

## Chapter 1: Introduction

### *A. Judiciary's Role as an Organ of the Government*

The Government, which is one of the four<sup>1</sup> constituent elements of the state- a politically organised community established as a natural, necessary and universal institution, is the means through which the will of the state is formulated, expressed and realised. Greek philosopher Aristotle (384-322 BC) identified three elements or powers in a government and judicial element or system of courts is the third element.<sup>2</sup> Thus judiciary is the third branch of the government, to use the words of Alexander Hamilton, 'the weakest of the three departments of powers' having '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 active resolution whatever. It may truly be said to have neither force nor will, but merely judgment; and must ultimately depend upon the aid of the executive arm for the efficacious exercise even of this faculty.'<sup>3</sup>

The judiciary is an important organ of the government which primarily administers the law by expounding and defining its true meaning. The interpretation of the law is the proper and peculiar province of the judiciary. It applies the existing law to resolve disputes between private individuals, between large private organisations (i.e. companies), between public bodies (i.e. government departments, local authorities, nationalised industries etc) or between a private individual and a government department. The judges do not implement their political views; they apply facts to legal rules and interpret those as best as they can. In a free

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<sup>1</sup> The other constituent elements of the state are: a) population, b) territory and c) sovereignty.

<sup>2</sup> Aristotle, *The Politics* (translated by Ernest Barker and RF Stalley) (Oxford: Oxford University Press, 1995) at pp. 165-177.

<sup>3</sup> Alexander Hamilton, 'The Federalist No. 78', in Alexander Hamilton, John Madison and John Jay (eds), *The Federalist or the New Constitution* (Oxford: Basil Blackwell, 1948) at pp. 396-397.

society, the necessity of the judiciary is keenly felt to ascertain and decide both public and private rights, to administer justice, to punish crimes and to protect the innocent from injury and usurpation. The judges may by their rulings, their dicta, powerfully and usefully contribute to adapt the law to the needs of a rapidly changing society. In countries where there is a written constitution, which cannot be overridden by ordinary legislation, the judges are guardians of the constitution and may declare a statute to be unconstitutional and invalid and thereby ensure the observance of the rule of law. As Alexander Hamilton says: ‘... No legislative act ... contrary to the constitution, can be valid. To deny this would be to affirm that the deputy is greater than his principal .... It [constitution] therefore belongs to them [the judges] to ascertain its meaning as well as the meaning of any particular act proceeding from the legislative body .... the constitution ought to be preferred to the statute, the intention of the people to the intention of their agents.’<sup>4</sup> In the same vein, James Bryce says:

When questions arise as to the limits of the powers of the Executive or of the Legislature, or in a Federation- as to the limits of the respective powers of the Central or National and those of the State Government, it is by a Court of Law that the true meaning of the Constitution, as the fundamental and supreme law, ought to be determined, because it is the rightful and authorised interpreter of what the people intended to declare when they were enacting a fundamental instrument.<sup>5</sup>

The judiciary seeks to evolve from the competing social interests, which appear before them, a solution that maximises the public advantage. It makes from a given and particular instance a universal rule by which the conduct of other men will be shaped and determined. Thus the judiciary plays a vital role to shape the life of the community and to secure the observance of the rule of law.

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<sup>4</sup> Ibid.

<sup>5</sup> James Bryce, *Modern Democracies*, vol. II (New York: Macmillan, 1921) at pp. 384-385.

The judiciary can perform its functions properly only in a democratic country and, as such, a democratic government is, a prerequisite for the existence of an independent and courageous judiciary. For, in a totalitarian state, the judiciary is expected to act in accordance with the policies of the central authority and, as such, political absolutism is to have free reign.<sup>6</sup> ‘If the executive could shape judicial decision’, rightly says Harold Laski, ‘in accordance with its own desires, it would be the unlimited master of the State.’<sup>7</sup> In the words of the UN Special Rapporteur on the Independence of Judges and Lawyers, who in his Report of 2004, said: ‘The rule of law and separation of powers not only constitute the pillars of the system of democracy but also open the way to an administration of justice that provides guarantees of independence, impartiality and transparency. These guarantees are ... universal in scope ...’<sup>8</sup> The judiciary’s interpretation of the law must not be bound by the will of the executive, rather it must be able to call the executive to account and protect the life as well as liberty of the governed. Thus it is evident that the more independent the position of the judiciary, the more likely it will be able to realise the purpose of the institution. Therefore, the independence of the judiciary is the central principle underlying the administration of justice.

### ***B. Judicial Independence as a Result of the Application of Doctrine of the Separation of Powers***

At modern times, it is contended that the independence of the judiciary is principally a result of the application of the doctrine of separation powers, the doctrine which generally means the distribution of the governmental powers among its three organs- executive, legislative and judiciary. French Jurist Montesquieu, who developed the modern formulation of the doctrine of separation of powers in 1748 after the English Philosopher John Locke (who had

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<sup>6</sup> For example, in the Nazi era in Germany, there was no independent judiciary as the judges were expected to follow the wishes and orders of the Fuehrer. In the Third Reich (the Federation), judges were under a duty to consider ‘the will of the Fuehrer’ as the supreme role.

<sup>7</sup> Harold Laski, *A Grammar of Politics* (London: Harper Collins Publishers Ltd, 1967) at p. 542.

<sup>8</sup> Report of the UN Special Rapporteur on the Independence of Judges and Lawyers, 2004, E/CN.4/2004/60, at para. 28.

propounded his theory in 1690), was concerned with the preservation of political liberty, by separating, in particular, the judicial power from the executive and legislative organs of the government. As he said:

Political liberty is to be found only when there is no abuse of power .... To prevent this abuse, it is necessary from the nature of things that one power should be a check on another .... When legislative power is united with executive power in a single person or in a single body of the magistracy, there is no liberty .... Nor is there liberty if the power of judging is not separated from legislative power and from executive power. If it were joined to legislative power, the life and liberty of the subject would be exposed to arbitrary control; for the judge would then be the legislator. If it were joined to executive power, the judge might behave with violence and oppression. Thus would be an end of everything if the same person or the same body, whether of the nobles or of the people, were to exercise these three powers: that of enacting laws, that of executing public resolutions, and that of judging the crimes or the disputes of individuals.’<sup>9</sup>

Blackstone also held the same view: ‘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 wheresoever these two powers are united together there can be no liberty.’<sup>10</sup>

However, it can safely be said that the maintenance of the independence of the judiciary is a ‘part of the Montesquian theory of division of power. The tri-partition of the public decision-makers into the executive, the legislative, and the judiciary is based on the idea that each of

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<sup>9</sup> Montesquieu, *The Spirit of the Laws*, vol. 1, (Cambridge: Cambridge University Press, 1989) at p. 157.

<sup>10</sup> O. Hood Phillips and Paul Jackson, *Constitutional and Administrative Law* (London: Sweet and Maxwell, 1978) at 45-46.

these three acting parts should have a certain independence in relation to each other.<sup>11</sup> Although the doctrine of separation of power has influenced constitutions of the democratic countries of the modern world, it has not been strictly implemented in any single democratic country particularly in countries where the Westminster system of government is in existence such as the UK, Australia, India, Pakistan, Malaysia and Bangladesh. For, the separation of powers between the executive and the legislative in this form of government does not in practice exist; the ministers- head of the ministries- are members of the parliament and are directly answerable to it. However, the doctrine may now be said to have received its application in democratic countries by securing the independence of the courts from the control of the executive.<sup>12</sup> The independence of judiciary is presently a fundamental aspect of the separation of powers in a state governed by the rule of law.

### ***C. Traditional and New Conceptual Dimensions (Four Meanings) of Judicial Independence***

#### **i) Traditional Meaning of Judicial Independence**

The most traditional and central meaning of the independence of the judiciary is that the judges are in a position to arrive at their decisions free from interference of the political branches, especially the executive and apprehension for suffering personally as a result of exercising their judicial powers. The Congress of the International Commission of Jurists held in New Delhi in January 1959 accepted this approach when it said: Judicial independence ‘... implies freedom from interference by the executive or legislative with the exercise of the judicial function.’<sup>13</sup> Sir Harry Gibbs, the former Chief Justice of Australia, also refers to the traditional meaning of judicial independence when he says: ‘... no judge

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<sup>11</sup> Quoted in Gustaf Patren, ‘The Independence of the Judiciary’, in *Report of the Symposium on the Independence of Judges and Lawyers* (Helsinki, Nov. 1980) at p. 95.

<sup>12</sup> O. Hood Phillips and Paul Jackson, *supra* note 10 at 15.

<sup>13</sup> Article 1, Report of Committee IV, International Congress of Jurists, (New Delhi, 1959).

should have anything to hope or fear in respect of anything which he or she may have done properly in the course of performing judicial functions. So neither the parliament nor the executive, nor anyone else, should be able to bring pressure of any kind to bear upon a judge in the performance of judicial duties.’<sup>14</sup>

Thus the traditional meaning of the independence of the judiciary, in fact, refers to the personal independence of the judges.

## **ii) Four Meanings of Judicial Independence**

The norms developed specially at the international level since 1950s have thickened and broadened the concept of judicial independence. It has now four facets including the traditional one:

- a) substantive independence;
- b) personal independence;
- c) collective independence; and
- d) internal independence.

It should be pointed out that apart from the traditional concept of personal independence, the concept of substantive independence of the judges is also universally recognised by law and legal scholars. These two- personal independence and substantive independence- comprise the independence of an individual judge. The independence of an individual judge carries two opposite connotations: negative and positive. In the negative sense, the concept of judicial independence implies freedom from influence, inducement, pressure, threat or interference from any quarter including executive, legislative or private individual. In the positive sense,

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<sup>14</sup> Garry Sturgess and Philip Chubb, *Judging the World: Law and Politics in the World's Leading Courts* (Sydney: Butterworths, 1988) at p. 149.

judicial independence means the freedom of judges in performing their judicial functions impartially in accordance with their own understanding of law and fact.<sup>15</sup>

On the other hand, the concepts of collective independence and internal independence constitute the independence of the judiciary as a whole and have developed in the 1980s. They were recognised first by the International Bar Association's Minimum Standards of Judicial Independence adopted in New Delhi in October 1982, then followed by the Montreal Universal Declaration on the Independence of Justice, 1983, the Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region, 1995 and the Bangalore Principles of Judicial Conduct, 2002. This inclusion of the two concepts of collective independence and internal independence in the expression 'independence of judiciary' as the component parts is considered as an important milestone in recent legal history. For, impartiality and freedom of individual judges is meaningless without the institutional independence of the judiciary including the powers and facilities' that are required to perform judicial independence functions.<sup>16</sup>

#### *a) Substantive Independence*

Substantive independence, which is also described as functional or decisional independence, means the independence of judges to arrive at their decisions in accordance with their oath of office without submitting to any kind of pressures- internal and external- but only to their own sense of justice and the dictates of law. As Erkki Juhani Taipale, an European Jurist, says that the judges in 'administering justice can only be subordinate to the law, and that only the law can influence the contents of the decisions made by [them] .... No other state authority, not even the highest, is allowed to influence the decisions made by the judicial

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<sup>15</sup> Pamela S Karlan, 'Two Concepts of Judicial Independence', (1999) 72 *Southern California Law Review* 535, at pp. 536, 558.

