



Practices of Writs in Bangladesh: Analysis and Evaluation

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ABSTRACT

Writs may be concisely defined as a written document by which one is summoned or required to do or refrain from doing something. An attempt has been made in this research to study the Writ Jurisdiction of the High Courts in India, Pakistan and Bangladesh. The origin of writs is embedded in the history of common law and judicial institution in England. Besides the Common Law remedies there is the extraordinary remedy by way of writs. Initially writs were royal prerogatives. They were called prerogative writs because they were conceived as being intimately connected with the rights of the Crown. The king issued them against his officers to compel them to exercise their functions properly or to prevent them from abusing their powers. The King issued writs through the Court of King's Bench or the Court of Chancery. In British India a Supreme Court (at Calcutta) was first established in 1774 under the Regulating Act of 1773. This court was first empowered to issue prerogative writs. Later on two Supreme Courts were established in Madras (in 1800) and Bombay (in 1823) and these two courts were also given writ power. In 1862 three Supreme Courts were abolished and in their place three High Courts were established. These three High Courts were empowered to issue prerogative writs. After the partition in 1947 India and Pakistan became two independent Dominions. The Indian Constitution adopted in 1949 gave both the Supreme Court and the High Court's power to issue writs and specific names of all writs were incorporated in both articles of 32 (for the Supreme Court) and 226 (for the High Court's). Under 1956's Constitution of Pakistan both the Supreme Court and the High Courts were given power to issue writs and specific names of all writs were incorporated in both the articles of 22 (for the Supreme Court) and 170 (for the High Court's). But it was 1962's Constitution of Pakistan where for the first time a change was introduced in writ matters. Unlike earlier the Supreme Court was not given any original writ jurisdiction. Only the High Courts were empowered under article 98 to issue writs but unlike earlier the particular names of specific writs were not used in wording of this article. Provisions were made instead where true contents of each of the major writs had been set out in self-contained propositions. Following the instance of the Pakistan 1962 Constitution the Constitution makers of Bangladesh also did not incorporate the specific names of various writs in Article 102 of the constitution of the People's Republic of Bangladesh. Subsequently the Pakistan Constitution of 1973 in art. 199 retained the formulation of art 98 of the former constitution. Thus, it is seen that gradually as the governmental function increased and the concept of rule of Law emerged and the Courts become independent, writs came to be the prerogatives of the courts instead of the King and lastly they came to be the prerogatives of the people, for they are now guaranteed right in the Constitution of many countries and citizens can invoke them as of right.

Keywords: *Writ Petition, Public Interest, Vulnerable Section, Fundamental Rights, Court, Public-Spirited*

INTRODUCTION

Writ is done to safe guard the fundamental rights of the people and to make enforcement of people's rights. Under writ jurisdiction, Court can give direction to do something and not to do something. [1] Article 102 of the Constitution of the Peoples Republic of Bangladesh empowered the High Court Division of the Supreme Court of Bangladesh to exercise writ jurisdiction. Although the contents of the writ have been embodied in the constitution. The Judges of the Supreme Court of Bangladesh look back to the English and sub continental case laws while exercising the writ jurisdiction.

Like other Superior courts of the subcontinent the supreme court of Bangladesh has been able to approach a writ system adapted to meet the needs of the present era. Writ jurisdiction means the power and jurisdiction of the High Court Division under the provisions of the Constitution whereby it can enforce fundamental rights as guaranteed in part III of the Constitution and can also exercise its power of judicial review. Like Article 32 of the Indian Constitution and article 22 of the Pakistan constitution of 1956 conferred power on the Supreme Court to enforce fundamental right and made the right to apply to Supreme Court for enforcement of fundamental rights.

OBJECTIVES OF THE STUDY

The specific objectives of the study are as follows:

1. To find out the present situation of writ in Bangladesh.
2. To find out the writ practices under the constitution of Bangladesh.
3. To identify the inconsistency of writ practices in prevailing justice system in Bangladesh.

