

Chapter V: Conclusion

In this Chapter, an endeavour will be made to summarise the discussions carried out in the preceding four chapters and recommendations shall be put forward, inter alia to introduce changes in the Constitutional process of appointment of judges of the higher judiciary in Malaysia and Bangladesh so that the executive's present power in the matter of appointment of judges as its 'royal privilege' is curtailed. For, to deprive the executive from exercising its power in the crucial matter of appointment of judges to fashion a judiciary of its choice (i.e. who will share its policy or show affiliation to its political philosophy or exhibit affinity to its ideology) and then to secure the appointment as judges those candidates who possess unimpeachable integrity, spotless character, judicial temperament, firmness, keen intellect, and ability to analyse facts. In a democratic society proclaiming the rule of law, there

cannot be anything of greater consequence than to keep the streams of justice clear and, pure.... [and] We expect our Judges to be almost superhuman in wisdom, in propriety, in decorum and in humanity. There must be no other group in society which must fulfil this standard of public expectation.⁵⁸²

In the words of William Shakespeare 'Good name in man or woman... is the immediate jewel of their souls and Judges share with you and me a taste for such treasures.'⁵⁸³

A. Role of the Judiciary

The judiciary has developed as a just and fair dispute-resolution mechanism to do justice between man and man, between the individuals and the state and ultimately stands between the people and the government as a bulwark against executive's exercise and misuse of power. To interpret law and constitution is the singular and unique province of the judiciary.

⁵⁸² Quoted in Gerald Gall, *The Canadian Legal System* (Toronto: Carswell Legal Publications, 1995).

⁵⁸³ Quoted in Maurice Rosenberg, 'The Qualities of Justice- Are they Strainable?', (1966) 44 *Texas Law Review* 1063, at p. 1068.

The Constitution, which embodies in it the power of the people, has entrusted the judiciary with the vigilant task of keeping executive and legislative within its imperative limits and dictates through the process of judicial review under which it nullifies the unconstitutional acts of these two organs of the government. By checking the executive and the legislative from assuming excessive authority beyond the ken of the Constitution, the judiciary, in fulfilment of the pious trust reposed on it by the people, acts as the watchdog not only of the Constitution but also of democracy and shapes the life of the community. Thus it is indeed the lifeblood of constitutionalism, democracy and welfare of societies.

B. Doctrine of the Separation of Powers and the Independence of the Judiciary

The role of the judiciary as a resolver of disputes, interpreter of laws, watchdog of democracy, guardian of the constitution, and lifeblood of constitutionalism necessitates that it should completely be separated from the other two organs of the government- the executive and the legislative. It is rightly said that the concept of the independence of the judiciary is essentially a result 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 these three acting parts should have certain independence in relation to each other.⁵⁸⁴ In countries where parliamentary system of government is in existence, the doctrine of the separation of powers has only been implemented or applied to secure the independence of the judiciary from the control of the executive and the legislative.⁵⁸⁵ The separation of the judiciary from the other two organs of the government is the lifeline of an independent judiciary that constitutes ‘the foundation on which rests the edifice... of democratic polity’, a setup without which there can be no liberty.

⁵⁸⁴ Supra note 11.

⁵⁸⁵ Because the separation of powers between the executive and the legislative in the parliamentary democracy does not in practice exist; the ministers are not only members of the parliament but they are also accountable to it.

C. Traditional Meaning of Judicial Independence

The most fundamental and long-established meaning of the independence of the judiciary is that the judges are free to perform their judicial functions without the interference of the executive and the legislative and from apprehensions for suffering personally because of the discharge of their judicial duties. In fact, this traditional meaning of the independence of the judiciary speaks of the personal independence of judges.

D. Modern Four Meanings of Judicial Independence

Apart from the traditional concept of personal independence, the concept of substantive independence of the judges, which means that the judges perform their judicial functions without submitting to no other authority but only to the dictates of law and the commands of their conscience, is also universally recognised by law (for example Article 76(3) of the Constitution of Japan, 1946) and legal scholars. The international norms developed specially in the 1980s and 1990s at the initiative of some international non-governmental organisations (like the International Bar Association's Minimum Standards of Judicial Independence, 1982, Law Association of Asia and Western Pacific's Beijing Statement of the Principles of the Independence of Judiciary, 1995) and international conferences (like the First World Conference on the Independence of Justice held in Montreal, in which the instrument titled the Universal Declaration on the Independence of Justice, 1983 was adopted) have thickened and broadened the concept of judicial independence by including into it two other concepts of collective independence and internal independence. Collective independence, which means the institutional, administrative and financial independence of the judiciary as a whole vis-a-vis the executive and the legislative branches of the government, and internal independence, meaning the independence of a judge from any kind of pressure or interference from his judicial superiors and colleagues in coming to decisions in individual cases, are considered as

