Judicial independence and accountability: a comparative study of contemporary Bangladesh experience

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JUDICIAL INDEPENDENCE AND ACCOUNTABILITY: A COMPARATIVE STUDY OF CONTEMPORARY BANGLADESH EXPERIENCE

A thesis submitted in fulfilment of the requirements for the award of the degree

DOCTOR OF PHILOSOPHY

from

UNIVERSITY OF WOLLONGONG

by

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FACULTY OF LAW

2002

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ABSTRACT

This thesis examines issues of judicial independence and judicial accountability with special reference to public confidence in the judiciary. The central issues of this thesis are the tension between judicial independence and accountability and the ways the two conflicting values may be balanced in the administration of justice to deliver an effective judicial service and win public confidence. The thesis emphasises that proper measures should be taken to maintain judicial independence and at the same time, an adequate system of judicial accountability should be established without undermining the independence of judges.

The thesis examines the conditions of judicial independence and accountability in Bangladesh in comparison with general principles, international standards and practices of some countries in the common law tradition. It evaluates the law and practice which have been followed in Bangladesh to deal with various aspects of the judiciary involving the independence and accountability of judges. It reviews the history and current state of the judiciary by analysing a wide range of sources, including constitutional and statutory law, public records, available statistical data and media reports and secondary literature.

The thesis identifies the strengths and weaknesses of the current system of constitutional and judicial administration in Bangladesh and their impacts on judicial independence and judicial accountability which include appointment, tenure and discipline of judges, and scrutiny of judges by the media and the bar. It proposes ways of preserving the strengths or remedying the weaknesses to improve the conditions of judicial independence and judicial accountability in Bangladesh.

ACKNOWLEDGEMENTS

First of all, I am indebted to the University of Wollongong for its scholarship which made my PhD studies in Australia possible.

I would like to express my deepest appreciation to my supervisors, Dr Richard Mohr and Professor Helen Gamble, for their advice, guidance and very useful comments on the earlier drafts and for their continuing support during the writing of this thesis.

Special thanks are due to all academic and non-academic staff of the Faculty of Law, University of Wollongong, for their assistance, support and understanding.

Many thanks to the staff of the Office of Research and Library of the University of Wollongong for their kind assistance during my study.

Special thanks to many judicial officers and Ministry officials of Bangladesh, including Senior Assistant Judge Mr M Akhtaruzzaman, Assistant Judge Mr Mohsinul Haque and Assistant Secretary Mr Jakerul Abedin, for their active co-operation in collecting valuable materials of this thesis.

I offer my grateful thanks to my colleagues of Rajshahi University, particularly Mr SM Daud Hassan, who helped me in many ways. I would like to acknowledge the assistance I received from my friend Mr SM Solaiman and his wife Mrs Afroza Begum in one way or another.

Finally, special thanks and deepest appreciation is due to my wife Mamtaz Sultana (Parul) for her patience and encouragement, and to my daughter Assafiat Zabeen (Setoo) and son Muneem Mahdee (Sakib) who missed me during the period of studies.

INTRODUCTION

The core topics of this study are the independence and accountability of the judiciary, which are the fundamental values of the administration of justice in a democratic society. This thesis examines the issues of judicial independence and accountability and their links with public confidence in the judiciary. Its main purpose is to evaluate the existing conditions of judicial independence and accountability in Bangladesh.

The main themes to be addressed in the thesis are the clash between the older concept of controlling the working of judges and the modern concept of ensuring the independence of judges from any kind of interference or influence and the failure to integrate completely the old and new values of judicial independence and accountability. The thesis addresses these problems in Bangladesh and focuses on the answers to these problems which are implicit in the adoption of proper principles of judicial independence and accountability. In doing so, the thesis is divided into nine chapters.

Chapter One introduces the conceptual issues of the study. It discusses the links between the doctrine of separation of powers and the concept of judicial independence and the meaning of judicial independence and its elements. This chapter also analyses the importance of judicial independence in the contemporary world for the protection of the rights and liberties of the citizens of a country and for the maintenance of public confidence in the justice system. It further discusses the

concept of judicial accountability and its relationship to judicial independence and the implications for public confidence in the judiciary.

Chapter Two outlines the aims and methods of the study. It discusses the scope and limits of the study, the objectives of the study and the research methodology.

Chapter Three provides some perspectives on the judiciary in Bangladesh. This chapter identifies the links between the history of the judicial system and the concepts of judicial independence and accountability in Bangladesh; it gives an outline of the current judicial system, and identifies the major themes of the study.

Chapter Four analyses the issues relating to the appointment of judges. It discusses, firstly, the general principles and importance of established criteria for judicial appointment and examines the criteria followed in appointing judges in Bangladesh. Secondly, it analyses the general principles and importance of the mechanisms for judicial appointment including the practices of some common law countries and examines the mechanisms used in appointing judges in Bangladesh.

Chapter Five deals with the issues relating to the tenure of judges which includes security of judicial tenure, changes of tenure and other terms and conditions of judicial service, and part-time and temporary appointment of judges. At first, the general principles and importance of these issues are discussed, and then the law and practice in Bangladesh are examined.

Chapter Six deals with the issues relating to judicial discipline with special reference to the tension and reconciliation between judicial independence and accountability in disciplining judges. It clarifies judicial discipline as an important means of ensuring judicial accountability and analyses the causes and mechanisms for discipline of judges. It also discusses the practices of disciplining judges in some common law countries and then examines the causes and mechanisms for judicial discipline in Bangladesh.

Chapter Seven deals with the issues relating to media scrutiny of the judiciary. At first, it discusses the role of the media as an important means of scrutinising judges and maintaining public confidence in the judiciary, and then it examines the role of the media in scrutinising judges in Bangladesh.

Chapter Eight discusses the role of the bar as an informal mechanism of judicial accountability. It analyses the relationship between judges and the bar and the role of the bar in scrutinising judges. It then examines the role of members of the bar in scrutinising judges in Bangladesh.

Finally, Chapter Nine presents a general conclusion to the thesis based on the summaries of findings and recommendations in each chapter. It provides a synopsis of the background including the strengths and weaknesses of the judiciary in Bangladesh, and identifies specific problems addressed in the thesis. It also summarises the main arguments of the thesis and recommends ways of preserving and building on the values of judicial independence and accountability in Bangladesh.

CHAPTER 1

GENERAL CONCEPTS

1.1 INTRODUCTION

This chapter deals with the conceptual issues of judicial independence and accountability, which are the main aspects of this thesis. It presents a background to the argument of the thesis developed in the following chapters. The substantive chapters of the thesis, from Chapters Four to Eight, examine the different issues of judicial independence and accountability in Bangladesh with special reference to public confidence in the judiciary. An understanding of the concepts of judicial independence and accountability and some of their implications are vital for this study.

Section 1.2 of this chapter deals with the doctrine of separation of powers and its contribution to the concept of judicial independence. Section 1.3 discusses the meaning and elements of judicial independence while section 1.4 explains the importance of judicial independence. Section 1.5 analyses the concept of judicial accountability and its relationship to judicial independence. Section 1.6 concentrates on the implications for public confidence in the judiciary.

The main purposes of this chapter are to analyse the values of judicial independence and judicial accountability and their interrelationship, and to identify the relevance of public confidence in the judiciary.

1.2 SEPARATION OF POWERS AND INDEPENDENCE OF THE JUDICIARY

The principle of judicial independence rests on the idea of separation of governmental powers, executive, legislative and judicial (Malleson, 1997: 659). The separation of powers is simply described as the three branches of government, the executive, legislature and judiciary acting independently of each other. It means 'at a minimum that no branch of government may [arrogate] to itself the core functions of a co-ordinate branch of government, and no branch may deprive another branch of the powers and resources necessary to perform its core functions' (Kelso, 1993: 2211). Hence, judicial independence is an essential ingredient of the separation of powers doctrine which differentiates the agencies of government that exercise those powers so that they are dispersed (Thompson, 1995: 62).

The doctrine of separation of powers has its origins in the ancient world, where the theories of government and the concept of governmental functions were developed (Vile, 1967: 2-3). The concept of governmental functions evolved gradually over many centuries. Aristotle (384-322 before Christian era) identifies three elements or powers in a government. The first element is the deliberative element concerned with common affairs including war and peace, enactment of laws, penalty of death, exile and confiscation, and appointment of officials. The second element is concerned with the system of public offices including the number of offices, the subjects with which the offices deal and the tenure of offices. The third element is the judicial element or the system of courts including the constitution and classification of courts and the manner of appointing the judges (Aristotle, 1995: 165-177).

However, there was no suggestion in Aristotle's observation that the different powers should be vested in different organs of government (Vile, 1967: 22). In the last decade of the 17th Century, Locke (1632-1704) propounded the first modern theory of separation of powers (Plucknett, 1956: 63). In 1690, in his *Second Treatise of Civil Government* Locke says:

> It may be too great a temptation to human frailty, apt to grasp at power, for the same persons who have the power of making laws, to have also in their hands the power to execute them, whereby they may exempt themselves from obedience to the laws they make, and suit the law, both in its making and execution, to their own private advantage.[1]

However, Locke's view of the separation of powers is equivocal. He emphasises the need for independent and impartial judges and makes a distinction between pronouncing judgment and enforcement of judgment, but he does not consider judicial power to be distinct. He emphasises only the separation of executive and legislative power, but does not formulate a separate judicial power (Vile, 1967: 59-60). Locke identifies as a third power, the 'federative power' which contains the 'Power of War and Peace, Leagues and Alliances, all the Transactions, with all Persons and Communities without the Commonwealth'.[2]

The theory of separation of powers was further developed in the 18th Century by the French writer Montesquieu (1689-1755) who contributed new ideas to it. He emphasised certain elements in it, particularly in relation to the judiciary (Vile, 1967: 77). He is commonly recognised as the founder of the modern theory of the separation of powers (Brooke, 1997: 101).

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[1] Ch XII, para 143 [Quoted in Vile, 1967: 62; Wade and Phillips, 1977: 45].

[2] *Second Treatise of Civil Government*, Ch XII, para 143 [Quoted in Vile, 1967: 60].

The exposition of Montesquieu was based 'on the British constitution of the early 18th Century, as he understood it' (Wade and Phillips, 1977: 45). The history of the English judiciary reveals that a centralised judicial system began after the Norman Conquest in 1066. The Norman Kings had great control over the functions of the courts and they exercised judicial powers themselves (Holdsworth, 1956: 32-35, 194). By the end of the 15th Century the King's role in exercising judicial powers was decreased, but judges were a part of the government (Mohan, 1981: 3). During the periods of the Tudors[3] and early Stuarts[4] judges were an integral part of the Royal administration and were under the strict control of the Crown (Shetreet, 1976: 2). As a rule judges served at the pleasure of the Crown and could be removed by the Crown without a need to show any cause (Friedland, 1995: 3). A number of judges were removed or forced by the Crown to retire because of failure to act in accordance with royal wishes (Hughes and Leane, 1996: 169).

The independence of the judiciary became an important issue in the early Stuart period in the 17th Century when there was a struggle for power between the Crown and Parliament. In this struggle both the Crown and the Parliament looked to the courts for support and began to exercise control over the judiciary in every possible way. The Crown could exercise control over the judiciary in numerous ways including removal, suspension, transfer and asking judicial opinions in respect of disputed Royal prerogatives and pending cases. On the other hand, Parliament sought to exercise control over the judiciary by impeachment or calling for explanations of judicial decisions or conduct of judges (Shetreet, 1976: 2-8).

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[3] The period of the Tudors began in 1485 and continued until the accession of the Stuarts in 1603.

[4] The period of the Stuarts began in 1603 and continued until in 1688 overthrown by the English Revolution.

During this period a series of conflicts arose between the Chief Justice Edward Coke and King James I. In 1608, James I had claimed that he was the supreme judge, 'inferior judges his shadows and ministers ... and the King may, if please, sit and judge in Westerminister Hall in any Court there, and call their judgments in question. The King being the author of the lawe [sic] is the interpreter of the Lawe [sic]' (Quoted in Holdsworth, 1945: 428 fn 5). On the other hand, Coke was of the opinion that the common law was the supreme law in the state and the judges were the sole interpreters of this supreme law. He said:

> The law was the golden metwand and measure to try the causes of his subjects: and which protected his majesty in safety and peace. ... The King in his own person cannot adjudge any case either criminal ... or betwixt party and party. ... The king cannot take any cause out of his courts and give judgment upon it himself. ... The judgments are always given per curiam; and the judges are sworn to execute justice according to the law and custom of England (Quoted in Holdsworth, 1945: 430).

At this, the King became angry and said that it means he 'shall be under the law, which it is treason to affirm'. Coke replied, '*quod Rex non debet esse sub homine, sed sub Deo et lege* - The King should not be under man, but under God and the Law' (Quoted in Holdsworth, 1945: 430; Cox, 1996: 569).

The most important conflict between the King and Chief Justice Coke arose in 1616 when in the famous *Case of Commendams*[5] Coke and other judges refused to stop or delay proceedings in accordance with a Royal order. Consequently, they were summoned before King James I and his Council. The King himself explained the offence presented by the judges' conduct. All the judges, except Coke, submitted, and

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[5] Reported as *Colt and Glover v Bishop of Coventry,* Hobart 140, 80 Eng Rep 290.

promised to act in accordance with Royal wishes. Coke alone attempted to defend his stance and was dismissed from office (Holdsworth, 1945: 439-440).

Meanwhile the conflict between the Crown and Parliament moved steadily to a crisis with Parliament strongly defending its privileges and freedom. Parliament was assuming control over the sources of revenue and was freely using the funds to force the King to dismiss ministers and to pursue the policies it dictated (Plucknett, 1956: 52-53). During this crisis, King James I died in 1625 and his son Charles I succeeded to the throne. The conflict between the new King and Parliament continued, and led to civil war in 1642. In January 1649 Charles I was sentenced to death by a revolutionary tribunal and executed. From 1649 to 1660 'various forms of government were devised' and then 'the restoration of Charles II, in 1660, automatically restored the state of affairs as it existed at the eve of the civil war' and his reign continued until his death in 1685 (Plucknett, 1956: 53-55; Smith, 1998: 136, 265). James II succeeded to the throne, but his short reign of three years witnessed an immediate crisis. He escaped to France and Parliament invited William III of Holland to become joint ruler with his wife Mary II, the daughter of James. The terms on which this settlement was made were manifested in the *Bill of Rights* 1689 and the *Act of Settlement* 1701 (Plucknett, 1956: 59). Some important provisions of the *Bill of Rights* 1689 are as follows:

> That the pretended power of suspending of laws or the execution of laws, by regal authority, without consent of Parliament is illegal;
> That the pretended power of dispensing with laws, or the execution of laws, by regal authority, as it hath been assumed and exercised of late, is illegal;
> That the commission for erecting the late Court of Commissioners for Ecclesiastical causes, and all other commissions and courts of like nature, are illegal and pernicious;
> That levying money for or to the use of the Crow by pretence of prerogative, without grant of Parliament, for longer time, or in other manner than the same is or shall be granted, is illegal;

> That the raising or keeping a standing army within the kingdom in time of peace, unless it be with consent of Parliament, is against law.

After 1688 all judges were appointed during good behaviour and thus the tenure of judges was no longer at the pleasure of the Crown (Wade and Phillips, 1970: 328, fn 2). Security of judicial tenure was established finally by the *Act of Settlement* 1701. Article III of the Act provided that 'judges' commissions be made *quam diu se bene gesserint* [during good behaviour], and their salaries ascertained and established, but upon the address of both houses of parliament it may be lawful to remove them'. Originally it was enacted that judges should be removed upon the address of either House of Parliament, but subsequent amendment provided 'both Houses' (Shetreet, 1976: 10, fn 47). Consequently, judges were no longer to hold office during the pleasure of the Crown; their tenure was secured during good behaviour. Nevertheless, the independence of the judges was not complete because the tenure during good behaviour ceased on the death of the reigning King (Shetreet, 1976: 10).

Subsequently, by an Act passed by Parliament in 1760 it was provided that notwithstanding the death of the reigning King judges would continue to hold office during good behaviour (Shetreet, 1976: 10-11). During this period Montesquieu observed that while the British Parliament had achieved legislative supremacy over the Crown and the independence of judges had been declared, the Crown still exercised executive power over the judiciary. Montesquieu stressed that the judicial function should be exercised by a body separate from the executive and the legislative authorities (Wade and Phillips, 1977: 46). In 1748, Montesquieu writes:

> When legislative power is united with executive power in a single person or in a single body of the magistracy, there is no liberty, because one can fear that the same monarch or senate that makes tyrannical laws will execute them tyrannically. Nor is there liberty if the power of judging is not separate from legislative power and from executive power. If it were joined to legislative power, the power over the life and liberty of the

> citizens would be arbitrary, for the judge would be the legislator. If it were joined to executive power, the judge could have the force of an oppressor.
>
> All would be lost if the same man or the same body of principal men, either of nobles, or of the people, exercised these three powers: that of making the laws, that of executing public resolutions, and that of judging the crimes or the disputes of individuals (Montesquieu, 1989: 157).

Montesquieu emphasised a rigid separation of governmental powers. However, complete separation of powers is impossible either in theory or in practice and the doctrine of separation of powers has not been strictly applied in any single society. In different democratic systems of government the separation of powers has been maintained in 'varying degrees of adherence' (Shetreet and Deschênes, 1985: 595).

There has never been real separation of powers in England. The most important example of this situation is the position of the Lord Chancellor who is the head of the judiciary, a cabinet member and the speaker of the House of Lords. The doctrine of separation of powers has been implemented largely in the United States of America in its written constitution. The United States Constitution vests all legislative powers in the Congress, executive powers in the President and judicial powers in the Supreme Court and such other inferior courts as might be established by the Congress.[6] All these powers are exercised by the respective branches of government under a system of checks and balances provided by the Constitution.

At the end of the 20th Century 'most modern western democracies claimed a system of government based on a functional separation of powers of some kind' (Saunders, 2000: 4). Actually, the real separation of powers between the executive and legislature branches does not work under the Westminister system of government, which prevails in numerous countries including Australia, Bangladesh,

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[6] *Constitution of the United States of America*, Arts 1(1), 2(1), 3(1).

England and India. In a Westminister system the ministers, the heads of the executive, are members of the legislature and are directly responsible to it. However, separation of judicial powers from the executive and legislature is recognised as practicable in different democratic societies. The doctrine has received its main application in democratic countries by securing the independence of the judiciary from the control of the other, political branches, particularly the executive government (Phillips & Jackson, 1987: 14). In fact, separation of powers is a necessary ingredient that ensures institutional independence of the judiciary (Kelso, 1993: 2210-11).

1.3 JUDICIAL INDEPENDENCE: MEANING AND ELEMENTS

Judicial independence is an important topic of discussion among judges, lawyers, academics, commentators and researchers in different countries. In any discussion of the topic of judicial independence one essential question needs to be asked: what is meant by the concept of judicial independence?

Generally, judicial independence means the freedom of judges to exercise judicial powers without any interference or influence. The 'most central and traditional' meaning of judicial independence is the collective and individual independence of judges from the political branches of the government, particularly from the executive government (Cappelletti, 1991: 69). It requires that judges should not be subject to control by the political branches of government and that they should enjoy protection from 'any threats, interference, or manipulation which may either force them to unjustly' favour the government or 'subject themselves to [punishment] for not doing so' (Larkins, 1996: 608). However, the contemporary

concept of judicial independence envisaged in numerous international instruments requires as well that judges should be free to decide cases impartially, 'without any restrictions, influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason'.[7]

The concept of judicial independence carries two opposite senses: negative and positive. In the negative sense the concept of judicial independence seeks to avoid any kind of dependence, interference or influence in administering justice. In other words, judicial independence refers to the existence of a judiciary that enjoys freedom from dependence, interference or influence from any sources whether from the executive, the legislature or private individuals. In the positive sense judicial independence means the freedom of judges to exercise judicial functions impartially, in accordance with their own understanding of law and fact (Karlan, 1999: 536, 558).

A comprehensive definition of judicial independence is given by Green. He defines judicial independence as:

> [T]he capacity of the courts to perform their constitutional function free from actual or apparent interference by, and to the extent that it is constitutionally possible, free from actual or apparent dependence upon, any persons or institutions, including, in particular, the executive arm of government, over which they do not exercise direct control (Green, 1985: 135).

This is the sense in which judicial independence is used in this thesis. The definition emphasises that in exercising judicial functions judges should be free from any direct or indirect interference by the executive government, any institution or any private individuals. It also emphasises the freedom from 'actual or apparent dependence' on any of the sources of interference. Hence, judicial independence has two substantial aspects: (1) freedom of individual judges to exercise judicial power and (2)

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[7] *Montreal Declaration* 1983, Art 2.02; *UN Basic Principles* 1985, Art 2. See also *Beijing Statement* 1995, Art 3(a). For an extensive discussion on these documents, see sections 1.4 and 2.3.

autonomy of the judiciary as an institution free from any kind of dependence upon the political branches of the government, any institution or private individuals.

In exercising their judicial functions individual judges need to be impartial and free from any direct or indirect control, interference or influence. However, 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 functions (Green, 1985: 135; Larkins, 1996: 611).

Therefore, the contemporary concept of judicial independence emphasises the independence of each and every member of the judiciary and the independence of the judiciary as an institution or organ of government (Singh, 2000: 248; Russell, 2001: 6). In other words, the concept of judicial independence has two important elements: the individual independence of judges and the collective or institutional independence of the judiciary (Shetreet and Deschênes, 1985: 598; Ferejohn, 1999: 355; Burbank, 1999: 317; 340).

1.3.1 Individual Independence of Judges

Individual independence of judges means that a judge is free to exercise judicial functions without any fear or anticipation of retaliation or reward (Ferejohn, 1999: 355). It requires that a judge should decide cases in accordance with an impartial 'assessment of the facts' and 'understanding of the law' without any direct or indirect improper influence or interference 'from any source' or 'for any reason.[8]

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[8] *Montreal Declaration* 1983, Art 2.02; *UN Basic Principles* 1985, Art 2; *Beijing Statement* 1995, Art 3(a).

In fact, the first essential for an independent judiciary is that the individual judge should enjoy complete freedom in discharging his or her judicial functions and other official duties. The complete freedom of an individual judge has three elements: (1) personal independence, (2) substantive independence, and (3) internal independence (Shetreet and Deschênes, 1985: 598-599; Singh, 2000: 248).

1.3.1.1 Personal Independence

Personal independence signifies that the tenure of judges and the terms and conditions of their service are 'adequately secured, so as to ensure that individual judges are not subject to executive control'.[9] In other words, the terms of judicial service including transfer, remuneration, and pension entitlements should not be under the control of the executive government and the tenure of judges should be guaranteed until a mandatory retirement age (Shetreet and Deschênes, 1985: 598-599; Singh, 2000: 249). These are the prerequisites to ensure that an individual judge may exercise judicial functions without 'fear or favour, affection or ill-will' (Malleson, 1997: 660). This aspect of judicial independence is very significant for an individual judge.

In order to secure the administration of justice a judge should be 'placed in position where he [or she] has nothing to lose by doing what is right and little to gain by doing what is wrong' (Dawson, 1954: 486). Such a position can be guaranteed by ensuring the personal independence of a judge.

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[9] *IBA Code* 1982, cl 1(b). For more details about this Code, see section 2.3.

1.3.1.2 Substantive Independence

Substantive independence, which is also referred to as functional or decisional independence, means that in the discharge of their judicial functions and other official duties, judges are subject to nothing but the law and their conscience (Shetreet and Deschênes, 1985: 630).[10]

In discharging judicial functions, a judge performs three kinds of duties: administrative, procedural and substantive. The administrative duties include the 'responsibility for managing the cases, fixing dates for their hearing, organising the judicial workload and expediting the hearings and resolution of cases'. The procedural duties concern the responsibility for 'conducting resolution of the trial' in accordance with the rules regarding the examination of witnesses, recording of evidence and disposal of other interlocutory matters. The substantive aspect of the duties of a judge is the actual decision-making role. It concerns 'the determination of the finding of fact and the application of the relevant legal norms to the facts of the case' (Shetreet and Deschênes, 1985: 637).

The substantive independence of judges requires that in performing all the administrative, procedural and substantive duties a judge should be free from any direct or indirect interference, improper influence or pressures (Shetreet and Deschênes, 1985: 630). It ensures the impartiality in judges: their capacity to make judicial decisions on the merit of cases, without any fear or favour (Geyh and Tassel, 1998: 31)

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[10] See also *IBA Code* 1982, cl 1(c).

1.3.1.3 Internal Independence

Internal independence means the independence of a judge from his or her fellow judges. The independence of individual judges may be undermined not only by the outside sources of interference or influence but also by fellow judges particularly by senior judges using their administrative power and control (Russell, 2001: 7). In this regard, the *Montreal Declaration* 1983 provides:

> In the decision-making process, judges shall be independent vis-à-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 [or her] judgment freely.[11]

Similarly, the *Beijing Statement* 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.[12]

The *Montreal Declaration* 1983 and the *Beijing Statement* 1995 clearly emphasise internal independence of judges from any hierarchical organisation of the judiciary and any difference in grade or rank. This means that threats to internal independence may come from the superior courts or judges.

In addition, internal independence covers the process of pronouncing judgement, that is the actual decision making process. Hence, internal independence of judges is relevant to both the procedural and substantive aspects of judicial duties. As discussed in section 1.3.1.2, procedural duties include the examination of witnesses, recording of evidence and disposal of interlocutory matters that are integral parts of the decision-making process. Any attempt to influence or interfere with these

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[11] *Montreal Declaration* 1983, Art 2.03.

[12] *Beijing Statement* 1995, Art 6.

functions by fellow judges may represent danger to the independence of individual judges. Similarly, any attempt to influence a fellow judge in substantive duties that are part of their actual decision-making functions is of great concern for internal independence.

However, not all influences from senior judges are to be regarded as violating the independence of individual judges. Since at common law the decisions of superior courts must be followed by lower courts the influence of superior judges' judicial decisions is certainly not objectionable. In addition, in the course of hearing appeals, superior judges may give directions to judges of the lower courts and such directions are not considered prejudicial to the independence of an individual judge. For example, in Bangladesh an appellate court has the power to remand a case back to a trial court for rehearing. In the order for such a remand the appellate court may direct the issue or issues to be tried in the case or may give such other directions as are required to do justice.[13]

1.3.2 Collective Independence of the Judiciary

The concept of collective or institutional independence is concerned with responsibility for the effective operation of the judicial branch of government. This aspect of judicial independence has a great impact on the individual independence of judges. If the judiciary as an institution depends on the executive, the legislature or other institutions for its operation, this may affect the performance of judicial duties by individual judges (Shetreet and Deschênes, 1985: 644; Ferejohn, 1999: 355). A

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[13] *Code of Civil Procedure* 1908, s 107, Or 41 r 23; see also *Chakraborty v Biswas* (1991) 43 DLR 276; *Molla v Mohammad* (1998) 50 DLR 613.

judge may not be able to exercise judicial functions independently unless he or she is 'part of an institution with authority over those human and physical resources incidental to (necessary for) performing judicial functions' (Millar and Baar, 1981: 54). Therefore, collective or institutional judicial independence is necessary to ensure the individual independence of judges (Winterton, 1995: 15). It creates an environment in which judges may exercise their judicial functions without fear or favour.

Collective or institutional independence is associated with court administration, which includes assignment of cases, control over administrative personnel, maintenance of court buildings and preparation of judicial budgets and allocation of resources. The *Montreal Declaration* 1983 and the *Beijing Statement* 1995 emphasise that the main responsibility for court administration should be vested in the judiciary.[14]

In fact, the principle of collective judicial independence requires that in different aspects of court administration, the involvement and control of the executive or legislature should be removed. In respect of judicial budgets, the executive and the legislature may have a legitimate role, but the judiciary should have an effective role in preparing them. In this context, the *Montreal Declaration* 1983 states that judicial budgets 'shall be prepared by the competent authority in collaboration with the judiciary. The judiciary shall submit their estimate of the budget requirements to the competent authority'.[15] Similarly, the *Beijing Statement* 1995 provides:

> The budget of the courts should be prepared by the courts or a competent authority in collaboration with the Judiciary having regard to the needs of judicial independence and administration. The amount allotted should be

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[14] *Montreal Declaration* 1983, Art 2.40; *Beijing Statement* 1995, Art 36.

[15] *Montreal Declaration* 1983, Art 2.42.

> sufficient to enable each court to function without an excessive workload.[16]

Regarding the assignment of cases, *Montreal Declaration* 1983 states that the 'judiciary shall alone be responsible for assigning cases to individual judges or to sections of a court composed of several judges, in accordance with law or rules of court'.[17] The *UN Basic Principles* 1985 states that the 'assignment of cases to judges within the court to which they belong is an internal matter of judicial administration'.[18] Similarly, the *Beijing Statement* 1995 provides that the 'assignment of cases to judges is a matter of judicial administration over which ultimate control must belong to the chief judicial officer of the relevant court'.[19]

In respect of the other aspects of court administration the *Montreal Declaration* 1983 provides:

> It shall be a priority of the highest order, for the state to provide adequate resources 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.[20]

The *Beijing Statement* 1995 provides that the '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'.[21] It does not define the body in which the judiciary may play an effective role. In this context the *Court Administration Authority* of South Australia may be worth

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[16] *Beijing Statement* 1995, Art 37.

[17] *Montreal Declaration* 1983, Art 2.43.

[18] *UN Basic Principles* 1985, Art 14. For more details about this document, see section 1.4.

[19] *Beijing Statement* 1995, Art 35.

[20] *Montreal Declaration* 1983, Art 2.41.

[21] *Beijing Statement* 1995, Art 36.

consideration as an important model which ensures collective independence of the judiciary.

In South Australia, control of the administration of the courts is vested in a Judicial Council established under the *Courts Administration Act* 1993. The Council known as the *State Courts Administration Council* is independent of the control of the executive government.[22] It consists of the Chief Justice of the Supreme Court, the Chief Judge of the District Court and the Chief Magistrate of the Magistrates Court and associate members nominated by them.[23]

The Council is 'responsible for 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'.[24] In addition, '[a]ll courthouses and other real and personal property of the Crown set apart for the use of the participating courts is under the care, control and management of the Council'.[25]

The Chief Executive Officer of the Council known as the *State Courts Administrator* is appointed by the State's Governor on recommendation by the Council. He is responsible to the Council, and, subject to its control and direction, for the 'control and management of the Council's staff' and the 'management of property that is under the Council's care and management'.[26] The collective name of

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[22] *Courts Administration Act* 1993, s 3(a).

[23] *Courts Administration Act* 1993, s 7.

[24] *Courts Administration Act* 1993, s 10(1).

[25] *Courts Administration Act* 1993, s 15(1).

[26] *Courts Administration Act* 1993, ss 16-17.

the Council, the Administrator and the Council's staff is the *Courts Administration Authority*.[27]

1.4 IMPORTANCE OF JUDICIAL INDEPENDENCE

Judicial independence is an important value in any democratic system of government. As Larkin says, 'an independent judiciary is the essential - indeed indispensable -component of a free and democratic society' (Larkin, 1997: 7). In every society, the judiciary is primarily entrusted with the function to resolve disputes between citizens or between citizens and the government. In performing this function, the judiciary needs to be independent from the executive, the legislature or any other sources of influence or interference.

The foundation stone of the development of this concept was established in England by the *Act of Settlement* 1701. In the 20th Century this concept was recognised as an important principle in the protection of human rights in the *Universal Declaration of Human Rights* 1948, adopted by the United Nations (UN). The Declaration provides:

> 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.[28]

Similar provision was made in the *International Covenant on Civil and Political Rights* adopted by the UN General Assembly in 1966.[29] In the past twenty years various international organisations including the International Bar Association,

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[27] *Courts Administration Act* 1993, s 5.

[28] *Universal Declaration of Human Rights* 1948, Art 10. Emphasis added.

[29] *International Covenant on Civil and Political Rights* 1966, Art 14.

International Commission of Jurists and *LAWASIA* have been working to devise a set of standards of judicial independence.

From 1981 to 1982, the International Commission of Jurists, the International Bar Association and *LAWASIA* adopted different codes, standards and declarations on the topic of judicial independence. After consideration of these codes, standards and declarations, the *Universal Declaration on the Independence of Justice* [*Montreal Declaration*] was adopted at the first World Conference on the Independence of Justice held at Montreal on 10 June 1983.[30] In 1985, the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders in Milan (Italy) adopted the *Basic Principles on the Independence of the Judiciary* [*UN Basic Principles*].[31] This was endorsed by the UN General Assembly in its resolution 40/146 of 13 December 1985. The United Nations Congress recommended the *Basic Principles* 1985 for national, regional and inter-regional action and the General Assembly then invited Member States 'to respect them and to take them into account within the framework of their national legislation and practice'. These recommendations were considered before the 6th Conference of Chief Justices of Asia and the Pacific unanimously adopted the *Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region* [*Beijing Statement*] on 19 August 1995. The *Beijing Statement* was amended in some minor respects at the 7th Conference of Chief Justices at Manila in 1997.[32]

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[30] For the text of the *Montreal Declaration* 1983, see Shetreet and Deschênes, 1985: 447-461.

[31] The text of the *UN Basic Principles* 1985 is available on the web site: <http://www.transparency.de/documents/source-book/c/cvL/11.html> 28 July 2000.

[32] The text of the *Beijing Statement* 1995 as amended at Manila in 1997 is available in the following web site: <http://www.taunet.net.au/lawasia/beijing.html> 12 May 2001.

Judicial independence is also an important issue of public discussion at the national level around the world. The question which needs to be asked is why is judicial independence so important?

A modern state is governed by three branches of government, the executive, legislature and the judiciary. Although, as discussed in section 1.2, complete separation of the branches of government is in fact a theoretical ideal which does not reflect actual arrangements in most countries, each branch has some special responsibilities. The responsibilities of the executive branch are to determine government policies, supervise execution of those policies, enforce or administer the laws and conduct other business of the government. The legislature is responsible for making the law of the land and the judiciary applies the laws in resolving disputes between citizens or between citizens and the government.

Among the three branches of government the judiciary is considered the weakest branch. In this regard, Hamilton says:

> The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated: The judiciary, on the contrary, has *no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever.*[33] 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. This simple view of the matter suggests ... that the judiciary is beyond comparison, the weakest of the three departments of power (Hamilton, 1948: 396-397).

In fact, the power of the judiciary is limited only to pronouncing judgment; it has no additional power to enforce its decisions. The enforcement of judicial decisions is the function of the executive government and therefore, the power of the judiciary is ultimately dependent on the executive government. Despite this weakness, the

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[33] Emphasis added.

judiciary being an essential organ of government critically contributes to maintaining the peace and order of a society by resolving legal disputes (Bari, 1985: 76; Bari, 1993: 8). In any democratic society the judiciary has the authority to resolve legal disputes with the object of playing two important roles: social service and protection of citizens' rights. The social service role of the judiciary indicates the day to day functions of the courts in resolving disputes between individuals (Malleson, 1997: 659). In protecting the rights of citizens the judiciary is authorised to keep the state within the bounds of law by resolving the conflicts between the state and citizens.

This authority of the judiciary comes from public confidence in the justice system. As Frankfurter says, '[t]he Court's authority, consisting of neither the purse nor the sword, rests ultimately on substantial public confidence in its moral sanction'.[34] According to Frankfurter, therefore, public confidence in the justice system is the most important element to retain the authority of the judiciary. If the judiciary fails to maintain public confidence, its legitimacy would be endangered (Esterling, 1998: 112). Without that confidence the effective functioning of the judicial branch is quite impossible (Handsley, 2001: 184).

However, public confidence in the justice system is largely dependent on the independence of the judiciary.[35] In other words, judicial independence is a precondition to maintaining public confidence in the judiciary. In fact, public confidence can be sustained only when the independence of the judiciary is adequately ensured (Bari, 1993: 9; Campbell and Lee, 2001: 49). However, public

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[34] *Baker v Carr* (1961) 369 US 186, 267.

[35] The issues of public confidence in the judiciary are discussed more extensively in section 1.6.

confidence does not mean popularity because judges are obliged to make unpopular decisions if they are required by the law (Zemans, 1991: 730; Handsley, 2001: 184). Judicial independence enables judges to make judicial decisions without fear or favour even when the decisions are unpopular or difficult (Parker and Petrie-Repar, 1999). Thus, it encourages 'tranquility and harmony' in society by ensuring litigants that their claims are determined fairly by the courts (Fein and Neuborne, 2000: 62).

Public confidence in the judiciary rests on a public understanding that judges are independent to administer justice impartially and according to law (Webster, 1995: 9; Campbell and Lee, 2001: 273). The independence of judges is necessary not only for the judges themselves but also for the benefit of the members of the society. Brennan says:

> Judicial independence does not exist to serve the judiciary; nor to serve the interests of the other two branches of government. It exists to serve and protect not the governors but the governed (Brennan, 1996: [1]).

The judiciary has a responsibility for ensuring that 'individual rights and liberties are secure' (Baar, 1999: 223). This responsibility cannot be effectively discharged without judicial independence. This is because without the independence of the judiciary 'the power over life and liberty of the citizens would be arbitrary' (Montesquieu, 1989: 157). Judicial independence helps to protect the right and liberty of citizens of a country.

An independent judiciary can protect the rights of citizens by the fair administration of justice. It may ensure that powerful individuals or institutions must conform to the law and no one is above the law. In the absence of an independent judiciary the fair administration of justice or protection of rights of citizens cannot be secure (Wallace 1998: 343; Wallace, 2001: 241). Therefore, the importance of

judicial independence in a democratic society is unequivocal to ensure the fair administration of justice and to gain public confidence in the justice system.

1.5 ACCOUNTABILITY OF JUDGES

The concept of accountability is recognised as an important value of a democratic society. Accountability means the obligation of public officials to explain, justify and legitimise the use of power in discharging public duties (Dhavan, 1985: 167). In a modern state there is a public expectation that all institutions of government will 'operate with integrity and efficiency' (Gleeson, 1994: 165). In order to gain public confidence in their integrity and efficiency all public institutions should be accountable for the exercise of legal powers and their performance of public duties. The judiciary being one of the institutions of government must also be accountable.

The objectives of judicial accountability are to ensure high standards of decision-making and public acceptance of judicial decisions (Gleeson, 1994: 168). The standards of decision-making depend on the quality of judges and their independence in the decision-making process. It is an important factor to create public respect for judicial decisions, which has an immense impact on public confidence in the judiciary. Public acceptance of judicial decisions, the second objective of judicial accountability, depends on public confidence in the justice system, particularly on judicial impartiality. Thus, both the objectives of judicial accountability are ultimately concerned with public confidence, which engenders public respect for the judiciary. In the absence of public confidence in the judiciary the decisions of the judges cannot be respected by the public (Campbell and Lee,

2001: 272). Consequently, judges are accountable to the public for maintaining public confidence in the judiciary.

Although the ultimate goal of judicial accountability is to enhance public confidence in the judiciary, it is also a concern for the independence of judges. In fact, there is a continuing tension between the concepts of judicial independence and accountability. How the tension between judicial independence and accountability can be reconciled is a matter of discussion among the commentators.

At a basic level, the aim of judicial independence is to ensure that the judges are free from all kinds of interference or influence in exercising judicial power while the aim of judicial accountability is to make judges accountable for the use of judicial power. From this perspective judicial independence and accountability are 'seen as two competing qualities which are traded-off in a search for the correct balance' (Malleson, 1999: 71). Despite this, the values of judicial independence and accountability are not opposed to each other: rather they 'work towards the same end' (Gleeson, 1994: 168). The main object of both the concepts is the same: to enhance or maintain public confidence in the judiciary. Therefore, they should be construed as interrelated rather than contrary values (Nicholson, 1993b: 414; Alam, 1999: [12]). As Morabito says:

> Judicial accountability and judicial independence are not inherently inconsistent. It is true that the more we scrutinise the behaviour of judges, the greater the likelihood that attempts will be made to exert improper pressure on them; whether or not judicial independence is, in fact, impaired will depend on the features of the system of accountability which [are] in place (Morabito, 1993: 490).

Therefore, judicial accountability itself is not opposed to the concept of judicial independence: rather it is an important means of strengthening judicial independence. Judicial independence can be promoted by ensuring judicial accountability. In fact,

judicial independence cannot be sustained without ensuring corresponding accountability 'for failure, errors or misconduct' of judges (Shetreet and Deschênes, 1985: 654; Shetreet, 1987a: 6-7). Judicial accountability is complementary to the concept of judicial independence if it is dealt with as a goal of enhancing public confidence in the judiciary, which is the foundation of judicial independence (Nicholson, 1993b: 424; Alam, 1999: [12]). Therefore, the tension between judicial independence and accountability should be resolved carefully so that the 'proper balance between these very important values be maintained' (Shetreet, 1987a: 16). Morabito argues:

> If a given system of accountability has sufficient safeguards to ensure that it cannot be manipulated to the detriment of judges and is also able to generate or enhance public confidence in the judiciary, through the public's knowledge that instances of judicial misconduct and disability will be appropriately dealt with, it will provide judicial accountability and, at the same time, enhance judicial independence (Morabito, 1993: 490).

I share the views of Morabito because the system or mechanism of accountability is the main factor that can contribute to erode or enhance public confidence and undermine or strengthen judicial independence.

In order to identify the mechanisms for accountability, one needs to understand that the accountability of judges may be described in a number ways. Firstly, decisional accountability relates to the manner in which a judge uses judicial power. It is almost universally recognised that in exercising judicial functions judges are primarily accountable to the law. In the administration of justice, a judge should maintain certain established legal rules and procedures. At every stage of the proceedings of a case a judge is bound to follow the direction of the law of the land. Under long established principles judges are obliged to perform judicial functions in full view of the public and to resolve all disputes after hearing both parties. They are

under an obligation to give judicial decisions publicly and to give reasons for their decisions. In addition, judicial decisions of the subordinate courts are subject to appeal to the superior courts (Nicholson, 1993b: 404; Gleeson, 1994: 168). All these rules and procedures ensure judicial accountability to law which in fact enhances public confidence in the judiciary and ensures public acceptance of judicial decisions.

Secondly, judges are accountable to the political branches of government, particularly the executive for their competence and conduct. They may be removed by the political branches through a disciplinary process under constitutional or statutory law. In a democratic society the political branches of government, the executive and legislature, are composed of the people elected by the general public. The public servants employed for the execution of the government's policies and implementation of the law are accountable to the executive. In discharging their public functions the executive and legislature act on behalf of the public to whom they are directly accountable. The general public in a society expect their judges to maintain the standards of judicial performance and judicial conduct. This expectation has a close link to the political branches' responsibility for dealing with different aspects of the judiciary. Consequently, when the executive or legislature removes a judge from office because of incapacity or misconduct, it ultimately satisfies the expectation of the general public. Therefore, the accountability of judges to the executive or legislature is an indirect accountability to the public.

Thirdly, judges may be accountable through media exposure of judicial competence and conduct. The media plays a significant role in maintaining public confidence in the judiciary by informing the public about the activities and conduct of judges. Through the media the general public observes and scrutinises the

workings of the judiciary. Media scrutiny generates public satisfaction or dissatisfaction with the activities of the judiciary. Consequently, the general public can put pressure on the government to make necessary changes to the judiciary.

Fourthly, judges may be accountable in other informal ways, including the scrutiny by academic and practising lawyers.

In summary, the accountability of judges may be ensured through a number of ways: (1) public exposure of judicial functions, (2) reasons for judicial decision (3) appellate process, (4) discipline of judges and (5) scrutiny by lawyers.

1.5.1 Public Exposure of Judicial Functions

Public exposure of judicial functions is a traditional form of judicial accountability. In the decision-making process judges are obliged to maintain certain established principles or procedures, which open the judiciary to public scrutiny. The most important among them is the requirement of public hearings. The public hearing of cases by the courts is recognised as a fundamental human right or civil right by the *Universal Declaration of Human Rights* 1948 and the *International Covenant on Civil and Political Rights* 1966.[36]

It is an established principle of common law that judicial proceedings should be conducted in open court where the public has free access (Campbell and Lee, 2001: 219; Butler and Rodrick, 1999: 128). Except in exceptional circumstances[37] judges

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[36] *Universal Declaration of Human Rights* 1948, Art 10; *International Covenant on Civil and political Rights* 1966, Art 14.

[37] For example, proceedings in camera to protect those appear before the court.

are obliged to perform judicial functions in full view of the public; this is called open justice. In the administration of justice it is an essential feature which restricts the arbitrary use of judicial power and stimulates judges to maintain the standards of judicial performance (Butler and Rodrick, 1999: 128). As Bentham says, '[p]ublicity is the soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity. It keeps the judge himself, while trying, under trial'.[38]

Therefore, the public hearing of cases is a significant scrutiny for impartial and efficient administration of justice and an effective way of gaining public confidence and respect for the justice system.[39] The public may be assured that their disputes are resolved by impartial assessment of the facts and the law. Thus, it fosters public confidence in the administration of justice and the acceptability of judicial decisions.

As discussed in section 1.4, for its legitimacy and authority the judiciary needs public confidence which generates public support for the continued existence of the judiciary. Public understanding of the functions of the judiciary is essential for the public support for the judiciary's power and role. Public support is related essentially to public knowledge or understanding of the working of the judiciary (Zemans, 1991: 724-725). Therefore, the judiciary has a responsibility to promote public understanding by informing the public of the activities of the judiciary. This responsibility of the judiciary provides judicial accountability and at the same time reinforces judicial independence.

The public hearing of cases is an opportunity for the public to scrutinise the activities of the courts, but very few people attend to observe judicial proceedings. In

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[38] Bentham J (1825), *Judicial Evidence*, p 67 [Quoted in Butler and Rodrick, 1999: 128].

[39] *Scott v Scott* (1913) AC 417, 463.

reality the general public seldom goes to the courts to see and observe the court proceedings. In most cases the litigants, their relatives and the people who have some interest are the audiences of courts proceedings. The general public relies on the media for information about the activities of courts (Buttler and Rodrick, 1999: 129).

Public hearings provide an opportunity for the media to watch and scrutinise the functions of the judiciary. By reporting the activities of courts the media play a crucial role in shaping public understanding of the courts, which in turn has a great impact on public confidence in the judiciary (Doyle, 1997: 42). Consequently, by utilising the media the judiciary can discharge its responsibility for promoting public understanding of the courts. This is because the media acts as a substitute for the general public and contributes to give substance to the principle of public hearings. In this age of technology court proceedings can be truly public if the judiciary provides sufficient opportunities for the media to play its role effectively. Although the media generally select the information that carries news value, and in some cases, the media may not have resources to monitor all judicial proceedings, enough opportunities should be provided so that the media can use its available resources (Buttler and Rodrick, 1999: 129).

In modern societies it is widely recognised that media scrutiny contributes to and promotes public acceptance of judicial decisions, objectives of judicial accountability and a requirement to promote public support for judicial independence.[40]

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[40] The issues of the media scrutiny of the judiciary are extensively discussed in Chapter Seven.

1.5.2 Reasons for Judicial Decisions

Judges are under an obligation to give full reasons for their judicial decisions and to state them publicly. The obligation to give reasons for judicial decisions is a requirement of good decision-making. It promotes public acceptance of judicial decisions (Gleeson, 1994: 168).

The giving of reasons for judgement is necessary for the satisfaction of the parties of their grievances. It helps the parties to appraise the decisions of judges and to assess whether there is any ground for an appeal. It may alleviate the grievances of the defeated party of a case (Campbell and Lee, 2001: 226). In *Beale v GIO* (1997)[41] the New South Wales Court of Appeal observed, '[t]he provision of reasons has an educative effect: it exposes the trial judge or magistrate to review and criticism and it facilitates and encourages consistency in decisions'.

In fact, the practice of giving reasons for judicial decisions can significantly enhance public confidence in the justice system (Shetreet, 1986: 39). Despite this, in many cases of common law jurisdictions, for example in summary trials, judges decide case without giving sufficient reasons for their decisions.

1.5.3 Appellate Process

The appellate process ensures the adjudicative accountability of subordinate courts. Judicial decisions of the subordinate courts are subject to appeal to the superior courts (Nicholson, 1993b: 404; Gleeson, 1994: 168). The appellate process is a means of reviewing judicial performance. The appellate courts may identify and

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[41] 48 NSWLR 430, 442.

correct judicial error made by judges in making judicial decisions (Gleeson, 1979: 343). Therefore, the appellate process encourages good decision-making and public acceptability of judicial decisions. Despite this, the appellate process is not an adequate mechanism of judicial accountability. This is because an appellate court can correct only departures from standards required to the administration of justice. Its jurisdictions are limited to (a) 'ensure that justice is done according to law', (b) 'enunciate general principles of law to be applied' by lower courts and (c) 'ensure that the decisions of those courts are regularly reached in conformity with proper procedural standards' (Mason, 1993: 4). In addition, there are other limitations of the appeal process; for example not every case is appealed. On the other hand, it may be overused or misused by the litigants because of the receptive judges at the appellate level.

Therefore, appeals are effective in the rectification of certain types of judicial errors or miscarriage of justice but cannot provide a complete system of making judges accountable for using judicial power (Handsley, 2001: 192).

1.5.4 Discipline

Discipline of judges is an important form of judicial accountability. In administering justice judges are obliged to maintain high standards of judicial performance and conduct. In the case of failure to maintain the standards judges may be subject to disciplinary action, including suspension or removal from office. Hence, judicial discipline relates to the tenure of judges which is an important aspect of individual independence of judges.

Obviously, judicial discipline is a significant aspect that combines both the conflicting values of judicial independence and judicial accountability. In other words, in the context of disciplining judges there is a great tension between judicial independence and accountability. This tension can be reconciled by a mechanism which ensures that disciplinary proceedings against judges cannot be manipulated to their detriment and that transgressing or incompetent judges are subject to appropriate sanctions. Zemans says, '[a] legitimate mechanism of judicial discipline actually enhances judicial independence because it contributes to the public's willingness to grant authority to the courts' (Zemans, 1999: 635).

Therefore, in ensuring the accountability of judges through judicial discipline disciplinary proceedings should not be conducted in such a manner, as to be detrimental to the ends of judicial independence.[42]

1.5.5 Scrutiny by Lawyers

The performance and conduct of judges may be scrutinised by academic or practising lawyers. This form of scrutiny is crucial to make judges careful about their standards of judicial performance and conduct (Handsley, 2001: 192).

In their professional capacity academic lawyers can evaluate and criticise the performance and conduct of judges. However, in doing so they should ensure that they have an adequate understanding of the practical operation of the justice system (Goldring, 1987: 153-154).

Perhaps scrutiny by practising lawyers is relatively more important. This is because legal practitioners spend most of their time in the courtrooms and observe

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[42] The issues of judicial discipline are discussed in Chapter Six.

the conduct and performance of judges very closely. In addition, they have close contact with litigants and therefore, they are in a position to convey information about the functions of the courts to the public. Therefore, scrutiny of judges by practising lawyers[43] is very significant in checking judicial performance and behaviour and in promoting public understanding of courts and judicial functions (Handsley, 2001: 192). If they are not satisfied with the performance and conduct of judges they may report to the disciplinary authority or Chief Justice. In some cases, they can boycott the court of judges who do not maintain the standards of judicial conduct.[44]

1.6 PUBLIC CONFIDENCE IN THE JUDICIARY

As discussed in section 1.5, the judiciary needs public confidence because of its effective operation as a branch of government in a democratic society. The public has a legitimate interest in the expeditious, efficient and fair administration of justice, which should be free from corruption and improper influence or interference. In addition, the public needs to be assured that judicial functions are discharged in accordance with established principles and procedures (Goldring, 1987: 152; Gleeson, 1998: 13). These are prerequisites to maintaining public confidence in the judiciary, which is essential to the effective operation of the judiciary (Handsley, 2001: 184).

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[43] The role of lawyers in scrutinizing judges is examined in Chapter Eight.

[44] Court boycott is a very common practice in Bangladesh. Some instances of court boycott are stated in Chapters Seven and Eight.

Loss of public confidence in the judiciary creates a situation in which people do not respect the decisions of the courts. This situation would be damaging to the very existence of the judiciary and ultimately could lead to breaches of the peace and break down in the order of the society. It would be extremely detrimental to the effectiveness of the working of the judiciary (Mason, 1997: 7; Alam, 1999: [11]).

It has been mentioned in the preceding sections that public confidence depends on the independence of the judiciary. Now the question is what sorts of guarantees of judicial independence would be needed to gain public confidence. In order to find out the answer to this question the implications for public confidence need to be considered. In fact, public confidence in the judiciary can be maintained by satisfying certain conditions related to some important aspects of the judiciary, such as judicial appointment, the terms and conditions of judicial service and judicial impartiality.

1.6.1 Judicial Appointment

Judicial appointment is an important factor to the fair administration of justice. It has a great impact on public confidence in the judiciary and the independence of judges. Public confidence in the judiciary primarily depends on the standards of justice administered by judges, but the standards of justice mostly depend on the quality of judges (Shetreet, 1987b: 766). Hence, public confidence in the judiciary is very much dependent on the quality of judges. The quality of judges also has a direct impact on judicial independence, which requires *inter alia* an independent attitude in judges. In making judicial appointments due consideration should be paid to the quality of judges that largely depends on the criteria and mechanisms for judicial appointment

(Shetreet, 1976: 46). For the public to have confidence in the judiciary they must be confident in the appointment system. In order to gain this public confidence, judges need to be appointed on the basis of explicit and publicly known criteria, and through a transparent mechanism.[45]

1.6.2 Tenure and Terms of Judicial Service

Public confidence in the judiciary requires that judges are independent in exercising judicial functions, but the independence of judges is said to be dependent in part on the tenure, terms and other conditions of the service of judges. The tenure of judges and the terms and conditions of their service should be secure to ensure that they may exercise judicial functions without 'fear or favour, affection or ill-will' (Malleson, 1997: 660).

If the tenure of judges, the terms, and other conditions of their service were left to the exclusive discretion of the executive government, the judges would not be able to perform judicial functions without fear or favour. Under these circumstances public confidence in the justice system would be seriously undermined. Therefore, the conditions of judicial transfer, remuneration and pension etc should assure the judges that they are independent of the executive government (Campbell and Lee, 2001: 272). In addition, the tenure of judges should be guaranteed until a mandatory retirement age (Shetreet and Deschênes, 1985: 598-599).

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[45] The values of the criteria and mechanisms for judicial appointments are discussed in Chapter Four.

All these conditions of the service of a judge are essential to assure that judges are independent in exercising judicial functions.[46] This assurance or guarantee of independence effectively enhances public confidence in the judiciary.

1.6.3 Judicial Impartiality

Judicial impartiality is perhaps the most substantial factor in maintaining public confidence in the judiciary. Impartiality is necessary for public acceptance of judicial decisions, a precondition of public confidence in the judiciary.

The public depends on the judiciary to protect them from arbitrary use of governmental power and to determine legal disputes impartially (Malcolm, 1998: [8]). Impartiality in making judicial decisions is the sum and substance of the administration of justice. It is the basic characteristic desirable in judges to deal equally with 'all parties to a dispute, and not to favour any, but to apply the law equally and fairly to all' (Walker, 1980: 601). Judicial impartiality means 'not merely an absence of personal bias or prejudice in the judge but also the exclusion of 'irrelevant' considerations such as his [or her] political or religious views' (Griffith, 1997: 290). This definition of judicial impartiality indicates a close link to the appointment and tenure of judges and other terms and conditions of their service. It has been discussed in section 1.3.1 that the appointment, tenure and other terms and conditions of judicial service are important factors to ensure personal independence

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[46] The issues of the tenure of judges including changes of tenure and other terms and conditions of service and part-time and temporary judges are discussed in Chapter Five.

of judges. It has also been mentioned that personal independence of judges is very significant to exercise judicial powers without fear or favour. Hence, personal independence is an important guarantee of judicial impartiality.

In fact, there are two difficulties in ensuring judicial impartiality. Firstly, judges may be impartial but may not be insulated from powerful political and social actors. Consequently, a judge may be inclined to act impartially, but pay a high personal price in attempting to act objectively when dealing with cases of powerful political and social actors (Larkins, 1996: 612). Secondly, a judge may be impartial but have 'no scope of authority with which to challenge the legality of certain agents' actions'. Therefore, insulation from powerful political and social actors and the scope of authority are important factors in maintaining judicial impartiality (Larkins, 1996: 612).

