- SEMINAR -

Organized by: Human Rights and Peace for Bangladesh

Subject: Judicial Reform and Independence of the Judiciary

Date: 11 August 2007, Saturday at 10.00 am

Venue: Supreme Court Bar Association Building

Shamsul Huq Chowdhury Hall

Keynote Paper: Barrister M. Amir-Ul Islam

I. INTRODUCTION

The Chief Guest, the Hon'ble Chief Justice of Bangladesh Mr. Justice Md. Ruhul Amin, Mr. Justice Mahmudul Amin Chowdhury, Mr. Justice Mohammad Fazlul Karim, Mr. Justice Kazi Ebadul Hoque, Mr. Justice Amirul Kabir Chowdhury, Mr. Justice Syed Amirul Islam, Dr. Kamal Hossain, Dr. M. Zahir, Mr. Mahmudul Islam, Barrister Shafique Ahmed, Mr. Habibul Islam Bhuiyan, Advocate Abdul Baset Majumder, Advocate Khadker Mahbub Hossain, the Hon'ble Judges, my distinguished colleagues in the Bangladesh Bar Council, distinguished Presidents and Secretaries of all the Bar Associations of the country, distinguished resources persons, members of the press, the Hon'ble Guests, Ladies and Gentlemen,

I deem it an unique privilege to be able to share some of the contemporary concerns about judicial reform and independence of judiciary. We from the Bar have been ringing the alarm bell particularly since 1994 and lent our full support to the Hon'ble Chief Justice Mr Shahbuddin Ahmed when he shared with the lawyers and the nation that Judges were appointed by the Executive head without any consultation with the Chief Justice. This time the wakeup call came from the Hon'ble Chief Justice Mr. M. Ruhul Amin addressing the Noakhali Bar Association pointing out as to the damage done to the highest judiciary which can not be remedied within next 20 years. This wakeup call coming from the Head of the Judiciary certainly evoked not only the concern of the Bar and the people at large but indeed inspired and evoked great expectations among the ordinary people. This inspires more than ever to put our heads together and earnestly search for the remedy now rather than waiting for next two decades.

I always believe that any reform worth its sort must come from within. Legal fraternity must therefore be able to guide how the reform can be materialized and we must act together and ought to engage with a meaningful agenda. This perhaps is the ideal time for reflection and for adopting and rebuilding a path for reinforcing our institutions which had a glorious history and heritage we all can be proud of, sharing the common constitutional goals and the values we cherish in the fraternity of law and justice.

The country is now poised for a change and change in the right direction in rebuilding our political and legal institutions on sound basis. The first exponent of separation doctrine, Montesquieu said that it is the "institutions which shape the chiefs of State." Let our search be for the present to find the correct model in restructuring our institutions in order to achieve our constitutional goals.

I. a. Brief History of Judicial Reform and the Emergence of the Fundamental Principle of the Independence of the Judiciary

The judicial system that we inherited from the British evolved through the legal system from the British period itself which had to go through various reforms starting from the days of Lord Conwallis since 1787 followed by Judicial Plan known as Cornwallis Code. Separation of the Judiciary from the executive and the legislative can be traced back to reforms introduced by Lord Wellesley in 1798.[1]

It was Lord Cornwallis again in his second term in India introduced the rule that the Chief Justice will not be a member of the Company's Council. This was followed by the reforms of Lord Minto in 1807.The appointment of the Chief Judge, however, continued to be vested in the Governor

[1] V.D Kulshreshta's Landmarks in Indian Legal and Constitutional History. 7th Edition Eastern Book Company.

General. During this period of reforms, conflicts continued between the judiciary and the executive throughout the Rule of East India Company and thereafter. Until the establishment of the High Courts, the dual Court Systems continued and it was only with introduction of the High Courts that there were improvements to the tone of administration of Justice. The High Courts were introduced in the Indian High Court Acts of 1865 and 1911 which was further reinforced with Government of India Act 1915. However, it was only with the Government of India Act 1935 that finally laid out a new framework for the functioning of the executive, legislative and judiciary.

In the 1935 Act, the High Court Judges' security of tenure was ensured because prior to the Act, the High Court Judges had to hold office till His majesty's pleasure.

After the end of the British Raj, the remnants of the fusion of the executive power over the magistracy level continued despite the urge for separation of powers. It could not be enforced even till now despite the decision of the landmark case of Masdar Hossain.

If we take stock, it would seem we have not made much progress. Unlike during the colonial era, the post colonial period, the reform as far as separation and independence of the judiciary is concerned has had an evolutionary development as the Supreme Courts in India, Pakistan and also to some extent in Bangladesh have been able to create its own space following the constitutional guidelines as aptly expounded by Justice Bhagwati in S.P. Gupta's case:

"The principle of independence of the judiciary is not an abstract conception but is a living faith which must derive its inspiration from the Constitutional charter and its nourishment and sustenance from the Constitutional values". It is necessary for every Judge to remember constantly and continually that our Constitution is not a non-aligned national charter. It is a document of social revolution which casts an obligation on every instrumentality including the judiciary, which is a separate but equal branch of the State, to transform the status quo ante into a new human order in which justice, social economic and political will inform all institutions of national life and there will be equality of status and opportunity for all. The judiciary has therefore a social-economic destination and a creative function. If there is one principle, which runs through the entire fabric of the Constitution, it is the principle of the rule of law and under the Constitution, it is the judiciary, which is entrusted with the task of keeping every organ of the State within the limits of the law and thereby making the rule of law meaningful and effective."[2]

The concept of the independence of the judiciary as was expounded in the Indian S.C. was adopted by Justice Badrul Haider Chowdhury in the Eighth Amendment case in the following words –

> *"...This is the principle of independence of the judiciary which is vital for the establishment of real participatory democracy, maintenance of the rule of law as a dynamic concept and delivery of social justice to the vulnerable sections of the Community. It is this principle of independence of the judiciary which must be kept in mind while interpreting the relevant provisions of the Constitution...."*

He further states –

> *"what is necessary is to have Judges who are prepared to fashion new tools, forge new methods, innovate new strategies and evolve a new jurisprudence, who are judicial statesmen with a social vision and creative faculty and who have, above all, a deep sense of commitment to the Constitution with a activist approach and obligation for accountability, not to any party in power nor to the opposition.... We need Judges who are alive to the socio-economic realities of Indian life, who are anxious to wipe every tear from every eye, who have faith in the constitutional values and who are ready to use law as an instrument for achieving the constitutional objectives."*

The Supreme Court of Pakistan observed that "Separation of Judiciary is the cornerstone of the independence of Judiciary and unless the Judiciary is independent, the fundamental right to access Justice can not be guaranteed" (Government of Balochistan vs. Azizullah Memon) PLD 1993 SC 341

[2] **Per Bhagwati, J. in** S.P. Gupta and others Vs. President of India and others, AIR (Reference--) Page 152, Para 26

It is further observed in AL Jehad Trust case (PLD 1996 S.C. 324) and Mehram Ali Case (PLD 1998 S.C. 1445) that "The independence of the Judiciary is inextricably linked and connected with the process of appointment of Judges and unless the Judiciary is independent, the fundamental right of access to Justice can not be guaranteed."

I.b. What is the Independence of the Judiciary

The existence of a judicial system as the final interpreter of the Constitution and the Law is a necessary facet of a democracy governed by laws. Judiciary, therefore, is necessary as guarantor of democracy and protector of the legal and Fundamental Rights.

As democracies struggle to establish and maintain their social justification, the powers that be always try to imbalance the structure of checks and balances to their advantage and one of the targets is the judiciary.

Justice M.H Rahman in the Eighth Amendment case held that:

> *"Alexander Hamilton, one of the founding fathers of the U.S. Constitution, in his "Federalist Paper No. 78" described the Supreme Court as the least dangerous branch. He said : "the executive not only dispenses the honours but holds the sword of the community. The legislature not only commands the purse but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society, and can take no direction either of the strength or of the wealth of the society, and can take no active resolution whatsoever.*
>
> *The "least dangerous" organ of the State in our country, however, has drawn much attention from the legislature as well as from the Marital Law Authorities. So far changes have been brought in the structure, powers and functions of the Supreme Court for the eighteenth time. What the U.S. Chief Justice William H. Rehanquist said of his Supreme Court in preface to his book "The Supreme Court, How It was, How It Is". (New York 1987) seems to be apt in our cases as well: "The Supreme Court is the least understood of the three branches."*[3]

Thus, a need has been felt for the judiciary to evolve institutional structures in a manner so as to enjoy public confidence by ensuring better management and transparency in handling of its own resources, both in terms of case management and manpower requirement and to have a leadership within to carve out a progressive direction. It is the unshaken public confidence which is the only strength for the judiciary to be able to act as a bulwark against tyranny. Unfortunately, while appointment of Judges to the higher judiciary receives very little scrutiny, in other courts, efforts are lacking to diminish dependence on the executive. That makes the judiciary vulnerable to interference by the executive and legislative branches. The executive always seek greater control in the process of appointment of judges. Independence of a judge essentially depends on the quality of the mind and strength of character of the person - but how and by whom a judge is selected and appointed made is also relevant to the Institution.