two far-reaching new components added to the concept of the independence of judiciary. For, independence of individual judges, comprised of personal independence and substantive independence, is virtually ineffective and meaningless without the internal and institutional independence of the judiciary including the powers and facilities that are required to perform judicial functions according to law, without fear or favour, affection or ill-will. Thus the concept of 'independence of judiciary' has currently four meanings or facets:

- I. personal independence;
- II. substantive independence;
- III. collective independence; and
- IV. internal independence.

E. Importance of Judicial Independence in a Democratic State

An independent and courageous judiciary, which is crucial in determining a nation's rank in political civilisation, provides the reason for its existence and continuance. It is *sine qua non* in a democratic society for securing pure and fair justice as strictly defined by law so that the 'lamp of justice' does not go 'out in darkness' and public confidence in the administration of justice also remains unshaken and unaffected. Therefore, in a democratic state, the necessity of an independent judiciary is keenly felt to i) uphold the rule of law, ii) to ensure fair justice, iii) to defend constitutional guarantees of fundamental rights/liberties and iv) to maintain and enhance public confidence in judicial impartiality. The judiciary, which is entrusted with the sole authority to decide over life, liberty, freedom, rights, duties and properties of the citizens, to expound and define the true meaning of law and constitution and to keep executive and legislative organs of the government within the limits of the constitution, can perform its proper role as a sentinel on the *qui vive* only if its independence is completely

ensured and institutional immunity as well as autonomy are guaranteed by constitution and law.

F. Judicial Independence as Enshrined in the Federal Constitution of Malaysia

Unlike the Constitution of Bangladesh, the Federal Constitution of Malaysia does not contain a preamble to incorporate into it the aspiration of justice and speak in the text of the separation of judiciary from the executive organ of the State. Furthermore, unlike the Constitution of Bangladesh, neither the Constitution of Malaysia provide that the judges of superior courts and subordinate courts shall be independent in the exercise of their judicial functions, nor oath to be taken by the judges of the superior courts under the Sixth Schedule containing 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. Although the absence of any explicit provision concerning the principle of the independence of judiciary in the Malaysian Constitution will go against the assertion that judicial independence is a basic pillar or structure of the Constitution, it contains several provisions to secure and safeguard the independence of the judiciary. These include a) method of appointment, b) security of tenure, c) restriction against alteration of conditions of service to the detriment of the judges after their appointment, d) salaries being charged on the Consolidated Fund, e) restriction on discussion of judges' conduct in the Parliament and f) power of the judges to punish for contempt of court.

G. Judicial Independence as Epitomised in the Constitution of Bangladesh

The concept of the independence of the judiciary has been given the place of a cornerstone in the scheme of the Constitution of Bangladesh; it is one of the central values and basic pillars on which the Constitution is based. The Constitution has embraced the principle of judicial independence by providing for the performance of the judicial functions by the judges

independently and requiring the judges to swear to ‘faithfully discharge the duties of ...[their] office according to law’ and to hold the scale of justice even between the humblest citizen and an all powerful executive, without fear or favour- regardless of the consequences to themselves. Every accused person has a fundamental right to have a ‘speedy and public trial’ by not only an independent judiciary but also by an impartial judiciary.⁵⁸⁶ Therefore, the judicial independence has been given teeth through a range of guarantees enshrined in our Constitution, namely, a) method of appointment, b) fixation and security of tenure, c) prohibition on altering the remuneration, privileges and other terms and conditions of services of judges to their disadvantages during their term of office, d) salaries being charged on the Consolidated Fund, and e) power of the judges of superior courts to punish any contempt for maintaining their dignity and authority. But unlike the Constitution of Malaysia, the Constitution of Bangladesh does not contain procedural safeguards to prevent unexpected discussion of the conduct of judges in the Parliament although the rules of procedure of the Parliament provide for such a provision.

