Continued from last week

Yes, we speak about public interest litigation as it has devel-oped in India and very eloquently. But I will try to point out cer-tain difficulties and certain limitations of public interest litigation. But before I do so, I would like to say that the whole concept, the origin of the judiciary was to settle bonafide not malafide, bonafide disputes between the parties.

Now, the role of the judiciary has expanded with the adoption of the concept of public interest litigation. And along with it the danger of public interest litigation is also being faced by the judiciary. I have just listed these dangers. Before you I will throw these dangers that I have thought out, I have been facing as a judge

of the Supreme Court. The first danger is this that 'over activism' by the judiciary, by the Supreme Court will result in user patterns of the powers of the parliament. Will it be allowed? Will it be wholesome for the Supreme Court to start legislating, to encroach on the area in which the parliamentarians dwell? Will it be proper of not? In this connection I would like to cite the case which is very eloquently cited here, the case of Justice (when he filed the case, he was not a judge but later became a judge of Calcutta High Court) B.K. Basu versus the state of West Bengal in which he challenged as a public interested person. While he was an advocate, he challenged illegal detention of a person and torture on that person by the police. In that case, the case ultimately went to the Supreme Court of India and in that case the Supreme Court of India specified, gave as many as eight directions as to how a person has to be dealt when he is arrested by the police. That is legislation. Whether the Supreme Court constitutionally possesses or whether it is desirable on the part of the Supreme Court constitutionally to assume the power of the parliament? It is the first difficulty being faced by the judiciary.

The second is this will we allow, there are various institutions, organs, shall we allow the Supreme Court to be the arbitrator of what is public interest? Will they have the last word about what is public interest, about what is social justice?

Now digging the question, is the Supreme Court right because its decision is final? Or is the Supreme Court decision final because it is right? Which is right? Shall we allow the Supreme Court to be the arbitrator of saying the last word about what is social justice, about what is in the interest of the society? Is it the function of the judges of the Supreme Court to say the last word in this matter? This is the second difficulty.

The third difficulty is this that 'over activism'. As in India you will find the Supreme Court has been encroaching on the jurisdictions of the executive. Who will select the priority? There are various problems before the executive branch of the government, social problems, economic problems, financial problems, political problems. Who will select the priorities? The executive will select? Or by issuing a writ petition, an order in a writ petition, a mandamus, the Supreme Court will select that this is the priority. Well look here President, look here council of ministers, you take action on this priority, this is the greatest priority. Who will be the selector of the priorities in the country, priorities of the problems? Whose function is it to select the priorities, the executive or the judiciary, the Supreme Court?

Then comes in the question of that it has been found that even those lawyers in the developed countries, even in the United States, lawyers who have been trained in public interest litigation sometimes they also fight malafide petitions only for the purpose of publicity. They have no concern whether they win the case or lose the case. They simply file an application before the court, in the name of public interest litigation, for the purpose of their own publicity. This has happened not only in India, not only in Pakistan. I do not know of any such instance in Bangladesh as yet. Maybe tomorrow such petition will be filed by some lawyer only for his self-publicity that he has filed an application in the nature of public interest litigation. So this is another difficulty. The fourth difficulty I have said.

The fifth difficulty is the question of standing. This is a very serious question, locus standi. Who knows that an interloper has not filed the petition? Who will decide? Is it possible for a judge in adversarial system of delivery of justice, judicial administration to find whether a person who has filed a petition is an interloper? Whether he is a busy body or is he a genuine person having interest in public welfare? Who is to select?

So, two solutions were given. One solution by often quoted former chief justice of India Justice Bhagabati. He said, in the language coined by Justice Bhagabati, "if the judge is on the same wavelength as the constitution of his country there will be no difficulty for him to find out whether a person who has filed an application in the nature of public interest litigation is an interloper or not."

There is another solution by very eminent judge of the US Supreme Court, Justice Stewart. He said, well look here, "I cannot define what is pornography. I can identify what is a porno when I see it." So, when a judge sees a man he can decide whether this man is an interloper, whether this man is a busybody or not?

So, to a judge, a dull-headed judge like me, the solution given by Justice Bhagabati is too optimistic a solution. And the solution given by Justice Stewart is too subjective. But what is the objective standard before me to find out who is an interloper and who is not?

