THE PROBLEM OF INDEPENDENCE OF THE JUDICIARY IN BANGLADESH

Justice Naimuddin Ahmed*

INTRODUCTION

At the Tenth Commonwealth Magistrates' and Judges' Conference at Victoria Falls, Zimbabwe, 22-26 August 1994, Professor Anthony Allot presented an illuminating background paper on the Independence of the Judiciary in Commonwealth Countries. In this paper the learned professor indicated how the judiciary even in the most advanced democratic countries, such as the United Kingdom, suffers from embarrassing obstacles against preserving and upholding the independence of the judiciary.

Bangladesh is no exception to Professor Allot's exposition and in this paper attempts are made to indicate how the judiciary is confronted with such obstacles; perceptible and imperceptible. Perceptible obstacles are those which are specifically ingrained in our Constitution and the laws. Imperceptible obstacles are the ones which are not specifically inherent in the Constitution and the laws but are, nevertheless, present and frequently resorted to by various agencies.

The dictionary meaning of "independence" is "not subject to the control of any person, country, etc.; free to act as one pleases; autonomous... not affected by others..."[1]

To conceive that a judge must be allowed such absolute independence as is lexicographically defined above is simply absurd, because, judges are, first of all, 'constrained by, and follow, existing laws and procedures'; Secondly, 'by less tangible requirements, such as, those of courtesy, fairness (*audi alteram partem*, etc.), cultural traditions, the etiquette of the law court and the profession'; thirdly, 'a judge or

---

* Mr. Justice Naimuddin Ahmed is currently a Member of the Law Commission of Bangladesh.

1 The Oxford Reference Dictionary, Hawkins J.M. (ed), Oxford, 1990 reprint. For similar meaning, see also, Chamber's Dictionary.

magistrate is not free to act perversely, unfairly or for ulterior ends or motives'; fourthly, 'the judge must rightly be influenced by others in performance of his or her judicial duties ... there is no point in advocacy or pleading if it does not affect judicial decision'; and lastly, 'the judge must be sensitive to guidance and directions reasonably and lawfully given by those of superior rank to him/herself, i.e., his/her appellate authorities or superintending authorities'. Subject to the above constraints, judicial independence has been defined as 'protection or immunity from improper or unlawful influences, direct or indirect, on the way in which the judicial officer carries out his/her judicial functions'. It has also been argued that that judicial independence can never be absolute but is relative and subject to the above constraints.

We now have to examine, with passing reference to some of the neighbouring countries, how far the judiciary in Bangladesh enjoys independence in terms outlined above.

STRUCTURE OF COURTS

The Judiciary in Bangladesh consists of the superior courts and the subordinate courts.[2]

The superior court is called the Supreme Court of Bangladesh comprising the Appellate Division and the High Court Division.[3]

The Supreme Court consists of a Chief Justice constitutionally known as the Chief Justice of Bangladesh and other Judges.

The Chief Justice and Judges appointed to the Appellate Division sit only in that Division and the other Judges sit in the High Court Division.[4]

The Appellate Division of the Supreme Court is the apex court and its jurisdiction extends to hearing and determination of appeals from judgements, decrees, order or sentences of the High Court Division. Appellate jurisdiction in other cases in addition to the above may be vested in it by Act of Parliament.[5]

---

2 For an introduction to the legal system of Bangladesh see, Patwari, A.B.M.M.I., Legal System of Bangladesh, Dhaka, 1991; an earlier and hence somewhat outdated but nevertheless useful account is Hoque, A., The Bangladesh Legal System, Dacca, 1980.

3 Article 94 of the Constitution.

4 Also, Article 94.

5 Article 103.

The jurisdiction of the High Court Division extends to hearing and determination of appeals from judgements, decrees, orders and sentences of the subordinate courts. This power is vested by different statutory enactments. The High Court Division also has original jurisdiction in certain matters such as, writ (Article 102),[6] admiralty, company matters, etc.

The Supreme Court is a court of record and has all the powers of such a court including the power to punish for its contempt (Article 108).[7]

---

[6] The Appellate Division in *Dr. Mohiuddin Faroque vs Bangladesh*, 17 (1997) BLD (AD) 1, expanded the meaning of 'aggrieved person' of Article 102, opening the door, as it were, for public interest litigation. Earlier, in *Kazi Mukhlesur Rahman vs Bangladesh*, 26 (1974) DLR (SC) 44, *Bangladesh Retired Government Employees Welfare Association vs Bangladesh*, 46 (1994) DLR (HCD) 426, and *Aftabuddin Ahmed vs Bangladesh*, 48 (1996) DLR (HCD) 1, 'an aggrieved person' was interpreted expansively. See also the articles in Hossain, S., Malik, S., and Musa B. (eds), Public Interest Litigation: Rights in Search of Remedies, Dhaka, 1997.

