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# JUDICIAL AGENCY TO ACHIEVE GOOD GOVERNANCE IN BANGLADESH: AN ANALYSIS

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## I. Introduction

The governance discourse in Bangladesh and elsewhere seems to remain focused more on the governance-development nexus than on the normative value of good governance.[1] The over-glamourisation of this nexus has largely blurred the concept's ethical and legal force as a principle of constitutionalism. Since the concept of good governance predominantly emphasises the responsibility and responsiveness of the government to the needs of the people, ensuring good governance in a society undoubtedly improves human development. Nevertheless, to overemphasise good governance as a key stimulator of development may paradoxically lead to under-achievement of the goals that 'good governance' seeks to prosecute. For example, although attributes such as the 'rule of law', 'public accountability', 'decentralisation of government', 'parliamentary oversight', and 'judicial independence' are rightly considered as elements of good governance, the agency of the judges in actualising these imperatives has not gained adequate attention.[2] Rather, the task of ensuring these fundamentals of good governance has traditionally been allocated more to the executive and legislative branches of the government than to the judicial branch. Thus, when the role of the judiciary vis-à-vis good governance has been acknowledged, much focus, again, has been given on judicial reform and on the role of the judge in resolving disputes expeditiously and expediently.

This paper will argue that a much greater role in achieving good governance can be assigned to the judiciary by considering good governance a principle of constitutionalism and justice. It will further

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1. Talks on good governance have occupied the central position in contemporary development debates in Bangladesh. See Sobhan, Rehman. 1993. *Problems of Governance in Bangladesh*. Dhaka: University Press Limited; Siddiqui, Kamal. 1996. *Towards Good Governance in Bangladesh: Fifty Unpleasant Essays*. Dhaka: UPL; Hye, Hasnat A. (ed.) 2000. *Governance: South Asian Perspectives*. Dhaka: UPL; Rahman, Mizanur (ed.) 2004. *Human Rights and Good Governance*. Dhaka: ELCOP; Hossain, Monzur. 2005. 'Good Enough Governance, PRSP and Reform', available at: <*http://thedailystar.net/2005/03/30/d503301501125.htm*> .
2. For the conceptual clarification, see below part II.

argue that an activist rather than traditionalist judiciary can make significant contributions to good governance, even without having much-focused judicial reform. Below, I propose to show that judicial activism in Bangladesh in some constitutional litigations, where the Court in effect enforced 'good governance' by, for example, nullifying some non-transparent government contracts, was driven by the judiciary's willingness to become tough on constitutionalism. By arguing that emphasising 'good governance' as a principle of constitutional justice would considerably facilitate judicial activism vis-à-vis factors that promote good governance, I suggest that much attention should now be given to a justice-based approach to 'governance' and to judicial social and democratising capacities.

A limitation of this paper should be noted at the outset. It has not analysed in detail the Bangladeshi judicial activity in the field of human rights, and the judicial role in eliminating corruption,[3] a major indicator of lack of good governance in Bangladesh. The paper has, however, touched in passing the issue of corruption, by examining the judicial role concerning non-transparent public contracts.

## II. Good governance and judicial agency: Conceptual approaches

'Good governance' is a single term with many connotations, and it is indeed impossible to give a definition that is not value-laden.[4] In its common parlance, the term governance refers to the exercise of economic, political and administrative authority to manage a country's affairs at all levels,[5] while 'good governance' means efficient, transparent, accountable and responsive administration of any political society. Good governance thus comprises mechanisms, processes, and institutions through which

3. Undertaking of research in this field is long due. For an ongoing research concerning the role of the anti-corruption courts see Malik, Shahdeen. 'Anti-corruption Court and the Law: A Diagnostic Study'. Dhaka: Research Initiative Bangladesh [http://www.rib-bangladesh.org].

4. For an excellent definitional analysis and for the origin and development of good governance see Botchway, Francis N. 2001. 'Good Governance: The Old, the New, the Principle, and the Elements', vol. 13 *Florida Journal of International Law*, pp. 159-210.

5. An observation of the the United Nations Development Programme (UNDP), as in note 6 below.

citizens and groups articulate their interests, exercise their legal rights, meet their obligations and mediate their differences.[6]

According to the United Nations Commission on Human Rights, the key attributes of good governance include transparency, responsibility, accountability, public participation, and responsiveness of the government to the needs of the people. The United Nations Economic and Social Commission for Asia and the Pacific (UNESCAP) has prescribed seven indicators of good governance: (i) participation, (ii) rule of law, (iii) transparency, (iv) responsiveness, (v) consensus-oriented equity and inclusiveness, (vi) effectiveness and (vii) efficiency and accountability.[7] Botchway limits the essentials of good governance to the concepts of "democracy, rule of law, effective bureaucracy, discretion, and decentralization", arguing that "these concepts have sufficient capacity to accommodate such issues as transparency, accountability, anticorruption, civil society, human rights and others".[8] Another definition of good governance with normative underpinning is that which states governance as "the conscious management of regime structures with a view to enhancing the legitimacy of the public realm".[9] This definition has a link with principles of constitutionalism, and seeks to widen the public's sphere in the governance structure. This definition can be advanced further by the one given by Dakolias who sees governance as very much "a part of how democracy functions—how citizens participate in society; how they are represented in government through elections; how they participate in decision-making; how checks and balances protect individuals from state power; and how local, regional,