So, before we open the avenue for public interest litigation we are to just plug these loopholes. These are the pitfalls, these are the loopholes of public interest litigation and you have to plug

These are the difficulties I have placed before you. You will find out the solutions. Yes, we have come here to bury Caesar and at the time of burial we have forgotten the contribution of Caesar for Rome. We have equally forgotten the contribution of the judiciary of Bangladesh for Bangladesh while we are burying.

Now, Tania is very aggrieved because one or two or three or four particular cases some of the judges might have committed a bonafide error, do not know, because might be the decisions which she spoke of might be decisions still subjudiced before the Appellate Division, I don't know. Let us wait for the outcome of

these judgments from the Appellate Division, then we will decide.

And I would now say one or two words about what Mr. Mahfuz Anam remarked at the time of the introductory speech.

Yes it is true and in this connection I am giving you an episode. I was inspecting the civil courts and criminal courts in a certain district and the Bar Association of that district met me at a dinner and during the dinner the Bar Association President addressed me and he told me in passing that the judges of that district were very honest. And when my turn came for replying to his address I said that Mr. President by terming the judges of your judgeship as honest you have not given me a compliment or the judges of the judgeship any compliment. It appears to me that you have slapped on my face. Because to say that a judge is honest is superfluous. Judges are presumably honest. A normal man does not go and drink water from a drain, polluted water from a drain. Similarly, if a person does not drink water from a drain, a normal man, you don't say that he is normal. But when he drinks water from a drain, you say he is insane otherwise he could not have done this. Similarly it is superfluous to term a judge as honest. You are to accept that a judge is honest. If he is not honest then he is like that insane man. Then you can say that such and such person is dishonest.

So, now the time has come for us to ponder why from the mouth of Mr. Mahfuz Anam this apprehension has come out. I don't say that what Mr. Mahfuz Anam has said is baseless. Twenty years back nobody would ever say whether the judiciary was honest or not, because the judiciary was accepted as honest. Might be, there are some judges who could not write judgment quickly. There are some judges who were slow in understanding the position of law. There were some judges who were inefficient, but nobody termed a judge as dishonest.

In fact, I would appeal to those who matter, who are concerned with the judiciary. It includes those people who are in-charge of the superintendence and control of the subordinate judiciary, those who are concerned with their control, their discipline, their promotion, those who are concerned with the superintendence and control of the judiciary. A day will come when the people of this country will demand from them that tell us, explain that why the judiciary has come to this state. I would only say that there is still time to reclaim the judiciary from where it is going very fast. Please do it. Thank you very much.

Dr. Kamal Hossain It think of the future, of those who will build the future. The

21 century is in front of us. In the Constitution we have set the ways by which the country will be run, for attaining what target will power be used. The power of state must be used in the interest of the people. This is the fundamental fact of constitutional rule.

Public interest is for the interest of 120 million people. Where we have a Constitution, the country is to be run in keeping with the Constitution. The values are all given in the Constitution.

Who wields the state power? The parliament. It sets up laws, promulgates rules, approves of the budget to see whether it is for the people or not. It sees if the executive applies its power in the interests of the people. The judiciary has a vital role to play. The fundamental rights of the people are recorded in the Constitution. The fundamental rights are those matters for which all people can have respect. Each an every organ of the state and each and every citizen of the country must be respectful towards these

The Yep Forum Public Dialogue on Public Interest and the Judiciary

Organised by the Young Entrepreneurs and Professionals Forum in collaboration with The Baily Star and the British Council.

Among those who participated Dr Kamal Hossain, Senior Advocate, Bangladesh Supreme Court.

Dr. Sirajul Islam Chowdhury, Convenor, The Committee for the Protection of the Trees of the Osmany Udyan-

Mr. Ehsanul Habib, Senior Staff Lawyer. Bangladesh Environmental Lawyers Association (BELA)

Mr. Adilur Rahman Khan, Advocate, Bangladesh Supreme Court Ms. Tania Amir, Advocate, Bangladesh

Supreme Court. Dr. M. Ershadul Bari, Professor and Dean, Faculty of Law, University of Dhaka.