[7] Three recent examples of contempt proceedings against a judicial officer, executive officer and elected official are *Ashok Kumar Karmaker vs State*, 51 (1999) DLR (AD) 235, *Abdul Haque, Deputy Commisoner vs District Judgeship*, 51 (1999) DLR (AD) 15 and *Habibul Islam Bhuiyan, President Supreme Court Bar Association*, 51 (1999) DLR (AD) 68 [*An Application of Habibul Islam Bhuiyan, President Supreme Court Bar Association*, 19 (1999) BLD (AD) 93], respectively.

In the *Ashok Kumar Karmaker* case, the petitioner tendered his unconditional apology for his offending (against the highest judiciary) write-up in an English language national daily newspaper and his conviction was set aside on the ground that "... the appellant has suffered enough. He has already undergone the sentence till rising of the Court (in the High Court Division). His promotion has been withheld for years. To keep his conviction standing will debar him from claiming promotion at every stage of his career and that will be too much to inflict upon him when he committed the offence at a relatively beginner stage of his career." 51 (1999) DLR (AD) 235, at p. 238, words in parenthesis added. Ashok Kumar Karmaker was an Assistant Judge when he wrote the offending article in 1995. The Appellate Division, however, concluded with the following stern observation:

> This is not to say that such kinds of conduct are to be condoned because of age, inexperience and fresh entry into service. This case should serve as a reminder to all concerned that the Court will not hesitate to deal

> with member of the subordinate judiciary if he is not cautious, restrained, respectful and deferential with regard to the highest judiciary. We highly disapprove of the manner and the language with which the offending Article was written and warn the author that any repetition of the same will be visited with punishment of even a greater scale, not to be condoned on any pleas whatsoever.

Ibid., at p. 238.

In the *Abdul Haque, Deputy Commisoner*, the contemner was a Deputy Commissioner who wrote a report to his superior, alleging that the judiciary in his district was inimical towards him and was tarnishing the image of the district administration. Earlier, the contemner was convicted and sentenced to 3 months civil imprisonment and fine of Taka 5,000 by a sub-ordinate court in his district. In his report the Deputy Commissioner "imputed improper motives to the Judicial Officers and made discourteous comments about them." 51 (1999) DLR (AD) 15, at p. 16.

In the contempt proceeding the contemner tendered unconditional and a lengthy apology which was accepted and his conviction was set aside with the observation that:

> He should not have done it. We know he would not have done it with a little more experience and guidance. Not only a Government official, high or low, but everybody should try to uphold the image of the Court, not for the sake of the Court but for the sake of the society, for their own sake.

Ibid., at p. 18.

In the last of these three recent cases, *Habibul Islam Bhuiyan, President Supreme Court Bar Association*, 51 (1999) DLR (AD) 68 [*An Application of Habibul Islam Bhuiyan, President Supreme Court Bar Association*, 19(1999) BLD (AD) 93], the President of the Supreme Court Bar Association submitted an application for contempt proceeding against Shaikh Hasina Wazed, the Prime Minister of Bangladesh, for her remarks about the Court in a press conference which were reported in national daily newspapers. The Prime Minister explained her remarks as being in the context of question by the journalists concerning allegations against certain courts. She, however, stated that by her remarks she did not doubt the integrity of judges. She also stated that her comments were in no way intended to denigrate the dignity of the court or the Chief Justice, nor meant to interfere with the functioning of the judiciary. The Court accepted the 'explanation' with the observation that:

> ... the Court expected more circumspection, understanding, discretion and judgment on the part of the Prime Minister because of the high office she holds in making off-hand remarks in respect of constitutional functionaries which have been alleged to be contumacious.

The Judicial structure of the subordinate courts may be broadly divided into two parts:

(1) civil courts and (2) criminal courts.

Civil Courts

The origin of the civil courts is derived from Section 3 of the Civil Courts Act. 1887 and according to it, there are the following classes of civil courts in Bangladesh:

1) Court of the District Judge,

2) Court of the Additional Judge,

3) Court of the Subordinate Judge and

4) Court of the Assistant Judge.