<sup>16</sup> Guy Green, 'The Rationale and Some Aspects of Judicial Independence', (1985) 59 *Australian Law Journal* 135, at p. 135.

organ.’<sup>17</sup> Thus a substantive independent judge is one who ‘dispenses justice according to law without regard to the policies and inclinations of the government of the day.’<sup>18</sup> (Sir Ninian Stephens). The International Bar Association’s Minimum Standards of Judicial Independence defines substantive independence to mean that ‘in the discharge of his judicial function, a judge is subject to nothing but the law and the commands of his conscience.’<sup>19</sup> The concept has been elaborated in the 1983 Universal Declaration on the Independence of Justice thus: ‘Judges individually shall be free, and it shall be their duty, to decide matters before them impartially, in accordance with their assessment of the facts and their understanding of the law without any restrictions, influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.’<sup>20</sup> This elaboration has been echoed in the 1985 UN Basic Principles on the Independence of the Judiciary thus: ‘The Judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influence, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.’<sup>21</sup> The Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region, 1995, also followed the 1983 Universal Declaration on the Independence of the Judiciary: ‘The judiciary shall decide matters before it in accordance with its impartial assessment of the facts and its understanding of the law without improper influences, direct or indirect, from any source.’<sup>22</sup>

The notion of substantive independence, which is considered as the kernel of judicial independence, had also received due recognition in the Constitutions of some of the countries of the world prior to the development of international norms in this regard. For example, the

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<sup>17</sup> Erkki- Juhani Taipale, ‘Judicial Independence from the Lawyer’s Point of View’, in *Report of the Symposium on the Independence of Judges and Lawyers* (Helsinki, Nov. 1980) at p. 118.

<sup>18</sup> Ninian Stephen, ‘Judicial Independence- A Fragile Bastion’, in Shimon Shetreet and Jules Deschenes (eds), *Judicial Independence: the Contemporary Debate* (Dordrecht: Martinus Nijhoff, 1985) at p. 531.

<sup>19</sup> Article 1(c), International Bar Association’s Minimum Standards of Judicial Independence, 1982.

<sup>20</sup> Article 2.02, the Universal Declaration on the Independence of Justice, 1983.

<sup>21</sup> Article 2, UN Basic Principles on the Independence of the Judiciary, 1985.

<sup>22</sup> Article 3(a), the Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region, 1995.



Constitution of Japan, which was adopted in 1946, provides that ‘All Judges shall be independent in the exercise of their conscience and shall be bound only by this Constitution and the laws.’<sup>23</sup> Later, the Constitution of the Republic of Korea, 1981, provides that ‘Judges shall rule independently according to their conscience and in conformity with the Constitution and law.’<sup>24</sup>

Thus substantive independence means the independence of individual judges to perform actual decision-making task merely on the basis of their assessment of the facts- merit of the cases, and understanding of law in accordance with their oath of office without taking into account whatsoever any kind of inducement, pressure or threat from any quarter and without taking into account the policies and inclinations of the government of the day. Such a frame of mind can be demonstrated only by those judges, to use the words of Justice Bhagwati of the Indian Supreme Court, who are ‘stern, stuff and tough fibre, unbending before power ....’ and who can alone ‘uphold the core principle of the rule of law which says ‘Be you ever so high, the law is above you.’<sup>25</sup>

### ***b) Personal Independence***

Personal independence, as mentioned earlier, corresponds to the traditional and central meaning of the independence of the judiciary. It ‘means that judges are not dependent on Government in any way which might influence them in coming to decisions in individual cases.’<sup>26</sup> It has been defined by the 1982 International Bar Association’s Minimum Standards of Judicial Independence as meaning ‘that the terms and conditions of judicial service are adequately secured so as to ensure that individual judges are not subject to executive

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<sup>23</sup> Article 76(3), the Constitution of Japan, 1946.

<sup>24</sup> Article 103, the Constitution of the Republic of Korea, 1981.

<sup>25</sup> *S. P. Gupta and others v President of Union of India*, AIR 1982 SC 149 at p. 672.

<sup>26</sup> J.A.G Griffith, *The Politics of the Judiciary* (London: Fontana, 1977) at p. 29.

control.’<sup>27</sup> Thus personal independence implies that the individual judges shall be independent of the political branches of the government, especially the executive in respect of the terms of judicial service including transfer, remuneration, pension and the security of tenure until or mandatory retiring age and should be ‘placed in a position where he has nothing to lose by doing what is right and little to gain by doing what is wrong.’<sup>28</sup>

### ***c) Collective Independence or Financial and Administrative Independence***

Collective independence means the institutional, administrative and financial independence of the judiciary as a whole *vis-a-vis* other branches of the government, namely the executive and the legislative. It aims at virtually the abolition of the dominant role that the executive plays in the administrative and financial matters of the court at the central level. In other words, collective independence demands a much greater effective judicial participation in the administration of the courts including control over administrative personnel, maintenance of court buildings, preparation and formulation of its budget and allocation of resources. For, interference in the management of the judiciary as a whole by the executive has adverse impact on individual judges in performing their judicial functions. The collective independence of the judiciary is considered as an important means to protect and buttress the freedom of an individual judge in his decision-making from executive interference by way of administrative control. ‘The protections enjoyed by judges, including financial independence ....’ claimed by the Commonwealth Law Ministers in their meeting held in Kuala Lumpur, Malaysia in 1996, ‘are an important defence against improper interference and free the judiciary to discharge the particular responsibilities given to it within national constitutional frameworks.’ The Montreal Universal Declaration on the Independence of Justice has given emphasis on this important conceptual aspect of the judicial independence thus: ‘It shall be a

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<sup>27</sup> Article 1(b), International Bar Association’s Minimum Standards of Judicial Independence, 1982.

<sup>28</sup> R.M. Dawson, *The Government of Canada* (Toronto: University of Toronto Press, 1954) at p. 486.

priority of the highest order, for the state to provide adequate resource to allow for the due administration of justice, including physical facilities appropriate for the maintenance of judicial independence, dignity and efficiency, judicial and administrative personnel, and operating budgets.’<sup>29</sup> The Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region, 1995, stresses that ‘The principal responsibility for court administration, including appointment, supervision and disciplinary control of administrative personnel and support staff must vest in the Judiciary, or in a body in which the Judiciary is represented and has an effective role.’<sup>30</sup> In this context, it is worthy of note that in 1993 the Courts Administration Act was passed in South Australia providing for the establishment of the State Courts Administration Council, independent of the control of the executive, consisting of the Chief Justice of the Supreme Court, the Chief Judge of the District Court and the Chief Magistrate of the Magistrate Court and associate members nominated by them<sup>31</sup> with the responsibility of ‘providing or arranging for the provision of the administrative facilities and services for participating courts that are necessary to enable those courts and their staff properly to carry out their judicial and administrative functions.’<sup>32</sup> The Council’s Chief Executive Officer, known as the State Courts Administrator, has been given the responsibility of the ‘control and management of the Council’s staff’ and the ‘management of property that is under the Council’s care and management’<sup>33</sup>, subject to the control and discretion of the State Courts Administration Council. This can serve as an important model for other democratic countries to follow in order to ensure the collective independence of the judiciary.

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<sup>29</sup> Article 2.41, Montreal Universal Declaration on the Independence of Justice, 1983.

<sup>30</sup> Article 36, the Beijing Statement of the Principles of the Independence of the Judiciary in the LAWASIA Region, 1995.

<sup>31</sup> Section 7, the Courts Administration Act, 1993.

<sup>32</sup> Section 10(1), *ibid.*

<sup>33</sup> Section 15, *ibid.*

#### *d) Internal Independence*

Internal Independence of the judiciary means the independence of a judge from any kind of order, indication or pressure from his judicial superiors and colleagues in coming to decisions in individual cases. This means that the threat to judicial independence may not only come from outside, it may also come from inside- colleagues and senior judges. Thus a judge should not only be independent from the interference of the executive and legislative but also from his judicial colleagues and superiors, having administrative power and control, in deciding a case. Although the International Bar Association's Minimum Standards and Montreal Declaration expressly recognise the importance of the concept of internal judicial independence, the notion has received more elaboration and featured prominently in the text of the Montreal Declaration. While the International Bar Association's Standards of Judicial Independence merely says that 'In the decision-making process, a judge must be independent vis-a-vis his judicial colleagues and superiors',<sup>34</sup> the Montreal Universal Declaration on the Independence of Justice provides that 'In the decision-making process, judges shall be independent vis-a-vis their judicial colleagues and superiors. Any hierarchical organisation of the judiciary and any difference in grade or rank shall in no way interfere with the right of the judge to pronounce his judgment freely.'<sup>35</sup> In the same vein, the Beijing Statement of the Principles of the Independence of the Judiciary, 1995, provides: 'In the decision-making process any hierarchical organisation of the Judiciary and any difference in grade or rank shall in no way interfere with the duty of the judge exercising jurisdiction individually or judges acting collectively to pronounce judgment.'<sup>36</sup> On the other hand, the UN Basic

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<sup>34</sup> Article 46, International Bar Association's Minimum Standards of Judicial Independence, 1982.

<sup>35</sup> Article 2.03, Montreal Universal Declaration on the Independence of Justice, 1983.

<sup>36</sup> Article 6, the Beijing Statement of the Principles of the Independence of the Judiciary in the LAWASIA Region, 1995.