DEFINITION OF KEY TERMS

Writ

The word Writ means a written document by which one is summoned or required to do or refrain from doing something.[2] Historically writ originated and developed in British legal system As defined by Blackstone, ‘writ is a mandatory letter from the king-in- parliament, sealed with his great seal, and directed to the Sheriff of the country wherein the injury is committed or supposed so to be requiring him to command the wrongdoer or party caused either to do justice to the complainant, or else to appear in court and answer the accusation against him.’”

Initially writs were royal prerogatives. Since only the King or Queen as the fountain of justice could issue writs, they were called prerogative writs. “They were called prerogative writs because they were conceived as being intimately prerogative writs because they were conceived as being intimately connected with the rights of the crown. A Prerogative writ was issued only on some probable cause being shown to the satisfaction of the court. Why the extraordinary power of the crown is called in to the party’s assistance.

A writ is a remedial right for the enforcement of substantive law. A writ literally means a written order. In England, the writs are issued by the Crown as the head of judicial System. Where there is no statutory source and the crown issued it by virtue of prerogative, it was called the prerogative writ e.g. the writ of habeas corpus, mandamus, prohibition, certiorari, quo-warranto.

In Bangladesh, there is no prerogative power belonging to any organ of government. But power to sue the writ corresponding to the English prerogative writ has been rested in the High court Division under Article 102 of the constitution. Since these writs are founded on the express provisions of the constitution; the High court divisions are also free to issue appropriate orders in the nature of those writs, embodying their essential principles.

In Bangladesh, these writs are available not only for the enforcement of fundamental rights but also for the enforcement of non fundamental legal rights created by various statutes and other laws enforce for the time being. This jurisdiction to enforce the legal rights is vested in the high court division under Article 102 of the constitution.

Article 102 of Constitution of Bangladesh

Powers of High Court Division to issue certain orders and directions, etc.

1. The High Court Division on the application of any person aggrieved, may give such directions or orders to any person or authority, including any person performing any function in connection with the affairs of the Republic, as may be appropriate for the enforcement of any the fundamental rights conferred by Part III of this Constitution.
2. The High Court Division may, if satisfied that no other equally efficacious remedy is provided by law-
 - a. on the application of any person aggrieved, make an order-
 - i. directing a person performing any functions in connection with the affairs of the Republic or of a local authority to refrain from doing that which he is not permitted by law to do or to do that which he is required by law to do; or
 - ii. declaring that any act done or proceeding taken by a person performing functions in connection with the affairs of the Republic or of a local authority has been done or taken without lawful authority and is of no legal effect.

RESEARCH METHODOLOGY

Study design: The study was survey and case study type.

Study area: The study was conducted at Dhaka district in Bangladesh.

Sampling method: Purposive sampling method was used for the study.

Sample size: 300 respondents were selected for the study. 4 types of respondents were taken: Advocates -100, Clients-100, Academicians-50, and Human Rights workers-50.

Sources of Data: Data was collected from primary and secondary sources.

Sources of primary data: Primary data was collected from the respondents of study area.

Sources of secondary Data: Secondary data was collected from books, research report, journals, internet etc.

Instruments of Data Collection: Questionnaire was used for data collection.

Method of Data collection: Data was collected through face to face interview with Questionnaire and secondary data was collected from books, research report, journals, internet etc.