The lowest tier of the subordinate judiciary on the civil side is the Court of the Assistant Judge which exercises specific territorial jurisdiction and tries suits and cases of limited pecuniary valuation. The Court of the Subordinate Judge has specific territorial jurisdiction and tries original suits and cases of limited pecuniary valuation and also hears appeals from the judgements, decrees and orders of the Court of the Assistant Judge. The District Judge and the Additional Judge mostly hear appeals from the judgements, decrees and orders of Assistant Judges and Subordinate Judges. The District Judge has also original jurisdiction in certain matters.

Criminal Courts

The criminal courts originate from Section 6 of the Code of Criminal Procedure, 1898, according to which there are the following five classes of criminal courts in Bangladesh:

1) Court of Sessions,

2) Court of the Metropolitan Magistrate,

3) Court of the Magistrate of the First Class,

4) Court of the Magistrate of the Second Class and

5) Court of Magistrate of the Third Class.

The District Judge and the Additional Judge are also Sessions Judge and Additional Sessions Judge, respectively. A Subordinate Judge is vested with the powers of an Assistant Sessions Judge. As such, the

---

51 (1999) DLR (AD) 68, at p. 70-71.

District Judge, the Additional Judge and the Subordinate Judge combine in themselves both civil and criminal powers.

The Sessions Judge and the Additional Sessions Judge are empowered to impose any sentence prescribed by law including the sentence of death which is, however, subject to confirmation by the High Court Division of the Supreme Court.[8] An Assistant Sessions Judge is empowered to impose sentence of imprisonment not exceeding seven years and a Magistrate is empowered to impose sentence not exceeding three years unless specially empowered to impose higher sentence.

Besides the above, there are certain special courts and tribunals, such as, the Family Court, Court of Settlement, Administrative Tribunal, etc., constituted under special laws.[9]

Supreme Court

Clause (4) of Article 94 guarantees the independence of the Judges of the Supreme Court in the exercise of their judicial functions by providing the following in unequivocal terms:

> Subject to the provisions of this Constitution the Chief Justice and the other Judges shall be independent in the exercise of their judicial functions.

It can, however, be presently shown that this guarantee is conditioned by the method of appointment of Judges, methods of

---

[8] The Proclamation of Withdrawal of Martial Law in 1986, paragraph 3 had provided that

all sentences passed by any Special Martial Law Tribunal or by authority receiving the proceeding of the cases of which no warrant of execution was issued before the commencement of this Proclamation shall, after such commencement, be put into execution under the warrant of the Session Judge ..... as if the sentences were passed by him.

Interpreting this paragraph, the High Court Division in *Abdul Baset vs Bangladesh*, 47 (1995) DLR HCD 203, held that in the case where a sentence of death was pronounced by a Martial Law Tribunal but the condemned prisoner was not executed before the withdrawal of Martial Law, the sentence must be referred to the High Court Division for confirmation under section 374 of the Cr.P.C.

[9] Majumdar, Md. G.M., *Adalatshomuher abong Bicharokder Khomota O Karjaboli* (in Bangla), Chittagong, no date, lists 40 different types of courts in operation.

determination of their remuneration and pension, tenure of office, disabilities of Judges during their tenure of office and after their retirement and the method of removal of Judges.

Clause (1) of Article 95 vests the President of Bangladesh with the power to appoint the Chief Justice and other Judges of the Supreme Court. The only condition the President is constitutionally required to fulfil is that before appointing the Judges of the Supreme Court other than the Chief Justice he must act according to the advice of the Prime Minister.[10] According to the Constitution as adopted in 1972 and before the numerous amendments, Judges could not be appointed by the President without consulting the Chief Justice. By a subsequent constitutional amendment this provision was repealed.[11]

Now, constitutionally, the power of appointing Judges of the Supreme Court other than the Chief Justice practically vests in the Prime Minister who is advised by his/her political colleagues and oftener by bureaucrats. Under such a constitutional set-up, the intrusion of political considerations into the process of appointments of Judges of the Supreme Court cannot be ruled out. It can only be hoped — the hope may sometimes be too roseate — that those who exercise the powers of appointment of Judges of the Supreme Court, perceptibly and imperceptibly, will do so in a fair, even-handed and non political manner till such time as may be taken for resurrection of legislative wisdom.

In this connection, the constitutional provisions of several countries where a Judicial Service Commissions for selection of Judges of the Supreme Court have been set up (first group) or the requirements of consultation with the highest judicial organ of the State before selecting Judges for appointment have been made may be referred to (second group). Trinidad and Tobago, Zimbabwe, Sri Lanka, and Nepal belong to the first category. India and Pakistan belong to the second category.