Justice Sandra Day O'Connor of US Supreme Court pointed out "Constitution and statutes do not protect judicial independence, people do." It is the people who sit on the bench who must protect the independence which can only be supported by the Bench and the people in general.

Mr. Justice Bhagwati of the Indian Supreme Court therefore emphasizes on the strength of the character of the judge and quality of his mind in the following words:

> *"Judges should be of stern stuff and tough fibre, unbending before power, economic or political and they must uphold the core principle of the rule of law which says "Be you ever so high, the law is above you". This is the principle of independence of the judiciary, which is vital for the establishment of real participatory democracy, maintenance of the rule of law as a dynamic concept and delivery of social justice to the vulnerable sections of the*

[3] Anwar Hossain V. Bangladesh; 1989 Bangladesh Legal Decisions

community. It is this principle of independence of the judiciary, which must be kept in mind while interpreting the relevant provisions of the Constitution."[4]

Though the examples of persons appointed by powerful executive authorities in U.S. and India turning out to be independent are many but examples of those who showed loyalty to the Master are not wanting. Institutional safe guards are therefore considered most essential in order to evolve the confidence of society in the independence of all process. Independence means complete freedom from influence, bias, temptation and above all ability to keep aside personal value judgments. A Judge is independent when he is able to rise above his own sentiments as well as his likes and dislikes. This quality and ability is sought after in the oath a judge takes. Those who cannot adhere to the oath is not worthy of the office either. It is not so much the fault of those who take the oath but mostly the system and the process which bring such weak links in the judiciary.

In tracing the constitutional values we are reminded by the Preamble of the Constitution of those values which inspired our heroic people in dedicating themselves and our brave martyrs to sacrifice their lives in war of liberation and struggle for national independence. The pledge undertaken by the Constitution which we gave to ourselves highlights those fundamental aim of the state "to realise the democratic process….. 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."

This fundamental aim has been reflected in vesting all powers of the Republic to the people under Article 7 and those powers to be exercised on behalf of the people "shall be effected only under and by the authority of this Constitution".

The doctrine of separation of powers is well entranced in our Constitution. Judicial Power has to be "effected under and by the authority of the Constitution". The Constitution further mandates the State meaning thereby all its organs to ensure the separation of the judiciary from the executive organs of the State" (Article 22).

This tracheotomy of power is an essential feature of our Constitution.

I.c. The Global Overview of the Independence of the Judiciary

While talking of judicial reform, we must take into account the drastic change which has taken place in recent years. Kate Malleson in her research has identified that in European civil law systems such as France, Spain and Italy, its most obvious manifestation has been the increasing judicial activism of examining magistrates, most notably in investigating criminal charges against political leaders. In many common law systems, such as Australia, Canada and England and Wales, the development of human rights adjudication (with or without a Bill of Rights) and the expansion of judicial review has been the primary source of judicialisation. In areas of the world which have experienced rapid political change, such as South Africa and Central and Eastern Europe, the newly formed or reinvigorated constitutional courts are the location of increasing judicial authority. The political and constitutional contexts of the global expansion of judicial power therefore vary considerably, but a common feature of this trend is that it is accompanied by a growing public and political interest in who judges are and how they are chosen.[5]

This awareness has become particularly relevant not only in the new democracies but it cuts across new and established democracies and there are a number of common themes that arise:

> The first of these themes is accountability in judicial appointments processes. In countries where judicial activitism has developed within established liberal democracies (Canada and Autstralia) the dilemma is how to increase judicial accountability by strengthening the link to the electoral process while avoiding the creation, strengthening, or revival of partisan political control.[6]

The experts suggest that the global research on this topic indicate that judges in top review courts are reaching decisions that often have far-reaching social and political implications, and greater emphasis must therefore be placed in the appointments process on their accountability. The case for

[4] ibid
[5] Kate Malleson and Peter H. Russel. Appointing Judges in an Age of Judicial Power. University of Toronto Press 2006.
[6] ibid

such processes as public interviews designed to provide the public with some knowledge about the values and attitudes of these powerful decision makers, is much more persuasive at the top court level. It is also arguable that threat to judicial independence posed by such arrangements is reduced at this level. Judges in these courts have reached the top of the career ladder and are not looking for promotion, thus they are better able to withstand pressure from the selectors once on the bench.[7]

The global research in this respect have also identified that the qualities and characteristics required of a judge presupposes an assumption about what judges do. There is a sharper distinction in some systems between the work of trial courts and top review courts. The upper courts are increasingly required to assess policy implications and reaching politically and socially sensitive decisions. The characteristics, backgrounds, knowledge and skills required of judges appointed to trial courts are bound to be different from those skills and qualities required for top review courts. The idea that thirty years as an advocate is the best possible training for both types of court, traditionally entrenched in many common law systems, is now increasingly being questioned.[8]

We must therefore review the qualification of becoming a judge under Article 95(2) and we must therefore also look at the creative innovation as can be carved out under Article 95 (2) (c) by adding a new requirement of qualifying through a selection process. In our situation, we already have launched a Judicial Service Commission (JSC) for recruiting subordinate courts (with a very limited power though for the JSC). In addition, now we must think about appointment of High Court Judges under Article 95 (2) (c).

If the gap between the different ranks of judges is growing, is it best to have separate appointments processes for them (as in many European systems), or to employ essentially the same system (as in many common law systems)?

This increasing global interest in judicial selection across different political systems can be seen in both common law and civil law systems and includes the full range of appointments processes found within them.

I.d. Separation of the Judiciary

"From early times men have demanded that certain kinds of questions should be decided by a process which was comparatively regular, stable, certain, more or less consistent and from which self interest and emotions were as far as possible eliminated. It was in regard to punishment of crime and the settlement of disputes involving violence that this process was first applied; and it is therefore in this field that judicial function makes its earliest appearance[9]."

Functions of the government could not be limited to trying the criminals or settling disputes between the subjects. It also included the business of law making and that of administrations or the regulation of public affairs and the conduct of public services all of which took vast area of governance under the King or the Chief as it was in ancient times and are also common in a modern state.

The modern state is however expected to deal also in the socioeconomic area. Vast mass of social problems are dealt either by direct intervention or by supervision of regulatory mechanism. In order to carry out this function the state must have agents or organs through which it is to operate. A state then not only has to establish such organization or agents, but it must also define the general function/power, their relations inter-se and between them and private citizens.

Montesquieu following the concept of Aristotle and Locke, divided these powers of the Government into Legislative, Executive and Judiciary.

Montesquieu was concerned with the preservation of political liberty, as he believed that:

> "Political liberty is to be found only when there is no abuse of power. But constant experience shows us that every man invested with power is liable to abuse it, and to carry his authority as far as it will go .... To prevent this abuse, it is necessary from the nature of things that one power should be a check on another.... when the legislative and executive powers are united in the same person or body.... there can be no liberty..... Again there is no liberty if the judicial

[7] ibid
[8] ibid
[9] Justice And Administrative Law by Prof. William Robson

> power is not separated from the legislative and the executive ..... There would be an end of everything if the same person or body, whether of the nobles or of the people were to exercise all these powers[10]."

Though a complete separation of powers without any overlapping or coordination may not be possible, but the prime caution as contained in this doctrine remains valid. Consistent experience in all governments is that too much concentration of power on any person or body without any check of one power by another would give rise to tyranny. The same concern is echoed by Blackstone (1765).

> "In all tyrannical governments .... the right of making and of enforcing the laws is vested in one and the same man, or the same body of men; and whosesoever these two powers are united together there can be no liberty[11]".

Edward Coke before becoming the Chief Justice witnessed and even participated as the attorney general in trial when the innocent people were tried as having incurred the displeasure of king James.

Historian Macdowele described this state of affairs as follows:

'if a Judge in those days had frankly charged a jury according the facts of the situation it would have been in such terms as this:

"if you acquit the prisoner, I shall be dismissed and you will go to prison"

King James was in habit of interfering with Judgments passed by the courts of law, asserting that he was entitled to do so in exercise of his royal prerogative when Chief Justice Coke refused to yield this power he was summoned by King and reminded that the King was Supreme and King's word is final in all matters. Chief Justice Coke uttered those immortal words "His majesty was not learned in laws of England' and that it was only the Judges who could interpret the law. As far as King's supremacy was concerned Chief Justice Coke said "The King Himself should be under no man, but under God and the Law".

These words heralded the beginning of England's transition from a nation under the rule of men to a nation under the Rule of Law.

The state activism and the increase of its functions in its quest to improve the physical, moral and economical welfare of the people lead inevitably to the assumptions of more and more powers by the state.

Consequently, all three organs of the state have a greater load to bear. State activism meant increase of work for all these organs. Legislature is to enact more and more laws in order to initiate new socio-economic schemes and the courts have to interpret new laws and decide many more disputes generated by new laws. In order therefore, the judiciary can cope with this new role, if need to be ever so sensitive to the socio-economic issues and their dynamics in a changing society. It is only the pro-people, pro-right and pro-active courts who may be able to meet this new challenge.