Justice Naimuddin Ahmed, Member, Law Commission. Mr. Mahfuz Anam, Editor, The Daily Star

rights. If anyone violates these, the judiciary, the Supreme Court is particular, has a constitutional responsibility. It ascertains that no one crosses the limit, that every one honours the fundamental rights. If anyone violates these, the Supreme Court has the power to issue orders against the person who violates the rights and can announce that the particular action has be in violation of the Constitution, that human rights have been violated. So this is to be considered unconstitutional and can be annulled. Even if a law goes against the Constitution, that law can be repealed. th

The 8 amendment says that if the basic structure is contrary tot he Constitution, it can be annulled. And our judiciary has done so. I want to tell Justice Naim Uddin that our highest court still have everyone's confidence and respect. The Halima Khatun case discussed today was under martial law when the court functioned but did not contribute as much as had been hoped for by the people. But that was under martial law. Martial Law and the Constitution can be placed side by side to explain martial law. This has been applied at different times in different countries. What we had hoped for at the time had not been fulfilled and so there was criticism. Our your colleague has been speaking. When we were that age, the court wouldn't listen to us either. Then we would go somewhere and unburden ourselves. But she has this opportunity at a good forum. There is the Appeal Division. But even so, there still are some problems.

Then there is the question of women's rights. Women want to go ahead. The women's movement is a valuable tool for this, but we don't want just a movement for women. We want a movement for humankind. Women want a change from the social system of 50 years ago. We hope for a changing progressive social system. The court can help. The movement must go on. Public opinion must be mobilised.

I am very interested to hear what our future leadership is thinking. What do they want? What role will they play in building the future? I have a few things to say on that.

What has been written in the Constitution will remain in the pages of the Constitution. It must be activated. We must be conscious citizens, aware of our own rights, our own responsibilities. The public interest litigation being talked about today has been possible because conscious citizens have come forward to play a role in this regard. Why? I want to tell Justice Naim Uddin that many persons have been obliged to take up public interest litiga- . tion because the government machinery has failed to carry out its duties. Where will the people take their frustrations, their anger? Ambedkar pointed out that there is discrimination between

man and woman, rich and poor, there is the matter of untouchability. These contradictions must be resolved. The law council's responsibility is to speedily formulate a law in this regard to bring reforms in the society. He said that if that was not done, he would burn the Constitution. What would he do today, had he been alive?

The Constitution is not there to be burnt. The Constitution must be rendered effective. We must use the contents of the Constitution to bring about change. This is a challenge. We cannot be happy with the society that we have. I want to ask the future leaders, are you all satisfied? Are you satisfied looking at the social scene around you? This society is a sick where, filled with violence, police misdemeanours and injustice. It is riddled with disease. Are you happy with the executive powers to cut down trees? My friends and I have demonstrated against this. The executive has the power, but is it using it in the interest of the people? We have no reason to presume that simply if the government does something that it is in the interest of the people. There are many instances where the government may take a decision, but the public may say that this was not correct. The government will accept that. If not, the people will come forward. I was very encouraged to see so many people come forward selflessly. This is an expression of public will.

Lastly, how can public interest be involved with the judiciary? The public has three points of interest in the judiciary. One is the judiciary be independent and neutral and free of corruption. Unless it is free of corruption it cannot be neutral. It cannot fulfill the minimum requirements. It is also more or less recognised that the subordinate judiciary has to be reclaimed. This cannot be destroyed. It has been corrupted, but if one has a headache one does not cut off the head. The judiciary must be cleansed. This does not need an extreme bomb blast, the Constitution is enough. No need for grenades. In Article 22 it is written that the state shall ensure separation of the judiciary from the executive. Then all judicial appointments, promotions, disciplinary action will be the responsibility of the Supreme Court. This has been carried out in many countries, even in Pakistan. So thetdemand for separation of judiciary is in our interests. In the 21 century we want such a court which is completely independent.

If you all now demand for a separate judiciary NOW, not tomorrow or a day after, I will be happy. If Mahfuz Anam give a headline, 'Separation of Judiciary NOW', my coming here will be justified. It is high time. There are only six months left for the new century. We don't want to enter it with a judiciary that is

We want change. We want a lot from the parliament. We have had several martial laws, but India has had an uninterrupted 50 years of parliamentary democracy. The parliament there too has disappointed the people at times. But there have been amendments and reforms.

