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The Case of Moulana Abdul Hakim and Judicial Review. A move towards the right direction?

Justice Dr. Syed Refaat Ahmed [1]

The ruling in Moulana Md. Abdul Hakim v. Government of Bangladesh & Others in 2014 has extended the frontiers of judicial review under the Bangladeshi constitutional scheme. The judgment explores the judicial reviewability of actions and decisions of private bodies operating in the public domain. The point of reference is article 102(2) of the Constitution that presupposes the availability of the Writs that may be appealed to for reviewing executive actions in the public domain. Challenging that conventional wisdom, this judgment identifies amenability to judicial review not exclusively by reference to an obvious derivative public status of a person but increasingly by the public domain within which it operates and prevails irrespective of its derivative status. The recognition is of a reality of public-private partnership of providing services to the public at large and in regulating public activity that has blurred the traditionally held view that a Writ in Certiorari under article 102(2) can only validly be addressed to public functionaries. This article finds such traditional view fallacious, as it belies the fact of public functionaries forsaking their monopoly over public affairs and of private and public enterprise being inextricably intertwined in the conduct of business of the Republic or of a local authority.

Introduction

By extending the frontiers of judicial review under the constitutional scheme of Bangladesh, the ruling in the case of *Moulana Md. Abdul Hakim v. Government of Bangladesh & Others*[2] (hereafter "*Abdul Hakim*") has explored the judicial reviewability of actions and decisions of private bodies operating in the public domain. The facts of the case involve a Superintendent of a non-Governmental Madrasah as Petitioner who filed a Writ Petition challenging an order of dismissal dated 12.02.2011 issued by the Chairman (Respondent in this case) of

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[2] *Moulana Md. Abdul Hakim v. Government of Bangladesh & Others* (2014) 34 BLD (HCD) 129 and (2014) 3 LCLR (HCD) 66.

the said Madrasah's Managing Committee. The concerned Upazila Nirbahi Officer in 2002 had once before suspended the Petitioner, leading to his dismissal in 2002 under the Non-Government Madrasah Teacher (Employment Terms & Condition) Rules, 1979. The 2002 dismissal order had been approved by the Appeal and Arbitration Committee, Bangladesh Madrasah Education Board in 2004. The Petitioner had filed an earlier Writ Petition challenging the memo issued by the Board Registrar communicating such approval. Subsequently, the Petitioner was acquitted from a criminal case lodged against him, but did not prosecute the Rule issued in the earlier Writ Petition per agreement with the Respondent leading to his reinstatement in the Madrasah. However, the Petitioner suddenly received a show cause notice on 30.01.2011 to which he replied on 07.02.2011. It is against this backdrop that he was dismissed again which was the subject matter of this subsequent Writ Petition.

Constitutional Essence of Article 102

Under the Bangladeshi constitutional law framework, an aggrieved person, in order to agitate his claim and case in judicial review, can do so by invoking articles 102(1) and/or (2) depending on the nature of the grievance as well as of the status of the perpetrator. Article 102(1) comes into play in relation to the infringement of any fundamental right guaranteed under Part III of the Constitution. Further, article 102(2) presupposes the availability of the various Writs that may be appealed to for reviewing actions and operations in the public domain, such actions being otherwise the preserve of the executive organ of the State affecting the citizenry in their contacts and dealings with the Executive and its functionaries. Articles 102(1) and (2)(a)(ii) (as envisages a Writ of Certiorari) for our purpose relevantly read thus :

> *(1) The High Court Division on the application of any person aggrieved may give such direction 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 of the fundamental rights conferred by Part III of this Constitution.*
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> *(2) the High Court Division may, if satisfied that no other equally efficacious remedy is provided by law -*
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> *(a) on the application of any person aggrieved, make an order-*
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> .....
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> *(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*[3].

As a result, article 102(1) sets itself apart from article 102(2)(a)(ii) by bringing within its purview a wider group of individuals and authorities on whom the Court may on judicial review hold sway. When issues of fundamental rights are raised, the sanction under article 102(1) is clearly of availability of redress against "anyone," or "any authority", inclusive of "any person performing any function in connection with the affairs of the Republic". The reference to government functionaries must accordingly, be seen as an appendage made to the broader category of *"anyone"* or *"any authority"* by way of abundant caution.