Principles on the Independence of the Judiciary, 1985 merely states that ‘There shall not be any inappropriate or unwarranted interference with the judicial process.’<sup>37</sup>

Thus, it is evident that only the International Bar Association’s Minimum Standards recognise the four types of judicial independence- substantive, personal, collective and internal. Although the Montreal Universal Declaration in the Independence of Justice contains express provision concerning substantive and internal independence of the judges, it does not provide for personal independence of the judges and has implied reference to the collective independence of the judiciary. On the other hand, the UN Basic Principles of the Independence of the Judiciary recognise expressly only the substantive independence of the judges and contain merely implied reference to the internal independence of the judges. Although the Beijing Statement of the Principles of the Independence of the Judiciary in the LAWASIA Region, 1995 embodies explicit provision concerning substantive, internal, and collective independence of the judges, it does not contain any reference whatsoever to their personal independence. Thus, it is clear that all these international norms have uniform approach only in one aspect of the judicial independence, namely the substantive independence of the judges.

#### ***D. Importance of an Independent and Impartial Judiciary in a Democratic State***

Although the concepts of ‘independence’ and of ‘impartiality’ are obviously related, they are separate distinct values. For, ‘impartiality’ refers to a state of mind or attitude of the tribunal in relation to the issues and the parties in a particular case, ‘Independence’ reflects or embodies the traditional constitutional value of judicial independence and connotes not only a state of mind but also a status or relationship to others ... particularly to the executive branch

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<sup>37</sup> Article 4, the UN Basic Principles on the Independence of the Judiciary, 1985.

of government.’<sup>38</sup> The importance of an independent judiciary can be gathered from the facts that as back as in 1776, the American revolutionaries listed the absence of judicial independence in the Declaration of Independence as one of the causes of their Revolution thus: ‘The history of the present King of Great Britain is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute Tyranny over these States ... He has made judges dependent upon his will alone, for the tenure of their offices and the amount of their salaries.’ However, the realities that the judiciary, which is charged with the ultimate decision over life, liberty, freedom, rights, duties and properties of citizens, is the weakest arm of the government and hold ‘... neither the sword nor the purse’ press the compelling necessity for the establishment of a competent, independent and impartial judiciary to i) uphold the rule of law, ii) ensure fair justice, iii) defend constitutional guarantees of fundamental rights and iv) to maintain and enhance public confidence in judicial impartiality, so that the legitimate aspirations of the citizens of a state are fulfilled.

### **i) Rule of Law**

An independent judiciary is the essential- indeed indispensable- component of a free and democratic society<sup>39</sup> and the essence of a modern democracy is the observance of the rule of law; in other words, the maintenance of the rule of law is the hallmark of any democratic society. An enlightened, independent and courageous judiciary is, therefore, a fundamental requisite, a basic element for the very existence of any society that respects the rule of law as a subservient judiciary cannot be relied upon to accomplish the task of maintaining rule of law. If judicial independence exists in a democratic society, absolutism in government cannot

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<sup>38</sup> The Supreme Court of Canada in *Walter Valente v Her Majesty the Queen*, (1985) 2 RCS 673.

<sup>39</sup> Francis J Larkin, ‘The Variousness, Virulence, and Variety of Threats to Judicial Independence’, (1997) 36 *Judges’ Journal* 1, at p. 7.

establish there; and where it is absent, absolutism is likely to have free rein.<sup>40</sup> For, it is the independent judiciary which ‘stands between the subject and any attempted encroachments of his liberty by the executive, alert to see that any coercive action is justified in law.’<sup>41</sup> Independent courts constitute the last bulwark of the citizen against the arbitrary encroachments of the state. Therefore, in ‘all countries cases, sometimes civil, but more frequently criminal, arise which involve political issues and excite party feeling. It is then that the courage and uprightness of the judges become supremely valuable to the nation commanding respect for the exposition of the law which they have to deliver.’<sup>42</sup>

The roots of the rule of law can only go deep into the society if the judiciary applies the law neutrally against the government and is not afraid of making unpopular decisions against powerful interests. To ensure the supremacy of law over the arbitrary exercise of power, to guarantee equal protection of law to all people without exception, and to maintain that legal decisions are based upon legal and factual merits rather than political interests or popular clamour, an enlightened, independent and courageous judiciary is indispensable so that a true civilised society proclaiming rule of law can be established and flourished. As Madison says: ‘Independent tribunals of justice will consider themselves .... an impenetrable bulwark against every assumption of power in the Legislature or Executive.’<sup>43</sup> ‘The importance of an independent judiciary’ says Lord Hailsham, ‘is not less but all the greater when judges have to serve under an all-powerful parliament dominated by a party cabinet, and concentrating all the powers, and more than all powers, of the executive and legislature combined in one coherent complex.’<sup>44</sup> In his oft-quoted judgment in the celebrated case of *Sharaf Faridi v the*

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<sup>40</sup> M. Ershadul Bari, ‘Importance of An Independent Judiciary’, (1993) 4 *Dhaka University Studies Part-F* 1, at p. 10.

<sup>41</sup> Lord Atkin in his memorable war-time dissent in *Liversidge v Anderson*, [1942] AC 206, at p. 244.

<sup>42</sup> James Bryce, *supra* note 5, at 384.

<sup>43</sup> Quoted in John Agresto, *The Supreme Court and Constitutional Democracy* (Ithaca: Cornell University Press, 1984) at p. 25.

<sup>44</sup> Lord Hailsham, *The Door Wherein I Went* (London: Collins, 1975) at 245.

*Federation of Islamic Republic of Pakistan*<sup>45</sup>, Saleem Akhter J. (then a Judge of the Sindh High Court) observed:

In a set-up where the Constitution is based on trichotomy of powers, the judiciary enjoys a unique and supreme position within the framework of the Constitution as it creates balance amongst the various organs of the State and also checks the excessive and arbitrary exercise of power by the Executive or the Legislature ... The jurisdiction and the parameters for exercise of powers by all three organs have been mentioned in definite terms in the Constitution. No organ is permitted to encroach upon the authority of the other and the Judiciary by its power to interpret the Constitution keeps the Legislature and the Executive within the spheres and bounds of the Constitution.<sup>46</sup>

Modern governments necessarily pose a greater threat to individual liberties as they intervene in areas previously little regulated. The citizen must look primarily to the judiciary for redress if there is a denial of benefits to which a citizen is entitled or of unlawful interference with his freedom of action according to law. An independent and impartial judiciary can only determine whether the executive actions challenged were exercised outside the provisions of the constitution and other laws of the country. In addition to reviewing executive actions, such a judiciary can also determine, by reference to the constitution, the validity of challenged legislation remaining unaffected either by the policy or the wishes of the government of the day. With regard to the practice as well as wide scope of judicial review of executive action and of legislation in the USA, where the Supreme Court in 1803 assumed power of judicial review in the case of *Marbury v Madison*<sup>47</sup>, Erwin N. Griswold commented, 'in the United States there is scarcely any sort of government action, or

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<sup>45</sup> PLD 1989 Karachi 404.

<sup>46</sup> *Ibid.*, at 444.

<sup>47</sup> [1803] 5 US 137.



threatened government action, which is not subject to judicial review. America has indeed moved a long way in the direction of government by the judiciary.’<sup>48</sup>

## **ii) Fair Justice**

It is aptly said that ‘Ideas, ideals and great conception are vital to a system of justice, but it must have more than that- there must be delivery and execution. Concepts of justice must have hands and feet or they remain sterile abstractions.’<sup>49</sup> Without a free and independent judiciary, ready to adjudicate between individuals and between the state and individual in an impartial manner, justice, indeed, is a meaningless word. ‘There is no better test of the excellence of a government’, rightly says James Bryce, ‘than the efficiency of its judicial system, for nothing more nearly touches the welfare and security of the average citizen than his sense that he can rely on the certain and prompt administration of justice .... if the Law be dishonestly administered, the salt has lost its savour; if it be weakly or fitfully enforced, the guarantees or order fail, for it is more by the certainty than by the severity of punishment that offences are repressed. If the lamp of justice goes out in darkness, how great is that darkness!’<sup>50</sup> Referring to the importance of an independent judiciary in ensuring fair justice, Henry Sidgwick, has gone so far as to say that ‘in determining a nation’s rank in political civilization, no test is more decisive than the degree in which justice as defined by the law is actually realized in its judicial administration; both as between one private citizen and

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<sup>48</sup> Erwin N. Griswold, ‘The Judiciary and the Government’, a paper presented at the Second International Conference of Appellate Judges, Australia, 20 May 1980, at p. 28.

<sup>49</sup> Chief Justice Warren Burger, ‘Address to the American Bar Association’, San Francisco, Reported in Vital Speeches, 1 October 1972; cited in Justice Michael Kirby, Independence Of The Legal Profession: Global And Regional Challenges, a paper presented at the Presidents of Law Association In Asia Conference, Law Council of Australia, Queensland, Australia, 20 MARCH 2005 <[http://www.hcourt.gov.au/speeches/kirbyj/kirbyj\\_20mar05.html](http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_20mar05.html)> (accessed on 10 August 2009).

another, and as between citizens and members of the Government.’<sup>51</sup> Justice in a democratic state can only be ensured if there is an independent and impartial judiciary.

### **iii) Fundamental Rights**

A mere declaration and insertion of fundamental rights (i.e. constitutionally guaranteed human rights) in the constitution is meaningless unless their enjoyment is effectively guaranteed by an effective, easy and independent judiciary.<sup>52</sup> In the absence of an independent judiciary having capability to interpret and enforce the constitutional guarantees of fundamental rights, the fundamental rights guaranteed by the constitution would be illusory and of little worth.

The judiciary, therefore, must be watchdog, guardian, protector and guarantor of the rights of the individuals entrenched in the constitution. In the words of Madison: ‘Independent tribunals of justice will consider themselves in a peculiar manner the guardians of those (constitutionally protected) rights. They will be naturally led to resist every encroachment upon rights expressly stipulated in that Constitution by the declaration of rights.’<sup>53</sup> One of the Conclusions of the International Conference of Jurists, held in Bangkok in 1965, emphasised the importance of judicial independence in order to enforce fundamental rights thus: ‘The ultimate protection of the individual in a society governed by the Rule of Law depends upon the existence of an enlightened, independent and courageous judiciary and upon adequate provision for the speedy and effective administration of justice.’

Hence, the peoples of the world affirmed in 1945 in the Charter of the United Nations, *inter alia*, their determination to establish conditions under which justice can be maintained to achieve international cooperation in promoting and encouraging respect for human rights and

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<sup>50</sup> James Bryce, *supra* note 5, at 384.