If there is no public support for a certain verdict, the parliament can rule out the verdict. The conservative court had nullified land reforms. But the parliament came and protected the amended laws. That is ideal. But no human institution is always ideal. There are imbalances. Then the balance has to be restored constitutionally, not by martial law. It is the misfortune of Pakistan and Bangladesh that a third party has had to come and intervene. This has hurt the Constitution. Constitutional balance can be maintained through by the parliament. If the parliament overdoes things, the court checks it. If the court overdoes things, its explanation must be heard. The final word is of the Constitution. The country will be run by the Constitution, but when there is an interpretation, then the parliament change matters. The court did not proceed for a second time on the land reform issue. So the ultimate word is with the people.

I will end with another example. Nixon's prosecutor Cox was a Harvard professor. He said that the day be issued summons, Washington's directions were that Nixon was to submit the tapes to his office the very next morning. The tapes had record of this illegal activities. Cox said he couldn't sleep the whole night, having wield more authority than the President.

If the guard turned away the messenger from the White House gates, what would the court do? The President is the Commandeering Chief of Armed Forces. The next morning the Washington Post carried a big editorial saying that Nixon would have to listen to the court's orders. So here, what will Mahfuz Anam do? He is such a powerful man. He is one of those who can mould public opinion. The New York Times had an editorial on Nixon. The TV programmes all were saying that Nixon would have to obey the court orders. The prosecutor was then confident that the people of the country would uphold the Constitution. The President would have to obey, there was no alternative.

We must make our Constitution effective in such a manner. Let us all now declare that we must follow the Constitution, the police must follow the Constitution. They cannot oppress the people. They cannot harass the people. People are being tortured everyday in police custody. But if we go on demanding for this, this will have to end. We are the force. The main statement of the Constitution is that power belongs to the people.

There will be deficiencies in the transitional phase. There have been misinterpretations of the Constitution. The state power is being misused. Illegal activities are taking place. We will

certainly urn to the court.

It was through newspaper reports that the 12 year old boy was released. It was by reading press reports that Judge Rabbani said that unlawfully carrying out hartals or unlawfully prohibiting hartals were both illegal. So our court has already reached that stage. There are no limits to the jurisdiction of the court. The court is the protector of the Constitution. The court will act if anything unconstitutional comes to its notice. If not, we will have to act and bring the matter to the attention of the court. I want our young leaders to take this responsibility. There must be judiciary activism, lawyer activism. The lawyers cannot simply wait for fees. Those working in public interests are not doing it for any fees. When we stand by them, we don't do it for fees either.

I brought an old file of the judges to show our young lawyers. When there is a bonafide petition, it can be seen how much work goes in behind it. When you think of Mustafa Faruk, reading his petition shows how much hard work went into it, how much research, how much information. This is not found in any, malafide petition.

Panel of young lawyers's discussion moderated by Mahfuz

Mahfuz Anam: Journalists have an occupational hazard. If I am going to be true to my profession, then I will have to be true in what I am saying. I want to tell Dr. Kamal Hossain, Justice Naim Uddin, sirs, I am very honoured and excited that you are with us, but I am extremely disappointed by what you said. I say this will all humility and respect. I didn't detect that sense of urgency that I think we share in the public. There is a crisis of confidence, don't have the boldness to say a crisis of confidence in the judiciary, as I might be pulled in for contempt of court. We have placed the court in the highest stature in the society. If they do not carry out their responsibilities as citizens we cannot say, you have erred. This will be a contempt of court. It's a structure protected by its own power.

We have made the executive accountable, we can write against the parliament, but we can't write against the judiciary. If I see a judge taking bribes and I write about it, I will be held for contempt of court. Where do I go? This is where I want your guidance. If Dr. Kamal Hossain says there is something wrong in the judiciary, if Justice Naim Uddin says so, it will make much more waves. It carries much more weight than we as journalists.