In order to maintain judicial impartiality judges should conduct themselves in a manner that assures the disputing parties that their case will be disposed of on merit and not on the basis of any irrelevant considerations or personal predisposition of judges (Gleeson, 1998: [15]). This is because the appearance of impartiality is a fundamental judicial virtue (Devlin, 1979: 4; Parker, 2000: 68-69). It is essential to sustain public confidence in the judiciary and public acceptance of judicial decisions.

1.7 CONCLUSION

An independent judiciary, by impartial application of the law, can ensure the fair administration of justice which is very significant to maintain public confidence in the judiciary. For the existence of the judiciary as an institution it needs public support that can be sustained by public confidence in the administration of justice.

Hence there is close relationship between judicial independence and public confidence in the judiciary. In this context, judicial accountability is another important aspect which strengthens judicial independence and enhances public confidence in the judiciary. Although there is a tension between judicial independence and judicial accountability, the principal object of both the concepts is to maintain public confidence in the judiciary.

Therefore, in order to gain public confidence in the judiciary proper measures should be taken to maintain judicial independence and at the same time, an adequate system of judicial accountability should be ensured. In addition, the mechanisms for judicial accountability should be envisaged in such a way that can ensure the safeguards of judicial independence.

CHAPTER 2

AIMS AND METHODS OF STUDY

2.1 INTRODUCTION

Chapter One provides a conceptual background for the study. In particular it has analysed the concepts of judicial independence and judicial accountability emphasising their links with public confidence in the judiciary. The following chapters develop the argument of the thesis based on the general concepts discussed in Chapter One.

This chapter discusses the aims of the thesis, the research methodology, the treatment of the data and the scope and limitations of the study. Its purposes are to identify the main objectives of the study, to summarise the nature of the research materials and the methods by which the materials are collected and treated in the thesis and to focus on the extent of the topics of the thesis and its limitations.

2.2 AIMS OF STUDY

The main aim of this thesis is to evaluate the existing conditions of judicial independence and judicial accountability in Bangladesh in comparative perspective. In view of the required inquiries this aim is reformulated into some specific objectives. They are:

(1) To review the existing conditions of judicial independence and judicial accountability in Bangladesh;

(2) To analyse and assess the existing measures for ensuring judicial independence and judicial accountability in Bangladesh;

(3) To analyse how judicial independence can be reconciled with judicial accountability in Bangladesh; and

(4) To propose improvements of the conditions of judicial independence and accountability in Bangladesh.

In order to attain these objectives some sorts of standards or benchmarks are necessary to judge the conditions of judicial independence and accountability in Bangladesh. With this end in mind, the thesis aims to discover general principles, policies, mechanisms and examples of best practices concerning judicial independence and accountability. In this regard, the study reviews and analyses the secondary literature, international standards and law and practices of some common law jurisdictions in accordance with the methodology of the research and the ways of treatment of the data discussed in sections 2.3 and 2.4.

2.3 RESEARCH METHODOLOGY

This thesis examines the law and practice relating to judicial independence and judicial accountability in Bangladesh. It evaluates the conditions of judicial independence and accountability in Bangladesh against certain arguments based on secondary literature, international standards, and the law and practices of some common law countries. In order to give complete shape to the thesis, a range of research methods is used:

(1) review of secondary literature and international instruments on judicial independence and accountability;

(2) examination of the constitutional provisions regarding the judiciary in Bangladesh and some other common law countries;

(3) analysis of statutory law and case law relating to judicial independence and accountability of Bangladesh and some other common law jurisdictions ;

(4) review of relevant public records, government notifications, available statistical data and media reports;

(5) case studies of specific incidents relating to the judiciary in Bangladesh; and

(6) survey on media reporting on the judiciary in Bangladesh during a specific period.

Discussion of the conceptual issues in Chapter One is based on the secondary literature including books, journals and electronic materials, and constitutional law, statutory law and case law of different common law countries. It also draws on the provisions of some international instruments which are related to judicial independence and accountability. They are: *Universal Declaration of Human Rights* 1948, *International Covenant on Civil and Political Rights* 1966, *Universal Declaration on the Independence of Justice* [*Montreal Declaration*] 1983, *United Nations Basic Principles on the Independence of the Judiciary* [*UN Basic Principles*] 1985, *Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region* [*Beijing Statement*] 1995, and *International Bar Association Code of Minimum Standards of Judicial Independence* [*IBA Code*] 1982.

All these sources of materials are also used in the substantive chapters, although the substantive chapters concentrate on three principal international instruments which are specifically concerned with the independence and accountability of judges. They are the *Montreal Declaration* 1983, the *UN Basic Principles* 1985 and the

Beijing Statement 1995. Although the *IBA Code* 1982[1] is also concerned with judicial independence and accountability, it is not reviewed in the substantive chapters because the main provisions of this Code are incorporated in the Montreal Declaration (Shetreet and Deschênes, 1985: 396).

The *Montreal Declaration* 1983, the *UN Principles* 1985, and the *Beijing Statement* 1995 set out some standards which cover all the major aspects of judicial independence and accountability including individual independence of judges, collective independence of the judiciary, and judicial discipline and removal. International standards are intended to ensure protection of judicial independence from all actual or apparent interference. Although these standards have no binding force, they are to be considered when judging the conditions of the judiciary in any country. Therefore, these instruments are considered in appropriate cases of this study.

Not all the three international instruments (*Montreal Declaration* 1983, *UN Basic Principles* 1985 and *Beijing Statement* 1995) are used in every chapter because they do not cover all aspects of this research. When provisions relevant to the issues of the research are available in any international instrument, they are reviewed.

In respect of the law and practice in Bangladesh, the materials are collected from a wide range of sources including the Constitution, statutory law, statutory regulatory orders, official rules and notifications, public records, case law, newspapers and the Internet. Most of the statutory regulatory orders, rules or notifications are collected from published documents including the *Bangladesh Gazette* and *Establishment Manual*. In addition, I collected some materials directly from the Ministry of Law,

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[1] For the text of the *IBA Code* 1982, see Shetreet and Deschênes, 1985: 388-392.

Justice and Parliamentary Affairs and the Supreme Court of Bangladesh by personal contact. For example, the Code of Conduct for judges, Gradation List of judges, notification for appointment of judges and list of superseded judges. Moreover, in order to understand some practices, for example the government's attitude to the incidents of court boycott, I talked with officials of the Ministry of Law, Justice and Parliamentary Affairs.

With a view to identifying the nature of information about the judiciary conveyed by the media in Bangladesh, I conducted a survey from 15 October 2000 to 30 November 2000 during my field trip in Bangladesh. The survey was conducted on reports published by the three national daily newspapers, television and radio.

In Bangladesh, there are some leading daily newspapers which have a wide circulation all over the country. I surveyed the reports published in three popular daily newspapers, the *Daily Star*, the *Dainik Sangbad* and the *Dainik Manavzamin*. The *Daily Star* and the *Dainik Sangbad* are broad-sheet newspapers published in English and Bangla respectively while the *Dainik Manavzamin* is a tabloid newspaper published in Bangla.[2]

There are two television channels in Bangladesh: *Bangladesh Television* (BTV) and *Ekushey Television* (ETV).[3] The BTV is fully controlled by the government of Bangladesh; the Ministry of Information scrutinises all its programs including News Bulletins. The ETV is a private channel newly established in April 2000 and controlled by its own authority that is independent of the government of Bangladesh.

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[2] The web sites of the *Daily Star* and *Dainik Manavzamin* are: <http://www.dailystarnews.com> and <http://www. bangladesh.net/manavzamin>. There is no web site of the *Dainik Sangbad*.

[3] On 29 August 2002, just before submitting this thesis the government stopped the transmission of ETV because of a judgment of the Supreme Court of Bangladesh.

With a view to gathering information about the courts conveyed by television, I surveyed the programs aired by both the BTV and ETV.

In Bangladesh, the single national radio broadcaster is known as *Bangladesh Betar* and there are six radio stations located in Dhaka, Rajshahi, Chittagong, Sylhet, Khulna and Rangpur. The government controls all these stations and they broadcast regional and national programs. Generally the national programs are broadcast simultaneously from all stations and I surveyed only the national programs.

2.4 TREATMENT OF THE DATA

The primary argument formed in Chapter One emphasises that public confidence in the judiciary is the most important requirement for its existence as an institution and judicial independence is a prerequisite to maintaining public confidence. It also emphasises that judicial accountability is a significant factor that can contribute to, erode or enhance public confidence and undermine or strengthen judicial independence. This primary argument is the basis of all substantive chapters of the thesis, from Chapters Four to Eight.

In each substantive chapter there are two basic sections, one related to general perspectives and the other to Bangladesh perspectives. The sections on Bangladesh perspectives evaluate the conditions of judicial independence and accountability in Bangladesh in comparison with the arguments developed in the general perspectives sections.

The arguments of the general perspectives sections are based on the secondary literature, the three international instruments and available case law of common law jurisdictions. In addition, law and practices in various countries of the common law

tradition are discussed in some cases to discover the best practices. Thus the general perspectives section of each substantive chapter identifies some benchmarks and examples which are used to judge the conditions of judicial independence and accountability in Bangladesh.

In each Bangladesh perspectives section the data collected from different sources, as discussed in section 2.3, are analysed and the condition of judicial independence and accountability in Bangladesh are evaluated in comparison with the arguments or benchmarks developed in general perspectives section.

On the basis of the evaluation in the Bangladesh perspectives sections, in the conclusion of each chapter some proposals are made to improve the conditions of judicial independence and accountability in Bangladesh. These are drawn together in Chapter Nine.

In respect of citation in the thesis, it is to be noted that all references from books, journal articles or other articles collected from hard copy or from electronic resources are cited in the text of the thesis inserting the author's surname, publication year and page number or paragraph number. All other sources are cited in footnotes. In referencing electronic materials, in most cases the paragraph number is cited within square brackets. However, in some cases where the paragraph number is not available or identifiable only the date of publication is cited. The Uniform Resource Locator of each electronic source is followed by the date of access.

2.5 SCOPE AND LIMITATIONS OF STUDY

It was seen in sections 1.3 and 1.5 that the concepts of judicial independence and judicial accountability encompass a wide range of elements which may be divided into two categories. The first category involves issues related to individual judges including the appointment, posting, promotion and transfer of judges, tenure and other terms and conditions of judicial service, judicial discipline and other forms of informal scrutiny of judges. The second category involves issues mainly related to court administration including assignment of cases, appointment and control over court staff, maintenance of court buildings and preparation of judicial budgets and allocation of resources.

The principal aim of the thesis is to discuss the issues related to individual judges particularly appointment, tenure, discipline and informal scrutiny of judges by the media and the bar. The issue of promotion is included as an aspect of judicial appointment. The study does not concern itself with issues relating to posting, transfer and other terms and conditions of service, and court administration.

Because this study is concerned with judicial independence and accountability in Bangladesh it is confined to the common law tradition and the principles of the civil law system are not considered in this thesis.

An important limit on the scope of this thesis occurs because it discusses the activities of courts or judges. Sometimes elaborate comments cannot be made because of the law of contempt of court. It is mentioned in Chapter Seven that the law of contempt of court in Bangladesh is vague and uncertain and there is always a risk of liability for contempt of court. Therefore, the thesis carefully avoids any comments about the judiciary which may be the subject to the law of contempt.

It is to be noted that this thesis uses the terms 'judge' to mean both the judges and magistrates exercising judicial functions and 'judiciary' to mean the judicial branch of the government.

2.6 CONCLUSION

Judicial independence and accountability are important features of Bangladesh as a contemporary democratic country. These concepts are matters of ongoing public debate requiring scholarly inquiry into the values of the independence and accountability of judges. There has not been any systematic and comprehensive study by any researcher so far of these aspects of the judiciary in Bangladesh. This thesis is intended to fill this gap in scholarly studies.

It is hoped that this study will make a significant contribution to the concepts of judicial independence and accountability in Bangladesh. It will help the policy makers, legislators, and researchers to know about the problems and prospects of the judiciary. The findings of this thesis are intended to help the government to improve the existing laws relating to judicial administration in Bangladesh.

CHAPTER 3

JUDICIARY IN BANGLADESH

3.1 INTRODUCTION

The People's Republic of Bangladesh emerged as an independent State in 1971. From ancient times Bangladesh was a part of undivided India and it was known as 'Bengal'.[1] In 1935 when a federal form of government was introduced in British India, Bangladesh was included as the 'Province of Bengal'.[2] In 1947, India was partitioned into two independent States, India and Pakistan, and the Province of Bengal was divided into two Provinces known as 'West Bengal' which became a Province of India and 'East Bengal' which became a Province of Pakistan.[3] In 1956, by the first Constitution of Pakistan 'East Bengal' was renamed the 'Province of East Pakistan'.

The rulers of Pakistan were from West Pakistan and they treated East Pakistan as a colony. The people of East Pakistan were discriminated against in many respects, political, economic, cultural and social. Therefore, they started a movement to establish their own rights. By 1966 the whole nation of East Pakistan was united under the leadership of Sheikh Mujibur Rahman, the leader of the *Awami League*. Sheikh Mujibur Rahman announced the *Six Points Formula*[4] which reflected the

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[1] Broadly speaking the term 'Bengal' designates the Bengali-speaking area, but its history is very complex because there is very little recorded history of the land, language and people of this area. However, the most available historical records reveal that in different ancient periods it was called *Vanga* or *Bang*, *Bangla* and then *Bengal*.

[2] *Government of India Act 1935*, s 46.

[3] *Indian Independence Act* 1947, ss 2-3.

[4] As a demand for provincial autonomy the Six Points Formula was first announced by Sheikh Mujibur Rahman on 6 February 1966 at the Convention of the opposition political parties of Pakistan

genuine grievances of the people of East Pakistan (Islam, 1995: 10-11). Subsequently, in the general election of 1970 the *Awami League* led by Sheikh Mujibur Rahman won 288 of 300 seats of the East Pakistan Provincial Assembly and 167 of 313 seats of the Pakistan National Assembly (Rahman, 1997: 247). Obviously, Sheikh Mujibur Rahman had a mandate to be Prime Minister of Pakistan, but Pakistan's rulers did not hand over power; rather they conspired to keep power in their own hands. Then Sheikh Mujibur Rahman led the nation in a non-cooperation movement in East Pakistan.

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held at Lahore. It was then amended and included in the *Awami League's* Manifesto. The original and amended Six Points are available on web site: <http://www.smajumder.freeservers.com/bangladesh111.html> 5 June 2002. The amended Six Points were as follows:

1. The character of the government shall be federal and parliamentary in which the election to the Federal legislature and to the legislatures of the federating units shall be direct and on the basis of universal adult franchise. The representation in the Federal legislature shall be on the basis of population.
1. The Federal government shall be responsible only for defence, foreign affairs, and subject to the conditions provided in (3) below, currency.
1. There shall be two separate currencies mutually or freely convertible in each wing for each region, or in the alternative a single currency subject to the establishment of a federal reserve system in which there will be regional federal banks which shall devise measures to prevent the transfer of resources and flight of capital from one region to another.
1. Fiscal policy shall be the responsibility of the federating units. The Federal Government shall be provided with the requisite revenue resources for meeting the requirements of defence and foreign affairs, which revenue resources would be automatically appropriable by the Federal Government in the manner provided and on the basis of the ratio to be determined in accordance with the procedure laid down in the Constitution. Such constitutional provisions would ensure that the Federal Government's revenue requirements are met consistently with the objective of ensuring control over the fiscal policy by the governments of the federating units.
1. Constitutional provisions shall be made to enable separate accounts to be maintained of the foreign exchange earnings of each of the federating units, under the control of the respective governments of the federating units. The foreign exchange requirement of the Federal Government shall be met by the governments of the federating units on the basis of a ratio to be determined in accordance with the procedure laid down in the Constitution. The regional governments shall have power under the Constitution to negotiate foreign trade and aid within the framework of the foreign policy of the country, which shall be the responsibility of the Federal Government.
1. The governments of the federating units shall be empowered to maintain a militia or a paramilitary force in order to contribute effectively towards national security.

Pakistan's rulers started military action with unprecedented brutality on the night of 25 March 1971; Bangladesh was declared an independent state on 26 March 1971 and the people of Bangladesh started to fight against Pakistan. After a war of about nine months, Pakistan's army surrendered on 16 December 1971 and Bangladesh became a sovereign and independent nation.

The concepts of judicial independence and accountability in Bangladesh evolved through a long and gradual process, their foundations deeply rooted in the past. An early idea of judicial independence is to be found in ancient Hindu judicial culture.[5] During this period justice was administered in accordance with the law books which contained mainly religious instructions and emphasised impartiality in judges. In fact, the concept of judicial independence was satisfied mainly by deciding cases 'without consideration of personal gain or prejudice or any kind of bias' (Kulshreshtha, 1989: 5, 9-10). The idea of the separation of judicial powers from the executive powers was not prevalent.

During the Muslim period in Bengal the administration of justice was based mainly on the Islamic concept of judicial administration imported from Arabia (Jain, 1970: 1).[6] The Islamic system of judicial administration established in the 7th Century recognises the independence of the judicial branch of the state. The judges as the deputies of God execute His laws, and the executive government has no authority over them (Al-Buraey, 1997: 151). By envisaging the possibility of disputes arising between the ruler and the ruled the *Holy Qur'an* declares that both the parties are

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[5] The Hindu period begins towards the end of the 3rd Century before the Christian era. See section 3.2.1 below for an extensive discussion on the judicial system during the Hindu period.

[6] The Muslim period in Bangladesh begins with the first major invasion by Muslims in the 10th Century. For the details of the judicial system during the Muslim period, see section 3.2.2.

subject to the ordinances of Islamic law (Qur'an, 4: 59). The *Qur'an* indicates that in discharging judicial functions judges are authorised to disagree with their leaders or the executive authority (Tan, 1997: 307). The *Qur'an* says:

> O ye who believe! Stand out firmly for justice, as witnesses to Allah, even as against yourselves, or your parents, or your kin, and whether it be (against) rich or poor: for Allah can best protect both. Follow not the lusts (of your hearts), lest ye swerve, and if ye distort (justice) or decline to do justice, verily Allah is well acquainted with all that ye do (Qur'an, 4: 135).

The Islamic idea of judicial independence went beyond theory into practice during the reign of the Prophet Muhammad (peace be upon him) and his successors. As the head of the Islamic State the Prophet (peace be upon him) was the supreme judge responsible for interpretation of the revelations in the *Qur'an* to meet the particular problems as and when they arose (Pearl, 1987: 3). Moreover, he appointed a *qazi* or judge to each province. The task of the judge was to dispense justice. In this he was independent of the governor, and reported directly to the Prophet (peace be upon him) (Al-Buraey, 1990: 244-245). After the death of the Prophet Muhammad (peace be upon him) this system was followed by the Caliphs of Islam and other Muslim rulers. Henceforth judges were responsible to the Caliphs or rulers in the place of the Prophet.

The Islamic system of judicial administration does not emphasise the separation of judicial functions from the executive government. Kumo says:

> Since sovereignty belongs to Allah alone the leader of the community must lead the community in accordance with the shari'a and his leadership is all-embracing from leading the prayers down to administering the social services. This means that the leader is responsible for both the administrative and the judicial functions, and therefore the doctrine of separation of powers does not apply (Kumo, 1978: 102).

In the early Islamic governments the leader or ruler was appointed by 'popular will' and held his office 'during good behaviour' as a trust. As the first Caliph Hazrat Abu Bakar in his inaugural address after his election said:

> [I]f I go along the right path, help me; if I go astray, put me right; the weaker amongst you is stronger in my eyes and I shall by the grace of Allah, see that he secures his rights. And the aggressive amongst you is the weaker in my eyes and I shall take away what is not his by right. ... So long as I obey Allah and [H]is Messenger follow me and if I deviate from the way of Allah and [H]is Messenger I have no right to your allegiance (Quoted in Kumo, 1978: 102).

Under the Islamic system the judicial office belongs to the ruler and he may appoint judges as his deputies who hold office during the pleasure of the ruler (Kumo, 1978: 104). The idea of judicial independence in the Islamic system is confined to independence in the decision-making process only. All other aspects of judicial independence, security of judicial terms and tenure, and administrative and financial independence, are ignored in the Islamic system, so the concept of judicial independence in Islam is not exhaustive in its modern sense. The modern concept of judicial independence emphasises that in order to ensure the impartial administration of justice judges must have security of tenure and other terms and conditions of service. In addition, they should be provided with adequate resources required in the exercise of judicial functions.

On the establishment of Muslim rule in Bengal the rulers widely accepted the Islamic concept of judicial administration. They followed the Islamic model of judicial administration established by the Abbásid Caliphs of Iraq, the Umayyád Caliphs of Spain and the Fátimide Caliphs of Egypt (Husain, 1934: 10).

During the British period, which begins with the consolidation of the British power in the middle of the 18th Century, British rulers gradually changed the judicial system in Bengal. Consequently, the contemporary concept of judicial independence

in Bangladesh stems from the Western concept.[7] However, the traditional concept of executive control over the judiciary existing in the early historical periods continues to compete for acceptance with Western notions of judicial independence. This Chapter seeks to identify the major issues of this competition between the older and Western concepts of judicial independence and accountability in Bangladesh.

The main purposes of this chapter are to identify the links between the history of the judicial system and the concepts of judicial independence and accountability in Bangladesh, to give an outline of the current judicial system, and to identify the major themes of the study. Section 3.2 of this chapter discusses the history of the judiciary in Bangladesh while section 3.3 concentrates on the current judicial system. Section 3.4 discusses the role and vulnerabilities of the judiciary.

3.2 HISTORY OF JUDICIARY IN BANGLADESH

As mentioned above, from 1947 to 1971 Bangladesh was a Province of Pakistan. It was a part of the British Indian Empire until 14 August 1947, when the Sub-continent was partitioned into two independent and sovereign States, India and Pakistan. Before the British period there were the Hindu period and the Muslim period, and each of these early periods had a distinctive judicial system of its own (Jain, 1990: 1). Hence, the judicial system in Bangladesh has not grown over night or in any particular period of history; its roots go back to the distant past (Huda, 1997: 740). To understand the conditions of judicial independence and accountability in Bangladesh it is necessary to understand some of this history of the evolution of the

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[7] The development of judicial administration in Bangladesh during the British period is discussed in section 3.2.3.

judiciary. This section addresses the evolution of the judiciary during four periods, viz Hindu, Muslim, British, and Pakistan periods with special reference to the condition of judicial independence and accountability.

3.2.1 Hindu Period

In ancient times, Bengal was ruled by Hindu rulers in a period known as the Hindu period, beginning towards the end of the 3rd Century before the Christian era (Talukdar, 1994:17). During the Hindu period the King was the supreme authority of the State and was regarded as the source of justice. In the discharge of his judicial functions the King was assisted by *Brahmans*[8], the Chief Justice (*Pradvivaka*) and other judges, ministers and learned men[9] (Kulshreshtha, 1989: 5; Batra, 1989: 541). The King's Court was the highest court of appeal, as well as having original jurisdiction over serious crimes against the State. Below the King's Court was the Court of the Chief Justice in which other puisne judges were appointed to assist the Chief Justice (Kulshreshtha, 1989: 5).

In appointing the Chief Justice and other judges, caste considerations played an important role. Castes were the social groups comprised solely of persons born into the groups. The whole society was divided into four main castes, namely, *Brahmans*, *Kshatriyas*, *Vaisyas* and *Sudras* (Kulshreshtha, 1989: 2). The *Brahmans* were considered to have priority for appointment as Chief Justice or puisne judges. The *Kshatriyas* and *Vaisyas* were in order of next preference, but no person belonging to

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[8] *Brahmans* were people learned in the law and religious textbooks.

[9] They were elders of the society and representatives of the trading community.

the *Sudras* was appointed as a judge. Moreover, in no case was a woman appointed a judge (Kulshreshtha, 1989: 9).

In towns and districts government officers presided over the King's courts, administering justice under the authority of the King (Kulshreshtha, 1989: 6). They were entrusted with judicial and administrative functions, but in exercising judicial functions they were assisted by two magistrates (Basham, 1954: 116).

At village level, justice was dispensed by the local village council known as the *Kulani*. It consisted of a board of five or more elders of the locality. In each village a local headman, who was the leader of the village, acted as the mediator in government matters between the villagers and the government. He was also a member of the village council and maintained the links between the village council and the government (Kulshreshtha, 1989: 5-6).

During the Hindu period the administration of justice was regarded not merely as a matter of public order but as a sacred and religious duty. The King, as the supreme authority of justice, was responsible for impartial and speedy justice. He performed this duty personally and through government servants or judges. The religious texts declare that by ensuring the proper administration of justice the King will obtain not only the goodwill of his subjects but also heaven. By miscarriage of justice, on the other hand, the King will lose the goodwill of his subjects and be punished for sin by God in the next life. A similar declaration was also applicable to the King's judge (Varadachariar, 1946: 122; Basham, 1954: 115). Accordingly, judges were to be impartial in deciding cases, and the King was forbidden to interfere with the judiciary in exercising judicial functions (Platto, 1991: 23; Manu Smriti, VIII/15 and Shukra Neetisar 5/157 cited in Huda, 1997: 742).

However, as the judiciary was headed by the King himself and he was free to make any changes in the structure of the courts, the independence of judges was not beyond question. Judges were appointed by the King and the tenure of their office depended entirely on the King's pleasure. Therefore, it is difficult to determine the degree of freedom enjoyed by judges in the exercise of their judicial functions, although it is likely that judges were more accountable to the King than to the public (Sharma, 1989: 12). Next to the King, the Chief Justice was responsible for justice, but he was an official who combined judicial and administrative functions (Basham, 1954: 116). The subordinate courts were presided over by government servants. Therefore, technically all judicial institutions were under the exclusive control of the King who was also the supreme executive authority of the State. However, day to day control was in the Chief Justice and the government.

3.2.2 Muslim Period

The Muslim period began with the conquest of India by Muslim invaders. The period of conquest commenced in the year 712 when Muhammad Bin Qasim, the famous Arab general, defeated King Dahir and conquered Sindh and Multan.[10] From 991 successive invasions began with incursions from different Muslim generals. These continued until the permanent conquest of India by Muhammad Ghori in 1206.[11]

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[10] After conquering the Provinces, Muhammad Bin Qasim did not establish any Muslim government. He entrusted the internal administration to the Indians who held important positions during the reign of King Dahir. He merely appointed a Muslim Governor and left some Muslim soldiers under the governor and the administrative and judicial functions of the conquered Provinces were carried out by Hindu officials in accordance with their own laws (Husain, 1934: 17-18).

[11] During this period, Sultan Mahmud of Ghazni, a Muslim of Turkish race, led a series of raids on north-west India, but he made no attempt to establish any stable government or a dynasty (Husain, 1934: 18-19; Raj and Terry 1977: 92). In 1192 Afghan ruler Muhammad Ghori, defeated the Hindu King Prithvi Raj and occupied Delhi. He established a Muslim Sultanate at Delhi conquering most of northern India (Kulshreshtha, 1989: 16). Thereafter, the Muslim rulers gradually conquered most of India and established a settled Muslim government in India from 1206.

From 1206 to 1526 India was ruled by Muslim rulers known as the Sultans of Delhi. In 1526 Zahir-ud-din Muhammad Babur, the King of Kabul, defeated Sultan Ibrahim Lodi and captured Delhi. He founded the Mughal Empire in India, and the Sultanate period came to an end (Kulshreshtha, 1989: 17). However, the rule of the Sultans in Bengal continued until 1529 (Majumdar, Raychaudhuri & Datta, 1967: 341).

The Mughal period lasted for nearly two centuries until British rulers took over in the middle of the 18th Century. However, the Mughal Emperor Humayun lost his Kingdom to Sultan Sher Shah in 1540, and regained it in 1555. Therefore, from 1540 to 1555, the Mughal Empire remained in abeyance (Kulshreshtha, 1989: 22).

For convenience of discussion of the Muslim period the study is divided into two separate periods: the Sultanate of Delhi and the Mughal period.

3.2.2.1 The Sultanate of Delhi

During the Sultanate period the judicial system was set up on the basis of the administrative divisions of the Kingdom.[12] A systematic classification and gradation of the courts existed in the Capital, Provinces (*Subah*), Districts (*Sarkar*), *Parganahs* and villages.

(1) Courts in the Capital

The highest court in the Capital was the King's Court, which exercised both original and appellate jurisdiction. It was presided over by the Sultan himself, assisted by two

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[12] The Kingdom was divided into *Subahs* (Provinces). The *Subah* was composed of *Sarkars* (Districts) and each *Sarkar* was further divided into *Parganahs*. A group of villages constituted a *Parganah* (Kulshreshtha, 1989: 18).

legal experts of high reputation known as *Muftis*. There were two other high courts of civil appeal and criminal appeal respectively known as *Diwan-e-Risalat* and *Diwan-e-Mazalim.* In addition, there was a separate Court of Chief Justice. The Chief Justice known as *Qazi-ul-Quzat* was the highest judicial officer next to the Sultan. The *Diwan-e-Risalat* and *Diwan-e-Mazalim* were nominally presided over by the Sultan, but he rarely sat in them, and in his absence the Chief Justice presided over these courts (Kulshreshtha, 1989: 19). Hence, the courts in the Capital were in fact subordinate to the Sultan, that is, the Executive Head of the State.

When Sultan Nasir Uddin (1246-1266)[13] became dissatisfied with the then Chief Justice in 1248, he created a superior judicial post known as the *Sadre Jahan*, which became more powerful than the Chief Justice. The *Sadre Jahan* was the *de facto* head of the judiciary and he occasionally presided over the King's Court. The offices of the *Sadre Jahan* and Chief Justice were amalgamated by Sultan Alauddin Khilji (1296-1316), but Sultan Firoz Shah Tughluq (1351- 1388) again separated them (Kulshreshtha, 1989: 19).

There was another court known as the *Diwan-e-Siyasat* which was to deal with cases relating to rebellion and high treason. The *Diwan-e-Siyasat* was established by Sultan Muhammad bin Tughluq (1325-1351) and continued only during his reign (Kulshreshtha, 1989: 19).

(2) Provincial Courts

In each Province (*Subah*) the *Adalat Nazim-e-Subah* was the highest court. It was presided over by the Governor (*Subehdar or Nazim*) of the Province. The Governor

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[13] Dates within the brackets refer to the period of reign.

was the representative of the Sultan and he exercised original and appellate jurisdiction. In original cases he exercised judicial power as a single judge, but in exercising appellate jurisdiction he sat with the Chief Provincial *Qazi*. Therefore, the executive and judicial powers were combined in the hands of the chief executive of the Province.

Below the *Adalat Nazim-e-Subah* there was the *Adalat Qazi-e-Subah* which was presided over by the Chief Provincial *Qazi*. The Chief Provincial *Qazi* was selected by the Chief Justice or by the *Sadre Jahan* and was appointed by the Sultan. He had original jurisdiction to try civil and criminal cases and appellate jurisdiction to hear appeals from the Courts of District *Qazi*. Appeals from the *Adalat Qazi-e-Subah* were referred to the *Adalat Nazim-e-Subah* in which the Governor sat with the Chief Provincial *Qazi* constituting a bench to hear the appeals (Kulshreshtha, 1989: 20; Hoque, 1998:147). Thus, the *Adalat Qazi-e-Subah* was subordinate to the Governor, that is, the executive government. Moreover, the Chief Provincial *Qazi* was a member of the bench constituted to hear appeals against his own judgments.

In each Province there was another court known as the Court of *Dewan-e-Subah*. It was presided over by the *Dewan* who was a civil officer responsible for treasury in the province. He was empowered to try all cases relating to land revenue (Kulshreshtha, 1989: 20).

(3) District Courts

In each district (*Sarkar*) there were the courts of *Qazi*, *Fauzdar*, *Kotwal, Sadre*, and *Amil*. The Court of the District *Qazi* was authorised to try all original civil and criminal cases. It was also empowered to hear appeals from courts of *Parganah Qazi*, *Kotwal* and Village *Panchayat*. The District *Qazi* was appointed on the

recommendation of the Chief Provincial *Qazi* or directly by the *Sadre Jahan* (Kulshreshtha, 1989: 20-21). Hence, the higher court in the district enjoyed a significant judicial autonomy.

The *Fauzdar* was the Chief Executive and Police Officer of the district and he tried petty criminal cases relating to security and suspected criminal offences. The *Kotwal* of the district was the commanding officer next to the *Fauzdar*. He was empowered to try petty crimes and police cases.

The Court of the *Sadre* was empowered to try cases relating to grants and registration of land. Appeals from this court were filed in the *Sadre-e-Subah*. The Court of the *Amil* was to deal with the cases concerning land revenue and appeals from this court were allowed to the Court of *Dewan-e-Subah* (Kulshreshtha, 1989: 21).

(4) Parganah Courts

At each Parganah there were two courts, *Qazi-e-Parganah* and *Kotwal.* The Court of *Qazi-e-Parganah* exercised original jurisdiction in all civil and criminal cases. It had no appellate jurisdiction. The *Kotwal* was the principal executive officer in the towns and he tried petty criminal cases (Kulshreshtha, 1989: 21).

(5) Village Courts

At the village level, there was a Village Assembly or *Panchayat* for a group of villages. The Assembly was a body of five leading men and it was empowered to look after the executive and judicial affairs of the villages. The Chairman of this assembly was appointed by the *Nazim* (Governor of the province) or *Faujdar* (Chief

Executive of the district). The Village Assembly had jurisdiction to try civil and criminal cases of a 'purely local character' (Kulshreshtha, 1989: 21).

During this period the Sultan was the supreme authority to administer justice, but the power of appointment of judges was not vested solely in him. The head of the judiciary, the *Sadre Jahan* and the Chief Justice were appointed by the Sultan himself, but in appointing the judges or *qazis* of the sub-ordinate courts the Chief Justice or *Sadre Jahan* played an important role in the process of selection. The Sultan appointed the Chief Justice from amongst the most virtuous of the learned men in his Kingdom. Judges were appointed on the basis of their high standard of learning in law. Incompetent and corrupt judges were condemned, degraded or dismissed from their offices (Kulshreshtha, 1989: 21).

3.2.2.2 Mughal Period

During the Mughal period the Emperor was regarded as the source of justice. With a view to administering justice properly the Emperor established a separate department of justice known as the *Mahukma-e-Adalat*. Similar to the Sultanate period a systematic classification and gradation of courts existed all over the empire.

(1) Courts in the Capital

In the capital there were three important courts: the Emperor's Court, the Court of the *Qazi-ul-Quzat* (Chief Justice) and the Court of *Dewan-e-Ala* (Chief Chancellor of Exchequer). The Emperor's Court and the Court of the *Qazi-ul-Quzat* were similar to the King's Court and *Qazi-ul-Quzat*'s Court of the Sultanate period. The Court of the

Dewan-e-Ala was the highest Court of Appeal deciding revenue cases (Kulshreshtha, 1989: 24).

In exercising judicial functions the Emperor was assisted by a *Darogha-e-Adalat* (Superintendent of the Court), a *Mufti* (learned jurist or law-officer), a *Mir Adl* (Chief Civil Judge), the *Mohtasib-e-Mumalik* or the *Chief Mohtasib* (Chief Public Censor), *Qazis* (judges of Canon Law) and the *Qazi-ul-Quzat* (Sarkar, 1972: 71; Kulshreshtha, 1989: 23). The *Qazi-ul-Quzat* was assisted by one or two puisne judges or *Qazis*. In addition, *Darogha-e-Adalat*, *Mufti*, *Mohtasib* and *Mir Adl* were attached to this Court (Kulshreshtha, 1989: 23).

It appears that to some extent in using judicial powers the Chief Justice enjoyed judicial autonomy. However, the Chief Justice and also the *Dewan-e-Ala* were appointed by the Emperor (Jain, 1970: 86). Therefore, they were not completely independent of the executive.

(2) Provincial Courts

In each Province of the Mughal Empire there were three courts: *Adalat-e-Nazim-e-Subah*, *Adalat-e-Qazi-e-Subah* and *Adalat-e-Dewan-e-Subah*. The composition, powers and jurisdiction of these courts were very similar to those of the provincial courts of the Sultanate period.

(3) District Courts

In each District (*Sarkar*) there were four courts presided over by the *Fauzdar*, *Qazi*, *Kotwal* and *Amalguzar*. All these courts were similar to the courts of *Fauzdar*, *Qazi*, *Kotwal* and *Amil* as existed during the Sultanate period. However, the court of *Sadre* of the Sultanate period was not in existence during the Mughal period.

(4) Paraganah Courts

In each *Parganah*, there were the courts of *Shikdar*, *Qazi* and *Amin*. The *Shikdar* was administrative head of the *Parganah* and he tried purely secular criminal cases. The *Qazi* tried all civil, criminal and religious cases. The *Amin* was empowered to try revenue cases (Jain, 1970: 83).

(5) Courts in Villages

In smaller villages, Village *Panchayats* (Council) were authorised to try all petty civil and criminal cases. The *Pancahyats* consisted of five persons elected by the villagers. Generally, the Village-Headman of each village was the President of the *Panchayat* (Kulshreshtha, 1989: 25). The larger villages were classified as *Qasbas* and for the administration of justice a *qazi* was appointed in each *Qasbas*. However, a village *qazi* could not try serious cases (Jain, 1970: 83).

Discussion of the Muslim period (Sultanate of Delhi and Mughal period) reveals that the head of the State, Sultan or Emperor, was the supreme authority to administer justice. In addition, the principal executive of every administrative unit was empowered to exercise judicial power. However, at all levels of the administration there were full time judges known as *qazi*. The superior *qazis* were authorised to supervise the functions of their subordinate *qazis* (Kulshreshtha, 1989: 21).

Although *qazis* were full time judges, at every level of administration the executive authority was empowered to exercise judicial functions. Therefore, the judiciary was not free from the control of the executive authority and there was a combination of executive and judicial functions in one hand. In the later Mughal

period when the Empire began to disintegrate as the provinces assumed independence, the judicial system in Bangladesh had practically broken down. In many cases, the office of the *qazis* remained unfilled or not filled on the basis of merit, but as a matter of official favour or mutual understanding (Jain, 1990: 60). In some cases, *qazis'* offices became hereditary and could even be leased to the highest bidder. Thus the *qazis'* offices were often occupied by unscrupulous people who were not paid any salaries, and justice could be purchased by payment of money (Jain, 1990: 32).

3.2.3 British Period

The British period in Bengal began with the consolidation of power of the East India Company from 1757. The East India Company, a chartered commercial British Corporation, came to India in 1601. In the year 1650-1 the Company first established a factory in Bengal. In 1717 the Mughal Emperor granted the Company the privilege of free trade for its goods in Bengal (Smith, 1981: 465).

Bengal was under a *Subehdar* known as *Nawab* who nominally acknowledged the authority of the Mughal Emperor, but was to all intents and purposes an independent King (Majumdar, Raychaudhuri & Datta, 1967: 647). In fact, from 1719 Bengal enjoyed substantial local autonomy (Smith, 1981: 466).

In 1756, a dispute between the *Nawab* of Bengal and the East India Company arose over trade abuses and the erection of fortifications by the Company around the Calcutta settlement (Raj and Terry, 1977: 117). In 1757 the famous Battle of Plassey was fought in which the Company defeated the *Nawab*. Thus, the real power of the *Nawab* of Bengal passed into the hands of the Company, but they did not annex the

territory immediately (Jain, 1990: 55). Instead, they appointed Mir Jafar as new *Nawab* and obtained all the privileges they needed.

In 1760, Mir Jafar was replaced by Mir Kashim who tried to be an independent ruler. This led to the outbreak of war between the Company and Mir Kasim. After suffering a number of defeats, Mir Kasim joined the forces of Mughal Emperor and the *Nawab* of Oudh. The three allies were defeated by the Company at Buxar in 1764 (Raj and Terry, 1977: 118).

Meanwhile in 1763, the Company once more proclaimed Mir Jafar as the *Nawab*, and in 1765 he was succeeded by his son Najam-ud-daula. With each change in the *Nawabship*, the power and influence of the Company increased in Bengal and the *Nawab* was merely a figurehead, a puppet. After the Battle of Buxar in 1764, the power and influence of the Company in Bengal took a significant change. In 1765, the Mughal Emperor granted to the Company the *Dewani* of Bengal, Bihar and Orissa (Jain, 1990: 55-56). The Company now as *Dewan* became responsible for collection of land revenue and administration of civil justice (Jain, 1990: 570).

Although the administration of criminal justice and maintaining the military was left with the *Nawab*, he had lost all real power (Kulshreshtha, 1989: 81). Ultimately, under an agreement with the Company, the *Nawab* surrendered his right to maintain the army. Thus a system of dual government was introduced in Bengal and it reduced the authority of the *Nawab* (Jain, 1990: 57). In 1772, the dual government came to an end and the Company began to administer justice directly (Raj and Terry, 1977: 118).

Bengal was ruled by the East India Company, operating with 'ever-increasing interference' from the British Crown until in 1858 when the British Crown took power into its own hand (Edwardes, 1976: 15). During this period the judiciary in

Bengal was gradually changed under different schemes introduced by the British rulers. The main features of the important schemes of regulating the administration of justice are discussed briefly below.

3.2.3.1 Hastings' Plan of 1772

The East India Company actually usurped all the powers of administration in Bengal from 1765, but it did not bring any material change in the judiciary before 1772. The first step to regulate the administration of justice was taken by Warren Hastings, the then Governor of Bengal, under a judicial plan known as the 'Warren Hastings' plan of 1772'.[14] It introduced a scheme of judicial administration along with a system of revenue collection. Under the scheme, two superior courts and three classes of lower courts were established in Bengal.

(1) Superior Courts

Two superior courts, the *Sadar Dewani Adalat* and the *Sadar Nizamat Adalat* were established at Calcutta[15]. The *Sadar Dewani Adalat* consisted of the Governor and the members of his Council and thus, it was entirely under the executive government. It was empowered to hear appeals from all *Mofussil Dewani Adalats* (Jain, 1990: 61; Hamid, 1991: 47).

The *Sadar Nizamat Adalat* was presided over by a native judge known as the *Daroga-i-Adalat* who was assisted by a Chief *Qazi*, a Chief *mufti* and three *moulvies*.

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[14] Warren Hastings was the Governor in Bengal from April 1772 to October 1774. After subsequent changes in the constitution of the East Indian Company by the Regulating Act 1773, Warren Hastings was appointed Governor General in Bengal, holding office from 20 October 1774 to 8 February 1785.

[15] At this time Calcutta was spelt 'Kolkata' and it was the Capital of West Bengal, a Province of India.

It was authorised to review the proceedings of the *Mofussil Fouzdari Adalats* and to approve sentences of death and forfeiture of property. In order to ensure corruption-free and impartial justice the Governor and the Council exercised general supervision over the proceeding of the *Sadar Nizamat Adalat* (Jain, 1990: 61-62; Hamid, 1991: 47). Thus the court was under the control of the executive government.

(2) Lower Courts

The lowest court was the *Small Cause Adalats* and the Head Farmers of *Parganahs* were authorised to act as judges in these courts. Petty disputes up to ten rupees could be decided finally by these courts. The next higher courts known as the *Mofussil Dewani Adalat* and *Mofussil Fouzdari Adalat* were established in each district. The *Mofussil Dewani Adalat* was authorised to decide all civil cases and was presided over by an English officer known as a 'Collector'.[16] The Collector was actually an administrative officer appointed in each district and he was primarily responsible for the collection of land revenue (Batra, 1989: 547; Jain, 1990: 61). Consequently, the *Mofussil Dewani Adalat* was under the exclusive control of the executive.

The *Mofussil Fouzdari Adalat* was authorised to try all kinds of criminal cases. It consisted of a *qazi* and a *mufti* and they were to determine cases with the help of two *moulvies*. The duty of the *moulvies* was to expound the Muslim law of crimes (Jain, 1990: 61). The Collector of the district was authorised to attend the proceedings of the court. His duty was to see 'whether the necessary witnesses and

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[16] In all cases relating to inheritance, marriage, caste and other religious usages and institutions, the personal laws of Hindus and Muslims were applied. In applying the Hindu law and the Muslim law, the Collector was assisted by native law officers known as *pundits* and *qazis* respectively (Jain, 1990: 61).

evidences were summoned and examined; whether due weight was attached to their testimony; and whether the decisions passed were fair and impartial' (Patra, 1962: 53). This supervision of the Collector made the *Mofussil Fouzdari Adalat* subordinate to the executive.

The scheme of 1772 was designed to provide a semblance of impartial justice to the people, and was perhaps the only feasible system at the time (Jain, 1990: 62). However, the judiciary was controlled by the executive government. It is apparent that the civil judiciary was under the exclusive control of the executive authority of the Company government. The administration of criminal justice was left to the judicial officers, but the executive government exercised a power of general supervision over the functions of the criminal courts.

Another conspicuous feature was the combination of executive and judicial powers in the Collector of each district. The Collector was the administrator, revenue collector, civil judge and supervisor of the criminal courts. As the revenue collector he had an interest in revenue cases, but as a judge of the civil court he was empowered to try such cases. Thus, the Collector was not only an administrator-cum-judge; he was also a judge in his own cause (Jain. 1990: 64).

3.2.3.2 New Plan of 1774

On implementation of the judicial plan of 1772 its major defect, the concentration of excessive power in the hands of the Collector as administrator, revenue collector, civil judge and supervisor of the criminal judiciary, appeared very soon. Consequently, organisational changes were made in a new plan of 1774. Under the 1774 plan the Collector was recalled from the district and a native officer known as

the *Naib-diwan* or *Amil* was appointed in place of the Collector (Dubey, 1968: 95-96). As the *Naib* or *Amil* was empowered to collect revenue and to act as judge in the *Mofussil Dewani Adalat*, the combination of revenue collection and civil judicial power remained in the hands of the *Naib*, who was thus still a judge in his own cause (Jain, 1990: 65).

In each Division, a Provincial Council consisting of four or five English covenanted servants of the Company was appointed to supervise the collection of revenue and to hear appeals from the decisions of the *Mofussil Dewani Adalats.*[17] Its decision in all cases over the value of 1000 rupees was subject to further appeal to the *Sadar Dewani Adalat.* The Provincial Council also had original jurisdiction to try all civil cases arising within the town where it had its seat. However, in practice the Provincial Council devoted most of its time to revenue work and treated administration of justice as of secondary importance. In fact, the judges of the Councils, being ignorant of native laws and custom, left the function of deciding cases to native law officers *qazis* and *Pundits*, but the judicial functions of the Councils were still under the control of the executive (Jain, 1990: 65, 118; Mittal, 1998: 54).

In 1775 a new office of *Naib Nazeem* was created to control the *Sadar Nizamat Adalat.* A native officer was appointed to this office, authorised to act on behalf of the *Nawab.* Thus the entire criminal judiciary was transferred to the supervision of the *Nawab* from the control of the Governor-General-in-Council (Kulshreshtha, 1989: 89).

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[17] Under the *New Plan of* 1774 Bangladesh was divided into six Divisions and each Division was comprised of several district.

3.2.3.3 Establishment of the Supreme Court at Calcutta

With the objects of reforming the constitution of the Company and the Company's government in India, and of providing remedies against illegalities and oppressions committed by Company servants, the British Parliament passed the *Regulating Act* 1773. Section 13 of the Act empowered the British Crown to establish by Charter a Supreme Court of Judicature at Calcutta to exercise full power and authority in all civil, criminal, admiralty and ecclesiastical jurisdictions. Accordingly, a Supreme Court was established at Calcutta by issuing a Charter in 1774. Under cl 3 of the Charter the Supreme Court comprised a Chief Justice and three puisne judges, all barristers from England or Ireland of not less than five years standing and appointed by the Crown.

According to s 14 of the *Regulating Act* 1773, the jurisdiction of the Supreme Court was extended to all British subjects residing in Bengal, Bihar and Orrisa and to all persons employed in the service of the Company or employed by any of His Majesty's subjects. However, the terms 'British subjects' and 'His Majesty's subjects' were not defined in the Act or in the Charter of the Supreme Court. Consequently, there was a great deal of confusion about the jurisdiction of the Supreme Court. Despite this, the Supreme Court claimed, and actually exercised jurisdiction over all persons in Calcutta (Majumder, Raychaudhuri & Datta, 1967: 789).

Before the establishment of the Supreme Court, the executive government had exclusive control over the judiciary. The *Regulating Act* 1773 changed this situation and authorised the Supreme Court to control the executive by specifically giving jurisdiction over His Majesty's subjects and persons employed in the service of the Company. The Supreme Court claimed its right to interfere in the judicial capacity of

the Company's servants in respect of illegal acts committed by them in collecting revenue (Kulshreshtha, 1989: 113; Jain, 1990: 75).

Thus it was a significant change in the old policy and pattern of executive-judiciary relationship and the Supreme Court was made quite independent of the executive government (Chowdhury, 1990: 3). This independence of the Supreme Court was not liked by the Governor General and Council and they tried to resist the Court in exercising its jurisdiction. Consequently, the executive government and Supreme Court came into serious conflict; for example the conflict in two important cases of the Supreme Court briefly discussed below.

***(1) The Case of Kamaluddin* (1775)**[18]

The Provincial Council of Calcutta imprisoned Kamaluddin, a salt farmer, for arrears of revenue. On a writ of *Habeas Corpus,* the Supreme Court ordered his release on bail. The Governor-General's Council resented this action of the Supreme Court and stated that the court was 'not empowered to take cognizance of any matter or cause dependent on or belonging to the revenue'. The Council was of the opinion that as Dewan of Bengal it had exclusive jurisdiction in revenue matters. It ordered the Provincial Council to re-arrest Kamaluddin and directed it to pay 'no attention to any order of the Supreme Court or any of the judges in matters which solely concern revenue' (Quoted in Kulshreshtha, 1989: 123).

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[18] For more details of the *Case of Kamaluddin*, see Kulshreshtha, 1989: 122-123.

(2) The Cassijurah Case (1779-1780)[19]

Kashinath Baboo lent a large sum of money to Raja Sundernarain, then *Zamindar* of Cassijurah.[20] The money was unpaid for a long time and Kashinat Baboo failed to recover it through the Board of Revenue. When he sued the *Zamindar* in the Supreme Court, the Court issued a writ for the arrest of the *Zamindar*, but he absconded to avoid arrest. The Collector of Midnapur within whose jurisdiction the *Zamindar* fell, reported the situation to the Governor-General-in-Council stating that the *Zamindar* was being prevented from collecting land revenue and it was causing damage to the revenue. The Governor-General-in-Council issued a notification to all *Zamindars* and landholders that they were subject to Supreme Court only (1) if they were servants of the Company or (2) had voluntarily accepted the court's jurisdiction under a contract with one of His Majesty's subjects. The notification added that if any *Zamindars* or landholders did not fall within any of these categories they were not subject to the Supreme Court and therefore, they should not pay attention to the process of the Court. The *Zamindar* of Cassijurah was specifically advised not to obey the process of the Court and the Collector of Midnapur was directed to refuse any assistance to the Sheriff of the Court in executing the writ. Accordingly, the Collector did not provide any assistance to the Sheriff's party and the writ remained unexecuted.

Thereafter the Supreme Court issued another writ of confiscation to seize the property of the *Zamindar* with a view to compelling him to appear before the Court. In order to execute the writ the Court's Sheriff marched to Cassijurah with a force of

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[19] For more details of the case see Mittal, 1998: 56-58; Jain, 1990: 93-96; Kulshreshtha, 1989: 128-131. This discussion of the case is extracted from these sources.

[20] A *Zamindar* was the estate-holder with powers to collect revenues. He was appointed for specific tracts, and required to remit specified sums to the government treasury.

60-70 men and they imprisoned the *Zamindar*. Meanwhile the Governor-General-in-Council directed the Commander of the armed forces near Midnapur to intercept and arrest the Sheriff with his party and to release the *Zamindar*. The Commander sent a force of two companies, which arrested the Sheriff and his party. Later the government released the Sheriff and his party, but directed the armed forces to resist any further writ of the Supreme Court.

When Kashinat Baboo brought another action for trespass against the Governor-General and members of his Council individually, they refused to submit to any process of the Supreme Court for acts done by them in their official capacity. Ultimately the Court was not able to proceed further against these persons.

These two cases demonstrate that the relationship between the executive government and the Supreme Court turned into a serious conflict of power. In fact, from 1774 to 1780 the highest executive and the Supreme Court came into serious conflict. In the circumstances, the British Parliament appointed a select committee to inquire into the administration of justice in Bengal. The Committee submitted its report on the basis of which the *Act of Settlement* 1781 was passed. The Act expressly declares that 'the Governor General and the Council shall not be subject to the jurisdiction of the Supreme Court', 'for or by reason of any act, order, matter counselled, ordered or done by them in their public capacity only and acting as Governor-General and Council'.[21] It further provides that 'the Supreme Court shall not have or exercise any jurisdiction in any matter concerning the revenue or concerning any act or acts ordered or done in the collection thereof according to the

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[21] *Act of Settlement* 1781, s 1.

usage and practice of the country or the regulations of the Governor-General-in-Council'.[22] Thus the jurisdiction of the Supreme Court was curtailed and the executive government was given a free hand and immunity from the Court's jurisdiction in respect of revenue collection.

3.2.3.4 Judicial Reforms from 1780 Onwards

In order to reorganise the existing Provincial Courts the Company Government prepared a new judicial plan with effect from 11 April 1780. One important feature of this plan was the separation of revenue from judicial functions. The judicial power of the Provincial Councils to hold civil courts was removed; they were to confine themselves to revenue collection and revenue cases. A Provincial *Dewani Adalat* (Civil Court) was established in each province. Thus the Provincial Courts became independent of the Provincial Councils and these courts were invested with the exclusive power to administer civil justice (Kulshreshtha, 1989: 90; Jain, 1990: 118-119).

However, there was a major defect in the new plan of April 1780. The revenue cases were excluded from the Provincial *Dewani Adalats*' jurisdiction; these cases were still decided by the Provincial Councils. Therefore, the Provincial Councils were to judge the cases in which the Councils themselves were parties.

In October 1780, the government made an important change. The Governor-General and Council divested themselves of responsibility for the *Sadar Dewani Adalat*, and appointed a Chief Justice as its sole judge (Jain, 1990: 120). The highest court was then separated from the executive authority.

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[22] *Act of Settlement* 1781, s 8.

In 1781, certain provisions made the *Sadar Dewani Adalat* a lively and active institution. These courts were authorised to control and supervise the subordinate courts. Thus, the *Sadar Dewani Adalats* were not only authorised to exercise original and appellate jurisdiction but also to act as a watchdog over the civil judicial system (Jain, 1990: 122). In this year (1781) the *Mofussil Dewani Adalats* were also separated from the revenue authorities.

However, this remarkable separation of the judicial and executive functions was abolished by a further judicial plan of 1787. Under this plan, a collector was again appointed in each district and authorised to exercise judicial and executive functions (Majumdar, Raychaudhuri & Datta, 1967: 790).

In 1790 a significant change was introduced in the highest criminal judicature. The authority of the *Nawab* over the criminal judiciary was abolished. In place of the native officer, the Governor-General-in-Council was authorised to preside over the *Sadar Nizamat Adalat* (Kulshreshtha, 1989: 148-149; Majumdar Raychaudhuri & Datta, 1967: 790). Thus the highest criminal court was vested in the hands of the highest executive authority.

In 1793, the judiciary was again separated from the executive at the district level. The judicial powers of Collectors were taken away and were given to the *Mofussil Dewani Adalats*. The Collector became merely an administrative officer to collect revenue from the districts (Kulshreshtha, 1989: 150). Another important change was introduced by empowering the courts to control the executive machinery. Collectors and all other servants of the government were subject to the court's jurisdiction for their official acts (Kulshreshtha, 1989: 151; Jain, 1990: 140).

In 1801, the *Sadar Dewani Adalat* and *Sadar Nizamat Adalat*, the highest courts, were separated from the executive. These courts were presided over by three judges

appointed by the Governor-General-in-Council; two judges were to be selected from the covenanted civil servants of the Company, but the Chief Justice was to be a member of the Governor-General's Council (Jain, 1990: 165; Mittal, 1998: 96). Therefore, the separation of the highest courts from the executive was not complete. In 1805, this defect was removed by introducing the significant change that the Chief Justice was not to be a member of the Council, but any covenanted civil servant of the Company distinct from the Council could be appointed as the Chief Justice. However, in 1807 again it was laid down that the Chief justice was to be a member of the Governor-General's Council (Jain, 1990: 165-166; Mittal, 1998: 98-99).

In 1821 the executive and judicial functions again combined in the hands of the Collectors at the district level. Collectors were invested with the powers to try criminal cases and those relating to rent and revenue (Jain, 1990: 193-194; Mittal, 1998: 105-106).