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6. *See* United Nations Development Programme (UNDP), *Human Development Report 2000*, available at: <*http://www.undp.org/hdr2000/english/HDR2000.html*>, quoted from Kumar, C. Raj. 2004. 'Corruption in Japan – Institutionalizing the Right to Information, Transparency and the Right to Corruption-free Governance', vol. 10 (1) *New England Journal of International & Comparative Law*, pp. 1-30, at p. 10, fn. 51. In a similar vein, Kaufmann and Mastruzzi identified six indicators to assess the quality of governance: voice and accountability; political stability and non-violence; government effectiveness; regulatory quality; rule of law; and control of corruption. *See* Kaufmann, D. and M. Mastruzzi. 2003. *Governance Matters: Governance Indicators for 1996-2002*. The World Bank Policy Research, WP No 3106.
7. *See* UNESCAP, *What is Good Governance?*, available at: <http://www.unescap.org/huset/gg/governance.htm>.
8. Botchway, above note 4, at p. 162.
9. Hyden & Bratton, as quoted in Botchway, above note 4, at p. 161. Botchway comments: "This definition appears sensitive to normative values in the prescription for governance." Ibid.

and devolved governments provide greater opportunities for the state to respond to the needs of citizens".[10]

A quick analysis of the above definitions will suggest that each of the state organs has its respective institutional role to play in maintaining or attaining the above-noted attributes of good governance. Yet while the political government, bureaucracy, legislatures, civil society, private actors all have been adequately highlighted as promoters of good governance, the judiciary has not been. One possible reason as to why judicial agency in improving good governance has remained rather under-focused could be the fact that the term 'good governance' has been largely popularised by international development and financial institutions who until recently remained unserious about the constitutional value of the concept of good governance. Following the efforts of these organisations in the late 1980s, prominently of the World Bank, to focus on the importance of good governance for human development, the concept has become increasingly a major issue in the development discourse. As a by-product, the legal and political-ethical dimensions of 'good governance' have largely been overshadowed by the over-emphasis on the concept's instrumentality in achieving development. One good reason why the international financial institutions' endeavour in promoting good governance was deficient in political-ethical vigour was probably their operational limitations, i.e., their claimed inability to deal with 'political' issues. Admittedly, this kind of infirmity of international financial institutions to indulge in 'political issues' has now become quite feeble. Moreover, catchments or working areas of the 'governance' project have dramatically increased.

Thus, in recent days the role of law and the judges in promoting good governance has been increasingly making its place on the agenda of development organisations' activity concerning good governance, a development which can be attributed to the efforts of the proponents of 'law and development' movement.[11] Yet this attitudinal shift is far from being satisfactory. The role of the judiciary in promoting good governance is till seen through the lens of its role in enforcing human rights or resolving other disputes. No doubt, a satisfactory level of human rights protection has a positive correlation to the state of governance.[12] However,

10. Dakolias, Maria. 2006. 'Are We There Yet?: Measuring Success of Constitutional Reform', (2006) *Vanderbilt Journal of Transnational Law*, pp. 1117-1231, at pp. 1134-35. As Dakolias (ibid.) says, this complexity of governance creates challenges for accountability and transparency in decision-making.

11. A post-war phenomenon, it refers to the school of thought that focuses on the mutually influential interconnectedness between law and development. See, among others, Franck, Thomas. 1972. 'The New Development: Can American Law and Legal Institutions Help Developing Countries?', (1972) *Wisconsin Law Review*, pp. 767-801.

12. *See* Sano, H. O. and G. Alfredson. 2002. *Human Rights and Good Governance: Building Bridges*. The Hague etal: Martinus Nijholff.

as regards 'good governance', the judiciary can and should do much more than it is usually perceived able to do. By the same token, when issues such as the rule of law judicial reform are emphasised as essentials of a performing governance regime, it is issues like law and order situation, speedy disposal of cases, reduction of case-loads, and electronic court management that are often given priority. As a result, the agency of the judges to attain the objectives of good governance through activist adjudication has remained rather un-focused. By saying this, it is not, however, meant that judicial reforms are unimportant. Rather, judicial reforms steered towards having an efficient and effective judicial system may significantly contribute to a country's overall progress and political stability.[13] Interestingly, it is out of this perception of the role of the judiciary towards development that international donor agencies are presently stressing on judicial reforms as an integral part of their activity concerning good governance.

Nonetheless, the point that needs to be re-made here is that, despite international financial institutions' new focus on judicial reform, the authority of the judges to improve governance has remained largely under-investigated, principally because of analytical deficiency concerning the nexus between good governance and constitutionalism.[14] Having said this, it must, however, be admitted that the political and administrative-ethical aspect of the concept and its substance, although it remained often unarticulated, has not been new. Rather, it is embedded in the old concept of (Platonic-Aristotelian) democracy. For example, Max Weber much earlier emphasised the strict observance of rule of law and legal rationality, and cautioned against admixtures by the administrators of personal interests with public responsibilities.[15] These higher principles of rule of law and accountability for public welfare became the grounding principles of many post-war Constitutions.