My second disappointment is that when we speak of the public, we define this in a collective sense. But the public is an individual as well. What I write as a journalists has a lot to do with my ethics, with my courage. I can ignore an issue or I can write about it. Now as lawyers, the Bar Association is nor only the judiciary, there are the judges who are responsible for upholding the integrity of the legal system, but also those who practice. Don't you know what is going on? Why is there no protest? Why is it that the public has to go to the streets and say, I want a good legal system? What about the lawyers? You are a part of the system. As a journalist, I know much more about the corruption in journalism. It is my moral obligation to reveal these weaknesses in my profession. I find the lawyers are not upholding the total responsibility of the judiciary system. I am sorry because I am speaking as an aggrieved citizen.

About public interest litigation, do we want an active judiciary? Do you want to impeach the right of the parliament? I don't want the judiciary to impeach the right of the parliament. I want a judiciary to implement the law which exists in the country. If those who are to implement the law do not do so, will you just sit back? Let me give a simple example. The municipality collects tax to clean the garbage. Yet every morning I wake up to see piles of garbage on the road. My municipality is doing nothing. My government is doing nothing. Is the judiciary going to do something That is my question. We have kept the judges in such a lofty position.

A judge saw the picture of the 12 year old boy in jail and released him. Can a judge see the picture of garbage piled on the streets and ask the municipality what it is up to? Why is it taking taxes but not cleaning the streets? Wouldn't this be judicial activism?

People are dying of lead poisoning in the air. Our lead poisoning is the highest in the world. Can the judiciary hold the Ministry of Environment or Ministry of Commerce responsible for the import of two-stroke engines? Dr. Kamal Hossain, if I promise to give you a heading tomor-

row, will you promise to lodge a public interest case tomorrow? That is the type of coalition we are looking for. I think journalists and lawyers together can do a lot. If former judges join us, the We have five young lawyers here: Khaled Hamid, Omar Sadat,

Tauzibul Alam, Tureen Afroze and Afzal Hossain. Khaled Hamid: I want to ask Justice Naim Uddin Ahmed, he

had said the court should be pro-active and reserve the rights of parliament. What we see in public interest litigation is who is the person suing, not what is the cause. If anyone goes for public litigation, it is assumed they are going in order to make a name for themselves. But there can be a good cause to. Why is the person and not the cause given prominence? Justice Naim Uddin: I have been misunderstood. I did not say

that the court will always assume that if any one goes for public litigation, he is going in his own interests. There must be public interest litigation. This cannot be stopped. I had tried to highlight the dangers of public interest litigation. Of course the section of people who are unheard and repressed must be heard. The court can offer a remedy which can be provided with another agency. The court will entertain such cases for the disadvantaged section of society. This is activism. There may be controversial issues. There may be infractions.

Look at the case where the boy was 14 years in jail. This was seen in the papers, the judge had a case. The government had to appear in court. There were lawyers and two days of hearing. Then the boy was released.

There are similar situations. Myself, Amirul Islam, Shahajahan Malik, Fazlul Haq. we visited Chittagong. but incidentally went to vist Chittagong Jail. We found that about half a dozen boys aged between 5 and 7 are in custody. They were under tribunals. We asked according to our penal code they cannot be criminals. How could they be put in jail? The magistrate who looked into their eyes surely could not have sent them to jail. He could have immediately allowed bail. They said they didn't know. They took the list of people. I said I had an appeal for a list of six boys for 5 to 7 years who were in jail. I asked, could you move a petition for bail tomorrow for those boys. They were released the following day. We didn't have to file a writ petition. It didn't appear in Mr. Anam's paper either. For a matter which can be dealt by an constable or an SP, why does a Supreme Court Judge have to be approached?

About the garbage of Dhaka city, if the people of the city rise up, the judiciary will certainly help. But it is not the function of the judiciary to resolve all the problems around the country and it cannot remedy all the problems. Thank you. Questions for Justice Naimuddin Ahmed:

You have told us about some of the dangers of public interest litigation. "over activism" is one of them. You have said that the supreme court may become a super legislation. From the experience of the American society we are hearing various terms like 'judicial disputism', 'judicial dictatorship', and they think that the judicial power has actually become boundless ocean. From their experience and after opening the floodgate of nearly 50 public litigation they are now saying, revising Lincoln's words that 'we the people of the United States today have a government of the judiciary, by the judiciary and for the judiciary'. But my question is that isn't there anything about the judiciary playing

all cases, where we even don't bother about social justice. I think some sort of risk should be taken at any cost. Otherwise for the sake of our future society if we don't venture we don't

an active role in a third world country like ours where you find

many examples of under-development, where we are backward in

The second point is that public interest litigation may turn to be publicity interest litigation. The abuse of process; court process, is going on in all cases then why cannot the judiciary do it in case of public interest litigation. I don't see any justified reason of not being able to identify the process.