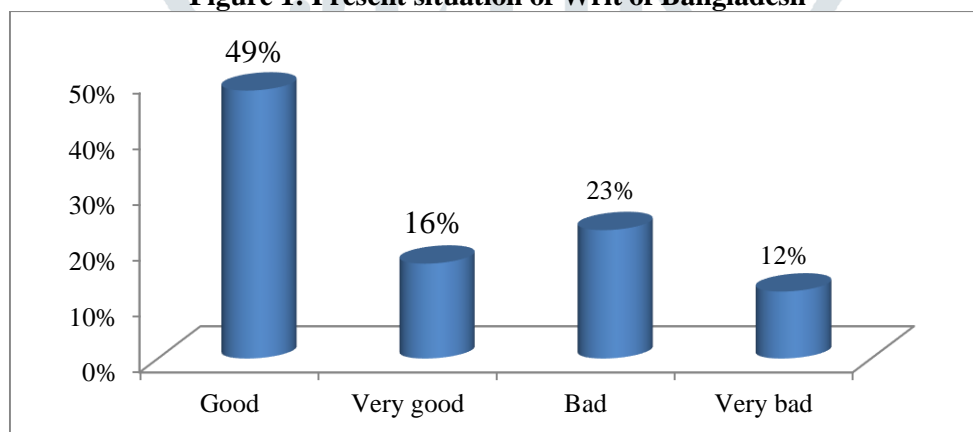
Data processing and Analysis: Data was computerized, analyzed and interpreted using Computer Program SPSS (Statistical Package for the Social Science).

RESULTS AND DISCUSSION

Table 1: Present situation of Writ of Bangladesh

Item	Percent
Strongly agreed	49%
Agreed	46%
Disagreed	3%
Strongly disagreed	2%
Neutral	0%
Total	100%

Figure 1: Present situation of Writ of Bangladesh



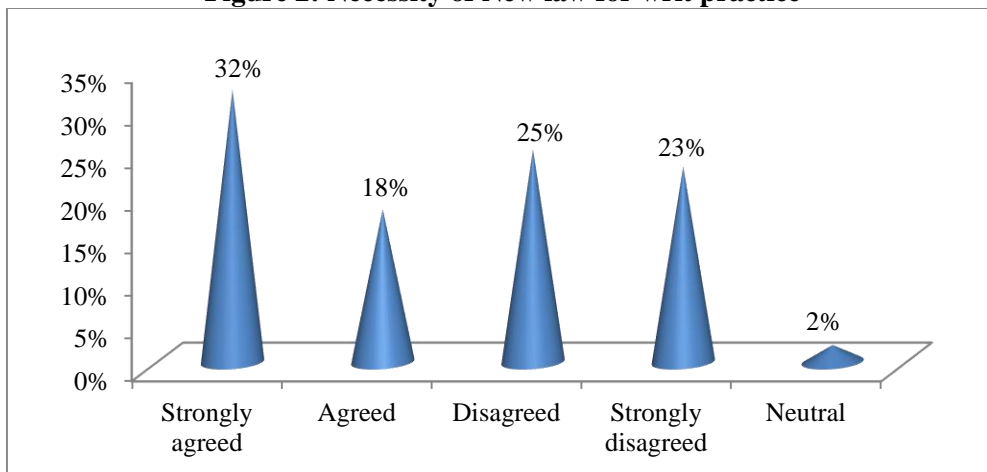
Source: Field Survey, 2019

The result revealed that 49% respondent replied that present situation of writ is good which was maximum but 12% respondents replied that present situation of writ is very bad which was minimum. On the other hand 16% respondents replied that present situation of writ is very good and 23% respondents replied that present situation of writ is bad.

Table 2: Necessity of New law for writ practice

Item	Percent
Strongly agreed	32%
Agreed	18%
Disagreed	25%
Strongly disagreed	23%
Neutral	2%
Total	100%

