional Law of Bangladesh, 3rd Ed. p. 856, para 5.169

26 Supreme Court (High Court Division) Rules 1973, as amended in 2012, Chapter XIA, rule 11(2)

27 Ibid., rule 17

28 Kochuni v. Madras, AIR 1959 SC 725; see also ibid., note 26, rule 17

29 See BLAST vs. Bangladesh, 55 DLR 363; A K Fazlul Haq vs. Secretary, Ministry of Housing, 57 DLR 725; Rudul Shah vs. Bihar, AIR 1983 SC 1086; Nilabati Behera vs. Orissa, AIR 1993 SC 1960.

30 Ibid., note 26, rule 10

31 Govt. of Bangladesh vs. Ahmed Nazir, (1975) 27 DLR (AD) 41

32 As once claimed by the U.S. Chief Justice John Roberts. He said that the role of a judge is simply to "call balls and strikes." In baseball, when the pitcher throws the baseball to the catcher, if it crosses the plate within the strike zone it is considered a "strike", and counts against the batter. If it's out of the strike zone it's called a "ball", and counts in the batter's favour.

33 (2000) 4 SCC 342

34 These two maxims were earlier applied by the Supreme Court of India in Raj Kumar Dey & Ors. vs. Tarapada Dey & Ors. [1987 (4) SCC 398] and Gursharan Singh & Ors vs. NDMC & Ors. [1996 (2) SCC 459].

35 Abu Sama v. Abu Syed, 48 DLR 141

36 1995 SCC (6) 749

37 But see State Of Jharkhand & Ors vs Bijay Kumar & Ors, AIR 2008 SC 1446, where the Supreme Court held that the High Courts were not given the special jurisdiction similar to that conferred on the Supreme Court by Article 142 of the Constitution of India. But in that case Jharkhand High Court issued a direction which ran counter to the Supreme Court's earlier order, which is why the High Court's order was declared illegal. Also, the earlier decision of B.C. Chaturvedi was not mentioned.

38 See Shahana Hossain vs. Asaduzzaman, 47 DLR (AD) 155, where our Appellate Division confirmed this by holding that doing 'complete justice' is the sole domain of the Appellate Division under Article 104.

39 Ibid., see note 32.

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