### III. Good governance as a principle of constitutionalism in Bangladesh

Before discussing good governance as a principle of constitutionalism, a few words about the effects of a good administration on Bangladesh's development seem relevant here. There is no denial that good governance is a crucial and key factor in reducing poverty and increasing prosperity,

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13. Gwartney, James, Robert Lawson, and Dexter Samida. 2000. *Economic Freedom of the World. 2000 Annual Report.* Vancouver, Canada: Cato Institute and Fraser Institute. See also Malik, W. Haider. 2002. *Judiciary-led Reforms in Singapore: Framework, Strategies, and Lessons.* New York: The World Bank.

14. To take an example, the World Bank's *Legal and Judicial Capacity Building Project* in Bangladesh (of 1998) included all the traditional aspects of legal and judicial reform except the role of progressive, justice-focused, and socio-transformative adjudicatory process.

15. Botchway, above note 4, at p. 165.

literature has not yet taken up the issue as to the consequences of characterising governance as a principle, concept or policy. The characterisation of good governance as a legal-political principle of constitutionalism is important because, "the legitimacy of good governance claims and procedures such as democratization, decentralization, liberalization, [and] accountability need to be explained to and accepted by the relevant constituency"[23] as, for example, the judiciary. Prosecute this imperative of popular legitimacy many modern constitutions either recognised 'good governance' as an overriding constitutional principle, or sought to achieve certain fundamental values such as the rule of law and democracy.[24]

As in other democracies with written constitutions, the Constitution of Bangladesh provides the basic mechanism for good governance, proclaiming that it shall be the "fundamental aim" of the nation to "realise through *the democratic process* a socialist society, free from exploitation – a society in which the *rule of law, fundamental human rights and freedom, equality and justice*, political, economic and social, will be secured for all citizens".[25] The Constitution is the supreme law of the Republic (Art. 7), and any law incompatible with it or its fundamental rights provisions is void to the extent of inconsistency (Arts. 7 & 26). The 'Fundamental Principles of State Policy' ("FPSPs") in Part II of the Constitution, though judicially non-enforceable, promise a new socio-economic order to be pursued by the 'state' as a whole including the judiciary. Moreover, these principles are to compulsorily inform state law-making and the interpretation of the Constitution and other laws (Art. 8). These principles, apart from declaring the Republic to be a democracy with guaranteed popular participation through elected representatives and based on fundamental human rights and respect for human dignity (Art. 11), enjoin the state, among others, to encourage local government institutions composed of elected representatives, to adopt measures to ensure participation of women in all spheres of national life and to bring radical transformation in rural areas (Arts. 9, 10 and 16).

On the other hand, the right of the people to judicially enforce their fundamental rights (in Part III) has been guaranteed as a human right itself. [Art. 44 (1)]. And, the High Court Division of the Supreme Court

23. Ibid.

24. See, e.g., Article 1 of the South African Constitution (1996), which provides that "[t]he Republic of South Africa is [a]... democratic state founded on the following values: [...] d) [...] regular elections and a multi-party system of democratic government, *to ensure accountability, responsiveness and openness*". (Emphasis is mine).

25. See the Preamble to the Constitution of the People's Republic of Bangladesh (adopted on 4 November 1972 and coming into force on 16 December 1972). (Emphasis is of the author).

enjoys the constitutional review power both over legislation and administrative decisions. It has been empowered under Art. 102 (1) to issue appropriate "directions or orders" to any person or authority, including the public functionaries, for the enforcement of any of the constitutional fundamental rights. The High Court Division has also been given the power to issue appropriate writs to remedy a legal wrong or to enforce legal obligations [Art. 102 (2)]. Functional independence of the Supreme Court judges has been guaranteed [Arts. 94(4); 96], and, all authorities, executive and judicial, are mandated to act in aid of the Supreme Court (Art. 112).

It thus appears that the Constitution not only mandates a constitutionalism-based system of democratic governance, but also provides the judiciary with adequate tools with which to attain the objectives of good governance. The constitutional remedial clause, i.e. Article 102 under which broader and innovative remedies can be issued, provides the principal instrumentality with which the higher courts can improve good governance. For the judiciary, what then matters is the willingness on its part to be active enough to perform the constitutionally-envisaged socio-transformative role.

## IV. Good governance and the judiciary in Bangladesh: Remedying some situations of non-governance

There simply is not much literature on the role of the Bangladeshi judiciary in improving good governance,[26] although the judicial role in protecting constitutional rights and enforcing various constitutional mandates has attracted many scholarly assessments. The judiciary has been playing its role in improving principles of good governance and justice since its inception in 1971 by way of enforcing the limits of the Constitution vis-à-vis both the legislature and the executive. For example, the Supreme Court has on several occasions struck down certain acts of Parliament for being not compatible with the Constitution. Importantly, in the famous case of *Anwar Hossain Chowdhury v Bangladesh* (1989),[27] concerning the diffusion of the unitary Supreme Court, the Court invalidated a constitutional amendment on the ground that it breached one of basic structures of the Constitution. Through the means of judicial review power, the Court has been vigilant against legal and constitutional breaches by the administration. All these judicial activity doubtless reflect the agency of the judiciary to help the people meet their legitimate claim for good administration.