That appendage in article 102(1) appears in a similar avatar taking centre stage in a Writ of Certiorari under article 102(2)(a)(ii), when fundamental rights aside the focus is on the legality or not per se of an action or decision emanating from any "person performing functions in connection with the affairs of the Republic or of a local authority.....".[4]

The Power of Judicial Review and the Public-Private Authority Nexus

The emerging judicial consensus in this jurisdiction is that article 102(2)(a)(ii) allows for identifying amenability to judicial review not exclusively by reference to an obvious derivative public status of a person but increasingly by the public domain within which it operates and prevails irrespective of its derivative status. The ever increasing reality of public-private partnership of providing services to the public at large and in regulating public activity has blurred the traditionally held view that a Writ in Certiorari, in particular, under article 102(2) can only validly be addressed to public functionaries. This traditional view indeed risks being exposed as a fallacy as it belies the fact that public functionaries in the strictest sense have in reality long forsaken their perceived monopoly over public affairs and that private and public enterprise and endeavour are intertwined in the conduct of the business of the Republic or of a local authority.

Viewed from a different perspective, the postulation here, therefore, is that even given the truism that private persons or bodies generally do not have an overreach in the public realm, it cannot, however, be gainsaid that they never do, and in

[3] Article 102 of the Constitution of the People's Republic of Bangladesh.

[4] Article 102(2) of the Constitution of the People's Republic of Bangladesh.

instances they do so there indeed remains the possibility of their treading on constitutional guarantees and arriving at erroneous and arbitrary decisions while performing a "public function" and unwarrantedly so. Such function could ideally have as its objective the granting of some collective benefit in the public realm. The complexities of social or economic enterprise in the public realm create opportunities for private bodies to strike a partnership with the public sector to keep the wheels of commerce and service delivery well-oiled and operational. Allowance is, therefore, made for private bodies and individuals to assume a hybrid character in discharging responsibilities in the public interest. The English Courts have over the past two decades freed themselves of an overly restrictive approach in the application of the Writ of Certiorari. In doing so they have come to recognize that instead of probing into the source of power exclusively, the better more pragmatic view instead is to analyze the type of function performed by any decision-making body as can be made amenable to judicial review.

In the landmark case of *R v. Panel on Takeovers and Mergers ex parte Datafin*[5] *("Datafin")*, the Court of Appeal was concerned with the actions of the Panel on Take-overs and Mergers which it termed "a truly remarkable body" in that it "is an unincorporated association without legal personality" thereby, performing functions without visible means of legal support. The Panel, the Court of Appeal found, is effectively a "self-regulating" body lacking any authority de jure but exercising considerable authority de facto in "devising, promulgating, amending and interpreting the City Code on Takeovers and Mergers...".[6] The issue of judicial reviewability of the Panel's actions wielding considerable collective power compelling compliance by others loomed large in this case given the very real potential of exercise of such powers arbitrarily and manifestly unfairly. Sir John Donaldson MR in finding that the Court in these circumstances has jurisdiction to entertain applications for the judicial review of the Panel's decisions considered two opposing views forwarded by Counsel for either side in this regard. Counsel for the Panel submitted that the Queen's courts' historic supervisory jurisdiction does not extend to a body as the Panel's power is not derived from legislation or the exercise of the prerogative.

On the other hand, Counsel for *Datafin* submitted this to be a too narrow a view arguing "that regard has to be had not only to the source of the body's power, but also to whether it operates as an integral part of a system which has a public law character".[7] Sir John Donaldson MR in these circumstances revisited at length

[5] *R v. Panel* on *Takeovers and Mergers ex parte Datafin* (1987) QB 815.

[6] *R v. Panel* on *Takeovers and Mergers ex parte Datafin* (1987) QB 815.