The Young Entrepreneurs & Professionals page——

And you have said about the 'optimistic approach' which is the correct social perspective and on the same wavelength. Here you have said that we need to build up an objective approach whether the problem can be resolved through a straight jacket approach?

Justice Naimuddin Ahmed At a seminar I told Justice Bhagabati that I am a very dull judge. Talking about being on the same wavelength, if I am intelligent I might be on the same wavelength and be able to catch things immediately.

And it is understood that Justice Stewart's solutions are subjective because, for example 'Lady Chatterly's Lover' that was born 60 years ago is one of the greatest literature of today. One which is porno to me may not be for others, he might be considering it as a great piece of art. This is subjective.

I said that I have a small solution and I also said that in the seminar that in our adversarial_system it is not possible on part of the judge to find out the actual reason of cases with litigation background. In adversarial system there is no relation with the client and we stay far away from them. It is not the system that the judge can himself go and find out.

Who can help them here? One organisation can and that is the 'bar'. The judge cannot find out, he cannot even ask. But the lawyer to whom the person had gone for getting a petition drafted in the nature of public interest litigation, that lawyer after 15 minutes or half an hour discussion can find out if the person is an interloper or has really come with public interest in his mind. It is my personal view that it won't be possible in 100 per cent

cases, but in 80 per cent cases the lawyer will be able to find out whether the person is really an interloper or a bonafide one. We are always saying here that judiciary means the bench of the bar. In the adverserial system one cannot run without the other. Coordination between the two is essential. The bar helps the court in this regard. It is for sure that the lawyers will be able to find out the intention of the person for filing the case. Is he filing the public interest litigation to put his neighbour or business ri-

val in problem or has he really come for public welfare. If a

lawyer discourages a person to move petition which are not for

public welfare then possibly the problem can be solved. Another question you have raised is about 'over activism'. 'judicial activism'. You have used the work 'over activism'. I am not saying anything against judicial activism or its danger. I am always saying about 'judicial over activism'. whether judiciary crosses the limit set by the constitution and the law. I have to admit that a judge should remember his constitution limit. He is not an executive, he is not a parliamentarian, he is a judge and has to be within the bonds of the constitution. I want to caution against crossing the constitutional limit or the law in case of over activism. Over activism means where a judge in his anxiety to do justice crosses the constitutional and legal limits. Thank

Omar Sadat: I want to ask a question to Justice Naimuddin regarding over activism. I did a case on behalf of "Adhunik" last month which was against tobacco advertisement. An ordinance was passed in 1990 banning all tobacco advertisement. After that Ershad went and BNP came to power and that ordinance was never raised in the parliament. And so, according to article 93 of the constitution the ordinance lives. So, I went to the court and said everybody is lobbying for tobacco and they are very powerful. But who will save the 14-15 year old children who are attracted by the Benson and Hedges packet saying 'turn to gold'. They actually say 'turn to death'. Here our political leaders fail to provide the correct leadership. What is the harm if they provide leadership here? Here Justice Fazlul Karim and Ali Asgar Khan are giving direction to the government to make a law. They are saying why the government should not be directed to make a law on the basis of the ordinance. I understand that the separation theory of the judiciary and the executive is obstructing here.

Justice Naim Uddin Ahmed : I cannot give a straight answer here. I don't know whether the parliament can be directed for such a legislate. Dr. Kamal Hossain is more learned in this matter. Although I agree that this involves the question of public welfare but I have every doubt about the constitutional right of the Supreme Court to issue such mandamus directions. The power to strike down a law is of course there but I will request Dr. Kamal Hossain to say something if it has got the power to issue mandamus.