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26. But *see* Islam, M. Amir-Ul, below note 35; Rahman, Mizanur. 1999. 'Governance and the Judiciary', in *Unveiling Democracy: State and Law.* Dhaka: Parama Publications, pp. 31-68; and Akkas, Sarker Ali. 2004. 'The Role of Judiciary in Good Governance: The Case of Bangladesh', in Rahman, Mizanur (ed.), above note 1, pp. 67-78.

27. 1989 BLD (Spl.) 1 (popularly known as the *Eighth Amendment Case*).

In what follows, however, I will analyse certain judicial decisions that have gone to enforce the imperatives of the rule of law and good governance otherwise than through the usual route of redressing violations of "enforceable" human rights.

**Attaining separation of the judiciary and ensuring judicial independence**

The constitutional principle of the independence of judiciary in its various manifestations has recently become a litigable issue in 'public interest litigation' (PIL), a development that owes its origin to a 1999 decision in *M. Idrisur Rahman v Shahiduddin Ahmed* (1999),[28] where a lawyer successfully challenged the constitutionality of the appointment of the Chief Metropolitan Magistrate of Dhaka without consulting the Supreme Court as mandated by the Constitution. In 2005, a public interest lawyer challenged, and gained interim injunction against, the government's attempt to transfer five assistant judges in disregard of the Supreme Court's opinion given earlier.[29] In another PIL by a lawyer, the Court debarred a clearly politically-biased judge, who was in charge of a Divisional Anti-Corruption Court, from performing judicial duties.[30]

The most prominent decision in this area was that of the Appellate Division in *Secretary, Ministry of Finance v Md. Masdar Hossain and Others*,[31] where the Court issued few directives concerning judicial independence against the executive for "forthwith" implementation. This class-action lawsuit arose in the High Court Division [decided on 7 May 1997: (1998) 18 BLD (HCD) 558] as a constitutional challenge by some 223 judges of the junior judiciary to a discriminatory fixation of their salaries and financial benefits by the government, an action that pushed the judges to a position at par with civil servants. The Court not only declared this governmental action unconstitutional, but also embarked on a whole spectrum of constitutional mandatory Provisions regarding judicial independence and their realisation by parliament and the executive. The Constitution [Arts. 94 (4) and 116A] guaranteed the functional independence of the Supreme Court judges and other judicial officers including the magistrates (now judicial magistrates), but the country's legal system retained the British legacy of constituting the whole magistracy by members of the administration who, except a few, were also to perform regular executive duties side by side judicial functions. This situation clearly unmade the very notion of judicial independence. The Constitution formally empowered the President to

28. (1999) 19 BLD (HCD) 291 (later approved by the Appellate Division).
29. *Dr. Shahdeen Malik v Secretary, Ministry of Law, Justice and Parliamentary Affairs* (pending WP No 2088 of 2005; the rule was issued on 2 April 2005 by a High Court Division bench).
30. *Khairul Alam Pipul v Bangladesh* (Pending WP No. 1171 of 2006).
31. (2000) 52 DLR (AD) 82.

appoint members of the judicial service and magistrates in accordance with Rules made by him (Art. 115), and to "control" (including the posting, promotion, and grant of leave) and "discipline" them in consultation with the Supreme Court (Art. 116), a requirement that was, until recently, more often than not ignored. And, there were no rules made by the President for these purposes.

Plausibly, however, going beyond the specific remedy sought by the petitioners, the Court virtually ordered to separate the judiciary from the executive. It directed the government to treat the "judicial service" as separate from the civil service, and to constitute a "judicial service commission" for recruitment of the members of junior judiciary, and a "judicial pay commission" to determine their salaries. It also directed the government to take measures to formulate Presidential rules or Parliamentary laws introducing an independent scheme of conditions of service of the members of the judicial service. Quite curiously, though the case in fact involved the junior judiciary, the Court demanded financial autonomy of the Supreme Court within the allocated budgetary financial limits. The Appellate Division has still retained monitoring jurisdiction in this case to supervise the implementation of its directives. Over the period of six years following the deision, the government often resorted to various dilatory tactics to delay the implementation of the decision, although it largely ensured, relatively promptly, the Supreme Court's financial autonomy, and constituted in 2006 a judicial service commission (now reconstituted).

The present government, too, sought from the Appellate Division extensions of compliance-deadline on two occasions, but finally implemented the *Masdar Hossain* directives.[32] Following a major development, which, needless to say, happened due to constant pushes from the Court, the government separated the lower judiciary from the executive control by appointing purely "judicial magistrates" who, unlike their predecessor magistrates, will remain insulated from executive functions.[33] The new change has been operating since 1 November 2007.

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32. On 16 January 2007, the government notified the promulgation of four sets of Rules by the President. These are: The Bangladesh Judicial Service (Pay-Commission) Rules 2007; The Bangladesh Judicial Service Commission Rules 2007; The Bangladesh Judicial Service (Constitution of the Service, Recruitment in Posts of the Service, Temporary Suspension, Dismissal and Removal) Rules 2007; and The Bangladesh Judicial Service (Posting, Promotion, Grant of Leave, Control, Discipline and other Conditions of Service) Rules 2007.