[7] *R v. Panel on Takeovers and Mergers ex parte Datafin* (1987) QB 815.

the judgement in *R v. Criminal Injuries Compensation Board, ex p Latin*[8] where Lord Parker CJ said that the exact limits of the ancient remedy of Certiorari had never been and ought not to be specially defined. The true inspiration for the intervention in Certiorari for Sir John Donaldson MR, however, is derived from Diplock LJ's observations in *Latin* thus:

> *The Jurisdiction of the High Court as successor of the court of Queen's Bench to supervise the exercise of their jurisdiction by inferior tribunals has not in the past been dependent on the source of the tribunal's authority to decide issues submitted to its determination...*
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> *The earlier history of the writ of certiorari shows that it was issued to courts whose authority was derived from the prerogative, from royal charter, from franchise or custom, as well as from Act of Parliament. Its recent history shows that as new kinds of tribunals have been created, orders of certiorari have been extended to them too and to all persons who under authority of government have exercised quasi-judicial functions...*
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> *If new tribunals are established by acts of government, the supervisory jurisdiction of the High Court extends to them if they possess the essential characteristics? It is plain on the authorities that the tribunal need not be one whose determinations give rise directly to any legally enforceable right or liability. Its determination may be subject to certiorari notwithstanding that it is merely one step in a process which may have the result of altering the legal rights or liabilities of a person to whom it relates. It is not even essential that the determination must have the result, for there may some subsequent condition to be satisfied before the determination can have any effect on such legal rights or liabilities. That subsequent condition may be a later determination by another tribunal.*[9]

Sir John Donaldson's view that in the absence of legislation certain bodies must not continue to be *"cocooned"* from judicial gaze and attention, was carried forward further by Lloyd LJ in *Datafin* when he held that where "there is a possibility, however remote, of the panel abusing its great powers, then it would be wrong for the courts to abdicate responsibility." This led him to conclusively

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[8] *R v. Criminal Injuries Compensation Board, ex p Latin* (1967) 2 ALL ER 770 at 778, and in (1967) 2 QB 864.

[9] *R v. The London Metal Exchange ex p. Albatros Warehousing BV.*

find against the supposition "that the source of power is the sole test whether a body is subject to judicial review or not."

In the unreported judgement in *R v. The London Metal Exchange ex p. Albatros Warehousing BV ("Albatros Warehousing BV")* (2000), Mr. Justice Richards considered the issue of what constitutes a public function. In doing so, he referred to the *Datafin,* as well as notably to the judgement in *R v. Disciplinary Committee of the Jockey Club, ex parte Aga Khan*[10] *("Aga Khan").* Mr. Justice Richards in doing so premised his enquiry on the need to make a broad assessment of all circumstances of a case and, in particular, on the extent to which "the powers can be said to be woven into a system of governmental control". Referring first to the decision of *Datafin Case,* Mr. Justice Richards cited the oft-quoted observation of Lloyd LJ thus:

> *Of course the source of the power will often, perhaps usually, be decisive. If the source of the power is a statute, or subordinate legislation under a statute, then clearly the body in question will be subject to judicial review. If, at the other end of the scale, the source of power is contractual, as in the case of a private arbitration, then clearly the arbitrator is not subject to judicial review.*
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> *But in between these extremes there is an area in which it is helpful to look not just at the source of the power but at the nature of the power. If the body in question is exercising public law functions, or if the exercise of its functions have public law consequences, then that may be sufficient to bring the body within the reach of judicial review.*[11]

The decision in *Aga Khan Case* was taken note of in *Albatros Warehousing BV* in the context of Sir Thomas Bingham's observation in *Aga Khan Case* that the effect of the decision in *Datafin* was "to extend judicial review to a body whose birth and constitution owed nothing to any exercise of governmental power but which had been woven into the fabric of public regulation..."[12]. This concept of the function of any public body being "woven into any system of governmental control" as highlighted by Sir Thomas Bingham in *Aga Khan* would eventually find further elaboration in the case of *Poplar Housing Association v. Donoghue*[13] *("Donoghue")* (2006).

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[10] *R v. Disciplinary Committee of the Jockey Club, ex parte Aga Khan* (1993) I WLR 909.