H. Substantive Independence, Method of Appointment and the Present Study

Substantive independence, which means the freedom of judges to decide matters before them in accordance with the command of their conscience without submitting to any kind of improper pressures, inducements or influences from any quarter- be it executive and legislative, pressure group, individual or even another judge- is considered as the kernel of judicial independence. Since substantive independence refers to a neutrality of mind of judges in the exercise of their judicial functions, the method of appointment has a great deal of bearing in securing the appointment of right judges who will be men of independent character, keen intellect, high legal knowledge and acumen, professional ability, equanimity, dignity and judicial temperament. In the words of Socrates (469 BC-399 BC), fair judges are

⁵⁸⁶ Article 35(3), the Constitution of the People’s Republic of Bangladesh, 1972.

required to do four things, namely ‘to hear courteously, to answer wisely, to consider soberly, and to decide impartially.’⁵⁸⁷ An erroneous appointment of an unsuitable person of doubtful competence as a judge on the basis of political or personal favouritism is bound to produce irreparable damage not only to the fair administration of justice but also to the public faith in the administration of justice. Litigant public come to the courts of law to have their disputes adjudicated with the expectation that judges are impartial and independent and they will administer justice according to law without taking into account any extraneous or irrelevant considerations. This kind of faith and trust will fade away if judges are appointed on considerations other than the merit.

Although Prof. Shimon Shetreet maintains that ‘politics should be neither a shortcut to nor an impediment in the appointment [of a qualified person] to a judicial office’⁵⁸⁸ which has been endorsed by Chief Justice Sajjad Ali Shah of the Pakistan Supreme Court when he observed that the ‘political affiliation of a candidate for judgeship may not be a disqualification provided he is a person of integrity and has active practice as [an] advocate.... and has sound knowledge of law.’⁵⁸⁹ It can hardly be expected that as soon as a judge appointed on the consideration of political allegiance ‘takes oath, there is a sudden transformation and he forgets his past connections and turns a new leaf of life.’ Justice Pandian in Supreme Court *Advocates-on-Record Association v Union of India*⁵⁹⁰, rightly observed that if the appointee

bears a particular stamp for the purpose of changing the cause of decisions bowing to the diktat of his appointing authority then the independence of judiciary cannot be secured

⁵⁸⁷ *Dictionary of Familiar Quotations* (London: Tophi Books, 1988) at p. 75.

⁵⁸⁸ Shimon Shetreet, *Judges on Trial: A Study of the Appointment and Accountability of the English Judiciary* (Amsterdam, New York, Oxford: North Holland Publishing Co., 1976) at p. 75.

⁵⁸⁹ Chief Justice Sajjad Ali Shah in *Al-Jehad Trust v Federation of Pakistan*, PLD 1996 SC 324.

⁵⁹⁰ (1993) 4 SCC 441.

notwithstanding the guaranteed tenure of office, rights and privileges, safeguards, conditions of service and immunity.⁵⁹¹

However, since substantive independence (also known as decisional independence) is the core of judicial independence, and method of appointment is the means to select and appoint persons with requisite qualifications and qualities as judges, the present study is undertaken to examine the constitutional process of the appointments of judges to superior courts in Malaysia and Bangladesh.

I. Methods of Appointment of Superior Court Judges in Malaysia and Bangladesh

Both Malaysia and Bangladesh have adopted in their Constitutions the method of appointment in which the executives have been given a pre-eminent role to play with striking diversities regarding prior mandatory consultation with the constitutional entities.

I. 1. Appointment of Chief Justice

Under the existing (as of 2011) arrangement of the Federal Constitution of Malaysia, the Chief Justice, who is the head of the Federal Court, is appointed by the Constitutional Monarch (the Yang di-Pertuan Agong) 'acting on the advice of the Prime Minister after consulting the Conference of Rulers.' The Judicial Appointments Commission, constituted first in February 2009 comprising of nine members of which the majority- five non ex-officio members- are appointed by the Prime Minister, has been empowered to select and recommend suitably qualified persons for the Prime Minister's consideration to advise the Head of the State for appointment as the Chief Justice of Malaysia. But the Prime Minister is not bound to recommend to the Yang di-Pertuan Agong after consulting the Conference of Rulers from among those candidates shortlisted by the Commission for appointment in the vacant post of the Chief Justice. Thus the system of plurality of consultees in the formation of

⁵⁹¹ Ibid. at p. 525.

opinion by the Prime Minister to advise the Yang di-Pertuan Agong does not serve as an inbuilt check against the likelihood of appointing the head of the Malaysian Judiciary taking into account political or extraneous considerations.