<sup>51</sup> Henry Sidgwick, *The Elements of Politics* (London: Macmillan, 1897) at p. 481.

<sup>52</sup> M. Ershadul Bari, *supra* note 40, at p. 5.

<sup>53</sup> Quoted in John Agresto, *supra* note 43, at p. 25.

fundamental freedoms without any discrimination. Since the adoption of the Universal Declaration of Human Rights in December 1948, the international community has made considerable progress towards the incorporation, promotion, and development of transnational jurisprudence of substantive human rights along with the principle of judicial independence embodied in a good number of global and regional conventions on human rights. Effective mechanisms for the enforcement of human rights in the national, regional and international systems of justices are a fundamental requisite as without such mechanisms human rights will remain unfulfilled injunctions in the constitutions or in the regional and international conventions. ‘An impartial judiciary composed of competent judges is the best guarantee of proper administration of justice, and in the final analysis, of defense of human rights.’<sup>54</sup> Thus, the 1948 Universal Declaration of Human Rights, with which began the real history of human rights at the level of international law, provides that: ‘Everyone has the right to an effective remedy by the competent national tribunal for acts violating the Fundamental Rights granted to him by Constitution or by law’<sup>55</sup> and enshrines the principle of the independence of the judiciary thus: ‘Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.’<sup>56</sup> Similarly, the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950 provides that ‘In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.’<sup>57</sup> Later in 1966, the International Covenant on Civil and Political Rights guarantees that all person shall be equal before the courts, and that in the determination of any criminal charge or of rights and obligations in a suit at law,

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<sup>54</sup> Annual Report of the Inter-American Commission of Human Rights, 1985, at p. 182.

<sup>55</sup> Article 8, the Universal Declaration of Human Rights, GA Res 217A (III), 10 December 1948, A/810.

<sup>56</sup> Article 10, *ibid.*

<sup>57</sup> Article 6(1), the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950, CETS 005.

everyone shall be entitled, without undue delay, to a fair and public hearing by a competent, independent and impartial tribunal established by law.<sup>58</sup> The American Convention on Human Rights, 1969, also invest every person with ‘the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent and impartial tribunal, ... in the substantiation of any accusation of a criminal nature made against him, or for the determination of his rights and obligations of a civil or any other nature.’<sup>59</sup> The latest regional convention on human rights, the African Charter on Human and Peoples’ Rights, 1981, in a similar manner states that ‘Every individual shall have the right to have his cause heard. This comprises: a) the right to an appeal to competent national organs against the acts of violating his fundamental rights as recognised and guaranteed by conventions [and] laws ... d) the right to be tried within a reasonable time by an impartial court or tribunal.’<sup>60</sup>

Thus the incorporation of the principle of judicial independence into the global and regional human rights law jurisprudence demonstrates the realisation of the international community to the effect that the independence and impartiality of courts is essential to the effective upholding of constitutional guarantees of human rights. Various international organisations such as the International Commission of Jurists’ Standards on Judicial Independence adopted in Athens (Greece) in 1955, in New Delhi in 1959, in Lagos (Nigeria) in 1961, in Rio de Janeiro (Brazil) in 1962, in Bangkok (Thailand) in 1965, and in Caracas (Venezuela) in 1989, International Bar Association’s Minimum Standards of Judicial Independence (adopted in New Delhi), 1982, the Montreal Universal Declaration on the Independence of Justice, adopted in Montreal by the First World Conference on the Independence of Justice, 1983, the United Nations Basic Principles on the Independence of the Judiciary, 1985, the Law Association of Asia and the Western Pacific’s (LAWASIA) Tokyo Principles on the

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<sup>58</sup> Article 14(1), the International Covenant on Civil and Political Rights 1966, 999 UNTS 171.

<sup>59</sup> Article 8(1), the American Convention on Human Rights 1969, 1144 UNTS 123.

<sup>60</sup> Article 7, the African Charter on Human and Peoples’ Rights, 27 June 1981, OAU Doc CAB/LEG/67/3 21.

Independence of the Judiciary in the LAWASIA Region, 1982 and the Beijing Statement on the Principles of the Independence of Justice, 1995, the Harare Declaration of the Commonwealth, the Bangalore Principle's of Judicial Conduct, the Latimer House Guidelines and the Suva (Fiji) Statement on the Principles of Judicial Independence and Access to Justice, 2004 have also given emphasis on the truth that the constitutional guarantees concerning fundamental rights can only be upheld and protected through a competent, independent and impartial judiciary.<sup>61</sup> The establishment of the Office of the United Nations Special Rapporteur on the Independence of Judges and Lawyers in 1994 is a glaring testimony/example of international community's recognition of the need to protect and strengthen the independence of the judiciary as a central tenet of the international human rights law of great practical importance.

#### **iv) Public Confidence in Judicial Impartiality**

The Judiciary, which is the last hope of the citizen, contributes vitally to the preservation of the social peace and order by settling legal disputes and thus promotes a harmonious and integrated society. The quantum of its contribution, however, largely depends upon the willingness of the people to present their problems before it. What matters most, therefore, is the extent to which people have confidence in judicial impartiality.<sup>62</sup> Credibility in the functioning of the justice delivery system and the perception of the aggrieved parties that the judicial power is exercised impartially in the right perspective are relevant considerations to ensure the continuance of public confidence in the independence of the judiciary. Justice Pathak has portrayed this dimension beautifully in his observation in *S. P. Gupta v Union of India*<sup>63</sup> thus:

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<sup>61</sup> M. Ershadul Bari, *Judicial Independence: National and International Perspectives* (Unpublished Book).

<sup>62</sup> M. Ershadul Bari, *supra* note 40, at p. 8.

<sup>63</sup> (1981) Supp SCC 87; AIR 1982 SC 149.

Public confidence in the administration of justice is imperative to its effectiveness, because ultimately the ready acceptance of a judicial verdict alone gives relevance to the judicial system. While the administration of justice draws its legal sanction from the Constitution, its credibility rests in the faith of the people. Indispensable to that faith is the independence of the judiciary. An independent and impartial judiciary supplies the reason for the judicial institution, it also gives character and content to the constitutional milieu.<sup>64</sup>

Thus judicial independence encourages tranquillity and harmony in society by ensuring litigants that their claims are determined fairly by the courts. As it was commented that: ‘The value of the courts as an important impartial forum for the resolution of disputes depends upon the public perception of the independence of the courts from the parties and particularly their independence from the government.’<sup>65</sup> Thus without public confidence, the effective functioning of the judiciary is almost impossible. ‘The confidence of the people is the ultimate reliance of the Court as an institution.’<sup>66</sup> It is the most important element to retain the authority of the judiciary. In fact, the ‘independence of the judiciary lends prestige to the office of a judge and inspires confidence in the general public.’<sup>67</sup> ‘Nothing does’ says James Bryce, ‘more for the welfare of the private citizen, and nothing more conduces to the smooth working of free government than a general confidence in the pure and efficient administration of justice between the individual and the State as well as between man and man.’<sup>68</sup> In the words of a distinguished Justice of the US Supreme Court: ‘The strength of the judiciary is in the command it has over the hearts and minds of men. That respect and prestige are the product of innumerable judgments and decrees, a mosaic built from the multitude of cases decided. Respect and prestige do not grow suddenly; they are the products of time and

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<sup>64</sup> Ibid., at 705.

<sup>65</sup> Ontario Ministry of Attorney General, ‘White Paper on Courts Administration’, 1976, at p. 13.

<sup>66</sup> Felix Frankfurter, ‘The Supreme Court in the Mirror of Justice’, (1957) 105*University of Pennsylvania Law Review* 781, at p. 796.

<sup>67</sup> W.A. Robson, *Justice and Administrative Law* (London: Stevens, 1951) at p. 47.

<sup>68</sup> James Bryce, *supra* note 5, at p. 389.

experience. But they flourish when judges are independent and courageous.’<sup>69</sup> Misconduct by any judge undermines public confidence in the administration and purity of justice and also damage public respect for the rule of law and, as such, a ‘judge shall exhibit and promote high standards of judicial conduct in order to reinforce public confidence in the judiciary which is fundamental to the maintenance of judicial independence.’<sup>70</sup> If the judiciary fails to retain public confidence, its legitimacy would ultimately be threatened. In fact, the significance of public perception in the judiciary is well reflected in the oft quoted maxim that ‘Justice must not only be done, but must also be seen to be done.’ It implies that ‘A judge shall not knowingly, while a proceeding is before, or could come before, the judge, make any comment that might reasonably be expected to affect the outcome of such proceeding or impair the manifest fairness of the process. Nor shall the judge make any comment in public or otherwise that might affect the fair trial of any person or issue.’<sup>71</sup> This point has further been elaborated by the Bangalore Principles of Judicial Conduct, 2002, thus:

A judge shall not allow the judge’s family, social or other relationships improperly to influence the judge’s judicial conduct and judgment as a judge.<sup>72</sup>

A judge shall not use or lend the prestige of the judicial office to advance the private interests of the judge, a member of the judge’s family or of anyone else, nor shall a judge convey or permit others to convey the impression that anyone is in a special position improperly to influence the judge in the performance of judicial duties.<sup>73</sup>

The two basic principles of natural justice-impartially and fairness of the proceedings- apply for self-disqualification for bias. The rule does not require that bias has actually influenced the judge, but rather that it is likely that it will influence the judges. Thus public perception is

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<sup>69</sup> William O Douglas, ‘From Marshal to Mukharjee: Studies in American and Indian Constitutional Law’ (Tagore Law Lectures, 1956) at p. 345.

<sup>70</sup> Article 1.6, the Bangalore Principles of Judicial Conduct, 2002.

<sup>71</sup> Article 2.4, *ibid.*

<sup>72</sup> Article 4.8, *ibid.*

<sup>73</sup> Article 4.9, *ibid.*

one of the fundamental values of the administration of justice.<sup>74</sup> Thus public confidence in the judicial system and in the moral authority and integrity of the judiciary is of the utmost importance in a modern democratic society.<sup>75</sup> Judiciary's very existence, authority, strength and prestige, indeed, depend entirely upon the confidence reposed in it by the public.