Figure 2: Necessity of New law for writ practice



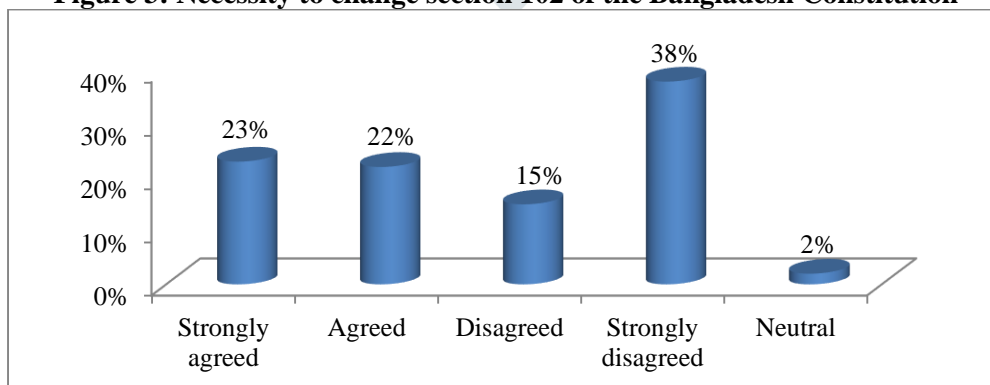
Source: Field Survey, 2019

From the result it was found that 32% respondents strongly agreed that proper new law is essential for writ system in Bangladesh which was maximum but only 2% respondents were neutral which was minimum. On the other hand 18% respondents agreed that new law is essential for writ practice system in Bangladesh, 25% respondents disagreed that proper steps are available in writ practice system in Bangladesh and 23% respondents strongly disagreed that new law is necessary in writ practice system in Bangladesh.

Table 3: Necessity to change section 102 of the Bangladesh Constitution

Item	Percent
Strongly agreed	23%
Agreed	22%
Disagreed	15%
Strongly disagreed	38%
Neutral	2%
Total	100%

Figure 3: Necessity to change section 102 of the Bangladesh Constitution



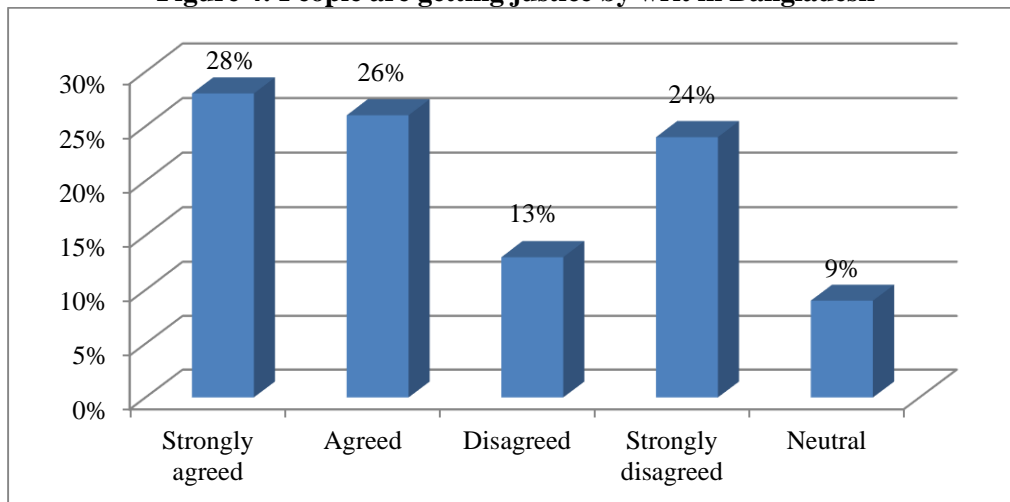
Source: Field Survey, 2019

From the result it was found that 38% respondents strongly disagreed that proper justice is present in criminal justice system of Bangladesh which was maximum but only 2% respondents were neutral that proper justice is present in criminal justice system of Bangladesh which was minimum. On the other hand 23% respondents strongly agreed that proper justice is present in criminal justice system of Bangladesh, 22% respondents agreed that proper justice is present in criminal justice system of Bangladesh and 15% respondents disagreed that proper justice is present in criminal justice system of Bangladesh.