I.e. The Four Cornerstones of Independence of the Judiciary

The concept of the independence of the judiciary rests on four cornerstones. First, the methods for selecting judges for appointment. Second, the determination of salaries and pensions and their payments. Third, the procedures provided for their removal. And lastly, as a culmination of the other three, the perception of the litigant as to the impartiality and the independence of the judiciary.[12]

These four aspects are interconnected. In any system of democratic government, these four together provide the necessary structural integrity to governance; for together, they provide the independence of a very important arm for governance- an independent judiciary. For democracy to be meaningful, the independence of the judiciary must be more than just a legal concept. In other words, it is not enough for it to be reflected in the words of the Consitution, but must exist in actual practice if it is to fulfill its conceptual significance.[13]

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[10] (L' Espirit des Lois) The spirit of Law (Chapter XI P.P. 3 -6)

[11] Blacksone's Commentaries (1765);

[12] The Draft Constitution of Sri Lanka- Critical Aspects, Editors: Dinusha Panditaratne, Pradeep Ratnam; Law and Society Trust. Page 96

[13] ibid

I.f. The First Cornerstone of the Independence of the Judiciary: The Recruitment and Appointment Process of the Judiciary

The first cornerstone being the most crucial one for ensuring independence of the judiciary is the choice of mode of recruitment for judges and the exercise of justice in accordance with the requirements of modern society.

In any State governed by the rule of law, it is vital for citizens to have an effective right to have this grievance placed before the judges capable of freely assessing the cases submitted to them, with demonstrable competence. These qualities depend on the selection, recruitment and training systems of the judges. There should be a solid link between the selection and recruitment of judges on the one hand, and their initial training on the other.

This right to a competent, impartial and independent judge could only be effective in the guaranteed absence of political influence over the exercise of judicial functions. Thus it is necessary to entrust the management of judicial careers, right from the selection stage, to an independent body.

The training system must provide judges with the necessary tools for enforcing the law, reasoning decisions and managing relations with the parties to the process and with the public. The training should therefore be pluralist in order to enable judges to manage the cases submitted to them independently, impartially, open-mindedly and with sound knowledge of societal problems.[14]

II. THE CURRENT RECRUITMENT AND APPOINTMENT PROCESS OF JUDGES IN THE SUPREME COURT OF BANGLADESH

II.a. Factors Affecting the Independence of Judiciary

II.a.(i) Executive Head Exercising Absolute Power: In form of Party Patronage, Party Loyalty being the Main Qualification

Firstly, regarding appointment of judges, we all are aware of the event which took place in 1994 when nine judges were appointed without proper consultation of the then Chief Justice Mr. Shahbuddin Ahmed. At the National Convention of the lawyer, the then Chief Justice Mr. Shahbuddin Ahmed said ‘I am Mr. nobody when it comes to appointment of judges’. The senior members of the Bar under the leadership of the then President of the Bar, Mr. Kazi Golam Mahboub, led a delegation of lawyers. The delegation met the Chief Justice and the full court, met the President and the then Prime Minister. Without narrating the details of the dialogue, which took place during those meetings, it would suffice to say that the leaders of the Bar were able to persuade the then PM. The PM then cancelled the appointment and sent the file to the Hon’ble Chief Justice and as per the opinion of the Chief Justice, seven out of nine were appointed and it was so gazetted incorporating those words “in consultation with the Hon'ble Chief Justice.” It was a great day as we thought we were able to establish a convention that judges will be appointed in consultation with the Chief Justice and the Chief Justice and his opinion having the primacy in this matter.

We were equally disappointed in 2001 when sixteen judges who were appointed during the tenure of the previous government were not confirmed in spite of their performance being above board. Lawyers from the Bar were in one opinion that they deserved to be confirmed. We learnt that the advice and recommendation of the Hon’ble Chief Justice was not given any heed to.

Both the Supreme Court Bar Association and Bangladesh Bar Council wrote to the Hon’ble Prime Minister hoping that this departure from the Convention could be reversed and the Constitutional Convention restored. But we did not receive any response nor even an acknowledgment of the letter. The Senior Advocates Late Syed Ishtiaq Ahmed, Dr. Kamal Hossain, M. A. Malek, Dr. Zahir and Mainul Hossein (the present Advisor) wrote to the Prime Minister for review and consultation. Their request and appeal also met the same fate.

In order, however, to resolve this issue of great public importance cases were filed in order to reassert the entitlement of the judges to be so confirmed as per opinion of the Chief Justice. A Special Bench was constituted to hear this case consisting of Mr. Justice Hamidul Haque, Mr.

[14] **The Recruitment and Training of Judges in Europe – Colloquy organised in Evora (Portugal) on 9-10 April 2003 by the High Council of Justice of Portugal with the support of the Council of Europe:** http://www.coe.int/t/dg1/legalcooperation/judicialprofessions/ccje/cooperation/Evora2003_en.asp

Justice Syed Amirul Islam, and Mr. Justice M. Ruhul Amin. In the midst of the submissions, their Lordships wanted to look at the file containing the consultative process and the opinion given by the Hon'ble Chief Justice. The State wanted stay of the order and as a consequence the entire proceeding has been stayed by the Appellate Division. Until this day, the matter is stuck and in the meanwhile some of the judges of the Special Bench have already been elevated and retired. The issue remains unresolved though the matter concerns the independence and quality of the judiciary which is of great public importance. Besides, it would have been most appropriate to lay down the Constitutional norms and practices to be followed in appointing the Judges and as to their confirmation. We seem to have missed the chance.

In the meanwhile, judges have been appointed without effective and wide consultation and the Hon'ble Chief Justice did not hold any effective consultation with the other senior judges of both the Divisions and Senior members of the Bar. As a result, most of the judges, being appointed during the political government are perceived as being party loyalists. There has been a lot of public criticism of such manner of appointment which lacks transparency and the objective criteria. It is also widely perceived by the Bar that the competence, qualification, experience and commitment for the institutional integrity has not been of any consideration. It is therefore a widely shared opinion that before any appointment of judges to this high Constitutional post, is made a wide and effective consultations must be held, both among the senior judges as well as the senior members of the Bar. Similarly, the same should also take place while confirming the judges. This is nothing against any judge so appointed – but against the process itself. Public confidence being the most powerful strength of the judiciary, transparency and fairness in the process of appointment is most crucial for building that confidence to start with.

Judiciary must be built on the basis of the meritocracy and those who are loyal to the institution and to the Constitution, and be able to defend those values at any cost even at the risk of incurring disfavour for the high political executive. This loyalty to the constitution and rule of law is distinct from loyalty to individual or any particular regime. As an American judge observes that *'men are often bribed by their loyalties and ambitions than by money'*. It is therefore important to ascertain that those who are going to be inducted as the judges for the new generation are free from party loyalties and those who are not ambitious in espousing their own cause i.e. elevation or any favour or a public office after their retirement.

In the case of Abdul Bari Sarker vs Bangladesh,[15] Shahabuddin Ahmed CJ held that:

> "…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. This Article, after amendment, lifted the embargo partially making a retired Judge eligible for appointment "in a judicial or quasi-judicial office"… If it is not thought expedient to make statutory provision in the case of such appointment, it is better that the original Article 99 be restored putting total ban on appointment of a retired Judge to any public office whatever."

II.a.(ii). Constitution and Deconstitution of the Bench

Under our constitutional scheme the judicial power of the Republic is vested in the judiciary, Supreme Court being the apex court and the High Court Division having the exclusive, original, and extraordinary jurisdiction of Judicial Review in protecting, preserving, and enforcing citizens' rights as well as having the supervision and control of the subordinate courts. Independence of judiciary is one of the basic features of the Constitution. Independence of judiciary means the independence of Judges. In other words, Judges should be given full and adequate opportunity to exercise their judicial function independently. Only in this way, they can discharge their judicial power vested in them. Judges are oath bound to ensure justice for the people 'without fear and favour'. Their independent functioning therefore cannot be interfered with in any manner whatsoever. If either directly or indirectly deconstitution of Benches in withdrawal of jurisdiction or staying the case in

[15] 46 DLR (AD) (1994) 38

the midst of hearing undermines the independence of Judges then the judiciary itself, rather than ensuring justice, will be deprived of it from within which would be a sad episode. Independence of the judiciary can thus be obliterated through interference of the Hon'ble Chief Justice if Benches are constituted and reconstituted in an arbitrary and abrupt manner as were witnessed in the past..

The power of constitution of Benches of the Chief justice is an administrative power which ought not to in any way interfere with the independence of Judges however remotely as this may create a demoralizing effect. Any perceptions relating to wrong judgments from the High Court Division can be dealt with by the Appellate Division in an appeal not by the Chief Justice exercising his administrative power by withdrawing jurisdiction which can easily be perceived as a punitive measure.