There is no Judicial Service Commission in Bangladesh. In the above constitutional backdrop one may refer to an occurrence which took place a few years back in connection with appointments of some Judges in the Supreme Court. Despite absence of any provision in the Constitution requiring the President to consult any one before selecting Judges for appointment, the long-standing practice of appointing

---

10 Clause (3) of Article 48.

11 Constitution (Fourth Amendment) Act, 1975 (Act II of 1975).

Judges of the Supreme Court after consulting the Chief Justice was being followed until the event in question when appointments of several Judges were made without consulting the Chief Justice and even, it is said, without his knowledge! The Chief Justice felt that some of the persons appointed were not suitable for holding the high office of a Judge of the Supreme Court. The Chief Justice, supported by all the Judges of the Supreme Court, protested. However, an imminent constitutional crisis was averted when the Government yielded quickly, rescinded the appointments and made appointments afresh after consulting the Chief Justice.

It has now to be seen whether, in spite of any constitutional requirement to consult the Chief Justice, a constitutional convention has been established that no appointments of Judges of the Supreme Court can be made without consultation with the Chief Justice. It is, however, true that a fool-proof system of selection and appointment of the judges of the superior court has not be evolved in any country and every method of appointment has its own advantage as well as disadvantage. But to boast of judicial independence in a constitutional set-up where constitutionally the Chief Justice of the Supreme Court is not required to be consulted in the matter of selecting persons for appointment of Judges of the Supreme Court is sheer self-deception.

The tenure of office of a Judge of the Supreme Court is that he holds office until he attains the age of sixty-five years.[12]

The remuneration, privileges and other terms and conditions of office of a Judge is determined by Acts of Parliament.[13] There are two Acts in this respect, namely the Supreme Court Judges (Remuneration and Privileges) Ordinance, 1978 and the Supreme Court Judges (Leave, Pension and Privileges) Ordinance, 1982, as amended from time to time. The existing remuneration and other terms and conditions of office of a Judge can not be varied to his disadvantage.[14]

A sitting Judge cannot held any office, post or position of profit or emolument or take part in the management or conduct of any company, association or body having profit or gain as its object.[15] By a proviso to

---

12 Clause (1) of Article 96.

13 Article 147.

14 Clause (2) of Article 147.

15 Clause (3) of Article 147. The appointment of Justice A.K.M.Sadeque as the Chief Election Commissioner was challenged in *M. Salem Ullah vs Justice*

this Article certain posts have been excluded from the operation of this Clause. A retired judge cannot plead before any court and cannot hold any office of profit in the service of the Republic not being a judicial or a quasi-judicial office.[16]

Obviously, Clause (2) of Article 147 which preserves the remuneration, privileges and terms and conditions of office of a judge is a wholesome provision guaranteeing independence of judges as well as of the judiciary. However, the other conditions are fraught with grave dangers to judicial independence.

There is no pay commission for recommending the salary structure or other terms and conditions of office of a Judge of the Supreme Court. These are theoretically determined by Parliament but in a Westminster type of Government, like that of ours, the executive organ having majority in Parliament is practically the determining factor. It is well-known that the political executive is constantly being advised by the administrative executive, i.e., the bureaucracy. The judges, therefore, have no say in the matter and are at the grace of the legislative and the executive organs of the State. Although instances of arbitrary discrimination against Judges of the Supreme Court are not frequent, this is not also totally absent as Judges are constitutionally, conventionally and characteristically incapable of canvassing for themselves. This is not conducive either to the concept of the separation of powers or to the concept of an independent judiciary, because, a Judge who has a feeling of dependence for his very sustenance cannot feel free to decide a dispute between one on whom he is dependent and

---

A.K.M. Sadeque, unreported Writ Petition 1010/95, on the ground that the appoint of a judge who has already retired is anti-constitutional. The case seems to have become infructuous as the Judge concerned retired from the post. Similarly, when another judge, Justice Abdur Rouf, was appointed as the Chief Election Commissioner, his appointment was challenged in *Salem Ullah vs Abdur Rauf, Chief Election Commissioner*, 48 (1996) DLR (HCD) 144 on the ground that a judge can not hold the office of the Chief Election Commissioner. Again this case became infructuous as the Judge was appointed to the Appellate Division. This appointment, then, was challenged in *Shamshul Huq Chowdhury vs Justice Md. Adbur Rauf*, 49 (1997) DLR (HCD) 176. The Court held that the government had power to make such re-appointments under the Constitution. On these and other cases, see Ahmed, N., Public Interest Litigation: Constitutional Issues and Remedies, forthcoming, 1999.