Figure 4: People are getting justice by writ in Bangladesh

Item	Percent
Strongly agreed	28%
Agreed	26%
Disagreed	13%
Strongly disagreed	24%
Neutral	9%
Total	100%

Figure 4: People are getting justice by writ in Bangladesh



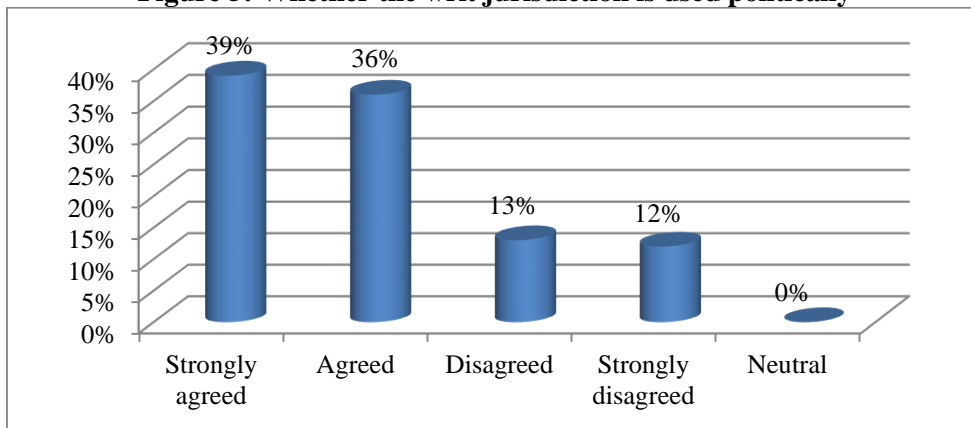
Source: Field Survey, 2019

From the result it was found that 28% respondents strongly agreed that people are getting justice by writ practice which was maximum but only 9% respondents were neutral that people are getting justice by writ practice which was minimum. On the other hand 26% respondents replied that people are getting justice by writ practice, 24% respondents strongly disagreed that people are getting justice by writ practice, 13% respondents disagreed that people are getting justice by writ practice.

Table 5: Whether the writ jurisdiction is used politically

Item	Percent
Strongly agreed	39%
Agreed	36%
Disagreed	13%
Strongly disagreed	12%
Neutral	0%
Total	100%

Figure 5: Whether the writ jurisdiction is used politically



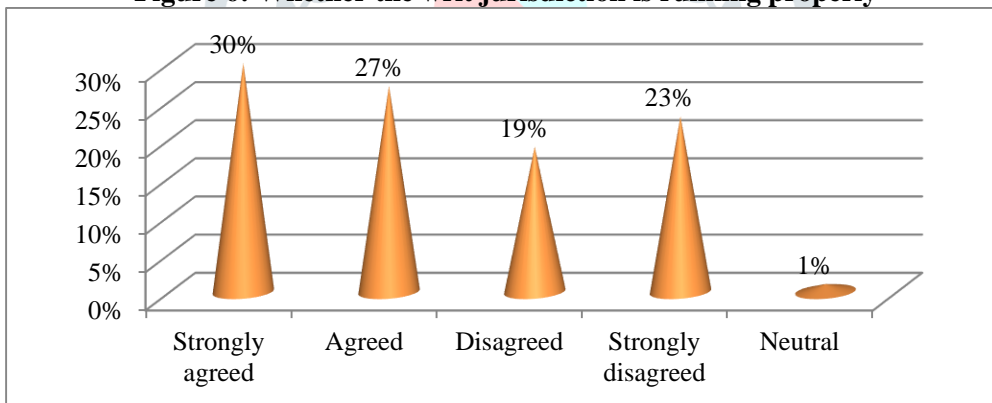
Source: Field Survey, 2019

From the result it was found that 39% respondents were strongly agreed that the writ jurisdiction is used politically which was maximum followed by 36% respondents agreed that the writ jurisdiction is used politically and 0% respondents were neutral which was minimum.

Table 6: Whether the writ jurisdiction is running properly

Item	Percent
Strongly agreed	30%
Agreed	27%
Disagreed	19%
Strongly disagreed	23%
Neutral	1%
Total	100%

Figure 6: Whether the writ jurisdiction is running properly



Source: Field Survey, 2019

From the result it was found that 30% respondents were strongly agreed that the writ jurisdiction is used politically which was maximum and 1% respondents were neutral which was minimum.