II.b. Suggestions for Appointing Judges in the Supreme Court

A Judge's appointment now as Justice Mustafa Kamal points out "is an exclusive privilege of the Chief Executive .... It is in fact the Chief Executive who advises the President to appoint the other Judges of the Supreme Court."

Original Article 95(1) contained a constitutional acknowledgement of the role of the Chief Justice in the matter of appointment of the Judges of the Supreme Court, the element of consultation in the selection of other Judges.

Article 95(2) Provides the qualification for appointments of a judge which are :

a) to be citizen of Bangladesh;

b) has for not less than ten years of practice as an Advocate of the Supreme Court or of holding Judicial office for not less than ten years.

Under 95 (2) (c), laws may be enacted providing such other qualifications as may be prescribed for appointment as a Judge of the Supreme Court.

It needs to be examined as to whether under the laws contemplated under Article 95 (2) (c) it is possible to add a qualification for being on the final panel to be prepared by a Judicial Appointment Commission for the Supreme Court (the High Court Division). If the experts agree, a reference may be made to the Appellate Division with a draft Ordinance providing for the Constitution of such a Judicial Appointment Commission for the High Court Division with elaborate power to encourage the best of talents to be selected. There could also be a Preliminary panel which would be continuously updated for the purpose of identifying the most deserving candidates on the basis of criteria and qualities a Supreme Court judge should possess.

We must take into consideration the sea change which has taken place in other countries and jurisdictions. The Judicial appointments is no longer made by the judicial hierarchy through consultations alone even in England and Wales. They used to have an elitistic approach but a drastic change has been introduced and the whole appointment process has been made open and transparent, fair and competitive. They encourage successful and meritorious people to participate in an open competition and an independent Judicial Appointment Commission has been created to select candidates for office.

II.c. The Approach taken in England and Wales

In England and Wales, the independent Judicial Appointments Commission (JAC)[16] selects candidates for judicial office. It does so on merit, through fair and open competition, from the widest range of eligible candidates. The JAC is an independent Non Departmental Public Body (NDPB) sponsored by the Ministry of Justice set up by the Constitutional Reform Act in 2005 to select judicial office holders. From 3 April 2006, JAC assumed responsibility for making selections for the appointment of judicial office-holders. For the first time in 900 years, the Lord Chancellor no longer has the sole power to select which judge to appoint. Instead the JAC select and make a recommendation to him. He can reject that recommendation but he is required to provide his reasons to the JAC.

Under the Constitutional Reform Act 2005 the JAC have very specific duties in the selection of judges and tribunal members, both legal and non-legal. Its statutory responsibilities are:

[16] www.judicialappointments.gov.uk

a) to select candidates solely on merit;
b) to select only people of good character;
c) to have regard to the need to encourage applications from a wider range of candidates.
The procedure for selection in the UK:

1. JAC's role in the judicial appointments process begins when it receives a request from Her Majesty's Courts Service (HMCS), the Tribunals Service or on behalf of a tribunal outside the Tribunals Service.
2. JAC then seeks out the very best candidates, using the processes described in "Annexure-1" and the qualities and abilities relevant to that post as described in "Annexure-2."
3. JAC then recommends to the Lord Chancellor one candidate for each vacancy. The Lord Chancellor can reject that recommendation but he is required to provide his reasons to the Commission. He cannot select an alternative candidate.

II.d. The Approach taken in Scotland

The Judicial Appointments Board advertises all positions within its remit as widely as possible and requires candidates to fill in a detailed application form with three named referees. In assessing a candidate, the Board cannot make use of personal knowledge of a candidate since applicants would expect to be judged on objective, open, transparent criteria and not to have their progress hindered or assisted by 'unofficial knowledge' that would not be put to them or be open for verification. All interviewing panels consist of equal numbers of lay and legal members of the board and are chaired by one of the lay members. Finally, during the interviews the judicial members have no particular primacy in the questioning so as to ensure that the judiciary do not exercise undue influence over the remainder of the board. Furthermore, in order to obtain adequate, reliable and verifiable information on every candidate, the Board developed the application form into a formidable document in which candidates are required to demonstrate (with examples from their own experience) how they meet the published criteria for judicial appointment.

II.e. Conclusions Drawn from the Approach Adopted in other Jurisdictions

The search for the elusive balance between independence and accountability in judicial appointments processes has led to substantive reforms in many countries. According to Kate Malleson,[17] global researcher on judicial appointment comes to the conclusion that the most obvious example of this is found in judicial appointments commissions, which look likely to become the most popular selection system of the twenty-first century. Throughout common law and civil law systems alike the use of commissions is increasingly being explored as a solution to the difficult problem of achieving a balance between independence and accountability in judicial selection. In England and Wales, Canada, South Africa and Scotland and many civil law systems in Europe now use some form of commission. Their great strength is their adaptability, which allows them to be shaped to meet the particular requirements of each system.
Now that we are thinking of overhauling our judicial system, we must try to adopt the most modern method.
The benefits of use of commissions is transparency, objective evaluation, independence, fairness, accountability and no tap on the shoulder. Once we can take a decision on the commission, the form may be part of a discussion paper. The idea is like any multinational corporation who only hire those executives who demonstrate the required skills and qualities for that particular job and in order to find such executives employees, companies heavily invest in productive human resources departments and make use of the latest technologies and testing criteria in order to ensure the recruitment of the best available candidates for the job. The judiciary, besides being an institution maintaining balance of three organs of the State, is also providing a service to the citizens and therefore the recruitment and selection process should be efficient so as to ensure that the best possible judges are chosen who are appointed through a process that are transparent, independent, open, fair and inclusive.

[17] Kate Malleson and Peter H. Russel. Appointing Judges in an Age of Judicial Power. University of Toronto Press 2006.

A Supreme Court Appointment Commission may be set up as the selecting body for preparing a preliminary and final panel to be permanently maintained and updated and Judges may be appointed as per the Serial reached on the basis of their merit and performance.

On the completion of 5 years of active practice, bright members at the Bar with promising background and potentials may be encouraged to join the preliminary panel and their names after due scrutiny could be placed on the preliminary panel. It may also be considered whether it is necessary for conducting motivational and skill development course, if after the assessment of the preliminary list the Commission identified the need for improvement of a particular applicant on a particular skill, specialized courses can be designed if so recommended in collaboration with other regional and international institutions.

There may be regular Judges colloquium, exchange programmes with Judges of other countries in order to exchange the experience of the respective jurisdiction.

III. THE RECRUITMENT AND APPOINTMENT PROCESS OF JUDGES IN THE SUBORDINATE COURTS OF BANGLADESH

III.a. The High Expectations from the Masdar Hossain Case

That the Appellate Division passed a momentous and landmark Judgment dated 02.12.1999 in Civil Appeal No. 79 of 1999 and decisively assert the independence of Judiciary as contemplated under the constitution as having a separate and distinct service and the terms and conditions well laid out in a manner commensurate to their status and dignity not to be subjected to unfettered control of the executive Branch. The said Judgment thereby reaffirmed the integrity of the Constitution of the People's Republic of Bangladesh by designing a framework for an independent subordinate judiciary having its ultimate control and supervision as envisaged under Article 109 not to be impaired or undermined in any manner, and being conscious of the fact that without the independence and protection of the judges in their service with appropriate terms and conditions protecting their honour, emolument and dignity as well as ensuring monitoring and supervision of their work in the Court by the High Court Division there cannot be any rule of law, the judgment of the Highest Court marked the true value of our independence and Rule of law. In the operative part of its Judgment the Hon'ble Court summarized its conclusion in twelve mandatory directives.

III.b. The Shortfall in Meeting the Directives of the Masdar Hossain Judgment

The expected outcome in the separation of the judiciary obviously had to do with the quality of the judges to be improved and the justice delivery system to be efficacious, just, honest and fair with particular need to provide access for the poor and the disadvantaged. The judges must be able to retain their independence while being free from the influence of money and political power and being able to function therefore, as a separate organ independent of the influence of the Executive branch. It is submitted that this may be the appropriate occasion and moment to highlight few but crucial steps in achieving the meaningful separation of the judiciary as contemplated in our Constitution.

With all due respect to all the relevant authorities concerned in implementation of the Four Rules, namely the Bangladesh Judicial Services Commission Rules, 2007, Bangladesh Judicial Service (Pay Commission) Rules, 2007, Bangladesh Judicial Service (Constitution, Appointment, Temporary Suspension, Termination and Dismissal) Rules, 2007 and Bangladesh Judicial Service (Posting, Promotion, Leave, Control, Discipline and other Service Conditions) Rules, 2007, it is necessary however, to put on record the need for a way forward and a road map as there is still a long way to go and various follow up actions need to be undertaken in order to fully accomplish the objectives for a meaningful separation in light of the judgment and expectation arising from the landmark judgment in the Masdar Hossain case.