16 Article 99.

another on whom he is not.[17] The answer to this problem seems to be in establishing an independent permanent Pay Commission with adequate representation from the judiciary for the Judges of the Supreme Court for reviewing their pay structure and other terms and conditions of their office and making its recommendation statutorily binding.

The practice of appointing Judges after retirement even to judicial, quasi-judicial and to certain specified posts which are kept out of the operations of Articles 99 and 147 is certainly an inducement which is likely to affect their detachment and impartiality which are indispensable for dispensation of justice without fear or favour.

In a recent case, the Supreme Court viewed appointment of Judges by the Government to any post or position after retirement with displeasure. The case is important and interesting for more than one reason.[18] A retired Judge of the Supreme Court was appointed to a quasi judicial post on contract. The post was directly under the administrative control of the Government. A Secretary to the Government summoned the Judge to his office. The Judge took serious exception and refused to comply, asking the Secretary to come to his office instead. The employment of the Judge was instantly terminated in terms of the contract giving one month's notice. The Judge took the matter to the Supreme Court insisting that despite the contract, he being a Judge, although retired, was still governed by the Constitution and was not, therefore, removable except in accordance with the procedures laid down in the Constitution for removal of a Judge. While dismissing his writ petition, the Chief Justice who spoke for the Court, said,

> Original Article 99 totally prohibited the appointment of a retired judge in any office in the service of the Republic. The purpose behind this prohibition was that the high position and dignity of a Judge of the Supreme Court should be preserved and respected even after his retirement and further that if any position was made for holding of office after retirement then a Judge, while in the service of the Supreme Court, might be tempted to be influenced in his decisions in favour of the authorities keeping his eye upon a future appointment.[19]

---

[17] See also, M.I.Farooqui, "Judiciary in Bangladesh: Past and Present" in 48 (1996) DLR Journal 65.

[18] *Abdul Bari Sarkar vs Bangladesh*, 46 (1994) DLR AD 37.

[19] Ibid., at p. 38.

True, some Judges need employment even after retirement mainly for financial reasons in a country plagued with a high inflation rate. The problem has been solved in a number of countries where Judges of the superior courts do not at all retire and hold office during good behaviour. There is another way of solving the problem and that is by keeping the facilities and remuneration of a sitting Judge in tact after retirement and completely barring any employment after retirement.

A Judge of the Supreme Court cannot be removed from office except in accordance with the procedure laid down in Article 96. This Article provides that a Judge of the Supreme Court may be removed from office by the President, if the Supreme Judicial Council constituted under this Article and consisting of the Chief Justice and two senior-most Judges of the Supreme Court reports, after an inquiry, to the President that the Judge has ceased to be capable of properly performing the functions of his office on account of physical or mental incapacity or has been guilty of gross misconduct.[20]

The Indian Constitution provides that a Judge of the Supreme Court or a High Court functioning in the States may only be removed on the grounds of proved misbehaviour or incapacity by way of an address supported by 2/3 of the voting members of each House of parliament.

In the Pakistan Constitution the procedure is the same as in Bangladesh.

In the Malaysian Constitution, a Judge can be removed on the recommendation of a tribunal appointed by the King, the constitutional Head of the State. In 1988, the King appointed a three-member tribunal to inquire into certain allegations brought by the Government against the then Lord President of Malaysia, which is the highest judicial position in the country. The Chairman of the tribunal was the Chief Justice of Malay which is one of the constituent parts of the Malaysian federation. The Lord President, Tun Saleh Bin Abas, took an objection against the constitution of the tribunal on the ground of conflict of interests and prayed for an order of prohibition directed against the members of the tribunal. It was refused. Five Judges of the Supreme

---

[20] Before the amendment, Article 96 in the Constitution as adopted and enacted in 1972 had provided for removal of Judges of the Supreme Court

":... by an order of the President passed pursuant to a resolution of Parliament supported by a majority of not less than two-thirds of the total number of members of Parliament, on the ground of proved misbehaviour or incapacity."

Court then passed an order prohibiting submission of the report by the tribunal until the application for prohibition was dealt with. Three days later all the five Judges were suspended by the King and a tribunal was appointed with six members to inquire into the conduct of the five Judges! The first tribunal duly recommended for removal of the Lord President and he was removed.

These instances of executive high handedness, particularly the manner of suspension of five Judges of the Supreme Court, had severe implications for the independence of the judiciary in a country having a democratic constitution like Malaysia. Parallel instances occurred in Bangladesh when her Constitution was superseded by imposition of Martial Law by a military adventurer in 1982 and as many as four Judges of the Supreme Court including the Chief Justice were summarily removed by Martial Law Orders without any inquiry and even without informing them of the grounds of their removal. During the period when the Constitution of Bangladesh was spared the trauma of military intervention there was, however, no occasion to apply Article 96.