In 1829 another change with far-reaching consequences was effected in administrative and judicial machinery. A class of officials called 'Commissioner' was appointed and placed in charge of a division comprising several districts. The Commissioners were entrusted with the power to control the workings of the magistracy, police, collectors and other revenue officers. They were authorised to hear appeals from the magistrates (Kulshreshtha, 1989: 164). Thus the judicial and administrative functions were concentrated in one person.

In the subsequent periods several kinds of experiments were made on judicial administration. The most important changes were made by creating a hierarchy of civil and criminal courts by the *Civil Courts Act* 1887 and *Code of Criminal Procedure* 1898, and by establishing the High Court and Federal Court under the

Indian High Courts Act 1861 and *Government of India Act* 1935.[23] It is to be noted that during the British period In India different rulers ruled over the country. Some of them were of the opinion that for the sake of political security of the British Empire in India and general obedience of the Indian people the evil consequences of the administration of justice should be removed. In this regard, the combination of the revenue and judicial functions was considered one of the most important factors and therefore they attempted to separate these two functions (Patra, 1962: 209). However, other rulers believed that if the judicial functions were left uncontrolled it would amount to abandoning the Supreme power of the state (Kulshreshth, 1989: 167). They treated the judicial power as an important instrument of exercising their right of governing the colonial administration and therefore there was always an experiment of reorganisation of the system of judicial administration. The combination of the executive and judicial functions caused delays in justice and failed to secure the affection of the general public. Consequently, there was a strong opinion against this system among the Indian people who suggested that the two functions should be separated (Patra, 1962: 210).

There was another important factor which caused significant changes including the establishment of the High Court at Calcutta. The Supreme Court of Calcutta, as discussed above, was established as the King's court to exercise jurisdictions in all civil, criminal and ecclesiastical cases against 'British subjects' and 'His Majesty's subjects'. However, the jurisdiction of the Supreme Court was not clearly defined and there was a serious jurisdictional conflict between the Sadar Adalats (*Sadar*

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[23] The *Civil Courts Act* 1887 and *Code of Criminal Procedure* 1890 are still applicable and with some minor changes, the courts introduced by these laws are still working in Bangladesh. A description of these courts is given in section 3.3.2.

Dewani Adalat and *Sadar Nizamat Adalat*) and the Supreme Court (Jain, 1990: 277-282).

In addition, the British subjects residing in the interior area of Bengal could get remedy against a native Indian easily by filing a case in the local Company's courts, the *Dewani Adalats*, but the native Indians had no such remedy against the British subjects who were under the jurisdiction of only the Supreme Court (Hamid, 1991: 94).

In the meantime the people of India were opposed to the British rule because of a wide range of oppression. Then an unsuccessful War of Independence happened in 1857 for the first time in British India. Consequently, the East India Company was dissolved and the government of India was taken by the Crown in 1858. This incident created a sense of responsibility for the administration including the judicial system in the British Government.

In the circumstances the *Indian High Courts Act* 1861 was passed by the British Parliament.[24] Under this Act the most significant changes in judicial administration were introduced in 1862, by establishing the High Court of Judicature at Calcutta. It replaced the Supreme Court and *Sadar Adalats* and combined the jurisdiction of both sets of old courts. The High Court was given original and appellate jurisdiction in all civil, criminal, admiralty, testamentary, intestate and matrimonial matters, and all power or authority to administer justice. The High Court was not barred from

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[24] The *High Court Act* 1861 provided for the establishment of the High Courts replacing the Supreme Courts and the Sadar Adalats in the presidency towns of Calcutta, Bombay and Madras. However, the Act did not create and establish the High Courts by itself. It authorised the Crown to establish the High Courts by issuing Charters. Accordingly, the Charter for the Calcutta High Court was issued on 14 May 1862 and published in Calcutta on 1 July 1862 establishing the High Court from the next day (Jain, 1990: 284).

exercising jurisdiction in revenue matters, which were excluded from the jurisdiction of the former Supreme Court (Jain, 1990: 285).

Under ss 2 and 3 of the *Indian High Courts Act* 1861 the High Court comprised a Chief Justice and other puisne judges. They were appointed by the Crown and held office during the Crown's pleasure. Subsequently, the *Indian High Courts Act* 1911 made some modifications to the *Indian High Courts Act* 1861. It raised the number of judges in each High Court from sixteen to twenty including the Chief Justice and provided for the appointment of additional judges to the High Court by the Governor-General-in-Council for a maximum period of two years.

In 1915, with to a view to 'consolidate and re-enact existing statutes' relating to the Government of India and the Indian High Courts the *Government of India Act* 1915 was passed by the British Parliament. The *Government of India Act* 1915 re-enacted all the provisions of the *Indian High Courts Act* 1861 and the *Indian High Courts Act* 1911 relating to the High Courts in India and repealed these old Acts. The Act of 1915 made a significant change in the original jurisdiction of the High Court. Section 106(2) of the Act debarred the High Court from exercising 'any original jurisdiction in any matter concerning revenue, or concerning any act ordered or done in the collection thereof according to the usage and practice of the country or the law for the time being in force'. In addition, s 110 of the Act granted immunity to the Governor-General and other executive officials[25] from the original jurisdiction of the High Court for anything counselled, ordered or done by them in their official capacity.

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25 Governor, Lieutenant Governor, Chief Commissioner, members of the Executive Council of the Governor General or the Governor or the Lieutenant Governor and Ministers.

In order to regulate the functions of the executive, legislature and judiciary the British Parliament passed the *Government of India Act* 1935 which changed the structure of the Government of British India from a 'Unitary' to a 'Federal' type. The *Government of India Act* 1935 made some important changes to the composition, constitution and working of the High Court. The most important provision related to the tenure of judges. It is to be noted that the security of tenure for English judges was established by the *Act of Settlement* 1701, but in colonial India judges held office during the pleasure of the Crown until 1935.

In respect of tenure of High Court Judges it was provided for the first time that a judge would hold office until the attainment of the age of 60 years, meaning judges were no longer to hold office during the pleasure of the Crown. The Crown could remove a judge only on the ground of misbehaviour or infirmity of mind or body if the Privy Council on reference made by the Crown so recommended.[26]

In addition, under s 200(1) of the *Government of India Act* 1935 a Federal Court was established in India in 1937.[27] Judges of the Federal Court were appointed by the British Crown and they held office until they attained the age of 65 years. A judge could be removed by the Crown for misbehaviour or mental or physical infirmity if the Privy Council on reference made by the Crown so recommended.[28]

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[26] *Government of India Act* 1935, s 220.

[27] Section 200(1) of the Act laid down:

> There shall be a Federal Court consisting of a Chief Justice and such number of other judges as His Majesty may deem necessary, but unless and until an address has been presented by the Federal Legislature to the Governor-General for submission to his Majesty praying for an increase in the number of judges, the number of puisne judges shall not exceed six.

[28] *Government of India Act* 1935, s 200(2).

The Federal Court had original, appellate and advisory jurisdiction. The original jurisdiction was confined to disputes between the federation and its units or between the units. As s 204(1) of the *Government of India Act* 1935 provides:

> [T]he Federal Court shall, ... have an original jurisdiction in any dispute between any two or more of the following parties, that is to say, the Federation, any of the Provinces or any of the Federated States, if and in so far as the dispute involves any question (whether of law or fact) on which the existence or extent of a legal right depends:
>
> Provided that the said jurisdiction shall not extend to –
> 1. a dispute to which a State is a party, unless the dispute –
> (i) concerns the interpretation of this Act or of an Order in Council made thereunder, or the extent of the legislative or executive authority vested in the Federation by virtue of the instrument of accession of that State; or
> (ii) arises under an agreement made under part VI[29] of this Act in relation to the administration in that State of a law of the Federal Legislature, or otherwise concerns some matter with respect to which the Federal Legislature has power to make laws for that State; or
> (iii) arises under an agreement made after the establishment of the Federation, with the approval of His Majesty's representative for the exercise of the functions of the Crown in its relations with Indian States, between that State and the Federation or a Province, being an agreement which expressly provides that the said jurisdiction shall extend to such a dispute;
> 2. a dispute arising under any agreement which expressly provides that the said jurisdiction shall not extend to such a dispute.

An appeal lay to this court from any case decided by the High Courts in India if the High Court certified that the case involved a substantial question of law as to the interpretation of the *Government of India Act* 1935 or 'any Order in Council made there-under'.[30] In its advisory jurisdiction the Federal Court was empowered to give an advisory opinion on any question of law referred to it by the Governor-General.[31]

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[29] Part VI of the Act provides for administrative relations between Federation, Provinces and States.

[30] *Government of India Act* 1935, s 205.

[31] *Government of India Act* 1935, s 213.

The Federal Court was the first constitutional court in India; appeals from this court lay to the Privy Council in England.[32]

Discussion of the British period reveals that efforts were made to establish a new pattern of judicial administration. Many measures were taken to improve the judiciary though the steps taken were not free from defects. British rulers accepted the principle of separation of powers, but deferred it in practice. While they always maintained a show of using their best endeavours to bring about an end to the system combining executive and judicial powers in one individual, the duties and powers of Collector, Deputy Commissioner, Magistrate and Government agent were in fact combined during the early days of British rule (Dugvekar, 1989: 563). In fact, the executive government always tried to control the judiciary. The *Sadar Dewani Adalat* and *Sadar Nizamat Adalat* appear to have been regarded as branches of the executive government. The government issued directions to the courts and closely scrutinised the judges; the government even asked for explanations of the decisions of judges (Mootham, 1983: 161-162).

During this period the conflicts between the judiciary and the executive continued for a long time and ultimately the supreme judicial control was placed in the hands of the executive government (Mootham, 1983: 165-166). However, by establishing the High Court in 1862, the judiciary was placed in a position to dispense real justice and to maintain its independence. All courts were brought under one unified system of control by the High Court. Judges of the High Court were to hold office during the pleasure of the Crown until security of tenure for judges was

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[32] *Government of India Act* 1935, s 208.

established by the *Government of India Act* 1935, which introduced a fixed age of retirement for them. However, the subordinate criminal judiciary was not separated from the executive branch of the government. Public servants employed in the executive position continued to exercise judicial power in criminal cases.

3.2.4 Pakistan Period

The Pakistan period of Bangladesh began in 1947 when the Indian Sub-continent was partitioned into two independent States, India and Pakistan.[33] Bangladesh was created as a separate province of Pakistan.

On the establishment of Pakistan the subordinate civil and criminal courts established by the *Civil Courts Act* 1887 and the *Code of Criminal Procedure* 1898 continued unchanged. In order to exercise the powers and jurisdictions over the territory comprising the then Province of East Bengal a High Court was created at Dhaka under the *High Courts (Bengal) Order* 1947.[34] It was the highest court of the province and was empowered to exercise the same powers and authority in the administration of justice as the Calcutta High Court had exercised.[35] The powers, authority and jurisdiction of the High Court as prescribed in the *Government of India Act* 1935 remained intact.

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[33] The struggle for independence in British India continued for a long time. Consequently, in March 1947 the British Government sent Lord Mountbatten as a new Viceroy with instructions to arrange the transfer of power by June 1948. Lord Mountbatten found the situation in India so explosive that he advanced the date for independence to August 1947 (Lamb, 1963: 90). With this object in view, the *Indian Independence Act* 1947 was passed by the British Parliament on 18 July 1947. Section 1 of the Act provided for the partition of India and the establishment of two Dominions of India and Pakistan. Accordingly, Pakistan came into existence on 14 August 1947.

[34] *High Courts (Bengal) Order* 1947 was promulgated under s 9 of the *Indian Independence Act* 1947.

[35] *High Courts (Bengal) Order* 1947, s 5.

In 1949, by the *Federal Court Order* 1947 a Federal Court of Pakistan was set up at Karachi.[36] It succeeded the Federal Court of India established under the *Government of India Act* 1935. The powers, authority and jurisdiction of the Federal Court as prescribed by this Act remained unchanged. The Federal Court was authorised to hear appeals from the High Courts in Pakistan. The *Federal Court (Enlargement of Jurisdiction) Act* 1949 provided that all appeals which previously lay to the Privy Council would lie to the Federal Court.[37] It also transferred all pending appeals in the Privy Council to the Federal Court.[38] In addition, the *Privy Council (Abolition of Jurisdiction) Act* 1950 transferred all the appellate jurisdiction of the Privy Council to the Federal Court. As the highest court of Pakistan the Federal Court continued until the establishment of the Supreme Court in 1956 under the first Constitution of Pakistan.[39]

Part IX of the 1956 Constitution dealt with the judiciary of Pakistan, but it did not significantly change the structure of the judiciary or the powers and jurisdiction of the courts. The Constitution renamed the Federal Court the 'Supreme Court of Pakistan'.[40] The Supreme Court comprised a Chief Justice known as the 'Chief Justice of Pakistan' and not more than six puisne judges.[41] The Chief Justice would

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36 Later, the Federal Court was shifted to Lahore.

37 The *Federal Court (Enlargement of Jurisdiction) Act* 1949 came into effect on 1 February 1950.

38 *Federal Court (Enlargement of Jurisdiction) Act* 1949, ss 1 & 5.

39 The *Constitution of the Islamic Republic of Pakistan* 1956 introduced a federal type of parliamentary government with a Cabinet of Ministers headed by Prime Minister who was to be appointed by the President. The President was to be elected by the members of the National Assembly and two Provincial Assemblies. The executive authority of the Federation was vested in the President but he or she was to act on the advice of the Prime Minister.

40 Article 155 of the Constitution provided:

> The Supreme Court shall sit in Karachi and at such other place as the Chief Justice of Pakistan may, with the approval of the President from time to time, appoint.
> Provided that the Court shall sit in Dhaka at least twice in every year, for such period as the Chief Justice of Pakistan may deem necessary.

41 *Constitution of Pakistan* 1956, Art 148.

be appointed by the President and the other judges by the President after consultation with the Chief Justice.[42] They were to hold office until the attainment of the age of 65 years. A judge could be removed from his or her office on the ground of proved misbehaviour or infirmity of mind or body. The President of Pakistan could remove a judge by order upon address of the National Assembly supported by a majority of the total number of the members of Assembly and by the votes of at least two-thirds of the members present and voting.[43]

The Constitution of 1956 provided for a High Court for each of the Provinces and accordingly, the Dhaka High Court continued functioning. The High Court consisted of a Chief Justice and other judges appointed by the President in consultation with the Chief Justice of Pakistan and the Governor of the Province. In the case of the appointment of judges other than the Chief Justice, the Chief Justice of the High Court was also consulted.[44] The judges would hold office until they attained the age of 60 years. The President of Pakistan could remove a judge from his or her office on the ground of misbehaviour or infirmity of mind or body if the Supreme Court on reference by the President so recommended.

The Constitution of 1956 was abrogated in 1958 under the Proclamation of Martial Law. In 1962, President General Ayub Khan promulgated a new constitution, which introduced a presidential form of government. Similar to the Constitution of 1956, the new Constitution of 1962 did not bring a significant change in the judicial system. The provisions regarding the judiciary prescribed by the Constitution of

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42 *Constitution of Pakistan* 1956, Art 149.

43 *Constitution of Pakistan* 1956, Art 151.

44 *Constitution of Pakistan* 1956, Art 166.

1956 were almost reproduced in the new Constitution. However, a fundamental change was brought in the mechanism of removal of judges.

The Constitution of 1962 provided for a Supreme Judicial Council consisting of the Chief Justice of the Supreme Court, the two most senior judges of the Supreme Court and the Chief Justices of each High Court. The Council was to frame a Code of Conduct to be observed by the judges of the Supreme Court and of the High Courts, and to hold enquiries on matters relating to the conduct of judges. When, on information received by the Council or from any other source, the President believed that a judge is not capable of performing his or her functions properly by reason of physical or mental incapacity or was guilty of gross misconduct, the President was to direct the Council to inquire into the matter. If, after making inquiry, the report of the Council was adverse to the judge, the President could remove him or her from office.[45]

The Constitution of 1962 was abrogated by the Proclamation of Martial Law in 1969. The Martial Law Government issued the *Provisional Constitution Order* 1969 which provided that all courts should exercise the same powers and jurisdiction as they had exercised immediately before the Proclamation of Martial Law.[46] However, the courts were prevented from entertaining any application or petition against the Martial Law Authority or any person exercising power or jurisdiction derived from it. No proceeding of the Special Military Court or the Summary Military Court could be questioned and no court could issue any order against the Military Court.[47] This

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[45] *Constitution of Pakistan* 1962, Art 128.

[46] *Provisional Constitution Order* 1969, Art 6.

[47] *Provisional Constitution Order* 1969, Art 5.

Martial Law ended on 16 December 1971 with the emergence of Bangladesh as a sovereign and independent State.

In the Pakistan period, the state of the judiciary was not drastically changed. The higher judiciary was separated from the executive branch of government but the lower courts, particularly the criminal courts were under executive control. Public servants appointed to executive positions exercised judicial functions in the criminal courts. In fact, the system introduced in the later British period was retained during the Pakistan period.

3.3 OUTLINES OF CURRENT JUDICIAL SYSTEM

After independence the first highest court in Bangladesh was the High Court established under s 2 of the *High Court of Bangladesh Order* 1972 promulgated pursuant to the *Proclamation of Independence* 1971 and the *Provisional Constitution of Bangladesh Order* 1972.[48] The High Court consisted of a Chief Justice and 'so many other judges as may be appointed from time to time'.[49] They would be appointed by the President and held office 'on such terms and conditions as the President may determine'.[50] Subsequently, by the *High Court of Bangladesh (Amendment) Order* 1972 an Appellate Division of the High Court of Bangladesh was established and it consisted of the Chief Justice and two other judges of the High

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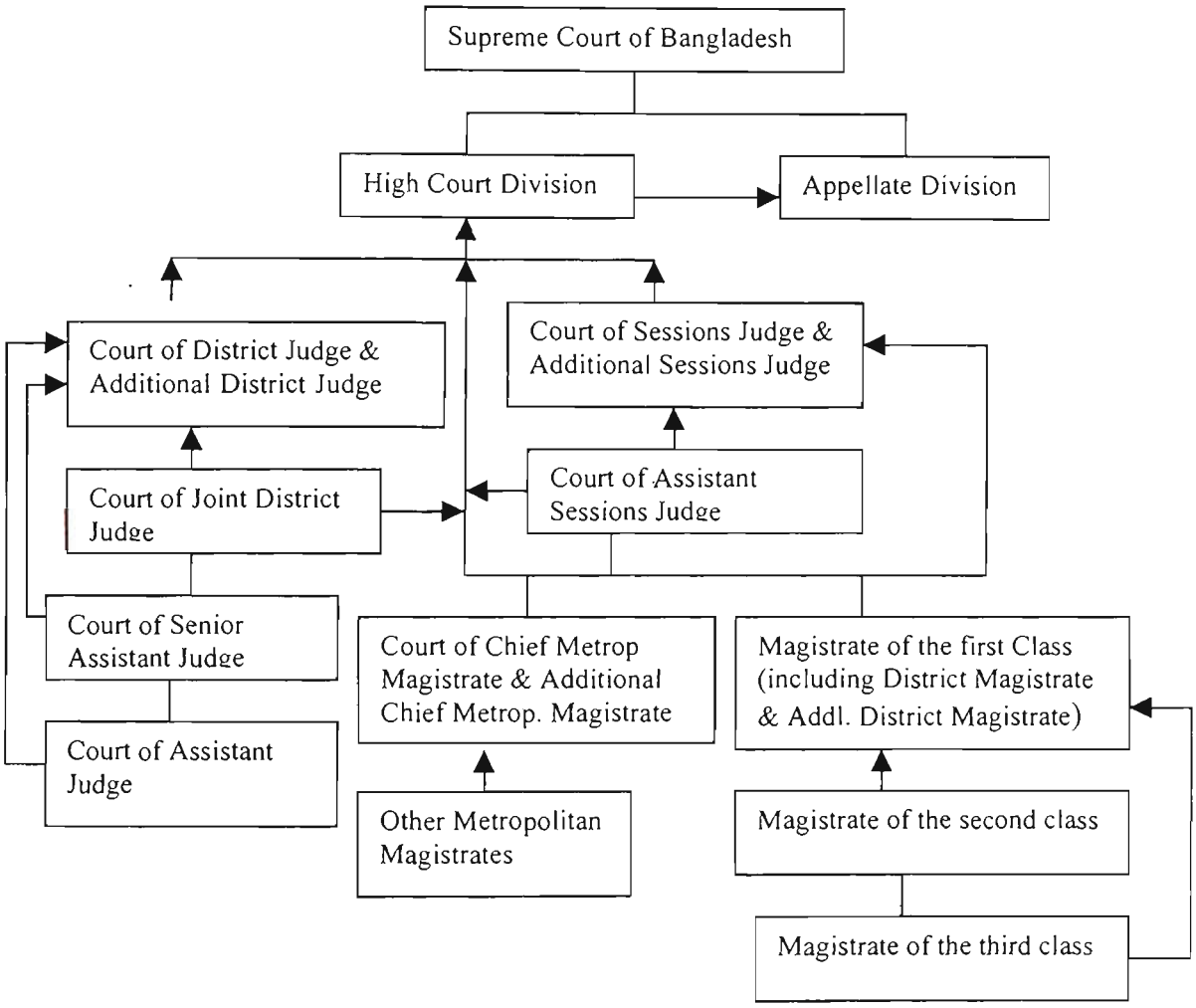
[48] The *Proclamation of Independence* 1971 was adopted by the Constituent Assembly on 10 April 1971 with retrospective effect from 26 March 1971; the date on which Bangladesh was declared as an independent State. The Constituent Assembly was constituted of the members of the National and Provincial Assemblies elected in the 1970 election from East Pakistan. The *Provisional Constitution of Bangladesh Order* 1972 was issued by the foundation President Sheikh Mujibur Rahman and published in the Bangladesh Gazette, Extraordinary, on 11 January 1972.

[49] *High Court of Bangladesh Order* 1972, s 3; *Provisional Constitution of Bangladesh Order* 1972, s 9.

[50] *High Court of Bangladesh Order* 1972, s 3.

Court appointed by the President after consultation with the Chief Justice.[51] The High Court of Bangladesh existed until the Supreme Court was established under the Constitution of Bangladesh.[52] Below the Supreme Court there is a network of subordinate civil and criminal courts and tribunals sitting throughout the country.

Hierarchy of Ordinary Courts



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[51] *High Court of Bangladesh (Amendment) Order* 1972, s 3.

[52] The *Constitution of the People's Republic of Bangladesh* 1972 [hereinafter *Constitution of Bangladesh*] was adopted by the Constituent Assembly on 4 November 1972, given effect from the 16 December 1972, the first anniversary of the victory day of Bangladesh. There have been 13 amendments to the Constitution to date (2002). The latest amendment was made by the *Constitution (Thirteenth Amendment) Act* 1996.

3.3.1 Supreme Court

The Supreme Court of Bangladesh is the highest court, comprising an Appellate and High Court Division. It consists of the Chief Justice who is the 'Chief Justice of Bangladesh' and such number of other judges as the President may appoint to each division.[53] The Chief Justice and judges appointed to the Appellate Division sit in that Division exclusively; other judges sit only in the High Court Division.[54] At present, the Appellate Division consists of seven judges including the Chief Justice and the High Court Division consists of 56 judges.[55]

The Appellate Division has jurisdiction to 'hear and determine appeals' against 'judgments, decrees, orders or sentences' passed by the High Court Division.[56] It has also an advisory jurisdiction.[57]

The High Court Division has 'original, appellate and other jurisdictions and powers as are conferred on it' by the Constitution or by any other law.[58] It has also a special original jurisdiction. Under this jurisdiction, it is authorised to enforce fundamental rights of the citizens and to issue certain orders and directions in the nature of writs of *prohibition*, *mandamus*, *certiorari*, *habeas corpus* and *quo*

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[53] *Constitution of Bangladesh*, Art 94(2).

[54] *Constitution of Bangladesh*, Art 94(3).

[55] The number of judges in the Appellate Division was five until early 2002. By adding two more judges the Government has restructured the Appellate Division through a gazette notification on 17 January 2002. On 2 March 2002, Justice Sayed JR Modassir Hossain and Justice Abu Sayeed Ahmed, judges of the High Court Division, were appointed to the newly created positions in the Appellate Division.

[56] *Constitution of Bangladesh*, Art 103(1).

[57] As to the advisory jurisdiction, Art 106 of the Constitution lays down:

> If at any time it appears to the President that a question of law has arisen, or is likely to arise, which is of such a nature and of such public importance that it is expedient to obtain the opinion of the Supreme Court upon it, he may refer the question to the Appellate Division for consideration and the division may, after such hearing as it thinks fit, report its opinion thereon to the President.

[58] *Constitution of Bangladesh*, Art 101.

warranto.[59] In addition, the High Court Division exercises special and statutory original jurisdiction, appellate jurisdiction, revisional jurisdiction, admiralty jurisdiction and miscellaneous jurisdiction under numerous laws.[60]

3.3.2 Subordinate Courts

Below the High Court Division of the Supreme Court, there is a network of subordinate courts and tribunals having civil, criminal or special jurisdiction. Currently, there are 749 judges in the subordinate judiciary.[61] The number of magistrates exercising judicial functions is not fixed because the government may invest the magisterial powers in a public servant appointed in the executive positions on the basis of necessity. During 1999, 135 public servants holding executive positions were appointed magistrates of different classes.[62]

3.3.2.1 Ordinary Courts of Civil Jurisdiction

The subordinate courts of civil jurisdiction are classified as (1) the Court of the District Judge, (2) the Court of the Additional District Judge, (3) the Court of the Joint District Judge, (4) the Court of the Senior Assistant Judge and (5) the Court of the Assistant Judge.[63]

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[59] *Constitution of Bangladesh*, Art 102.

[60] Important among those laws are the *Admiralty Court Act* 1997, the *Bank Company Act* 1990, the *Code of Civil Procedure* 1908, the *Code of Criminal Procedure* 1898, the *Companies Act* 1994, the *Contempt of Court Act* 1926, the *Income Tax Ordinance* 1984, and the *Industrial Relations Ordinance* 1969.

[61] Ministry of Law, Justice and Parliamentary Affairs, *Gradation List of Subordinate Court Judges* (2001).

[62] *Bangladesh Gazette*, 13 May 1999, 1 July 1999, 5 August 1999, 12 August 1999, 7 October 1999, 28 October 1999, 16 December 1999, 23 December 1999, 6 April 2000, and 20 April 2000.

[63] *Civil Courts Act* 1887, s 3 (As amended by the *Civil Courts (Amendment) Act* 2001, *Bangladesh Gazette*, Extraordinary, 15 July 2001).

(1) Court of District Judge

The Court of the District Judge is the principal court at the district level.[64] It is mainly an appellate court with very limited original jurisdiction to try only cases relating to probate and letters of administration.[65] In the appellate jurisdiction, a District Judge hears and determines some appeals against Joint District Judges' judgments, decrees or orders in which the value of the original suits or proceedings does not exceed the specific limit of TK 600,000 (equivalent to US$ 10,400 approximately).[66] However, the judge is authorised to hear and determine appeals against all judgments or orders of Senior Assistant Judges and Assistant Judges.[67]

(2) Court of Additional District Judge

The judicial function of Additional District Judges is similar to the District Judges' except that they cannot receive appeals from any inferior courts. An Additional District Judge may discharge any of the functions of a District Judge, as assigned by a District Judge. In discharging those functions, the Additional District Judge exercises the same power as the District Judge.[68]

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64 'District' is an important administrative unit in Bangladesh. The whole Bangladesh is primarily divided into six administrative divisions, which are composed of a number of districts. Each district is again divided into a number of sub-districts known as *Upazila*.

65 In the past, the court of district judge had original jurisdiction to try cases relating to guardianship, insolvency, house building loan, industrial loan etc., but subsequently the jurisdiction to try these cases has been given to some special courts, such as family court, insolvency court and financial loan court.

66 *Civil Courts Act* 1887, s 21(1).

67 *Civil Courts Act* 1887, s 21(2).

68 *Civil Courts Act* 1887, s 8.

(3) Court of Joint District Judge

The Court of Joint District Judge has original and appellate jurisdiction. All cases which exceed the pecuniary jurisdiction of Senior Assistant Judges are filed in the court of the Joint District Judge. The jurisdiction of the Court of Joint District Judge extends to all original suits without any pecuniary limit.[69] In addition, Joint District Judges can hear and determine appeals against judgments, decrees or orders of Senior Assistant Judges or Assistant Judges when such appeals are transferred to them by District Judges under s 21(4) of the *Civil Courts Act* 1887.

(4) Court of Senior Assistant judge

The Court of Senior Assistant Judge is a court of original jurisdiction. All cases which exceed the pecuniary jurisdiction of Assistant Judges are filed in the Court of Senior Assistant Judge. Its maximum pecuniary jurisdiction is limited to TK 400,000 (equivalent to US$ 7,000 approximately).[70]

(5) Court of Assistant judge

The Court of Assistant Judge is the lowest grade of subordinate civil judiciary. All civil suits are filed in the Court of Assistant Judge unless barred by the pecuniary jurisdiction. The pecuniary jurisdiction of the Court of Assistant Judge is limited to TK 200,000 (equivalent to US$ 3,500 approximately).[71]

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[69] *Civil Courts Act* 1887, s 18.
[70] *Civil Courts Act* 1887, s 19(2).
[71] *Civil Courts Act* 1887, s 19(1).

3.3.2.2 Ordinary Courts of Criminal Jurisdiction

The subordinate courts of criminal jurisdiction are classified as (1) Courts of Session, (2) Metropolitan Magistrates, (3) Magistrates of the first class, (4) Magistrates of the second class and (5) Magistrates of the third class.[72]

(1) Courts of Session

For the purposes of the administration of criminal justice, Bangladesh is divided into 64 sessions divisions, each sessions division constituting a district and there is a Court of Session in each district.[73] The Court of Session for a metropolitan area is known as the Metropolitan Court of Session.[74] A Court of Session is presided over by a Sessions Judge, an Additional Sessions Judge or an Assistant Sessions Judge.[75] In practice, judges from the civil jurisdiction, District Judges, Additional District Judges and Joint District Judges are appointed to these positions.

(a) Jurisdiction and Powers of Sessions Judge

A Sessions Judge exercises original, appellate and revisional jurisdiction. In the original jurisdiction, a Sessions Judge can try offences under the *Penal Code* 1860 or under any other law.[76] Schedule II of the *Code of Criminal Procedure* 1898 shows the offences under the *Penal Code* which are triable by Sessions Judges. The offences include waging or attempting to wage war against Bangladesh, sedition, murder, culpable homicide, giving or fabricating false evidence with intent to cause

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[72] *Code of Criminal Procedure* 1898, s 6.
[73] *Code of Criminal Procedure* 1898, s 7.
[74] *Code of Criminal Procedure* 1898, s 9(1).
[75] *Code of Criminal Procedure* 1898, ss 9(1), 9(3).
[76] *Code of Criminal Procedure* 1898, s 28-29.

any person to be convicted of a capital offence, and counterfeiting currency-notes or bank notes. Despite this, a Sessions Judge can try any offence; for example, 'A is tried by the Sessions Court on a charge of culpable homicide. He may be convicted of voluntarily causing hurt, an offence triable by a Magistrate'.[77]

Under the appellate jurisdiction, a Sessions Judge can hear and determine appeals from convictions and sentences passed by an Assistant Sessions Judge, a District Magistrate, an Additional District Magistrate or other Magistrate of the first class. However, when an Assistant Sessions Judge passes any sentence of imprisonment for a term exceeding five years or when a Magistrate passes any sentence for sedition charged under s 124A of the *Penal Code* 1860, the Sessions Judge cannot exercise appellate jurisdiction. In such cases, appeals lie to the High Court Division only.[78]

A Session Judge can exercise revisional jurisdiction for the purpose of satisfying himself or herself as to the 'correctness, legality or propriety of any finding, sentence or order' and 'regularity of any proceeding' before any inferior court.[79]

A Sessions Judge is empowered to impose any sentence prescribed by law including the sentence of death. However, 'any sentence of death passed' by a Sessions Judge is 'subject to confirmation by the High Court Division'.[80]

(b) Jurisdiction and Powers of Additional Sessions Judge

The powers and functions of Additional Sessions Judges are similar to those of Sessions Judges. However, they cannot hear cases or receive or admit an appeal or a

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[77] *Code of Criminal Procedure* 1898, s 28, illustration.
[78] *Code of Criminal Procedure* 1898, s 408.
[79] *Code of Criminal Procedure* 1898, s 435.
[80] *Code of Criminal Procedure* 1898, s 31(2).

revision from any inferior court by themselves. Additional Sessions Judges can try such cases or hear appeals or revision of such cases as directed by the government or as transferred or made over to them by the Sessions Judge.[81]

(c) Jurisdiction and Powers of Assistant Sessions Judge

Similar to an Additional Sessions Judge, an Assistant Session Judge cannot hear cases or receive or admit an appeal or a revision unless directed by the government or as transferred or made over to them by the Sessions Judge.[82] The fundamental difference between the power of an Additional Session Judge and that of an Assistant Session Judge is that the former can pass any sentences including the death penalty but the latter cannot pass any death penalty.[83]

(2) Courts of Metropolitan Magistrates

Under s 18 of the *Code of Criminal Procedure* 1898, the Courts of Metropolitan Magistrates are established in Metropolitan Areas of Bangladesh. A Chief Metropolitan Magistrate, one or more Additional Chief Metropolitan Magistrates and other Metropolitan Magistrates are appointed to try criminal cases in a Metropolitan Area.

A Metropolitan Magistrate can exercise jurisdiction in all places within a Metropolitan Area for which he or she is appointed.[84] A Chief Metropolitan Magistrate or Metropolitan Magistrates may try the offences shown in sch II of the

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[81] *Code of Criminal Procedure* 1898, ss 193, 526B, 528.

[82] *Code of Criminal Procedure* 1898, ss 193, 526B, 528. For an elaborate discussion, see Islam, 1989: 33-34.

[83] *Code of Criminal Procedure* 1898, s 31(3-4).

[84] *Code of Criminal Procedure* 1898, s 20.

Code of Criminal Procedure 1898 including sedition, assaulting or obstructing public servant when suppressing riot etc., giving or fabricating false evidence in a judicial proceeding and harbouring an offender who has escaped from custody. A Chief Metropolitan Magistrate or Metropolitan Magistrates may also try the petty offences including rioting, promoting enmity between classes, committing affray, bribery, voluntarily causing hurt and theft, which are shown in sch II to be triable by any magistrate. In addition, under s 29C of the *Code of Criminal Procedure* the government 'may invest the Chief Metropolitan Magistrate ... with power to try as a Magistrate all offences not punishable with death'.

The Courts of Metropolitan Magistrates may impose the sentences of imprisonment for a term not exceeding five years, fine not exceeding Tk 10,000 and whipping.[85] However, a Metropolitan Magistrate specially empowered under s 29C *Code of Criminal Procedure* 1898 'may pass any sentence authorised by law, except a sentence of death ... or of imprisonment for a term exceeding seven years'.[86]

(3) Magistrates of the first class, second class or third class

Magistrates of the first class, Magistrates of the second class and Magistrates of the third class are appointed to try criminal cases outside the Metropolitan Areas. Under s 10(1) of the *Code of Criminal Procedure* 1898 a Magistrate of the first class is appointed as a District Magistrate in every district outside the Metropolitan Areas. In addition, a Magistrate of the first class is appointed as an Additional District Magistrate who is subordinate to the District Magistrate. Moreover, under s 12(1) of the *Code of Criminal Procedure* 1898 the government 'may appoint as many persons

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[85] *Code of Criminal Procedure* 1898, s 32(a).

[86] *Code of Criminal Procedure* 1898, s 33A.

as it thinks fit' as a Magistrate of the first, second or third class in any district: all of them subordinate to the District Magistrates.[87] A District Magistrate may hear appeals from sentence passed by a Magistrate of the second class or third class, but may direct that an Additional District Magistrate hears such an appeal.[88]

Some offences are shown in sch II of the *Code of Criminal Procedure* 1898 to be triable by the District Magistrates, Additional District Magistrates or Magistrates of the first class. They include sedition, assaulting or obstructing public servant when suppressing riot etc, giving or fabricating false evidence in a judicial proceeding, delivery of coin of Bangladesh with knowledge that it is altered and harbouring an offender who has escaped from custody. Some offences including possession of an instrument or material for the purpose of using the same for counterfeiting coin, voluntarily causing hurt by dangerous weapons or means, extortion and criminal breach of trust are shown to be triable by the Magistrates of the second class.

Similar to the Chief Metropolitan Magistrate or Metropolitan Magistrates, all magistrates of the first class, second or third class may try petty offences shown in the Schedule to be triable by any magistrate.

Section 29C of the *Code of Criminal Procedure* 1898 empowers the government to invest a District Magistrate or any Additional Magistrate 'with power to try as a Magistrate all offences not punishable with death'. In addition, the government may 'invest any Magistrate of the first class with power to try as a Magistrate all offences not punishable with death ... or with imprisonment for a term exceeding ten years'.

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[87] *Code of Criminal Procedure* 1898, s 17(1).

[88] *Code of Criminal Procedure* 1898, s 407.

A Magistrate of the first class may impose the sentences of imprisonment for a term not exceeding five years, fine not exceeding Tk 10,000 and whipping.[89] However, as mentioned above, a Magistrate specially empowered under s 29C *Code of Criminal Procedure* 1898 'may pass any sentence authorised by law, except a sentence of death ... or of imprisonment for a term exceeding seven years'.[90]

A Magistrate of the second class may impose imprisonment for a term not exceeding three years and fine not exceeding Tk 5,000.[91] A Magistrate of the third class may impose imprisonment for a term not exceeding two years and fine not exceeding Tk 2,000.[92]

3.3.2.3 Courts and Tribunals of Special Jurisdiction

Besides the ordinary courts, there are numerous courts and tribunals of special jurisdiction established by different laws. Some of these special courts or tribunals are as follows:

(1) Small Causes Court

In order to try some small causes, the Courts of Small Causes were established under s 5 of the *Small Cause Courts Act* 1887. Senior Assistant Judges are appointed as judges of these courts.

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89 *Code of Criminal Procedure* 1898, s 32(a).
90 *Code of Criminal Procedure* 1898, s 33A
91 *Code of Criminal Procedure* 1898, s 32 (b).
92 *Code of Criminal Procedure* 1898, s 32 (c).

(2) Family Court

Family Courts were established under s 4 of the *Family Courts Ordinance* 1985. For the purposes of the Ordinance, all Courts of Assistant Judge are invested with the power of the Family Courts and all Assistant Judges act as judges of these courts. A Family Court has jurisdiction to 'entertain, try, and dispose of any suit relating to, or arising out of' dissolution of marriage, restitution of conjugal rights, dower, maintenance and guardianship and custody of children.[93]

(3) Financial Loan Court

Financial Loan Courts were established under s 4 of the *Financial Loan Court Act* 1990, which was enacted to make special provisions for recovery of loans given by financial institutions. Judges of the Financial Loan Courts are appointed from among the Joint District Judges.

(4) Special Tribunal

Special Tribunals were established under s 26 of the *Special Powers Act* 1974. These tribunals are authorised exclusively to try the offences under different statutes including the *Arms Act* 1878 and the *Explosive Substances Act* 1908. The offences include unlicensed manufacture, conversion, sale, importation, exportation, and possession of any arms, ammunition or military stores, and causing explosion by explosive substances likely to endanger life, person or private property or with intent to commit offence.[94]

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[93] *Family Courts Ordinance* 1985, s 5.

[94] Arms Act 1878, ss 5-6, 13; *Explosive Substances Act* 1908, ss 3-3A.

All Session Judges, Additional Session Judges or Assistant Session Judges act as judges of the Special Tribunals for the areas with their sessions division.[95] The judges may impose 'any sentence authorised by law for the punishment of the offence of which [a] person is convicted'.[96]

The proviso of s 26(2) of the *Special Powers Act* 1974 empowers the government to constitute additional Special Tribunals consisting of Metropolitan Magistrates or Magistrates of the first class. The Magistrates may impose 'any sentence authorised by law' ... 'except death, imprisonment for life or imprisonment for a term exceeding seven years and fine exceeding ten thousand [t]aka'.[97]

(5) Court of Special Judge

Under the *Criminal Law Amendment Act* 1958 the Courts of Special Judge were established to try and punish special kind of offences including corruption. The Special Judges may be appointed from among Sessions Judges, Additional Sessions Judges, Assistant Sessions Judges, Metropolitan Magistrates or Magistrates of the first class.[98]

(6) Administrative Tribunal/Administrative Appellate Tribunal

Administrative Tribunals were established under the *Administrative Tribunals Act* 1980. An Administrative Tribunal consists of one member appointed from 'among persons who are or have been District Judges'.[99] It has exclusive jurisdiction to hear

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[95] *Special Powers Act* 1974 s 26(2).
[96] *Special Powers Act* 1974 s 28(a).
[97] *Special Powers Act* 1974 s 28(b).
[98] *Criminal Law Amendment Act* 1958, s 3(2).
[99] *Administrative Tribunals Act* 1980, *s 3.*

and determine disputes relating to the service matters of persons employed in the service of the Republic or of any statutory public authority.[100]

In order to hear and determine appeals from any order or decision of an Administrative Tribunal, Administrative Appellate tribunals are established comprising one Chairman and two other members.[101]

3.4 ROLE AND VULNERABILITIES OF THE JUDICIARY

The foregoing discussion discloses that there is a well-organised court system in Bangladesh and it is in fact the culmination of a long historical tradition. In the historical periods the courts were mostly presided over by more than one individual, but under the current system the bench of judges exists only in the Supreme Court. All subordinate courts are presided over by a single judge. Under ss 15 and 19 of the *Code of Criminal Procedure* 1898 benches of two or more magistrates may be constituted to try criminal cases, but in practice no such bench is constituted.

In this context another important deviation from the past needs to be discussed briefly. During the Hindu and Muslim periods justice was administered in accordance with the religious law. Therefore, in the Hindu period, learned *Brahmans* assisted the King in the administration of justice by expounding the Hindu law. Similarly, in the Muslim period the Sultan or Emperor and even in some cases *Qazis*

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100 *Administrative Tribunals Act* 1980, *s 4(1).*

101 *Administrative Tribunals Act* 1980, *ss 5-6.* Section 5(3) of the Act provides:

> The Chairman shall be a person who is, or has been, or is qualified to be a Judge of the Supreme Court, and of the two other members, one shall be a person who is or has been an officer in the service of the Republic not below the rank of Joint Secretary to the Government and the other a person who is or has been a District Judge.

were assisted by a learned law-officer *Mufti* who explained the Islamic legal provision.

At the beginning of the British period the rulers adopted the policy of applying the personal laws of the Muslims and Hindus to them in the administration of justice. However, the Muslim and Hindu laws were mostly in Arabic and Sanskrit languages which the English judges could not read and understand. Moreover, the books containing the personal laws were not pure books of law: law, morality and ethics were all mixed in them. Consequently, the British rulers appointed native law officers, *qazis* and *pandits* who were to explain the legal principles before the judges. Subsequently, the personal laws of Muslims and Hindus were codified and translated into English. Then the practice of appointing the law officers was abandoned in 1864 and the obligation to find the principles of personal law was vested in the judges themselves (Jain, 1990: 581).

This system is now applied in Bangladesh and therefore, there is no practice of appointing religious law officers in the courts. Judges are appointed irrespective of their religious background and they can apply any law including the personal laws of different religious communities in respect of disputes relating to family matters, which involves marriage, divorce and guardianship.

A very significant similarity between the colonial and current judicial administration is that the British rulers used judicial power in revenue collection which was an important aspect of legal disputes. This system still exists in Bangladesh; Deputy Commissioner, a public servant, invested with the power of the chief executive in each district, exercises the power of a district magistrate and revenue collector.

Article 7(1) of the Constitution of Bangladesh provides that all powers of the State belong to the people and their exercise should be effected on behalf of the people. Therefore, the judiciary is under the indirect control of the people and this control is stimulated by public confidence in the judiciary which is an important factor to the maintenance of judicial independence and to ensure judicial accountability. Despite this, there are some important issues which affect public confidence in the judiciary. Some of the major issues are enumerated below.

(1) Executive Control over the Judiciary

The executive branch of the government exercises extensive control over the judiciary. The Constitution of Bangladesh recognises the principle of separation of the judiciary from the executive as a fundamental principle of State Policy. Article 22 of the Constitution provides, '[t]he State shall ensure the separation of the judiciary from the executive organs of the State'. However, in practice, this principle is not completely implemented. The executive enjoys control over many aspects of the judiciary including the appointment, tenure and discipline of judges.[102]

Another important issue of the executive control over the judiciary relates to the working of the subordinate criminal judiciary. In order to try criminal cases magistrates exercising judicial functions are appointed from among public servants employed in executive positions. They are entrusted with a large number of functions including those of implementing the policies of the government. It has been mentioned above that a public servant is appointed as the Deputy Commissioner who is the chief executive in the district and at the same time, he or she exercises the

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[102] The issues of executive control over the appointment, tenure and discipline are discussed in the following chapters, from Chapters Four to Six.

powers of a District Magistrate.[103] As the Deputy Commissioner he or she can on the one hand, arrest and prosecute a person and, on the other hand, as a District Magistrate he or she can act as a judge of the criminal court to try criminal cases. Under the control of the Deputy Commissioner-cum-District Magistrate, a number of public servants are appointed in the executive position to discharge miscellaneous functions including exercising judicial functions as different classes of magistrates.

In discharging their duties as public servants the magistrates are always in close contact with the political executive who are responsible for their posting, promotion and prospects. Nevertheless, the magistrates try criminal cases in which the government is essentially a party. Therefore, it is likely that in deciding criminal cases they are dictated and influenced by the political executive (Halim, 1998: 312).

(2) Delay in the Disposal of Cases

Delay in the disposal of cases is an alarming issue of the judiciary in Bangladesh. There are appalling arrears of cases pending in the lower courts as well as in the Supreme Court. According to the latest (2002) report of the Ministry of Law, Justice and Parliamentary Affairs there are more than 968,000 pending cases in Bangladesh. Among these cases 5,000 (approximately) are pending in the Appellate Division, 127,244 are in the High Court Division, 344,518 are in the subordinate civil judiciary, 95,689 are in the Courts of Session, and 296,862 are in the Magistrates'

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[103] Under numerous laws or rules, the functions of a Deputy Commissioner are of different classes. Some of his or her functions are related to the (1) collection of revenue, (2) recovery of public demands, (3) survey and settlement, (4) treasury and stamp, (5) supervision and control of *wakf, debuttor* and trust property, (6) eviction of illegal occupants from the lands of the government or corporations, (7) land acquisition for development activities, (8) criminal justice, (9) supervision of the activities police department, (10) supervision and inspection of prison, (11) license of weapon etc., (12) permission or censure of publication of newspapers, (13) coordination of the functions of local government, (14) public examinations, (15) government protocol, (16) supervision of development activities of the district.

Courts.[104] This figure indicates the scale of jurisdictions of the courts rather than a measure of delay. However, Minister for Law, Justice and Parliamentary Affairs Barrister Maudud Ahmed recently expressed concern at the delay, saying that it would take a hundred years to dispose of the pending cases even if no new cases were filed.[105]

In fact, when a case is filed with a court, nobody knows when it will end. Even a small case, which should be disposed of within one year, may take ten to fifteen years to dispose of through all stages. In fact, delay in the justice system 'has reached a point where it has become a factor of injustice, a violator of human rights. Praying for justice, the parties become part of a long, protracted and torturing process, not knowing when it will end' (Alam, 2000: [3]). In a workshop titled 'Court Administration and Case Management: In Quest of Capacity Building' Chief Justice Mahmudul Amin Chowdhury, as he was then, said that there is no denying that public confidence is diminishing day by day because of delay in the administration of justice.[106]

The causes for the delay in disposal of cases are manifold although they may differ in civil and criminal cases. The most common causes for delay are the slow process of serving notice or summons, frequent adjournments of the trial, lawyers'

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[104] The report was published in the *Dainik Janakantha* on 3 February 2002. Barrister Maudud Ahmed, the Minister for Law, Justice and Parliamentary Affairs, also disclosed it in an Interview with the *Dainik Janakantha* which was published on 7 March 2002.

[105] *The Daily Jugantor*, Dhaka (Bangladesh), 21 August 2002.

[106] *The Daily Star*, Dhaka (Bangladesh), 12 December 2001.

economic interests in litigation, the lack of an effective case management system and insufficient accountability of judges.

Arguably, three classes of people may be mainly responsible for delay in the disposal of cases. They are court staff, lawyers, and judges. In criminal cases, however, investigating officers may also be responsible for delay. Court staff are responsible for issuing notices and summonses and the management of cases, however, they perform their functions under the supervision of the judges. Lawyers engaged by the parties are mainly responsible for protecting the interests of their clients, but in doing so, they enjoy a monopoly to conduct cases in the way they consider best suited to their own financial interests (Alam, 2000: [4]). Judges are the main actors in the justice delivery system and therefore, their responsibility is greater than others. Although judges cannot perform their functions without the active co-operation of court staff and lawyers, they can eliminate delays in the disposal of cases by effective supervision of the functions of the court staff and by checking delaying tactics of lawyers. Lawyers often submit applications for the adjournment of cases, on grounds which may include their personal convenience.

One study shows that in 1982, the number of subordinate judges (apart from magistrates) was 278 and the average annual disposal of cases by a judge 491. By the end of 1994, the number of judges had increased to 653 and in 1993, the average disposal of cases by a judge was 268. In the High Court Division of the Supreme Court, the number of judges was 19 in 1982 and the average of disposal of cases by a judge was 419. In 1993, the number of judges was 31 and the average disposal of cases by a judge was 255 (Hoque, 1998: 301, 317-318).

Although delay in the disposal of cases is not directly related to judicial independence, it is an aspect of judicial accountability. This is because when cases

are delayed inordinately because of the acts of a judge he or she should be accountable for delays. Moreover, delay in justice is an important factor undermining public confidence in the judiciary which is crucial to judicial independence and accountability.

(3) Corruption

Corruption is a widespread problem in Bangladesh and the judiciary is not free from it. It is generally believed that the judiciary is significantly involved in corruption. In 1997, the *Transparency International-Bangladesh Chapter* undertook a national baseline survey of corruption in Bangladesh. The survey was conducted on a sample size of 2,500 households (HH). Information was collected about the delivery of services provided by ten sectors and corruption in providing those services.[107] The report of the survey shows that 63% of the people involved in court cases reported that they had to pay bribes to court officials.[108] It adds:

> The proportion of rural HHs paying bribe money to court officials was 63.63% compared to that of 57.1% of urban HHs. Cash for bribe was paid to the court employees by 73.1% of HHs, followed by 16.3% of HHs to opponent's lawyer. Majority of HHs (53.3%) made payments for bribe directly, i.e. in person and through lawyers (28.1%).

In addition, the report says that 'almost 9 out of every 10 HHs (88.5%)' thought that 'it was almost impossible to get quick and fair judgment from the court without money or influence'.

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[107] The sectors are: (1) education, (2) health, (3) judiciary, (4) grameen shalish, (5) police service, (6) land administration, (7) financial service, (8) municipal services, (9) public transport and (10) news media.

[108] The report entitled 'Survey on Corruption in Bangladesh' is available on the Transparency International - Bangladesh's web site: <http://www.ti-bangladesh.org/olddocs/index.htm> 4 December 2001.

The report does not mention the payment of bribes directly to judges, but it suggests that court officials receive bribes directly from the parties or through the lawyers. In this context it is to be noted that Eigen, Chairman of Transparency International, while commenting on judicial corruption in different countries observes:

> '[c]ontributing to this parlous state of affairs are lawyers – [who] demand bribes for the judge, but may well keep them for themselves – and court clerks who lose files and require money to find them or who withhold bail bonds until bribes have been paid' (Eigen, 2001: 6).

This observation of Eigen is fairly applicable to the condition of Bangladesh. In some cases, although judges in Bangladesh are not involved in corruption, the lawyers or court staff demand bribes for the judges and keep them for themselves. It is likely that court staff may receive bribes from both sides of cases without the knowledge of the other party. When the court pronounces judgement the court staff may return the money paid by the defeated parties. Thus successful parties are informed that they obtained a favourable judgment because of the bribe paid to court staff. Similarly, the defeated parties are informed that they lost because of the failure to give more bribes. Consequently, although judges may not be involved in corruption, all parties are informed that the judges receive bribes.

Though it is known that some judges are involved in corruption, it is very difficult to prove their involvement. They may receive bribes through lawyers or court staff. In this regard, Chief Justice Latifur Rahman, as he was then, said, '[f]or the judicial officials, the lawyers work as intermediaries and at times office subordinates contact them for bribe'. He recognises that 'it is indeed difficult to find out strong evidence of corruption against a particular judge' (Rahman, 2000: [11]).

There is a widespread public perception that some judges are involved in corruption. In a seminar titled 'Independence of Judiciary: Transparency and

Accountability of Judges' organised by the *Bangladesh Law Association* on 23 October 1999, Justice Naimuddin Ahmed, a former Supreme Court Judge said that 'I unequivocally acknowledge that because of erosion of values the judiciary is facing questions of transparency and accountability'.[109] In the same seminar, Chief Justice Latifur Rahman, as he was then, said that 'when the credibility of all institutions appears to have eroded, we cannot ignore the reality that the image of the judiciary is also tarnished to a substantial extent'.[110]

In fact, corrupt practices of the people involved in the justice system seriously undermine the image of the judiciary. An opinion survey (1997) conducted by the *Bangladesh Unnayan Parishad* among 2,197 individuals selected randomly from 60 districts, reveals that 82% of the people opined that the judiciary is one of the most corrupt sectors in Bangladesh.[111]

Judicial corruption is an important ingredient of judicial misconduct that is a cause for discipline and removal of judges.[112]

3.5 CONCLUSION

The historical retrospective of the judiciary in Bangladesh reveals that there was a regular system of judicial administration from ancient times. From the early historical periods the administration of justice was established as an important

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[109] *The Daily Star*, Dhaka (Bangladesh), 24 October 1999.

[110] Ibid.

[111] Cited in 'Political and Administrative Corruption: Concepts, Comparative Experiences and Bangladesh Case', a paper prepared for Transparency International - Bangladesh by Mohammad Mohabbat Khan, <http://www.ti-bangladesh.org/docs/research/Mkhan.htm> 5 December 2001 (Copy on file with author).

[112] An example of removal of a subordinate court judge for corruption is discussed in section 6.3.2.2.

function of the state, but the independence and accountability of judges were not well recognised. Since the beginning the executive government always tried to control the judiciary in Bangladesh.

After independence, Bangladesh continued with inherited institutions and legacies (Hoque, 1980: 1). The judicial system as outlined in section 3.3 is essentially a reproduction of the system introduced by British rulers. Naturally, Bangladesh inherited British ideas of judicial independence and judicial accountability which were widely accepted in the original Constitution of Bangladesh. Subsequent amendments to the Constitution, which are discussed from Chapters Four to Six, have introduced some far-reaching changes to the judiciary affecting the independence and accountability of judges.

Although the Supreme judiciary is separated from the executive, the lower judiciary is still considered as a part of the executive. In addition, like the rulers of the early historical periods the executive always attempts to control the judiciary through different mechanisms which include the appointment, tenure and discipline of judges. Thus the older traditions of executive control over the judiciary continue to compete for recognition with the more recently introduced Western concepts of judicial independence and accountability. Therefore there is no clear integration of the values of judicial independence and accountability in Bangladesh.

CHAPTER 4

APPOINTMENT OF JUDGES

4.1 INTRODUCTION

This chapter analyses the issues related to the appointment of judges which is an important aspect of judicial independence. The fundamental principle of judicial independence requires that in administering justice judges should be free from all sorts of direct or indirect interference or influences. This freedom of judges has a close relationship with judicial appointment.

In the context of judicial appointment an important factor is the transfer of judges. In fact, the appointment of judges may be made by direct recruitment to judicial office and on promotion from among judges at the lower level. This chapter does not deal with the transfer of judges separately; it considers judicial transfer as a relevant part of judicial appointment.

It is widely recognised by jurists and commentators that public confidence in the judiciary is essential for the maintenance of judicial independence. An important requirement of sustaining public confidence in the judiciary is openness and transparency in making judicial appointments. Openness and transparency in making appointments essentially depend on the criteria and mechanisms for judicial appointment. Thus, the appointment of judges has a direct impact on public confidence as well as judicial independence (Shetreet, 1976: 46; Barnett, 2000: 412).