But unlike Malaysia, the Constitutional Head of the State of Bangladesh under the 1972 Constitution, as amended in 1991, enjoys unfettered discretion to appoint the Chief Justice of Bangladesh without consulting any constitutional entity, even not required under the amended Article 48(3) to act in accordance with the advice of the Prime Minister. Similarly, unlike the Judicial Appointments Commission of Malaysia, the Supreme Judicial Commission of Bangladesh⁵⁹² was not given the authority to select and recommend candidates to the President for appointment as the Chief Justice of Bangladesh. The established convention of seniority in appointing the senior most judge of the Appellate Division as the Chief Justice of Bangladesh has been violated on five occasions between 2003 and to-date (as of 2011).⁵⁹³ This phenomenon of violating the convention of seniority in appointing the Chief Justice of Bangladesh gained ground after adding to the Constitution in 1996 the new provisions of heading the Non-Party Care-taker Government by the immediate past Chief Justice, to be constituted within 15 days of the dissolution of Parliament as an interim government with the special mandate ‘to give to the Election Commission all possible aid and assistance for holding the general election of members of Parliament peacefully, fairly and impartially.’ The appointment of the Chief Justice on the ground of political allegiance ignoring the convention of seniority not only shatters the legitimate expectation of the superseded judges but also has the disastrous impact of making the highly dignified and prestigious office of the Chief Justice controversial and of lowering the public faith, confidence and trust in the impartiality of the judges of the highest court of the land.

⁵⁹² The Supreme Judicial Commission of Bangladesh was set up in March 2008 under a Presidential Ordinance and ceased to exist since February 2009.

⁵⁹³ The present Awami League Government within a period of two years breached the principle of seniority on two occasions, first in December 2009 and then in September 2010.

1.2. Appointment of the Puisne Judges

The Federal Constitution of Malaysia, as amended in 1963, 1965 and 1994, empowers the Yang di-Pertuan Agong to appoint the other judges of the Federal Court, the Court of Appeal and the High Courts acting on the advice of the Prime Minister, after consulting the Conference of Rulers. But it has also been made a Constitutional imperative for the Prime Minister to consult the Chief Justice of the Federal Court, who is best equipped to know and assess the worth of the candidates and their suitability for judicial appointment by reason of his long tenure on the bench, before tendering his advice to the Yang di-Pertuan Agong for appointing puisne judges to the Federal Court, the Court of Appeal and the two High Courts. Furthermore, in appointing judges to the Court of Appeal and the two High Courts (the High Court of Malaya and the High Court of Sabah and Sarawak), the Prime Minister is constitutionally obligated to consult the President of the Court of Appeal and the Chief Judge of the concerning High Courts respectively so that every relevant particular about the candidate is known and duly weighed as expert advices by him before presenting his advice to the Head of the State for the appointment of judges to these courts. The Prime Minister has an additional duty to consult the Chief Minister of each of the two States of Sabah and Sarawak before handing over his advice to the Constitutional Monarch in appointing judges to the High Court in Sabah and Sarawak. Thus the appointment process of judges of the superior courts in Malaysia is participatory and certain constitutional functionaries are designed to act in trust as collective repositories for the purpose of selecting the best and most suitable candidates from among those available for appointment as judges of the superior courts. Furthermore, the Judicial Appointments Commission, established in 2009 under an ordinary Act of Parliament consisting of, *inter alia*, the Chief Justice of the Federal Court, the President of the Court of Appeal, the Chief Judges of the two High Courts as its ex-officio members, has been empowered to recommend to the Prime Minister for tendering his advice

to the Yang di-Pertuan Agong three candidates for the appointment as judges in the High Courts and ultimately four candidates for the appointment as judges in the Federal Court and the Court of Appeal. This has given rise to the over-lapping process of exercising powers in the matter of appointment of judges in superior courts. For, the Prime Minister is required under the Constitution after receiving the names of the candidates from the Commission, to consult again the Chief Justice of the Federal Court before tendering his advice to the Head of the State for the appointments of all the judges of the superior courts, consult the President of the Court of Appeal for the appointment of judges to the Court of Appeal and consult each of the Chief Judges of the two High Courts for appointing puisne judges to the High Court concerned. This enabled the heads of the superior courts to express their personal views about the suitability of the candidates for the second time and, as such, enable them to have a 'second bite at the cherry', if they disagreed earlier with the Commission's decision taken in the selection meeting. It should be stressed here that the Prime Minister is free to accept or reject, after consulting the Conference of Rulers, the recommendation of the Commission for appointment in the vacant posts of judges to the superior courts which in essence makes the Commission 'a toothless tiger.' In fact, the selection and appointment of judges in superior courts of Malaysia is still virtually a power of the Prime Minister as the Constitutional Monarch, the Yang di-Pertuan Agong, has no choice but to accept and act on his (the Prime Minister's) advice in the matter of appointment of judges of the Federal Court, the Court of Appeal and the two High Courts.