Article 107 vests the Supreme Court with the power to make rules for regulating the practice and procedure of each Division of the Supreme Court and the courts subordinate to it.[21] This rule-making power has been made subject to two constraints. First, all such rules made by the Supreme Court are subject to law made by Parliament. Secondly, to be effective, the rules framed by the Supreme Court must obtain the approval of the President. Consequently, it is patent that the Supreme Court for determining its own procedure and the procedure of the subordinate courts are subject to both legislative and executive control. The rule making power of the Supreme Court of India is also subject to similar legislative and executive control. It appears that reserving legislative and executive control over the procedures that the courts may deem fit to adopt for their performance has left scope for irritating interference in the functioning of the courts.

ASPECTS OF INDEPENDENCE OF THE JUDICIARY

Article 113 empowers the Chief Justice or a person authorised by him to appoint the staff of the Supreme Court in accordance with rules made by the Supreme Court. This Article also empowers the Chief Justice to make rules for determining the conditions of service of the

---

21 See *Md. Masdar Hossain and others vs Bangladesh*, 18 (1998) BLD (HCD) 558.

staff. The rules relating to appointment of the staff are subject to previous approval of the President. The rules relating to conditions of service of the staff are subject to any law made by Parliament in this respect. Although apparently the staff is appointed by the Supreme Court, clearance for such appointment has to be obtained from the Government. The creation of posts of non-judicial personnel in the Supreme Court is also made by the Government on the proposals submitted by the Supreme Court. These restrictions on the power of appointment of its staff is an encroachment on the administrative freedom of the Supreme Court.

The most serious dependence of the Supreme Court on the executive branch of the Government is in respect of financial matters except the remuneration of the Judges of the Supreme Court which are paid out of the consolidated fund. The Supreme Court, for all practical purposes, is still under the administrative control of the Government in financial matters. The budget allocation for meeting the expenses of the Supreme Court is finally made by the Ministry of Finance on the suggestions made by the Ministry of Law, Justice and Parliamentary Affairs. Although the proposals for budget allocation are submitted by the Supreme Court, scissors are invariably applied by the Government and, sometimes, to drastically cut the proposals. Moreover, the Chief Justice is empowered to sanction expenditure up to a certain limit from the budget allocation and any expenditure exceeding the said limit must be sanctioned by the Government. This enormous financial power retained by the executive organ seriously hampers the independence of judicial administration directly and indirectly in various ways which need not be elaborated.

There is a misgiving in the minds of many that the judicial organ of the State means the Supreme Court alone and the subordinate courts do not form part of the judicial organ of the State exercising sovereign judicial power. This idea had its birth at the very inception of the present judicial system in the Indian Sub-continent when more than two hundred years ago the British were establishing their colonies in India and along with the colonies were setting up the courts. From the very beginning the British treated the Judges of the subordinate courts as civil servants like all other civil servants and they were always equated with the administrative executives.[22] The same idea and the

---

[22] On the hierarchy, organisation and function of the Judiciary during the British colonial period, see Ahmed, M.B., Administration of Justice in

same system persisted long after the British left and still persists today in Bangladesh. This is absolutely wrong and when reiterated in the Constitution, an abuse of the concept of judicial independence. It must be understood that the independence of the judiciary means independence of the judiciary as a whole and the judiciary indisputably consists of the superior court and the subordinate courts.

The state has been enjoined to "ensure the separation of the judiciary from the executive organs of the State".[23] But this wholesome provision has been hedged in by including it as one of the "Fundamental Principles of State Policies", thereby making it unenforceable through the Courts.[24] The Supreme Court is, however, unaffected by this hurdle against the concept of the separation of powers and has all along been enforcing it in practice expect during extra-constitutional regimes. The picture is just the reverse so far as the subordinate courts are concerned.

Like Clause (4) of Article 94, Article 116A guarantees that all persons employed in the judicial service, i.e., the Judges from the rank of District Judge to the rank of Assistant Judge and Magistrates exercising judicial functions shall be independent. That is all. It will be readily apparent that in the very constitutional set-up itself the pious wish expressed by the constitution-makers in Article 116A had been rendered nugatory.