The main purpose of this chapter is to evaluate the existing criteria and mechanisms for judicial appointment in Bangladesh. Section 4.2 analyses the general

principles of judicial appointment emphasising their importance in the context of judicial independence and accountability. Section 4.3 examines the issues of judicial appointment in Bangladesh.

4.2 GENERAL PERSPECTIVES ON JUDICIAL APPOINTMENT

In any society, judicial appointment has two important aspects, the criteria for appointments and mechanisms for appointment. This section deals with the general principles of the criteria and mechanisms for judicial appointment. It develops arguments by examining the issues involved in the criteria and mechanisms. Discussion of this section presents a background for evaluating the existing criteria and mechanisms for judicial appointment in Bangladesh which follows in section 4.3.

4.2.1 Criteria for Judicial Appointment

The criteria for appointment of judges may vary between countries depending largely on the social values of different jurisdictions. Despite this fact, a consensus exists that judicial appointments should be devoid of political and personal considerations bearing on the selection of judges. The criteria for appointments should be devised to select the best available persons for judicial office. In addition, whatever criteria are to be followed in appointing judges, there should be explicit and publicly known criteria.

If the criteria for appointment are clearly and fully expressed in writing, aspiring candidates can assess their suitability and understand the criteria to be used in

making appointments and the public can have confidence in the appointment system. When the criteria for appointment of judges are not explicit and publicly known, there is great scope for manipulation of the criteria for appointment. Consequently, judges might be appointed on the basis of personal or other considerations of the executive government.

Therefore, the value in having explicit and publicly known criteria for appointing the best-qualified persons to judicial office should never be underestimated. Generally, the criteria for judicial appointments involve three broad aspects, merit, non-discrimination and political considerations (Malleson, 1999: 95).

4.2.1.1 Merit Principle

Merit is recognised as the most important criterion for judicial appointments in modern societies. In a modern democratic state, perhaps there is no controversy as to the proposition that judges should be appointed solely on merit. Gibbs says, 'if merit ... is not the sole criterion, it should always be an essential and dominant criterion of judicial appointment' (Gibbs, 1987b: 145).

Merit is a 'term which expresses the worth of a potential employee to a specific organisation. It combines his or her education, skills, experience, and background insofar as these things are relevant to performing a specific job well' (Harisch, 1999). However, there is no broad consensus on the exact meaning of merit and the 'more controversial question is how merit is to be assessed' (Lavarch, 1993: 5).

The concept of merit does not indicate any fixed elements that are to be assessed in making judicial appointments and therefore it is difficult to identify 'what distinct qualities should be looked for when appointing judges' (Malleson, 1999: 96).

Different jurists and academic writers consider a variety of elements of merit, which can be broadly divided into two groups, professional skills and personal qualities. Professional skills include legal knowledge and experience, intellectual ability and competence. Personal qualities can be explained as independence, integrity, impartiality, high moral character, patience, temperament, and good manners etc (Yackle, 1989: 307-310; Lavarch, 1993: 5; Mason, 1997: 10).

As to the merit criteria for appointment of judges the *Montreal Declaration* 1983 provides that judicial candidates should be 'individuals of integrity and ability, [and] well-trained in law'.[1] Similarly, the *UN Basic Principles* 1985 state that judicial appointees should be 'individuals of integrity and ability with appropriate training or qualifications in law'.[2] The *Beijing Statement* 1995 provides that judges should be selected 'on the basis of proven competence, integrity and independence'.[3]

The international instruments recognise two common elements of merit, professional skills and personal qualities. Professional skills have been defined as ability or competence and training or qualification in law. In this regard, unlike the *Montreal Declaration* and *UN Basic Principles* the *Beijing Statement* does not specifically require training or qualification in law but emphasises 'the appointment of persons who are best qualified for judicial office'.[4] Although personal qualities have not been defined in detail, the fundamental quality 'integrity' is mentioned in all documents. The *Beijing Statement* includes 'independence' as one more personal quality.

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[1] *Montreal Declaration* 1983, Art 2.11.
[2] *UN Basic Principles* 1985, Art 10.
[3] *Beijing Statement* 1995, Art 11.
[4] *Beijing Statement* 1995, Art 12.

In some countries, for example Canada and England, the merit criteria are explicitly defined and made public. The Canadian criteria for federal judicial appointment are of three categories.[5] The first category is defined as 'professional competence and experience' which include 'proficiency in the law', 'well rounded legal experience', 'advocacy experience', 'writing and communication skills', and 'scholarly ability'. The second category is identified as 'personal characteristics' which include 'ethical standards, honesty, integrity, fairness, tolerance, patience, common sense, ability to listen and ability to make decisions'. The third category is 'social awareness' which includes 'sensitivity to gender and racial equality, appreciation of social issues arising in litigation, public and community service and receptivity to ideas'. In addition, the criteria for appointment contain 'potential impediments to appointment' which include 'drug or alcohol dependency, civil or criminal actions, health, sexual harassment complaints, professional complaints and financial difficulties'.

In England, the criteria for judicial appointment, 'personality, integrity, professional ability, experience and capacity' were first clearly stated in 1986.[6] Thereafter, important criteria for judicial appointment were defined and made public during 1994. At last, following some suggestions for change, and after consultation with the senior judiciary, a revised set of criteria was adopted in April 2000.[7] The newly published criteria are summarised as follows:

- legal knowledge and experience

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[5] Office of the Commissioner for Federal Judicial Affairs, *Federal Judicial Appointments Process* <http://www.fja.gc.ca/jud_app/pub2_c_e.html> 8 April 2002 (Copy on file with author) [Appendix].

[6] 'Lord Chancellor's Department, *Judicial Appointments - Policies and Procedures*, 1986 [Quoted in Malleson, 1999: 96].

[7] Lord Chancellor's Department, *Judicial Appointments Annual Report* (1999-2000), <http://www.lcd.gov.uk/judicial/ja_arep2000/jindex.htm> 14 June 2001(Copy on file with author) [2.20].

- intellectual and analytical ability
- sound judgment
- decisiveness
- communication and listening skills
- authority and case management skills
- integrity and independence
- fairness and impartiality
- understanding of people and society
- maturity and sound temperament
- courtesy
- commitment, conscientiousness and diligence.[8]

An important feature of the recent criteria for appointment in England is that advocacy experience is no longer regarded as an essential requirement for appointment to judicial office.[9] Under this principle, persons who are not currently engaged in legal practice, such as academic lawyers and policy advisers, are now eligible to be appointed as judges (Patmore, 1999: [69]).

4.2.1.2 Non-discrimination

Non-discrimination is an emerging criterion for judicial appointment. The basic aim of this criterion is to establish a representative judiciary by appointing judges without discrimination against any sex, religion, race, ethnic background or such other factors. In this regard, Arts 2.12 and 2.13 of the *Montreal Declaration* 1983 provide:

> 2.12 In the selection of judges, there shall be no discrimination on the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or status, subject however to citizenship requirements.
> 2.13 The process and standards of judicial selection shall give due consideration to ensuring a fair reflection by the judiciary of the society in all its aspects.

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[8] For the revised criteria, see the Lord Chancellor's Department, *Judicial Appointments Annual Reports* (2000-2001) <http://www.lcd.gov.uk/judicial> 12 March 2001 (Copy on file with author) [Annex A]. The summary of the criteria are quoted from para 1.19 of the Report.

[9] Lord Chancellor's Department, *Judicial Appointments Report* (1999-2000), <http://www.lcd.gov.uk/judicial/ja_arep2000/jindex.htm> 14 June 2001 (Copy on file with author) [1.9, 2.20].

Similarly, Art 10 of the *UN Basic Principles* 1985 provides:

> In the selection of judges, there shall be no discrimination against a person on the grounds of race, colour, sex, religion, political or other opinion, national or social origin, property, birth or status, except that a requirement, that a candidate for judicial office must be a national of the country concerned, shall not be considered discriminatory.

In this regard the provisions of the *Beijing Statement* 1995 are identical to the *UN Basic Principles* 1985.[10]

The principle of non-discrimination is widely recognised in the contemporary world. It seeks to ensure that all sections of society are fairly represented in the judiciary. Fair representation is necessary to ensure a well-balanced composition of the judiciary so that all sections of the society can have confidence in the courts. It is also necessary to ensure balanced panels in appellate courts in deciding cases, particularly public or political controversies (Shetreet, 1987b: 776).

Generally, in making judicial decisions judges are influenced by the their social backgrounds, values and ideologies (Leubsdorf, 1987: 237; Shetreet, 1987b: 777; Ashenfelter *et al* 1995). Therefore, fair representation in the judiciary would be helpful to improve the quality of justice (King, 1994: 14). However, with a view to ensuring the representation of different social groups judicial appointments should not be made regardless of the merit principle. In order to establish a representative judiciary, a member of a minority group having requisite legal skills and personal qualities may be preferred to another person from a privileged section having similar skills and qualities (Mason, 1997: 8). In other words, subject to the fulfilment of

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[10] *Beijing Statement* 1995, Art 13.

merit criteria positive discrimination can be made for a group, which is not well represented in the judiciary.

Moreover, members of different social groups having the requisite legal skills and personal qualities should not be deprived of judicial office only because of their social background. Such a deprivation would certainly tend to shake public confidence in the judiciary. In order to maintain public confidence and judicial independence, fair representation criteria should be adopted subject to the appropriate considerations of legal skills and personal qualities that are required for a judge. In this regard, the South African constitutional arrangement may be an important example. The *Constitution of South Africa* provides:

> (1) Any appropriately *qualified woman or man* who is a *fit and proper* person may be appointed as a judicial officer. Any person to be appointed to the Constitutional Court must also be a South African citizen.
> (2) The need for the judiciary to reflect broadly the *racial and gender composition* of South Africa must be considered when judicial officers are appointed.[11]

Thus, the South African model emphasises fair representation in the judiciary subject to the merit principle.

However, in the context of fair representation subject to the merit principle, a crucial problem is that the merit of candidates for judicial office is judged by members of majority groups and it is likely that the merit of minorities is often overlooked or undervalued. In order to solve this problem the merit of different candidates should be judged through a mechanism which is transparent and open to public scrutiny.[12]

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[11] *Constitution of South Africa*, s 174(1-2). Emphasis added.

[12] For an extensive discussion on the mechanisms for judicial appointment, see section 4.2.2.

4.2.1.3 Political Considerations

The appointment of judges on political considerations is a very sensitive issue in different countries. Since judges are appointed by the executive government, political considerations might have some influence in the making of judicial appointments. In some cases, political considerations may play a major role in appointing judges. It is likely that political parties in power would prefer a judge to be of their own ideology (Thomson, 1987: 71). Therefore, it is impossible to remove politics totally from the process of appointing judges.

Political considerations may intrude into the process of judicial appointments in a number of ways. Firstly, executive government may be driven to select persons 'who are sympathetic to its own political' ideology with a prospect of influencing the judiciary in future. Secondly, appointments can be made of persons who are directly involved in politics. Thirdly, appointments of judges can be made 'as a personal reward for political services' (Blackshield, 2000: 427-428).

If judges are appointed solely on political considerations, it can seriously affect public confidence in the judiciary. Some may argue that once appointed on political considerations, judges are beyond the influence of their appointing authority and therefore, their decisions might not be affected by political reasons (King, 1994: 13). Nevertheless, for the sake of public confidence judges should not be appointed for political reasons. This is because political appointments might not always affect the decisions of judges, but they can seriously affect public confidence in the judiciary (Shetreet, 1976: 76). If judges are appointed as a reward for political services, they

might be obligated to the appointing authority in a manner which can undermine the independence of the judiciary.[13]

However, political ideology should not be considered as a disqualification for a person to be appointed as a judge. When appointments are made not purely on political grounds, there is no harm in appointing judges from among lawyers who have been involved in politics or who are supporters of a political party. As Shetreet says, 'politics should be neither a shortcut to nor an impediment in the way of appointment to a judicial office' (Shetreet, 1976: 75).

As to political considerations in appointing judges, none of the international instruments (*Montreal Declaration* 1983, *UN Basic Principles* 1985 and *Beijing Statement* 1995) adopts any specific provisions, but it is recognised in these documents that there must be no discrimination because of political or other opinion.[14]

In fact, intrusion of political considerations into the making of judicial appointments is very common in most jurisdictions. The reality is that if political appointments are allowed to intrude into the process it is very likely that the full range of candidates for appointment will not be considered. By the time political appointments are made there are no jobs left for appointments on merit alone. Even if merit is used it becomes merit plus political considerations. Since this situation is unavoidable, utmost effort should be made to limit the impact of political considerations on judicial appointments. With this end in view, two important considerations are necessary to make the appointments in the best possible way.

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[13] Manitoba Law Reform Commission, *Report on the Independence of Provincial Judges* (Winnipeg, 1989: 18) [Quoted in Friedland, 1995: 233].

[14] *Montreal Declaration* 1983, Art 2.12; *UN Basic Principles* 1985, Art 10; *Beijing Statement* 1995, Art 13.

Firstly, appointments should not be made only because of political ideology, but the professional skills and personal qualities must be considered. Secondly, appointments should not be made as a reward for political services.

However, these conditions can be maintained only in the appointive system of judicial selection discussed in section 4.2.2.2 below.

4.2.2 Mechanisms for Judicial Appointment

Mechanisms for judicial appointment are important factors in appointing judges. In any society, the appointment of judges involves some formal and informal practices. The whole system depends largely on the political culture and social values of a society. Consequently, mechanisms for appointment of judges differ between jurisdictions. There are no standardised systems of judicial appointment (Skordaki, 1991: 12). Whatever mechanism is used in any particular country, it should be transparent and open to public scrutiny. Transparency and public scrutiny in the mechanisms for judicial appointment are of paramount importance to ensure appointment of the best available persons to judicial office and to enhance public confidence in the judiciary.

Mechanisms for judicial appointment operating in some different countries are outlined under two sub-headings: elective and appointive systems.

4.2.2.1 Elective System

The elective system has two basic models, popular election and election by the legislature. Under the popular election model, judges are elected on the basis of either partisan election or non-partisan election.

In the United States, the model of popular election is employed in selecting judges of some states, and a mixed system that combines the features of both appointment and popular election is employed in other States (Abraham, 1986: 38-39; Martineau, 1990: 83). The model of election by the legislature is employed in a few states of the United States, for Federal judges in Switzerland and for judges of the German Federal Constitutional Court (Shetreet, 1987b: 768; Baar, 1991: 146).

At one time, a majority of American States employed the elective system of selecting judges, but during the latter part of the nineteenth century, the general trend began to move away from the elective system (Comisky and Paterson, 1987: 7; Shetreet, 1987b: 768). Now only nine states use partisan election, twelve states use non-partisan election, five states use election by the legislature and nine states use combined merit selection and different election methods.[15]

Proponents of the elective system offer two predominant arguments. Firstly, since judges are periodically required to submit themselves to the electorate, it ensures accountability of judges. Secondly, judges make law and, therefore, they should be selected or chosen by the people who will be subject to or affected by those laws (Comisky and Patterson, 1987: 8; Webster, 1995: 17).

Opponents of the elective system argue that this system does not consider any formal qualifications and competence for the persons to be appointed as judges. In partisan election systems, political considerations are instrumental in the selection process and judges are selected on campaign expertise rather than merit (Scheuerman, 1993: 460-461). In some states of the United States with a view to

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[15] American Judicature Society, *Judicial Selection Methods in the States* (April 2002) <http://www.ajs.org/select11.htm> 8 June 2002 (Copy on file with author). For the selection methods of other states, see section 4.2.2.2.

being elected as a judge 'a candidate must not only participate in a party campaign, but must almost constantly be active in party politics' (Fabian, 2001: 167). The opponents of the elective system also argue that most voters are not competent to evaluate the candidates' qualifications and it may result in the election of candidates who are not best-qualified (Webster, 1995: 14-15; Barnett, 2000: 418).

4.2.2.2 Appointive System

The appointive system of judicial appointment is widely employed all over the world. Under this system appointments to judicial office are made by the government. The *Montreal Declaration* 1983 provides:

> Participation in judicial appointments by the Executive ... is consistent with judicial independence, so long as appointments of judges are made in consultation with members of the judiciary and the legal profession, or by a body in which members of the judiciary and the legal profession participate.[16]

The principle of judicial independence requires that the power of appointment of judges should not be vested exclusively in the executive government. This is because if the executive government enjoys an exclusive privilege in selecting judges, a risk always exists of misuse of the power of appointment. Sometimes political or other considerations may prevail over the merit criteria for appointments.[17] Thus by facilitating nepotism and political favouritism the quality of the judiciary might be weakened (Colvin, 1986-1987: 239). Judges who obtain their position as a result of executive discretion or favour could be obligated to serve the interests of their

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[16] *Montreal Declaration* 1983, Art 2.14(b).

[17] For a discussion on political considerations in appointing judges, see section 4.2.1.3.

appointing authority in a manner which might undermine judicial independence (Colvin, 1986-87: 240; Friedland, 1995: 233).

Therefore, the appointment of judges exclusively by the executive government is not well accepted by jurists and commentators. The exclusive executive power to appoint judges may be reduced by involving other mechanisms including parliamentary approval, consultation with the judiciary and legal profession, and use of an independent commission.

(1) Parliamentary Approval

Under this mechanism the executive government initially selects the candidates for judicial office, but makes formal appointments only when the selections are approved by parliament. For example, in the United States the President nominates and 'by and with the Advice and Consent of the Senate' appoints federal judges.[18]

Parliamentary approval provides a check on the power of the executive and there is scope for public scrutiny of the appointment process (Kendall, 1997: 182; Devlin, MacKay & Kim, 2000: 825-826). Nevertheless, this system has some inherent defects. Firstly, parliament has nothing to do with the initial stages of selecting candidates. Since the initial selection of candidates is a vital issue in appointing judges and it is exclusively vested in the executive, this system may not be effective to control pre-eminent political or other irrelevant considerations in selecting candidates for judicial office. Rather it may foster an increasing tendency to introduce political bargaining (Kirby, 1999: [26]). Secondly, although the

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[18] *Constitution of the United States of America*, Art II, s 2.

requirement of approval by parliament may impose some restrictions on the discretion of the executive government, it may not be effective to change the basic form of 'political infighting'. Moreover, it may 'result in the kind of coalition building behaviour common in other legislative matters' (Baar, 1991: 146). Thirdly, if the party in power commands a majority in parliament, political 'patronage may still be a strong factor' in appointing judges (Devlin, MacKay & Kim, 2000: 826).

Therefore, though parliamentary approval has some implications for checking exclusive executive power in appointing judges and making the appointment process open to the public through parliament, it has serious drawbacks. The parliamentary mechanism is transparent and open to public scrutiny, but if there is a majority in Parliament, nothing can be done even if the public does not approve of the appointment.

(2) Consultation with Judiciary and Legal Profession

The executive government may appoint judges in consultation with the senior judiciary and legal profession. Generally, senior members of the judiciary and legal profession are consulted, and the consultations may be formal or informal.

Judges are in a position to assess the performance of lawyers who are to be appointed to judicial office. Therefore, consultation with members of the higher judiciary is very significant in appointing the best-qualified persons to judicial office. It is an important means to strengthen the independence of the judiciary (Baar, 1991: 149).

Consultation with members of the legal profession is also very important. A body representing the legal profession may be able to assess the character and ability

of the lawyers to be appointed as judges (Gibbs, 1987b: 145). It can help to select suitable persons for judicial office.

Therefore, the consultation system has significant implications for the quality of the judiciary and public confidence in it. However, it has a serious limitation, because the efficacy of consultations depends mostly on the attitude of the executive government. It could be that after consultation with the judiciary and legal profession the executive government will ignore the opinion given by them (Gibbs, 1987a: 11).

In respect of consultation with the judiciary a significant system was introduced in India by a decision of the Supreme Court. The Indian model is worthy of consideration. Under the Indian Constitution, the President of India appoints all judges of the Supreme and High Courts including the Chief Justices after consultation with different functionaries as follows:

(1) In appointing the Chief Justice of India, the President consults such of the judges of the Supreme Court and High Courts as he or she 'may deem necessary for the purpose'.[19]

(2) In appointing other judges of the Supreme Court, the President consults such of the judges of the Supreme Court and High Courts as he or she 'may deem necessary', but consultation with the Chief Justice of India is mandatory.[20]

(3) In appointing the Chief Justice of a High Court, the President is under an obligation to consult the Chief Justice of India and the Governor of the State.[21]

(4) In appointing the puisne judges of a High Court, the President consults the Chief Justice of India, the Governor of the State and the Chief Justice of the High Court.[22]

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[19] *Constitution of India*, Art 124(2).
[20] *Constitution of India*, Art 124(2).
[21] *Constitution of India*, Art 217(1).
[22] *Constitution of India*, Art 217(1).

The constitutional provision of consultation was an important issue of interpretation in a series of decisions of the Indian Supreme Court. In *Gupta v President of India*[23] popularly known as the *First Judges Case*, the Supreme Court observed that the President was obliged to consult the Chief Justice, but the opinion of the Chief Justice was not binding upon the President.

In 1993, this decision was overruled in *Supreme Court Advocates-on-Record Association v Union of India*[24] known as the *Second Judges case* which held that in the case of difference between the opinion of the Chief Justice and the President, the opinion of the Chief Justice must prevail and no judge should be appointed without the concurrence of the Chief Justice. The Chief Justice, however, should consult the next two senior judges of the Supreme Court. The Court held:

> The process of appointment of Judges to the Supreme Court and the High Courts is an integrated 'participatory consultative process' for selecting the best and most suitable persons available for appointment; and all the constitutional functionaries must perform this duty collectively with a view primarily to reach [*sic*] an agreed decision, subserving the constitutional purpose, so that the occasion of primacy does not arise. ... In the event of conflicting opinions by the constitutional functionaries, the opinion of the judiciary 'symbolised by the view of the Chief Justice of India', and formed in the manner indicated has primacy. ... In exceptional case alone, for stated strong cogent reasons, disclosed to the Chief Justice of India, indicating that the recommendee is not suitable for appointment, that appointment recommended by the Chief Justice of India may not be made. However, if the stated reasons are not accepted by the Chief Justice of India and the other Judges who have been consulted in the matter, on reiteration of the recommendation by the Chief Justice of India, the appointment should be made as a healthy convention.[25]

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[23] (1982) AIR (SC) 149.

[24] (1994) AIR (SC) 268.

[25] *Supreme Court Advocates-on-Record Association v Union of India* (1994) AIR (SC) 268, [508].

In July 1998, the President of India asked for the advisory opinion of the Supreme Court on various areas of the judgment of 1993 including the issue of consultation.[26] In October 1998, the Supreme Court in its advisory opinion confirmed the primacy of the Chief Justice's opinion over that of the President in appointing judges. The Court, however, observed that the 'sole, individual opinion of the Chief Justice of India does not constitute 'consultation' within the meaning of Arts 217 and 222(1) of the Constitution. In appointing judges to the Supreme Court, the Chief Justice must make a recommendation in consultation with the four most senior puisne judges of the Supreme Court. In the case of appointments to the High Courts, the Chief Justice must consult the two most senior puisne judges of the Supreme Court. The views of the puisne judges 'should be in writing and should be conveyed to the [President] by the Chief Justice of India along with his [or her] views'. The Supreme Court further observed that the Chief Justice is under an obligation to follow the 'norms and requirements of the consultation process', and recommendations made by him or her 'without complying with the norms and requirements of the consultation process' are not binding upon the President.[27]

The consultation system has a significant impact on the quality of the judiciary and its independence, but its ultimate weight is dependent on the executive. If the executive is reluctant to give due consideration to the advice of the judiciary and legal profession, this system is useless. In fact, consultation should be an effective

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[26] Under Art 143(D) of the *Constitution of India* President K.R. Narayanan made the Reference to the Supreme Court on 23 July 1998. The Supreme Court disposed of the Presidential Reference by its Advisory Opinion on 28 October 1998 in *Re Presidential Reference*, AIR (1999) SC 1.

[27] *Re Presidential Reference* (1999) AIR (SC) 1, 16.

consultation and in this regard the Indian system of consultation with the judiciary may be considered an effective model.

(3) Use of an Independent Commission

The use of an independent commission in appointing judges is the most acceptable mechanism among the commentators in the contemporary world (Baar, 1991: 153). The *Beijing Statement* 1995 states:

> In some societies, the appointment of judges, by, with the consent of, or after consultation with a Judicial Service Commission has been seen as a means of ensuring that those chosen as judges are appropriate for the purpose. Where a Judicial Service Commission is adopted, it should include representatives of the higher judiciary and the independent legal profession as a means of ensuring that judicial competence, integrity and independence are maintained.[28]

The commission system is operating well in different countries including Canada, South Africa and in many jurisdictions of the United States.[29] There are also judicial appointment committees in Ireland, Israel, New Zealand and the Netherlands (Blair, 2000: 59). Such commissions and committees are entrusted with the task of either making the actual selection of the candidates, or making 'recommendations only', or providing 'a shortlist outside of which' appointments should not be made by the executive without justifying the reasons for doing so (Lavarch, 1993: 22).

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[28] *Beijing Statement* 1995, Art 15.

[29] American Judicature Society (AJS) reported in April 2002 that Judicial Nominating Commission is used for all terms of appointment to all courts of Alaska, Colorado, Connecticut, Delware, District of Columbia, Hawaii, Iowa, Maryland, Massachusetts, Nebraska, New Hampshire, New Mexico, Rhode Island, Utah, Vermont and Wyoming. It is also used for midterm vacancies on some or all levels of court in Alabama, Georgia, Idaho, Kentucky, Minnesota, Montana, Nevada, North Dakota and Wisconsin. For details of the Report, see *Judicial Selection Methods in the States* <http://www.ajs.org/select11.html> 8 June 2002(Copy on file with author).

The effectiveness of the commission system depends on the composition of the commission and the system used by it. The commission may be constituted with senior judges, senior lawyers and distinguished legal academics. Community representatives and parliamentary representatives may also be included (Malleson, 1999: 133; Spry, 2000: [91]).

The commission system can provide a stronger form of scrutiny of prospective candidates for judicial office (Lavarch: 1993: 23). It can ensure the selection of the best-qualified candidates for judicial office, if the commission uses a fair and non-discriminatory selection process. In addition, if the system used by the commission is transparent and open to public scrutiny, it can reduce the exclusive executive control over judicial appointments and maintain public confidence in the appointment system. Thus, it is likely to increase transparency and accountability and to remove improper political control or other irrelevant considerations from the appointment system (Kendall, 1997: 184; Lavarch: 1993: 23; Malleson, 1999: 128, 136, 152).

In respect of the composition of the commission and the system that may be used by it, the South African Model of Judicial Service Commission is an important example. The South African Commission consists of judges, the Minister of Justice, practising and academic lawyers, members of the National Assembly including a substantial number of opposition members, members of the Provincial parliaments, persons nominated by the President of South Africa after consulting leaders of all political parties represented in the National Assembly and in some cases the Premier of the Province or the Premier's nominee.[30] Thus the composition of the

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[30] Under s 178 of the Constitution of South Africa the Judicial Service Commission consists of the following members:
(a) the Chief Justice, who presides at the meetings of the Commission;
(b) the President of the Supreme Court of Appeal;
(c) one Judge President designated by the Judges President;

Commission is representative in nature and is not under the exclusive control of the executive government.

The system used by the South African Judicial Service Commission in appointing judges is credited with having 'a fair degree of openness'. The Commission identifies a list of meritorious candidates by advertising judicial vacancies and interviewing the 'short-listed candidates in public, as if in open court' (Corder, 2001: 198). It 'must prepare a list of nominees with three names more than the number of appointments to be made, and submit the list to the President' who 'may make appointments from the list'.[31] The President 'must advise the Judicial Service Commission, with reasons, if any of the nominees are unacceptable and any appointment remains to be made'.[32] The Commission then 'must supplement the list with further nominees and the President must make the remaining appointments from the supplemented list'.[33]

The commission system is perhaps the best mechanism for judicial appointment to maintain public confidence in the appointment system and to ensure judicial

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(d) the Cabinet member responsible for the administration of justice, or an alternate designated by that Cabinet member;
(e) two practising advocates nominated from within the advocates' profession to represent the profession as a whole, and appointed by the President;
(f) two practising attorneys nominated from within the attorneys' profession to represent the profession as a whole, and appointed by the President;
(g) one teacher of law designated by teachers of law at South African universities;
(h) six persons designated by the National Assembly;
(i) four permanent delegates to the National Council of Provinces designated together by the Council with a supporting vote of at least six provinces;
(j) four persons designated by the President as head of the national executive, after consulting the leaders of all the parties in the National Assembly; and
(k) when considering matters relating to a specific High Court, the Judge President of that Court and the Premier, or an alternate designated by the Premier, of the province concerned.

[31] *Constitution of South Africa*, s174(4)(a-b).

[32] *Constitution of South Africa*, s 174(4)(b).

[33] *Constitution of South Africa*, s 174(4)(c).

independence and accountability. However, for the effectiveness of this mechanism the commission should be representative in nature comprising members of the executive, legislature, judiciary, legal profession and lay persons. In addition, it should be ensured that the commission uses a system which is transparent and open to public scrutiny. In this regard the composition and working system of the South African Commission may be an acceptable model.

A judicial commission which has a representative composition and uses an open and transparent system may be used not only in making initial appointment to judicial office, it may also be effective in promoting judges to the higher posts.

4.3 BANGLADESH PERSPECTIVES

This section examines the existing criteria and mechanisms for judicial appointment in Bangladesh. Its objective is to evaluate the criteria and mechanisms for appointment on the basis of the arguments developed in section 4.2. It concludes that the criteria for appointment of judges in Bangladesh are not completely explicit and published. It also concludes that the mechanisms for appointment are under the control of the executive and are not open to public scrutiny.

Judges in Bangladesh are primarily divided into two classes: (1) judges of the Supreme Court and (2) judges of subordinate courts. Under Art 115 of the Constitution of Bangladesh subordinate court judges are classified as 'persons employed in the judicial service' and 'magistrates exercising judicial functions'.

Discussion in this section deals with the criteria for and mechanisms for appointment of judges to the Supreme Court and subordinate courts under two

subheadings: criteria for appointment of judges and mechanisms for appointment of judges.

4.3.1 Criteria for Appointment

In Bangladesh, the only known criterion for appointment of judges is 'eligibility' which includes legal knowledge and professional experience. In addition, there are two other special criteria know as the principles of 'seniority' and 'reservation or quota'.

4.3.1.1 Eligibility

In terms of the eligibility criteria for appointment, judges of the Supreme Court and subordinate courts may be classified as 'career judges' and 'non-career judges'.

(1) Career Judges

Career judges belong to a hierarchical system of judicial service in Bangladesh. The expression 'judicial service' is defined in the Constitution as 'a service comprising persons holding judicial posts not being posts superior to that of a [D]istrict [J]udge'.[34]

Members of the judicial service are designated as Assistant Judge, Senior Assistant Judge, Joint District Judge, Additional District Judge and District Judge in the subordinate civil judiciary.[35] Joint District Judges, Additional District Judges and

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[34] *Constitution of Bangladesh*, Art. 152(1).

[35] *Civil Courts Act* 1887, s 3. Under the original *Civil Courts Act* 1887, the ranks of 'Assistant Judge' and 'Joint District Judge' were designated as 'Munsif', and 'Subordinate Judge'. The former has been

District Judges exercise criminal powers as Assistant Sessions Judges, Additional Sessions Judges and Sessions Judges when they are appointed under s 9 of the *Code of Criminal Procedure* 1898.

All career judges are initially appointed as Assistant Judges, and appointments to any post higher than that of the Assistant Judge are made by promotion from the officers at the immediate lower stage. Normally, subject to the existence of a vacancy, Assistant Judges are promoted to the posts of Senior Assistant Judge on seniority. Accordingly, Senior Assistant Judges are promoted to the posts of Joint District Judges, and Joint District Judges are promoted to the posts of Additional District Judge who are then promoted to the ranks of District Judge. District Judges are eligible to be appointed as Supreme Court Judges. Therefore, from the lowest rank of judicial service, career judges eventually may be elevated to the Supreme Court of Bangladesh. The eligibility criteria for appointments of career judges in all tiers of the judiciary are as follows:

1) ***Assistant Judge***: A degree in law or jurisprudence or equivalent degree.[36] Experience in legal practice is not a requirement for appointment as an Assistant Judge.
2) ***Senior Assistant Judge***: Four years' experience as Assistant Judge in the judicial service.[37]
3) ***Joint District Judge***: Five years' experience as Senior Assistant Judge in the judicial service.[38]

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changed by the *Civil Courts (Amendment) Act* 1990 and the later by the *Civil Courts (Amendment) Act* 2001.

[36] *Bangladesh Civil Service (Age, Qualification and Examination for direct Recruitment) Rules* 1982, sch I.

[37] *Bangladesh Civil Service Recruitment Rules* 1981 (As amended in 1995), pt XXII.

[38] *Bangladesh Civil Service Recruitment Rules* 1981 (As amended in 1995), pt XXII.

4) ***Additional District Judge:*** Although Additional District Judges are appointed by promotion from among the Joint District Judges, there is no specific requirement of experience as a Joint District Judge.[39]

5) ***District Judge:*** Ten years experience in the judicial service including three years experience as an Additional District Judge and Joint District Judge.[40] It means a person having ten years experience in the judicial service may be appointed as a District Judge if he or she has at least three years experience as a Joint District Judge or both as a Joint District Judge and Additional District Judge.

6) ***Supreme Court Judge:*** At least ten years' experience as a judicial officer in the territory of Bangladesh.[41] For appointment of judges to the Supreme Court, the Constitution of Bangladesh provides specific qualifications, which are common to the appointees of both the High Court Division and Appellate Division. In practice, all judges of the Supreme Court are initially appointed to the High Court Division and Appellate Division Judges are appointed from among the High Court Division Judges (Akkas, 2002: 147-148).

Under the original Art 95(2)(b) of the Constitution a career judge who has held judicial office for at least ten years and exercised the powers of a District Judge for not less three years could be appointed a Supreme Court Judge. In 1977, by amending the original Art 95, the requirement of experience as a District Judge was omitted and now a judicial officer having merely ten years experience can be appointed as a Supreme Court Judge.[42] In practice, senior and efficient district

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[39] *Bangladesh Civil Service Recruitment Rules* 1981 (As amended in 1995), pt XXII.

[40] *Bangladesh Civil Service Recruitment Rules* 1981 (As amended in 1995), pt XXII.

[41] *Constitution of Bangladesh*, Art 95(2)(b).

[42] *Second Proclamation (Tenth Amendment) Order* 1977 (Second Proclamation Order No I of 1977), s 2.

judges are appointed to the Supreme Court. So far, no one from the rank below District Judge has been appointed to the Supreme Court.

(2) Non-career Judges

In Bangladesh, non-career judges may be of two kinds: 1) public servants exercising judicial power and 2) practising lawyers appointed as judges.

(a) Public Servants Exercising Judicial Power

In Bangladesh, public servants employed to executive positions are appointed as judges of lower criminal courts of the subordinate judiciary. Judges of criminal courts are of two kinds, Sessions Judges and Magistrates. As mentioned above, career judges are appointed as Sessions Judges to try criminal cases involving serious offences.[43] Below the Sessions Judges, there are different classes of magistrates to try less serious offences and they are known as Metropolitan Magistrates, Magistrates of the first class, Magistrates of the second class and Magistrates of the third class.[44]

All kinds of magistrates are appointed from the ranks of public servants who are designated as Assistant Commissioners, Additional Deputy Commissioners and Deputy Commissioners (Ahmed, 1998: 137). They perform dual functions - executive and judicial functions. Appointments to the post of Assistant Commissioner are made directly and all other appointments are made by promotion.

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[43] For the offences triable by the Sessions Judges, see section 3.3.2.2.

[44] *Code of Criminal Procedure* 1898, s 6. For the offences triable by different classes of magistrates, see section 3.3.2.2.

For appointment as an Assistant Commissioner, no legal background is required. Persons having graduated from any discipline are eligible to be appointed as Assistant Commissioners. They are invested with magisterial powers to try criminal cases. On first appointment, they are required to undergo a basic training course, which helps them to understand their role in exercising judicial powers (Khalequzzaman, 1995: 85). At the initial stage, they are invested with the powers of Magistrates of the third class and after gaining some experience, they are appointed as Magistrates of the second class, first class etc. (Khalequzzaman, 1995: 69-83).

(b) Practising Lawyers Appointed as Judges

In Bangladesh, practising lawyers are commonly known as advocates. Under the original Constitution of Bangladesh, an advocate could be appointed directly to the office of District Judge as well as to that of Supreme Court Judge. According to the original Art 115(2) of the Constitution, an advocate who had professional experience for at least ten years could be appointed as a District Judge.[45] Under this provision, non-career judges from the ranks of practising lawyers were appointed directly as Additional District Judges. However, this provision was removed from the Constitution in 1975.[46] Now advocates are eligible to be appointed directly to the Supreme Court only, but they are selected solely from members of the Supreme Court bar. An advocate may be a member of the Supreme Court bar, if:

(a) he [or she] has practised as an advocate before subordinate courts in Bangladesh for a period of two years; [or]
(b) he [or she] is a law graduate and has practised as an advocate before any Court outside Bangladesh notified by the Government in the official Gazette; [or]

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[45] According to the interpretation as contained in Art 152 of the Constitution, 'District Judge' includes 'Additional District Judge'.

[46] *Constitution (Fourth Amendment) Act* 1975, s 19.

(c) he [or she] has, for reasons of his [or her] legal training or experience been exempted by the Bar Council from the foregoing requirements of this clause on the basis of the prescribed criteria.[47]

An advocate of the Supreme Court having professional experience for a period of not less than ten years is eligible to be appointed as a Supreme Court Judge.[48]

Under the original Art 95(2)(b) of the Constitution, a person who had been an advocate in the territory of Bangladesh for not less than ten years and exercised the powers of a District Judge for not less than three years could be appointed as a Supreme Court Judge. This provision was omitted by s 2 of the *Second Proclamation (Tenth Amendment) Order* 1977. In fact, after the amendment of Art 115(2) of the Constitution by the *Constitution (Fourth Amendment) Act* 1975, advocates were no longer eligible for appointments directly to the rank of District Judge and therefore, this provision became obsolete. The *Second Proclamation (Tenth Amendment) Order* 1977 added a new clause to Art 95(2) of the Constitution under which a person who 'has such other qualifications as may be prescribed by law' is eligible to be appointed as a Supreme Court Judge.[49] To date (August 2002), no law prescribing such other qualifications has been made and thus no one from this category has been appointed to the Supreme Court.

In practice, the majority of judges of the Supreme Court are appointed from the Supreme Court bar. Other judges are selected from among District Judges of the subordinate judiciary, but there is no written provision relating to the ratio of the appointees to be selected from the bar and from the subordinate judiciary (Akkas, 2002: 147-148). On 20 February 2001, for instance, nine additional judges were

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[47] *Bangladesh Legal Practitioners and Bar Council Order* 1972, Art 21(1).

[48] *Constitution of Bangladesh*, Art 95(2)(a).

[49] *Constitution of Bangladesh*, Art 95(2)(c).

appointed to the High Court Division, among them, six were selected from the Supreme Court bar, and three were selected from the subordinate judiciary. At the time of their appointment to the High Court Division, all three judges of the subordinate judiciary were at the rank of District Judge.[50] Similarly, on 26 June 2001, when nine additional judges were appointed to the High Court Division, six were selected from the Supreme Court bar and three from the career judges. The three career judges were at the rank of District Judge.[51] Very recently, on 27 July 2002, eleven additional judges were appointed to the High Court Division, among them, nine were selected from the bar and two were selected from the rank of District Judge.[52]

Appointment of lawyers to the High Court Division is generally made because of a 'good length of standing [practice] in the Bar, commanding excellence and experience with abilities' (Hoque, 1980: 81).

4.3.1.2 Principle of Seniority

The principle of seniority is an important factor in appointing judges in Bangladesh. Although there is no constitutional or statutory basis for applying seniority criterion in appointing judges, in practice, this principle is considered in four classes of appointments. They are (1) appointment by promotion of career judges in the subordinate judiciary, (2) appointment of career judges to the High Court Division,

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50 Ministry of Law, Justice and Parliamentary Affairs, Justice Section-4, *Notification*, SRO, No 45/Law/2001, 20 February 2001, See *also The Independent*, Dhaka (Bangladesh), 21 February 2001.

51 Ministry of Law, Justice and Parliamentary Affairs, Justice Section-4, *Notification* SRO, No *Bichar* -4/1H-4/Law/2001, 28 June 2001. See also *The Daily Star,* Dhaka (Bangladesh) 4 July 2001.

52 *The New Nation*, Dhaka (Bangladesh), 29 July 2002.

(3) appointment of judges to the Appellate Division and (4) appointment to the office of Chief Justice of Bangladesh.

(1) Seniority of Career Judges in Subordinate Judiciary

As mentioned above in section 4.3.1.1, appointments to the post of Senior Assistant Judge, Joint District Judge, Additional District Judge and District Judge are always made by promotion from the immediate lower ranks. In making such appointments, the two paramount considerations are merit and seniority.

The merit of an appointee is determined by the Supreme Court considering Annual Confidential Reports (ACR) prepared by District Judges on the 'work, character, qualifications and official merits' of subordinate judges. District Judges are responsible for submitting ACRs to the High Court Division not later than 15 February of each year on all judges serving under them from January to December of the previous year. They are required to analyse and comment on the work done by subordinate judges 'only as aids to forming judgment as to their respective deserts and fitness for promotion'.[53] The ACR should:

> [S]et out distinctly and tersely sufficient particulars and it is essential that they should be so full as clearly to show special merits or defects so that the Supreme Court (High Court Division) may form a definite and correct judgment on the merits of the officer. In the case of a very bad report, it is necessary that the unfavourable traits should be briefly illustrated.[54]

For Assistant Judges, Senior Assistant Judges and Joint District Judges there is a single prescribed ACR Form, which contains *inter alia* reports on the sense of discipline, professional experience, level of intelligence, relationship with

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[53] *Civil Rules and Orders* 1982, Vol I, r 809.

[54] *Civil Rules and Orders* 1982, Vol I, r 810.

colleagues, bar, litigants and staff, personality, punctuality, quality of judgment and judicial work, quantity of work disposed of, sense of duty and responsibility, grasp of facts, efficiency in analysing evidence, administrative ability and powers of expression.[55] The prescribed ACR Form for Additional District Judges is separate, but it contains reports on aspects which are almost the same as mentioned above.[56]

If the ACR supports the suitability for promotion of the prospective appointee, the principle of seniority is strictly followed in making an appointment by promotion of career judges.

(2) Seniority in Appointing Career Judges to the High Court Division

The principle of seniority is considered in appointing judges to the High Court Division of the Supreme Court from among the career judges. As mentioned above in section 4.3.1.1, under Art 95(2)(c) of the Constitution a citizen of Bangladesh who has held judicial office for not less than ten years may be appointed as a judge of the Supreme Court. Consequently, any subordinate judge having merely ten years experience may be appointed to the High Court Division and under the Constitution there is no obligation to maintain the seniority among the subordinate judges.

In practice, following the principle of seniority, only judges from the rank of District Judge are appointed to the High Court Division. This principle is strictly followed and as mentioned above, no one from a rank below District Judge has been appointed so far. However, in making such an appointment seniority among the District Judges is not strictly maintained. There are some instances of judges being appointed to the High Court Division by superseding senior District Judges. On 20

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[55] *Civil Rules and Orders* 1982, Vol I, Form No (M) 8.

[56] *Civil Rules and Orders* 1982, Vol I, Form No (M) 8-A.

February 2001, for instance, three judges were appointed to the High Court Division, two of them superseded a senior District Judge. In order of seniority the first four judicial officers in the rank of District Judge were (1) Mr M Abdul Hye, (2) Mr Afzal Hossain Ahmed, (3) Mr M Abdur Razzak, (4) Mr M Marzi-Ul-Haque.[57]

Mr Afzal Hossein Ahmed (number (2)) was superseded by Mr M Abdur Razzak and Mr M Marzi-Ul-Haque (Numbers (3)-(4)).[58]

(3) Seniority in Appointing Judges to the Appellate Division

The Constitution of Bangladesh does not provide any special criteria for appointment of judges to the Appellate Division. As mentioned above, for appointment of judges to the Supreme Court Art 95(2) of the Constitution provides some eligibility criteria, which are common to the appointees of both the High Court Division and Appellate Division. Therefore, any person who fulfils the eligibility criteria can be appointed to the Appellate Division.

Generally, the most senior judges of the High Court Division are appointed to the Appellate Division. However, the principle of seniority is not always strictly followed in appointing judges to the Appellate Division (Akkas, 2002: 148). There have been many instances of senior judges of the High Court Division being by-passed in the appointment of judges to the Appellate Division. From December 1985 to November 2000, this occurred nineteen times.[59] Thereafter, on 10 January 2001,

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[57] Ministry of Law, Justice and Parliamentary Affairs, *Gradation List of Subordinate Judges* (2001).

[58] Ministry of Law, Justice and Parliamentary Affairs, Justice Section-4, *Notification*, SRO, No 45/Law/2001.

[59] By personal contact with the Ministry of Law, Justice and Parliamentary Affairs, I collected the list of nineteen superseding as well as superseded judges. A similar list of superseding judges was published in the *Dainik Sangbad* on 14 January 2001.

two more judges and again on 16 May 2001, one more judge were appointed to the Appellate Division, superseding the senior judges.[60]

When by-passed for the third time, Justice Kazi Shafi Uddin, a Judge of the High Court Division resigned from his office on 9 November 2000. In an interview with the *Dainik Manavzamin*, a tabloid Bangla daily, on 10 November 2000, he explained the reasons for his resignation.[61] Justice Shafi Uddin said that after being by-passed twice he was still waiting appointment to the Appellate Division, but eventually another judge, who was very junior to him in the High Court Division, was appointed. Consequently, he realised that it was no longer prestigious for him and there was no environment to continue as a judge of the High Court Division.

Being asked by the interviewer he claimed there was no complaint against him. He added that if there were any complaints, he could be removed from office after investigation by the Supreme Judicial Council. Justice Shafi Uddin emphatically said that he might have been by-passed for other reasons. In explaining the other reasons, he emphasised the political considerations of the government and disclosed that when the political party in power was in opposition [before 1996], they boycotted Parliament for a long time and the boycott was challenged in a case on which he sat. Justice Shafi Uddin said that as a Judge of the High Court Division he declared the Parliament boycott illegal and ordered opposition Members of Parliament to refund the remuneration etc they received during the boycott.[62]

In addition, he indicated that a group of judges of the Supreme Court were always active in restraining his appointment to the Appellate Division. He said that

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[60] *The Daily Star*, Dhaka (Bangladesh), 11 January 2001; *The Dainik Prothom Alo*, Dhaka (Bangladesh), 16 May 2001.

[61] For details of the interview see the *Dainik Manvzamin*, Dhaka (Bangladesh), 11 November 2000.

[62] For details about this case, see *Special Reference No 1* (1995) 47 DLR (AD) 111.

before his appointment as a High Division Judge in 1987, he was consulted by the then Vice-President of Bangladesh, who was in charge of the Ministry of Law, Justice and Parliamentary Affairs, regarding the appointment of some High Court Division Judges to the Appellate Division. He disclosed that the then Vice-President asked his opinion about the appointment of some judges to the Appellate Division by-passing senior judges of the High Court Division and he gave an adverse opinion. Justice Shafi Uddin indicated that judges who were to be appointed to the Appellate Division were aggrieved by his opinion.

When the remarks of Justice Shafi Uddin were published, the Ministry of Law, Justice & Parliamentary Affairs issued a press release which was published in different national dailies.[63] The press release stated that the appointment of judges to the Appellate Division cannot be treated as promotion, and seniority is not the only standard to consider in making such appointments. It added that under Art 95 of the Constitution the President appoints Appellate Division Judges after considering the Chief Justice's recommendation based on efficiency, experience and other performance standards. It was further stated that due to his inefficiency Justice Kazi Shafi Uddin failed to be recommended by the two former Chief Justices and the present Chief Justice, and therefore, the President did not appoint him. The press release continued that in accordance with latest information, Justice Shafi Uddin was not attentive in administering justice and in 2000 he performed judicial duties only on a few days and therefore, the quantity of work disposed of by him was almost nil.

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63 *The Dainik Manavzamin*, Dhaka (Bangladesh), 14 November 2000; *The Dainik Sangbad*, Dhaka (Bangladesh), 15 November 2000.

In fact, the executive enjoys an exclusive power in appointing judges to the Appellate Division and it is not publicly known exactly what criteria are followed in making such an appointment.

(4) Seniority in Appointing Chief Justice

The principle of seniority is strictly followed in appointing the Chief Justice of Bangladesh. The Constitution of Bangladesh does not prescribe any special qualification for the appointment of a Chief Justice. Any person who fulfils the qualifications required for appointment as a judge to the Supreme Court and who has been appointed as such, is automatically qualified for appointment as Chief Justice.

There is no constitutional obligation to follow the principle of seniority in appointing the Chief Justice, but it is an established practice that the most senior judge of the Appellate Division is appointed Chief Justice of Bangladesh. This principle is so firmly established that with one exception, all Chief Justices thus far have been appointed according to seniority (Talukdar, 1994: 94; Halim, 1998: 305). The only exception was the appointment immediately after the independence of Bangladesh, when the then Chief Justice and other senior Judges of the High Court at Dhaka were not re-appointed to the High Court of Bangladesh (Chowdhury, 1990: 162; Huda, 1997: 807).

4.3.1.3 Principle of Reservation or Quota

In respect of any employment in the service of the Republic of Bangladesh, equality of opportunity is a fundamental right, and no citizen should be 'ineligible for or discriminated against' on the 'grounds only of religion, race, caste, sex or place of

birth'.[64] However, this is subject to the following exceptions, the government is not to be prevented from:

> (a) making special provision in favour of any [disadvantaged or minority group of] citizens for the purpose of securing their adequate representation in the service of the Republic;
> (b) giving effect to any law which makes provision for reserving appointments relating to any religious or denominational institution to persons of that religion or denomination;
> (c) reserving for members of one sex any class of employment or office on the ground that it is considered by its nature to be unsuited to members of the opposite sex.[65]

Under this provision, there is a quota system (reservation of posts) for recruitment to the service of the Republic. At present, 45% of posts are reserved for recruitment on merit and 55% of posts are reserved for district quotas, which are distributed among the 64 districts based on population. From the quota distributed to each district 10% is reserved for women and 5% is reserved for tribal groups. Candidates from the different categories of the quotas are selected based on merit.[66] The principle of reservation or quota is an important criterion for appointment from among the social groups based on positive discrimination. It might be helpful to establish a representative judiciary.

The quota system is applicable throughout the civil service, including the judicial service. Accordingly, in appointing judges of the subordinate courts, the government considers the principle of reservation to secure adequate representation of different social classes, including females. At present (August 2002), there are 749

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64 *Constitution of Bangladesh*, Art 29(1-2).

65 *Constitution of Bangladesh*, Art 29(3).

66 Ministry of Establishment, *Established Manual*, Vol I (1996) 324-325.

judges in the subordinate judiciary and of them 70 judges are female, 50 Hindu and 3 tribal.[67]

The principle of reservation is not applicable for appointment of judges to the Supreme Court. However, under the Constitution, members of any disadvantaged or minority groups can be appointed as Supreme Court Judges. At present (August 2002), there are 62 judges in the Supreme Court including the Chief Justice and only two of them are female while five are Hindu. On 25 May 2000, the first female judge of the Supreme Court Justice Nazmun Ara Sultana was appointed from among career judges. The second female judge Justice Salma Masood Chowdhury was appointed from the Supreme Court bar on 27 July 2002.[68]

Consideration of the criteria for the appointment of judges in Bangladesh reveals that there are some significant drawbacks. The primary drawback is that the criteria for appointments are not completely explicit and publicly known.

Although in the Constitution and in some statutory instruments there are some specific criteria, they are not sufficient to ensure the appointment of persons who are the best-qualified for judicial office. Due to the absence of explicit and publicly known criteria for appointment, there is a possibility of appointing judges based on personal and political favouritism. Although there is no clear-cut evidence that judges are appointed purely on political considerations, there is no guarantee that political considerations will not prevail over the principle of merit. In practice,

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[67] Ministry of Law, Justice and Parliamentary Affairs, *Gradation list of Subordinate Judges* (2001).

[68] Ministry of Law, Justice and Parliamentary Affairs, *Gradation list of Supreme Court Judges* (2001). See also the *New Nation*, Dhaka (Bangladesh), 29 July 2002.

involvement in politics is not considered a disqualification for appointment and sometimes appointments are made from persons who are actively involved in politics or active supporters of the party in power. Therefore, it is likely that executive government may appoint judges, particularly Supreme Court Judges, from people who are sympathetic to their policies and ideologies. This is because under the present system, anyone who fulfils the eligibility criteria can be appointed as a judge without being subject to the assessment of other qualities that are required for judges.

Another drawback exists in respect of the criteria for appointment of Appellate Division Judges. Although the Appellate Division is a distinct and separate Division from the High Court Division, there are no special criteria for appointment of judges to the Appellate Division. Anyone having the qualifications under Art 95(2) can be appointed to the Appellate Division. It is not obligatory that Appellate Division Judges are appointed from among High Court Division Judges, but no judge of the Appellate Division has so far been appointed except from among the judges of the High Court Division.

4.3.2 Mechanisms for Appointment

The mechanisms for appointment of judges of the Supreme Court and subordinate courts are significantly different. Therefore, the mechanisms are discussed under two sub-headings: appointment of Supreme Court Judges and appointment of subordinate court judges.

4.3.2.1 Appointment of Supreme Court Judges

Under Art 95(1) of the Constitution, the Chief Justice and other judges of the Supreme Court are appointed by the President. In addition, Art 98 of the Constitution empowers the President to appoint additional judges of the Supreme Court. However, in practice, all judges of the Supreme Court are initially appointed to the High Court Division as additional judges for a period of two years under Art 98 and then they may be appointed as High Court Division Judges under Art 95(1). Subsequent to serving in the High Court Division, they are only appointed as Appellate Division Judges on the occurrence of a vacancy (Akkas, 2002: 147).

The original Art 95(1) provided, '[t]he Chief Justice shall be appointed by the President, and the other judges shall be appointed by the President after consultation with the Chief Justice'. Art 98 originally provided, 'if the President is satisfied, after consultation with the Chief Justice, that the number of the judges of a division of the Supreme Court should be for the time being increased, the President may appoint one or more ... additional judges'.

The original Constitution introduced a parliamentary system of government under which the President was the titular head of the State and the executive power of the State was vested in the Prime Minister. According to the original Art 48(3) of the Constitution, the President was bound to act in accordance with the advice of the Prime Minister in the exercise of all his functions, except in appointing the Prime Minister. Therefore, the President could appoint the Chief Justice and other judges only on advice of the Prime Minister.

The parliamentary system of government was abolished by the *Constitution (Amendment) Act* 1975 which established a presidential form of government. This amendment vested the executive authority of the Republic in the President and

empowered the President to appoint the Chief Justice and other judges of the Supreme Court. In this respect, the President was not bound to act on the advice of the Prime Minister or to consult the Chief Justice. Under ss 14 and 16 of the *Constitution (Fourth Amendment) Act* 1975, the requirement of consultation with the Chief Justice was omitted by amending Arts 95 and 98 of the Constitution.

In 1976, during the first Martial Law in Bangladesh, some major changes were introduced in the structure of the Supreme Court.[69] Instead of the Supreme Court comprising the Appellate Division and the High Court Division, a separate Supreme Court and a High Court were established by s 4 of the *Second Proclamation (Seventh Amendment) Order* 1976. Under the changes, the Chief Justice and other puisne judges of the Supreme Court were appointed by the President, but in appointing the puisne judges, the President was under an obligation to consult the Chief Justice. The Chief Justice of the High Court would be appointed by the President after consultation with the Chief Justice of the Supreme Court, and other judges of the High Court would be appointed by the President after consultation with both the Chief Justice of the Supreme Court and the Chief Justice of the High Court. However, in appointing the additional judges of the Supreme Court and the High Court, the President was not under an obligation to consult the Chief Justice of the Supreme Court or that of the High Court.

In 1977, the separate structure of the Supreme Court and High Court was abolished and a Supreme Court comprising the Appellate Division and the High Court Division was re-established by s 2 of the *Second Proclamation (Tenth Amendment) Order* 1977. The powers to appoint the Chief Justice and other judges

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[69] The first Martial Law was declared in independent Bangladesh on 15 August 1975 and it was withdrawn after passing the *Constitution (Fifth Amendment) Act* 1979 on 6 April 1979.

of the Supreme Court were again vested exclusively in the President, and he was empowered to appoint the puisne judges of the Supreme Court without consulting the Chief Justice. As the Chief Executive of the State, the President was not bound to act on the advice of the Prime Minister.