III.b.(i) The composition of the Judicial Services Commission. Under the Bangladesh Judicial Services Commission Rules, 2007, there are only four judges out of ten who constitute the Judicial Services Commission ("JSC") and as a result the same falls short of the requirement for a majority of judges from the Superior Court in constituting the Judicial Services Commission as mandated in the 4th Directive of the Masdar Hossain Judgment.

III.b.(ii) Recruitment of Judges. In recruitment of the judges under Rule 6, the control and authority in recruitment of the judges, with respect to the satisfactory completion of the probation, is vested with the Executive. Thus, the JSC has no role to play and the Executive authority continues to retain the upper hand in recruitment of judges.

III.b.(iii) Appointment. The appointing authority being the President and the 'appropriate authority' being the concerned Ministry or Division, it is the Executive branch which has been given enormous power in this regard while the JSC has been made into a mere recommendatory body for selection of judges. Besides, it is the Executive who will decide the syllabus for examination and the method of examination although it is to be done in consultation with the JSC. This is the Executive Government instead of the JSC has again been given the upper hand and a proactive role instead the JSC in this regard. Furthermore, until the syllabus and manner of the examinations are formulated, the prevailing Bangladesh Civil Service (Age, Qualification and Examinations for Direct Recruitment) Rules 1982 for the appointment of Assistant Judges in the BCS Cadre Service would be applicable. Hence, one does not see any prospect for changing the criteria or requirement for the recruitment of judges. The kind of tests necessary to ascertain their abilities, knowledge, experience and aptitude, particularly with regard to sensitivity towards various social issues, the poor and disadvantaged, respect for human rights and dignity, the gender equality as well as their commitment for the rule of law, constitutional governance, fundamental rights and civil liberties of the citizen side by side with motivational programmes along with training and evaluation of their performance during probationary periods have not been taken into consideration. The result of giving the 'appropriate authority,' i.e. the relevant Ministry or Division, power to make such decisions regarding appointment/confirmation, then even if the right candidates are selected initially but during the probationary period they may be thrown out at the entry point on various extraneous considerations thereby providing scope for the political executive to choose his or her loyalists as judges.

III.b.(iv) Disciplinary Action. With regard to disciplinary action against the judges it would be following the Government Servants (Discipline and Appeal) Rules, 1985 once again and providing no role of the JSC.

III.b.(v) Dismissal. Furthermore, the Supreme Court will be consulted only before the dismissal, (temporary dismissal and removal) is proposed and thereby the judges can be subjected to proceedings initiated by the Executive without any consultation with the Supreme Court. As a result, the independence of the judiciary is undermined and the judges are not free from the fear that (s)he could be subject to harassment if (s)he is perceived to be on the wrong side of the Executive on any particular matter.

III.b.(vi) Absorption of the Magistrates in Judicial Service. The 'appropriate authority, i.e. the concerned Division or Ministry will be inviting applications for the Magistrates to be absorbed into the Judicial Services. The 'appropriate authority' with recommendation of the Select Committee will absorb or integrate them into the Judicial Service. The Select Committee is constituted with only one sitting judge of the High Court Division, the Registrar of the Supreme Court and the rest are Secretaries of Ministries. Here once again the predomination of the Executive is visible as it will be inviting applications and deciding who should be absorbed in the Judicial Service. The JSC has again been undermined as it has no power/role in the process of absorbing the Magistrates in Judicial Service. The existing Magistrates can apply within the next two years to be absorbed in the Judicial Services and will be recruited by the Select Committee consisting of six out of whom there is only one judge of the High Court Division, Registrar of the Supreme Court and the rest being Secretaries of four Ministries. Within three years of absorption into the Judicial Services, the Magistrates can return to the original BCS Original Cadre.

III.b.(vii) Pay Commission. With regard to the members of the Pay Commission, out of nine there are only three judges, one from the Appellate Division, one from the High Court

Division and one from the rank of a District Judge of Dhaka and the Pay Commission so constituted, can recommend for salaries, allowances and other facilities.

III.b.(viii) Promotion. It is the Executive who can promote the judicial officer in consultation with the Supreme Court. According to the High Court Rules, the General Administration Commission will conduct the selection but the evaluation, monitoring, reporting and preparing the list of recommendations all will continue to be done by the 'appropriate authority,' i.e. the relevant Division or Ministry. The JSC could be conferred with the powers of the 'appropriate authority' to conduct the monitoring, reporting, preparing a recommendation list and also assessing the performance, efficiency, quality of judgment reflecting the sensitivity towards doing justice to the poor and disadvantaged and commitment for rule of law and fundamental rights. Such evaluation can only be done by a body such as the JSC because the 'appropriate authority' being the Executive branch does not have the capacity to evaluate judges. Hence the scope for manipulating the list and selection could become dependent on the sweet will of the concerned Department or the Ministry.

III.b.(ix) Deputation. With regard to deputation to the Supreme Court and the Ministry of Justice, Law and Parliamentary Affairs the 'appropriate authority,' being the Ministry has once again been given the driving seat. The concerned Ministry in consultation with the Supreme Court could put someone on deputation. In enabling the Ministry of Justice, Law and Parliamentary Affairs in consultation with the Supreme Court to put any judge on deputation to any Ministry seems to be a clear departure from the judgment of Masdar Hossain's case and needs to be remedied.

III.b.(x) Directions and Circulars. With regard to the directions and circulars they are to be issued, by the 'appropriate authority,' i.e. the Ministry having the authority with regard to the Administration and Control under Rule 8(3) of the Judicial Service (Posting, Promotion, Leave, Control, Discipline and other Service Conditions) Rules, 2007. This is a clear departure from the Masdar Hossain case and needs to be remedied.

Thus, the role of the JSC has been circumscribed. It has become a formal decorative Commission rather than having any real power. They are not on the driving seat. It does not have a Secretariat of its own. Although there is a wishful contemplation that the JSC would have its own Secretariat one day but apparently the Public Service Commission Secretariat will be used for the purposes of holding examinations, etc. If the Public Service Commission Secretariat act for the JSC including making the arrangement for examinations for entry into the Judicial Services, it will not be able to meet the expectation of the fairness and quality oriented incorruptible recruitment policy to be implemented nor can it give the support as is needed for JSC in order to monitor the quality of judges and their performance. This process cannot enable the recruitment of judges.

III.c. Suggestions for Appointing Judges in the Subordinate Courts

III.c.(i) Appointment of Judges:

Existing process in appointing Judges in the subordinate Judiciary is based on assumptions that there are adequate number of motivated law graduates available and on passing a written test they may be appointed as Judges. After having done their period of probation they can perform the obligation and responsibility for dispensing Justice in matters involving dispute between citizens or between State and the citizens in respect of their rights, obligations and liabilities.

It is high time to put these assumption on test and review the process.

It is important to consider whether after completing the LL.B Hons or LL.M, there is need for selecting those candidates aspiring to become Judges to undergo a Justice Education Training. Such a course can be designed by adopting a practical and problem solving mode, having to absorb and analyze the facts and documents for making decisions, prompting them to respond to socio-economic issues, civil right, gender and environmental issues and relation between crime, punishment while taking into account as to the punitive corrective and remedial measures as may be available in the law.

III.c.(ii) Secondly, to consider whether Judicial Service Commission should act closely with the Justice Education Training project to be conducted by an institution already in existence i.e. JATI.

III.c.(iii) Thirdly, whether Judicial Service Commission supported by JATI with an adequate trained research team and work force be made the "appropriate authority" for evaluation, performances and quality of each of the Judges dispensing justice in subordinate courts.

III.c.(iv) Fourthly, the Salary of a Magistrate or a Subordinate Judge be pretty high, one who is doing the magistracy work is a Judge in Australia does that well without any expectation of promotion. Job of a Magistrate is an office and an institution by itself having various specialization i.e. juvenile crime, sexual crime, offences against women and children.

III.c.(v) Fifthly, to consider an open competition and selection process for becoming District Judge as was provided under Article 116 of the original Constitution.

III.c.(vi) Sixthly, Judicial Service Commission and its Secretariat be equipped with all datas, informations and reports as to the performance of each of the Judges and workout an evaluation and assessment criteria to be applicable for their promotion and transfer.

III.c.(vii) Economic compensation for Judges work and their social status be so maintained that it would be well integrated in a coordinated fraternity of the Judicial hierarchy, each tier having its own unique specialization, status and dignity.

III.c.(viii) Supervision and control of the High Court Division be reinforced with detailed rules framed in this regard. So that there could be continuous monitoring and due investigation of any complaint, which could be performed with the support of the research cell as to be maintained and shared by the Judicial Service Commission with the High Court Division.

III.c.(ix) A continuous vigil of inspection be conducted to stream line the Judicial performance, ensure accountability and ensure speedy disposal.