33. The process of separating the lower judiciary has been effected through the Code of Criminal Procedure (Amendment) Ordinance 2007. For a brief report on this, see Hoque, Ridwanul. 2007. 'Problems of Judicial Affairs in Bangladesh' and 'Bangladesh Strengthens Independent Judiciary', in *D+C Development and Cooperation*, respectively in vol. 11 and vol. 12, at p. 426, and p. 447.

The experience shows that, but for this decision the executive would not, in all likelihood, have even initiated measures to comply with the constitutional mandate for an independent judiciary.[34]

**Judicial review of public contracts: Ensuring transparency in government dealings**

Sadly, corruption, which is a major source of un-governance in Bangladesh, permeates the whole spectrum of her public institutions. Until recently, the country had allegedly the worst record of corruption in the world. At the higher level of the administration, nepotism and lack of transparency in allocating public contracts or state largesse has been one of the major sources of corruption by the state bureaucracy and political high-ups. Ironically, however, Bangladeshi judicial review's scope to embrace state or public contracts has been a contested issue. Until recently, the Supreme Court was quite reluctant, sometimes overly rigid, in extending its constitutional review power to scrutinise the legality of contracts by government agencies on the ground that these belonged to the private affairs of the government, thus pushing the justice-seekers to seek remedies in ordinary courts where procedures have been rather tardy and remedies largely inefficacious. Undoubtedly, the higher courts' ducking of such issues of public importance on procedural grounds affects the judicial authority to ensure good governance by checking non-transparency in public procurements and in allocating public largesse. Thus, by not entertaining judicial review applications against the state contracts made in exercise of the state's so-called private/trading capacity, the Court failed in discharging its obligations vis-à-vis good governance in Bangladesh.[35]

However, since the late 1980s, the Court began to gradually open itself towards government, agreeing to review a public contract, but only "when the government violates the terms of the contract with a *mala fide* intention" or acts arbitrarily or discriminatorily.[36] Admittedly, this was a hard test to apply, and, as the Court made it clear in *Sharping M. S. Samity v Bangladesh* (1987), judicial review proceedings are available with respect to a public contract entered into by the government as a "sovereign", and not to a "pure and simple contract" entered into in its trading capacity. A similar but slightly broader reasoning was drawn in

34. A judicially non-enforceable fundamental principle of state policy (Article 22) mandated the State to "ensure the separation of the judiciary from [its] executive organs". For a view of the politics involving judicial independence, see Ahmed, Justice Naimuddin. 1998. 'The Problem of Independence of the Judiciary in Bangladesh', vol 2(2) *Bangladesh Journal of Law*, pp. 133-51.

35. For further criticisms of this line, see Islam, M. Amir-Ul. 2000. 'Governance and the Judiciary', in Hye, Hasnat A. (ed.): *Governance: South Asian Perspectives.* Dhaka: University Press Limited, pp. 117-36.

36. *Sharping Matshyajibi Samabaya Samity v Bangladesh* (1987) 39 DLR (AD) 105.

*BIWTC v Birds Bangladesh Agencies Limited* (1995)[37] where the Appellate Division of the Supreme Court of Bangladesh held that a "pure and simple" government contract was judicially reviewable if it was concluded in pursuance of the government's international obligation. In the Court's view, "the principle of fairness in Government actions" comes into play in respect of such contracts, and hence the government should not be treated as a private litigant to drive the defendant to an ordinary civil suit.[38] The Appellate Division, however, disapproved a sounder principle enunciated by the High Court Division in *BIWTC* (above) where it held that a right created by a public body even through a commercial contract is amenable to judicial constitutional review.[39] It is submitted that this argument is more in line with the emerging modern principle of public law adjudication that creates a judicial control over public dealings.

But the Court still is heavily leaned towards differentiating between "pure and simple" trading contracts by the state and what it calls "statutory" contracts,[40] with a risk that public contracts involving private companies may still be conveniently placed beyond constitutional review. Appreciably, however, there seems to be growing a trend of exercising constitutional jurisdiction over government contracts on the ground of 'rationality' or 'reasonableness',[41] or, recently, the breach of 'legitimate expectation' of the concerned person of being fairly dealt with by the government.[42]

It needs to be mentioned that while the grounds of rationality and reasonableness are old grounds of judicial review (but with high-threshold of proof), doctrine of legitimate expectation as an allied but not yet as a stand-alone ground of judicial review is of recent usage.[43] The use of the