This system continued until 1991, when the *Constitution (Twelfth Amendment) Act* 1991 re-introduced a parliamentary system of government. The President must now act in accordance with the advice of the Prime Minister when exercising his or her functions, except in appointing the Prime Minister and the Chief Justice.[70] The President may appoint the Chief Justice without consulting the Prime Minister, but in appointing other judges of the Supreme Court, he or she is bound to act on the advice of the Prime Minister.

The Twelfth Amendment of the Constitution has almost revived the original Constitution, but it has not revived the original Arts 95 and 98, which related to the appointment of Supreme Court Judges. In terms of the President's powers in appointing the Chief Justice and other judges, there are two basic differences between the original Constitution and the Twelfth Amendment of Constitution. First, under the original Constitution, in appointing the Chief Justice the President was bound to act in accordance with the advice of the Prime Minister. Under the Twelfth Amendment, the President is not bound to appoint the Chief Justice in accordance with the advice of the Prime Minister. Secondly, in appointing the puisne judges of the Supreme Court, consultation with the Chief Justice was obligatory under the original Constitution, but under the Twelfth Amendment, there is no constitutional obligation to consult the Chief Justice.

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[70] *Constitution of Bangladesh*, Art 48(3).

Due to the conventional principle of seniority, the former difference is not particularly significant. Under Art 96 of the Constitution judges of the Supreme Court enjoy an adequate security of tenure and it is not possible to create pressure on senior judges to resign or return before the attainment of the mandatory age of retirement.[71] Therefore, according to constitutional convention, the President appoints the most senior judge of the Appellate Division of Supreme Court as the Chief Justice of Bangladesh. However, the latter difference could be very significant, because the principle of consultation was a great constraint on the exclusive executive power.

Under the present system, the executive government enjoys an exclusive privilege in appointing Supreme Court Judges. The Prime Minister being the Chief Executive of the State plays the decisive role in making appointments. In practice, the Ministry of Law, Justice and Parliamentary Affairs takes the initiative for the appointment of judges. With specific recommendations of the Minister-in-charge candidates for appointment are submitted to the Prime Minister and then they are submitted to the President for formal approval.[72] However, before making any appointments, the government informally consults the Attorney-General, judges and lawyers.

Although there is no constitutional requirement to consult the Chief Justice, all appointments are made in consultation with him or her. The Chief Justice, before forming his or her opinion about the suitability of the persons for the office of

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[71] For discussion on security of tenure of judges of the Supreme Court, see section 5.3.1.

[72] Cabinet Division, Government of the People's Republic of Bangladesh, *Rules of Business* 1996, rr. 7, 9 & Sch IV.

Supreme Court Judge, informally consults the other judges of the Supreme Court and sometimes senior lawyers of the Supreme Court Bar Association.[73]

The original Constitution adopted the provision of consultation as a major safeguard against political appointment and it was a constitutional acknowledgement of the role of the Chief Justice in appointing judges (Kamal, 1994: 29). Following the withdrawal of the provision requiring consultation with the Chief Justice, there is great scope for appointments to be made based on political or other considerations regardless of merit. However, in spite of the constitutional changes, consultation with the Chief Justice has been established as a constitutional convention. The weight of this convention can be seen in the following two case studies.

Case Study 1: Appointment of High Court Division Judges in 1994

In February 1994, the government selected nine additional judges for the High Court Division without consultation with the Chief Justice. On the very day of the appointments, the then Chief Justice Shahabuddin Ahmed made reference to the incident at the inaugural session of the National Lawyers' Conference organised by the Bangladesh Bar Council. The Chief Justice expressed his concern that judges of the Supreme Court should be appointed in accordance with the Constitution and the Chief Justice had no role in the process. He added that the Chief Justice is 'Mr. Nobody' in making such appointments.[74]

The Conference then expressed its disapproval of such appointments by a unanimous resolution and urged the Chief Justice to refuse to swear in the judges. The resolution was conveyed to the Chief Justice by the leaders of the Bar Council

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[73] Law Commission of Bangladesh, *Annual Report* (1997), Vol II, para 22.

[74] *The Daily Star*, Dhaka (Bangladesh), 5 February 1994.

and the Supreme Court Bar Association. The Chief Justice, after consultation with all other judges of the Supreme Court, informed the leaders of the Bar Council and Bar Association that he would defer swearing in the newly appointed judges for two days and that during this period the President and the Prime Minister could be approached to resolve the situation (Ahmed et al, 2001: [7]). Thereafter, a delegation of senior lawyers met the President and the Prime Minister and urged them not to violate the established practice of consultation in appointing the judges (Ahmed, 1998: 128).

The government tried to justify its stance by saying that there was no constitutional requirement of consultation with the Chief Justice. However, due to the pressure of public opinion and the increasing pressures from lawyers, the government ultimately rescinded its notification of the appointments (Kamal, 1994: 30; Patwari, 1994: 143; Ahmed, 1998: 128). After consultation with the Chief Justice, the names of two of the judges earlier appointed were dropped and fresh appointments were made adding another two judges.[75]

This incident demonstrates two aspects of the conventional practice of consultation. Firstly, although the Chief Justice has no formal power in relation to the appointment of judges, he or she is constitutionally empowered to swear in the judges. Any judge appointed to the Supreme Court must 'make and subscribe an oath or affirmation' before entering upon the office.[76] He or she is 'deemed to have entered upon the office immediately after he [or she] makes the oath'.[77] The oath or affirmation of a judge must be administered by the Chief Justice or another person

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[75] *The Dainik Sangbad*, Dhaka (Bangladesh), 14 January 2001.

[76] *Constitution of Bangladesh*, Art 148(1) and Sch III, para 6.

[77] *Constitution of Bangladesh*, Art 148(3).

designated by the Chief Justice.[78] After the incident of 1994 this power of the Chief Justice came to be regarded as a safeguard against the unilateral power of the executive government in appointing judges. Other safeguards were the active role of the lawyers and public criticism.[79] Consequently, the importance of the executive government consulting the Chief Justice prior to appointing judges to the Supreme Court became recognised as essential. Thus, in practice, the constitutional convention of consultation has partially filled the gap in the written constitutional provisions.

Secondly, the incident highlights the Chief Justice's role in informing lawyers and the public of a breach of this constitutional convention. The Chief Justice decided to defer swearing in the judges for two days. If the government chose not to change its controversial appointments, the Chief Justice was ultimately powerless to stop it. He was under a constitutional obligation to administer the oath because being appointed Chief Justice, he made and subscribed an oath or affirmation that 'I will preserve, protect and defend the Constitution and the laws of Bangladesh'.[80] Under his oath the Chief Justice was bound to observe the constitutional provision of administering the oath or affirmation of judges and was therefore only able to defer it for a short time. The government was bound to change its decision only because of the pressure from lawyers and the weight of public criticism. However, lawyers' role in creating pressure relies on them being informed when judicial appointments are

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[78] *Constitution of Bangladesh*, Art 148(2) and Sch III, para 6.

[79] In Bangladesh, the general public through the media and lawyers individually and collectively play significant roles in scrutinising the judiciary as well. For the media scrutiny and scrutiny by lawyers of the judiciary, see Chapters 7 and 8.

[80] *Constitution of Bangladesh*, Sch III, para 6.

made without consultation with the Chief Justice. They were only aware of the incident as a result of the Chief Justice's disclosure at a lawyers' conference.

The process of judicial appointment is very secretive and, as a consequence, only the Chief Justice knows whether or not the practice of consultation has been followed. The Chief Justice's position does not, however, permit public disclosure of details relating to judicial appointments or of cases where the government has departed from the conventional practice of consultation. Whether an incident is reported to the public will often depend on the personal attitude of the Chief Justice. It is likely that some Chief Justices will prefer to avoid confrontation with the government, so there is no guarantee that all governments in future will be compelled, as in this case study, to follow the practice of consultation in making appointments to the Supreme Court.

Case Study 2: Appointment of Appellate Division Judges in 2001

On 10 January 2001, the President of Bangladesh appointed Justice Golam Robbani and Justice Ruhul Amin as judges of the Appellate Division. At the time of their appointments, both were judges of the High Court Division. The question of consultation arose again just after the appointment of these two judges.

In practice, the Chief Justice initiates the process of appointment of judges to the Appellate Division. When vacancies occur in the Appellate Division, the Chief Justice sends a proposal for appointment of judges to the Ministry of Law, Justice and Parliamentary Affairs. The proposal includes a seniority list of the most senior judges of the High Court Division. The Minister-in-Charge of the Ministry sends it to the President. The President sends the proposal to the Prime Minister who takes the

actual decision for appointments. After finalising the names for appointment, the Prime Minister forwards it to the President for formal approval.[81]

In the present case, to fill two vacancies of the Appellate Division, the Chief Justice sent a list of the four most senior judges of the High Court Division in order of seniority. The list was as follows: (1) Justice KM Hasan (2) Justice Golam Robbani (3) Justice Syed Modassir Hossain and (4) Justice Ruhul Amin.[82] The government appointed Justice Golam Robbani and Justice Ruhul Amin from the second and fourth positions. When the Chief Justice was about to administer the oath to the two selected judges on 11 January, a group of Supreme Court lawyers belonging to the main opposition political party, strongly protested the appointments and urged the Chief Justice not to administer the oath. Their plea was that the two judges were not appointed in accordance with the seniority as recommended by the Chief Justice. However, the Chief Justice administered the oath despite demonstrations on the Supreme Court premises. Protestors and pro-government lawyers scuffled in the court premises, and the proceedings of the Supreme Court were disrupted for several hours, before the senior lawyers of the Supreme Court took the initiative to resolve the situation.[83] In a meeting of lawyers, a proposal was agreed and put forward for the appointment of the remaining two judges to the Appellate Division. A five-member committee of senior advocates from the Supreme Court Bar Association was selected to pursue the agreed proposal (Ahmed *et al*, 2001: [4]).

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[81] *The Dainik Sangbad*, Dhaka (Bangladesh), 14 January 2001. See also Cabinet Division, Government of the People's Republic of Bangladesh, *Rules of Business* 1996, rr. 7, 9 & Sch IV.

[82] *The Dainik Sangbad*, Dhaka (Bangladesh), 14 January 2001.

[83] *The Daily Star*, Dhaka (Bangladesh), 12 January 2001.

The committee met the President and the Chief Justice. Both agreed with the proposal to resolve the crisis and indicated that the proposal would be given due consideration (Ahmed *et al*, 2001: [4]). However, the government was firm in its stand and the committee was refused a meeting with the Prime Minister. Justifying the government's stance, Advocate Abdul Matin Khasru, the then Minister of Law, Justice and Parliamentary Affairs, in a statement in Parliament on 15 January 2001, said that appointment to the Appellate Division is not a promotion and seniority is not the only standard for appointing judges. He added that competence, knowledge of law and commitment to the rule of law are also important factors.[84] On 21 January 2001, in a talk show arranged by *Ekushey Television* (ETV), Advocate Abdul Matin Khasru categorically said that the appointments were made in accordance with the constitution and in consultation with the Chief Justice. The Minister, as he was then, added that if seniority were strictly followed there would not be any scope for consultation with the Chief Justice.

This incident demonstrates a conflict between the principle of seniority and consultation. The principle of seniority implies that only the most senior persons can be appointed and there is no chance of an alternative. On the other hand, the principle of consultation implies that there is an opportunity to depart from seniority. Through the consultative process, any person can be selected irrespective of seniority. It has already been mentioned in section 4.3.1.2 that the principle of seniority is not strictly followed in appointing judges of the Appellate Division. Therefore, the main

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[84]United News of Bangladesh, *Matin-Contempt Motion* (Nationwide International News), 15 January 2001, <http://80-www.lexis.com.ezproxy.uow.edu.au:2048/research> 3 August 2002 (Copy on file with author).

question for consideration in the present case was whether or not the constitutional convention of consultation was followed.

The discussion reveals that the Chief Justice sent a list of four judges against two vacancies. Any two of the judges recommended in that list could be selected and therefore, appointment of judges from the second and fourth position cannot be considered a strict violation of the principle of consultation. However, it was reported that at the time of sending the list of four judges, the Chief Justice gave his opinion that all were equally competent and that their seniority should be respected (Ahmed *et al*, 2001: [4]). The Chief Justice was the right person to assess the competence of the judges and in the present case, the core element of his opinion was that since all four judges recommended were equally competent the appointments should be made in order of seniority. This opinion of the Chief Justice was not accepted. In addition, the executive government did not communicate with the Chief Justice when disregarding his opinion, and therefore, the Chief Justice did not have any opportunity to withdraw his opinion (Ahmed *et al*, 2001). Consequently, the consultation with the Chief Justice might not be considered effective.

From these two case studies, it is clear that the conventional practice of consultation is not sufficient to regulate exclusive executive control over appointments or to exclude undue political or other considerations in appointing judges. Due to the absence of a constitutional obligation of consultation with the Chief Justice, there is always a risk that with an object of facilitating nepotism and political favouritism the practice of consultation will be ignored and the power of judicial appointment will be misused.

4.3.2.2 Appointment of Subordinate Court Judges

It has already been mentioned that subordinate court judges are of two kinds: persons employed in the judicial service and magistrates exercising judicial functions. The President of Bangladesh appoints them under Art 115 of the Constitution. The original Art 115(1) provided:

> Appointments of persons to offices in the judicial service or as magistrates exercising judicial functions shall be made by the President –
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> (a) in the case of district judges, on the recommendation of the Supreme Court; and
> (b) in the case of any other person, in accordance with rules made by the President in that behalf after consulting the appropriate public service commission and the Supreme Court.

Art 115 was amended by s 19 of the *Constitution (Fourth Amendment) Act* 1975. It now provides, '[a]ppointments of persons to offices in the judicial service or as magistrates exercising judicial functions shall be made by the President in accordance with rules made by him in that behalf'. To date (2002), no rules have been made under Art 115 for appointment of subordinate court judges. They are appointed in accordance with the *Bangladesh Civil Service (Judicial) Composition and Cadre Rules* 1980 and *Civil Service Recruitment Rules* 1981 made under Art 133 of the Constitution.

In fact, subordinate court judges are members of the civil service known as the 'Bangladesh Civil Service' (BCS). Regarding the services of Bangladesh, there are elaborate provisions in the Constitution in Part IX, which contains two chapters. The first chapter (Arts 132-136) deals with the services of the Republic and the second chapter (Arts 137-141) deals with the Public Service Commission. In respect of appointment and conditions of service, Art 133 of the Constitution provides:

> Parliament may by law regulate the appointment and conditions of service of persons in the service of the Republic:

> Provided that it shall be competent for the President to make rules regulating the appointment and conditions of service of such persons until provision in that behalf is made by or under any law, and rules so made shall have effect subject to the provisions of any such law.

In addition, Art 136 provides, '[p]rovision may be made by law for the reorganisation of the service of the Republic by the creation, amalgamation or unification of services and such law may vary or revoke any condition of service of a person employed in the service of the Republic'.

Under Art 136 of the Constitution, Parliament enacted the *Services (Reorganisation and Conditions) Act* 1975, which empowered the government to reorganise the services of the Republic and to prescribe grades, scales of pay and other terms and conditions of services.[85] In the exercise of this power the government created 16 cadres and 22 sub-cadres of different services under the *Bangladesh Civil Service (Reorganisation) Order* 1980. In 1986, by abolishing all sub-cadres, 30 cadres have been created.[86] Moreover, according to the proviso of Art 133 of the Constitution, the government made the *Bangladesh Civil Service Recruitment Rules* 1981 for recruitment of persons in the service of the Republic.

Persons employed in the judicial service are members of the BCS (Judicial) cadre and as mentioned above in section 4.3.1.1, they are designated as Assistant Judge, Senior Assistant Judge, Joint District Judge, Additional District Judge and District Judge.

Under the existing system, appointments to the rank of Assistant Judge are made by direct recruitment on the basis of competitive examinations conducted by the

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[85] *Services (Reorganisation and Conditions) Act* 1975, ss 4-5.

[86] Cabinet Secretariat, Establishment Division (Implementation Cell), Government of the People's Republic of Bangladesh, SRO No 347/L/86/ME/IC-4/85, 31 August 1986.

Public Service Commission (PSC).[87] Appointments to any post higher than that of Assistant Judge are made by promotion of officers at the stage immediately below that stage.[88]

In order to fill the vacant posts of Assistant Judge, the Ministry of Law, Justice and Parliamentary Affairs (MLJPA) refers the matter to the Ministry of Establishment (ME) and the ME sends it to the PSC for selection of candidates. The PSC conducts tests and examinations for selection of suitable persons for appointment to the posts of Assistant Judges and recommends the list of successful candidates to the ME. The ME submits the list of selected candidates to the Prime Minister for approval and then the formal appointments are made by the President or an officer authorised by him.[89] After making the formal appointments, the ME sends the list of appointees to the MLJPA for their posting.

Magistrates exercising judicial functions are members of the BCS (Administration) cadre and as mentioned above in section 4.3.1.1, they are designated as Assistant Commissioner, Additional Deputy Commissioner, and Deputy Commissioner. It has also been mentioned in section 3.3.1.2 that they are

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[87] *Constitution of Bangladesh*, Art 140; *Bangladesh Civil Service (Judicial) Composition and Cadre Rules* 1980, r 6(1). The PSC is a quasi-judicial body established under Art 137 of the Constitution. Under Art 140 of the Constitution, its basic functions are (1) to conduct tests and examinations for appointment of public servants from among university graduates, (2) to advise the President on any service matter on which the Commission is consulted with respect to (a) matters relating to qualifications for and methods of recruitment, (b) the suitability of candidates and principles to be followed in making appointments, promotions and transfers, (c) matters affecting the terms and conditions of service, and (d) the discipline of the service.

[88] *Bangladesh Civil Service (Judicial) Composition and Cadre Rules* 1980, r 6(2).

[89] Cabinet Division, Government of the People's Republic of Bangladesh *Rules of Business* 1996, r 7; *Bangladesh Civil Service (Judicial) Composition and Cadre Rules* 1980, r 5.

public servants employed in executive positions and invested with magisterial powers to try criminal cases.

Similar to the Assistant Judges, Assistant Commissioners are recruited directly by competitive examinations conducted by the PSC. Thereafter, they rise by promotion to the higher posts, and in some cases, they are appointed as Secretaries of the Government of Bangladesh (Ahmed, 1998: 137-138). All of them are appointed by the President through the Ministry of Establishment and the Supreme Court is not involved in their appointment in any manner.

Under the original Art 115 of the Constitution, appointments to the rank of District Judge were made by promotion as well as by direct recruitment. The *Constitution (Fourth Amendment) Act* 1975 abolished the process of direct appointments to the rank of District Judge. Now a judge may be promoted to the rank above the one he or she holds. In making the appointments by promotion, the President exercises his power under Art 116 of the Constitution. The original Art 116 of the Constitution provided that the 'control (including the power of posting, promotion and grant of leave) and discipline of persons employed in the judicial service and magistrates exercising judicial functions shall vest in the Supreme Court'. Under this provision, the Supreme Court was authorised to exercise the power of appointment of higher judicial officers on promotion from the immediate lower ranks.

In this context, the provisions of the original Arts 115 and 116 were not well designed; rather there were ambiguities in two cases.[90] Firstly, Art 116 vested the

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[90]The provisions of the original Arts 115 and 116 of the Constitution of Bangladesh were similar to the provisions of Arts 233-235 of the Constitution of India. Some flaws in Arts 233 and 235 of the Constitution of India are discussed in Jain, 1990: 254 citing the XIV report of the Law Commission of India. In identifying the ambiguities in original Arts 115 and 116 of the Constitution of Bangladesh I borrowed the basic idea from Jain, 1990: 254.

Supreme Court with the exclusive power to promote subordinate court judges and it was not clear whether subordinate judges of all levels were within the purview of this Article. Thus after initial appointment by direct recruitment, all appointments on promotion could be made by the Supreme Court. On the other hand, Art 115 provided that the President, on the recommendation of the Supreme Court, would appoint District Judges from among subordinate judicial officers and from practising lawyers. Obviously, appointments from among practising lawyers were made by direct recruitment, but it was not clear whether appointments of District Judges from among the judicial officers were regarded as promotions. If such appointments were regarded as promotions, they would be made exclusively by the Supreme Court under Art 116. If they were not regarded as promotions, the appointments would be made by the President on the recommendation of the Supreme Court. Secondly, there was ambiguity about appointments to ranks higher than entry level but lower than District Judge. If such appointments were regarded as promotions, they would be made by the Supreme Court under Art 116, but if they were regarded as appointments, they would be made by the President under Art 115.

In spite of these ambiguities, the original Arts 115 and 116 had the following very important features:

(a) The Supreme Court had the power of recommendation in appointing the District Judges. The word 'recommendation' indicates the finality to the suggestion given by the Chief Justice to the President.[91] Therefore, the President was bound to follow the Chief Justice's recommendation and he or she could not appoint a

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[91] Law Commission of Bangladesh, *Annual Report* (1997), Vol II, para 25.

person as a District Judge unless the Supreme Court recommended the appointment;

(b) The Supreme Court had a consultative role in appointing judicial officers other than District Judges; and

(c) The Supreme Court was empowered to exercise the power of promotion of judicial officers and in fact, after initial appointments at entry level the executive government ceased to have any control over appointments by promotion.

The *Constitution (Fourth Amendment) Act* 1975 made major changes to Arts 115 and 116. The Act omitted the provision for consultation and recommendation from Art 115 and empowered the President to appoint all persons in the judicial service and magistrates exercising judicial functions.[92] After this amendment, the Supreme Court lost its power of recommendation and consultation in appointing subordinate court judges. In addition, the Act amended Art 116 by substituting the word 'President' for the word 'Supreme Court'.[93] Thus, the President was empowered exclusively to exercise the power of appointment of subordinate judges on promotion. However, s 2(5) of the *Second Proclamation (Fifth Amendment) Order* 1978 added that the President should exercise his or her power in consultation with the Supreme Court.[94]

Although, as mentioned in section 4.3.2.1, the *Constitution (Twelfth Amendment) Act* 1991 has almost revived the original Constitution by repealing the maximum changes that were introduced by the *Constitution (Fourth Amendment) Act* 1975, it did not revive the original Arts 115 and 116 to re-establish the role of the Supreme Court in appointing subordinate court judges. Therefore, as provided by the

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[92] *Constitution (Fourth Amendment) Act* 1975, s 19.

[93] *Constitution (Fourth Amendment) Act* 1975, s 20.

[94] *Second Proclamation (Fifth Amendment) Order* 1978, s 2(5).

Fourth Amendment, the President requires neither any recommendation from the Supreme Court for appointment of the District Judges nor is he required to consult the Supreme Court in appointing other subordinate judges.

In making appointments on promotion to the ranks of Senior Assistant Judge, Joint District Judge, Additional District Judge and District Judge the President now consults the Supreme Court under Art 116 of the Constitution. In this regard, there is a General Administration Committee of the Supreme Court comprising the 'Chief Justice and not more than three Judges as the Chief Justice may appoint from time to time'.[95] The Committee is empowered to make recommendations for these appointments, but all such recommendations must be 'placed before the Full Court for approval'.[96] The Chief Justice may 'direct that the powers conferred on the Administration committee ... shall be exercised by one or two Judges of that Committee and such Judges may apportion the duties of the Committee between them, subject to the approval of the Chief Justice'.[97]

As to consultation with the Supreme Court, the High Court Division in *Aftabuddin v Bangladesh* (1996) held that consultation with the Supreme Court under Art 116 of the Constitution is mandatory.[98] Again, in *Secretary, Ministry of Finance v Hossain* (2000) the Appellate Division considered the issue of consultation as envisaged in Art 116 and held that the executive government should not disregard the 'views and opinion of the Supreme Court', 'which is the best judge of judicial matters and judicial officers'. The court directed that in the process of consultation,

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[95] *Rules of the High Court of Judicature for East Pakistan*, Vol I, Ch I, r 1. It was framed for the High Court at Dhaka of the then East Pakistan (Now Bangladesh). These Rules are now applicable to the High Court Division of the Supreme Court.

[96] *Rules of the High Court of Judicature for East Pakistan*, Vol I, Ch 1, r 3(d).

[97] *Rules of the High Court of Judicature for East Pakistan*, Vol I, Ch 1, r 4.

[98] *Aftabuddin v Bangladesh* (1996) 48 DLR 1.

the 'views and opinion of the Supreme Court shall have primacy over those' of the executive.[99]

In the context of the mechanism of appointment and promotion of subordinate court judges, the Appellate Division's judgment in *Secretary, Ministry of Finance v Hossain* (2000) is of paramount importance.

The government by an order of 8 January 1994 substantially enhanced the pay scale of members of the BCS (Judicial) cadre, but under pressure from other BCS cadres, the government by an order of 28 February 1994 postponed its previous order. By another order of 2 November 1995, the government re-fixed the pay scale of BCS (Judicial) cadre to align them with pay scales of other cadres. The order of 2 November 1995 was alleged discriminatory against the subordinate courts judges.[100] Consequently, some 233 members of the BCS (Judicial) cadre filed a writ petition in the High Court Division against the government directed against different secretaries and other functionaries of government, including the Secretary of the Ministry of Finance.

The writ petitioners challenged *inter alia* the orders of 28 February 1994 and of 2 November 1995 and the creation of the BCS (Judicial) cadre, and raised important questions of law relating to the judicial service. When the writ petition came on for hearing before a division bench of the High Court Division, no respondent appeared before the court. After hearing only the advocates for the petitioners the division bench passed a judgment on 7 May 1997, then the Secretary, Ministry of Finance filed an appeal to the Appellate Division.[101] The Appellate Division in its judgment

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[99] *Secretary, Ministry of Finance v Hossain* (2000) 52 DLR (AD) 82, 109.

[100] *Secretary, Ministry of Finance v Hossain* (2000) 52 DLR (AD) 82, 86.

[101] *Secretary, Ministry of Finance v Hossain* (2000) 52 DLR (AD) 82, 85-86.

of 2 December 1999, made observations on numerous aspects of the judiciary including the appointments, discipline and salary of subordinate judges and financial independence of the Supreme Court. The Court held:

> [T]he judicial service is a service of the Republic within the meaning of [Art] 152(1) of the Constitution, but it is a functionally and structurally distinct and separate service from the civil executive and administrative services of the Republic with which the judicial service cannot be placed on par on any account and that it cannot be amalgamated, abolished, replaced, mixed up and tied together with civil executive and administrative services.[102]

The Court further held:

> [T]he word "appointments" in [Art] 115 means that it is the President who under [Art] 115 can create and establish a judicial service and also a magistracy exercising judicial functions, make recruitment rules and all pre-appointment rules in that behalf, make rules regulating their suspension and dismissal ... and that [Art] 133 and [Art] 136 of the Constitution and the *Services (Reorganisation and Conditions) Act* 1975 have no application to the above matters in respect of the judicial service and magistrates exercising judicial functions.[103]

The Court then declared that the 'creation of BCS (Judicial) cadre along with other BCS' cadres by the *Bangladesh Civil Service (Reorganisation) Order* 1980 including its amendment in 1986 is '*ultra vires* the Constitution' and the *Bangladesh Civil Service Recruitment Rules* 1981 do not apply to the judicial service.[104] It also declared that 'the nomenclature of the judicial service shall follow the language of the Constitution and shall be designated as the Judicial Service of Bangladesh or Bangladesh Judicial Service'.[105] The government was directed to take the steps

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[102] *Secretary, Ministry of Finance v Hossain* (2000) 52 DLR (AD) 82, 109. It is to be noted that Art 152(1) of the Constitution defines 'the service of the Republic' as 'any service, post or office whether in a civil or military capacity, in respect of the Government of Bangladesh, and any other service declared by law to be a service of the Republic'.

[103] *Secretary, Ministry of Finance v Hossain* (2000) 52 DLR (AD) 82, 109. Emphasis added.

[104] *Secretary, Ministry of Finance v Hossain* (2000) 52 DLR (AD) 82, 109.

[105] *Secretary, Ministry of Finance v Hossain* (2000) 52 DLR (AD) 82, 109.

necessary to 'make Rules under Art 115 [of the Constitution] to implement its provisions which is a constitutional mandate and not a mere enabling power'.[106] It was also directed to establish 'either by legislation or by framing Rules under [Art] 115 or by executive Order having the force of rules a Judicial Service Commission ... with majority of members from the Senior Judiciary of the Supreme Court and the subordinate courts for recruitment to the Judicial Service'.[107] The Court observed that the independence of subordinate court judges as envisaged in Art 116A of the Constitution is 'meaningless without judicial autonomy', which requires that appointments should 'be made on merit by a separate judicial service commission'.[108]

It should be noted that the government filed a review petition to the Appellate Division against the judgment in *Secretary, Ministry of Finance v Hossain* (2000) on two grounds, including opposition to the directive to establish a Judicial Service Commission.[109] On 18 June 2001, the Court rejected the review petition, but the government is yet to establish the Judicial Service Commission. Consequently, the mechanisms for appointment of subordinate court judges remain unchanged.[110]

The Supreme Court emphasised that the Judicial Service Commission was only for recruitment of subordinate court judges at the entry level under Art 115 of the Constitution. It did not consider the Commission in the context of appointment of

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[106] *Secretary, Ministry of Finance v Hossain* (2000) 52 DLR (AD) 82, 109.

[107] *Secretary, Ministry of Finance v Hossain* (2000) 52 DLR (AD) 82, 109.

[108] *Secretary, Ministry of Finance v Hossain* (2000) 52 DLR (AD) 82, 96. Article 116A was inserted in the Constitution by the *Constitution (Fourth Amendment) Act* 1975. It provides, '[s]ubject to the provision of the Constitution, all persons employed in the judicial service and all magistrates shall be independent in the exercise of their judicial functions'.

[109] Another ground was related to the establishment of a Judicial Pay Commission.

[110] Judgment by the Appellate Division of the Supreme Court in *Civil Appeal No. 189* (2000) [Unreported].

subordinate court judges on promotion under Art 116 of the Constitution. In fact, for the sake of the independence of judges all judicial appointments whether direct recruitment or on promotion should be made by an independent Judicial Service Commission.

The appointment of judges to the Supreme Court was not, however, an issue in *Secretary, Ministry of Finance v Hossain* (2000). Perhaps the Court, therefore, did not clearly focus on the Judicial Commission for the appointment of judges to the Supreme Court. In the context of the independence of subordinate court judges, the court placed emphasis on Art 116A of the Constitution. Likewise, the position of judges of the Supreme Court may be considered under Art 94 (4) of the Constitution. Similar to Art 116A, Art 94(4) lays down the provisions for the independence of judges of the Supreme Court in the exercise of their judicial functions, and the existing mechanism of appointment of judges to the Supreme Court is not better than that for subordinate court judges.[111] Therefore, in the light of the judgment of the Supreme Court, it can be argued that Art 94(4) regarding the independence of judges of the Supreme Court may also be meaningless, if they are not appointed by an independent commission.

Another important issue is the advertising of judicial vacancies. The Supreme Court, in *Secretary, Ministry of Finance v Hossain* (2000), held that judicial vacancies should be advertised, but the judgment does not clearly indicate whether this should occur in respect of vacancies at all levels.[112] It is remarkable that the

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[111] Article 94(4) of the Constitution provides, '[s]ubject to the provision of this Constitution the Chief Justice and other Judges shall be independent in the exercise of their judicial functions'.

[112] *Secretary, Ministry of Finance v Hossain* (2000) 52 DLR (AD) 82, 104.

appointments of subordinate court judges at the entry level are always made by advertising the vacancies in national daily newspapers. All other subordinate court judges are appointed to the higher posts by promotion based on seniority and efficiency. Therefore, the question of advertisement rests on the appointment of the Supreme Court Judges.

Consideration of the mechanisms for judicial appointment in Bangladesh reveals that the executive government enjoys an exclusive privilege in appointing judges. In appointing Supreme Court Judges, the constitutional practice of consultation is not sufficient to restrict the exclusive executive control over appointments.

In respect of the appointment of subordinate courts judges at the entry level, the Supreme Court of Bangladesh has no role at any stage of the appointment process. Under Art 116 of the Constitution, in making appointments by promotion of persons employed in the judicial service and magistrates exercising judicial service, the executive government is under an obligation to consult the Supreme Court. However, in practice, consultation is limited to the promotion of persons employed in the judicial service, and in the case of promotion of magistrates exercising judicial functions the government does not consult the Chief Justice. In this respect, the former Chief Justice Shahabuddin Ahmed (later, he became the President of Bangladesh) said that the Supreme Court has never been consulted in the case of magistrates (Ahmed, 1998: 139).

Due to the different flaws in the system of appointing judges, there is an increasing demand for the system to be changed. In a national conference of lawyers organised by the Bangladesh Bar Council held 21-22 April 2000, Barrister Amirul Islam, Vice-Chairman of the Bar Council, says that judges should be appointed

through a system that helps them gain experience before their appointment. He emphasises the need for a process of judicial selection which is based on merit, administered in the form of an examination.[113] The conference unanimously recommended that a 'high-powered' Judicial Commission should be formed to look into the matter of judicial appointments.[114]

4.4 CONCLUSION

In Bangladesh, since the existing criteria for appointment of judges are not explicitly published and the mechanisms used in making the appointments are not transparent and open to public scrutiny, the following measures should be taken to improve the system:

(a) Judges should be appointed only on the basis of the explicit and publicly known criteria and through a transparent process. With a view to defining explicit and publicly known criteria for appointments, the Canadian and English models of criteria should be taken into consideration.

(b) In order to ensure transparency in the appointment process and to exclude political or other considerations in appointing judges, an independent Judicial Service Commission should be established for the appointment of judges of all levels including the judges of the Appellate Division. In this regard, the South African model of Judicial Service Commission can be followed.

(c) All judicial vacancies including the High Court Division and the Appellate Division should be advertised and appointments should be made by open

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113 *The Daily Star*, Dhaka (Bangladesh), 22 April 2000.

114 *The Daily Star*, Dhaka (Bangladesh), 23 April 2000.

competition so that the best-qualified people can be appointed to judicial office. Open competition perhaps can restrain the executive government from appointing judges on the basis of discretion or favour.

(d) The criteria and mechanisms for judicial appointment recommended above should be guaranteed by the constitutional or statutory law so that non-compliance with the guaranteed criteria and mechanisms can be challenged in court.

CHAPTER 5

TENURE OF JUDGES

5.1 INTRODUCTION

The tenure of judges is a crucial aspect of judicial independence and accountability. It is closely connected to judicial appointment discussed in Chapter Four. When a person is appointed to judicial office, the next essential question is whether the tenure of his or her office is adequately secure or not. If the tenure of judges is not secure, they may be subject to discipline or removal in an arbitrary manner. Thus the tenure of judges is also tied to judicial discipline which is an important aspect of judicial accountability. This chapter examines issues relating to the tenure of judges while the issues of judicial discipline are discussed in Chapter Six.

The main purpose of this chapter is to examine the security of tenure of judges in Bangladesh. In doing so, section 5.2 deals with general perspectives on judicial tenure. It discusses the nature of security of tenure, changes of tenure and other terms and conditions of service, and the appointment of part-time and temporary or acting judges. Section 5.3 evaluates the conditions of the tenure of judges in Bangladesh.

5.2 GENERAL PERSPECTIVES ON JUDICIAL TENURE

The principle of judicial independence requires that the tenure of judges should be adequately secured. As discussed in section 1.3.1.1, security of tenure is an essential ingredient of the personal independence of a judge. In order to ensure the administration of justice impartially and fearlessly judges should have a guarantee

that they will not be subject to discipline or removal because of their decisions or the exercise of arbitrary discretion of the appointing authority.

This section analyses the concept of judicial tenure under three subheadings: security of tenure, changes of tenure and conditions of service, and part-time and temporary or acting judges.

5.2.1 Security of Tenure

Security of tenure is a prerequisite to the maintenance of the individual independence of a judge. It is perhaps the most central of the guarantees of the independence of the judiciary (King, 1984: 344). The Supreme Court of Canada termed it as 'the first of the essential conditions of judicial independence'.[1] In the absence of security of tenure, judges may be removed from office at any time without any reasonable grounds and thus, judicial independence can be undermined 'at a fundamental level' (Zeitz, 1998: 163).

In order to ensure the independent exercise of judicial powers, judges should be free from the fear or risk of arbitrary removal by the political branches of government. If judicial tenure depends upon the pleasure of the executive government, judges cannot be free from the fear of arbitrary removal. In this situation, judicial powers might be exercised by judges with a view to pleasing the authority that has the power to terminate their service (Friedland, 1995: 2).

Security of judicial tenure signifies permanent tenure which is essential to protect judges from day to day political or other undue pressures. Hamilton says,

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[1] *Valente v The Queen* (1985) 2 SCR 673 <http://www.lexum.umontreal.ca/csc-scc/en/pub/1985.vol2/html/1985scr2_0673html> 24 March 2002 (Copy on file with author) [27].

'nothing will contribute so much' as permanent judicial tenure to the 'independent spirit in the judges, which must be essential to the faithful performance of [arduous judicial] duty' (Hamilton, 1948: 400).

The permanent tenure of judges may be fixed for the whole of life or for a definite period of life extending up to a certain retirement age. Life tenure or tenure until a mandatory retirement age allows judges to hold permanent office without any fear of termination. However, commentators identify some drawbacks of life tenure. As Shetreet says:

> The physical condition of elderly judges renders the efficient discharge of their judicial functions difficult, if not impossible, and results in unnecessary inconvenience and delays in the judicial process. This in turn imposes an unnecessary burden on the parties and their lawyers. The experience of the past has shown that judges have often remained on the bench even when they could no longer properly discharge their duties due to ill health or old age. This negates any argument that the decision regarding retirement should be left to the individual judges (Shetreet, 1976: 36).

There is little doubt that at some stage a judge will not be able to perform his or her duties effectively and perhaps from this point of view, a mandatory age of retirement may be more acceptable than life tenure. Malleson argues that the introduction of a retirement age serves to strengthen judicial independence because it reduces the necessity to remove a judge for incapacity (Malleson, 1999: 213).

The *Montreal Declaration* 1983 and *UN Basic Principles* 1985 identically provide that judges should have 'guaranteed tenure until a mandatory retirement age or expiry of the term of office, where such exists'.[2] Similarly, the *Beijing Statement* 1995 recommends that judges should be 'appointed for a period to expire upon the attainment of a particular age'.[3]

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[2] *Montreal Declaration* 1983, Art 2.19(b); *UN Basic Principles* 1985, Art 12.

[3] *Beijing Statement* 1995, Art 20.

However, a mandatory retirement age has the adverse effect that some judges, who are elderly but competent to continue in office, are bound to retire from office (Oliver, 1986: 814). The tenure of such retired judges is extended in some countries. In England, for example, under s 26(4-6) of the *Judicial Pensions and Retirement Act* 1993, judges below the rank of the High Court Judge may continue in office if the Lord Chancellor considers it desirable in the public interest. Such continuation can be authorised by the Lord Chancellor for a period not exceeding one year and not exceeding beyond the day on which the judges attain the age of 75 years. In addition, under s 9(1) of the *Supreme Court Act* 1981, retired Law Lords and Supreme Court Judges are appointed on a part-time basis in the Court of Appeal, the High Court and the Crown Court.[4]

In respect of the extension of judicial service a prominent argument is that it is useful to reduce the backlog of cases by using experienced retired judges who are elderly, but capable of continuing in office. However, this practice 'opens the door for abuse by the authorities, who have the power of extension and may exercise it for their own ends, with adverse effects on judicial independence' (Shetreet and Deschênes, 1985: 624).

In fact, the extension beyond retirement or re-employment of retired judges is not consistent with judicial independence (Singh, 2000: 249). In deciding cases, judges 'should not have an eye on future employment and thus have any temptation or appearance of temptation to decide issues in ways that would assist their future plans' to be re-employed (Friedland, 1995: 46). A judge 'who sees a government as a

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[4] See also Lord Chancellor's Department, *Judicial Appointments Report* (1999-2000) <http://www.lcd.gov.uk/judicial/ja_arep2000/jindex.htm> 14 June 2000 (Copy on file with author) [3.18].

prospective future employer might be tempted to give it favoured treatment' (Wood, 1996: 40). In any democratic society, government is a party in a large number of cases and may have a political or other interest in many others. Consequently, the general public may gain the impression that judges, who look forward to being employed by the government after their retirement, are tempted to favour the government in deciding cases. This situation undermines the independence of the judiciary and therefore, the practice of extension beyond retirement or re-employment of retired judges should be avoided.[5]

5.2.2 Changes of Tenure and Terms and Conditions of Service

Security of judicial tenure may be endangered by changes of tenure, terms and other conditions of service. One potential risk to judicial tenure is that the executive government may be tempted to remove judges by reducing the tenure of judges in office. Another risk is that if the executive government does not like the existing judges, it may reduce the judicial salary or change other conditions of service so that the judges give up their office with a view to earning more money in legal practice. Therefore, judicial independence requires that the tenure of judges and other terms and conditions of their service should not be changed to their disadvantage.

The *Montreal Declaration* 1983 states that the 'terms of office of the judges, their independence, security, adequate remuneration and conditions of service shall

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[5] Law Commission of India, *Fourteenth Report* (1958) 46.

be secured by law and shall not be altered to their detriment'.[6] It further provides that the retirement age should not be 'altered for judges in office without their consent'.[7]

The *UN Basic Principles* 1985 provide that the 'term of office of judges, their independence, security, adequate remuneration, conditions of service, pensions and the age of retirement shall be adequately secured by law'.[8] Unlike the *Montreal Declaration* 1983 there is no express provision preventing alterations or changes of terms and conditions of service. In fact, it should be ensured that any changes of the tenure and other terms and conditions of service are not applicable to existing judges. In this regard, the *Beijing Statement* 1995 provides that the tenure of a judge 'must not be altered to the disadvantage of the judge during her or his term of office'.[9] It further provides:

> Judges must receive adequate remuneration and be given appropriate terms and conditions of service. The remuneration and conditions of service of judges should not be altered to their disadvantage during their term of office, except as part of a uniform public economic measure to which the judges of a relevant court, or a majority of them, have agreed.[10]

Security of judicial tenure requires that when the tenure, terms and conditions of judicial service are changed by government, existing judges should be saved from any reduction of retirement age, salary etc. In this regard, the reduction of retirement age of English judges may be an important example. In England, the *Judicial Pensions Act* 1959 introduced a mandatory retirement age of 75 for superior judges, but it was not applied to the existing judges.[11] Again, the *Judicial Pensions and*

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6 *Montreal Declaration* 1983, Art 2.19.
7 *Montreal Declaration* 1983, Art 2.22.
8 *UN Basic Principles* 1985, Art 11.
9 *Beijing Statement* 1995, Art 21.
10 *Beijing Statement* 1995, Art 21.
11 *Judicial Pensions Act* 1959, ch 9, s 2.

Retirement Act 1993 reduced the retirement age to 70 which was not applicable to persons appointed to judicial offices before the change came into effect.[12] Now, all English judges enjoy security of tenure until the mandatory retirement age of 70 years and during this period they hold office subject to good behaviour.

In the context of changes of tenure and terms of judicial service it is to be noted that sometimes permanent and full time judges may intend to retire early to go into private practice or to accept other government or non-government assignments. In such a case so long as a person serves in the judicial office it should be ensured that he or she could stay without interference.

5.2.3 Part-time Judges and Temporary or Acting Judges

In some countries including Australia and England, part-time judges are appointed for a fixed term that is less than full time or for a fractional period, eg year to year. Since 2000 all part-time judges in the ordinary courts in England, who are Deputy High Court Judges, Deputy Circuit Judges, Recorders, Deputy District Judges, Deputy Masters and Registrars of the Supreme Court, Deputy District Judges (Magistrates' Courts)[13] are appointed for a period of not less than five years.[14]

In some jurisdictions, temporary judges are appointed to full-time positions for a limited or fixed period less than the full time tenure ending at the compulsory retirement age. For example, temporary judges may be appointed to the High Courts

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12 *Judicial Pensions and Retirement Act* 1993, s 26.

13 Formerly Acting Stipendiary Magistrates.

14 Lord Chancellor's Department, *Judicial Appointments Report* (1999-2000) <http://www.lcd.gov.uk/judicial/ja_arep2000/jindex.htm> 14 June 2000 (Copy on file with author) [2.15].

of India for a period not exceeding two years and they are designated as additional or acting judges.[15] After completion of the two years they are appointed to permanent positions or their terms are extended though there are instances in which additional judges were neither appointed to the permanent bench nor re-appointed as additional judges (Sharma, 1989: 118-119).

In the context of judicial tenure, appointment of part-time, temporary or acting judges is an important matter of concern among jurists and commentators. This is because all these kinds of appointments pose a problem for the independence of judges. As Hamilton says, '[p]eriodical appointments, however regulated, or by whomsoever made, would, in some way or other, be fatal to [the] necessary independence' of judges (Hamilton, 1948: 401).

The *Montreal Declaration* 1983 provides that the appointment of judges for a temporary period is not consistent with judicial independence, but it does not object to part-time judges if 'proper safeguards' are laid down to 'ensure impartiality and avoid conflict of interests'.[16] However, the *Montreal Declaration* neither defines the term 'proper safeguards' nor explains what sorts of safeguards should be laid down.

A judge holding office for a temporary period or appointed on a part-time or periodical basis does not enjoy security of tenure. Consequently, part-time or temporary judges might not be able to perform their judicial functions fearlessly and independently. They are 'susceptible to being influenced by external matters and pressures' which may affect their judicial decisions (Shetreet and Deschênes, 1985: 627). It is likely that judges appointed on a part-time, temporary or periodical basis might exercise judicial powers with a hope of reappointment or full-time

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[15] *Constitution of India*, Art 224.

[16] *Montreal Declaration* 1983, Art 2.20.

appointment in future. Therefore, public confidence in the judiciary and the independence of judges may be affected seriously. One judge of the High Court of Australia, who strongly criticises the practice of appointing acting and part-time judges, says, '[a]mbition for permanent appointment in an acting judge is potentially a very dangerous thing' (Kirby, 1998: 74).

An important argument in favour of part-time, temporary or periodical appointment of judges is that these appointments are useful to reduce the backlog of cases (Campbell and Lee, 2001: 86). This argument is probably acceptable if the appointments are made as a temporary measure and 'only in special circumstances which render [them] necessary'.[17] Therefore, part-time, temporary or periodical appointment of judges should not be made as a regular practice to avoid continued need for appointment of permanent judges (Mason, 1997: 9).

In addition, when these appointments are necessary for special circumstances or for solving a temporary shortage of judges, the power of appointment should not be vested in the executive government exclusively. In this respect, an independent commission as discussed in section 4.2.2.2 may be a useful mechanism. This is because if the future term of office of a judge depends upon the approval of the executive government, it might be a danger that judicial 'decisions would improperly be made to favour the government' (Friedland, 1995: 41). The power of the executive to extend a term is not essentially different from the power to abridge the term of a judge. Both these powers create pressure on judges to favour the executive government (Friedland, 1995: 42).

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[17] *Declaration of Principles on Judicial Independence* 1997 <http://www.travel-net.com/~billr/judges/judindep.html> 5 August 2001 (Copy on file with author) [cl 2]. It was issued by the eight Chief Justices of the Australian States and Territories.

5.3 BANGLADESH PERSPECTIVES

This section evaluates the tenure of judges in Bangladesh by reference to the general principles discussed in section 5.2. It demonstrates that although Supreme Court Judges hold office until a mandatory retirement age, the practice of appointment of additional judges is a concern for security of tenure. It also demonstrates that although there is a fixed age of mandatory retirement for subordinate court judges, they hold office during the pleasure of the President. In addition, there are some other factors which weaken security of judicial tenure.

The issues of judicial tenure in Bangladesh are discussed under two sub-headings: tenure of Supreme Court Judges, tenure of subordinate court judges.

5.3.1 Tenure of Supreme Court Judges

The original Art 96 of the Constitution of Bangladesh provided a guaranteed tenure of office for Supreme Court Judges up to their mandatory retirement at the age of 62 years. The mandatory retirement age was first changed by the *Second Proclamation (Seventh Amendment) Order* 1976, which created a separate Supreme Court and High Court instead of the Supreme Court comprising the Appellate Division and the High Court Division.

The retirement age for Supreme Court Judges was fixed at 65 years and that of High Court Judges at 62 years.[18] The *Second Proclamation (Seventh Amendment) Order* 1976 provided that from the commencement date of the Proclamation Order persons holding office as judges of the High Court Division and of the Supreme

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[18] *Second Proclamation (Seventh Amendment) Order* 1976, s 4.

Court should hold office as High Court Judges and persons holding office as judges of the Appellate Division should hold office as Supreme Court Judges.[19] Consequently, Appellate Division Judges who were to retire at the age of 62 years immediately before the commencement of the Order became Supreme Court Judges with tenure to 65 years.

The *Second Proclamation (Tenth Amendment) Order* 1977 which re-established the Supreme Court comprising the Appellate Division and the High Court Division, again fixed the retirement age at 62 years for all Supreme Court Judges. It provided:

> A person holding office as Chief Justice or Judge or Additional Judge of the Supreme Court or Chief Justice or Judge or Additional Judge of the High Court immediately before the commencement of the *Second Proclamation (Tenth Amendment) Order,* 1977 ... shall, if he has attained the age of sixty-two years on the date of such commencement, stand retired on that date.[20]

It further provided that '[a] person holding office as Chief Justice or Judge or Additional Judge of the Supreme Court ...shall, if he has not attained the age of sixty-two years ... hold office as Chief Justice of Bangladesh or Judge or Additional Judge of the Appellate Division'. It added that '[t]he person holding office as Chief Justice' and '[a] person holding office as Judge or Additional Judge' of the High Court 'shall, if he has not attained the age of sixty-two years ... hold office' as High Court Division Judge.[21]

Thus the *Second Proclamation (Tenth Amendment) Order* 1977 brought two disastrous consequences for security of tenure. Firstly, Supreme Court Judges who were to retire at the age of 65 years became subject to the reduction of the retirement

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19 *Second Proclamation (Seventh Amendment) Order* 1976, s 10.

20 *Second Proclamation (Tenth Amendment) Order* 1977, s 2(7)(c).

21 *Second Proclamation (Tenth Amendment) Order* 1977, s 2(7)(c).

age. Under this provision, some sitting judges, Justice Debesh Chandra, Justice Ahasanuddin Chowdhury and Justice Mahmood Hossain of the then Supreme Court, were bound to retire before the age of 65 years.[22] The Proclamation Order was promulgated on 27 November 1977 and those judges had to retire on 30 November 1977 (Shetreet and Deschênes, 1985: 40). Regarding this incident, in an interview with a tabloid daily the *Dainik Manavzamin* Justice Debesh Chandra said that he had decided to engage in legal practice after retirement from the High Court and he was not interested in joining the Supreme Court.[23] Justice Abusadat Muhammad Sayem, the then President of Bangladesh, had insisted on his joining the Supreme Court. Thereafter, the then Chief Martial Law Administrator Ziaur Rahman reduced the retirement age from 65 to 62 years and Justice Debesh Chandra, and other judges, had to retire, at that time he was 63.[24]

Secondly, the Chief Justice of the High Court became a puisne judge of the High Court Division with his other junior colleagues. In the context of the status of the Chief Justice of the former High Court it was a very unfortunate incident. He could be appointed at least as a judge of the Appellate Division.

During the period of the second Martial Law in Bangladesh from 1982 to 1986, some Supreme Court Judges were removed from office without assigning any reason and only by dint of Martial Law order. They were Justice KM Subhan, Justice Abdur Rahman Chowdhury and Justice SM Hossain (Chowdhury, 1990: 164).

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[22] *The Dainik Manavzamin*, Dhaka (Bangladesh), 25 November 2000.

[23] After retirement from the High Court, a person is eligible to engage in legal practice before the Supreme Court, but after retirement from the Supreme Court, he or she was barred from the legal practice in any court.

[24] *The Dainik Manavzamin*, Dhaka (Bangladesh), 25 November 2000.

Moreover, the then Chief Justice Kamaluddin Hossain was removed by a technical reduction of the retirement age. The *Proclamation Order* No 1 of 1982 provided that the Chief Justice of Bangladesh, whether appointed before or after this proclamation, must retire three years after the date of his or her appointment or at the age of 62 years, whichever was earlier.[25] Before this Proclamation Order, the Chief Justice was entitled to hold office up to the age of 62 years, but under this Order if the Chief Justice had held office for a period of three years, he or she was to retire before attaining the age of 62 years. Thus, the retirement age of the Chief Justice was technically reduced by the 'three years rule' and thereby Justice Kemaluddin Hossain had to retire from office as Chief Justice before attaining 62 years of age. The Proclamation Order was issued on 11 April 1982 and Chief Justice Kamaluddin Hossain retired on 12 April 1982 (Halim, 1998: 306).

However, just a few days later, when the next Chief Justice FKMA Munim was due to retire, the 'three years rule' was repealed (Chowdhury, 1990: 164; Huda, 1997: 809). Thereafter, by the *Constitution (Seventh Amendment) Act* 1986 the retirement age was again increased to 65 years for all Supreme Court Judges. Consequently, Chief Justice FKMA Munim held office for about eight years and retired on 30 November 1989 upon turning 65 (Halim, 1998: 306).

Under the Seventh Amendment of the Constitution Supreme Court Judges now hold office until the age of 65 years.[26] During their tenure, a judge can be removed only on specific grounds of 'gross misconduct' or 'physical or mental incapacity' and by means of a specified procedure.[27] Therefore, Supreme Court Judges now

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[25] *Proclamation Order* No 1 of 1982, para 10(1).

[26] *Constitution of Bangladesh*, Art 96(1) as amended by the *Constitution (Seventh Amendment) Act* 1986, s 2.

[27] The grounds and mechanisms for removal of judges in Bangladesh are discussed in section 6.3.

enjoy security of tenure, but the practice of appointing additional judges to the High Court Division remains a threat to their security of tenure. As to the appointment of additional judges to the Supreme Court, Art 98 of the Constitution provides:

> Notwithstanding the provisions of [Art] 94, if the President is satisfied that the number of the Judges of a division of the Supreme Court should be for the time being increased, the President may appoint one or more duly qualified persons to be additional Judges of that division for such period not exceeding two years as he may specify, or, if he thinks fit, may require a Judge of the High Court Division to sit in the Appellate Division for any temporary period as an *ad hoc* Judge and such Judge while so sitting, shall exercise the same jurisdiction, powers and functions as a Judge of the Appellate Division:
>
> Provided that nothing in this article shall prevent a person appointed as an additional Judge from being appointed as a Judge under [Art] 95 or as an additional Judge for a further period under this article.

The expression 'notwithstanding the provisions of [A]rticle 94' clearly indicates that Art 98 is an exception to Art 94. Article 94(2) provides that the Supreme Court should consist of the Chief Justice and 'such number of other judges as the President may deem it necessary to appoint' to the Appellate Division and the High Court Division of the Supreme Court. It signifies that the President is empowered to increase the number of judges of the High Court Division and the Appellate Division whenever necessary. In addition, Art 98 empowers the President to appoint additional judges for the time being to meet a temporary necessity; it does not envisage the appointment of additional judges as a regular practice. Nevertheless, all judges of the High Court Division of the Supreme Court are initially appointed as additional judges for a period of two years. Then they may be appointed as judges of the High Court Division. For example, on 28 May 1998, Justice Iftekhar Rasul, Justice MA Aziz, Justice Amirul Kabir Chowdhury, Justice Hasan Amin, Justice AK Badrul Hoque, Justice Joynul Abedin, Justice M. Abdul Matin and Justice Shah Abu

Nayeem Mominur Rahman were appointed as judges of the High Court Division and at the time of their appointments all of them were additional judges.[28]

Thus, the office of the additional judge has become the first step towards an appointment to the High Court Division and in practice, no one is directly appointed as a judge unless he or she held office as additional judge. Although most additional judges are eventually appointed as permanent judges, there are some instances in which additional judges were not appointed as permanent judges after completion of their terms of office.[29] Therefore, the additional judges of the High Court Division do not have adequate security of tenure.

Arguably, the practice of appointing additional judges has a good reason behind it, that as a trial appointment it can ensure that judges are effectively screened. The rationality of this argument cannot be denied but in reality it may not be tenable for a country like Bangladesh where the executive enjoys exclusive privilege in appointing judges. In this context a very recent incident is worth consideration.