It should be kept in mind that judicial independence is something which must never be taken for granted, and like freedom, exacts the price of eternal vigilance.<sup>76</sup> The tyranny of an autocratic regime may not be as dangerous and harmful to the public welfare as the independence of citizens in a democratic state. Public opinion is a better safeguard for the independence of judges than laws and constitutional guarantees. In the long run, the manner in which judges perform their duties can build up public opinion for the courts. The public, particularly the lawyers and all sections of civil society, will support the courts if they are seen as an effective impartial forum for dispensation of justice.<sup>77</sup> Henry Cecil says 'Justice is such a precious commodity that everything reasonable [on the part of the public] should be done to attain the highest standard' as judges do not live in 'ivory tower protected against tides in the affairs of men' (Benjamin Cardozo). He (Henry Cecil J) also added a rider that 'if the public does not want to pay for more expensive articles, it can have the cheaper.'<sup>78</sup> An impartial administration of justice 'is like oxygen in the air, they [the people] know and care nothing about it until it is withdrawn.' (Lord Atkin).

### ***E. The Constitution of Malaysia and the Independence of Superior Courts***

Malaysia, literally means land of the Malay people who constitute 50% of the total population (about 28 million), is a country in Southeast Asia with a total land area of 329,748,000 km (66<sup>th</sup> largest country) separated by the South China Sea into two regions,

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<sup>74</sup> M. Ershadul Bari, supra note 40, at p. 10.

<sup>75</sup> The Bangalore Principles of Judicial Conduct, 2002, at preambular para 6.

<sup>76</sup> M. Ershadul Bari, supra note 40, at p. 10.

<sup>77</sup> Ibid., at p. 11.

<sup>78</sup> Cecil Henry, *The English Judge* (London: Stevens and Sons, 1970) at p.113.



Peninsular Malaysia and Malaysian Borneo (also known as East Malaysia consisting of two states of Sabah and Sarawak). The 11 territories of peninsular Malaysia joined together to form the Federation of Malaya in 1948 and eventually gained independence from the British on 31 August 1957. The decolonised Singapore, Sarawak and British North Borneo (now known as Sabah) joined the Federation of Malaya on 16 September 1963 and the newly formed 14- State Federation was named as Malaysia. Malaysia has subsequently been comprised of 13 States since 1965, when Singapore left the Federation of Malaysia, and of three Federal Territories of Kuala Lumpur (capital city), Putrajaya (the new government administrative centre) and the island of Labuan (situated near Sabah). Malaysia borders Thailand, Indonesia and Brunei.<sup>79</sup>

The Constitution of the Federation of Malaya, which was drafted by the Independent Constitutional Commission chaired by Lord Reid of the United Kingdom<sup>80</sup>, came into force on the *Merdeka* Day, 31 August 1957, and subsequently after passing the Malaysia Act, 1963, to amend Article 1(1) and 1(2) of the 1957 Constitution to provide for, *inter alia*, the admission of the three new States and the renaming of the Federation as Malaysia, the Constitution was introduced as the Constitution of Malaysia on 16 September 1963, the Malaysia Day.<sup>81</sup>

The first Prime Minister of the Federation of Malaya, and Malaysian *Bapa Kemerdekaan* (Father of Independence), Tunku Abdul Rahman, in his 'Proclamation of Independence' on 31 August 1957 at *Merdeka* Stadium (Kuala Lumpur) declared that the new Federation 'shall

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<sup>79</sup> US Department of State, *Background Note: Malaysia* <http://www.state.gov/r/pa/ei/bgn/2777.htm> (accessed on 21 June 2010); Wikipedia, *Malaysia* < <http://en.wikipedia.org/wiki/Malaysia> > (accessed on 21 June 2010).

<sup>80</sup> The other members of the Independent Constitutional Commission were Sir Ivor Jennings (United Kingdom), Sir William Mckell (Australia), B. Malik (India) and Justice Abdul Hamid (Pakistan). At the last moment, the Canadian nominee withdrew.

<sup>81</sup> Tunku Sofiah Jewa, Salleh Buang and Yaacob Hussain Merican (eds), *Tun Mohammed Suffian's An Introduction to the Constitutional of Malaysia*, 3<sup>rd</sup> edn (Petaling Jaya, Selangor: Pacifica Publications, 2007) at pp. 11-14.

be forever a sovereign democratic and independent State founded upon the principles of liberty and justice.’<sup>82</sup> But the basic objectives and principles- democratic way of life and upholding the Constitution and Rule of Law- constituting the *Rukunegara* (result of lengthy deliberations in the representatives of political parties and other interests<sup>83</sup>) have not been incorporated into the Constitution of Malaysia as Directive Principles of Policy, as have been done in the 1949 Indian Constitution or as the Fundamental Principles of State Policy included in the 1972 Constitution of Bangladesh.

The Malaysian Constitution does not even contain a preamble, which contains in essence the basic philosophy of the constitution (i.e. ideals and aspirations of the people) and is the key to open the mind of the framers to find out the general purpose for which they made the several provisions of the Constitution<sup>84</sup>, as it is to be found in the Constitution of Bangladesh. The Preamble to the Constitution of Bangladesh provides, *inter alia*, that: ‘it shall be a fundamental aim of the State to realise through the democratic process a socialist society, free from exploitation- a society in which the *rule of law, fundamental human rights and freedom, equality and justice*<sup>85</sup> .... will be secured for all citizens.’<sup>86</sup>

Judiciary is, among the trinity of the government, to use the language of Montesquieu ‘next to nothing’<sup>87</sup> and its importance is ‘rather profound than prominent’<sup>88</sup> having the judicial power under the Constitution to decide controversies between citizens, or between citizens and state, and ‘declare all acts contrary to the manifest tenor of the Constitution void.’<sup>89</sup> Hence, judicial power of the Federation of Malaya was vested in a Supreme Court (consisting

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<sup>82</sup> H P Lee, ‘Constitutional Heads and Judicial Intervention’, in Wu Min Aun (ed), *Public Law in Contemporary Malaysia* (Selangor: Addison Wesley Longman Malaysia Sdn. Bhd., 1999) at p. 5.

<sup>83</sup> *Ibid.*, at pp. 5-6.

<sup>84</sup> The Supreme Court of India in *Re Berubari’s Case*, AIR 1960 SC 845.

<sup>85</sup> Italics added.

<sup>86</sup> The Constitution of Bangladesh, 1972, at preambular para 3.

<sup>87</sup> Montesquieu, *supra* note 9, at p. 186.

<sup>88</sup> Henry Sidgwick, *supra* note 51, at p. 481.

<sup>89</sup> Alexander Hamilton, *supra* note 3, at p. 465.

of a High court and a Court of Appeal) and the inferior courts<sup>90</sup> (established under the federal law) by the original Federal Constitution, 1957 in the same manner as legislative power was vested in Parliament<sup>91</sup> and executive power of the federation was vested in the Yang di – Pertuan Agong (King)<sup>92</sup> in line with the doctrine of separation of powers. When the Federation of Malaysia was formed on 16 September 1963, the Part IX of the Constitution was amended to restructure the superior courts and under the amended Article 121(1) the judicial power of the Federation was vested in the three High Courts (as a result of the breaking away of Singapore from the Federation of Malaysia on 9 August 1965, the number of High Court stands at two) of coordinate jurisdiction and status, namely the High Court in Malaya, the High Court in Borneo and the High Court in Singapore. Amended Article 121(2) provided for the establishment of the Federal Court as the apex court replacing the existing Supreme Court giving exclusive jurisdiction to determine appeals from the decisions of a High Court and such original or consultative jurisdiction. Thus the newly established Federal Court in reality took the place of the Court of Appeal of the abolished Supreme Court. But the Constitutional (Amendment) Act, 1983, which provided for the abolition of all appeals in civil matters (appeals in criminal and constitutional matters were abolished in January 1978) from Malaysian Federal Court to the Privy Council in London by repealing Article 131 of the Constitution with effect from 1 January 1985, contained provision to establish on the same day the Supreme Court of Malaysia in place of the Federal Court as the final court of appeal and the highest court of the land.<sup>93</sup> Two years later in 1987 the Supreme Court observed in *Public Prosecutor v Dato' Yap Peng*<sup>94</sup> that ‘judicial power to transfer cases from a subordinate court of competent jurisdiction as presently provided by S. 418A cannot be

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<sup>90</sup> Article 121(1), the Original Federal Constitution of Malaya.

<sup>91</sup> Article 44, *ibid.*

<sup>92</sup> Article 39, *ibid.*

<sup>93</sup> Tun Dato Seri Abdul Hamid Omar, *The Judiciary in Malaysia* (Kuala Lumpur: Asia Pacific Publications Sdn. Bhd., 1994) at pp. 18-21.

<sup>94</sup> [1987] 2 MLJ 311 SC.

conferred on any organ of government other than the judiciary.’ The Supreme Court held that 121(1) of the Constitution, which then provided, as mentioned earlier that the judicial power of the Federation was vested in the two High Courts and such inferior courts as might be provided by federal law. It seems that the decision incurred the displeasure of the Government; an amendment to Article 121 of the Constitution was passed in 1988 to remove the reference to vesting of the judicial power of the Federation in two High Courts of coordinate jurisdiction and status; the amended Article merely provided: ‘There shall be two High Courts of coordinate jurisdiction and status ....’

The abolishing of any reference to the vesting of the judicial power of the Federation of Malaysia in the Constitution in 1988 reminds us that the framers of the Constitution of Bangladesh in 1972 had not even vested the judicial power in the Supreme Court and subordinate courts in any of the Articles, from 94 to 117, of Part VI titled the Judiciary although they conferred the executive power of the Republic on the Prime Minister<sup>95</sup> (not the Head of the State- President) and entrusted the legislative powers of the Republic in the Parliament- the House of the Nation.<sup>96</sup> Since judicial power has not been vested in any other authority, the judiciary of Bangladesh exercises its exclusive and inherent jurisdiction of judicial power including reviewing executive acts and Acts of Parliament. For example, in *Anwar Hossain Chowdhury and others v Bangladesh*<sup>97</sup>, the Appellate Division of the Bangladesh Supreme Court declared the establishment of six permanent Branches of the High Court Division by amending Article 100 of the Constitution under the Constitution (Eight Amendment) Act, 1988, ultravires and invalid.

It seems inconsistent that although the reference to vesting of judicial power of the Federation in the two High Courts and the inferior courts was abolished in 1988 by an amendment to the

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<sup>95</sup> Article 55(2), the Constitution of Bangladesh, 1972.

<sup>96</sup> Article 65(1), *ibid*.

<sup>97</sup> 41 DLR (AD) (1989) 165.