Article 115 empowers the President to appoint persons to offices in the judicial service and as Magistrates. This is at present done on the basis of competitive examination conducted by the Public Service Commission. There is no separate Judicial Service Commission for recruitment of Judges and Magistrates in the subordinate judiciary and the Supreme Court or the Chief Justice is in no way associated with their recruitment and appointment. The part played by political influence in appointment of judges and magistrates in the subordinate judiciary now-a-days is often talked about and often not without a reasonable basis. The present method of recruitment and appointment is at least a sworn enemy of the noble principle, "justice should not only

---

British India, Calcutta, 1934; Fawcett, C., The First Century of British Justice in India, Oxford, 1934; Kulshershtha, V.D., Landmarks in Indian Legal and Constitutional History, 3rd edition, Lucknow, 1977; and Jain, M.P., Outline of Indian Legal History, Allahabad, 1978.

23 Article 22.

24 Clause (2) of Article 8. The 'unenforceable' part of the Constitution.

be done, but must also appear to have been done." The lamentation of a US President that after appointing an intimate friend as a Judge of the US Supreme Court he lost his friend for all time to come may be often inapplicable here. As such, the method of recruitment and appointment in the subordinate judiciary has to be placed in the hands of a body of persons who are not amenable to any consideration other than merit and suitability of the candidates.

Article 116 (which ironically preceeds Article 116A guaranteeing independence of the Judges and Magistrates) vests the control (which includes the power of posting, promotion, and grant of leave) and discipline of persons employed in the judicial service and Magistrates exercising judicial functions in the President and requires the President to exercise it in consultation with the Supreme Court.[25] Originally, Article 116 provided that the power would vest completely in the Supreme Court but instead of implementing it, this power was transferred to the executive organ of the Government by a subsequent constitutional amendment secured not through martial law dispensation[26] but through a popularly elected Westminster type of Parliament.[27] The requirement of the consultation with the Supreme Court by the President was, however, a subsequent innovation under martial law dispensation which was an obvious attempt to exhibit respectfulness of the military to the concept of independence of the judiciary.

The impact of Article 116, as it stands today, on the independence of the subordinate courts will be illustrated by a single concrete instance. During the latest military regime, a district judge was transferred from the capital within twenty-four hours after he had passed an order which was not liked by the Government. Cases of serious misdemeanour by Judges and the supporting staff of the subordinate courts detected by the Judges of the Supreme Court while inspecting their courts and reported to the Government with recommendations for taking drastic action were sometimes overlooked and sometimes treated with paternal indulgence.

---

[25] See *Aftabuddin vs Bangladesh* 48 (1996) DLR HCD 1 for interpretation and implication of Article 116.

[26] Second Proclamation Order No. IV of 1978.

[27] Constitution (Fourth Amendment) Act (Act II of 1975).

In some cases even the "formality" of consultation with the Supreme Court before promoting some judges of the subordinate judiciary was avoided by the Government. And in this context, the Supreme Court observed in a case:

> There is no dispute that the original Article 116 enacted in the Constitution of 1972 was perfectly in conformity with the independence of the judiciary and the concept of the separation of the judiciary from the executive as enshrined in Article 22 of the Constitution and also the pledge of the people of Bangladesh embodied in the Third Paragraph of the Preamble to the Constitution. It is clear that all these concepts including the concept of independence of the judiciary and the separation of the judiciary from the executive organ of the State were done away with by enacting Section 20 of Act II of 1975. It also appears that by a further amendment of Article 116 of the Constitution, although by a Martial Law dispensation, the concept of independence of the judiciary and the concept of the separation of powers as enshrined in Article 22 of the Constitution as well as the pledge embodied in the Third Paragraph of the Preamble thereof were partially restored.[28]

Yes, the restoration was only partial and, as we have already seen, has been largely ineffective in securing independence of the subordinate judiciary in Bangladesh, because, the retention by the executive organ of the State of the power of promotion, transfer and discipline of judges of the subordinate judiciary and Magistrates exercising judicial functions has exposed them to an expectation of favour, or a gnawing fear of victimisation. In such situation, they can not be expected to discharge their judicial functions without fear or favour. Moreover, without commenting on the genuineness of the allegations of interference it must, at least, be said that the constitutional provision empowering the executive organ to control the judges of the subordinate courts has lowered the image of the subordinate judiciary. The loss of image of the judges can never be conducive to the basic principle of administration of justice. To achieve public acceptance of judicial decisions, the judges' functions must both be and be perceived to be carried out impartially *vis-à-vis* the parties and the executive and legislative branches of the state. So far as the constitutional requirement of "consultation" is concerned, apart from the omission to consult the Supreme Court, the Government often feels that the constitutional requirement of "consultation" is fully met as soon

---

[28] Supra note 24, at p. 12.

as "consultation" is made and no further. In many cases in the past, "consultation" had been in the literal sense of the term. As such, promotions and postings are resorted to by the Government, not infrequently, bestowing undue favour and withholding legitimate due, against the opinion of the Supreme Court. The net result is strangulation of the judicial independence of the subordinate courts followed by erosion of the very foundation on which the upper edifice of the judicial organ of the country is based having been built up through the centuries.