Unlike Malaysia, where there are now several constitutional and legal entities to consult with in appointing judges of superior courts, in Bangladesh the 1972 Constitution made it imperative for the President to consult only with the Chief Justice of Bangladesh- the single consultee- in appointing regular and additional judges of the High Court Division under Articles 95(1) and 98 and judges of the Appellate Division of the Supreme Court as per

Article 95(1) of the Constitution of Bangladesh. The Chief Justice, who was best suited and had the best opportunity to adjudge the professional experience, knowledge of law, ability, firmness and integrity of the members of the Supreme Court Bar and senior judicial officers (district judges) for appointment as judges, could reasonably be expected to look at the matter of appointment of judges objectively and impartially so that undesirable and unfit persons did not get a berth on the bench. It was tantamount to negate this premise when the Constitutional provision concerning consultation with the Chief Justice was first omitted in January 1975 and then after its restoration in May 1976 for a brief period, the President was again freed from the constitutional obligation of consulting the Chief Justice in appointing judges of the Supreme Court. Thus the unfettered and unrestrained power of appointing judges was vested in the President- the Lord of Lords' in a Presidential form of Government (1975-1979)- leaving the door wide open for intruding political consideration and arbitrariness into the appointment process. However, ultimately in 1978, the convention of consulting the Chief Justice in appointing judges of the Supreme Court was established by President Ziaur Rahman which is still in existence. Ultimately the Supreme Judicial Commission was established under an Ordinance in March 2008, which lasted for less than a year, as a recommendatory authority to select and recommend two candidates for each vacancy (incorporating into law the usual practice) of the Supreme Court. But the President was given the right to accept and reject the candidates recommended by the Commission at his pleasure which defeated the very objective of establishing this nine member-body (which was dominated by six ex-officio members from the Supreme Court) for a cautious, informed, professional and non-political search for the most competent persons for the judgeship of the Supreme Court. Like the Judicial Appointments Commission of Malaysia, Supreme Judicial Commission of Bangladesh was also established neither in pursuance of any provision of the

Constitution nor by introducing any amendment into the Constitution and, as such, can strongly be argued that both the Commissions are unconstitutional.

1.3. Appointment of Judicial Commissioners and Additional Judges

The Federal Constitution of Malaysia, as amended in 1963 provided for the first time the provision for the appointment of judicial commissioners in the High Court of Malaya and the High Court in Sabah and Sarawak. Under the new method of appointment introduced in 1994, the Yang di-Pertuan Agong, acting on the advice of the Prime Minister, after consulting the Chief Justice of the Federal Court may appoint a judicial commissioner for unspecified period or purposes. This is different from the method of appointing regular judges to the High Courts in which the Prime Minister is also required to consult the Conference of Rulers and the Chief Judge of the High Court concerned. Thus the Chief Judges of the High Courts, who are the most competent persons to express their views as to the necessity of appointing judicial commissioners and the suitability of candidates for such an appointment, have deliberately been excluded from the appointment process of judicial commissioners so that the method can easily be used to appoint those persons as judicial commissioners who have rendered valuable services to the government or strongly believe in the philosophy of the government. It seems that keeping this in mind, the Judicial Appointments Commission of Malaysia has not been given the jurisdiction to select suitably qualified persons, who merit appointment as judicial commissioners in the High Courts, for the consideration of the Prime Minister.⁵⁹⁴ But the judicial commissioners have been given the right to apply to the Judicial Appointments Commission for the selection and recommendation for appointment as judges of the High Courts.⁵⁹⁵

⁵⁹⁴ See Section 21, the Judicial Appointments Commission Act, 2009.