Constitution, amended Article 121 of Part IX still contains the heading 'Judicial Power of the Federation' and there is no explicit reference of investing the judicial power in the two High Courts and inferior courts mentioned in that Article. It appears that amended Article 121 makes the jurisdiction and powers of the High Court dependent upon in fine on federal law that may be passed by Parliament from time to time. In other words, under the new arrangement the High Court has been deprived of the constitutionally entrenched original jurisdiction and its original source of power- the constitution- has been replaced with the Federal Legislature in contrary to the commencing constitutional scheme and the doctrine of separation of powers. Thus the equal status of judiciary with the legislative and executive has been eroded by the amended Article. Still it can safely be said that the doctrine of separation is a basic pillar of the Constitution of Malaysia although the reference to vesting of judicial power of the Federation in the two High Courts was abolished in 1988 by an amendment to the Constitution. The judicial power including the protection of the fundamental liberties and interpretation of, as well as maintaining the supremacy of the Constitution of Malaysia are being exercised by the superior courts of the country.<sup>98</sup>

However, in 1994 the Constitution of the Federation of Malaysia was amended to set up from 24 June 1994 the Court of Appeal as an intermediary court (between the Federal Court and the High Courts) and to rename the Supreme Court as the Federal Court- the final court of appeal for Malaysia. Thus the present structure of the superior courts of Malaysia under the Federal Constitution is as follows:

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<sup>98</sup> For example, in connection with the liberty of the person, Article 5(2) of the Malaysian Constitution provides that 'where complain is made to a High Court or any judge thereof that a person is being unlawfully detained, the court shall inquire into the complaint and, unless satisfied that the detention is lawful, shall order him to be produced before the court and release him.' On the other hand, as regards the interpretation of the Constitution, Article 128(1) provides that 'The Federal Court shall, to the exclusion of any other court have jurisdiction to determine- a) any question whether a law made by Parliament or by the Legislature of a State is invalid on the ground that it makes provision with respect to a matter with respect to which Parliament or, as the case, the Legislature of the State has no power to make laws.' See *Sugumar Balakrishnan v Pengarah Imigresen Negeri Sabah & Anor*, [1998] 3 MLJ 289(CA).

1. the Federal Court (the highest court of the land)
2. the Court of Appeal (as an intermediary court between the Federal Court and the High Courts), and
3. the High Court of Malaya and the High Court of Sabah and Sarawak.

Prior to the name change in 1994, the head of the Supreme Court was titled 'Lord President' and the title of 'Chief Justice' was held by the head of the High Court in Malaya and the High Court in Borneo respectively. But after the amendment of 1994, when the Supreme Court was renamed the Federal Court, the office of Lord President of the Supreme Court was replaced by that of 'Chief Justice of Malaysia', while the Chief Justices of Malaya and Borneo were retitled 'Chief Judge of Malaya' and 'Chief Judge of Sabah and Sarawak.' These name changes appear to be a deliberate attempt to downgrade the position, prestige and image of the Malaysian Judiciary.

However, it is true that unlike the Constitution of Bangladesh (the Constitution of the USA and the Constitution of India), the Constitution of Malaysia, as mentioned earlier, does not contain a preamble to incorporate into it the aspirations of justice and liberty, neither does it contain a Part titled the Fundamental Principles of State Policy like the Constitution of Bangladesh, Directive Principles of State Policy like the Constitution of India incorporating into it an Article (as it has been done in Article 22 of the 1972 Constitution of Bangladesh and Article 50 in the Indian Constitution) providing that the 'State shall ensure the separation of the judiciary from the executive organs of the State' to demonstrate clearly the intent of the constitution makers to safeguard the judiciary from any form of executive control or interference. Furthermore, unlike the Constitution of Bangladesh, which in Article 94(4) categorically provides for the independence of the Chief Justice and other Judges of the Supreme Court, consisting of the High Court Division and the Appellate Division, in the exercise of their judicial functions and in Article 116A speaks of the independence of the

Subordinate Judicial Officers and Magistrates exercising functions in discharging their judicial duties, there are no Articles in the Constitution of Malaysia dealing with expressly the principle of the independence of the judiciary to show that it is very much a basic pillar or basic structure in the scheme of the Constitution. Even the oath to be taken by the judges of superior courts, as mentioned in Sixth Schedule, does not contain a promise ‘to do right to all manner of people according to law, without fear or favour, affection or ill-will’- the core principle of the independence of the judiciary- as is to be found in Third Schedule of the Constitution of Bangladesh.

However, a judge of the superior court is required to take an oath or make an affirmation that he will ‘faithfully discharge’ his ‘judicial duties in that office’ to the best of ... [his] ability, that he ‘will bear true faith and allegiance to Malaysia, in connection with the liberty of the person, and will preserve, protect and defend its constitution.’<sup>99</sup> Since the oath speaks of discharging judicial duties ‘faithfully’, it may be strongly argued that this has the reference to performing judicial functions with loyalty, trustworthiness and unwaveringly, to use the words of Sir Gerard Brennan, who in 1995 in his swearing-in speech as Chief Justice of the High Court of Australia commented on the judicial oath, ‘it commands independence from any influence that might improperly tilt the scale of justice. When the case is heard, the judge must decide in the lonely room of his or her own conscience but in accordance with law.’<sup>100</sup> In the words of Raja Azlan Shah, who had a distinguished career in Government service before becoming a judge and rising to be Lord President of the Federal Court and sometime after his retirement first became the Sultan of Perak and then the Yang di-Pertuan Agong of Malaysia, judges ‘are lions under the throne’ but that seat is occupied in their eyes not by Kings, Presidents or Prime Minister but by the law and their conception of the public interest.

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<sup>99</sup> ‘Sixth Schedule. Forms of Oaths and Affirmation’, The Federal Constitution of Malaysia.

<sup>100</sup> (1995) 183 CLR IX at X; cited in HP Lee, ‘The Malaysian Constitution after 50 years- Retrospective, Prospective and Comparative Perspectives’, (2007) 9 *Australian Journal of Asian Law* 307 at p. 311.

It is to that law and to that conception that they owe their allegiance. In that lies their strength.’<sup>101</sup> Furthermore, oath of judges also states that he will ‘bear true faith and allegiance to Malaysia’ which implies that their allegiance are not to the Head of the State, Head of the Government, ministers or the Parliament and, as such, unlike the civil servants, do not take any orders particularly from the executive. As Article 132(3)(c) of the Constitution of the Federation of Malaysia states that: ‘3. The public service shall not be taken to comprise- .... c) the office of judges of the Federal Court, the Court of Appeal or a High Court;’

However, although the Constitution of the Federation of Malaysia does not contain the expression ‘independence of the judiciary’ or words performing the judicial functions independently, as mentioned earlier, there are several provisions in the Constitution designed to secure the independence of the judges of superior courts- the Federal Court, the Court of Appeal and the High Court- under the Federal Constitution of Malaysia so that they can discharge their duties without fear or favour.

Since **the substantive independence of the judges of the Malaysian Superior Courts, with which the present comparative study is concerned**, is inextricably linked with the method of appointment, the constitutional provisions relating to it will be discussed in the second. In this chapter, only those provisions of the Constitutions of Malaysia and Bangladesh would be discussed which are aimed at to further enhance the independence of judges of superior courts of Malaysia and Bangladesh.

In the **first place**, a very significant provision concerning the discussion of the conduct of judges in the Parliament has been contained in Article 127 of the Constitution which provides that:

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<sup>101</sup> These comments were made in a public lecture in 1986 at the University Sains Malaysia in Penang which have been quoted in HRH Sultan Azlan Shah, *Constitutional Monarchy, Rule of Law and Good Governance* (Kuala Lumpur: Professional Law Books & Sweet Maxwell Asia, 2004) at p. 59.



The conduct of a judge of the Federal Court, Court of Appeal or High Court shall not be discussed in either House of Parliament except on a substantive motion of which notice has been given by not less than one quarter of the total number of members of that House, and shall not be discussed in the Legislative Assembly of any State.

It seems that the provision of serving notice of a substantive motion to discuss the conduct of judges of superior courts only in the Federal Parliament, not in any State Legislative Assembly, by at least one quarter of the number of members of the House concerned is aimed at to prevent raising sudden and indiscriminate questions about them in Parliament which may cause embarrassment to the judges concerned or affect the public confidence in the judiciary.

**Secondly**, in order to ensure the dignity and honour of the Judges of the Federal Court, the Court of Appeal and the High Court, the Federal Constitution has given them the ‘power to punish any contempt of itself.’<sup>102</sup> In this context, in *Attorney- General and Others v Arthur Lee Meng Kuang*<sup>103</sup>, the then Supreme Court in 1987 aptly observed:

In this country the need to protect the dignity and integrity of the Supreme Court and the High Court is recognised by Article 126 of the Federal Constitution and also by Section 13 of the Courts of Judicature Act, 1964. A proper balance must therefore be struck between the right of speech and expression as provided for in Article 10 of the Federal Constitution and the need to protect the dignity and integrity of the superior courts in the interest of maintaining public confidence in the Judiciary.

**Third and finally**, since the power to reduce salaries and privileges of judges is by its nature a threat to attack on the judicial independence, like many states of the world<sup>104</sup> Malaysia

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<sup>102</sup> Article 126, the Federal Constitution of Malaysia.

<sup>103</sup> [1987] 1 MLJ 206.

<sup>104</sup> For example, Article III S. 1, the Constitution of the USA, 1787, Article 147(2) & (4e), the Constitution of Bangladesh, 1972, Article 125, the Indian Constitution, 1949.

stipulates prohibition on reduction of judicial salaries entrenched first in its Constitution and then in Judges (Remuneration) Act, 1971. The Constitution of Malaysia provides that ‘The remuneration and other terms of office (including pension rights) of a judge of the Federal Court shall not be altered to his disadvantage after his appointment.’<sup>105</sup> It should be stressed here that the remuneration of judges as provided by the Judges (Remuneration) Act, 1971, enacted in pursuance of this Constitutional provision, is charged on the Fund, and, as such, is not subject to annual Parliamentary debate as it does not require annual Parliamentary approval for the allocation of fund. However, it should be mentioned here that the traditional or statutory guarantee regarding the remuneration of judges is no longer effective if there is no timely or automatic adjustment of judicial salaries in the face of rapid inflation.<sup>106</sup>

#### ***F. The Constitution of Bangladesh and the Independence of Superior Judiciary***

Bangladesh, which is a low-lying riparian country located in South Asia having a total land area of 147, 570 square kilometres and a population of 150 million (July 2007 CIA estimation), emerged as an independent State on 16 December 1971 following a nine-month bloody liberation war which began after Pakistan Army’s crackdown on the inhabitants of erstwhile East Pakistan on the night of 25 March 1971.<sup>107</sup> It is the world’s third largest Muslim majority and seventh most populous country having 88.3% Muslim population and

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<sup>105</sup> Article 125(7), the Federal Constitution of Malaysia.