III.c. (x) To have all the data and information including the status of the case be put in the computer. Any information regarding the latest position of the case can be made available for litigants and the High Court Division. Certified copies of case documents, orders and Judgments be made available more easily and a service oriented case management system may be developed. -()-

"Annexure-1"

JUDICIAL APPOINTMENT COMMISSION (ENGLAND AND WALES): STAGES OF RECRUITMENT

Stage 1: Application

a) **Advertising and Outreach:** Most positions are advertised widely in the national press, legal publications, the professional press and online.
b) **Application Form and Information Packs:** This is tailored for each individual selection exercise.
c) **Eligibility checks and good character**: Once JAC has received a completed application form, it checks each candidate's eligibility for the post. As required by the Constitutional Reform Act 2005 (CRA) , JAC also makes an assessment of the good character of each candidate.

Stage 2: Assessment

a) **References:** Candidates are asked on their application form to nominate up to three referees normally, or in some cases six
b) Short listing: Short listing may be done on the basis of qualifying tests or paper sift, using the application form and references.
c) **Interviews and selection days:** The next stage of the assessment will vary depending on the nature of the post to be filled. Candidates might be asked to attend a selection day, which may entail a combination of role-

plays and an interview. For some specialist and the most senior appointments, there might be only a panel interview.
d) Panel reports: Panel members assess all the information about each candidate, prepare reports on their findings and agree which candidates best meet the required abilities.
e) Statutory Consultation:
As required under section 88(3) and 94(3) of the CRA, the panel's reports on candidates likely to be considered by the Commission and are sent to the Lord Chief Justice and another person who has held the post, or has relevant experience.

Stage 3: Selection and Recommendation

a) Recommendation to the Lord Chancellor: The Commissioners consider all the information gathered on the candidates and select candidates to be recommended to the Lord Chancellor for appointment.
b) Final checks: For existing judicial office holders, JAC will check with the Office for Judicial Complaints (OJC) that there are no complaints outstanding against them. For all other candidates recommended for appointment, a series of good character checks are done with the Police, Her Majesty's Revenue and Customs and relevant professional bodies. The Lord Chancellor may also require candidates to undergo a medical assessment before their appointment is confirmed.

"Annexure –2"

Qualities and Abilities Required for Appointment of Judges in England and Wales

Judicial Appointments Commission has identified the following five core qualities and abilities which are required for judicial office. These qualities and abilities may be adapted slightly for different posts - for example a High Court judge would be expected to display a high level of legal knowledge, whereas a lay tribunal member would be expected to display expertise in their professional field.

1. **Outstanding Intellectual Capacity:**

- High level of legal expertise
- Ability to quickly absorb and analyse information
- Appropriate knowledge of the law and its underlying principles and the ability, where appropriate, to master unfamiliar areas of law

2. **Personal Qualities:**

- Integrity and independence of mind
- Sound judgment
- Decisiveness
- Objectivity
- Ability and willingness to learn and develop professionally

3. **Ability to Understand and Deal Fairly:**

- Ability to treat everyone with respect and sensitivity whatever their background
- Willingness to listen with patience and courtesy

4. **Authority and Communication:**

- Ability to express and explain clearly and succinctly to all concerned matters of procedure and judgement
- Ability to inspire respect and confidence
- Ability to maintain authority when challenged

5. **Efficiency:**

- Ability to work at speed and under pressure
- Ability to organise time effectively and produce clear reasoned judgments expeditiously
- Ability to work constructively with others (including leadership and managerial skills where appropriate)

বিচার বিভাগীয় সংস্কারে
বিশেষ সুপারিশমালা

এম. আমীর-উল-ইসলাম

মূল সংবিধানের ৯৫ (১) অনুচ্ছেদে বিচারপতি নিয়োগের ক্ষেত্রে প্রধান বিচারপতির ভূমিকা রাখা হয়েছিল এবং প্রধান বিচারপতির পরামর্শ ছাড়া কোন আলোচনা না করে বিচারপতি নিয়োগ করা যেতো না। বর্তমানে হাইকোর্টে বিচারপতি নিয়োগের ক্ষেত্রে সরকার প্রধানের সর্বময় ক্ষমতা বিরাজ করছে।

সংবিধানের ৯৫ (২) অনুযায়ী বাংলাদেশের যে কোন নাগরিক এর হাইকোর্ট বিভাগে ১০ (দশ) বছর ওকালতি অভিজ্ঞতা থাকলে তিনি বিচারপতি হবার যোগ্যতা অর্জন করেন।

সংবিধানের ৯৫ (২) (গ) অনুচ্ছেদ অনুযায়ী আইন প্রণয়ন দ্বারা বিচারপতি নিয়োগের ক্ষেত্রে যোগ্যতার নতুন মাপকাঠি নির্ধারণের ক্ষমতার জন্য আইন প্রণয়ন করার বিধান থাকলেও এমন কোন আইন আজও প্রণীত হয়নি।

সংবিধানের ৪র্থ সংশোধনীর মাধ্যমে বিচারপতি নিয়োগের ক্ষেত্রে প্রধান বিচারপতির সাথে পরামর্শ করার বিধান বিলুপ্ত করা সত্বেও সংবিধানিক প্রথা অনুযায়ী বিচারপতি নিয়োগের ক্ষেত্রে প্রধান বিচারপতির সাথে পরামর্শ ক্রমে হাইকোর্টেও বিচারপতি নিয়োগ হয়ে আসছিল।

২। কিন্তু ১৯৯৪ সালে তৎকালীন প্রধানমন্ত্রী বেগম খালেদা জিয়ার আমলে প্রধান বিচারপতির সাথে কোন পরামর্শ না করেই হাইকোর্টে ৯ (নয়) জন বিচারপতি নিয়োগ করা হয়। এদের অনেককে প্রধান বিচারপতি শাহাবুদ্দিন সাহেব চিনতেন ও না। উল্লেখ্য এদের একজন সে সময় বিএনপি-ও জেলা কমিটির সভাপতি হিসেবে কর্মরত ছিলেন।

প্রধান বিচারপতিকে পাশ কাটিয়ে নিয়োগ দেয়া হয়েছে জানতে পেরে দলমত নির্বিশেষে তখন দেশের সমগ্র জনগণ ঐরূপ নিয়োগের বিরুদ্ধে প্রতিবাদ মুখর হলে তৎকালিন সরকার আইনজীবীদের আন্দোলনে বাধ্য হয়ে ঐ নয় (৯) জনের মধ্যে প্রধান বিচারপতির সাথে পরামর্শ করে সাত (৭) জনকে নিয়োগ দেন।

পরবর্তীতে জোট সরকার ক্ষমতায় আসার পর ২০০২ সালে তদপূর্ববর্তী আমলে নিয়োগ প্রাপ্ত ষোল (১৬) জন বিচারপতির নিয়োগ বাতিল করেন। যাঁরা সুনাম ও যোগ্যতার সাথে বিচারকাজ করেছেন তাদের স্থায়ী নিয়োগ না দিয়ে অপসারণ করা হয়। এমন একটি নজির বিহীন ঘটনা পৃথিবীর বিচার বিভাগীয় ইতিহাসে নেই এসব কারণে উচ্চতর আদালতে শুরু হয় অভিজ্ঞতা, ও মেধার শুন্যতা। এর পর দফায় দফায় যে সকল বিচারপতি নিয়োগ দেওয়া হয়েছে, সর্বশেস ১৯ (উনিশ) জনের মধ্যে অধিকাংশের যোগ্যতার মাপকাঠি ছিল বিশেষ করে দলের প্রতি আনুগত্য। দেশের সর্বোচ্চ আদালতে এমনভাবে দলীয় আনুগত্যের ভিত্তিতে বিচারপতি নিয়োগ দেওয়ার ফলে বিচার বিভাগের মান ও ভাবমূর্তি ক্ষুন্ন হয়।

১। এমন একটি নাজুক অবস্থা থেকে মুক্তি লাভের লক্ষ্যে সুপ্রীম কোর্ট আইনজীবী সমিতির সভাপতি জনাব ব্যারিষ্টার ইমীর উল ইসলাম 'স্বাধীন বিচারক নিয়োগ কমিশন' গঠনের প্রস্তাব পেশ করেন। ইতোমধ্যে যুক্তরাজ্য, স্কটল্যান্ড ও সাউথ আফ্রিকা, কানাডা, ফ্রান্স, ইটালি ও নেদার‌ল্যান্ডস সহ পৃথিবীর বহু দেশেই বিচারক নিয়োগের ক্ষেত্রে এধরনের স্বাধীন কমিশন নিয়োগের কথা উল্লেখ করেন। নয়শ (৯০০) বছর ধরে যে দেশে লর্ড চ্যান্সেলর (যিনি ব্রিটিশ কেবিনেটের একজন মন্ত্রী) যুক্তরাজ্যেও সকল স্তরে বিচারপতি নিয়োগের একক ক্ষমতার অধিকারী ছিলেন সে ক্ষমতা একটি স্বাধীন জুডিশিয়াল এপয়েন্টমেন্ট কমিশনের নিকট অর্পন করা হয়েছে। যখনি কোন বিচারপতি নিয়োগের প্রয়োজন হয় তখনই বিভিন্ন ল জার্নাল ও বিশেস উল্লেখযোগ্য পত্র পত্রিকায় উপযুক্ত প্রার্থীদের নিকট থেকে দরখাস্ত আহবান করা হয় এবং এই নিয়াগ প্রক্রিয়া সম্পূর্ণ স্বচ্ছতার ভিত্তিতে হয়। যে কোন প্রার্থী বিচারপতি হবার কি যোগ্যতা রাখেন ও বিচারপতি হলে তিনি কিভাবে বিচারকাজ করবেন এধরনের সকল বিষয়ে খুটিনাটি প্রশ্নের উত্তরে বিস্তারিতভাবে বর্ণনা করে দরখাস্তের ফরম পূরণ করতে হয়। তাঁর সমক্ষে ওয়াকিবহাল এমন বিশিষ্ট তিন জন ব্যক্তির নাম উল্লেখ করতে হয়। এর ভিত্তিতে তাদের প্যানেল ইন্টারভিউ চলতে থাকে অনেক সময় মিডিয়ার মাধ্যমে পাবলিক ইন্টারভিউ ও হয়। যাতে সকল নাগরিক জানতে পারেন যে বিচারক নিয়োগ প্রক্রিয়ায় কতখানি স্বচ্ছতা রয়েছে এবং কারা এ নিয়োগ দিচ্ছেন এবং কি কি গুণাবলির কারণে এরা নিয়োগ পাওয়ার ব্যাপারে যোগ্য বলে বিবেচিত হচ্ছেন।