FINDINGS

Article 102 of the Constitution of the Peoples Republic of Bangladesh, 1972 empowered the High Court Division of the Supreme Court of Bangladesh. Like other Superior Courts of the subcontinent the Supreme Court of Bangladesh has been able to fashion a writ system tailored to meet the needs of the present era. However, it should be stressed here that even after the lapse of a quarter of a century no rules have been framed for the exercise of writ jurisdiction by the High Court Division under Article 107 of the 1972 Constitution of Bangladesh. Furthermore, the Constitution of Bangladesh under Article 105 has only empowered the Appellate Division of the Supreme Court to review any judgment pronounced or order made by it. No power has been given to the High Court Division to review any judgment or order passed by it in exercise of its writ jurisdiction.

Injustice anywhere is a threat to justice everywhere”. A system of law, without effective remedies either fails in its mission or serves very little purpose. An effective system of remedies would also serve no good purpose unless there is a vast awareness of the existence and availability of those remedies. Out of all legal remedies, writ is a very important piece of legal remedy against arbitrary administrative action. If proactive approaches are taken to the practical modification in the existing system of Law of Writs in Bangladesh, it can be proved truly effective as a remedy to the public to guarantee their rights. Initially the development of Writ in Bangladesh was slow due the

prolonged periods of Martial Laws and autocratic regimes that curtailed the fundamental rights and disrupted the normal functions of the judiciary.

Once the democratic institutions had changed to operate the judiciary boldly re-asserted its proper constitutional role. As a result, progressive interpretations of the Constitution, including the development of Public Interest Litigation (PIL), became possible. The Supreme Court tackled the problem of access to justice by people through radical changes and alterations made in the requirements of locus standi and of party aggrieved. Public Interest Litigation as it has developed in recent years marks a significant departure from traditional judicial proceedings. The court is now seen as an institution not only reaching out to provide relief to citizens but even venturing into formulation of policy which the state must follow.

CONCLUSIONS

After the emergence of Bangladesh in 1971, Article 102 of the Constitution of the Peoples Republic of Bangladesh, 1972 empowered the High Court Division of the Supreme Court of Bangladesh to exercise writ jurisdiction similar to that which had been conferred on the High Courts of Pakistan under Article 98 of the Constitution of Pakistan 1962. Although the contents of the writ have been embodied in the Constitution it is basically a legacy of the English Writs and still the Judges of the Supreme Court of Bangladesh look back to the English and sub continental case laws while exercising the writ jurisdiction. Like other Superior Courts of the subcontinent the Supreme Court of Bangladesh has been able to fashion a writ system tailored to meet the needs of the present era. However, it should be stressed here that even after the lapse of a quarter of a century no rules have been framed for the exercise of writ jurisdiction by the High Court Division under Article 107 of the 1972 Constitution of Bangladesh. Rules regarding writ petitions framed under Article 170 of 1956 Constitution of the Islamic Republic of Pakistan are still followed by the Supreme Court of Bangladesh to deal with writ petitions filed under Article 102 of the Constitution of the People's Republic of Bangladesh, 1972. Furthermore, the Constitution of Bangladesh under Article 105 has only empowered the Appellate Division of the Supreme Court to review any judgment pronounced or order made by it. No power has been given to the High Court Division to review any judgment or order passed by it in exercise of its writ jurisdiction.

The concept of law of writs has assumed much importance in the last few decades and many important judgments of far reaching consequences were delivered by the High Court Division while exercising power under the writ jurisdiction. Dr. Ambedkar, the architect of the great Indian Constitution argued that "If I was asked to name any particular Article in this Constitution as the most important an Article without which this Constitution would be a nullity I could not refer to any other Article except the Articles which dealt with writ remedies. It is the very soul of the Constitution and the very heart of it." In the same many researchers think that a right is a dominating relation of a man with the things or object of his necessity and the man creates a world to live in and attempts to shape it to his inner ideal. He too believes that it is only possible by seeking resort to Writ jurisdictions of High Court Division.