[11] *R v. The London Metal Exchange ex p. Albatros Warehousing BV.*

[12] *R v. Disciplinary Committee of the Jockey Club, ex parte Aga Khan* (1993) I WLR 909.

[13] *Poplar Housing Association v. Donoghue* (2001) 1 EWCA Cir 595 and (2002) QB 48.

Before proceeding on to *Donoghue*, it suffices to note at this junction that Murray Hunt[14] in elaborating on the legal-philosophical premises for a court's jurisdiction over the exercise of non-statutory powers spoke of the redundancy of identification of the source of a body's power in determining its "public" status thus:

> *The test for whether a body is "public" and therefore whether administrative law principles presumptively apply to its decision making should not depend on the fictional attribution of derivative status to the body's powers. The relative factors should include the nature of the interest affected by the body's decisions, the seriousness of the impact of those decisions on those interests, whether the affected interests have any real choice but to submit to the body's jurisdiction and the nature of the context in which the body operates. ... The very existence of institutional power capable of affecting rights and interest should itself be a sufficient reason for subjecting exercises of that power to the supervisory jurisdiction of the High Court, regardless of its actual or would be source.*[15]

The Province of Administrative Law, being a compilation of essays, dwells on the phenomenon of the expanding frontier of Administrative Law through judicial activism in various jurisdictions as the UK, US, Canada, Australia and New Zealand. As one review of this book reads aptly in most mirroring the observation in *Datafin:*

> *During the past decade, administrative law has experienced remarkable development. It has consistently been one of the most dynamic and potent areas of legal innovation and of judicial activism. It has expanded its reach into an ever broadening sphere of public and private activities. Largely through the mechanism of judicial review, the judges in several jurisdictions have extended the ambit of the traditional remedies, partly in response to a perceived need to fill an accountability vacuum created by the privatization of public enterprises, the contracting-out of public services, and the deregulation of industry and commerce.*[16]

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[14] Michael Taggart (ed.) *The Province of Administrative Law* (Oxford: Hart Publishing, 1997).

[15] Michael Taggart (ed.) *The Province of Administrative Law* (Oxford: Hart Publishing, 1997).

[16] *R v. Disciplinary Committee of the Jockey Club, ex parte Aga Khan* (1993) I WLR 909.

As Lloyd LJ in *Datafin* and Murray Hunt as above explored at length the "public" character of a body or authority derived from its institutional power and capacity to affect significantly any individual's rights and interests, thereby, justifying a remedy in Certiorari, the judgment in *Donoghue* witnessed the Court of Appeal stressing on the administrative structural inter-connectedness of private and public bodies as an additional facet to the test of "public" character. Therefore, in dealing with the term "public authority" as arising within section 6 of the Human Rights Act, 1998, the Court of Appeal in *Donoghue* significantly elaborated on the test of the "extent of control over the function exercised by another body which is a public authority" as an important determinant of the act of an ostensible private body assuming public dimensions. In elaborating on that test and carrying the argument in that regard a notch further than the *Aga Khan,* Lord Woolf CJ observed thus:

> *What can make an act, which would otherwise be private, public, is a feature or a combination of features which impose a public character or stamp on the act. Statutory authority for what is done can at least help to mark the act as being public; so can the extent of control over the function exercised by another body which is a public authority. The more closely the acts that could be of a private nature are enmeshed in the activities of a public body, the more likely they are to be public.*[17]

A snapshot of what has been achieved by *Datafin, Donoghue* and other cases cited above in terms of the *modus operandi* of ascertaining the public denominator of any act comes across in the judgment in *Hampshire County Council v. Beer* (2003) that revisited the ambit of the notion of the public element of a private act and its determinants. Dyson LJ accordingly said:

> *It is clear from the authorities that there is no simple litmus test of amenability to judicial review. The relevant principles tend to be stated in rather elusive terms. There was a time when courts placed much emphasis on the source, rather than the nature, of the power being exercised by the body making the impugned decision. If the power derived from statute or the prerogative, then it was a public body and the decision was amenable to public law challenges. If the source was contractual, then public law had no part to play. The importance of the seminal decision in R v. Panel on Take-overs and*

[17] *R v. Disciplinary Committee of the Jockey Club, ex parte Aga Khan* (1993) I WLR 909.