<sup>106</sup> Supra note 61.

<sup>107</sup> During twenty-five year union with former Pakistan, which became an independent Dominion after partitioning of the British India on 14 August 1947, Bangladesh (first as East Bengal from 1947 to 1956, and then as East Pakistan from 1956 to 1971) witnessed the move to declare Urdu as the sole State language of Pakistan bypassing Bengali (since 1988 called Bangla) the language of the majority population, dismissal of the 1954 democratically elected provisional government, greater discrimination in the recruitment and promotions in the civil services and armed forces, massive economic disparity between East and West Pakistan and increased suppression on the political parties.

98% Bangali (i.e. who speak Bangla) population. Bangladesh borders with India on three sides- north, east and west- and with Burma and the Bay of Bengal on the south side.<sup>108</sup>

It should be mentioned here that the independence of Bangladesh was declared officially on 10 April 1971 by issuing the 'Proclamation of Independence' which had been deemed to have come into effect from 26 March 1971. Although the instrument 'Proclamation of Independence' confirmed the declaration of independence already made on 26 March 1971, it contained 'provisional arrangements' for the governance of the People's Republic of Bangladesh. It provided that 'till such time as a Constitution is framed,' the President would 'exercise all the Executive and Legislative powers of the Republic including the power to grant pardon.' This vesting of legislative power in the hands of the President instead of the Constituent Assembly (consisting of people's representatives elected from 7 December 1970 to 17 January 1971) empowered 'to frame' the Constitution of the country, was indeed contrary to the doctrine of separation of powers. Furthermore, the previous example set by the British in the Subcontinent under the Indian Independence Act, 1947 to allow the Constituent Assemblies of Pakistan and India to act as the central legislatures for both the Dominions until new constitutions were framed, was not adhered to. However, the Proclamation of Independence, which is considered as the first interim Constitution of Bangladesh, was not only silent as to the exercise of judicial powers but also did not provide for the creation of a superior court for Bangladesh. About a month after the independence of Bangladesh, on 11 January 1972, the Provisional Constitution of Bangladesh Order, 1972 was issued in pursuance of the Proclamation of Independence which provided for the establishment of a High Court, not Supreme Court, as the highest court of Bangladesh. The Provisional Constitution merely provided that the High Court would consist of 'a Chief

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<sup>108</sup> US Department of State, *Background Note: Bangladesh* <http://www.state.gov/r/pa/ei/bgn/3452.htm> (accessed on 3 March 2010). Jalal Alamgir, 'Bangladesh's Fresh Start', (2009) *20 Journal of Democracy* 41 at p. 41.

Justice and so many other Judges as may be appointed from time to time.’<sup>109</sup> It was silent as to the authority who would appoint the Judges of the High Court and on what terms and conditions they should hold the office. This lacuna was removed by the High Court of Bangladesh Order (President’s Order No. 5 of 1972) issued on 17 January 1972, only six days after the issuance of the Provisional Constitution of Bangladesh Order. It provided that the President would appoint the Chief Justice and other Judges of the High Court from time to time ‘who shall hold office on such terms and conditions as the President may determine.’<sup>110</sup> Thus the President was not only given the power to appoint Chief Justice and other Judges of the High Court, he was also given the authority to determine terms and conditions of their service in accordance with the advice of the Prime Minister. This left the door too wide open in appointing the judges of the High Court for measuring their fitness in terms of political eminence and closeness to the ruling party rather than judicial qualities and if such persons were appointed as judges, they could hardly be expected to administer justice without fear or favour especially when the executive itself was a litigant. As a result of the aforesaid provision, the Chief Justice of the erstwhile ‘Dacca’ High Court<sup>111</sup> and another four senior judges<sup>112</sup> were not reappointed in the newly established High Court of Bangladesh without assigning any reason whatsoever which is contrary to the international norms developed in this regard thus: ‘... Where a court is abolished or restructured, all existing members of the court must be reappointed to its replacement or appointment to another judicial office of equivalent status and tenure ....’<sup>113</sup> It seems that the President did not consider these five judges as persons who shared their philosophy or ideology and, as such, dropped them unceremoniously ignoring their competence, integrity, seniority and

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<sup>109</sup> Article 9, the Provisional Constitution of Bangladesh Order, 1972.

<sup>110</sup> Article 3, the High Court of Bangladesh Order, 1972.

<sup>111</sup> Justice B. A. Siddiqui was the Chief Justice of erstwhile Dhaka High Court.

<sup>112</sup> The other four judges who were dropped are Maksumul Hakim, Abdul Hakim, Nurul Islam and T. H. Khan.

<sup>113</sup> Article 29, Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region, 1995.

experience. However, the High Court of Bangladesh was given ‘all such original, appellate, special, revisional, review, procedural and all other power as were exercisable in respect of the ... territories [of Bangladesh] by the High Court at ‘Dacca’ under any law in force before the 26<sup>th</sup> day of March, 1971.’ About seven months after the issuance of the High Court of the Bangladesh Order, necessity was felt to provide for an Appellate Division of the High Court to deal with all ‘appeals and petitions, which immediately before the commencement of the Provisional Constitution of Bangladesh Order, 1972, were pending before the erstwhile Supreme Court of Pakistan arising out of matters within the territories of Bangladesh.’<sup>114</sup> Accordingly the High Court of Bangladesh (Amendment) Order (President Order No. 91 of 1972) was issued on 2 August 1972, which provided that ‘There shall be an Appellate Division of High Court of Bangladesh which shall consist of the Chief Justice and two other Judges to be appointed by the President after consultation with the Chief Justice.’<sup>115</sup> Thus the President’s, who could not reasonably be expected to know the members of the bar properly as to assess their qualities, power of appointment was safeguarded by the mandatory consultation with Chief Justice who were in the best possible position to assess the probable fitness of the men likely to prove successful on the bench. However, the High Court of Bangladesh with its Appellate Division remained in force until the Supreme Court was established under the Constitution of Bangladesh which was adopted, enacted and given to the citizens of Bangladesh by the Constituent Assembly on 4 November 1972, only 325 days after the liberation, and was given effect from 16 December 1972 to commemorate the First Anniversary of the Victory Day of Bangladesh (marking the defeat of the Pakistan Army in the Bangladesh Liberation War).

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<sup>114</sup> Article 4, the High Court of Bangladesh (Amendment) Order, 1972.

<sup>115</sup> *Ibid.*

The framers of the Constitution of Bangladesh, as mentioned earlier, vest the 'executive power of the Republic' in the Prime Minister<sup>116</sup> (not in the Head of the State), and conferred the 'legislative powers of the Republic' on the Parliament<sup>117</sup> but they did not invest the judiciary with the judicial power of the Republic for reasons best known to them. Thus they embrace the spirit of separation of powers only in case of the executive and legislative, but they preferred to maintain silence as to the vesting of the judicial powers on the judiciary which is placed in Part VI of the Constitution. This is a clear-cut departure from the general practices of the written constitutions to vest the judicial power in the judicial arm of the government. But unlike the Constitution of Malaysia as amended in 1988, which took away judicial power from the High Courts and made them dependant on federal law for their powers and jurisdiction, the superior court of Bangladesh- the Supreme Court comprising of the Appellate Division and the High Court Division<sup>118</sup>- exercises judicial power of the Republic deriving from the Constitution itself. In the *Mujibur Rahman v Bangladesh*<sup>119</sup>, the Appellate Division of the Supreme Court of Bangladesh observed that although the Constitution is silent about the vesting of the judicial power in the Supreme Court, there cannot be any doubt that the judicial power of the Republic is vested in the courts with the Supreme Court at the apex.<sup>120</sup> It should be mentioned here that, after the proclamation of Martial Law on 15 August 1975 which was withdrawn on 6 April 1979, the Martial Law Administration in May 1976 established two independent superior courts- the Supreme Court and the High Court- in place of one superior court under the Second Proclamation (Seventh Amendment) Order No. IV of 1976. Next year, on 27 November 1977, the Supreme Court of Bangladesh was restored as it was originally in the Constitution by issuing the Second Proclamation (Tenth Amendment) Order (No. 1 of 1977).

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<sup>116</sup> Article 55(2), the Constitution of Bangladesh, 1972.

<sup>117</sup> Article 65(1), *ibid.*

<sup>118</sup> Article 94(1), *ibid.*

<sup>119</sup> 44 DLR (AD) (1992) 111.

<sup>120</sup> *Ibid.*

The Independence of the Judiciary, which is the central principle underlying the administration of justice, succeeded to acquire the place of a cornerstone in the scheme of the 1972 Constitution of Bangladesh; it is indeed a fundamental feature of the Constitution and one of the central values on which the Constitution is based. Although the Constitution does not explicitly speak of vesting the judicial power in the Judiciary of Bangladesh, it provides, *inter alia*, that ‘the State shall ensure the separation of the judiciary from the executive organ of the State’<sup>121</sup>, perhaps taking into account the famous words of French Jurist Montesquieu, as mentioned earlier,: ‘There is no liberty if the judicial power be not separated from the legislative and the executive.’ This constitutional provision emphasises the importance of protecting the judiciary from executive interference as an independent judiciary is a backbone of rule of law and rule of law is a fundamental requirement for the existence of a true democracy. Thus the well-chosen words of democracy, rule of law, fundamental rights and freedom, equality and justice have been articulated in the Preamble to the Constitution, pointed out earlier, as the fundamental aim of the State. However, the Constitution explicitly embraces the principle of judicial independence, by providing that ‘Subject to the provisions of this Constitution, the Chief Justice and the other Judges shall be independent in the exercise of their judicial functions.’<sup>122</sup> It is interesting to note that the Constitution (Fourth Amendment) Act, passed on 25 January 1975, added Article 116A to the Constitution of Bangladesh, 1972 using similar expression of the independence of judicial officers of the subordinate courts in the exercise of their functions thus: ‘Subject to the provisions of the Constitution, all persons employed in the judicial service and all magistrates shall be independent in the exercise of their judicial functions.’ Furthermore, Article 35(3) of the Constitution of Bangladesh provides that ‘Every person accused of a criminal offence shall have a right to a speedy and public trial by an independent and impartial court or tribunal

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<sup>121</sup> Article 22, the Constitution of Bangladesh.