প্যানেলের সদস্যরা প্রার্থীদের যোগ্যতা বা গুণাবলী সম্পর্কে নিজস্ব ধারণা বিবেচনার জন্য পেশ করতে পারবেন। এমন একটি স্বাধীন নিরপেক্ষ ও নৈর্বিত্তিক পদ্ধতিতে প্রার্থীর চারিত্রিক গুণাবলীর মাপকাঠির ভিত্তিতে বিচারক নিয়োগের সুপারিশ জানিয়ে ব্যারিষ্টার আমীর উল ইসলাম বলেন শুধুমাত্র যোগ্য বিচারক নিয়োগ দিলেই হবে না, নিয়োগ পদ্ধতি ও সকলের জন্য গ্রহণযোগ্য ও স্বচ্ছ হতে হবে এবং মাপকাঠির সবার জন্য একই হতে হবে এবং যিনি বিচারপতি হিসেবে নিয়োগ পাবেন তিনিও নিশ্চিত হবেন যে যোগ্যতার মানদন্ডেই সবার জন্য একই হতে হবে এবং যিনি বিচারপতি হিসেবে নিয়োগ পাবেন তিনিও নিশ্চিত হবেন যে যোগ্যতার মানদন্ডেই তিনি নিয়োগ পেয়েছেন। এরূপ যোগ্যতার স্থানটি তিনি সারা জীবন অক্ষুন্ন রাখতে পারেন এমনি একটি আত্মবিশ্বাসের মনোভাব তার নিয়োগের প্রথম দিন থেকেই শুরু হবে। নিয়োগ কারো অনুরাগ বা আনুকুল্যের কারণে হয়নি এমন একজন বিচারকের পক্ষেই সম্ভব সকল প্রকার অনুরাগ বিরাগের উর্দ্ধে উঠে নিরপক্ষেভাবে সুবিচার করবার শপথ গ্রহন করা ও তা সুচারুভাবে পালন করা।

২। ব্যারিস্টার আমির-উল ইসলাম আরো বলেন যে মেধা ও যোগ্যতা সম্পন্ন প্রতিশ্রুতিশীল আইনজীবীদের জন্য ৫ (পাঁচ) বছর আইন পেশায় থাকবার পরই তাদের জন্য মেধা ও যোগ্যতার প্রতিযোগিতা যাচাই বাছাইয়ের মাধ্যমে একটি প্রামিক প্যানেল তৈরী করা যেতে পারে এবং পরবর্তী ৫ (পাঁচ) বছর তাদের পেশাগত কার্যাবলী পর্যাবেক্ষন করা এবং বিভিন্ন মোটিভেশন, প্রশিক্ষন, দক্ষতা উন্নয়ন ও প্রশিক্ষনের মাধ্যমে একটি বিচারক সুলভ গুনাবলী সৃষ্টি করার কাজে এগিয়ে নিয়ে যাওয়ার লক্ষ্যে বিচারক নিয়োগ কমিশন তাদের ভূমিকা রাখতে পারে। জাস্টিস এডুকেশন এন্ড ট্রেনিং বিষয়ক একটি কোর্স চালু করা সম্ভব। সেমিনার ওয়াকশপ, গবেষনামূলক প্রবন্ধ রচনা থেকে শুরু করে হত দরিদ্র মানুষের এবং নিগৃহীত জনগোষ্ঠি, শিশু, নারী ও আদিবাসী এবং সমাজের পিছিয়ে পড়া অসহায় মানুষের জন্য ন্যায় বিচার নিশ্চিত করার ক্ষেত্রে বিচারকের ভূমিকা কি হতে পারে এ বিষয়ে প্রশিক্ষণ ও গবেষনার কাজ তারা যেন তাদের পেশার পাশাপাশি চালিয়ে যেতে পারেন। এজন্য বিচারক নিয়োগ কমিশনের পরিকল্পনা ও সুপারিশ অনুযায়ী ব্যবস্থা গ্রহণ করা সম্ভব। জাতীয় ও আঞ্চলিক বিভিন্ন ইনষ্টিটিউট এর সাথে সহযোগিতায় গড়ে তোলা সম্ভব আমাদের দেশেই উন্নত মানের বিচার শিক্ষার প্রশিক্ষণ কেন্দ্র। পাশাপাশি বিচারকদের Colloquium, Exchange Programme এর মাধ্যমে বিচারকদের দৃষ্টিভঙ্গি প্রসারিত করা সম্ভব এবং সুপ্রীমাকোর্টের দুই বিভাগই নিজেদের মধ্যে একটি Collegeum হিসাবে কাজ করে জ্ঞান ও তাপসধর্মী পরিবেশ সৃষ্টি করতে পারেন। ন্যায়, সত্য ও সুবিচার প্রতিষ্ঠায় সুপ্রীম কোর্টকে কেন্দ্র করে এমন একটি সুদুর প্রসারী পরিকল্পনা গ্রহণ করা সম্ভব। বাংলাদেশের মানুষের জন্য একটি ন্যায় ভিত্তিক সমাজ ও রাষ্ট্র গড়ে তুলতে প্রয়োজনীয় মূল্যবোধ সৃষ্টি করতে সুপ্রীম কোর্ট একটি অনন্য ভূমিকায় অধিষ্ঠিত হতে পারে।

৩। ক) পাশাপাশি ব্যারিষ্টার আমির-উল ইসলাম আরো উল্লেখ্য করেন যে অধঃস্থন আদালতের বিচার ব্যিবস্থাকে নির্বাহী বিভাগ থেকে পৃথকীকরনের জন্য মাসদার হোসেন মামলায় যে রায় দেয়া হয়েছে তা বাস্তবায়নের জন্য যদি ও কিছু বিধিমালা প্রণয়ন করা হয়েছে কিন্তু এগুলো মাসদার হোসেন মামলার রায়ের যে নীতিমালা তা থেকে অনেক দূরে। অধঃস্থন আদালতের বিচারক নিয়োগের জন্য যে জুডিশিয়াল সার্ভিস কমিশন গঠিত হয়েছে সেই জুডিশিয়াল সার্ভিস কমিশনে বিচার বিভাগীয় প্রতিনিধি অপেক্ষা নির্বাহী বিভাগের প্রতিনিধি বেশী এটা মাসদার হোসেন মামলার রায়ের পরিপন্থি।

খ) জুডিশিয়াল সার্ভিস কমিশনের প্রয়োজনীয় কর্তৃত্ব ও ক্ষমতা থেকে দূরে রেখে মন্ত্রপালয়কে প্রকারন্তরে ক্ষমতাশালী করা হয়েছে। এমনকি পরীক্ষা নিরীক্ষার পদ্ধতি বা প্রক্রিয়া সিলেবাস ইত্যাদিও বিষয়ে ও মূল উদ্যোগটি ঐ মন্ত্রপালয়ের নিকট রাখা হয়েছে। জুডিসিয়াল সার্ভিস কমিশিনের কোন সেক্রেটারীয়েট রাখা হয়নি। জুডিসিয়াল সার্ভিস মমিশনকে 'উপযুক্ত কর্তৃপক্ষ' না করে মন্ত্রপালয়কে 'উপযুক্ত কর্তৃপক্ষ' হিসাবে সকল ক্ষমতা দেওয়া হয়েছে। ফলে পৃথকীকরণ তো দূরের কথা। অধঃস্তন আদালত ও বিচারকদেরকে মন্ত্রপালযের অধিনস্ত করার ব্যবস্থা পাকাপাকি করা হয়েছে। প্রশিক্ষন সময়কালে তাদের চাকরী থেকে বাদ দেয়ার ক্ষমতা ও মন্ত্রপালয়ের নিকট রাখা হয়েছে। এমনিভাবে জুডিসিয়াল সার্ভিস কমিশনকে একটি অলংস্কারিক পদে পর্যবেসিত করেছে।