⁵⁹⁵ Sections 23(3) and 29, *ibid.*

Like the provision for the appointment of judicial commissioners (in fact additional judges) in the two High Courts of Malaysia, the provision for appointment of additional judges in the High Court Division of the Supreme Court of Bangladesh has become a gateway to the cadre of permanent judgeship in the High Court Division. But unlike Malaysia, where exists a difference between the method of appointment of regular judges and the judicial commissioners to the High Courts, the same method of appointment is followed in Bangladesh in appointing regular and additional judges to the High Court Division of the Supreme Court. Unlike the Judicial Appointments Commission of Malaysia, the defunct Supreme Judicial Commission of Bangladesh was empowered to select and recommend suitable candidates for appointment as additional judges of the High Court Division. Unlike Malaysia, where non-appointment of judicial commissioners as regular judges of the High Courts has never been challenged in superior courts, in Bangladesh non-appointment of certain additional judges as regular judges of the High Court Division was challenged in which the Appellate Division of the Supreme Court in 2009 held that the additional judges only have the right to be considered for appointment as permanent judges in the High Court Division and not beyond. Unlike Malaysia, where consulting the Chief Justice of Malaysia in appointing judicial commissioners to the High Courts is constitutional, the requirement of consulting the Chief Justice of Bangladesh for the appointment of additional judges in the High Court Division of the Supreme Court has been conventional since 1978.⁵⁹⁶ Unlike Malaysia, where in *Re Dato' Seri Anwar Ibrahim's* case⁵⁹⁷ constitutional consultation was given a literal meaning to the effect that consultation does not mean concurrence and the consultant may consider the advice or opinion given but he is not bound by it⁵⁹⁸, in Bangladesh the conventional consultation with the Chief Justice in appointing judges of the

⁵⁹⁶ Supra notes 572 and 573.

⁵⁹⁷ Supra note 561.

⁵⁹⁸ Supra note 562.

Supreme Court by the President was given, to some extent, an extended meaning in *Bangladesh and Justice Syed Md. Dastagir Hossain v Md. Idrisur Rahman, Advocate*.⁵⁹⁹ As it was held in this case that, ‘In the matter of selection of the Judges, the opinion of the Chief Justice should be dominant in the area of legal acumen and suitability for the appointment.’⁶⁰⁰ Furthermore, in that case, it was observed that the Prime Minister, on whom (instead of the President) the executive power of the Republic is vested and under Article 48(3) the President is required to act in accordance with the advice of the Prime Minister in the exercise of his constitutional and legal powers, cannot advise the President contrary to the opinion of the Chief Justice regarding the appointment of regular judges and additional judges to the Supreme Court.⁶⁰¹ This is an unacceptable interpretation as there is no such explicit or implicit limitation on Prime Minister’s power of advising the President in Articles 95(1) and 98 of the Constitution that deal with the appointment of judges of the Supreme Court. Referring to this observation, Chief Justice Md. Tafazzul Islam in the case of *Khondker Delwar Hossain & Others v Bangladesh Italian Marble Works Limited*⁶⁰² observed in 2010 that:

in view of the declarations given in the Judges case... declaring that convention of consultation being a Constitutional imperative, is binding upon everybody. Accordingly this retention of substituted Article 95 [in which consultation with the Chief Justice was omitted] will have no bearing on the matter of consultation.⁶⁰³

It is true that the independence of judiciary is a basic pillar and cardinal feature of the Constitution of Bangladesh and judicial independence is inextricably linked and connected with the constitutional process of appointment of judges of the Supreme Court. But in

⁵⁹⁹ Supra note 563.

⁶⁰⁰ Supra note 564.

⁶⁰¹ Supra notes 510 and 511.

⁶⁰² Supra note 379.

⁶⁰³ Ibid. at p. 179.

interpreting the provisions of amended Article 95(1) and 98 of the Constitution of Bangladesh, which no longer contain the words ‘after consultation with the Chief Justice’ in the context of appointing judges by the President, the Supreme Court does not have the right to go beyond the framework and the parameters of the provisions of Article 95(1) and 98 of the Constitution in interpreting these Articles. As Justice Bhagwati of the Indian Supreme Court rightly observed in *S.P. Gupta v Union of India*⁶⁰⁴ that:

We have... to rid our mind of any preconceived notions or ideas and interpret the Constitution as it is and not as we think it ought to be. We can always find some reason for bending the language of the Constitution to our will, if we want, but that would be rewriting the Constitution in the guise of interpretation.⁶⁰⁵