In May 2000 Justices AFM Mesbahuddin, AKM Shafiuddin, Munsurul Haque Chowdhury, Nazmun Ara Sultana and NK Chakravarty were appointed as additional judges to the High Court Division. In May 2002, Chief Justice Mahmudul Amin Chowdhury, as he then was, recommended all of them except Justice NK Chakravarty for appointment to permanent positions of the High Court Division, however only Justice Nazmun Ara Sultana was appointed to the permanent position and all other judges were dropped.[30]

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28 *Bangladesh Gazette*, Extraordinary, 2 June 1998.

29 Law Commission of Bangladesh, *Annual Report* (1997) Vol II, para 22; see also *The Daily Star*, Dhaka (Bangladesh), 23 October 2001.

30 *The Daily Star*, Dhaka (Bangladesh), 22 May 2002; *The Dainik Jugantor*, Dhaka (Bangladesh), 21 May 2002.

The question is: why were Justices AFM Mesbahuddin, AKM Shafiuddin and Munsurul Haque Chowdhury not appointed to permanent positions though recommended for the appointment by the Chief Justice? The answer to this question may be that although they successfully completed their trial periods as additional judges, they did not meet the political or other considerations of the executive. The Chief Justice was the best person to evaluate the performance of the judges during their service as additional judges and according to his evaluation he recommended four of the five judges. Nevertheless, the Chief Justice's recommendation was ignored and only one of the four recommended judges was appointed by the executive.

This incident clearly shows that instead of appointing judges to the permanent bench of the High Court Division, appointment of additional judges as a regular practice is a potential threat to the security of judicial tenure which is an essential condition of the independence of judges.

5.3.2 Tenure of Subordinate Court Judges

Under Art 134 of the Constitution, the tenure of subordinate court judges depends upon the pleasure of the President of Bangladesh. Article 134 provides, '[e]xcept as otherwise provided by this Constitution every person in the service of the Republic shall hold office during the pleasure of the President'. The 'service of the Republic' means 'any service, post or office whether in a civil or military capacity, in respect of

the government of Bangladesh, and any other service declared by law to be a service of the Republic'.[31]

In *Secretary, Ministry of Finance* v *Hossain* (2000), a question arose whether subordinate court judges' service, that is, judicial service, is a service of the Republic.[32] The Appellate Division of the Supreme Court held that although judicial service is a 'functionally and structurally distinct and separate service from the civil executive and administrative services of the Republic', it is a service of the Republic within the meaning of the Constitution.[33]

Therefore, subordinate court judges hold office during the pleasure of the President under Art 134 of the Constitution until the attainment of compulsory retirement age fixed by *Public Servants (Retirement) Act* 1974. Section 4 of the Act provides that 'a public servant shall retire from service on the completion of the fifty seventh year of his [or her] age'. The term 'public servant' as defined in s 2(d) of the *Public Servants (Retirement) Act* 1974 includes any person who is in the service of the Republic. Subordinate court judges being members of a service of the Republic are within the purview of this Act and therefore they compulsorily retire from office at the age of 57 years.[34]. However, under s 9(1) of the Act a public servant 'may opt to retire from service any time after he [or she] has completed twenty-five years of service by giving notice in writing ... at least thirty days prior to the date of his [or

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[31] *Constitution of Bangladesh*, Art 152(1).

[32] As mentioned in section 4.3.1.1, Art 152(1) of the Constitution defines 'judicial service' as 'a service comprising persons holding judicial posts not being posts superior to that of a district judge'.

[33] *Secretary, Ministry of Finance v Hossain*, 52 DLR (AD) (2000) 82, 109.

[34] The average life expectancy in Bangladesh is 60.54 years. See *World Factbook* (2001), <http://www.cia.gov/cia/publications/factbook/geos/bg.html> 29 April 2002 (Copy on file with author).

her] intended retirement'. If such an option is once exercised by a public servant, it 'shall be final and shall not be permitted to be modified or withdrawn'.

During their terms of office, subordinate court judges may be removed only on the specific grounds and by means of the procedures prescribed by statutory law.[35] Despite this, tenure during the pleasure of the President under Art 134 is not consistent with the values of security of judicial tenure. In *Secretary, Ministry of Finance* v *Hossain* (2000) the Appellate Division of the Supreme Court observed that although subordinate court judges hold office during the pleasure of the President under Art 134 of the Constitution, security of tenure of their office is assured by Art 135.[36] Article 135(2) of the Constitution provides:

> (2) No such person shall be dismissed or removed or reduced in rank until he [or she] has been given a reasonable opportunity of showing cause why that action should not be taken:
>
> Provided that this clause shall not apply ----
>
> (i) where a person is dismissed or removed or reduced in rank on the ground of conduct which has led to his [or her] conviction of a criminal offence; or
>
> (ii) where the authority empowered to dismiss or remove a person or to reduce him [or her] in rank is satisfied that, for a reason recorded by that authority in writing, it is not reasonably practicable to give that person an opportunity of showing cause; or
>
> (iii) where the President is satisfied that in the interest of the security of the State it is not expedient to give that person such an opportunity.

In *Jamuna Oil Company Ltd v Dey* (1992) the Appellate Division held that in the case of dismissal, removal or reduction in rank a person holding a civil post in the service of the Republic is entitled to a second show cause notice under Art 135.[37]

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35 The grounds and procedures for removal of subordinate court judges are discussed in section 6.3.2.

36 *Secretary, Ministry of Finance v Hossain*, 52 DLR (AD) (2000) 82, 103-104.

37 *Jamuna Oil Company Ltd v Dey* (1992) 44 DLR (AD) (1992) 104.

Relying on the provision for a second show cause notice, the Appellate Division in *Secretary, Ministry of Finance* v *Hossain* (2000) observed that, so long as this protection under Art 135 remains, the pleasure of the President provided in Art 134 'cannot impair or destroy' security of tenure of subordinate court judges.[38]

However, the provision for a second show cause notice under Art 135 appears a very weak protection which might not always be effective to secure the tenure of judges. This is because under s 9(2) of the *Public Servants (Retirement) Act* 1974 the government 'may, if it considers necessary in the public interest so to do, retire from service a public servant at any time after he has completed twenty-five years of service without assigning any reason'. Thus the government is empowered to force the retirement of any subordinate court judge at any time after completion of 25 years of service without assigning any reason. This power is subject to only one condition that the government can require such retirement before the mandatory retirement age 'if it considers necessary in the public interest', but the 'public interest' is not defined in the Act. Consequently, the power of the government can be misused and in this regard the pleasure of the President may be a crucial factor.

5.4 CONCLUSION

As Supreme Court Judges of Bangladesh hold office until a mandatory retirement age, their tenure may be said to be adequately secured. However, the appointment of additional judges to the High Court Division of the Supreme Court is not compatible with security of tenure. Since there is no guarantee of appointment as permanent

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[38] *Secretary, Ministry of Finance v Hossain*, 52 DLR (AD) (2000) 82, 104.

judges, additional judges might exercise judicial powers with a hope for permanent position. This is not consistent with judicial independence and therefore the practice of appointing additional judges as a regular practice should be discontinued. However, additional judges may be appointed to meet any temporary necessity, for example to reduce the backlog of cases.

Although similar to Supreme Court Judges subordinate court judges hold office until a mandatory retirement age, the provision of forced retirement is not consistent with the principles of security of judicial tenure. It is likely that because of the tenure during the pleasure of the President, subordinate judges may be forced to retire before attaining the mandatory retirement age. Therefore, provision should be made to ensure that until attainment of the mandatory retirement age subordinate court judges should hold office during good behaviour and competence without being subject to forced retirement.

CHAPTER 6

DISCIPLINE OF JUDGES

6.1 INTRODUCTION

Judges wield judicial power to administer justice according to the law of the land. In the proper administration of justice judicial conduct and the capacity to perform judicial duties are two important requirements for judges. The conduct and performance of a judge have direct impact on the status and integrity of the judicial office, and therefore they are very significant to retain public confidence in the judiciary (Potas, 2001: 105).

Judicial discipline is an important instrument to make judges accountable for their conduct and performance of legal duties. It is essential to check illegality and corruption in the administration of justice and to maintain high standards of conduct and propriety in judges. Judicial discipline is a matter of proceeding against judges and is conducted in accordance with the constitutional or statutory law of a country. Discipline of judges involves performance appraisal and other actions necessary to ensure proper conduct and performance of judges. The actions may be of different kinds, including censure, reduction to a lower rank and salary, forced transfer, compulsory retirement and removal. These disciplinary actions or penalties have a direct bearing on the conditions and tenure of judicial office, which are closely related to the independence of judges.

This chapter examines issues relating to the discipline of judges. The main objective of this chapter is to evaluate the existing conditions of judicial discipline in

Bangladesh. In doing so, section 6.2 deals with general perspectives on judicial discipline while section 6.3 addresses the issues of judicial discipline in Bangladesh.

6.2 GENERAL PERSPECTIVES ON JUDICIAL DISCIPLINE

In every system of judicial discipline there are two basic elements, causes for discipline and mechanisms for discipline. This section deals with the general principles of the causes and mechanisms for judicial discipline. Its purpose is to develop the arguments which will be used to examine the conditions of judicial discipline in Bangladesh that follows in section 6.3. For convenience, the issues of judicial discipline are discussed under two sub-headings: the causes for discipline and mechanisms for discipline.

6.2.1 Causes for Discipline

The fundamental responsibility of judges is to perform the legal duties attached to their judicial office. In discharging this responsibility, they are obliged to conduct themselves consistently with the status and integrity of their office. In a democratic society, it is an expectation of the public that their judges maintain standards of judicial conduct and exercise judicial functions in accordance with legal norms and principles (Malleson, 1999: 226). Therefore, a judge should be accountable for his or her incapacity in exercising judicial functions and for any breach of the judicial conduct, and this accountability can be ensured by way of disciplining judges or by the threat of discipline.

In disciplining judges causes for discipline should be specified and defined by law. The *Montreal Declaration* 1983, the *UN Basic Principles* 1985 and the *Beijing Statement* 1995 provide two common causes for judicial discipline or removal: incapacity and misconduct or misbehaviour. The *Montreal Declaration* provides that judges should not be removed from office 'except on proved grounds of incapacity or misbehaviour rendering [them] unfit to continue in office'.[1] Similarly, the *UN Basic Principles* provide that a judge may be subject to disciplinary action only for the causes of 'incapacity or behaviour' which make him or her unfit to perform judicial duties.[2] Likewise, the *Beijing Statement* states that a judge may be removed from his or her office only for 'proved incapacity, conviction of a crime, or conduct which makes the judge unfit to be a judge'.[3]

In most jurisdictions, the causes for discipline are mentioned in the disciplinary laws though they may vary between different countries (Shetreet, 1986: 40). However, the most common causes for discipline in all countries are incapacity and misconduct or misbehaviour.

6.2.1.1 Incapacity

The term 'incapacity' is synonymous with 'incompetence' (Black, 1990: 760). The Court of Appeals of Indiana defines 'incapacity' as 'a lack of physical or intellectual power, or of natural or of legal qualification' and recognises that it 'is synonymous with inability, incapability, disqualification'.[4]

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[1] *Montreal Declaration* 1983, Art 2.38.
[2] *UN Basic Principles* 1985, Art 18.
[3] *Beijing Statement* 1995, Art 22.
[4] *Bole v Civil City of Ligonier* (1959) 130 Ind Appl 362, 373; 161 NE 2d 189, 194.

Incapacity in exercising judicial functions is an important cause for discipline of judges. Incapacity or incompetence of a judge can be explained as a state of being unable or incompetent to perform the duties of judicial office. It may arise from the lack of physical, intellectual or mental ability. In this regard, the Federal Court of Australia held that incapacity 'relates primarily and principally to physical or mental incapacity'.[5] In *Bruce v Cole* the Court of Appeal of New South Wales recognises unreasonable delay in delivering judgments as an incapacity of a judge.[6] It is to be noted that Justice Vince Bruce was a judge of the Supreme Court of New South Wales. A complaint was made against Justice Bruce with allegations of extensive delay in delivering judgment. In the course of dealing with the complaint the Conduct Division of NSW Judicial Commission found that due to his health problem Justice Bruce delayed in the delivery of judgments in a great number of cases heard by him.[7] A majority of the members of the Conduct Division found that the allegations were substantiated and demonstrated Justice Bruce's continuing incapacity to perform judicial duties. The Conduct Division concluded:

> It is the Division's view these substantiated complaints against Justice Bruce could justify Parliamentary consideration of his removal from office. The reason for that opinion is that, ... there has been proved an incapacity to perform judicial duties judged by any reasonable standard. The number of instances of delay is great. The extent of individual delays is unacceptable by any reasonable standard. The failure to adhere to assurances of performance which Justice Bruce knew or suspected would be conveyed to litigants has been shown to result in both distress and hardship to litigants. Incapacity to perform judicial duties has been proven to have been present from, at least, early 1995 and continues.[8]

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[5] *Repatriation Commission v Moss* (1982) 40 ALR 553, 558.
[6] *Bruce v Cole* (1998) 45 NSWLR 163, 197.
[7] Judicial Commission of New South Wales, Conduct Division, *Report of the Conduct Division to the Governor Regarding Complaints Against the Honourable Justice Vince Bruce*, 15 May 1998, para 24, Table A.
[8] Ibid 80.

Justice Bruce challenged the Commission's report in the Supreme Court of New South Wales, but was unsuccessful. On 12 June 1998, the Court held that 'the failure to deliver judgments in a timely way was properly held by the [Conduct] Division to constitute incapacity'.[9]

For the proper administration of justice, it is essential that a person holding judicial office has the physical, intellectual and mental ability or competence to do the work. Therefore, physical, intellectual or mental incapacity or incompetence is widely recognised as an important cause for discipline of judges.

However, one commentator (Professor Shetreet) is reluctant to admit 'incompetence' as a sufficient ground for discipline or removal of judges (Shetreet 1976: 284-285; Shetreet, 1987a: 14-15). He says that this ground may be used as a pretext for removing competent judges who 'for some reason or another do not enjoy the support of those who control the machinery of removal, whoever they may be'. He argues:

> The price for tolerating incompetent judges on the bench should be borne by the society in order to protect the competent judges against abuse of power. Just as society is prepared to let some guilty go free to protect the innocent, so is it is necessary to let some incompetent judges stay on the Bench to protect the judges against abuse (Shetreet 1976: 285).

Shetreet's argument is not beyond question. It is apparently right to say that there is a strong possibility of abusing 'incapacity or incompetence' in disciplining judges, but this possibility may not be a justification for leaving incompetent judges on the bench. It is universally recognised that a person accused in a criminal case can be punished only when the charge is proved beyond reasonable doubt. In the course of a trial, if any reasonable doubt remains as to the guilt of the accused he or she must be acquitted. Several jurists and commentators suggest that it is better to let some guilty

[9] *Bruce v Cole* (1998) 45 NSWLR 163, 197.

persons free than to convict one innocent person (Volokh, 1997: 173-176). However, there is no place for giving an incompetent judge the benefit of this principle to protect the innocent. The position of a judge who is alleged to be incompetent is not similar to an accused in a criminal case. Society expects its judges to be physically and mentally fit for delivering justice. The physical or mental condition of a judge has a great impact on the exercise of judicial functions and therefore, the necessity of physical or mental fitness of a judge should not be ignored.

Shetreet argues that the appellate courts may mitigate the injustices caused by incompetent judges (Shetreet, 1976: 285). This argument may be acceptable, as discussed in section 1.5.3, only to the extent of correcting certain types of judicial error, but it is quite insufficient to exclude incapacity or incompetence for several reasons. Firstly, an appeal will involve further litigation costs for the parties and in many cases the aggrieved party will not be able to file an appeal. Consequently, it may not be rational to allow incompetent judges to continue in judicial office at the cost of the suffering of the general public. Secondly, the appellate process cannot serve the purpose of disciplining judges. As Malleson says:

> The appeal process cannot be a substitute for performance appraisal because the two do not share the same goals. The purpose of an appeal is primarily to put right a mistake rather than to ensure that the same mistakes do not reoccur (Malleson, 1999: 204).

Thirdly, if the incompetent judges themselves become the appellate judges, there would be no scope for reducing the severity of injustices.

Therefore, incapacity or incompetence should not be excluded from the list of causes for discipline, but necessary measures should be taken to protect competent judges from removal by misuse of the cause of incapacity or incompetence.

6.2.1.2 Misconduct

Misconduct is a universally recognised cause for the discipline of judges. It is synonymous with 'misbehaviour' which is used in some jurisdictions (Black, 1990: 999). The Supreme Court of India defines 'misconduct' as 'wrong conduct or improper conduct'.[10] The Privy Council observed that misconduct is a 'word of general effect, involving some act or omission which falls short of what would be proper in the circumstances'.[11] The Supreme Court of New South Wales observed that misconduct includes 'a deliberate departure from accepted standards or such serious negligence as, although not deliberate, to portray indifference and an abuse of the privileges'.[12]

Therefore, misconduct of judges means non-compliance with the standards of judicial conduct that should be complied with by a person holding judicial office. It refers to gross negligence or non-compliance with the standards that should be respected by judicial officers. If the standards of judicial conduct are not effectively maintained or respected, public confidence in the judiciary will be undermined (Thomas, 1997: 9).

The question is what are these standards? Judicial conduct is 'regulated by a combination of rules of law, convention and ethics' (Campbell and Lee, 2001: 132). The term 'ethics', as Thomas says, 'refers to a collection of rules or standards of conduct expected of a particular professional group' (Thomas, 1997: 9). He goes on to say, 'the ethical standards required from judges call for perhaps the highest and most rigorous standards, sacrifices and disciplines of any profession in the

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[10] *Iyer v Bhattacharjee* (1995) SOL Case No. 249 <http://www.supremecourtonline.com/cgi-bin/htsearch?restrict=;exclude=;config=> 17 August 2001 (Copy on file with author) [24].
[11] *Roylance v General Medical Council* (1999) 3 WLR 541, 557.
[12] *Pillai v Messiter (No 2)* (1989) 16 NSWLR 197, 200.

community' and these standards are 'based on perceptions of human duty' (Thomas, 1997: 10-11).

The *Montreal Declaration* 1983, the *UN Basic Principles* 1985 and the *Beijing Statement* 1995 identically emphasise that disciplinary proceedings against judges should be determined in accordance with 'established standards of judicial conduct'.[13] However, none of the documents provide any specific standards of judicial conduct. It is to be noted that some countries, including Australia, Bangladesh, Canada and United States, have prescribed a set of standards of judicial conduct.[14]

However, a written code of conduct may not cover all sorts of standards defining judicial misconduct. Similarly, a written code may contain some guidelines which may not be sufficient to discipline judges for misconduct. In fact, 'ethical duties are the real basis against which all questions of misconduct or misbehaviour must be measured' (Thomas, 1997: 17). As Thomas says:

> It is only the rare case of serious misconduct which shows the judicial officer to be quite unfit for office, or the repeated flaunting of standards to such an extent as to show that person to be temperamentally unfit to act as a judge, that fairly raises the question of removal (Thomas, 1997: 6).

Misconduct is not limited only to the conduct in office of a judge, but also the conduct in private life.[15] In this regard, the Supreme Court of India held that

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[13] *Montreal Declaration* 1983, Art 2.34, *UN Basic Principles* 1985, Art 19 and *Beijing Statement* 1995, Art 27.

[14] The standards of judicial conduct to be followed by judges in Bangladesh are discussed in section 6.3.1. The Australian standards of judicial conduct known as the *Guide to Judicial Conduct* is adopted by the Council of Chief Justices of Australia and published by The Australian Institute of Judicial Administration (AIJA) in June 2002. It is available on the AIJA's web site: <www.aija.org.au> and the web sites of all Australian courts. The Canadian standards of judicial conduct known as the *Ethical Principles for Judges* is adopted by the Canadian Judicial Council in 1998. The text of the Ethical Principles is available on the web site: <http://www.cjc-ccm.gc.ca>. The United States standards of judicial conduct, *Model Code of Judicial Conduct,* adopted by the House of Delegates of the American Bar Association in 1990 is available on the web site: <http://www.law.sc.edu/freeman/ejc51.htm>.

[15] *Kenrick's Case* (1826) 14 Parl Deb, 2nd Ser 507. See also Shetreet, 1976: 274.

misconduct 'would extend to conduct' of a judge 'in or beyond the execution of judicial office'.[16] In fact, non-official conduct which may affect the status or prestige of judges or undermine public confidence in the judiciary is also included in judicial conduct (Cappelletti, 1989: 99, note 191; Thomas, 1997: 9, 91). The Australian *Guide to Judicial Conduct* contains a wide range of guidelines for non-official conduct which includes shareholding in litigant companies, participation in public debate, commercial activities, public fund raising and engagement in community organisations. The Supreme Court of India observed:

> Judicial office is essentially a public trust. Society is, therefore, entitled to expect that a Judge must be a man of high integrity, honesty and required to have moral vigour, ethical firmness and impervious to corrupt or venial influences. He [or she] is required to keep most exacting standards of propriety in judicial conduct. Any conduct which tends to undermine public confidence in the integrity and impartiality of the court would be deleterious to the efficacy of judicial process. ... It is, therefore, a basic requirement that a Judge's official and personal conduct be free from impropriety; the same must be in tune with the highest standards of propriety and probity'.[17]

In any society judges are under an obligation to act or conduct themselves properly and they should always refrain from improper or wrongful conduct or acts. This is because the acts or conduct of a judge whether in their private capacity or in office have a great impact on public respect and confidence in the judiciary (Thomas, 1997: 9). Judges should refrain not only from acts or conduct which are apparently improper or wrongful, but also from acts or conduct which appear to be improper or wrongful (Thomas, 1997: 15). Any improper or wrongful act or conduct of a judge would constitute judicial misconduct. However, the improper or wrongful acts or

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[16] *Krishnaswami v Union of India* (1992) SCC 605, 650-651.

[17] *Iyer v Bhattacharjee* (1995) SOL Case No. 249, <http://www.supremecourtonline.com/cgi-bin/htsearch?restrict=;exclude=;config=> 17 August 2001 (Copy on file with author) [21].

conduct, which constitute misconduct, may be manifold. Some of examples of these acts or conduct are as follows:

(a) Bias and Prejudice

Judges are under an obligation to maintain strict impartiality in making judicial decisions. Each party to a case has legal rights to present his or her claims, to produce evidence in support of the claims and to argue his or her legal positions. It is a fundamental duty of a judge to ensure that no party is deprived of their right of attentive hearing. A judge who refuses this right of the parties must be guilty of misconduct (Thomas, 1997: 22-23).

Judges should not be biased for or against a party in a particular case. Bias is 'an attitude of mind which prevents' a judge 'from making an objective determination of the issues' which he or she has to determine.[18] In fact, the rule against bias is a fundamental principle of natural justice which signifies that a person should not be a judge in his or her own cause. This rule, as observed by the Queen's Bench Division of England, 'in its simplest form means that a man shall not judge an issue in which he has a direct pecuniary interest'. The Court, however, held:

> [T]he rule has been extended far beyond such crude examples and now covers cases in which the judge has such an interest in the parties or the matters in dispute as to make it difficult for him to approach the trial with the impartiality and detachment which the judicial function requires.[19]

Bias may be of various forms and in this regard, the observation of the Court of Appeal (Civil Division) of England is worthy of consideration. The Court held that a judge may be biased because he or she 'has reason to prefer one outcome of the case

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[18] *Re Medicaments and Related Classes of Goods (No 2)* (2001) 1 WLR 700, 711.
[19] *R v Altrincham Justices, ex parte Pennington*, (1975) 2 All ER 78, 81.

to another' or 'has reason to favour one party rather than another'. A judge may also be biased, as the Court added, 'not in favour of one outcome of the dispute but because of a prejudice in favour of or against a particular witness which prevents an impartial assessment of the evidence of that witness'.[20] The Court further held that bias 'may consist of irrational prejudice or it may arise from particular circumstances which, for logical reasons, predispose a judge towards a particular view of the evidence or issues before him [or her]'.[21]

In *Webb v R* (1994) the High Court of Australia observed that the area covered by bias 'encompasses at least four distinct, though sometimes overlapping, main categories of case'. The first category involves any direct or indirect pecuniary or other interest in the proceedings which 'gives rise to a reasonable apprehension of prejudice, partiality or prejudgment'. The second category consists of judicial conduct 'including published statements', 'either in the course of, or outside, the proceedings', which 'gives rise to such an apprehension of bias'. The third category signifies association with the person or persons who are 'interested in, or otherwise involved in, the proceedings'. Sometimes it overlaps the first category 'eg, a case where a dependent spouse or child has a direct pecuniary interest in the proceedings'. The fourth category related 'extraneous information' that includes 'cases where knowledge of some prejudicial but inadmissible fact or circumstance gives rise to the apprehension of bias'. Sometimes it overlaps the third category 'eg, a case where a judge is disqualified by reason of having heard some earlier case'.[22]

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[20] *Re Medicaments and Related Classes of Goods (No 2)* (2001) 1 WLR 700, 711.
[21] *Re Medicaments and Related Classes of Goods (No 2)* (2001) 1 WLR 700, 711.
[22] *Webb v R* (1994) 68 ALJR 582, 598; 122 ALR 41, 64-65.

In addition, judges may also be biased because of social, cultural, racial, sexual and other moral reasons. As mentioned in section 4.2.1.2, in making judicial decisions a judge may be influenced by his or her social backgrounds, values and ideologies (Leubsdorf, 1987: 237; Shetreet, 1987b: 777). Consequently, social backgrounds, values and ideologies may influence a judge to be biased in favour of or against a party in a case.

Any act of bias for or against a party is a gross misconduct in the office of a judge. In some cases, a party who is aggrieved by a judicial decision made violating the rule against bias and prejudgment may have a remedy on appeal that is by an order for a rehearing. However, as with the requirement to hear both parties mentioned above, perhaps the appellate process is not adequate to ensure the maintenance of the rule against bias and prejudgment.

Bias and prejudgment are recognised as important elements of misconduct (Thomas, 1997: 51). In respect of this misconduct, sometimes the appellate process may be a remedy for an aggrieved party, but an appeal cannot be a sufficient remedy in all cases. This is because, as mentioned in sections 1.5.3 and 6.2.1.1, appeals are effective only in the rectification of certain types of judicial error. In addition, appellate process involves further litigation costs and parties in all cases may not be able to file appeals. In fact, the threat of discipline for misconduct may be an effective means of preventing injustice caused by bias and prejudgment of judges.

Perhaps for bias and prejudgment a judge may not be subject to major penalties, including compulsory retirement and removal from office, but minor penalties, eg censure, forced transfer and reduction in rank may be useful to this kind of misconduct.

(b) Corruption

Corruption is official misconduct in which a judge uses judicial office for his or her personal benefit. A judge may be guilty of corruption for (i) accepting bribes as rewards for judicial favours, (ii) extorting by threats of unfavourable judicial decisions and (iii) misappropriating funds of court (Comisky and Patterson, 1987: 214).

Judicial corruption has serious consequences for the administration of justice and public confidence in the justice system. The detrimental effects of judicial corruption destroy public respect for law and the judiciary (Wallace, 1998: 342). Therefore, as the Supreme Court of India held, judges must be individuals of 'high integrity, honesty and required to have moral vigour, ethical firmness and impervious to corrupt ... influences'.[23]

In fact, corruption is a gross misconduct which warrants disciplinary sanction, including removal from office.

(c) Criminal Offence:

Involvement in a criminal offence by a judge is serious misconduct.[24] When a judge commits a crime, he or she is subject to criminal prosecution like any other person (Wallace, 1998: 344-345).

If convicted of a criminal offence a judge would be subject to disciplinary action. However, when a judge is acquitted of a criminal charge a question may arise whether he or she will be subject to discipline. According to some opinions,

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[23] *Iyer v Bhattacharjee* (1995) SOL Case No. 249, <http://www.supremecourtonline.com/cgi-bin/htsearch?restrict=;exclude=;config=> 17 August 2001 (Copy on file with author) [21].

[24] *Krishnaswami v Union of India* (1992) SCC 605, 650-651.

involvement in a criminal charge can provide more information about the conduct of a judge. Therefore, it is quite justifiable to proceed beyond the formal verdict of acquittal and to assess 'all the facts and circumstances of the case' (Shetreet, 1976: 370). Another view suggests that when a judge is acquitted of a criminal charge it should be assumed that the verdict of the court genuinely rejects the charge and therefore, it is not justifiable to proceed beyond the formal verdict of acquittal of the judge (Shetreet, 1976: 370). These views, however, maintain that when the criminal proceedings disclose information which adversely affects the character of the judge, it is justifiable to proceed beyond the verdict of acquittal. Likewise, when a judge is acquitted on a purely technical ground, such as the law of limitation or jurisdiction, then the case of misconduct may be taken into consideration (Shetreet, 1976: 370-371).

In the context of causes for discipline, it is to be noted that assertion and proof of the cause of incapacity or misconduct are important factors to disciplining judges. An acute problem may arise when a judge is charged with an allegation of incapacity or misconduct because it would take a lot of courage to contest the charge. Once such a charge is made, whether judicial or not, people tend to desert the victim and the press tends to support the government's stance. In such circumstances if the system is corrupt it may be enough to just make the charge public to have the average judge resign.

In this context, it is be noted that there is a very common practice in Bangladesh that lawyers boycott subordinate court judges in case of allegations of incapacity or

misconduct.[25] In most of these cases, the government transfers the judges to another jurisdiction rather than carrying out a proper investigation. Such a practice may not be effective to enhance public confidence in the disciplinary system.

6.2.2 Mechanisms for Discipline

The effectiveness of a system of disciplining judges depends on the features of the mechanisms for discipline. In this respect, perhaps the most important factors are openness and transparency in the mechanisms and the working members involved in them. Since judicial discipline is an important aspect combining the two conflicting concepts of judicial independence and accountability, the mechanisms for discipline must reconcile the tension between them in disciplining judges. In the context of disciplinary mechanisms, judicial discipline may be classified as informal or formal.

Informal discipline of judges is mainly exercised by the Chief Justice or the Chief Judge of the jurisdiction. It may be very effective to ensure the maintenance of judicial conduct and performance of judicial duties. The Chief Justice or the Chief Judge of the jurisdiction informally corrects or regulates the conduct and disabilities of judges and discourages delays in disposal of cases. He or she can investigate and address a wide range of judicial misconduct or in some cases influence disabled judges to resign or retire from their office (Geyh, 1993: 281, 285). A simple visit from the Chief Justice or Chief Judge 'may prove highly effective in persuading a miscreant judge to change his or her behaviour' (Geyh, 1993: 268, 281). The Canadian Federal Court of Appeal observed:

> [A] Chief Justice cannot disinterest himself or herself from the pace of progress and the timeliness of disposition of the cases the court has to deal

[25] For more discussion on this practice, see sections 7.3.1 and 8.3.2.

> with. He or she has a responsibility to ensure that the court provides "timely justice". Indeed, it is his or her duty to take an active and supervisory role in this respect.[26]

Similarly, on appeal from the Federal Court, the Supreme Court of Canada held that 'a Chief Justice is responsible for the expeditious progress of cases through his or her court and may under certain circumstances be obliged to take steps to correct tardiness'.[27]

In fact, the effectiveness of informal discipline is 'attributable to at least three factors'. Firstly, 'judges who are dedicated to their work and to the judiciary as an institution, are likely to need no more than a gentle suggestion' from the Chief Justice or the head of the jurisdiction. Secondly, judges may have a very co-operative reaction to 'criticism couched as a friendly suggestion' from the Chief Justice or the head of the jurisdiction. Thirdly, the mere presence of formal mechanisms for discipline 'provides an incentive for judges to take seriously the informal suggestion' of the Chief Justice or the head of the jurisdiction (Geyh, 1993: 282-283).

As an important example of informal judicial discipline the policy adopted by the Chief Justice of New South Wales regarding delays in the delivery of judgments may be mentioned. The Chief Justice has decided that the names of judges with reserved judgments outstanding for more than six months will be publicly revealed. The tabloid newspaper, the *Daily Telegraph* quoted a spokesman for the Chief Justice that 'the court has decided to adopt a new policy so that from the end of the month just completed it will be prepared to answer requests for information about

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[26] *Canada (Minister of Citizenship and Immigration) v Tobiass* (1997) 142 DLR (4th) 270, 282.
[27] *Canada (Minister of Citizenship and Immigration) v Tobiass* (1997) 3 SCR 391, 421.

judgments which are outstanding for more than six months at the end of each month'.[28] Accordingly, it was reported that:

> Up to [1 May 2001] three judgments remain outstanding for longer than six months – all belonging to Justice Robert Austin of the equity division. Of those, he handed down his decision on one case last Wednesday, on a second yesterday and the third will be handed down on Thursday.[29]

This policy might be a very useful informal mechanism of judicial discipline. This is because it will make judges careful to avoid delays in the disposal of cases. In this way, the Chief Justice or Chief Judge of any jurisdiction may play an important informal role in maintaining the performance and conduct of judges in many respects.

However, this role of the Chief Justice or Chief Judge may also be a concern for the internal independence of judges.[30] The etiquette of the judiciary is that a judge expects intervention from nobody. So, a Chief Justice or Chief Judge who tells an individual judge to 'hurry up' may be seen as interfering with judicial independence if that judge believes he or she needs time to do justice to their judgment. This sort of interference with judicial independence can also take place when a Chief Justice or Chief Judge issues directions or guidelines on different aspects of the decision-making process, eg interpreting and imposing a policy of non-adjournment. As discussed in section 1.3.1.3, individual independence of a judge may be undermined not only by the outside sources of interference but also by fellow judges particularly by senior judges using their administrative power and control (Shetreet and Deschênes, 1985: 637; Russell, 2001: 7). Therefore, in the case of informal judicial

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[28] *The Daily Telegraph*, Sydney (Australia), 8 May 2001.
[29] Ibid.
[30] For internal independence of judges, see section 1.3.1.3.

discipline the Chief Justice or Chief Judge of the jurisdiction should exercise his or her power taking care with the internal independence of judges.

In respect of formal judicial discipline, there are two important functions: institution of disciplinary proceedings and its adjudication. In this context, the *Montreal Declaration* 1983 provides that proceedings for discipline or removal should be 'held before a court or a board predominantly composed of members of the judiciary and selected by the judiciary'.[31] It adds that the 'power of removal may be vested in the legislature by impeachment or joint address, preferably upon a recommendation' of such a court or board.[32] The *Montreal Declaration* recommends that in 'countries where the legal profession plays an indispensable role in maintaining the rule of law and judicial independence', members of the profession should 'participate in the selection of the members of the court or board, and be included as members thereof'.[33] It further provides that with the 'exception of proceedings before the legislature or in connection with them, the decision of a disciplinary tribunal shall be subject to appeal to a court.[34]

The *UN Basic Principles* 1985 do not specifically mention the mechanisms for discipline, but indicate that the power of discipline may be vested in the judiciary or parliament. The Principles provide that decisions in the proceedings for discipline or removal, except decisions taken by the highest court or the legislature, should be 'subject to an independent review'.[35]

The *Beijing Statement* 1995 recognises that due to historical and cultural differences, different mechanisms may be used in different societies. In some

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[31] *Montreal Declaration* 1983, Art 2.33(a).
[32] *Montreal Declaration* 1983, Art 2.33(b).
[33] *Montreal Declaration* 1983, Art 2.33, explanatory note.
[34] *Montreal Declaration* 1983, Art 2.37.
[35] *UN Basic Principles* 1985, Art 20.

countries, a parliamentary procedure of discipline is traditionally employed while it is not suitable for some other countries.[36] The *Statement* provides that where 'parliamentary procedures or procedures for the removal of a judge by vote of the people do not apply, the procedures for the removal of judges must be under the control of the judiciary.[37]

None of the international instruments (*Montreal Declaration* 1983, *UN Basic Principles* 1985 or *Beijing Statement* 1995) approves the use of exclusive executive power in disciplining judges. In fact, exclusive executive power of disciplinary control may place judges in a position of subservience to the executive (Cappelletti, 1989: 105). In other words, this power places the executive government in a position where it can easily interfere with the decision-making process of the judiciary. For this reason, exclusive executive power of disciplining judges is not desirable; rather it is highly objectionable to the commentators. Particularly, the power of adjudication in the disciplinary proceedings is probably the most important power and it should not be vested in the executive (Shetreet, 1986: 40).

It is argued that with a view to protecting judicial independence, disciplinary power should be vested in a mechanism which is independent of executive control (Shetreet, 1986: 40). On the other hand, in order to ensure the accountability of judges, the disciplinary power should not be vested exclusively in the judiciary. Therefore, the power of judicial discipline should be vested in mechanisms which can resolve the tension between independence and accountability and can 'promptly, effectively and fairly deal' with the discipline of judges (Morabito 1993: 490). In most jurisdictions the power to discipline judges is exercised by the executive

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[36] *Beijing Statement* 1995, Art 23.
[37] *Beijing Statement* 1995, Art 24.

government involving parliament, the judiciary or an independent commission. An overview of the existing mechanisms for the discipline of judges is given below.

6.2.2.1 Parliament

The power of discipline or removal of judges is vested in parliament in a large number of countries including Australia, Canada, England, India and the United States of America. Under this system, disciplinary action can be taken against judges by impeachment or address of parliament.

The impeachment procedure is in fact the trial of a judge by parliament and under this procedure parliament itself can take disciplinary action against judges (Shetreet, 1976: 121). The procedure of address empowers the executive government to remove judges upon the address of both houses of bicameral parliament.[38] Under this system parliament acts as a mechanism to control the exclusive executive power of disciplining judges. It can protect judges from arbitrary removal by the executive government. However, the parliamentary process of judicial discipline carries inherent drawbacks. The most important drawbacks are as follows:

Firstly, in any parliamentary form of government, the government of the day holds a majority though sometimes it can differ between the houses. Thus parliament is controlled by the executive government and therefore disciplining judges by the parliamentary process is not free from executive interference which is a danger for judicial independence. As Shetreet, in the context of English judiciary, says:

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[38] In a country where parliament is not bicameral, the question of addresses of 'both houses' does not arise. For example, before the Fourth Amendment of the Constitution of Bangladesh in 1975, Supreme Court judges could be removed upon an address of Parliament which was not bicameral. Bangladesh is a unitary State having a Parliament of a single house known as the House of the Nation. In Queensland in Australia the legislature is unicameral through which Justice Angelo Vasta, a judge of the Supreme Court of Queensland, was removed from office in 1989. For a discussion on this incident, see Campbell and Lee, 2001: 105-106).

> It is significant that an examination of the cases where a motion for an address was presented shows that, except for *Baron Smith's case* (1834), in which the Government changed [its] mind, in all the cases the result was the one supported by the Government (Shetreet, 1976: 405).

Secondly, the executive government is empowered to control parliamentary time and therefore it can prevent parliamentary debate on any motions by refusing required time for discussion of judicial conduct. In 1924, for example, the then Prime Minister of England 'refused a request of time for discussing a motion for an inquiry into Justice McCardie's conduct in *General O'Dwyer's case* with a view to passing an address for his removal' (Shetreet, 1976: 137, 406).

Thirdly, since parliament is a political body, political passions are important factors in the parliamentary process of judicial discipline. The entire process of parliamentary discipline may be guided by political considerations (Shetreet, 1976: 405). In this respect, in *Barrington's case* (1830) a member of the British Parliament said that 'a spirit of party was often observable in the examination [of witnesses] before a committee of the whole House which tended to pervert the course of justice'. In some cases he experienced 'men whose conduct was generally impartial, led by the feeling of party spirit into acrimonious dissensions, which diverted their minds from the real bearings of the case under consideration'.[39]

In the context of political considerations in disciplining judges through the parliamentary mechanism, an unsuccessful attempt of removal of a judge in Australia is worth mentioning. In the early 1980s, the parliamentary form of removal of judges proved ineffective in Justice Murphy's case in Australia. Justice Lionel Murphy, a High Court Judge of Australia, was accused of attempting to pervert the course of

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[39] Mr CW Wynn, 24 Parl Deb, 2nd ser, 969-970 (1830); see also Shetreet, 1976: 405.

justice. In early 1984 the *Age*, one of Australia's leading newspapers, published a series of articles about telephone conversations allegedly held between a Sydney solicitor Mr Morgan Ryan and Justice Lionel Murphy. It was alleged that in relation to a committal proceeding against Ryan Justice Murphy had tried to influence the Chief Stipendiary Magistrate of New South Wales (Campbell and Lee, 2001: 102).

The Federal Government rejected calls for a parliamentary inquiry into the matter. However, in March 1984 a Senate Committee known as 'the Senate Select Committee on the Conduct of a Judge' comprising four members was established by the Senate against the opposition of the government which did not command a majority in that House. The Committee was asked to determine whether tapes of conversations were authentic and whether the judge's conduct amounted to 'misbehaviour' which could be a cause for his removal from office (Blackshield, 1987: 235; Campbell and Lee, 2001: 103).

The finding of the Committee was inconclusive because its members were evenly divided (Campbell and Lee, 2001: 103). Consequently, a second Senate Committee called 'the Second Select Committee on Allegations Concerning a Judge' was formed in September 1984 comprising six members (Blackshield, 1987: 245). Five of the six members of the Committee concluded that the judge had attempted to influence the course of justice and could be guilty of 'misbehaviour' (Blackshield, 1987: 248).

In July 1985 Murphy was tried before the Supreme Court of New South Wales and was convicted of attempting to pervert the course of justice. He successfully appealed and was acquitted at a retrial ordered by the Court of Appeal in 1986. Nevertheless, 'the allegations against him continued to be made' and the Parliament appointed a Parliamentary Commission of Inquiry to examine and 'report on all the

allegations' (Gibbs, 1987: 147). It was only when it was revealed that Murphy had terminal cancer that the Commission was discontinued (Campbell and Lee, 2001: 103).

In respect of the influence of politics on this incident a Report of an Advisory Committee on the Australian Judicial System stated:

> The reports of the two Senate Select Committees in that case demonstrated the difficulty, no matter how well-intentioned the members participating, of separating questions of fact and degree from issues of politics in an inquiry conducted by a Special Committee comprising Members of Parliament from various political parties.[40]

6.2.2.2 Judiciary

The judiciary may be involved in disciplining judges in two ways: (1) investigation required for other disciplinary mechanisms, for example, a parliamentary procedure and (2) consultation or recommendation.

(1) Judicial Involvement through Investigation

The power to discipline judges may be exercised by the executive or legislature on the basis of a report of an investigation conducted by the judiciary. In this regard, the disciplinary system of superior judges of India may be an important example.

Under Arts 124(4) and 217(1)(b) of the Constitution of India a Supreme Court Judge or a High Court Judge may be removed by order of the President of India upon address of each House of Parliament (the House of the People and the Council of States). The proceedings for an address for removal originate by a notice of motion

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[40] Constitutional Commission, *Australian Judicial System Advisory Committee Report* (1987), para 5.51.

signed by at least 100 members of the House of the People or 50 members the Council of States.[41] If the Speaker/Chairman of the House/Council admits the motion, he or she constitutes a Committee for the purpose of investigating the alleged grounds for removal of the judge. The Committee consists of three members one of whom should be chosen from among the Chief Justice and other judges of the Supreme Court, one from among the Chief Justices of the High Courts and one person who is, in the opinion of the Speaker/Chairman, a distinguished jurist.[42]

After investigating the charges against the judge, if the Inquiry Committee records a finding in its report that the judge is 'not guilty', then no further steps should be taken by Parliament. However, if the report contains a finding that the judge is 'guilty of any misbehaviour or suffers from any incapacity', the motion together with the report should be taken up for consideration by Parliament. If Parliament adopts the motion, then the 'misbehaviour or incapacity' of the judge should be 'deemed to have been proved and an address praying for the removal of the judge' should be presented to the President.[43]

Thus although parliamentary procedure is employed in disciplining superior judges in India the judiciary plays a very significant role in investigating the charges. The charges against a judge are investigated by committee, the membership of which predominantly consists of the senior members of the judiciary.

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[41] *Judges (Inquiry) Act* 1968 s 3(1). It is to be noted that Art 124(4) of the Constitution of India empowers Parliament to make legal provisions for regulating the proceedings and for the investigation and proof of the charges against a judge. Accordingly, the *Judges (Inquiry) Act* 1968 was enacted by Parliament with the object of regulating the procedures for the (1) investigation and proof of the 'misbehaviour' or 'incapacity' of judges, (2) presentation of an address to the President and (3) related matters of the proceedings.

[42] *Judges (Inquiry) Act* 1968 s 3(2).

[43] *Judges (Inquiry) Act* 1968 s 6.

(2) Judicial Involvement through Consultation or Recommendation

In the case of consultation, the powers of initiating and adjudicating disciplinary proceedings are vested in the executive, but in exercising these powers the executive may consult the senior judiciary. In such cases, the role of the judiciary is merely consultative and the advice given by the judiciary in the course of consultation may or may not be accepted by the executive. In addition, unless the advice of the judiciary is public, it is not a transparent process.

In the case of recommendation, the powers of disciplining judges are vested in the executive subject to the recommendation of the judiciary. The judiciary initiates the disciplinary proceedings and recommends measures against judges, and then the executive takes disciplinary actions based on the recommendation of the higher judiciary (Shetreet, 1986: 40). For an example of this system of discipline, the Indian model of disciplining subordinate court judges may be mentioned.

In respect of subordinate court judges, Art 235 of the Constitution of India confers powers of control on the High Courts. The Supreme Court of India, in several cases, has held that the term 'control' in Art 235 includes 'disciplinary control'.[44] Under this provision the High Courts are exclusively invested with disciplinary control over subordinate court judges and in exercising these powers they can initiate disciplinary proceedings, hold inquiries and impose punishment. However, the High Courts cannot make orders of punishment including 'dismissal, removal, reduction in rank or termination' from office. They are empowered to make decisions, but the formal orders to give effect to such decisions have to be made by

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[44] *Ghouse v State of Andhra* (1957) AIR SC 246; *Chief Justiec of Andhra Pradesh v Dikshitulu* (1979) SC 193: (1979) 3 SCC 34; *Choudhury v State of Bihar* (1999) SOL Case No 111 <http://www.supremecourtonline.com/cases/493.html> 17 August 2001 (Copy on file with author) [22].

State Governor on the recommendation of a High Court.[45] It is well established by several decisions of the Supreme Court that the recommendations of the High Courts are binding upon the State Governors in this matter.[46]

The power of recommendation of the judiciary is very significant for controlling the exclusive executive power of disciplining judges. It is useful to protect judges from arbitrary disciplinary action by the executive. As the system of disciplining judges is controlled mainly by the judiciary it may be considered an insufficient means to ensure the accountability of judges.

6.2.2.3 Independent Commission

The system of disciplining judges by an independent commission is a relatively modern practice and it is working in some countries including the United States of America and Australia. In 1960, a Commission on Judicial Performance was first introduced in California in the United States, but subsequently all other states have established some form of commission for disciplining judges (Friedland, 1995: 123). Following the Californian model, a Judicial Commission has been established in New South Wales in Australia under the *Judicial Officers Act* 1986.

The effectiveness of such a commission depends on its composition, powers and functions. If a disciplinary commission comprising members of the executive, legislature, judiciary, legal profession and lay persons uses an open and transparent process, it might be effective to retain public confidence in the disciplinary system

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[45] *Registrar (Admn), High Court of Orissa v Satapathy* (1999) SOL Case No 544 <http://www.supremecourtonline.com/cgi-bin/htsearch> 26 August 2001 (Copy on file with author) [15-16].

[46] *Raj v Punjab & Haryana High Court* (1976) AIR SC 2490; *State of Haryana v Anand* (1976)(2) SCC 977; *Registrar (Admn), High Court of Orissa v Satapathy* (1999) Sol Case No 544 <http://www.supremecourtonline.com/cgi-bin/htsearch> 26 August 2001 (Copy on file with author) [15].

and to balance the conflicting values of independence and accountability in disciplining judges. In this context, the models of commission used in California and New South Wales may be discussed briefly.

(1) Commission on Judicial Performance of California

The Commission on Judicial Performance of California is composed of three judges, two lawyers and six citizens.[47] The Supreme Court of California appoints the three judge-members of the Commission, one from a court of appeal, one from a superior court and one from a municipal court.[48] The lawyer-members are appointed by the Governor from the members of the State Bar of California who have experience of legal practice for ten years.[49] Among the six citizen-members, two are appointed by the Governor, two by the Senate Committee on Rules, and two by the Speaker of the Assembly, and all of them are appointed from persons who are not sitting or retired judges or lawyers.[50]

Anyone, whether litigants, lawyers, general public, judges, court staff or legislators, can file a complaint in writing against a judge to the Californian Commission.[51] Upon receiving a complaint, if it 'is not obviously unfounded or frivolous', after notifying the judge the Commission may 'make a staff inquiry to

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[47] *Constitution of California*, Art 6, s 8.

[48] *Constitution of California*, Art 6, s 8. At present (2002) the three judge-members are Justice Vance W Raye, Ms Madeleine I Flier and Mr Rise Jones Pichon, Commission on Judicial Performance's (CJPC) web site: <http://www.cjp.ca.gov/commrules.htm> 12 May 2002 (Copy on file with author) [Commission Membership].

[49] *Constitution of California*, Art 6, s 8. The present lawyer-members are Mr Marshall B Grossman and Mr Michael A Kahn, CJPC's web site: <http://www.cjp.ca.gov/commrules.htm> 12 May 2002 (Copy on file with author) [Commission Membership].

[50] *Constitution of California*, Art 6, s 8. Current citizen-members are Ms Lara Bergthold, Ms Gayle Gutierrez, Ms Crystal Lui, Ms Ramona Ripston, Ms Barbara Schraeger and Ms Betty, Wyman, CJPC's web site: <http://www.cjp.ca.gov> 12 May 2002 (Copy on file with author) [Commission Membership].

[51] CJPC's web site: <http://www.cjp.ca.gov> 12 May 2002 (Copy on file with author) [Filing a Complaint].

determine whether sufficient facts exist to warrant a preliminary investigation'.[52] If the staff inquiry determines sufficient facts the Commission may, after notifying the judge make, a preliminary investigation to determine whether formal proceedings should be instituted and a hearing held. After the preliminary investigation the Commission may choose to issue a private or public admonishment, but if the Commission 'concludes that formal proceedings should be instituted', it issues a written notice to the judge and the public advising them of the institution of formal proceedings.[53] Then the Commission schedules a hearing either before itself or a panel of special masters which report to the commission. If the Commission does not determine to hold the hearing itself, it 'may request the Supreme Court to appointment three special masters to hear and take evidence in the matter'.[54] At the completion of the hearings, the masters submit a final report to the Commission, which contains 'findings of fact and conclusions of law, along with an analysis of the evidence and reasons for the findings and conclusions', but the report does not 'contain a recommendation as to discipline'.[55]

The Californian Commission is invested with the power of different disciplinary sanctions including removal, suspension, censure, retirement and public or private admonishment. The decisions of the commission are subject to review by a tribunal of seven Court of Appeal judges. No court, except the Supreme Court, is empowered to exercise jurisdiction in any kind of action or proceeding brought by a judge against the Commission.[56]

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[52] CJPC, *Commission Rules* <http://www.courtinfo.ca.gov/reference/rules.htm> 13 May 2002 (Copy on file with author) [r 109].
[53] Ibid 113-118.
[54] Ibid r 121.
[55] Ibid r 129.
[56] *Constitution of California* Art 6, s 18(a-g).

The proceedings of the Californian Commission are open to public scrutiny. Prior to commencing formal proceedings all papers and proceedings before the Commission are confidential, but once the Commission institutes formal proceedings all subsequent papers, formal hearings, conclusions and findings of law and fact are open to the public.[57]

(2) Judicial Commission of New South Wales

The Judicial Commission of New South Wales is an independent statutory corporation consisting of ten members six of whom are official members and four of whom are appointed members.[58] The official members are the Chief Justice of the Supreme Court, the President of the Industrial Relations Commission, the Chief Judge of the Land and Environment Court, the Chief Judge of the District Court, the Chief Judge of the Compensation Court, and the Chief Magistrate.[59] The Chief Justice of the Supreme Court acts as the President of the Commission.[60]

The appointed members are appointed by the Governor on the nomination of the Minister for a period of not less than five years.[61] Among them, one should be a legal practitioner nominated by the Minister after consultation with the President of the New South Wales Bar Association and the President of the Law Society of New South Wales.[62] The remaining three appointed members are nominated by the

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[57] CJPC, *Commission Rules* <http://www.courtinfo.ca.gov/reference/rules.htm> 13 May 2002 (Copy on file with author) [r 102].

[58] *Judicial Officers Act* 1986, ss 5(1A), 5(3). The Act originally provided the Commission would be composed of eight members, two of whom were appointed members. One appointed member would be appointed from legal practitioners and the other one would be appointed from the lay persons of the community. The *Judicial Officers Amendment Act* 1998 increases the number of appointed community members from one to three.

[59] *Judicial Officers Act* 1986, s 5(4).

[60] *Judicial Officers Act* 1986, s 5(6).

[61] *Judicial Officers Act* 1986, s 5(3) & sch 1(3).

[62] *Judicial Officers Act* 1986, s 5(5)(a).

Minister after consultation with the Chief Justice and they are nominated from persons 'who, in the opinion of the Minister, have high standing in the community'.[63]

The New South Wales' Commission has three kinds of functions: (1) monitoring or assisting to monitor sentences and disseminating information and reporting on sentences of different courts, (2) organising and supervising a scheme for 'continuing education and training' of judges and (3) handling complaints concerning the 'ability or behaviour' of judges.[64] Obviously, the function mentioned in (3) is related to the discipline of judges.

In order to examine and deal with serious complaints against judges, there is a Conduct Division, which is composed of three members appointed by the Judicial Commission.[65] The members of the Conduct Division must be appointed from judges and one of them may be a retired judge.[66] After receiving a complaint from any person against a judge, the Commission conducts a preliminary examination.[67] Following the preliminary examination, the Commission may summarily dismiss the complaint or refer it to the Conduct Division if it involves a serious complaint.[68] After investigation, if the Conduct Division observes that 'a serious complaint is wholly or partly substantiated' it submits a report with its opinions to the Governor, and then the Governor may remove the judge upon address of both Houses of Parliament.[69]

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[63] *Judicial Officers Act* 1986, s 5(5)(b). At present (2002), the three appointed community members are Mr Norman Lyall AM, Ms Jenni Mack and Dr Michael Dodson Judicial Commission of New South Wales, *Annual Report* 2000-2001 <http://www.judcom.nsw.gov.au/AnnRep01/menu.htm> 13 May 2002 (Copy on file with author).
[64] *Judicial Officers Act* 1986, ss 8(1), 9(1), 10, 15.
[65] *Judicial Officers Act*1986, ss 13, 14, 22.
[66] *Judicial Officers Act* 1986, s 22(2).
[67] *Judicial Officers Act* 1986, ss 15, 18.
[68] *Judicial Officers Act* 1986, ss 19-21.
[69] *Judicial Officers Act* 1986, ss 28-29, 41.

There is a lack of openness of the procedures followed by the New South Wales' Commission. The preliminary examination or inquiries into the subject matter of a complaint 'shall, as far as practicable, take place in private'. Similarly, the examination or investigations into the subject matter of a complaint referred to the Conduct Division 'shall, as far as practicable, take place in private'.[70] In the case of a hearing before the Conduct Division, if the Division 'decides to hold a hearing in connection with a serious complaint, the hearing shall take place in public'; if it 'decides to hold a hearing in connection with a minor complaint, the hearing shall take place in private'.[71]

It is to be noted that both the Californian Commission and the New South Wales' Commission are composed of judges, lawyers and lay persons. This feature of the composition of the Californian Commission and the New South Wales' Commission indicates that there is no exclusive control of the executive, legislature or judiciary in disciplining judges. However, the executive governments are empowered to nominate lay persons and thus, there is an indirect participation of the executive. One important drawback is that neither the Californian Commission nor the New South Wales' Commission has specific provision to nominate members of the legislature to the commissions. However, unlike New South Wales, in California, the Speaker of the legislature is empowered to nominate two members who are not retired judges or lawyers and thus there is a participation of the legislature.

The significant feature of the New South Wales' Commission is that it combines the power of the executive, legislature and the judiciary in disciplining judges. The

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[70] *Judicial Officers Act* 1986, ss 18(3), 23(3).
[71] *Judicial Officers Act* 1986, s 24(2-5).

power of initiation of disciplinary proceeding is vested in the Commission itself, which is composed of six heads of the judiciary, and one lawyer and three lay persons appointed by the executive. The power of examination and investigation of complaints against judges is conferred on the Conduct Division, which is composed of three judges. Moreover, the Chief Justice of New South Wales is the President of the New South Wales' Commission and three of the four appointed members of the Commission are nominated after consultation with the Chief Justice. Thus, senior judges play a predominant role in initiating and investigating complaints against their own colleagues 'who cannot be seen to be entirely free from predetermined views' (Goldring, 1987: 158).