37. *BIWTC v Birds Bangladesh Agencies Limited*, Leave to Appeal Petition (CLAP) Nos. 405-8 of 1994 (unreported).
38. Ibid.
39. *Birds Bangladesh Agencies Limited v Secretary, Ministry of Food* WP Nos. 198, 278 and 537 of 1994 (unreported).
40. It refers to contracts concluded under the authority of any statue. See *Ananda Builders v BIWTA* (2005) 57 DLR (AD) 37.
41. *M/s. Hyundai Corpn. v Sumikin Bussan Corpn. and Others* (2002) 22 BLD (AD) 16.
42. *D.G., BWDB v BJ Geo Textiles* (2005) 57 DLR (AD) 1.
43. In *North Pole (BD) Ltd v BEPZA* (2005) 57 DLR (AD) 631 the court held that "inaction" on the part of the government in clear breach of legitimate expectations is judicially reviewable. This suggests that the Court did not recognise 'substantive legitimate expectation' as a ground, as it actually relied on culpable 'inaction' on the part of the government. On the growth of the doctrine of legitimate expectation see, among others, Thomas, Robert. 2000. *Legitimate Expectations and Proportionality in Administrative Law*. Oxford: Hart; and Islam, Zahidul. 2005. 'Legitimate Expectation: How a View Turned to a Principle', vol. 9 (1 & 2) *Bangladesh Journal of Law*, pp. 69-84. For an overview of the presence of 'legitimate expectation, in Bangladeshi courts, see Islam, Rumana. 2006. 'Doctrine of Legitimate Expectation: An Overview', in Rahman, Mizanur (ed.) : *Human Rights and Domestic Implementation Mechanism*. Dhaka: ELCOP, pp. 221-44.

doctrine of legitimate expectation in recent times has significantly increased, and the Court seems to link it to the boarder principles of the rule of law, and open and fair governance.[44] In essence, the doctrine of legitimate expectation is an extension of the principle of natural justice, and hence is not that much novel. The adoption of this doctrine nonetheless symbolises the Court's new preparedness to give due attention to the overriding importance of transparency in public decision-making, especially when public financial interests are involved.[45]

Though laudable, these judicial developments were far less than enough because, the petitioners, apart from proving sustained 'injury', often had to fight seriously for justice even in the higher courts. However, a more assertive judicial stance against public corruption involved in granting state largesse or licences has been of fairly vintage. Broader principles of the rule of law and open governance constituted the hub of judicial constitutional activism in two famous decisions in *Ekushey Television Ltd. & Others v Dr. Chowdhury Mahmood Hasan*[46] and *Engr. Mahmud-ul-Islam v Govt. of Bangladesh (Private Port Terminal)*.[47] In these cases, the Court respectively invalidated a public license in favour of a private television operator and struck down a government decision allowing a foreign company to construct container terminals at the Chittagong Port on the ground of non-transparency in public functioning. As a result, the most popular television channel faced a sudden closure, and the construction of a private port terminal became abandoned. It might seem that the Court stood somewhat in the way of economic development of Bangladesh, as huge amount of foreign investment were at stake. But the Court indeed took a step with farsighted positive implications for good governance. It was indeed influenced by the higher principle of constitutionalism, that is, a just and honest system of governance.[48]

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44. *See SAS Bangladesh Ltd v Engr. Mahmudul Islam* (2004) 24 BLD (AD) 92. On legitimate expectation, see also *MD, WASA v Superior Builders and Engineers Ltd.* (1999) 51 DLR (AD) 565 (agreeing to depart from the "basic" rule of no writs against public contract, when the contractor's legitimate expectation as to fair dealing is breached); *Chairman, BTMC v Nasir Ahmed Chowdhury* (2002) 22 BLD (AD) 199; *North Pole (BD) Ltd v BEPZA* (2005) 57 DLR (AD) 631; and *Selim Reza v Govt of Bangladesh* (2006) 58 DLR (HCD) 1.
45. *DG, BWDB v BJ Geo Textiles*, ibid., *per* F. Karim J.
46. (2002) 54 DLR (AD) 130 = (2002) 22 BLD (AD) 163 [confirming the HCD's decision in *Chowdhury M. Hasan v Bangladesh* (2002) 22 BLD (HCD) 459].
47. (2003) 23 BLD (HCD) 80, *per* S. A. N. Mominur Rahman J.
48. For a criticism of this decision see Islam, M. Rafiqul and S. M. Solaiman. 2003. 'Public Confidence Crisis in the Judiciary and Judicial Accountability in Bangladesh', vol. 13 *Journal of Judicial Administration*, pp. 29-60, at pp. 45-48 (considering the decision as lacking "community perspective").

In *Ekushey Television,* the Court offered the following reasoning, highlighting the need to check public corruption:

> There are some essentials in the legal realm that are of monumental importance. One of them is the duty of the Court to protect the ordinary citizens from executive excess and corrupt practice. The Court is always under tremendous pressure to locate and address the question of executive accountability since *a citizen has a right to clean administration.*[49]

The Court then continued:

> This Court [...] is duty bound to preserve and protect the *rule of law.* The cutting edge of law is remedial and the art of justice has to respond here so that transparency wins over opaqueness. [...] Unless this Court responds [...], governmental agencies would be left free to subvert the *rule of law* to the detriment of the *public interest.*[50]

In the same vein, the High Court Division's motto in *Private Port Terminal* case was to "play a vital [...] role not only in preventing and remedying abuse and misuse of public power, but also [in] eliminat[ing] injustice".[51] Sitting on appeal in this case, the Appellate Division sought to honour the people's "legitimate expectation" as to honest governance, to "protect" public interest and to "jealously" guard against government's unlawful dealing with public property.[52]

The promising aspect of these two cases is that members of civil society and the "concerned" citizens were allowed to challenge the breach of 'law' in greater public interest though they were not personally affected. This kind of use of 'public interest litigation' to craft potent legal controls on the executive functions and thereby to vindicate the rule of law and good governance is a significant, welcome development.