<sup>122</sup> Article 94(4), the Constitution of Bangladesh, 1972.

established by law.’ In other words, the Article guarantees a fundamental right to every accused person in Bangladesh (whether citizen or not) to have a ‘speedy and public trial’ (as ‘publicity’ is the authentic hallmark of judicial .... procedure) by not only an ‘independent judiciary’ but also by an ‘impartial judiciary’ meaning members of the judiciary having neutrality of ‘mind or attitude in relation to the issues and the parties in a particular case. Under the Constitution, the Chief Justice of Bangladesh, the Judges of the Appellate Division and the High Court Division of the Supreme Court are not only required to solemnly swear (or affirm) to preserve, protect and defend the Constitution and the laws of Bangladesh’ but also to swear to ‘faithfully discharge the duties of ... [their] office according to law’ and to ‘do right to all manner of people according to law, without fear or favour, affection or ill-will.’<sup>123</sup> This pattern of oath for the Chief Justice or Judges of the Supreme Court emphasises that they are expected to hold the scales of justice even between the humblest citizen and an all powerful executive, without fear or favour- regardless of the consequences to themselves. In order to maintain the independence of the judges of the Supreme Court of Bangladesh, like the framers of the Constitution of Malaysia, as mentioned earlier, the framers of the Constitution of Bangladesh also provide that the remuneration, privileges and other terms and conditions of service of a judge of the Supreme Court ‘shall not be varied to ... [his] disadvantage ... during his term of office.’<sup>124</sup> The present laws which govern these matters are 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 to the advantages, not disadvantage, of the Judges of the Supreme Court. Taking into account the above constitutional guarantee of the remuneration and privileges of judges, the Appellate Division of the Supreme Court of Bangladesh observed in *Commissioner of Taxes v Justice S.*

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<sup>123</sup> Third Schedule, Oaths and Affirmations, Chief Justice or Judges, the Constitution of Bangladesh of 1972.

<sup>124</sup> Article 147(2) and (4)(e), the Constitution of Bangladesh, 1972.



*Ahmed*<sup>125</sup> that salary of the Supreme Court judge is exempted from income tax and this position cannot be affected by notification issued under the Income Tax Act.<sup>126</sup> Like the Constitution of Malaysia, which empowers the superior courts to ‘punish any contempt’ for maintaining their dignity and authority, the Constitution of Bangladesh also gives the High Court Division and the Appellate Division of the Supreme Court ‘.... the power subject to law to make an order for the investigation of or punishment for any contempt of itself’<sup>127</sup> i.e. for scandalising the court to bring its authority into disrespect or disregard, disobeying its orders and interfering with the due course of justice. In *Moazzem Hossain v State*<sup>128</sup>, the Appellate Division of the Supreme Court of Bangladesh rightly observed that the power to punish for the contempt has been given not for the protection of the individual judges from imputations, but for the protection of the public themselves from the mischief they will incur if the authority of the Supreme Court is impaired.<sup>129</sup> Thus it is evident that the independence of the judiciary has been incorporated into the Constitution of Bangladesh as an integral and inseparable pillar of the Constitution. With regard to ascertaining the basic pillars of the Constitution, the observations made by Justice Shahabuddin Ahmad of the Appellate Division of the Supreme Court of Bangladesh (as he then was) in *Anwar Hossain Chowdhury and Others v Bangladesh*<sup>130</sup> are worthy of note:

There is no dispute that the Constitution stands on certain fundamental principles which are its structural pillars and if these pillars are demolished or damaged the whole Constitutional

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<sup>125</sup> 42 DLR (AD) (1990) 162 <[http://clcbd.org/index.php?option=com\\_content&task=view&id=2175&Itemid=82](http://clcbd.org/index.php?option=com_content&task=view&id=2175&Itemid=82)> (accessed on 20 July 2010).

<sup>126</sup> *Ibid.*

<sup>127</sup> Article 108, the Constitution of Bangladesh, 1972.

<sup>128</sup> 35 DLR (AD) (1983) 290.

<sup>129</sup> *Ibid.*

<sup>130</sup> 41 DLR (AD) (1989) 165.

edifice will fall down. It is by construing the Constitutional provisions that these pillars are to be identified.<sup>131</sup>

He, after referring to the provisions of certain Articles of the Constitution including 94(4) which speaks of the independence of the judges of the Supreme Court in the exercise of their judicial functions, also observed ‘Independence of the Judiciary [is] a basic structure of the Constitution ....’<sup>132</sup> Later on in 2000, the then Chief Justice of Bangladesh, Justice Mustafa Kamal, referring to the provisions of Article 94(4) and 116A, held in *Secretary, Ministry of Finance v Md. Masder Hossain and Others*<sup>133</sup> that:

The independence of the judiciary, as affirmed and declared by Articles 94(4) and 116A, is one of the basic pillars of the Constitution and cannot be demolished, whittled down, curtailed or diminished in any manner whatsoever, except under the existing provisions of the Constitution. It is true that this independence .... is subject to the provisions of the Constitution, but we find no provision in the Constitution which curtails, diminishes or otherwise abridges this independence.<sup>134</sup>

However, unlike the Constitution of Malaysia, which contains procedural safeguards in Article 127 as to the unexpected discussion of the conduct of judges in the Federal Parliament, the Constitution of Bangladesh does not contain any provision whatsoever aiming at to prevent raising abrupt and indiscriminate questions about the conduct of a judge of the Supreme Court in the Parliament which may cause distress and discomfit to the judge concerned. But the rules of procedure of the Parliament contain provision in this regard: no question, motion or resolution which contains reflection on the conduct of any judge of the

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<sup>131</sup> Ibid., at 262.

<sup>132</sup> Ibid., at 259.

<sup>133</sup> 52 DLR (AD) (2000) 82.

<sup>134</sup> Ibid., at 103.

Supreme Court shall be admissible.<sup>135</sup> But the enforcement of the provision of the Rules of Procedure in this regard depends generally on the neutrality, boldness and uprightness of the Speaker of the Parliament.<sup>136</sup>

Since the present study is concerned with the substantive independence of the judges of superior courts of Malaysia and Bangladesh, the provisions of the Constitutions of Malaysia

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<sup>135</sup> Rules 53, 63 and 133, Rules of Procedure of the Parliament, 1973. Rule 53 (2) provides that 'In order to be admissible a question must ...', inter alia, '(xviii) .... not ask for information on a matter which is under adjudication by a Court of Law having jurisdiction in any part of Bangladesh;' '(xx) .... (a) contain any reflection on the conduct .... of the Judges of the Supreme Court.' Rule 63, which deals with restrictions on the right to make adjournment motions, provides: 'The right to make an adjournment motion under rule 61 shall be subject to the following restrictions, namely: .... xi) the motion shall not deal with any matter which is under adjudication by a Court of Law having jurisdiction in any part of Bangladesh; and xii) the motion shall not contain a reflection on the conduct .... of a Judge of the Supreme Court of Bangladesh. Rule 133 provides that 'No resolution shall be admissible which ....' inter alia, 'iv)' do 'not relate to any matter which is under adjudication by a court of law having jurisdiction in any part of Bangladesh'; v) do 'not contain a reflection on .... a Judge of the Supreme Court.'

<sup>136</sup> In the past, following the pronouncement of the judgment of the *Anwar Hossain Case* in 1989 by the Appellate Division of the Supreme Court of Bangladesh, the then Leader of the Opposition strongly protested and questioned the rational and justification of the decisions given by the Supreme Court. Following a remark of the then Chief Justice of Bangladesh made in 1999, the then Home Minister made some unkind remarks about the judiciary in the Parliament and contradicted the Chief Justice by saying that the judges of the Supreme Court were also responsible for increased violence and terrorism in the country for releasing the notorious criminals on bail. But in neither occasions, the Speaker did stop them from making indecent remarks or attacks on the Chief Justice of Bangladesh and other Judges of the Supreme Court nor their remarks were expunged from the proceedings of the Parliament. The then Prime Minister on 2 August 2000 in an interview with the BBC attacked the judiciary in line with its Home Minister. Furthermore, in a meeting held in Dhaka on 18 April 2000 the speakers, including half a dozen of ministers and state ministers of the Party in power, made outrageous and audacious remarks about certain judges of the Supreme Court, for, they felt embarrassed in hearing the Murder Case (death reference) of Sheik Mujibur Rahman. They went so far as to bring out a procession after the meeting brandishing lethal sticks and warned by saying that they had simply exhibited sticks this time, but these would be applied in future (meaning the Judges of the Supreme Court concerned). (MM Rezaul Karim, 'Resorting to Rule of Law: By Stick and Terror!', *The Daily Star*, 4 May 2000; Staff Correspondent, 'What I [Prime Minister] said is the truth and I'll continue to say it', *The Daily Star*, 5 August 2000 and Staff Correspondent, 'AL blows hot against higher judiciary', *The Daily Star*, 18 April 2000.)

Ultimately three petitions were filed seeking the drawing up of contempt of court proceedings against the Prime Minister. The common allegations in these applications were that on 26 July, 2000, Sheikh Hasina, in an interview with BBC, made objectionable and contemptuous statements that both the lower courts and the High Court Division are the sanctuary of corrupt and accused persons; that whenever they approach the Court, they are released on bail after which they again commit murders; that both, the lawyers seeking bail and the courts granting bail, should be held accountable.

Mr. Mozammel Hoque J. of the High Court Division on 24 October 2000, disposed of all three applications (the case is reported as *Mainul Hossain & others v Sheikh Hasina*, 53 DLR (2001) 138) with a note that, ...*the Hon'ble Prime Minister shall be more careful and respectful in making any statement or comment with regard to the Judiciary or the judges or the Courts of Bangladesh in future.* 53 DLR ((2001) 138, at p. 142, para. 10.) In doing so, he noted that the Court was taking into consideration the greater interest of the country, protection of the prestige and dignity of the highest executive post and avoidance of any possible political unrest over a sensitive issue. He further noted the need to prevent confrontation between the executive and the judiciary and to maintain and preserve harmonious coordination and cooperation between these two important organs of the State.

and Bangladesh concerning the appointment of judges (on which the substantive independence of the judges depends) of the superior courts shall be examined in the second and third chapters of this Dissertation.