Another drawback of the New South Wales' Commission is that the legislature enjoys the ultimate power of disciplining judges. The Governor may remove a judge only upon address of both Houses of Parliament and therefore, the drawbacks of parliamentary forms of discipline as discussed in section 6.2.2.1 still exist.

The most important features of the Californian Commission are that its formal proceedings are fairly open to public scrutiny and the Commission itself is empowered to impose disciplinary sanctions. Consequently, judicial discipline is probably free from executive control or political pressure. Another important feature is that unlike the New South Wales' Commission the Californian Commission is not presided over by the Chief Justice, who is not even a member of the Commission. This feature is perhaps useful to reduce the influence of the superior judiciary in disciplining its members.

Given these features of the Californian Commission it may be considered an acceptable model of disciplining judges. However, in the context of the composition of the Californian Commission, it is to be noted that the composition of the South

African Commission may be more acceptable. There is no direct participation of the executive or legislature in the Californian Commission, but, as discussed in section 4.2.2.2, the South African Commission consists of members of the executive, legislature, judiciary, legal profession and lay persons. In appointing judges the South African Commission plays a significant role through an open and transparent process of selection. However, in disciplining judges its power is limited to inquire into the conduct and competence of judges. If the South African Commission finds that a 'judge suffers from incapacity, is grossly incompetent or is guilty of gross misconduct' and the National Assembly 'calls for [the] judge to be removed, by a resolution adopted with a majority of at least two thirds of its members', then the President of South Africa removes the judge from office.[72]

For the sake of judicial independence and judicial accountability the ultimate power of discipline should be vested in the commission itself and in this regard the Californian Commission is perhaps the best example. In fact, for the appointment, promotion and discipline of judges an independent judicial commission should be established following the model of the South African Commission, but its power of disciplining judges should follow the model of the Californian Commission. In such a commission, members of the legal profession and judiciary may advise other members on the legal issues and lay members may have a role to play in advising on community standards of acceptability and propriety in disciplining judges. Consequently, public confidence in the disciplinary system may be enhanced.

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[72] *Constitution of South Africa*, s 177.

6.3 BANGLADESH PERSPECTIVES

This section examines the causes and mechanisms for discipline of judges in Bangladesh. Its purpose is to evaluate the causes and mechanisms for discipline of judges in Bangladesh on the basis of the arguments developed in section 6.2. Discussion in this section is divided into two subheadings, causes for discipline and mechanisms for discipline.

6.3.1 Causes for Discipline

In examining the causes for discipline of judges in Bangladesh the issues concerning Supreme Court Judges are discussed first followed by those concerning subordinate court judges.

6.3.1.1 Supreme Court Judges

The Constitution of Bangladesh lays down provisions for the discipline of Supreme Court Judges. Under Art 96 of the Constitution judges are subject to removal for 'gross misconduct' or 'physical or mental incapacity'. As the causes for removal of judges, the original Art 96 used the terms 'proved misbehaviour' or 'incapacity', but the *Constitution (Fourth Amendment) Act* 1975 omitted the word 'proved'.

The *Second Proclamation (Seventh Amendment) Order* 1976 again used the term 'proved misbehaviour' or 'incapacity'. Eventually, the *Second Proclamation (Amendment) Order* 1977 incorporated 'physical or mental incapacity' and 'gross misconduct' as the causes for removal of judges.

Despite some minor changes in the terminology, the basic causes 'misconduct' and 'incapacity' were always recognised in the Constitution. The causes 'physical or mental incapacity' and 'gross misconduct' as they exist at present are more specific than the previous terminology.[73] The general term 'incapacity' is specifically identified as 'physical or mental incapacity'. Similarly, the scope of 'misconduct' is limited to 'gross misconduct' only, but the Constitution does not define 'gross misconduct'.

In this context it is to be mentioned that under Art 96(4)(a) of the Constitution the Supreme Judicial Council is entrusted with the function to 'prescribe a Code of Conduct to be observed' by all judges of the Supreme Court.[74] Accordingly, the Supreme Judicial Council initially prescribed a Code of Conduct which was not detailed and publicly known. In 2000 the Supreme Judicial Council prescribed a detailed Code of Conduct for Supreme Court Judges. In this regard, it is to be noted that a detailed Code of Conduct was thought necessary when several High Court Division Judges were embarrassed to hear *Bangbandhu Murder Case*.

Bangabandhu Sheikh Mujibur Rahman, the foundation President of Bangladesh, along with his wife, three sons, two daughters-in-law and other relatives were assassinated on 15 August 1975. Thereafter, an ordinance known as the *Indemnity Ordinance* 1975 was promulgated to protect those who were involved in the assassination from any trial or legal proceedings. In the general election of June 1996, Bangabandhu's daughter Sheikh Hasina became Prime Minister. The so-called *Indemnity Ordinance* 1975 was then repealed and a criminal case was filed against the killers of Bangabandhu and his family members. On 8 November 1998, 15

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[73] *Constitution of Bangladesh*, Art 96(5).

[74] For details about the Supreme Judicial Council see section 6.3.1.2 below.

accused of the crimes were sentenced to death by the trial court. Under s 374 of the *Code of Criminal Procedure* 1898, the death sentence was referred to the High Court Division on 11 November 1998 for confirmation.[75]

When the death reference was pending in the High Court Division, several judges expressed embarrassment at hearing the reference one after another. The last event of embarrassment happened on 10 April 2000.[76] It created a misunderstanding among the public that judges were trying to delay the execution of the sentence. The Supreme Judicial Council then prescribed the revised Code of Conduct which has been effective since 7 May 2000. Some of the important provisions of the Code of Conduct are as follows:

(1) Judges 'should participate in establishing, maintaining, and enforcing high standards of conduct, and should personally observe those standards, so that the integrity and independence of the judiciary may be preserved'.[77]

(2) Judges 'should respect and comply with the law'. They should always act 'in a manner that promotes public confidence in the integrity and impartiality of the judiciary'.[78]

(3) Judges 'should not allow family, social or other relationships to influence judicial conduct or judgment'. They 'should not hold membership in any organisation that practices invidious discrimination on the basis of race, sex, caste, religion or place of birth'.[79]

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[75] Section 374 of the *Code of Criminal Procedure* 1898 lays down:

> When the Court of Session passes sentence of death, the proceedings shall be submitted to the High Court Division and the sentence shall not be executed unless it is confirmed by the High Court Division.

[76] *The Daily Star*, Dhaka (Bangladesh), 11 November 2000.

[77] Supreme Judicial Council, *Code of Conduct* (2000), para 1.

[78] Ibid 2(a).

[79] Ibid 2(b-c).

(4) Judges 'should be faithful to and maintain professional competence in the law, and should not be swayed by partisan interests, public clamour, or fear of criticism'. They 'should be patient, dignified, respectful, and courteous to litigants, lawyers, and others' who may be in contact with them in an official capacity.[80]

(5) Judges 'should accord to every person who is legally interested in a proceeding, or [his or her] lawyer, full right to be heard according to law, and except as authorized by law, neither initiate nor consider *ex parte* communications on the merits, or procedures affecting the merits, of a pending or impending proceeding'.[81]

(6) Judges should dispose promptly of their judicial functions and should avoid 'inordinate delay' in making judicial decisions. They are expected to let their 'judgments speak for themselves' and 'will not give interviews to the media'.[82]

(7) Judges should not make any comment about the merits of a proceeding. They should disqualify themselves in a proceeding in which their 'impartiality might reasonably be questioned'. In the case of 'any embarrassment to hear a case', a judge 'shall inform the Chief Justice of such embarrassment so that the Chief Justice can take appropriate steps'.[83]

(8) Judges 'will not accept gifts or hospitality' from any person except their 'family, close relatives and friends'.[84]

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[80] Ibid 3(1), 3(3).
[81] Ibid 3(4). Emphasis added.
[82] Ibid 3(5), 7.
[83] Ibid 3(6), 12.
[84] Ibid para 8.

(9) Judges should not be involved 'directly or indirectly in trade or business' activities. They should 'disclose their assets and liabilities, if asked for, by the Chief Justice'.[85]

It appears that the Code of Conduct provides very significant standards of conduct for Supreme Court Judges in Bangladesh. It includes a wide range of aspects which are the elements of misconduct discussed in section 6.2.1.2. Therefore, it can be assumed that any breach of the Code of Conduct may be considered 'misconduct' in a judge. However, there is no clear indication what sort of misconduct may be considered 'gross misconduct' which is an important cause for discipline of judges under Art 96(5) of the Constitution. Thus the Code of Conduct is not adequate to define the 'gross misconduct' as a cause for discipline and the relationship between the Constitution and the Code is not clear.

6.3.1.2 Subordinate Court Judges

On the basis of the causes for discipline two kinds of penalties, minor and major penalties, may be imposed on subordinate court judges. The minor penalties include censure and withholding of promotion or incremental benefit of salary for a specified period.[86] The major penalties include reduction to a lower post, compulsory retirement and removal or dismissal from office.[87] There is an important distinction between the effect of 'removal' and 'dismissal'. 'Dismissal' from office disqualifies a person from future employment in the government or in any statutory institution, but 'removal' does not disqualify from future employment.[88]

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[85] Ibid 9, 14.
[86] *Government Servants (Discipline and Appeal) Rules* 1985, r 4(2).
[87] *Government Servants (Discipline and Appeal) Rules* 1985, r 4(3).
[88] *Government Servants (Discipline and Appeal) Rules* 1985, r 4(4).

The causes for discipline of subordinate court judges are provided not by the Constitution of Bangladesh, but by the *Government Servants (Discipline and Appeal) Rules* 1985 which are applicable to all government servants including subordinate court judges. According to r 3 of the *Government Servants (Discipline and Appeal) Rules* 1985, subordinate court judges may be subject to discipline for inefficiency, misconduct, desertion, corruption or subversive activities.

(1) Inefficiency

Subordinate court judges may be subject to any minor or major penalty, except censure and dismissal from service, for inefficiency. A judge may be inefficient by reason of -

> (i) infirmity of mind or body, or
> (ii) having, on two or more consecutive occasions, failed to pass in a departmental examination prescribed for the purpose of maintaining or raising general efficiency, or
> (iii) having, without reasonable cause, failed to appear at any such examination as aforesaid, or
> (iv) otherwise.[89]

This definition includes 'infirmity of mind or body' that may be translated as 'physical or mental incapacity' which is an important cause for discipline of judges discussed in section 6.2.1.1. In this context, it is to be noted that the Annual Confidential Report of subordinate court judges contain medical reports given by an authorised medical officer.[90] Consequently, subordinate court judges are required to undergo a medical check up, particularly to examine their physical or mental capacity every year.

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[89] *Government Servants (Discipline and Appeal) Rules* 1985, rr 3(a), 4(5)(a).
[90] For an extensive discussion on the Annual Confidential Report, see section 4.3.1.2.

However, other ingredients of the definition of 'inefficiency', particularly 'otherwise' is not appropriate for a person holding judicial office. The term 'otherwise' broadens the scope of 'inefficiency' which may be misused in disciplining judges.

(2) Misconduct

For misconduct in a subordinate court judge any penalty whether minor or major may be imposed. The term 'misconduct' is defined as 'conduct prejudicial to good order or service discipline or contrary to any provision of the *Government Servants (Conduct) Rules,* 1979, or unbecoming of an officer or gentleman'. It also includes –

(i) disobedience to lawful orders of superior officers,
(ii) gross negligence of duty, flouting of Government orders, circulars and directives without any lawful cause, and
(iii) submission of petitions before any authority containing wild, vexatious, false or frivolous accusation against a Government servant.[91]

The *Government Servants (Conduct) Rules* 1979 provide some restrictions on the capacity of public servants with regard to a wide range of their official and non-official conduct. They include acceptance of gifts and foreign awards, acceptance of any subscriptions or taking part in raising funds for any purpose without order or instructions of the government, promotion and management of companies, private trade or employment.

Since subordinate court judges are treated as government servants these restrictions are applicable to them and therefore any conduct violating these restrictions will be considered misconduct in judges. However, the above definition of misconduct covers some aspects, including disobedience to lawful orders of

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[91] *Government Servants (Discipline and Appeal) Rules* 1985, rr 2(f), 3(b), 4(5)(a).

superior officers and flouting of government orders, circulars and directives, which are not appropriate for independent judicial officers. These ingredients of misconduct may be appropriate for public servants in executive positions, but not for judges because they may be detrimental to the independent exercise of judicial functions.

(3) Desertion

A subordinate court judge may be subject to any minor or major penalty for 'desertion' if he or she –

(iv) quits 'service without permission', or

(v) remains 'absent from duty for a period of sixty days or more', or

(vi) remains 'absent from duty in continuation of absence from duty with permission, for a period of sixty days or more without further permission', or

(vii) leaves 'the country without permission and [remains] abroad for thirty days or more' or

(viii) overstays 'abroad after leaving the country with permission, for sixty days or more without further permission'.[92]

As a cause for discipline 'desertion' may be appropriate for judges and in fact it may be considered an ingredient of 'misconduct' as discussed in 6.2.1.2.

(4) Corruption

Subordinate court judges may be subject to major penalties, compulsory retirement, removal or dismissal from office, for corruption if –

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[92] *Government Servants (Discipline and Appeal) Rules* 1985, rr 2(d), 3(c), 4(5)(d).

(a) they are or any of their dependants or any other person through them or on their behalf is 'in possession (for which [they] cannot reasonably account) of pecuniary resources or if property disproportionate to [their] known sources of income', or

(b) they have 'assumed a style of living beyond their ostensible means', or

(c) they have a 'persistent reputation of being corrupt'.[93]

Evidently, corruption is distinctively defined as a cause for discipline though it may be an element of 'misconduct' as discussed in section 6.2.1.2. However, this definition of corruption is somewhat inappropriate for judges because it makes a judge subject to discipline for corruption if he or she has 'assumed a style of living beyond their ostensible means' which is an alarming issue. In this context there are two important questions. Firstly, how will it be proved that a judge's style of living is beyond his or her ostensible means? Secondly, who will prove it? The answers to these questions are not easy and they may be matters of great concern for the independence of judges.

(5) Subversive Activities

A judge may be subject to compulsory retirement, removal or dismissal from office if he or she is

(a) engaged in subversive activities, or

(b) 'reasonably suspected of being engaged' in subversive activities, or

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[93] *Government Servants (Discipline and Appeal) Rules* 1985, rr 3(d), 4(5)(e).

(c) 'reasonably suspected of being associated with others engaged' in subversive activities, and 'retention in service is considered prejudicial to national security'.[94]

'Subversive activities', may also be elements of the broad definition of 'misconduct' as discussed in section 6.2.1.2, but similar to corruption there are some issues which are not appropriate for a person holding judicial office. Particularly, a judge may be subject to discipline if he or she is 'reasonably suspected of being associated with others engaged in subversive activities' and his or her 'retention in service is considered prejudicial to national security'. As in the case of the definition of 'corruption' one needs to ask how and by whom will these be proved? Consequently, they are inappropriate for an independent judicial officer.

Discussion of the causes for discipline of judges in Bangladesh reveals that the causes are provided by the Constitution, the *Government Servants (Discipline and Appeal) Rules* 1985 and the *Government Servants (Conduct) Rules,* 1979. In the case of Supreme Court Judges the specific causes for discipline are 'physical or mental incapacity' and 'gross misconduct'. However, there is no clear definition of 'gross misconduct' and this lack of the definition is not covered by the Code of Conduct for Supreme Court Judges.

In the case of subordinate court judges, the causes for discipline, inefficiency, misconduct, desertion, corruption and subversive activities are defined in the *Government Servants (Discipline and Appeal) Rules* 1985. However, as discussed

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[94] *Government Servants (Discipline and Appeal) Rules* 1985, r 3(e), 4(5)(e).

above, some definitions are vague and inappropriate for persons holding judicial office.

6.3.2 Mechanisms for Discipline

Similar to the causes for discipline, discussion of the mechanisms for discipline of judges in Bangladesh is divided into two parts, Supreme Court Judges and subordinate court judges.

6.3.2.1 Supreme Court Judges

The Constitution of Bangladesh originally provided a parliamentary procedure for removal of Supreme Court Judges. Under the original Art 96 of the Constitution a judge could be removed from his or her office by an order of the President following a resolution of Parliament on the ground of 'proved misbehaviour or incapacity'. The resolution for removal was to be supported by a majority of at least two-thirds of the total number of members of Parliament. Parliament was empowered to make legal provision regulating the procedure for adopting a resolution and for the 'investigation and proof of the misbehaviour or incapacity' of the judge.

The original Art 96 was effective until 1975, when the *Constitution (Fourth Amendment) Act* 1975 was passed, but no law was made by Parliament to regulate the procedure for removal of judges. Under s 15 of the *Constitution (Fourth Amendment) Act* 1975, Art 96 of Constitution was drastically changed providing that a judge could be removed from his or her office by an order of the President on the ground of 'misbehaviour or incapacity'. However, no judge would be removed without being given a 'reasonable opportunity of showing cause against the action

proposed to be taken in regard to him [or her]'. Thus, by the Fourth Amendment the power of removal of judges was exclusively vested in the President who was the Chief Executive of the State and he or she could remove a judge simply by giving an opportunity of showing cause.

This system was repealed by the *Second Proclamation (Seventh Amendment) Order* 1976[95] which re-introduced parliamentary process of removal as it was provided by the original Constitution. However, the parliamentary process was again repealed by the *Proclamation (Amendment) Order* 1977[96] and a new system of removal of judges by a Supreme Judicial Council (SJC) was introduced. The *Second Proclamation (Tenth Amendment) Order* 1977[97] changed the structure of the Supreme Court, but the process of removal of judges was unaffected.[98] The system of removal of judges by a SJC still exists in Art 96 of the Constitution.

Under the current system, the President on a report of the SJC may remove a Supreme Court Judge from his or her office. The SJC consists of the Chief Justice and the two next most senior judges. If there is any allegation against a Member of the Council or a Member of the Council is absent or unable to act, the judge who is next in seniority would act as Member.[99]

Under Art 96(4) of the Constitution, the functions of the SJC are (a) to 'prescribe a code of conduct to be observed' by all judges of the Supreme Court; and (b) to

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[95] *Second Proclamation Order* No IV of 1976, 28 May 1976.
[96] *Proclamations Order* No I of 1977, 23 April 1977.
[97] *Second Proclamation Order* No I of 1977, 27 November 1977.
[98] It has already been mentioned in section 4.3.2.1 that instead of the Supreme Court comprising the Appellate Division and the High Court Division, a separate Supreme Court and a High Court were established by the *Second Proclamation (Seventh Amendment) Order* 1976. However, this structure was again changed by the *Second Proclamation (Tenth Amendment) Order* 1977, which re-established a Supreme Court comprising the Appellate Division and the High court Division.
[99] *Constitution of Bangladesh*, Art 96(3).

'inquire into the capacity or conduct of a judge or of 'any other functionary who is not removable from office except in like manner' as a Supreme Court Judge.[100]

When the President, on any information received from the SJC or from any other source, apprehends that a judge 'may have ceased to be capable of properly performing the functions' of his or her office by 'reason of physical or mental incapacity', or 'may have been guilty of gross misconduct', then the President may direct the SJC to 'inquire into the matter and report its finding'.[101]

After making the inquiry, if the SJC submits its reports with a finding that the judge 'has ceased to be capable of properly performing the functions of his office or has been guilty of gross misconduct, the President by his or her order removes the judge from office.[102]

In fact, the Ministry of Law, Justice and Parliamentary Affairs submits the cases of removal of judges first to the Prime Minister and then to the President.[103] This is because, under Art 48(3) of the Constitution, the President is bound to act upon the advice of the Prime Minister. Thus, the Chief Executive of the State participates in the discipline of judges of the Supreme Court. However, the important power of adjudication of the disciplinary proceedings is vested in the SJC, which is exclusively composed of the members of the most senior judges of the Supreme Court.

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[100] Under Arts 118(5), 129(2), 139(2) of the Constitution an election Commissioner, the Comptroller and Auditor-General, and the Chairman and other members of the Public Service Commission of Bangladesh are removable in 'like manner and on the like grounds' as a judge of the Supreme Court.
[101] *Constitution of Bangladesh*, Art 96(5).
[102] *Constitution of Bangladesh*, Art 96(6).
[103] Cabinet Division, *Rules of Business* 1996, r 7 and sch IV.

The system of discipline of judges of the Supreme Court has some important drawbacks. Firstly, the President may initiate the disciplinary proceedings by directing the SJC to inquire into the capacity or conduct of a judge. Under Art 48 (3) of the Constitution the President is bound to act on the advice of the Prime Minister who is the Chief Executive of the State. Hence initiation of disciplinary proceedings against a Supreme Court Judge depends on the executive and therefore, the political will of the executive may be very crucial to disciplining judges. As discussed in section 4.3.1, under the current system of judicial appointment in Bangladesh, the executive may appoint Supreme Court Judges from among persons who are involved in politics or active supporters of the party in power or at least sympathetic to its ideologies and policies. Consequently, the power of initiating disciplinary proceedings may be misused by the executive. It is likely that the executive may intend to save a transgressing judge from disciplinary action because of personal or political favouritism or nepotism. In this context a recent incident is worth mentioning.

In 2000, Justice Latifur Rahman, a judge of the High Court Division resigned from his office after alleged misconduct. It was alleged he had a telephone conversation with former President HM Ershad who was convicted in a corruption case known as *Janata Tower Case*. Ershad filed an appeal to the High Court Division against the conviction imposed by the trial court. Justice Latifur Rahman was one of the judges of a division bench which upheld the judgment of the trial court. It was alleged that with a view to a favourable judgment Ershad influenced Justice Latifur Rahman, but ultimately the division bench confirmed the conviction of Ershad. Thereafter, he talked with Justice Latifur Rahman by telephone, but an unidentified person recorded their conversation on a cassette.

On 13 September 2000, a report about the cassette was first published in the *Dainik Jugantor*. It was reported in the *Dainik Sangbad* on 21 September 2000 that the cassette was then in the office of the President and the Chief Justice. The report added that the cassette contained a conversation between a judge and a political leader. On 16 September 2000, a tabloid daily the *Dainik Manavzamin* published a fairy story entitled *Aekti Rajokio Kelengkarir Khasra* (The Draft of a Royal Scandal) indicating a conversation between a judge and a convict without mentioning any name, place or country. Mr Mahmudul Islam, the Attorney General of Bangladesh, filed a contempt charge against the *Dainik Manavzamin* on 8 November 2000.

In defending the case, the lawyer for the *Dainik Manavzamin* submitted the cassette before the High Court Division bench on 22 November 2000. After hearing the cassette, Justice Syed Amirul Islam and Justice Shafiuddin, judges of the High Court Division bench, were convinced that the conversation was held between Justice Latifur Rahman and HM Ershad. The court sent the cassette to the Chief Justice to take action against Justice Latifur Rahman.[104] On the following day Justice Rahman resigned from the office of High Court Division Judge.[105] The High Court Division in its judgment of 20 May 2002 sentenced Ershad to six months imprisonment including a fine of Tk 2000 for his attempt to influence the judge before the conversation took place. At the same time, for contempt of court, the Chief Editor of the *Dainik Manavzamin* was sentenced to one-month imprisonment including a fine of Tk 2000 and its publisher was fined Tk 2000.[106]

Evidently, the incident came to light through the media first on 13 September 2000 and Justice Rahman resigned from office on 23 November 2000. During this

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[104] *The Dainik Manavzamin*, Dhaka (Bangladesh), 23 November 2000.
[105] *The Dainik Sangbad*, Dhaka (Bangladesh), 24 November 2000.
[106] For more discussion on this case, see section 7.3.

period the President could direct the SJC to inquire into the matter but he did not do so. Instead of initiating disciplinary proceedings against the judge, a contempt case was filed against the media. Ultimately, by resigning from office Justice Rahman escaped from any disciplinary sanction or punishment. It is to be noted that he was appointed to the High Court Division first as an additional judge in April 1998 and then as a judge in April 2000. Prior to his appointment as additional judge he unsuccessfully contested parliamentary elections twice as a candidate of the political party which was in power from June 1996 to October 2001. Moreover, during the 1970s he was the President of a district unit of the same political party.[107]

Hence it can be assumed that the executive tried to save Justice Rahman from disciplinary action because of political favouritism. Therefore the executive power of initiating disciplinary proceedings against a Supreme Court Judge is a significant drawback in disciplining judges.

The second drawback of the system of disciplining Supreme Court Judges is that there is no specific system for making complaints against a judge. Under the current system the process of making complaints against a judge is not easily accessible and it might be called inappropriate.

The President may receive information about the incapacity or misconduct of a judge from the SJC or from 'any other source'. From the expression 'any other source' it is not clear what sources may be acceptable or may have access to the President to make a complaint against a judge. In the absence of any specific system of making complaint, it may not be possible for an ordinary citizen to inform the

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[107] *The Dainik Manavzamin*, Dhaka (Bangladesh), 24 November 2000.

President about the incapacity or misconduct of a judge. It might be possible only for those people who are well connected with the executive.

In fact, the main potential source of information about the incapacity or misconduct of a judge is the SJC. However, in this regard the SJC is placed in an impossible position. This is because the SJC is, on the one hand, an important source from which the President receives information about incapacity or misconduct of a judge and on the other hand, it is entrusted with the power of making inquiry about the alleged incapacity or misconduct. Obviously, the SJC can make a complaint against a judge to the President, but cannot inquire into the matters unless the President directs it to do so.

In addition, the SJC is exclusively composed of judges and therefore, it is likely that in some cases the SJC would hesitate to make a complaint against a fellow judge. In this way, a transgressing judge might escape disciplinary proceedings. It is very likely that the SJC will not act first, but will rely on other sources to complain to the President.

It is alleged that there are some instances of breach of judicial conduct in which the SJC did not make any complaint to the President to initiate disciplinary proceedings. While interviewing the former Chief Justice ATM Afzal Advocate Shahabuddin Ahmed, the editor of the *Dhaka Law Reports* (DLR), asserted:

> Late Mr Justice ARM Aminul Islam Chowdhury, sitting in the High Court Division was found deliberately defying the judgment of the Appellate Division. He is not a lone instance in respect of committing breach of judicial discipline, but there is no instance of any initiative ever taken by the Supreme Judicial Council on any matter susceptible to their jurisdiction.[108]

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[108] See 'Dialogue with a legal luminary', *Dhaka Law Reports* (1999) 51 DLR 73-76.

In response to this assertion of Mr Shahabuddin Ahmed, Justice ATM Afzal replied, 'indeed, till date not one case has been referred to the Council by the President for inquiry even'. However, the main question is whether the SJC has ever informed the President about the incapacity or misconduct of a judge. In fact, there is no such instance so far though, as stated above, there were instances of misconduct.

Another drawback of the disciplinary system is that the SJC enjoys ample power to discipline but its composition is not compatible with the concept of judicial accountability. There is no participation of the legal profession or lay persons. The executive government participates in the proceedings, but the role of the SJC is predominant in disciplining judges. This is because:

(1) The President may receive information about the misconduct or incapacity of a judge from the SJC,

(2) On being directed by the President the SJC is empowered to make an inquiry about the misconduct or incapacity, and

(3) A judge may be removed by order of the President only on the recommendation of the SJC.

Thus, it is obvious that the judiciary itself plays the most significant role in disciplining judges which accords with the concept of reducing executive control over the judiciary. However, this system is probably less effective in ensuring the accountability of judges. Under this system complaints against judges are to be made and investigated by a peer group which is empowered to regulate its procedure under Art 96(7) of the Constitution. Thus the discipline of judges of the Supreme Court is largely controlled by the judiciary itself and this system might fail to gain public confidence in the disciplinary system.

The *Montreal Declaration* 1983, the *UN Basic Principles* 1985 and the *Beijing Statement* 1995 do not support any self-regulatory body for disciplining judges. Rather it is inconsistent with the *Montreal Declaration* which provides that the disciplinary board should be 'predominantly composed of members of the judiciary'.[109] It is noticeable that instead of the term 'exclusively' the *Montreal Declaration* uses the term 'predominantly' so that members of the disciplinary board may also be appointed from persons who are not members of the judiciary. In contrast, the SJC in Bangladesh is exclusively composed of members of the judiciary.

In addition, as mentioned above in section 6.2.2, the *Montreal Declaration* 1983 recommends that lawyers should be included in the disciplinary bodies in countries where they play an indispensable role in maintaining rule of law and judicial independence. In Bangladesh, there is a long history and tradition of struggle by the legal profession to maintain the rule of law and judicial independence, but there is no participation of the legal profession in the SJC.[110]

It is to be mentioned that until now (August 2002) no judge of the Supreme Court has been removed from office under the provisions of Art 96 of the Constitution.

6.3.2.2 Subordinate Court Judges

Under the original Art 116 of the Constitution, the power of discipline of subordinate court judges was exclusively vested in the Supreme Court. This power of the

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[109] *Montreal Declaration* 1983, Art 2.33.

[110] One important role of lawyers is discussed in section 4.3.2. For some other discussions, see section 8.3.

Supreme Court was curtailed by the *Constitution (Fourth Amendment) Act* 1975, which replaced the 'Supreme Court' by the 'President' as the sole authority to discipline the subordinate court judges.[111] Thus, the Supreme Court lost its power to exercise disciplinary supervision over the judges of the subordinate judiciary.

However, an improvement was made by the *Second Proclamation (Fifteenth Amendment) Order* 1978, which amended Art 116 of the Constitution by adding that the power of the President in disciplining judges should be exercised in consultation with the Supreme Court.[112] After this amendment, in exercising the power of discipline the President is under a constitutional obligation to consult the Supreme Court. In this regard, as mentioned in section 4.3.2.2, there is a General Administration Committee of the Supreme Court comprising the Chief Justice and not more than three judges. However, in the case of making any recommendation for dismissal of a subordinate judge the Committee should consult all judges of the Supreme Court.[113]

Under the present parliamentary form of government, as mentioned above, the President is bound to act on the advice of the Prime Minister, who is the Chief Executive of the State. Therefore, the real power of disciplining lower judges is vested in the Prime Minister, who is the Chief Political Executive of the State. However, provision for consultation is a check on the absolute power of the political executive in disciplining judges.

In practice, the executive government consults the Supreme Court in disciplining persons employed in the judicial service, but in the case of magistrates, the executive

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[111] *Constitution (Fourth Amendment) Act* 1975, s 20.

[112] *Second Proclamation (Fifteenth Amendment) Order* 1978, s 2(4)(iv).

[113] *Rules of the High Court of Judicature for East Pakistan*, Vol I, ch 1, r 16(e). It was framed for the High Court at Dhaka of the then East Pakistan (Now Bangladesh). These Rules are now applicable to the High Court Division of the Supreme Court.

does not consult the Supreme Court. As mentioned in section 4.3.1.1, magistrates are appointed from public servants who are members of the administrative service. The executive government through the Ministry of Establishment exclusively exercises the power of disciplining the magistrates. In the case of persons employed in the judicial service, the executive authority exercises its power of discipline through the Ministry of Law, Justice and Parliamentary Affairs (MLJPA). Considering the allegations against a lower judge, the Secretary of MLJPA determines whether the allegations, if established, would warrant a major or a minor penalty.

In the case of allegations that may warrant a major penalty against a judge, the Secretary of the MLJPA frames a charge stating the penalty likely to be imposed and communicates it to the judge asking him or her to submit a written statement and to show cause within ten working days.[114] In the case of allegations that may warrant a minor penalty, the Secretary does not frame the charge but makes the allegations known to the accused asking for an explanation of the conduct within seven working days.[115] If after considering the statements submitted by the accused the Secretary thinks there is a reason to proceed further, he or she takes initiatives to inquire into the allegations. An Inquiry Officer who is not below the rank of the accused, or a Board consisting of three members, should be appointed to conduct the inquiry.[116] The Inquiry Officer or Board should hold an inquiry under r 10 of the *Government Servants (Discipline and Appeal) Rules* 1985 at which oral evidence should be heard and documentary evidence should be considered. The accused is entitled to cross-examine the witnesses against him or her and to give evidence for the defence. At the

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[114] *Government Servants (Discipline and Appeal) Rules* 1985, r 7(1).
[115] *Government Servants (Discipline and Appeal) Rules* 1985, r 6(1)(a).
[116] *Government Servants (Discipline and Appeal) Rules* 1985, rr 6(1)(b), 7(2-3), 10(9)).

conclusion of the inquiry, the Inquiry Officer or Board of Inquiry should submit its report with the findings whether the accused is guilty or not.

On receipt of the reports with findings, the executive government considers the report and decides on the charges against the judge. If the government decides to impose any penalty, it gives a second show cause notice to the accused.[117] After receiving the reply to the notice, the authority forwards the proceedings together with the statements of the accused to the Supreme Court and the Public Service Commission. On the basis of the opinion given by the Supreme Court and the Public Service Commission, the government takes the final decision on the disciplinary proceedings. For example, on 17 July 2000, Mr SM Badrul Islam, a former Joint District Judge of Dhaka, was dismissed from his office in consultation with the Supreme Court and the Public Service Commission.

The dismissal order issued by the Acting Secretary of the MLJPA by order of the President states that under rr 3(b) and 3(d)(1-2) of the GSR a disciplinary proceeding No. 5/1995 was initiated against Mr Badrul Islam for 'misconduct' and 'corruption'. Mr Islam was asked to show cause why he should not be dismissed, but failed to show reasonable cause. Then an Inquiry Officer was appointed and he submitted a report with the findings that the charges against Mr Islam were proved. Mr Islam was considered guilty at the primary hearing based on the inquiry report and a second show cause notice was issued on him. He could not submit a reasonable plea against his punishment. Consequently, in consultation with the Supreme Court

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[117] *Government Servants (Discipline and Appeal) Rules* 1985, r 7(5-6).

and the Public Service Commission, he was dismissed in accordance with rr 3(d) and 4(3)(d) of the *Government Servants (Discipline and Appeal) Rules* 1985.[118]

It is to be noted that a judge aggrieved by the decision of the disciplinary proceeding may apply to the President for review of the decision.[119] An order of the President made on an application for review can be challenged in the Administrative Tribunal and the decision of the Administrative Tribunal is subject to appeal to the Administrative Appellate Tribunal.[120] Finally, a person may appeal to the Appellate Division of the Supreme Court against the decision of the Administrative Appellate Division.[121]

The foregoing discussion reveals that in disciplining subordinate court judges in Bangladesh, the executive government enjoys exclusive power. As mentioned above, the original Art 116 of the Constitution vested this power exclusively in the Supreme Court, but under the amended Art 116 the power of discipline is vested in the executive subject to consultation with the Supreme Court. The provision of 'consultation' does not necessarily mean that the executive is obliged to comply with the advice of the Supreme Court. However, as mentioned in section 4.3.2.2, in *Secretary, Ministry of Finance v Hossain* (2000), the Supreme Court held that the 'views and opinion' of the Supreme Court given under Art 116 of the Constitution should have 'primacy over the views and opinions of the executive'.[122] Under this decision, the views and opinions of the Supreme Court prevail over those of the executive in disciplining subordinate court judges. Moreover, a judge aggrieved by

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[118] Ministry of Law, Justice and Parliamentary Affairs, Justice Section – 3, *Order* No Justice-3/1-D-5/95, 17 July 2000.
[119] *Government Servants (Discipline and Appeal) Rules* 1985, r 23.
[120] *Administrative Tribunals Act* 1980, ss 4, 6.
[121] *Administrative Tribunals Act* 1980, ss 4, 6; *Constitution of Bangladesh*, Art 103.
[122] *Secretary, Ministry of Finance v Hossain* (2000) DLR (AD) 82, 102, 109.

the decision of the disciplinary proceeding may challenge the disciplinary action and the ultimate appellate authority is the Supreme Court. Thus, the Supreme Court has control over the discipline of subordinate court judges except in the case of magistrates. As mentioned above, in disciplining magistrates the government exercises its power through the Ministry of Establishment and in this respect the Supreme Court does not have any role. Although under Art 116 of the Constitution the executive government is under an obligation to consultation the Supreme Court, in practice, as mentioned in section 4.3.2.2, in the case of magistrates the government does not consult the Supreme Court in accordance with Art 116.

It appears that the system of discipline of the lower judges has two inherent defects. Firstly, there is no specific system for making complaints against a judge and the process is not open to the public. Generally, disciplinary proceedings are based on the internal administrative control of the judiciary. The MLJPA directly controls the subordinate court judges, but it is not easy for the public to make a complaint against a judge to the Ministry. This is because the general public does not have easy access to the Ministry. Moreover, there is a fear of contempt of court because of the absence of a specific system of making complaints. In some cases, complaints are made by the Bar Associations. In the case of breach of judicial conduct, lawyers of the court concerned pass a resolution through their association and send it to the MLJPA and the Supreme Court. If the Ministry considers the allegations are genuine, it takes initiative to discipline the judge. In practice, there is no specific system to receive any complaints directly from the public.

Secondly, the investigation of a complaint against a judge is conducted by an Inquiry Officer or a Board appointed by the MLJPA, that is, the executive government. Therefore, there is a strong possibility of interference from the political

executive. In addition, there is no participation of the legal profession or lay persons and the executive can abuse the system of discipline. Consequently, the current system might not be effective to enhance public confidence in the mechanisms for discipline.

Discussion of the mechanisms for discipline of judges in Bangladesh identifies some significant drawbacks. The most important drawback is that the system is under the control of executive government and the judiciary, and there is no participation of the community and the legal profession. Another important drawback is that there is no specific system of filing a complaint against a judge.

As discussed in section 3.3, there is a widespread corruption in the judiciary in Bangladesh and it is generally believed that many judges are involved in corruption, but disciplining of judges is very rare. Perhaps the most important reason for this situation is the ineffective system of discipline, particularly the absence of any specific system of making a complaint and lack of transparency in the mechanisms for discipline.

6.4 CONCLUSION

The disciplinary system of Bangladesh is not sufficient to gain public confidence for several reasons; particularly there is no specific system or procedure for making complaints against a transgressing judge. Consequently, it is almost impossible for the general public to file a complaint against a judge for incapacity or misconduct, particularly for corruption. For the sake of public confidence in the judiciary, particularly to ensure justice free from illegality and corruption and to maintain high

standards of conduct and propriety of judges, there should be an accessible system to make complaints against judges. However, to save the judges from baseless allegations, a system of preliminary examination of the complaints should be introduced.

With a view to improving the disciplinary system in Bangladesh an independent commission should be established following the models of South Africa and California. It has already been observed in section 4.4 that in accordance with the South African model an independent Judicial Service Commission should be established for the appointment of judges and promotion of judges at all levels. In fact, the same commission could be empowered to deal with the discipline of judges whether superior or lower. In that context, the commission should be empowered to impose disciplinary sanctions following the Californian model.

CHAPTER 7

JUDICIARY AND MEDIA

7.1 INTRODUCTION

In a democratic society, judges are expected to exercise judicial power in accordance with the guidance of law and their conscience. They enjoy an absolute legal authority to apply the law of the land according to their own understanding. The authority of a judge 'is established not only by the law itself'; it also depends on the 'invocation of the correct form of words in the right place at the right time' (Mohr, 2000: 79). However, as mentioned in section 1.4, the most important element of the authority of judges is public confidence in the judiciary. As argued in section 1.5, in order to sustain public confidence in the judiciary judges should be accountable for the use of judicial power and one important form of accountability is public exposure of judicial functions. Public exposure of judicial functions provides an opportunity for scrutinising the working of the judiciary. In this regard, the media plays a very important role by transmitting information to the public. The relationship of the judiciary and the media has a great impact on public confidence in the judiciary. In fact, the role of the media is significant to make judges indirectly accountable to the general public.

This chapter discusses the role of the media as an informal mechanism of scrutinising judges. The main purpose of this chapter is to analyse the role of the media in Bangladesh in scrutinising judges. In doing so, section 7.2 deals with the general policy on the role of the media and its relationship with the judiciary while section 7.3 examines the role of the media in Bangladesh.

7.2 GENERAL PERSPECTIVES ON MEDIA SCRUTINY

This section deals with the general issues relating to the role of the media. After a brief discussion of the types of media including an overview of the nature of media reporting it examines the role played by the media in scrutinising judges, then it focuses on the relevance of the law of contempt of court to the media scrutiny of judges.

This section argues that the media plays a significant role in ensuring public accountability of judges by scrutinising their activities and conduct. It also argues that media scrutiny may also be a concern for the independence of judges because of baseless criticism or unsubstantiated allegations undermining public confidence in the judiciary. However, the law of contempt of court is an important instrument to restrain baseless criticism or unsubstantiated allegations against judges.

7.2.1 Types of Media and its Reporting

The media may be broadly divided into two classes: print media and electronic media. The print media is popularly known as the 'press'. The electronic media may be of three kinds: television, radio and Internet.

The press is recognised as an important source of information for the general public in all societies. The role of a free and honest press is very important to ensure public accountability of judges. It keeps a watchful eye on the judiciary and thus, serves as an important mechanism of checking the performance and conduct of judges (Cappelletti, 1989: 83). Reporters from the press can make reports 'from their position inside the courtroom' on the 'full proceedings of court cases' including 'a brief narrative on the facts and outcome' of the cases and judgments passed by

judges (Gamble and Mohr, 1996: 7). They can also report the reactions of the parties to cases and their lawyers.

Television, as a visual electronic medium, plays an important role in conveying information about the functions of the courts to the general public. However, its reports are generally limited to the decisions of court cases and pictures 'from outside the court precincts' (Gamble and Mohr, 1996: 8). In some cases, television may broadcast the reactions of the parties involved and their lawyers. It can also arrange talk shows about the activities of the judiciary. Court proceedings are televised in some jurisdictions; for example, in the United States of America television coverage of court proceedings is widely accepted (Richardson, 1995: 89). There are also instances of televising court proceedings in the Courts of Victoria[1] and the Federal Court of Australia (Black, 1999: 9; Evans, 2000).

An important difference between the print media and television is that talk in television is restricted and information flows from visual and sound sources, as well as from the content of the speaker's words.

The role of the radio may be similar to television and the press as well. Radio can broadcast the decisions of court cases, the reactions of the parties and lawyers, and can transmit commentary, from reporters and through talkback radio.

The Internet is a modern form of electronic media. In many countries of the world, the Internet plays an important role in conveying information about the activities of the courts. It can convey the judgments of court cases, information about the roles and procedures of the courts and other information about the judiciary, such

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[1] Law Reform Committee of Parliament of Victoria, *Final Report* (1999), Technology and the Law, <http://www.parliament.vic.gov.au/lawreform/tech/> 27 October 2001 (Copy on file with author) [12.29 -12.30].

as historical introduction, jurisdiction and contact details of the courts (Parker, 1998: 73).

As a medium of information about the courts, the Internet has three important features. Firstly, unlike other media it can be used by the judiciary itself. Generally, the judiciary does not have any control over reporting on television, radio or in the press, but it can pass information through the Internet according to its own choice. Secondly, the Internet can be used as a medium to inform other media, such as television, radio and the press. These media (television, radio and press) can also publish their own reports through the Internet. Thirdly, the full text of the judgments of court cases can be published through the Internet immediately. The full reasoning of the decisions of the courts may be available on the Internet. It is a distinctive feature of the Internet because the reasoning of the decisions might not be available in other media particularly on television and radio.

7.2.2 Role of the Media

The judiciary's primary responsibility is to serve the people in the administration of justice (Doyle, 1997: 40). It is given power to resolve disputes between citizens and between citizens and the state. Judges are under an obligation to administer justice in accordance with the law and complying with standards set for judicial conduct, but the justice administered by them would be imperfect without public participation, even if passive.

In a democratic state, every citizen enjoys legal or fundamental human rights which include the right to a fair trial. Without having the right to a fair trial, all other legal or human rights would be unenforceable and would be useless (Keeble, 1994: 231). Therefore, the public should have confidence that in case of any violation of

their rights they are able to get remedies through 'fair and impartial treatment' in the courts (Richardson, 1995: 87).

To maintain public confidence in the courts, public understanding of the justice system is essential. Lord Hewart observes, '[j]ustice should not only be done but should manifestly and undoubtedly be seen to be done'.[2] To ensure justice is 'seen to be done', court proceedings are conducted openly in view of the public so that they can see and observe the functions of the courts. Some people may directly see and observe the functions of the courts, as the parties of legal disputes, witnesses or jurors. However, a very few of the general public come to the courts with a view to see the functions of judges. Nevertheless, they have a 'legitimate interest' or right to get information about the activities of the courts (Richardson, 1995: 87).

In a modern state, the citizens are increasingly interested to know what is going on in the courts. The interaction of the judiciary with the general public may strengthen public confidence in the courts or it may illuminate public perception of the functions of the courts. Conversely, absence of an effective interaction or communication between the judiciary and the public can create public dissatisfaction tarnishing the prestige and image of the judiciary (Nicholson, 1993a: 215). Therefore, effective communication between the judiciary and the public is essential. Parker says:

> [A]dequate ... communication between courts and [the] public will build up relationships of confidence and will improve both actuality and the perceptions of the service that the courts offer. With such improvement will come improvements in the quality and perception of the justice that is done (Parker, 1998: 29).

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[2] *R v Sussex Justices, ex parte McCarthy* (1924) 1 KB 256, 259.

This communication can be well established through the media. Lord Taylor says, 'the principle that justice must be seen to be done means not merely by those who can attend the trial but by the wider community via the media' (Taylor, 1994: [5]). To satisfy their interest about the judiciary, the general public depends on the media. The media plays a very important role of passing on information about the activities of the courts, particularly information about the process of judicial functions and the judges' decisions in different cases (Gamble and Mohr, 1996: 7; Williams, 1999: 17). In addition, the media may convey information about the conduct of judges. Constant checking of the conduct and functions of judges by the media has a great impact on public understanding of the working of the judiciary. Through the media the general public may closely observe and criticise the activities of the courts. The quality of public understanding of the judiciary is influenced by what 'they see, read and hear through the media' (Doyle, 1997: 42). This is an important means of public scrutiny; essential for public confidence and to ensure continuing independence of judges (Taylor, 1994: [15]).

In fact, the media is a link between the judiciary and the general public and it has the power to make or to tarnish the reputation of the judiciary (Keyzer, 1999: 152). The media, as the 'eyes and ears' of the public, may play a very significant role in ensuring public accountability of judges (Keeble, 1994: 231-232). The significance of this role of the media is that 'fair and accurate reports of courts proceedings enable the public to understand what the judiciary is doing' (Campbell and Lee, 2001: 247). For the fairness and accuracy of the media reporting on the courts, there are two essential requirements. Firstly, the legal knowledge and experience of the media reporters and secondly, access to information about the activities of courts.

7.2.2.1 Legal Knowledge and Experience of Media Reporters

It is the responsibility of the media to report accurate, complete and fair information. For the accuracy and fairness of the media reports on the courts, the reporters should have some knowledge about the judicial procedures and activities of judges. They should have a capacity to understand the law, legal process and reasons behind the decisions of judges (Williams, 1999: 15).

If court reporters do not have any legal training, background or experience, it may be difficult for them to interpret the functions of the courts. Although it cannot be expected that reporters should be lawyers, for fair and accurate reporting of the functions of the courts reporters require some legal knowledge and experience. If media reporters possess some legal knowledge and experience, they can 'translate to the public' the technicalities of law, legal procedures and the functions of the courts. Legal knowledge and experience of the reporters would help them to examine and explore the reasons behind the judicial functions which are necessary for public understanding of the activities of the courts (Brennan, 1997: [8, 40]). Therefore, reporters should have legal training to an extent necessary to perform their professional duties of understanding the procedures and activities of the courts (Williams, 1999: 15; Nicholson, 1995: 17).

7.2.2.2 Access to Information about Courts

Access to information about courts is an important factor for accuracy and fairness in media reporting. Lack of access to information may lead to inaccurate, insufficient and unfair reporting of the courts. In the absence of adequate information a serious communication gap is inevitable between the judiciary and the public.

The judiciary as a public institution requires public confidence in its activities and therefore, as discussed in section 1.5.1, the judiciary has a responsibility for fostering public confidence by improving public understanding of the role and activities of the courts. In order to improve public understanding of the activities of the courts, the judiciary should undertake measures for informing the public about the nature and procedures of judicial functions (Doyle, 1997: 39, 41).

It is recognised that the mass media is the most prominent source of information used by the general public to learn about the courts. Therefore, the judiciary needs the media 'so the public can be informed about what they are doing and how they are administering justice, otherwise they would be operating in a vacuum' (Campbell, 1999: 128). The judiciary can co-operate with the media by providing accurate information and suggestions to improve reporting of courts. Such co-operation benefits the judiciary, because, by providing accurate information to the public through the media, the judiciary can maintain public confidence in the justice system more effectively (Doyle, 1997: 45; Doyle, 1999: 27).

In this regard, two things are worth consideration. Firstly, in conveying information to the public about the decisions of the courts, the media have a responsibility to report not only the decisions, but also the reasons behind the judicial decisions. However, it may not be possible for the media to summarise judicial decisions with their reasoning. Therefore, the courts have a responsibility to make their decisions easily understood by the media (Williams, 1999: 22). In this regard, summaries of judgments given by the courts may be very helpful to the media and the public (Black, 1999: 11; Teague, 1999: 117). Secondly, in order to discharge the responsibility of informing the public, the judiciary should take effective measures to make information accessible to the media. With this object in mind, the appointment

of public information officers may be a good starting point. Public information officers may be invested with responsibility to supply information about the activities of the courts (Nicholson, 1993a: 219). They may also be involved in writing summaries of judgment for the media with the judges. Public information, or Media liaison, officers are working well in several jurisdictions, including in the courts of the United States and Australia. Media liaison officers have been appointed in the Federal and the Family Courts of Australia and in the Supreme Courts of New South Wales, Victoria, Western Australia and South Australia (Parker, 1998: 86-87).[3]

Media liaison or public information officers play a very important role in providing information to the media and in improving media and public understanding of the courts (Black, 1999: 9; Parker, 1998: 87-88). Therefore, the appointment of a media liaison or public information officer may be a very useful way to establish a healthy relationship between the judiciary and the media in any democratic country.

7.2.3 Media and Contempt of Court

As an informal mechanism of scrutinising judges, the media watches and criticises the activities and conduct of judges. It is an established fact that the conduct and decisions of judges are subject to constructive criticism. Any constructive criticism may be beneficial to the judiciary, because by identifying incorrect judicial conduct

[3] For more information, visit the web sites of the courts: Federal Court of Australia <http://www.fedcourt.gov.au>; Family Court of Australia <http://www.familycourt.gov.au>; Supreme Court of New South Wales <http://www.lawlink.nsw.gov.au/sc>; Supreme Court of Victoria <http://supremecourt.vic.gov.au>; Supreme Court of Western Australia <http://www.supremecourt.wa.gov.au> and Supreme Court of South Australia <http://www.courts.sa.gov.au/courts/supreme>.

and defects in the legal system, it can 'promote the cause of justice' (Pannick 1987: 128).

In *R v Metropolitan Police Commissioner, Ex parte Blackburn (No 2)* (1968)[4] Lord Denning observed that it is the 'right of every man, in Parliament or out of it, in the [p]ress or over the broadcast, to make fair comment, even outspoken comment, on matters of public interest. Those who comment can deal faithfully with all that is done in a court of justice'.

In support of the right to criticise judges Lord Atkin, in *Ambard v Attorney-General for Trinidad and Tobago* (1936)[5], observed:

> The path of criticism is a public way: the wrong headed are permitted to err therein: provided that members of the public abstain from imputing improper motives to those taking part in the administration of justice, and are genuinely exercising a right of criticism and not acting in malice or attempting to impair the administration of justice, they are immune. Justice is not a cloistered virtue; she must be allowed to suffer the scrutiny and respectful even though outspoken comments of ordinary men.

However, the right of criticism of judges is not an absolute right. It is subject to the law of contempt of court which is an important protection for the judiciary (Shetreet, 1976: 185). The law of contempt of court may affect the role of the media in reporting and criticising judges. It is 'concerned with words or actions that interfere with the administration of justice or that constitute a disregard for the authority of a court' (Butler and Rodrick, 1999: 171). As Lord Russel CJ in *R v Gray* (1900)[6] observed:

> Any act done or writing published calculated to bring a Court or a judge of the Court into contempt, or to lower his [or her] authority, is a contempt of Court. That is one class of contempt. Further, any act done or writing published calculated to obstruct or interfere with the due course of justice or the lawful process of the Courts is a contempt of Court.

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[4] 2 QB 150, 155.
[5] 1 All ER 704, 709.
[6] 2 QB 36, 40.

Sometimes the criticism of judges may be a matter of concern for the independence of the judiciary. This is because baseless criticisms or unsubstantiated allegations may affect the image of the judiciary and ultimately it may undermine public confidence, which is a prerequisite to judicial independence. Therefore, any criticism should be based on true information or substantiated allegations (Taylor, 1994: [57]). In this context, the High Court of Delhi observed:

> [I]t is in the public interest to see that allegations or criticism which would scandalize or tend to scandalize or tend to lower authority of the Courts is not permitted because in the functioning of democracy an independent judiciary to dispense justice without fear or favour is necessary and its strength is the faith of the public in general in that institution. That cannot be permitted to be undermined because that will [be] against [the] public interest. The public interest in ensuring both fair trial and freedom of speech necessitates a delicate balancing exercise.[7]

In fact, the law of contempt of court is an instrument that controls the criticising power of the media. However, judges should not use the power of contempt with a view to suppressing criticism by the media. In this regard, Lord Russel CJ in *R v Gray* (1900)[8] held:

> Judges and Courts are alike open to criticism, and if reasonable argument or expostulation is offered against any judicial act as contrary to law or public good, no Court could or would treat that as a contempt of Court. The law ought not [to] be astute in such cases to criticise adversely what under such circumstances and with such an object is published.

In the case of the media criticisms, judges should be very careful in their use of the power of contempt. This power should not be used merely to restrain criticisms against the judiciary (Shetreet, 1986: 39). The Supreme Court of India held:

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[7] *Khatri v Trehan* (2001) <http://www.thehoot.org/medialaw/documentation.asp> 2 November 2001(Copy on file with author) [15].
[8] 2 QB 36, 40.

> The contempt of court is a special jurisdiction to be exercised sparingly and with caution whenever an act adversely affects the administration of justice or which tends to impede its course or tends to shake public confidence in the judicial institutions. This jurisdiction may also be exercised when the act complained of adversely affects the majesty or dignity of the courts.[9]

To ensure an effective role for the media in scrutinising judges another important factor is that the contempt law should be beyond uncertainty and vagueness, and the liability for contempt of court should be clearly defined. It is to be noted that the common law principles of contempt are criticised for their vagueness and uncertainty. The Australian Law Reform Commission in its report of 1987 said, 'it limits freedom of expression to an excessive extent', 'its substantive principles are too vague' and 'its procedures are unfair'.[10]

Discussion in this section reveals that the role of the media is very significant in scrutinising the activities and conduct of judges, but accuracy and fairness of media reporting are important factors for the effectiveness of this role. Although the law of contempt of court is a danger to the role of the media, it may be useful to check dishonesty and unfairness in media reporting. However, the judiciary should be careful to use the contempt law so that the media can play its role effectively. In exercising the power of contempt the courts need 'to be vigilant to ensure that the [media] is not curbed more than is absolutely necessary or it will not be able to do its job' (Lowe and Sufrin, 1996: 6).

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[9] *Supreme Court Bar Association v Union of India* (1998) 4 SCC 0409 (SC).
[10] Australian Law Reform Commission, *Contempt*, Report 35 (1987) [10, 44].

7.3 BANGLADESH PERSPECTIVES

This section discusses the role of the media in ensuring public accountability of judges in Bangladesh. It examines the sorts of information conveyed to the public by the print media and electronic media. In this regard, as mentioned in section 2.3, I have collected some information by conducting a survey from 15 October 2000 to 30 November 2000 during a field trip in Bangladesh.

In this context it is to be noted that although the Internet is a modern and important medium of information, its application to convey information to the public about the judiciary in Bangladesh is still unfamiliar. The judiciary in Bangladesh is not well equipped with modern technology and thus far, there is no Internet site relating to the courts. Consequently, information about the activities of the judiciary in Bangladesh is not available on the Internet, but different newspapers have their own web pages and the information conveyed by the newspapers is available on those web sites. Consequently, Internet was not included in the survey. I conducted the survey to collect information conveyed by the press, television and radio.