J. Recommendation

The following recommendations can be put forward regarding a) additional judges/judicial commissioners, b) strength of judges and c) method of appointment.

a) Abolition of the System of Appointment of Additional Judges/Judicial Commissioners

The system of appointing additional judges/judicial commissioners as a gateway through which they are required to pass before being appointed as regular/permanent judges in the High Court Division of the Supreme Court of Bangladesh and in the High Courts in Malaysia should be abolished on the following grounds:

In the first place, since the tenure of judicial commissioners/additional judges is generally two years they can hardly be expected to hold the scale of justice as independently and courageously as a permanent judge in cases, particularly in which the executive- the largest single litigant before the High Courts- is involved.

⁶⁰⁴ AIR 1982 SC 149.

⁶⁰⁵ Ibid.

Secondly, if they pronounce a fair and fearless judgment against the executive it may cost them either appointment as a regular judge or ‘for a further period.’

Thirdly, a litigant’s confidence in the independence and impartiality of judicial commissioners/additional judges, whose continuance in office after the specified period is subject to the pleasure of the executive, is bound to suffer from the thought that they (judicial commissioners/additional judges) are likely to be biased.

Fourthly, taking into account the adverse impact of appointing additional judges/judicial commissioners on their independence and impartiality, only very few constitutions of the world, e.g. the Constitution of India, 1949, as amended in 1956, the Constitution of Singapore, 1963, the Constitution of Pakistan, 1973 and the Constitution of Sri Lanka, 1978 provide for the appointment of such judges.

Fifth and finally, international standards on the independence of judiciary disapprove the system of appointing temporary judges like judicial commissioners and additional judges. As the Montreal Declaration on the Independence of Justice, 1983 provides that the appointment of temporary judges is inconsistent with judicial independence and calls for phasing out gradually where such appointments exist.⁶⁰⁶

b) Strength of Judges

Since there is the scope of taking decision by the executive to increase the number of judges of superior courts on political considerations (like finding berths on the bench as rewards for those favourites who have ‘delivered’ as law officers, as party men and judges), rather than judicial considerations (e.g. increased number of cases, speedy disposal of cases), the power of increasing the number of judges of the superior courts in Malaysia and Bangladesh should be given to the Head of the State either on the recommendation of a Judicial Service Commission as it is to be found in Article 79(1)

⁶⁰⁶ Article 2.20, the Montreal Declaration on the Independence of Justice, 1983.

of the Constitution of Namibia, 1990 or upon the request of the Federal Court/ Supreme Court as provided for by Article 3 of the Constitution of Puerto Rico, 1952.

c) *Establishment of a New Forum for Judicial Appointment*

It seems that the present method for selection and appointment of judges to the superior courts in Malaysia and Bangladesh should be given a ‘decent burial’ for excluding patronage appointment of judgeship or appointment on extraneous consideration. In order to strengthen the independence and impartiality of the judiciary, an independent, effective and meaningful judicial commission, representing various interests with pre-eminent position in favour of the judiciary with the power of selecting and recommending best candidates to the Head of the State for judicial appointment, is the demand of modern times. For, the principles on the independence of the judiciary, formulated and adopted by various international and regional organisations, particularly in the 1980s and thereafter, favour the appointment of judges of superior courts by, on the recommendation, proposal/advice of, or after consultation with an appropriately constituted and representative judicial body.⁶⁰⁷ Furthermore, the Constitutions of Guyana, Algeria, Croatia, Namibia, Fiji, Nepal, Saudi Arabia, South Africa, Rwanda, Poland, Albania, Nigeria and Iraq, adopted in the 1980s and thereafter, provided for the establishment of a nominating or recommendatory judicial body enjoying high degree of independence from the political process.⁶⁰⁸ In very recent times, the Constitution of some of the countries of the world, e.g. the 1973 Constitution of Pakistan as amended in 2010 (provides for the establishment of a Judicial Commission) and the Constitution Reform Act, 2005 of the UK (provides for the establishment of a Judicial Appointments Commission), have been amended to provide for the establishment of an independent body for

⁶⁰⁷ Supra note 284.