> *Mergers, ex p Datafin Plc (1987) 1 QB 815 was its recognition of the fact that the issue of amenability to judicial review often requires an examination of the nature of the power as well as its source .*[18]

Noting further that in *Datafin* Lloyd LJ did not explain what he meant by "public law functions", Dyson LJ found the *Datafin* test of "public element" to be one "which can take many forms" and as being one expressed in very general terms. In that context, taking a cue from Lord Woolf CJ's observations in *Donoghue* that what could make an act "which would otherwise be private, public is a feature or a combination of features which impose public character or stamp on the act", Dyson LJ further enunciated the exercise a court must undertake to ascertain the true nature of such feature thus:

> *It seems to me that the law has now been developed to the point where, unless the source of power clearly provides the answer, the question whether the decision of a body is amenable to judicial review requires a careful consideration of the nature of the power and function that has been exercised to see whether the decision has a sufficient public element, flavour or character to bring it within the purview of public law*[19].

Aside from the fact that the common law pronouncements above considered against our Constitutional context necessarily operate to blur the distinction between the diverse situational approach taken under articles 102(1) and (2), the otherwise pronounced and distinct impression is that the dividing line between "public and private", is at best, vague. What can, however, be asserted with certainty is that the question of whether an activity has sufficient public element to it is quite properly a matter of fact and degree ascertainable from a consideration of each given case on its merits. But it is nevertheless indisputably well-established by now, and as held by the Privy Council in *Jeewan Mohit v. The Director of Public Prosecution of Mauritius*[20] that the principle enunciated in *Datafin* is invariably the effective law, or rather the "invariable rule" entrenched in the judicial psyche.

Expansion of the Power of Judicial Review in *Abdul Hakim*

The Petitioner a Superintendent of a non-Governmental Madrasah filed a Writ Petition challenging an order dated 12.02.2011 issued by the Chairman of the Madrasah's Managing Committee. The Respondent Chairman having at the

[18] *Hampshire County Council v. Beer* (2003)

[19] *Hampshire County Council v. Beer* (2003)

[20] *Jeewan Mohit v. The Director of Public Prosecution of Mauritius* (2006) UKPC 20.

outset raised reservation as to the reviewability of the impugned order issued by an ostensible private authority, the Court delved into the issue of maintainability by exploring the ambit of judicial review.

It was accepted that public function need not be the exclusive preserve of the State and article 102(2) of the Constitution was found as accommodating the idea of non-State actors operating in the commercial and professional arena that far exceed their nominally private terms of reference which takes them into the larger realm of functioning in the public domain. Article 102(2), therefore, permits of any function "in connection with the affairs of the Republic" which the State itself may not perform but necessarily other bodies, even private non-statutory bodies, may in substitution of the State or government perform, thereby significantly complementing and supplementing the otherwise essential responsibilities of the Republic due its citizenry.

These bodies, therefore, almost assume the character of an alter ego of the State and should they have not been licensed or permitted to perform certain public duties then the Government or the local authority would invariably have had to step in and discharge obligatory functions in this regard.

That matter of "fact and degree" being determinant of the public element of any ostensible private authority's operational ambit struck a chord with the Court in delving into the facts and issues raised in the Writ Petition. In that regard, the Court had to examine the extent of the Madrasah Managing Committee Chairman's capacity to affect the rights and interests of the affected Petitioner. Also examined was such authority's capacity to so act being inextricably enmeshed in a complex regulatory regime that links it to a higher authority that is a creature of statute.

It is in that sense that the impugned order if viewed purely from the *Datafin* perspective, a hybrid character in that the Order issued by the Respondent Chairman, Madrasah Managing Committee, was clearly meant to operate in the public domain. Furthermore, the impugned order's public denomination was gauged against the provisions of the Madrasah Education Ordinance, 1978[21] and the Bangladesh Madrasah Education Board (Governing Body & Managing Committee) Regulation, 2009 and the resultant statutory prescription of the Managing Committee's authority to be exercised under the

[21] Ordinance No.IX of 1978.

constant and active oversight of the Committee and the Board. It was not disputed by any party that both the Committee and the Board exercise and discharge statutory authority in the public domain and in their capacities as instrumentalities of the State. By that reason alone clearly, and applying the *Datafin* test, therefore, the action of the Respondent Chairman was found equally to be reviewed under article 102(2) of the Constitution.