**Enforcing democratic norms and democratic electoral culture**

It is universally recognised that conducting free, fair, and regular elections is a requirement for a well functioning democracy. Elections are the primary way for citizens to participate in their government, and they also provide an effective mechanism of government accountability.[53] In Bangladesh too, 'decentralisation' or governance through elected

49. (2002) 54 DLR (AD) 130, 140.
50. Ibid., at p. 144. (Emphasis is of the author).
51. (2003) 23 BLD (HCD) 80, 99.
52. *SAS Bangladesh Ltd v Engr. Mahmud-ul Islam* (2004) 24 BLD (AD) 92, 112.
53. Dakolias, above note 10, at p. 1145.

representatives at all levels of the country and effective public participation in state affairs are constitutionally recognised as imperatives of good governance. The system of elected local-government bodies is a unique feature of the Constitution of Bangladesh (Arts. 59 and 60). Yet, local governments at all strata in Bangladesh continue to remain largely an unimplemented agenda, due to lack of political commitment. But it is encouraging that the Court has sought to enforce the Constitution's promise for local-level democracy.[54] In *Kudrat-E-Elahi Panir v Bangladesh* (1992)[55] in which an Act of Parliament repealing an existing tier (Upa-Zilla) of the local government system was challenged, the Court, though refused to give the expected remedy, nevertheless issued some directions asking the government to bring all local government laws in conformity with the Constitution. The Court in effect ordered for "election" to "[t]he existing local bodies [...] keeping in view the provision for special representation [of women] in Art 9 [...] within a period not exceeding six months from date."[56] In a mix response to this decision, the legislature made provisions for elections of the country's city corporations which were earlier run by selected personnel rather than elected representatives. As regards some other local bodies, successive governments deferred elections by pursuing the technique of amending the relevant local government laws, postponing the timeframe for holding elections. In a much later case, *Ziaur Rahman Khan v Bangladesh* (1997),[57] a politician unsuccessfully challenged the *vires* of a law that provided for installation of interim bodies before elections are held to three Hill Districts of the country. Going a step further, an activist Court here attempted to infuse an electoral culture into the body politic by directing fresh elections of local government bodies in these Districts within a timeframe. In both of these decisions the Court rendered some extraordinary remedies, not sought for by the litigating parties.

More recently, in an encouraging instance, a legal-aid NGO successfully challenged the constitutionality of a law that undermined the principle of governance through elected representatives by providing for selected rather than elected 'village governments'.[58] The Court held that the provision for an un-elected local body violated the letter and spirit of the Constitution, specially its provisions for democracy, popular sovereignty, and local participatory governance.

The Court also showed activism in strengthening the very basis of democracy, i.e.> a fair and free electoral practice. In an action brought by

54. These provisions were restored on 18 September 1991 following the country's reversion to democracy in 1991 [see The Constitution (Twelfth Amendment) Act 1991].

55. (1992) 44 DLR (AD) 319.

56. Ibid., at pp. 336-7.

57. (1997) 49 DLR (HCD) 491.

58. *BLAST v Bangladesh* (WP No. 4502/2003,) (by its order of 2 Aug 2005, the HCD declared unconstitutional The Village Government Act 2003).

a lawyer, *Abdul Momen Chowdhury and Ors v Bangladesh* (2005), the Court directed the Election Commission to require all aspiring candidates in elections to furnish eight categories of information covering a variety of issues such as educational qualification, existing wealth, bank-loans, and past criminal activities, with a view to enabling the voters to make an informed choice as to their prospective representatives.[59] This governance-an reinforcing decision, however, became subject to an immediate appeal before the Appellate Division by an unknown petitioner who claimed to be a potential electoral candidate. A single-judge chamber bench of the Appellate Division halted the effectiveness of this landmark decision (interim order of 19 December 2006), controversially reasoning that compelling aspiring electoral candidates to disclose their educational background or other antecedents is unconstitutional. Finally, however, the full bench of the Appellate Division has recently rejected the appeal on the ground that the petitioner, not a real petitioner, fabricated the facts.[60] In pursuance of this decision, the Election Commission later framed rules requiring compulsory submission of court-directed necessary information by electoral candidates.

## V. Public interest jurisprudence, and the judicial attitudinal change

In view of the above enlightened judicial decisions that have significant governance implications, this paper suggests that those developments could not be attained but for judicial activism exercised prominently in public interest litigations. The 'law' under which these new remedies were given had been there all along, but the remedies were innovative or not-given-before.

Apart from the cases discussed above, there is a long series of judicial decisions in public interest environmental litigations, kept out of the purview of this article, in which both Divisions of the Supreme Court of Bangladesh played a pro-active role in improving environmental governance.[61] These developments were indeed attained without 'reform' as formally understood. The kind of judicial activism studied here was facilitated by the emergence of public interest jurisprudence and the shifts, at whatever degree, in the judicial perceptions regarding the judicial role in a democracy.