This section demonstrates that the media in Bangladesh conveys information about the conduct and functions of judges, but there is a lack of information about the activities of judges and the reasons for their decisions.

7.3.1 Press

In Bangladesh, the press publishes information about the activities of courts and judicial decisions. In some cases, particularly in important and sensitive cases, the proceedings of the courts are regularly reported in the daily newspapers. With a view

to identifying the nature of information conveyed by the newspapers, the following case studies are useful.

Case Study 1: Conduct of Judges

On 5 November 2000, it was reported in the *Dainik Sangbad* that the District Bar Association of Nawabganj demanded the withdrawal of District Judge Mr Abul Hossein and Joint District Judge Mr Abdul Hamid for their alleged involvement in bribery and irregularities and departmental action against them. The demands came from a meeting presided over by the president of the bar association on 31 October 2000. According to the report, the decision of the meeting was forwarded to the Bar Council, Ministry of Law, Justice & Parliamentary Affairs, the Chief Justice and the President of Bangladesh. The same report was published in the tabloid *Dainik Manavzamin*, on November 14, 2000 adding that the Bar Association decided that if the demands were not fulfilled, lawyers would boycott the courts continuously from the 21 November 2000.

On 5 November 2000, the *Dainik Manavzamin* published a report that lawyers of the Naogaon District Bar Association had decided to boycott the courts of three judges for an unscheduled period. The judges were Additional District & Session Judge Mr Sajedul Karim, Assistant Judge Mr Nazmul Huda and Assistant Judge Mr Rustom Ali. They were allegedly involved in corruption and irregularities.

On 20 November 2000, it was reported in the *Dainik Sangbad* that lawyers of Naogaon were still boycotting the courts of three judges. It added that they started the boycott from 5 November on the allegation that the three judges were involved in corruption and irregularities.

The above reports of the newspapers convey three important pieces of information about the conduct of judges. Firstly, some judges of the subordinate judiciary were allegedly involved in corruption. Secondly, some judges of the subordinate judiciary were allegedly involved in irregular practices in the administration of justice. There was no complete picture of the irregularities and corruption and therefore, it was not clear what sorts of irregularities and corruption were alleged to have been committed by the judges. Thirdly, the reports were based on the resolutions of the concerned bar associations, which are responsible bodies of the lawyers.

Case Study 2: Judicial Decisions and Quality of Judges

On 6 November 2000, the *Dainik Manavzamin* published information about a judgment of the High Court Division of the Supreme Court. It was reported that one Abdul Aziz and his eight sons killed three people of Chuadanga district on 11 November 1996. In a judgment passed by the Additional District & Session Judge of Chuadanga on 8 October 1997, Abdul Aziz and his two sons were sentenced to death, and six others were sentenced to life imprisonment. They filed an appeal to the High Court Division against the decision of the trial court. On 2 November 2000, the death reference bench of the High Court Division confirmed the judgments of Additional District & Session Judge. At the same time, the High Court Division bench criticised the Additional District & Session Judge for using incorrect English language in the order sheet of the case record. The bench also criticised the magistrate who recorded the confessional statement of the accused at the stage of investigation of the case.

The report of the *Dainik Manavzamin* conveys two kinds of information. Firstly, the stories of a murder case and judicial decisions in the case, and secondly, a judge of the subordinate judiciary was criticised by the superior court for using incorrect language in the judgment.

Case Study 3: Delay in the Disposal of Cases

On 29 November 2000, the *Daily Star* and the *Dainik Manavzamin* published identical reports relating to the delay in the disposal of a case. According to the report, the long awaited judgment in the sensational *Humayun Zahir murder case* in Additional District & Session Judges' court Dhaka was adjourned for the third time. The case had earlier been transferred to two courts for disposal, but one of them felt 'embarrassed' to deliver judgment. Later, the High Court Division directed the Additional District & Session Judge Mr Mohammad Awlad Hossain to dispose of the case. The judge did not deliver the judgment because it was not prepared. The report added that the case was filed in 1993, when the victim was murdered by a group of assailants. The investigation officer of the case submitted a charge sheet on 24 March 1994.

Thus, the report conveys information that the case was filed about eight years ago and that police had submitted the charge sheet within one year of filing the case, but it was still pending for judgment. It is an important example of communication to the public of delay in the disposal of cases.

Case Study 4: Speedy Disposal of Cases

On 27 November 2000, the *Daily Star*, the *Dainik Manavzamin*, and the *Dainik Sangbad* published reports of a judgment of the District and Session Judge of

Narayanganj. According to the reports, on 26 November 2000, the judge ordered the death sentence against the husband, mother-in-law and sister-in-law of Mahmuda Sultana Mammy for strangling her for her dowry. At one stage in pronouncing the verdict, the judge became passionate, which caused his voice to lower and he stopped for a while.

It was reported that after hearing the judgment, Ripon, the convicted husband of the victim, expressing his faith in *Allah*, told the reporters that he hoped to get justice. He added that the complainants had purchased (bribed) some persons involved in the case. Ripon's father said that they would file appeals against the death sentences and hoped that they would get justice. On the other hand, the victim's father expressed satisfaction with the judgment.

The victim was killed on 29 October 1999 and the murder case was filed on 30 October 1999. The police submitted their charge sheets on 24 November 1999 and the charges were framed on 8 March 2000. The case was disposed of within 1 year and 26 days, a record in the history of the Narayanganj judge court.

In this regard, on 28 November 2000, the *Daily Star* published an editorial identifying the judgment as a landmark judgment. The editorial observed:

> [T]he whole process of trial has been completed and a verdict reached in record quick time of a little over one year, which is certainly worth emulating in all such cases pending before the court of law. Secondly, the judgment has served a hugely important social purpose by pronouncing a powerful message of deterrence to the dowry-lovers' fraternity.

These reports convey information about the judgement, the feeling of the judge in pronouncing judgment and the reactions of both parties. However, the main information in these reports was that if the justice system works properly it is possible for the courts to dispose of cases within a short time.

Case Study 5: Late Night Sitting of Court

On 13 November 2000, a bench of the High Court Division granted bail to an accused in a sedition case at an unusually late night sitting. It was a matter of great public controversy in the country and the whole incident was continuously published in newspapers from 14 November to 23 November 2000. The continuous information about this incident was published in the *Daily Star* from 14 November to 22 November, in the *Dainik Sangbad* from 14 November to 19 November and in the *Dainik Manavzamin* from 17 November to 18 November and 23 November. The reports of all the three newspapers are discussed:

On 20 October 2000, a parody of the national anthem of Bangladesh was published in the *Dainik Inqilab* edited by AMM Bahauddin. Thereafter, Mohammad Alauddin, a senior assistant secretary of the Home Ministry filed a sedition case with a metropolitan magistrate court against three people, including AMM Bahauddin. The magistrate issued a warrant of arrest against three accused on 13 November 2000. On the following day, Bahauddin filed a bail petition with the High Court Division of the Supreme Court. During the hearing of the bail petition in a division bench, Justice Momtazuddin asked Barrister Moudud Ahmed, a lawyer representing Bahauddin, about the person responsible for publishing the parody. Barrister Moudud Ahmed loudly replied that it would be determined after trial. At this, the judge felt embarrassed to hear the matter saying that Moudud Ahmed was speaking with anger that sounded like a threat. Consequently, the case was referred to the Chief Justice and then Bahauddin's lawyers rushed to the residence of the Chief Justice who was not at home in the late afternoon.

The lawyers waited there for two hours and the Chief justice returned home at 8.15pm. After hearing the submission of the lawyers, the Chief Justice immediately

formed a new bench comprising Justice MM Ruhul Amin and Justice Zoynal Abedin who were requested by the lawyers over the phone to hear the matter that very night. The judges agreed and they came to the High Court at 10.00pm and started hearing in a closed-door courtroom without giving any notice to the Attorney-General and state attorneys. At 11.40pm anticipatory bail was granted to AMM Bahauddin.

This incident was widely criticised by people from different sectors including the Prime Minister, Home Minister, Law & Justice Minister and eminent lawyers of the country. *The Daily Star* published an editorial on 18 November 2000 and commented, '[w]e think the High Court (HC) should have waited until the next morning to decide on the anticipatory bail petition of the editor of *Inqilab*. It has unnecessarily brought controversy upon itself by acting hastily'.

By reporting this incident the newspapers conveyed information to the public about the exercise of judicial power by a court in a disreputable situation.

7.3.2 Television

As mentioned in section 2.3, I surveyed the information broadcast by Bangladesh Television (BTV) and Ekushey Television (ETV) from 15 October 2000 to 30 November 2000. The nature of information conveyed by the BTV and ETV is discussed below.

7.3.2.1 Bangladesh Television (BTV)

From 15 October 2000 to 30 November 2000, I surveyed all programs aired by the BTV and it was found that only the following information was conveyed during the survey:

On 26 November 2000 the BTV in its main news at 8.00pm and 10.00pm broadcast descriptive reports on the judgment of the sensational *Mammy murder case* passed by the District & Session Judge of Narayanganj. The report showed the court area including the courtroom, but the proceedings of the case were not shown. It included reactions from the Public Prosecutor and the General Secretary of the District Bar Association of Narayanganj. They expressed their satisfaction at the judgment of death sentence of the three accused who were the husband, mother-in-law and sister-in-law of the victim.

Thus, it reveals that in its news programs the BTV conveys limited information about the judgments of some important court cases including the reactions of the concerned people.

7.3.2.2 Ekushey Television (ETV)

During the survey, it was found that the ETV broadcast two kinds of programs, which conveyed information about the judiciary. The programs are news bulletins and *Ajker Potrikaay*.[11] The information gathered by surveying these programs is examined in the following case studies:

Case Study 1: News Bulletins

The ETV broadcasts two main news bulletins in Bangla at 7.30pm and 11.00pm. The bulletins include reports with pictures and reactions of the people to judgments in important and sensational cases. By surveying the bulletins at 7.30pm the following information was gathered:

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[11] *Ajker Patrikaay* is an important program in which the main reports of the leading daily newspapers are reviewed.

(1) At 7.30pm on 17 November 2000, it was broadcast that the incident of granting bail in the late night sitting of the High Court Division came up as a matter of discussion all over the country. On this issue, the lawyers were divided into two sections. Some lawyers were of the opinion that there was no legal bar against the late sitting while other lawyers strongly criticised the incident of granting bail late at night. The report included the comment of a lawyer who said that the quality of judges was deteriorating. In addition, the ETV broadcaster commented that the court granted bail in a late night sitting, but thousands of court cases were still pending for disposal. He added that 85000 cases were pending in 16 districts of Rajshahi Division.

(2) On 23 November 2000, a report was broadcast on a verdict of the Appellate Division of the Supreme Court in the *Janata Tower corruption case* against former President HM Ershad. It was reported that the Appellate Division partially upheld a High Court Division judgment sentencing him to five years imprisonment and directed Ershad to pay a fine of nearly Taka 5.5 crore (55 Millions); in default of paying the fine he would be simply imprisoned for six months. According to the report, the Court held that Ershad had already served three years and eight months in jail from 1993 to 1997 before he was released on bail and he would be freed if he paid the fine.

The report was broadcast with the picture of the court area, Ershad, his lawyers and political supporters including the reaction of the Secretary General of *Jatiya Party* that is the political party of Ershad. Naziur Rahman, the Secretary General of the party, rejected the judgment and announced a campaign to raise money to pay the

fine, saying that '[r]ight now we have formed Ershad Freedom Fund to release our leader'.

(3) On 26 November 2000, news with pictures was broadcast about the judgment in the *Mammy murder case*. It was reported that the court emphasised the testimony of a 10-year old girl who was the domestic help and she was the only eyewitness of the murder. The report also included the reaction of the defence lawyer who expected that the accused would be acquitted on appeal.

The case study on the news bulletins reveals that the ETV conveys information to the public about some judgments in court cases including reactions of the concerned people. In some cases, the reports are used to comment on the activities of judges. The news broadcasts of the ETV are more probing and critical than those of the BTV. There is more coverage of the courts.

Case Study 2: Ajker Potrikaay

Ajker Potrikaay is a regular program of ETV broadcast at 2.00pm and 5.50pm for ten minutes. It discusses the main reports of almost all daily national newspapers and sometimes the reports include issues relating to courts and judges. The outcome of the survey of this program is discussed as follows:

(1) At 2.00pm on 17 November 2000, it was reported that in a joint statement the editors and publishers of different daily national newspapers expressed their concern over issuance of rule and show cause notices by a High Court Division bench against five national dailies. The rule and show cause notices were issued for contempt of court because of the publication of news about a telephone conversation between a High Court Division Judge and the former President Ershad who was

convicted of corruption. The ETV broadcasters commented that instead of filing a contempt case the matter should have been investigated by the Supreme Judicial Council, otherwise freedom of expression would be jeopardized. The broadcasters further added that in what they were saying in that very program they had to express themselves carefully, otherwise they may become subject to contempt of court.

(2) At 5.50pm on 19 November 2000, the ETV broadcasters discussed the news of the bail of AMM Bahauddin and commented that there was no emergency for granting bail in the late night sitting of the court. It added that the relationship between the courts and the executive is now in transition.

(3) At 5.50pm on 22 November 2000, the ETV broadcasters discussed the reports of different newspapers about the decision of the Appellate Division regarding *ad interim* bail of AMM Bahauddin. It was reported that AMM Bahauddin, editor of daily the *Dainik Inqilab* was granted anticipatory bail until 20 November by a bench of the High Court Division of the Supreme Court in a late night sitting on 14 November. On 20 November 2000, after hearing both sides the same bench rejected the bail and directed Bahauddin to surrender to the Chief Metropolitan Magistrate Court by 22 November 2000. The bench also ordered the police not to harass him in the meantime. On 21 November 2000, the Appellate Division of the Supreme Court stayed the verdict of the High Court Division bench for two weeks and directed the government not to harass or arrest Bahauddin during this period. The ETV broadcasters commented that bail of Bahauddin was extended by the decision of the Appellate Division.

(4) At 5.50pm on 29 November 2000 it was broadcast that the judge in the *Humayun Zahir murder case* again felt embarrassed and adjourned the pronouncement of judgment. The case had been delayed for eight years.

The survey of the *Ajker Patrikaay* of ETV shows that some important information about the functions of judges is conveyed to the public. At the same time, some judicial activities are criticised by the broadcasters. Moreover, there is comment on the vagueness of the law of contempt.

7.3.3 Radio

As mentioned in section 2.3, the Bangladesh national radio broadcaster is known as *Bangladesh Betar* which is controlled by the government. During the survey from 15 October 2000 to 30 November 2000 it was found that the radio broadcasts only brief news about judgment in important and sensational cases. For broadcasting regular national news there are some fixed times of five minutes and ten minutes duration. The main news times are 7.00 AM in the Bangla followed by 7.30 AM in English and 8.30 PM in Bangla followed by 9.30 PM in English. During the survey from 15 October to 30 November 2000, the only relevant broadcast occurred at 8.300 PM on 26 November 2000, it concerned the judgment in the *Mammy murder case* on the *Bangladesh Betar*. It conveyed information about the conviction of the accused.

Thus, the survey of the radio in Bangladesh discloses that only brief information about the judicial decisions is conveyed to the public by the radio. Similar to the BTV the coverage of the radio is inadequate.

The foregoing discussion reveals that the media in Bangladesh plays an important role in scrutinising judges. The media conveys information on different

aspects which are concerned with public confidence in the judiciary. The information includes the conduct and quality of judges, delays in disposal of cases, and decisions of judges. However, information about the judicial process and reasons for judicial decisions is not sufficiently conveyed by the media. In fact, the roles of the media in conveying adequate information about what judges do and why and how they do it depends largely on the co-operation of the judiciary in providing information to the media.

In the context of the media role in scrutinising judges in Bangladesh an important issue is the law of contempt of court. The law of contempt of court in Bangladesh is a very old and vague law, enacted in 1926. The *Contempt of Courts Act* 1926 was enacted in the British period when Bangladesh was a part of undivided India. This colonial law of contempt may not be appropriate for a modern and independent state. The Act has only three sections. Section 1 of the Act contains its title, extent and commencement, section 2 gives power to the High Court Division to punish contempt of court and section 3 limits punishment for contempt. There is no other provision in the Act; even 'contempt of court' is not defined. In fact, the law of contempt of court as applied in Bangladesh is the common law which, as stated in section 7.2.3, is vague and uncertain. In the absence of any exhaustive codified law of contempt of court the media may be in fear of contempt in conveying information about the courts.

In this regard, the conviction of Mr Matiur Rahman Chowdhury and Mrs Mahbuba Chowdhury, the Chief Editor and Publisher of the *Dainik Manavzamin*, in a contempt case is worth mentioning. As discussed in section 6.3.2.1, on 8 November 2000, a contempt case was filed in the High Court Division against the *Dainik Manavzamin* for publishing a fairy story which was interpreted as a reference to a

conversation between HM Ershad and Justice Latifur Rahman who ultimately resigned from office. The High Court Division in its judgment of 20 May 2002 sentenced Ershad to six months imprisonment including a fine of Tk 2000 for his attempt to influence the judge. At the same time, for contempt of court, Matiur Rahman was sentenced to one-month imprisonment including a fine of Tk 2000 and Mahbuba Chowdhury was fined Tk 2000. After this judgment, in a reaction to media reporters Matiur Rahman said that as Ershad had confessed to his conversation and the judge concerned had resigned, he had not done any wrong.[12]

In this respect, a report of the *Dainik Janakantha* termed the judgment surprising and unprecedented because both the persons who committed a crime and who helped to catch the culprit were convicted. It commented that the duty of the press is to publish reports of crime, corruption and irregularities and although the *Dainik Manavzamin* had performed this duty properly, it had been convicted for contempt of court.[13] In the meantime, fifteen editors of leading national dailies in a joint statement expressed their utter disappointment at the verdict of imprisonment and fines against Matiur Rahman and Mahbuba Chowdhury.[14] The statement termed the verdict 'an unprecedented interference in the freedom of press' and added:

> The court and the press have common roles to play in many cases. And, the matter (taped conversation between Ershad and a High Court judge) was published by different newspapers being fully conscious of the judiciary's image. Our objective was not to undermine the judiciary but to help uphold its image by revealing the flaws.[15]

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[12] *The Daily Star*, Dhaka (Bangladesh), 21 May 2002; The *Dainik Jugantor*, Dhaka (Bangladesh), 21 May 2002; The *Dainik Janakantha*, Dhaka (Bangladesh) 21 May 2002.

[13] *The Dainik Janakantha*, Dhaka (Bangladesh) 21 May 2002.

[14] The signatories of the statement are the editors of *The Bangladesh Observer*, *The independent*, *The New Nation*, *The Ittefaq*, *The Prothom Alo*, *The Sangbad*, *The Jugantor*, *The Janakantha*, *The Ajker Kagoj*, *The Bhorer Kagoj*, *The Dinkal*, *The Banglabazar Patrika*, *The Daily Star*, *The Inqilab* and *The Financial Express*.

[15] *The Daily Star*, Dhaka (Bangladesh), 22 May 2002; *The independent*, Dhaka (Bangladesh), 22 May 2002.

This incident reveals that although the media plays a significant role in scrutinising judges that is an important aspect of public confidence in the judiciary, the law of contempt of court is a barrier to this role.

7.4 CONCLUSION

The study on the role of the media exposes that the media in Bangladesh, particularly the print media and television, plays an important role in making judges accountable to the public. It also exposes some important limitations which can be remedied by the following measures:

- Media liaison officers or public information officers as in the United States and Australia should be appointed.
- The law of contempt of court should be changed providing detailed principles including a clear definition of contempt of court.
- In order to ensure proper understanding of the functions of the courts, steps should be taken to arrange legal training for reporters.
- As the apex court, at least the Supreme Court should have a web page containing information about its activities.

CHAPTER 8

JUDICIARY AND BAR

8.1 INTRODUCTION

The bar is an essential part of the justice system in any society.[1] Members of the bar protect the interests of their clients and at the same time, help judges in the administration of justice. In discharging these functions, they also play a role in scrutinising judges. This role of the bar is recognised as an informal mechanism of public accountability of judges (Cappelletti, 1989: 83).

This chapter seeks to analyse the role of the bar in ensuring the accountability of judges. The purpose of this chapter is to evaluate the role of the bar in scrutinising judges in Bangladesh. Section 8.2 deals with general perspectives on the role of the bar in scrutinising judges while section 8.3 examines the role of the bar in a Bangladesh perspective.

8.2 GENERAL PERSPECTIVES ON THE ROLE OF THE BAR

This section examines issues of the scrutiny of judges by members of the bar in ensuring judicial accountability. For convenience, the discussion is divided under three subheadings: relationship between judges and the bar, rationale of the role of the bar in scrutinising judges and ways of scrutinising judges.

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[1] In some countries, including Australia and England, members of the legal profession are divided into two groups, barristers and solicitors. In this study, the term 'bar' is used to mean all members of the legal profession.

8.2.1 Relationship between Judges and the Bar

The administration of justice is fundamentally the responsibility of the judges, but this responsibility cannot be discharged properly without active participation of members of the bar. Verma terms the administration of justice 'a joint venture' in which members of the bar and judges are 'equal participants' (Verma, 1995: [3]). Although in ensuring the proper administration of justice the obligations of judges are greater than the lawyers, all of them are accountable to the public (Baxi, 1987: [7]; Shepard, 2000: 223).

A judge resolves legal disputes on the basis of three main factors: a finding of facts in dispute, receiving evidence in support of the facts and determining the relevant laws. The lawyers articulate the facts of the case, gather evidence in support of the claims of parties and put forth the legal arguments before the judges (Jain, 1990: 669). Thus, members of the bar actively help judges in the administration of justice. At the same time, they individually or collectively play an important role in scrutinising the conduct and performance of judges.

However, in scrutinising judges, members of the bar are under an obligation to uphold the status and dignity of judges. They are not allowed to act in such a manner that can undermine the independence and image of the judiciary. In *Balwani's case* (1999), the Supreme Court of India observed that '[l]aw does not give a lawyer, unsatisfied with the result of any litigation, licence to permit himself the liberty of causing disrespect to the court or attempting, in any manner, to lower the dignity of the Court'.[2]

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[2] SOL Case No 148 <http://www.supremecourtonline.com/cases/526.html> 2 November 2001 (Copy on file with author) [4].

Therefore, members of the bar should be alert and mindful of the status and dignity of judges. It is an important duty of the lawyers that they should maintain a respectful attitude towards the courts 'bearing in mind that the dignity of the judicial office is essential for the survival of an independent judiciary' (Jain, 1995: [11]). The Supreme Court of India, in *Supreme Court Bar Association v Union of India* (1998), held that '[n]othing is more destructive of public confidence in the administration of justice than incivility, rudeness or disrespectful conduct on the part of [a lawyer] towards the court'.[3]

In this context, it is to be noted while it is recognised that lawyers are duty bound to respect the courts there is a reciprocal duty of judges to pay due respect to the lawyers. As the Supreme Court of India observed, judges should be courteous to the lawyers and 'make every endeavour for maintaining and protecting the respect which members of the bar are entitled to have from their clients as well as from the [litigants]'. The Court added that both judges and the bar 'are the two inextricable wings of the judicial forum and therefore the ... mutual respect is the *sine qua non* for the efficient functioning of the solemn work carried on in courts'.[4]

The mutual respect between judges and the bar should be maintained not only in the courtroom, but also outside the courtroom.

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[3] *Supreme Court Bar Association v Union of India* (1998) 4 SCC 0409 (SC).
[4] *Ramon Services Pvt Ltd v Subhash* (2000) SOL Case No 625 <http://www.supremecourtonline.com/cases/1246.html> 15 November 2001 (Copy on file with author) [25].

8.2.2 Rationale of the Role of the Bar in Scrutinising Judges

The bar has the capacity to explain the law and legal procedure to the public in and out of the courts: in places and situations in which it may not be possible for judges. This role of the bar may influence public understandings of the activities of judges and thus, it plays a crucial role in interpreting the judicial activities to the public. Therefore, as an informal mechanism of scrutinising judges, the role of the bar is very important to ensure public accountability of judges (Nicholson, 1993b: 425).

The rationale behind the power of the bar in scrutinising judges can be identified in two ways. Firstly, members of the bar possess legal knowledge and practical experience of trial processes. They understand the law as interpreted and applied by the judges. Therefore, they can assess the legal competence of judges. Secondly, members of the bar 'spend most of their working days in court and encounter from time to time the common pattern of judicial misconduct and incompetence' (Shetreet, 1976: 225). Consequently, the bar plays a very significant role in controlling the shortcomings of the conduct and performance of judges (Sharma, 1989: 95). In other words members of the bar directly and constantly watch legal competence and conduct of judges. This direct and constant scrutinising by the legal profession ensures judges are careful to administer justice according to law.

8.2.3 Ways of Scrutinising Judges

Members of the bar may create informal and professional pressures on judges to perform legal duties and to maintain standards of judicial conduct. They can censure or criticise judges for any departures from 'appropriate civility and judicial

detachment' (Gleeson, 1998: [16]). However, as stated in section 8.2.1, in playing this role the bar should be careful to its duty of maintaining the status and dignity of judicial office. This is because any unjust criticism of judges by lawyers may undermine the status and dignity of judges and at times, they may cause interference with the administration of justice. While the lawyers have a right to criticise judges they 'should be certain of the merit' of their complaints, and should 'use appropriate language, and avoid petty criticisms, for unrestrained and intemperate statements tend to lessen public confidence' (Lieberman, 1997: 786). However, in any case of unjust criticism or lowering the dignity of the courts by a lawyer, the law of contempt of court may be an effective instrument to protect the status and dignity of the judiciary.

As to the role of lawyers in scrutinising judges the *Montreal Declaration* 1983 provides that a lawyer should 'have the right to raise an objection to the participation or continued participation of a judge in a particular case, or to the conduct of a trial or hearing'.[5] This provision signifies that for the cause of justice members of the bar have the right to restrain a judge from conducting a trial or from participating in the hearing of a particular case. Shetreet, in the context of the English judiciary, observes:

> Over the years good advocates learn how to cope with the common patterns of judicial misconduct in court, and develop techniques for checking judges. In many cases an appropriate on-the-spot reaction of the advocate is more effective than the informal or formal methods of discipline (Shetreet, 1976: 243).

In fact, Shetreet's observation may be considered relevant to any jurisdiction having well-organised legal profession. In addition to such an on-the-spot reaction, members

[5] *Montreal Declaration* 1983, Art 3.15.

of the bar may play their role in numerous ways. Firstly, they may informally express their opinion about the conduct and performance of a particular judge through private communication to the judge concerned or to members of the judiciary. This sort of informal communication may be very effective because it is less embarrassing to the judge (Shetreet, 1976: 234).

Secondly, they may protest any misconduct of a judge through their leaders or make a complaint against the judge to the Chief Justice or the Chief Judge or to the disciplinary authority. In such a case the judge may be subject to informal or formal disciplinary proceeding.[6]

Thirdly, in special circumstances, members of the bar can boycott a judge. Sometimes the boycott of a judge by the lawyers creates an ethical question because it affects litigants' right to be heard or to a speedy trial (Jain, 1995). Nevertheless, when the other means of scrutinising the conduct of a judge do not work properly then the boycott may be employed in appropriate cases (Shetreet, 1976: 234). For example, if a judge fails to respect members of the bar and improperly insults lawyers or uses undignified language to them but the lawyers do not get a remedy by making a complaint to the superior authority of the judge, perhaps the boycott of the judge may be justifiable in such a case.

The foregoing discussion emphasises that members of the bar should act not only to protect the interests of their clients but also to help judges in the administration of justice. Simultaneously, they should scrutinise the conduct and performance of judges with due respect to the judicial office. In this respect, they

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[6] For discussion on informal and formal discipline of judges, see section 6.2.2.

have a professional duty to maintain a proper relationship with the judiciary while the judiciary has a responsibility to be courteous to members of the bar so that this relationship can be properly maintained. This is because the relationship between the judiciary and the bar is an important factor to enhance public respect for the judiciary and to ensure judicial accountability.

8.3 BANGLADESH PERSPECTIVES

In Bangladesh, there is only one class of practising lawyers known as 'advocates' and they are admitted to practice by the Bar Council of Bangladesh under the *Bangladesh Legal Practitioners and Bar Council Order* 1972.[7] To be admitted as an advocate, a person should obtain a degree in law from a recognised university of Bangladesh; or a bachelor's degree in law from any university outside Bangladesh recognised by the Bar Council; or be a barrister. In addition, he or she must have passed such examination as may be prescribed by the Bar Council.[8] An advocate is 'entitled as of right to practise throughout Bangladesh, and to appear, act and plead before any court, [t]ribunal or revenue authority in Bangladesh'.[9] However, all advocates are not automatically entitled to practise before the Supreme Court of Bangladesh. In this respect, they have to fulfil certain other requirements specified in the *Legal Practitioners and Bar Council Order* 1972.[10]

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[7] The Bangladesh Bar Council regulates all matters relating to the advocates. Under s 5(1) of the *Bangladesh Legal Practitioners and Bar Council Order* 1972, it is an independent statutory body and consists of fifteen members elected by advocates. The Attorney-General of Bangladesh is the ex-officio Chairman of the Bar Council.

[8] *Bangladesh Legal Practitioners and Bar Council Order* 1972, s 27(1).

[9] *Bangladesh Legal Practitioners and Bar Council Order* 1972, s 19.

[10] Advocates entitled to practice before the Supreme Court are of two categories. They are (1) advocates entitled to practice before the High court Division and (2) advocates entitled to practice before the Appellate Division. Under s 21(1) of the *Bangladesh Legal Practitioners and Bar Council Order* 1972, an advocate may be entitled to practice before the High Court Division, if -

No advocate is entitled to practice in any court without being a member of the Bar Association of the place where he or she usually practices.[11] There is a Bar Association in every district and in the Supreme Court of Bangladesh. In addition, there is a National Bar Association known as *Bangladesh Jatiya Ainjibi Samity*. All Bar Associations are governed by a body elected from and by its members and the Bar Associations are required to be recognised by the Bar Council of Bangladesh.[12]

This section examines the role of the bar in scrutinising judges in Bangladesh. In this respect there are two substantial issues, the criticism of judges and the boycott of a judge.

(a) he has practised as an advocate before subordinate courts in Bangladesh for a period of two years;
(b) he is a law graduate and has practised as an advocate before any Court outside Bangladesh notified by the Government in the official Gazette;
(c) he has, for reason of his legal training or experience been exempted by the Bar Council from the foregoing requirements of this clause on the basis of the prescribed criteria.

According to the *Supreme Court of Bangladesh (Appellate Division) Rules* 1988 advocates entitled to practice before the Appellate Division are of three classes: Senior Advocate, Advocate and Advocate-on-Record. Senior Advocates are selected by the Chief Justice and other judges from among the Advocates based on 'knowledge, ability and experience' (Pt I, r 11). Advocates and Advocates-on-Record are enrolled by an Enrolment Committee consisting of at least two Supreme Court judges nominated by the Chief Justice (Pt I, rr 5, 19). To be enrolled as an Advocate, a person must have 'been for not less than five years enrolled as an Advocate in the High Court Division' (Pt I, r 3). For being enrolled as an advocate-on-Record, a person must-

> [Have] been for not less than seven years enrolled as an Advocate of the Courts subordinate to the Appellate Division of the Supreme Court including at least three years standing as an Advocate of the High Court Division (Pt I, r 17(a)).

An Advocate-on-record has the exclusive right to act and plead for a party in any proceedings in the Appellate Division, but an Advocate is not entitled to appear or plead in any matter without being instructed by an Advocate-on-Record (Pt I, rr 14-15). A Senior Advocate should not 'appear or plead without a junior, except in a case in which he is instructed by an Advocate-on-Record'. Moreover, except in consultation with a junior a Senior Advocate should not 'accept instructions to draw pleadings, affidavits, advice on evidence or to do any drafting work of an analogous kind' (Sch I, r 3).

[11] *Bangladesh Legal Practitioners and Bar Council Rules* 1972, r 66(1).

[12] *Bangladesh Legal Practitioners and Bar Council Rules* 1972, r 67.

8.3.1 Criticism of Judges

The role of the bar is recognised as an important informal mechanism of judicial accountability in Bangladesh. Members of the bar individually and collectively scrutinise the activities and conduct of judges. The *Canons of Professional Conduct and Etiquette* 1969 framed by the Bangladesh Bar Council provide:

> [W]henever there is proper ground for complaint against a judicial officer, it is the right and duty of an Advocate to ventilate such grievances and seek redress thereof legally and to protect the complainant and persons affected.[13]

In accordance with this right or duty of the advocates, they criticise any misconduct of judges. The professional criticisms of the lawyers are very useful to make judges accountable for exercising their judicial power, but the lawyers are not free to criticise unjustly. In *State v Munshi* (1981) the High Court Division of the Supreme Court of Bangladesh observed:

> [I]t is of utmost importance for all concerned to remember that [the] judiciary is the upholder and preserver of the liberties and rights of the people and nothing should be said or done to lower the judiciary in the estimation of the people or obstruct the administration of justice, more so by the lawyers, who are the integral part of the court and it is their duty to uphold the dignity and prestige of the court and not to lower it[14]

In this regard, the *Canons of Professional Conduct and Etiquette* 1969 for lawyers in Bangladesh provide:

> It is the duty of an Advocate to maintain towards the courts a respectful attitude, not for the sake of the temporary incumbent of the judicial office, but for the maintenance of its supreme importance. Judges not being wholly free to defend themselves are peculiarly entitled to receive the support of the Bar against unjust criticism and clamour.[15]

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[13] Ch II, para 1. The Bar Council framed the *Canons of Professional Conduct and Etiquette* in accordance with s 48(q) of the *Legal Practitioners and Bar Council Act* 1965 and adopted them by a resolution of the Bar Council on 5 January 1969.

[14] *State v Munshi* (1981) 33 DLR 220, 227.

[15] Ch III, para 1.

This respect from the lawyers is essential to maintain public confidence in the judiciary. Unjust criticisms from them may undermine the authority of the courts and thus, the independence of judges may be diminished. Therefore, the criticism of judges by the lawyers though useful to ensure judicial accountability, it is also a concern for the independence of judiciary. In this context the law of contempt of court is essential to maintain the balance between the values of judicial independence and accountability. In the case of any unjust criticism judges apply the law of contempt of court to protect the status and dignity of the judiciary. However, all criticisms of judges are not considered contempt of court. In this regard *Hussain v Chowdhury* (1996) is worth consideration.

***Hussain v Chowdhury* (1996)**[16]

Justice Abdur Rouf, then a judge of the High Court Division, was appointed as the Chief Election Commissioner of Bangladesh in December 1990. He became controversial due to unprecedented vote rigging at the by-election in 1994 and consequently, the opposition political parties forced him to resign from the office of the Chief Election Commissioner for his role in running the election. After his resignation from the office of the Chief Election Commissioner, he was appointed a judge of the Appellate Division of the Supreme Court in 1995.

Mr Shamsul Huq Chowdhury, a senior member of the Supreme Court Bar Association and also a member of the Bangladesh Bar Council, published a statement in two daily newspapers, the *Bangladesh Observer* and the *Dainik Ittefaq*,

[16] 48 DLR 155.

on 22 May 1995 and on 9 June 1995 respectively. In his statement Mr Chowdhury criticised *inter alia* the appointment of Justice Rouf to the Supreme Court as follows:

> Presence of Mr Justice Abdur Rouf, a disputed person as the Chief Election Commissioner in the holy premises of the Supreme Court has tarnished the image of the highest Court in the eye of the public. His role as the Chief Election Commissioner is one of ignominy and unbecoming of what he was just before his appointment as the Chief Election Commissioner. His indecision during the controversial Magura parliamentary by-election last year had not only led the nation to the present crisis but also forfeited his right to hold a job that entails decision-making. He shamefully deserted the Magura constituency and left the musclemen to rig the by-polls as they wished. This has put the entire Election Commission into deep controversy.[17]

Then a contempt petition was filed in the High Court Division alleging that Mr Chowdhury's statement was intended to lower the image of Supreme Court Judges, particularly one of the sitting judges and to scandalise the judiciary as a whole. However, in its judgment the High Court Division observed:

> [The] statement is directed to Mr Justice Abdur Rouf at the time when he was functioning as the Chief Election Commissioner and not as a Judge. Therefore, ... there is nothing in the statement relating to the judgment or a person acting as a Judge. But the controversy is over the activity of the high official like the Chief Election Commissioner and not of a Judge.[18]

The Court further held that 'it was not a criticism of any particular judge nor can it be termed as scandalisation of the Judges of the Superior Court or the judiciary in any form'. It added that 'mentioning of the name of a sitting Judge, Mr Abdur Rouf, in the statement is without any motive to lower the honour, dignity, prestige and neutrality of the Supreme Court'.[19]

Hence the criticism of judges is not always seen to undermine the status and dignity of the courts. Very recently, the incumbent Chief Justice was subject to

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[17] Quoted in *Hussain v Chowdhury* (1996) 48 DLR 155, 156.
[18] *Hussain v Chowdhury* (1996) 48 DLR 155, 157.
[19] *Hussain v Chowdhury* (1996) 48 DLR 155, 158.

criticism by the lawyers. It was reported in different national dailies that the Chief Justice Mahmudul Amin Chowdhury sent a proposal to the government to raise the retirement age of Supreme Court judge from 65 to 68 years and of subordinate court judges from 57 to 60 years. Later, on 19 February 2002, he met the Prime Minister Khaleda Zia and discussed his proposal with Prime Minister who said that the proposal was under consideration. This move of the Chief Justice was strongly criticised in a two-day national convention of lawyers in Dhaka organised by the *Sammilito Ainjibi Samannaya Parisad* (The Combined Lawyers' Co-ordination Council) ended on 17 May 2002. The resolution of the convention states that after sending the proposal to the Prime Minister, the Chief Executive of the State, the Chief Justice met with her and requested consideration of his proposal.[20] It categorically states, '[w]e strongly protest this sort of unconventional attitude of the Chief Justice'.[21] The resolution further states that the lawyers are embarrassed because in spite of doing this unconventional act the Chief Justice is still holding the judicial office[22]

Thus the lawyers in Bangladesh scrutinise the activities of judges and this scrutiny is very useful to ensure judicial accountability. However, there are also instances of unjust criticisms which are considered contempt of court. As an example, *State v Islam* (1985) in which a lawyer was found guilty of contempt of court is discussed below.

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[20] *The Dainik Janakantha*, Dhaka (Bangladesh), 18 May 2002.
[21] *The Independent*, Dhaka (Bangladesh), 18 May 2002.
[22] *The Dainik Janakantha*, Dhaka (Bangladesh), 18 May 2002.

***State v Islam* (1985)**[23]

Advocate Nazrul Islam, a member of Rangpur Bar Association, was engaged as a lawyer in a criminal appeal filed in the First Court of Additional Sessions Judge. He moved applications for admission of appeal and for bail. The judge admitted the appeal fixing the date of hearing for 17 days hence and rejected the application for bail.

When the judge passed the order, Advocate Nazrul Islam took the records of appeal from the bench assistant of the court. After the reading of the order he 'stood up and threw the records while the Court was engaged in hearing another case'. At the same time he said:

> I want to know why you have not granted bail to my client. What is your power of not granting the bail? You do not know anything of judging. During 22 years of my experience as a lawyer, I have never seen a rubbish judge like you. Without having any knowledge of judging, you have no right to sit down on that chair. You leave that place. You have not granted bail to my client. I have understood what sort of a judge you are. You know nothing about the law. After knowing judging you would sit down on that chair. I would teach you how to judge. You have not granted bail to my accused. I would show how you could do the job of a judge.[24]

Then the judge filed a contempt case with the High Court Division of the Supreme Court.[25] At the hearing of the case, the contemner Advocate offered an 'unqualified and unconditional apology' for his statement and he threw himself 'at the mercy of the Court'. The High Court Division observed:

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[23] 37 DLR 200.

[24] *State v Islam* (1985) 37 DLR 200, 202. The utterances of Advocate Nazrul Islam were quoted in the judgment in Bangla. I have translated them in English by myself.

[25] The courts below the Supreme Court have no power of dealing with contempt cases. Under Art 108 of the Constitution of Bangladesh, both Appellate Division and the High Court Division of the Supreme Court have the power to 'make an order for the investigation of or punishment for any contempt' of themselves. In respect of the contempt of subordinate courts, the High Court Division has the power to punish under s 2 of the *Contempt of Courts Act* 1926.

> The Bar and the Bench are complementary to each other. Any propensity by one side to carry its temporary ruffled feelings against the other to an unreasonable length destroys the moral foundation of both the two institutions. In the most disrespectful and contemptuous words possible the contemner Advocate has poured scorn on the learned Additional Sessions Judge blurting out defamatory and scandalous allegations against the Court and thwarting the administration of justice itself.[26]

However, the Court accepted the apology offered by the contemner Advocate and warned him to be careful in future. The Court held:

> However, the contemner Advocate has ultimately realised what a gross contempt of Court he had committed by uttering those disrespectful words which are unworthy of any Advocate of long 22 years standing. We hope and expect that his regret and remorse are sincere and lasting. We would expect him to maintain the noble traditions of the profession of advocacy and to maintain the best of relations with the Judges, whatever be their individual failings, in future.[27]

Thus unjust criticisms undermining the status and dignity of judges is subject to the law of contempt of court.

8.3.2 Boycott of a Judge

In some cases, members of the bar boycott the court of judges for their misconduct or misbehaviour. In fact, court boycott of the subordinate judiciary is a common practice in Bangladesh. In the case of any allegation made by a member or members of the bar against a judge, the concerned Bar Association meets to discuss the allegations and to decide whether to boycott the judge. If the Association resolves to boycott the judge, it sends copies of the resolution to the superior authority of the judge including the President, the Chief Justice, and the Ministry of Law, Justice and Parliamentary Affairs before taking action against the judge. In addition, the

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[26] *State v Islam* (1985) 37 DLR 200, 204.
[27] *State v Islam* (1985) 37 DLR 200, 204.

Association informs the Bar Council of Bangladesh by sending a copy of the resolution.

I discussed the weight and outcome of the practice of court boycott with some officials of the Ministry of Law, Justice & Parliamentary Affairs.[28] I asked them about the general attitude or outlook of the government to incidents of court boycott. The Ministry officials disclosed that the government does not seriously consider all cases of court boycott. According to them, when there is any continuous boycott against a judge, the government particularly, the Ministry of Law, Justice and Parliamentary Affairs informally gathers information to assess whether there are any substantiated allegations against the boycotted judge. If it is found that there is *prima facie* evidence of the allegations made against the activities or conduct of a judge, disciplinary proceedings are taken against him or her. However, if the allegations do not appear to be substantiated, they simply see that the concerned judge is transferred to another jurisdiction.

The practice of court boycott can be better understood by a case study discussed below.

Case Study: Boycott of the Natore District Judge's Court in 1996

In 1996, the Natore District Bar Association started a continuous boycott of the court of the District & Session Judge Mr Sirajul Islam. On 15 July 1996, the Natore Bar Association adopted a resolution based on some specific allegations boycotting the

[28] As discussed in section 6.3.2.2, in any case of disciplinary action against a subordinate court judge the proceedings are initiated, investigated and adjudicated through the Ministry of Law, Justice and Parliamentary Affairs.

court for an indefinite period.[29] According to the resolution, the important allegations against the judge were that he used to misbehave with the lawyers, did not maintain the sitting hours of the court, and did not record properly the depositions of defence witnesses, but when the witnesses disclosed any information favourable to the accused, he shouted the witnesses down. The allegations added that the judge favoured the prosecution side of criminal cases and asked questions of the prosecution witnesses and in some cases he even asked leading questions of the witnesses. Another important allegation was that one day when a junior advocate was assisting a senior advocate, the judge got angry and loudly told the junior advocate to 'get out'.

The resolution of the Bar Association was sent to the Bar Council, to the Supreme Court and to the Ministry of Law, Justice and Parliamentary Affairs. I was told by the officials of the Natore Bar Association that after continuous boycott for about eight months the judge was transferred to another jurisdiction.

It is likely that according to the executive's assessment the allegations against the judge were not substantiated and therefore, the government did not take any disciplinary action against him. In order to resolve the situation of continuous boycott by lawyers the judge was simply transferred to another jurisdiction. This incident raises some unanswered questions: if there were no substantiated allegations, what would happen if the lawyers continued to boycott the judge and if there was any basis for the allegations, why should the government shift the problems to another jurisdiction by simple action of transfer?

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[29] I collected a copy of the Resolution by personal contact with the Bar Association.

In fact, there is no transparency in the role of the government to deal with the allegations on the basis of which the incidents of court boycott occur. This situation may be effectively improved by the establishment of an independent judicial commission as suggested in sections 4.4 and 6.4. If there were an independent commission having the power of disciplining judges, it could investigate the allegations through a transparent process and resolve the issues properly.

The above discussion reveals that the lawyers play their role in scrutinising the conduct and performance of judges by way of private or public or official criticism and boycott. Any constructive or substantiated criticism may protect judges from deviating from proper judicial conduct. Such criticism of judges by the lawyers may be useful to foster public confidence in the judiciary, and at the same time may enhance public awareness about the activities of the judiciary. It ultimately ensures public accountability of judges and also strengthens judicial independence.

It appears from the incident discussed above that the District Judge did not have to face any disciplinary action in respect of the allegations against him, but he was transferred to another jurisdiction. As mentioned above, the process of dealing with the incident was not transparent and therefore, the merit of the allegations is unknown to the general public. However, if such an incident occurs on the basis of substantiated allegations, it has a great impact on judicial accountability. The lawyers have close contact with the general public and their actions may have an impact on public understanding of the activities of judges. In any court boycott, when the incidents are made public by the lawyers directly or, as discussed in section 7.3.1, through the media the general public will know of the alleged misbehaviour or misconduct of judges. It has two important effects on the judges or judicial branch.

Firstly, it may have an adverse impact on public confidence in the judiciary and secondly, it may ensure that judges are careful about their activities and conduct. Hence, the practice of boycott is an important check on judicial conduct which may ensure judicial accountability.

8.4 CONCLUSION

In Bangladesh, the role of practising lawyers ensures public accountability of judges, but sometimes it may conflict with the ideal of judicial independence. In this regard, the law of contempt of court is an important balancing instrument to ease the tension between the independence and accountability of judges. However, as mentioned in section 7.3, the law of contempt of court in Bangladesh is very old and adequate provisions are not provided by it. The law of contempt should be in specific terms so that the lawyers can play an effective role in checking judges by upholding the status and dignity of the judiciary.

Another important factor is the mechanisms for dealing with the concerns of the bar about the activities and conduct of judges. An independent judicial commission, as recommended in sections 4.4 and 6.4, should be established so that the concerns of the bar may be considered in a systematic and transparent manner.

CHAPTER 9

GENERAL CONCLUSION

9.1 INTRODUCTION

This thesis presents an evaluation of the existing conditions of judicial independence and judicial accountability in Bangladesh. The concepts of judicial independence and accountability involve numerous aspects including the appointment, posting, promotion and transfer of judges, tenure and other terms and conditions of judicial service, discipline and other forms of informal scrutiny of judges. Not all the aspects of judicial independence and accountability are examined in this study. As discussed in section 2.5, the thesis concentrates on (1) the appointment of judges, (2) the tenure of judges, (3) discipline of judges, (4) media scrutiny of judges and (5) the scrutiny of judges by the legal profession.

This final chapter summarises the major findings of the thesis. In doing so, sections 9.2 and 9.3 identify the strengths and weaknesses of the systems of constitutional and judicial administration relating to the independence and accountability of the judiciary. Then section 9.4 outlines the possible solutions to strengthen judicial independence and to ensure judicial accountability in Bangladesh.

9.2 STRENGTHS

The Constitution of Bangladesh guarantees that judges 'shall be independent in the exercise of their functions'.[1] In addition, there are some other features of the constitutional arrangements and judicial administration which strengthen judicial independence and ensure judicial accountability. An overview of these features is as follows:

1) Judges in Bangladesh enjoy a fixed tenure of office until a mandatory age of retirement. Supreme Court Judges and subordinate court judges hold office until the attainment of 65 and 57 years of age respectively. Judges are subject to removal for specific causes and under a specified procedure. Supreme Court Judges are removable by the order of the President of Bangladesh following an inquiry conducted by the Supreme Judicial Council composed of the Chief Justice and the two next senior judges. The disciplinary proceedings against subordinate court judges, are initiated, investigated and adjudicated by the executive through the Ministry of Law, Justice and Parliamentary Affairs, however, in this respect the executive consults the Supreme Court.[2]

Thus the power of removal or discipline of judges is not vested exclusively in the executive. The Supreme Court has a role in disciplining judges.

2) There is a well-organised legal profession which plays a significant role in maintaining judicial independence and accountability in Bangladesh. Members of the profession actively protest any act of interference with the independence of the judiciary and there are some instances where they have successfully restrained such

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1 *Constitution of Bangladesh*, Arts 94(4) & 116A.

2 For more details, see sections 5.3 and 6.3.

interference.[3] They also play an effective role in scrutinising the conduct and performance of individual judges. This role of the bar ensures that judges are careful in exercising judicial functions and maintaining judicial conduct. It is an effective informal mechanism of ensuring judicial accountability.[4]

3) The media in Bangladesh plays an important role in preserving judicial independence and ensuring judicial accountability. It conveys information to the public about the judiciary and criticises matters which may be crucial to the independence and accountability of judges. For example, the media extensively covered the midnight sitting of the High Court Division for granting bail to an accused in a sedition case.[5] Another example is the publication of the cassette scandal which forced a High Court Division Judge to resign from the office for a telephone conversation with a former President convicted in a corruption case.[6]

9.3 WEAKNESSES

Although judicial independence is guaranteed by the Constitution of Bangladesh, there are numerous important weaknesses which undermine the independence and accountability of judges. Some of the weaknesses are summarised below.

1) The criteria for appointment of judges in Bangladesh are not explicitly published. Only some specific eligibility criteria have been stated in the Constitution and in the statutory instruments. In some cases, principles of seniority and quota are followed, but other criteria or qualities considered in making judicial appointment

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[3] For an important example of this role of the bar, see section 4.3.2.1.

[4] For more details, see Chapter Eight.

[5] For more details, see the case study 5 discussed in section 7.3.1.

[6] For more discussion, see section 6.3.2.1.

are not made explicit or publicly known. Moreover, magistrates exercising judicial functions are appointed from among public servants and a qualification in law is not a requirement for them.[7]

2) The executive enjoys almost exclusive power in appointing judges at all levels. In appointing Supreme Court Judges, there is a constitutional convention to consult the Chief Justice, but there are instances where this convention has not been followed. In appointing judges at entry level to the subordinate judiciary there is no role for the Supreme Court, even by way of consultation. In making appointments by promotion of subordinate court judges, the executive is under a constitutional obligation to consult the Supreme Court. In practice, this constitutional obligation is properly maintained in the case of persons employed in the judicial service, but not in the case of magistrates exercising judicial functions.[8]

3) The process of judicial appointment is very secretive and there is no scope for public scrutiny. Furthermore, there is no participation of members of the legal profession or lay persons in making judicial appointments.[9]

4) Although judges have a fixed tenure of office, in some cases their security of tenure is not adequate. Firstly, the tenure of additional judges of the High Court Division is not secure. The additional judges are appointed for a period of two years and on the expiry of the terms of their office they are appointed as permanent judges. However, in some cases after the expiry of the term of two years additional judges

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7 See section 4.3.1.

8 See section 4.3.2.

9 See section 4.3.2.

are not appointed to permanent judicial office. Consequently, the tenure of additional judges is not consistent with the concept of security of judicial tenure.[10]

Secondly, subordinate court judges hold office during the pleasure of the President and after completion of 25 years of service they may be forced to retire from office at any time before attaining the mandatory retirement age, simply by reason of 'public interest'.[11]

5) In respect of judicial discipline there is no specific system of making complaints against judges and it is almost impossible for a member of the general public to make a complaint against a judge. In addition, the system of discipline is not open to public scrutiny and there is no participation of members of the legal profession or lay persons.

6) Although the media plays a significant role in the context of judicial independence and judicial accountability, it does not have adequate access to information about the activities of the courts. In fact, there is no effective system to provide accurate and adequate information to the media. Another problem is the law of contempt of court which is a barrier to the role of the media. There is no specific provision regarding liability for contempt, even 'contempt of court' is not clearly defined in the law. In this respect the courts' powers depend on the vague and uncertain common law.[12]

7) Although members of the legal profession play a crucial role in maintaining judicial independence and ensuring judicial accountability, they do not have any

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[10] See section 5.3.1.

[11] See section 5.3.2.

[12] For an extensive discussion on corruption, see Chapter Seven.

formal role in the affairs of the judiciary, including in the appointment and discipline of judges.

8) Judicial corruption is a serious problem for the judiciary in Bangladesh. In most cases that occur court staff are involved in the corruption and they receive bribes directly from the parties or through the lawyers. In some cases, judges are involved in corruption, but it is very difficult to prove their involvement. This problem seriously undermines public confidence in the judiciary.[13]

9) Delay in the disposal of cases is a significant weakness of the justice system in Bangladesh. After filing a case nobody knows when it will be disposed of. There are several causes for delay, including the role of court staff, lawyers and judges, and the poor system of court management and case management. In criminal cases, however, investigating officers may also be responsible for the delays.[14]

9.4 SOLUTIONS

This thesis does not deal with all the above weaknesses, particularly delay and corruption. Although the issues of the delay in disposal of cases and corruption may impinge on judicial independence and accountability, they are beyond the scope of this work. However, they are discussed as relevant aspects of Chapters Six and Seven. As the thesis concentrates on the issues related to judicial appointment, security of tenure, judicial discipline, and the role of the media and bar in scrutinising judges, it identifies some solutions based on the arguments advanced throughout the thesis. The following solutions are proposed in order to strengthen

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[13] For more discussion, see section 3.3.

[14] For more details, see section 3.3.

judicial independence and to ensure judicial accountability in Bangladesh. In summary, it is recommended that:

- The criteria for appointment of judges should be made explicit and publicly known and in this regard the criteria for appointment of judges in Canada and England can be followed.
- The mechanisms for judicial appointment should be made transparent and open to public scrutiny. In this respect the working procedure employed by the Judicial Service Commission of South Africa can be followed.
- For the appointment, promotion, transfer and discipline of judges at all levels an independent commission should be established with members from the executive, legislature, judiciary, legal profession and lay persons. In this respect, the models of the Judicial Service Commission of South Africa and the Commission on Judicial Performance of California can be followed.
- Judicial vacancies should be advertised and all appointments should be made by open competition as in South Africa.
- Appointment of additional judges of the Supreme Court should not be made as a regular practice. Additional judges may be appointed to meet urgent necessity, particularly to reduce backlogs of cases or to solve temporary shortages of judges.
- The judiciary, particularly the subordinate criminal judiciary should be separated from the executive branch of the government. For the sake of security of tenure of magistrates of the subordinate criminal judiciary, full-time judicial magistrates should be appointed to exercise judicial functions instead of investing magisterial powers in public servants.

- Provision should be made to ensure that until the attainment of the mandatory retirement age subordinate judges should hold office during good behaviour and competence instead of the pleasure of the President and without being subject to forced retirement.
- Media liaison officers should be appointed to provide adequate information about the judiciary to the media. In this respect, the models of Australia or United States can be followed.
- The law of contempt of court should be amended to specify clearly the liability for contempt.

LIST OF ABBREVIATIONS

Abbreviation	Title	Jurisdiction
AC	English Law Reports, Appeal Cases	England
AIR	All India Reporter	India
AIR (SC)	All India Reporter (Supreme Court)	India
ALR	Australian Law Reports	Australia
ALJR	Australian Law Journal Reports	Australia
All ER	All England Law Reports	England
DLR	Dhaka Law Reports	Bangladesh
DLR (AD)	Dhaka Law Reports (Appellate Division)	Bangladesh
DLR (4^{th})	Dominion Law Reports (Fourth Series)	Canada
Eng Rep	English Reports	England
Ind App	Indiana Appellate Court Reports	USA
KB	Law Reports, King's Bench Division	England
NE 2d	North Eastern Reporter (2^{nd} Series)	USA
NSWLR	New South Wales Law Reports	Australia
QB	Law Reports, Queen's Bench Division	England
SCC	Supreme Court Cases	India
SCR	Canada Supreme Court Reports	Canada
SOL	Supreme Court Online	India
US	Reports of Cases in the Supreme Court	USA
WLR	Weekly Law Reports	England

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