Accordingly, the 'functional approach' was found to best determine the amenability to judicial review of the impugned order. It was found further that the Chairman of the Managing Committee of a Non-Governmental Madrasah in discharging his powers and duties engages effectively in regulating the service of teachers. By doing so, the Chairman is seen to wield considerable authority in the education sector. In that regard, the Chairman remains a repository of power that otherwise is the preserve of the State under articles 15(a) and 17 of the Constitution to ensure and provide education. The Respondent Chairman resultantly was found as part of a statutory regulatory regime in the Ordinance, the (1979) Rules and 2009 Regulations, discharging functions for and on behalf of the State subject to a well-defined hierarchical order of compliance and oversight both by the Madrasah Managing Committee and indeed the Bangladesh Madrasah Education Board.

Resultantly, the Court found that it is indeed reposed with the authority under article 102 to consider and dispose of the Rule Nisi. The Court held that the impugned order being issued by the Respondent Chairman, Managing Committee of the Madrasah indeed operates in the public domain both in the derivative and functional sense to affect the rights and interest of the Petitioner through unlawful intervention without legal sanction and results in a scenario that is clearly envisaged in both article 102(1) and article 102(2) of the Constitution making the Petitioner's grievances in the Writ Petition amenable to judicial review by invocation of the said article.

It was also noted that a closer scrutiny of the (1997) Rules with the 2009 Regulations in particular reveals that such process of disciplinary action resulting in a dismissal of any functionary of a Madrasah like the Petitioner without exception in law requires active investigatory intervention by the Committee and can only be validly imposed and effected upon a prior express approval of the Board. Evidently such mandatory compliance measures have completely been skipped over in the Petitioner's case.

There was very little on record to explain to the Court as to how all this came to pass. The reinstatement of 2009 represents the beginning of a new chapter in the Petitioner's relationship with the Madrasah which appears to have progressed concurrently in 2010 and 2011 with the Madrasah and the Managing Committee seeking the initiation of disciplinary measures against Petitioner. Yet here again, documents on record chiefly in the form of a notice to show cause and the Petitioner's written response were in substantiation of an initiation of process of inquiry into certain allegations but are not further accompanied by any information or substantiating documents of a duly instituted and continued process of determination based on the principle of natural justice or indeed due subscription to the provisions of the Ordinance and the Rules in allowing that process to reach its natural legal conclusion with the active involvement of the Committee and finally the Board as the ultimate arbiter. Therefore, the Court found that the impugned order in the manner in which it has been issued and formulated is marred by arbitrariness seriously and irreparably prejudicing the Petitioner's legitimate interests.

Conclusion

The ratio of *Abdul Hakim* was later relied upon in the case of *UTI Pership (Pvt) Ltd vs. Bangladesh and Others* (2015) and in that case as well the High Court Division of the Supreme Court of Bangladesh held that the writ jurisdiction can also be invoked to challenge any decision of a private body, discharging public body functions, like Bangladesh Freight forwarders Association (a trade organization body and a company incorporated under the Companies Act, 1994).

The Courts are, therefore, fulfilling a promise and a prophecy as Syed Ishtiaq Ahmed with some prescience observed in his book. He wrote, "Let the great judicial power entrusted to our judges by entrenchment of the jurisdiction of judicial review of administrative and legislative acts be used by them to usher in a new era of a liberal and progressive constitutional order. At the break of the dawn of this order we will have made the greatest achievement of our lifetime at the Bar and by our judges in their judicial lifetime from the Bench. Our citizens shall be assured of effective protection of their guaranteed rights and we all will prosper in freedom".[22]

[22] Syed Ishtiaq Ahmed, Certiorari: *An Administrative Law Remedy* (Mullick Brothers, 2011).