⁶⁰⁸ Supra note 285.

selection and recommendation of duly qualified persons for appointment as judges in the superior courts in order to ensure that neither political bias nor personal favouritism and animosity play any part in judicial appointment. In order to bring in greater transparency and accountability in judicial appointments, the Government of India, introduced two Bills, the Constitution (Sixty-Seventh Amendment) Bill, 1990 and the Constitution (Ninety-Eighth Amendment) Bill, 2002, in the Lower House of the Parliament, but both the Bills lapsed.⁶⁰⁹

In *Supreme Court Advocates-on-Record Association v Union of India*⁶¹⁰, Justice Kuldip Singh of the Indian Supreme Court in giving the words ‘consultation with the Chief Justice of India’ a wide connotation (i.e. that the Chief Justice’s opinion was binding on the Executive), observed: ‘We have come to the conclusion that the exclusion of the final say of the executive in the matter of appointment of judges is the only way to maintain the independence of judiciary.’ Such an objective of maintaining the independence of judiciary should be achieved neither by way of judicial activism (as the Supreme Court of Bangladesh also followed the foot-step of the Indian Supreme Court) nor by passing any Act (as Malaysia did in 2009) or by promulgating any Ordinance (as Bangladesh did in 2008). In order to ensure that the matter of appointment in the superior courts of Malaysia and Bangladesh does not result in politically biased judges or judges who are or feel beholden to the appointing authority, an independent Judicial Appointments Commission/ Supreme Judicial Commission is to be set up through constitutional amendments. The power of appointment of judges of the superior courts by the Head of the State is to be exercised on the recommendation of such a commission. The recommendation of the Commission should be binding upon the Constitutional Head but it shall be open to the Yang di-Pertuan Agong/President to refer the recommendation back to the Commission in any given case along with the information in his

⁶⁰⁹ Supra notes 288 and 289.

⁶¹⁰ (1993) 4 SCC 441.

possession regarding the suitability of the candidates. If, however, after reconsideration the Commission reiterates its recommendation, then the President/Yang di-Pertuan Agong shall be bound to make the appointment. Preferably the Judicial Appointments Commission/Supreme Judicial Commission should consist of ex-officio members from the higher judiciary (e.g. the Chief Justice and the five senior most judges), last retired Chief Justice or Judge and Professor of Law on the basis of seniority from public universities by rotation. In this context, it is very pertinent to remind the immortal words of former Chief Justice of Australia, Sir Harry Gibbs who said in 1987:

Judicial Commissions, advisory Committees and procedures for consultation [with the Chief Justice] will be useless unless there exists, among the politicians of all parties, a realization that the interest of the community requires that neither political nor personal patronage nor a desire to placate any section of a society, should play any part in making judicial appointments.⁶¹¹

He further added that ‘no procedure will be effective if the will to appoint only the best is lacking. In the end, we must depend on the statesmanship of those in all political parties.’⁶¹² Chief Justice Harry Gibbs’s requisite ‘statesmanship’ of political leadership is to be found in former British Prime Minister Gordon Brown who, even after enacting Constitutional Reforms Act, 2005 which radically changed the way in which judges are appointed by investing the whole process of selection in the hands of the independent Judicial Appointments Commission, said on 3 July 2007:

For centuries, they [the Executive] have exercised authority in the name of the monarchy without the people and their elected representatives being consulted. So I now propose that in 12 important areas of our national life, the Prime Minister and the Executive should surrender or limit their powers, the exclusive exercise of which by the Government of the day should

⁶¹¹ Harry Gibbs, ‘The Appointment of Judges’, (1987) 61 *Australian Law Journal* 7, 11.

⁶¹² *Ibid.*

have no place in a modern democracy ... and I purpose that the Government should consider relinquishing its residual role in the appointment of judges.⁶¹³

It is our earnest and sincere expectation that in near future we shall be able to hear from any Malaysian or Bangladeshi leading personality echoing the words of the first Chairman of the Judicial Appointments Commission of the UK, who in her first speech in November 2006 said: 'For the first time in its 1,000-year history, the Judiciary is fully and officially independent of the government. This has been described as the most significant change since *Magna Carta* in 1215.'⁶¹⁴

⁶¹³ Quoted in Ministry of Justice, *The Governance of Britain: Judicial Appointments* (Consultation Paper Code No CP 25/07, 25 October 2007) at p. 5.

⁶¹⁴ Speech by Baroness Prashar, Chairman of the Judicial Appointments Commission, at the Society of Construction Law, 22 November 2006 <http://www.judicialappointments.gov.uk/static/documents/JAC_Speech_Society_of_Construction_Law_221106.pdf> (accessed on 1 December 2010).