59. *Abdul Momen Chowdhury and Ors v Bangladesh*, WP No 2561 of 2005 (Order of 24 May 2005). Later, another PIL was filed by five conscious citizens, seeking to compel the Election Commission to frame necessary rules to implement the earlier court directives. See *Prof Muzaffar Ahmed v Election Commission*, WP No. 5069 of 2005.

60. See its Order of 11 December 2007. See *The Daily Star*, Dhaka, 12 December 2007.

61. *See* Razzaque, Jona. 2000. 'Access to Environmental Justice: Role of the Judiciary in Bangladesh', vol. 4 (1 & 2) *Bangladesh Journal of Law*, pp. 1-26; Razzaque, Jona. 2004. *Public Interest Environmental Litigation in India, Pakistan and Bangladesh*. The Hague; London; New York: Kluwer.

Public interest litigation or "PIL" refers to that activist branch of jurisprudence which allows any public-minded person to espouse genuine public causes like human rights violations affecting the general public and administrative injustices, with a view to bringing justice to the common citizen or to vindicate the rule of law. In that process, PIL allows the court to provide unorthodox remedies. With the advent of this jurisprudence in Bangladesh during the mid-1990s,[62] there has been a change in the judicial interpretations of the Constitution and other laws. In the result, the judiciary is gradually becoming more robust in applying its constitutional review power where the public goods are concerned. Notably, PIL now recognises public interest standing to challenge not only violations of fundamental rights, but also the constitutionality of any law/constitutional amendment or administrative decisions, even without having to prove specific and existing 'legal injury'. Social action groups in Bangladesh are increasingly invoking PIL as a tool to ensure public accountability or good governance.[63] The impact of PIL is being incrementally seen also in other traditional constitutional adjudicative areas as we saw in *Masdar Hossain* above and other cases that involved judicial independence. This judicial change-mindedness would certainly have positive impacts on the judiciary's democracy-enforcing role.

Also importantly, judicial activism vis-à-vis the principles of constitutionalism and rule of law creates an atmosphere of democratic dialogue among various organs of the state. Such a participatory role in promoting good governance also helps the judiciary to contribute to the country's development in several significant ways such as by controlling corruption and ensuring transparency in government procurements or in awarding public contracts or state largesse. At the minimum, judicial activism concerning governance issues redirects the political attention to the areas that need executive-legislative focusing, or to the marginalised sections of society that need state protection and uplifting.

## VI. Concluding observations

To conclude, this paper offers a two-pronged suggestion. It has argued that 'judicial agency', exercised in an activist rather than traditionalist fashion, is an effective means to ensure and promote good governance.

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62. *See* Ahmed, Naim. 1999. *Public Interest Litigation in Bangladesh: Constitutional Issues and Remedies.* Dhaka: BLAST. See also Hoque, Ridwanul. 2006. 'Taking Justice Seriously: Judicial Public Interest and Constitutional Activism in Bangladesh', vol. 15 (4) *Contemporary South Asia*, pp. 399-422.

63. *See*, e.g., Kumar, C. Raj. 2004. 'Corruption and Human Rights: Promoting Transparency in Governance and the Fundamental Right to Corruption-free Services in India', vol. 17 *Columbia Journal of Asian Law*, pp. 31-72. (describing the role of PIL in establishing the right to good administration); Rahman, Altafur. 1999. 'Public Accountability through Public Interest Litigation', vol. 3 (2) *Bangladesh Journal of Law*, pp. 161-80.

Second, increased judicial activism in this field depends much on judicial sensitisation as to 'good governance' as a principle of constitutional justice rather than as a mere developmental tool. This is so because, at the end of the day judges administer justice and apply the law. In order for it to remain as a sustained judicial agenda, the concept of good governance needs to be developed as a right of the people and a constitutional obligation of those who govern. A categorically enforceable right to good administration is absent even in countries with better record of good governance.[64] As noted above, the emerging right to democratic governance is gaining growing transnational recognition.[65] Thus, it is not difficult but rather imperative for a pro-active judiciary, duty-bound to enforce rights of the people and "protect" the Constitution, to construct a right to constitutional good governance by actively interpreting and applying the Constitution and other legal principles. Evidently, much attention should now be given to a justice-based approach to 'governance' and to judicial social and democratising agency. There is also a need to conceptualise 'governance-development' interface not only in terms of merely economic growth but also with respect to the overall development of society.

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64. See Millett, Lord. 2002. 'Right to Good Administration in Europe', (2002) *Public Law*, pp. 309-22. It cannot, however, be taken for granted that there is no right to good administration. Rather, it is being increasingly argued that 'good governance' qualifies as a human right. But see Jowell, who thinks that "'good governace' is still too uncertain and unspecific" to qualify as a fundamental right. Jowell, Jeffrey. 2008. 'The Democratic Necessity of Administrative Justice', a draft-paper presented at a workshop on *Effective Judicial Review: A Cornerstone of Good Governance*, organised by the Chinese University of Hong Kong and Cambridge University, held at Hong Kong, 10-12 December 2008. (On file with the author).
65. Frank, Thomas M. 1992. 'The Emerging Right to Democratic Governance', above note 21.