Law is a discipline that keeps growing simultaneously with the development in the society has to be learnt continuously and consistently with the times. In Bangladesh, literature on the Law of Writs is quite scant. Hence, the author motivated to study on the same and divulges the four corner of writ in Bangladesh in the form of a book namely "Law of writs Constitutional remedies"

The book under review written by Mr. Md. Zakir Hossain, Director (Judge), Judicial Administration Training Institute (JATI), is an insightful Study, where he worked hard for about seven years on the subject and which shows that the writs are valuable weapons for enforcement of Human Rights i.e. fundamental right & other legal rights. It is basically based on Bangladeshi case-law, attempts a historical and up-to-date account of the extraordinary legal remedies as developed by our Courts in controlling administrative & judicial actions. The historical evolution of certiorari, habeas corpus, mandamus, prohibition, and quo warranto are given in separate chapters to present the materials in their respective perspective. Wherever appropriate, comparable American, Pakistan, Indian & UK law is also mentioned in the book.

The book 'Law of Writs constitutional remedies' tersely presents the trajectory of the life and development of fundamental rights which are sine qua non for a civilized man and has been dealt.

RECOMMENDATIONS

The recommendations of the study are as follows:

1. The High Court Division of the Supreme Court is overburdened with all kinds of civil/criminal suits, including writ cases. In our country the writ petition can be filed only in the High Court Division which is situated in Dhaka. But it is troublesome for the people who live in rural area to come to Dhaka and file a writ petition in the High Court division. So it would be better to confer the writ jurisdiction to every District Judge Court like as India. This will not be unconstitutional as Article-44(2) declares, without prejudice to the powers of the Supreme Court under Article-102,

Parliament may by law empower any other court, within the local limits of its jurisdiction, to exercise all or any of these powers.

2. Some of the Writs of Habeas Corpus can be delegated to District Judges. Many of the Writs of Habeas Corpus are simple, such as the case of *Sardar Begum v. Habib Shah Khan*. A person can be arrested in remote areas outside the capital. In such situation, it will be better if a District Judge, where a person is arrested, issues the writ of Habeas Corpus.

3. Some of the Jurisdiction of Writ of Mandamus can be delegated to District Judges when the case is simpler and when it involves an order upon any statutory public authority of a lesser status or of any inferior tribunal such as the case of *Md. Abdul Mannan Bhuiyan v. University of Rajshahi & Others*. Some jurisdiction regarding Writ of Prohibition can be delegated to District Judges, where it involves an order upon a statutory public authority of a lesser status such as the case of *Abdul Latif v. Govt. of West Pakistan*.

4. At present the writ petition can be filed only against the Government/public bodies. It will be more effective to protect the fundamental rights if Writ Petitions can be filed against individuals as well. Article 102 of our Constitution uses the term 'any person aggrieved'. It does not use the expression as "aggrieved party" or "any person personally aggrieved". So, the Supreme Court of Bangladesh should expressly come forward to allow PIL. Sri Lanka and Pakistan these two neighboring countries have, although they have same Constitutional constraints as we have in our Constitution, already overcome the barricade of 'aggrieved person' and they are now widely allowing PIL.

5. The approach of the court about PIL requires rethinking and restructuring. Overuse and abuse of PIL will make it ineffective. Hence, any change to improve it further should be encouraged and welcomed. The PIL should not be merely a cloak for attaining private ends of a third party or of the party bringing the petition. The court should examine the previous record of public service rendered by the organization bringing PIL. Before entertaining a writ petition and passing any interim orders in such petitions, the court must carefully weigh conflicting public interests.

6. Only when it comes to a conclusion that there is overwhelming public interest in entertaining the petition, the court should intervene. Even when public interest litigation is entertained, the court must be careful to weigh conflicting public interests before intervening.

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