I am saying another thing as I had the opportunity and that is about the frustration regarding contempt as said by Mr. Mahfuz Anam. There is no confusion in particular regarding this. There is no law regarding contempt. What is contempt? Apart from other countries, there had been so many cases in our country in the last two hundred and fifty years but there is no precise definition of contempt. But the causes of contempt are very clear to the court. I understand what is agitating his mind and that is I am unable to say anything against things like taking bribe, there is no accountability.

In the lower courts, from subordinate judiciary assistant judges to district judges, there is accountability in every step. If you read the rules you will find that every assistant judge is accountable every moment to the district judge. If an assistant judge sits in the court at 9:35 in the morning instead of the scheduled 9:30, the district judge is bound to take action against him, but he is not doing so. Monthly statement of who is doing what job is reaching the Supreme Court. There is a quarterly report of who is working more and who is working less. But the report of the work of an assistant secretary or a secretary does not go to the minister. The accounts of the work of a munsif or an assistant judge or sub-judge is going to the district judge every month and to the Supreme Court every three months. So, he has his accountability where the question of disposal comes.

Accountability of subordinate judiciary, chief justice is not there. The Supreme Court judge is accountable to his own contents and if that feeling is not there the person is not fit to be elevated to the Supreme Court. I will say that if one is not accountable to the people for his work he is not fit to be a judge of the Supreme Court. Such a person should not be made a judge

Question: Sir my question is what can the Supreme Court do in Suomoto? Separation of judiciary from the executive, but it is in the constitution?

Answer: Dr. Kamal Hossain has not disagreed with me. It is in the constitution and there is a judgment that even without the amendment of Article 116 the separation can be done. I this Article it is said that "The control which includes posting, promotion and discipline these shall vest in the President who shall exercise it in consultation with the Supreme Court." In the original constitution it was said that "it will vest on the Supreme Court". Now it can be done in this way that the Law Minister will ditto what the Supreme Court says after consultation and there will be no interference. But an executive authority may come tomorrow who may say that constitutionally that this power is vested in President, why this power shall be relegated to the Supreme Court, we will exercise this power according to Article 116. This depend on the wishes of the executive.

Secondly, there are many subtle things. For example, the executive department, ministry of law or the ministry of establishment sends a proposal of 100 transfers. How many will the Supreme Court receive in 100 cases? It will be embarrassing for the Supreme Court to refuse all the postings, promotions and transfers the government as authority is sending. Refusing all of them is not exercising of power. And as soon as the Article 116 is amended, the government will have no alternative but then and there to transfer this. The government will listen to what the Supreme Court says in consultation as written in the constitution. If it is not followed then again writ petition, again argument and then again its interpretation.

Question: Article 70 clearly says that the judiciary and the executive will be separate. But it has been done by an amendment. It is now to uphold the constitution.

Answer (Dr. Kamal Hossain) : We can get a judgment. We have won in the High Court. Judicial service cannot be part of civil service. It is completely separate. It is pending in the court and the hearing might take place this month. Suppose the Appeal Division says that separation is fundamental principle and now this principle should be implemented. Some law will be necessary to do this. The file transfer should be necessary. The appointments will be made. These cannot happen through a tug of war. Some impasse has been their with the appointment of the CMM because CMM are appointed without consultation. There is no benefit in dragging the entire judiciary of the country into this tug of war.

Dr. Kamal: There is no use of going into this tug of war. The court says there has been a separation and the executive agreed. but there was no implementing measures. If there is a public movement now for separation of the judiciary now, I assure you whatever needs to be done will be done. We will go to the court together to mobilise public opinion.

Justice Naim Uddin Ahmed: In this connection, let me speak of a recent incident. There needs to be constitutional support. A judge must be appointed in consultation with the Chief Justice. Traditionally for 250 years it is done but it is not in Article 95. There was a provision but it was removed in the last amendment. Then a few judges were appointed. The Chief Justice did not like them and thought they were undesirable. What was to be done? I was called and others too. I said don't add minister's oath. I can speak frankly now I am out of the Supreme Court. He said, if I do not do so, will I not be guilty of violating the Constitution? The Constitutional matter is that the President will control, will change. This is a great obstacle. Why should we keep the defect in

Dr. Kamal Hossain: We told him not to take oath for 48 hours. We will mobilise things in that time. The Bar will unitedly say that the Chief Justice must be consulted for appointment of high

court judges. That resolution was passed.

the Constitution?