গ) সিলেবাস ও পরীক্ষা পদ্ধতি নিরূপন না করা পর্যন্ত বিসিএস ক্যাডার সার্ভিসের রুলস অনুযায়ী পরীক্ষা গ্রহণ করা হবে। শৃঙ্খলাজনিত বিষয়ে ও বর্তমানে প্রচলিত বিধি কার্যকর রাখা হয়েছে। শুধুমাত্র কাউকে অপসারণের ক্ষেত্রে সুপ্রীম কোর্টের নিকট পাঠানোর ব্যবস্থা থাকলেও শৃঙ্খলাজিত কারণে প্রসিডিং শুরু করা, তদন্ত ইত্যাদি পূর্বের ন্যায় মন্ত্রপালয়ের উপর ন্যাস্ত এবং ম্যাজিষ্ট্রেটদের আত্মীযকরনের বিষয়টি ও মন্ত্রপালয়ের নিকট ন্যস্ত রয়েছে। সে ক্ষেত্রে জুডিসিয়াল সার্ভিস কমিশনের কোন ভূমিকা নেই এবং সিলেক্ট কমিটির শুধুমাত্র সুপারিশ করার ক্ষমতা আছে কিন্তু উপযুক্ত কর্তৃপক্ষ হচ্ছে মন্ত্রপালয়। এই সিলেক্ট কমিটিতে একজন মাত্র হাইকোর্ট জজ, এবং রেজিষ্টার আছেন, বাকী ৪ জন ৪ মন্ত্রপালযের সচিব। পদোন্নতির বিষয়টি ও নির্বাহী বিভাগের হাতে।

ঘ) শুধুমাত্র হাইকোর্টের General Administrative কমিটি সিলেকশন করবে। কিন্তু বাকী যাচাই বাছাই, সবই করবে মন্ত্রপালয় এবং প্রেশনে পাটানোর ক্ষেত্রে, পদোন্নতি, বদলী ইত্যাদির সার্কুলার অর্ডার মন্ত্রপালয়ের মাধ্যমে যাবে। এভাবেই জুডিসিয়াল সাভিস কমিশনকে ঠুটো জগন্নাথ বানিয়ে রাখা হয়েছে। ফলে আগে যা ছিল এখন ও তাই বহাল রয়েছে। অথচ সাধারণ জনগণকে বলার চেষ্টা হচ্ছে যে বিচার বিভাগ, নির্বাহী বিভাগ থেকে পৃথক হয়ে গেছে।

৪। ব্যারিষ্টার আমীর-উল আরো সুপারিশ করেন যে, জুডিসিয়াল সার্ভিস কমিশনের নিজস্ব সেক্রেটারিয়েট থাকবে। নতুন বিচারক নিয়োগের ক্ষেত্রে এলএলবি, এল,এলবি (অনার্স), এলএল,এম, পাশ করার পর ধরে নেয়া হয় বিসিএস পাশ করলেই তার বিচারক হবার যোগ্যতা অর্জন করলেন। এমন ধারনা পুণর্বিবেচনার দাবী রাখে। ভারতে তিন বছর আইন পেশায় থাকবার পর বিচারক হবার পরীক্ষায় অংশ গ্রহণের যোগ্যতা অর্জন করেন। ব্যারিষ্টার আমীর-উল ইসলাম সুপারিশ করেন যে, আইন পরীক্ষায় পাশ করার পর অন্তত দুই বছর আইন পেশায় নিয়ুক্ত থাকা ও সেই সাথে ৬ মাস বা একবছর একটি জাস্টিস এডুকেশন ট্রেনিং কোর্সে সমাপ্তির পর তাকে জুডিসিয়াল সার্ভিস কমিশনে দরখাস্ত পাঠানোর মাধ্যমে ইন্টারভিউ ও বিভিন্ন প্রকার যাচাই বাছাই ও পরীক্ষার মাধ্যমে নিয়োগ দান করা সম্ভব এবং এ বিষয়ে অন্যান্য দেশে জুডিসিয়াল কমিশন যে ধরনের নিয়োগ পদ্ধতি চালু করেছে তা আমাদের দেশে ও চালু করা যেতে পারে। সেই সাথে নিম্ন আদালতের বিচারকদের অবসর নেবার সময় ৫৭ থেকে ৬০ বা ৬০ বছর নির্দ্ধরণ বিবেচনায় রাখা যেতে পারে।

৫। প্রত্যেকটি জুডিসিয়াল অফিসকেই তার নিজস্ব স্বকীয় মর্যাদায় প্রতিষ্ঠিত করা উচিত। যেমন ম্যাজিষ্ট্রেট এর পদ নিজেই একটি প্রতিষ্ঠান। অষ্ট্রেলিয়াতে যিনি ম্যাজিষ্ট্রেট এর কাজ করেন তিনি চাকুরীকালীন পুরো মেয়াদ শুধু ম্যাষ্টিষ্ট্রেসি করেন এবং তার স্কেল, মর্যাদা ও বেতন ভাতাদি অন্যান্য বিচারকদের চাইতে কোন অংশে কম নয়। ইটালির ম্যাজিষ্ট্রেটরা রাজনৈতিক দুর্নীতি দমনে এবং মাফিয়াদের দুর্বত্তায়ণ থেকে ইটালিকে মুক্ত করতে যে ভূমিকা রেখেছে তা আন্তর্জাতিকভাবে প্রশংসিত এবং তাদের মর্যাদা, তাদের

অফিসের মর্যাদা ও ক্ষমতা কোন অংশে খাটো করে দেখার অবকাশ নাই। এ কারণে এসব পদকে ক্যাডার ভিত্তিক না রেখে প্রতিষ্ঠানিক ভিত্তি দেয়া যায় কিনা তা বিবেচনায় আনার জন্য ব্যারিষ্টার আমীর-উল ইসলাম ভেবে দেখার জন্য সুপারিশ করেন।

৬। ব্রিটিশ ও পাকিস্তান আমলে মুন্সেফদের যে মর্যাদা ছিল, ক্যাডার সার্ভিসে নিয়ে এলে সহকারী জজ করায় তাদের মর্যাদা বৃদ্ধি পেয়েছে কিনা তা ভেবে দেখার প্রয়োজন এসেছে। সেজন্য প্রত্যেকটি জুডিসিয়াল অফিসকে তেমন একটি প্রতিষ্ঠানিক মর্যাদায় রূপান্তরিত করতে হবে এবং সেই গর্বিত জায়গায় বিচারকদের আসনকে সমাদৃত করতে হবে। নিম্ন আদালতের বিচারকদের সাথে উচ্চ আদালতের বেতন স্কেলের পার্থক্য কমিয়ে দিতে হবে। মূল সংবিধানের ১১৬ অনুচ্ছেদ অনুযায়ী জেলা জজ নিয়োগের ক্ষেত্রে এবং জেলা জজ সহ অন্যান্য বিচারক নিয়োগের ক্ষেত্রে সংবিধানের মূল ১১৫ ও ১১৬ অনুচ্ছেদের পুনঃ প্রবর্তন প্রয়োজন এবং জেলা জজ নিয়োগের ক্ষেত্রে একটি উপযুক্ত প্রতিযোগিতামূলক যাচাই বাছাইয়ের মাধ্যমে নিয়োগের ব্যবস্থা করতে হবে। জুডিসিয়াল সার্ভিস কমিশনের একটি নিজস্ব সেক্রেটারিয়েট থাকবে এবং প্রত্যেক বিচারকের পারফরমেন্স এর ইভেল্যুয়েশন তথ্য সংরক্ষিত থাকবে। এ বিষয়গুলি তাদের পোষ্টিং ও প্রমোশনের সময় বিবেচনায় নিতে হবে। তাদের তত্ত্বধান ও নিয়ন্ত্রণ করবার জন্য হাইকোর্টের ক্ষমতার পূর্ণ ও যথাযথ প্রয়োগের মাধ্যমে ব্যবস্থাপনাকে আরো স্বচ্ছ ও গতিশীল করতে হবে। কোন বিচারকের বিরুদ্ধে কোন অভিযোগ আসলে তার সুষ্ঠু ও দ্রুত তদন্ত আবশ্যক। অভিযোগ গ্রহণ ও তদন্ত হাইকোর্ট করবে এবং জুডিসিয়াল কমিশনকে হাইকোর্ট অবগত করবে। পুরো বিচার ব্যবস্থাকে যুযোগপযোগী ও আধুনিকিকরণ করতে হবে। কম্পিউটারের প্রচলন ও ইন্টারনেটের ব্যবহারে কার্য্যকর পদক্ষেপ গ্রহণ সময়ের জরুরী প্রয়োজন তাই এ বিষয়ে সকল প্রকার প্রশিক্ষণ ও সুযোগ সৃষ্টি করতে হবে।

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