In the above context, the time has now arrived for serious consideration of the implication of "consultation" with the Supreme Court under Article 116 of the Constitution. Does it merely mean consultation in the literal sense of the term? Does the word carry merely lexicographic and pedantic meaning? In order to find an answer to these questions it is necessary to refer to one or two other Articles of the Constitution.

Article 109 provides that the Supreme Court shall have superintendence and control over all courts subordinate to it. Article 94 (4) and Article 116A guaranteeing independence of the Judge of the Supreme Court and the subordinate courts respectively have already been referred to.

The literal, lexicographic and pedantic interpretation of the word, "consultation" in Article 116[29] renders the effect of Articles 109 and 116A absolutely nugatory, because, without control over the presiding judges there cannot be any effective superintendence and control by the Supreme Court over the courts subordinate to it and executive control of the Judges of the subordinate courts by the Government cannot, we have already said, ensure their independence. Article 116 must, therefore, be read along with the other provisions of the Constitution, particularly, Articles 109 and 116A. So, the world, "consultation" occurring in Article 116 means "fruitful and effective consultation" and does not mean merely "formal, empty or unproductive consultation." As literally understood, the lexicographic and pedantic interpretation of

---

[29] Article 116 of the Constitution in 1972, before subsequent amendment, read: "The control (including the power of posting, promotion and grant of leave) and discipline of person employed in the judicial service and magistrates exercising judicial functions shall vest in the Supreme Court."

The Fourth Amendment of the Constitution (Act II of 1975) substituted "the President" for "the Supreme Court".

the word, "consultation," occurring in Article 116 is, therefore, an interpretative error and virtually means that the opinion of Supreme Court obtained by the Government under the said Article cannot be arbitrarily and readily disregarded an in case of disagreement the matter must be referred back to the Supreme Court with reasons for disagreement for further consideration. In that case also the question as to whose opinion shall ultimately prevail in case disagreement persists shall remain an open question for a long time in Bangladesh, if the original Article 116 is not restored.

The Supreme Court of India authoritatively interpreted the word consultation' in similar context in numerous cases, only two of which will suffice for our present purposes. Article 233 of the Indian Constitution provides that appointment of persons to be, and posting and promotion of District Judges (which is, as in Bangladesh, the highest tier in the subordinate judiciary in India) shall be made by the Governor of the State (who is the Chief Executive of the State) in consultation with the High Court of the state concerned. In *State of Kerala vs A Lakshmikutty,*[30] the Supreme Court of India having been called upon to interpret the word, "consultation", occurring in the above Article said,

> As well settled, the duty of the Governor to consult the High Court in the matter of appointment of district judges is so integrated with the exercise of his power that the power can only be exercised in the manner provided in Article 233 (1). Normally, as a matter of rule, the recommendations of the High Court for appointment of a district judge should be accepted by the State Government and the Governor should act on the same. If, in any particular case, the State Government for "good and weighty reasons" finds it difficult to accept the recommendations of the High Court, the State Government should communicate its views to the High Court, and must have complete and effective consultation with the High Court in the matter.[31]

In a subsequent case, The Supreme Court held much more forcefully that

> Appointment of District Judge — Consultation is with the entire body of Judges constituting the High Court and not with a single individual like the Chief Justice of the High Court — Moreover, the consultation with the High Court is condition precedent to the exercise of power by

---

[30] AIR 1987 SC 331.

[31] Ibid.

the Governor of the State — Such consultation must be complete, meaningful and purposive.[32]

The position, thus, regarding the requirement of consultation with the highest court is much more stringent in our neighbouring country. Such an understanding of the requirement of 'consultation' is essential for implementing our constitutional mandate of separation of the judiciary as provided in Article 22 of our Constitution.[33] Seen in this light, Article 116, as it stands now, is the insurmountable block for the separation of the judiciary from executive control. However, the problem of independence of the judiciary is certainly not an insurmountable one. In fact, the sooner this problem is resolved, the better it is for the country and the people.

---

[32] *S.C.Advocates-On-Record Association and others vs Union of India*, (1993) 4 SCC 441, head notes at p. 485 and also at pp.613-14.

[33] Article 22 reads:

"The State shall ensure the separation of the judiciary from the executive organs of the State."