

# Appointing Judges in the Appellate Division

## A MEMORANDUM FROM THE SENIOR COMMITTEE OF FIVE MEMBER ADVOCATES

A five member committee was selected in a meeting of lawyers of all shades for trying to resolve the impasse arising out of the appointment of two Judges to the Appellate Division of the Supreme Court. There was an incident on 11 January 2001 in the Supreme Court premises, which was widely covered by the press. During the deliberations of the Committee, there was discussion about the situation in Parliament, outside Parliament, in press conferences by or on behalf of the Government.

We had earlier an assurance for such meeting in the near future. Having waited for quite a long time and having noticed the views of the Government being reiterated emphatically we thought that we had no other alternative but to let people know how we see the prevalent crises.

Non-observance of the Constitution is such a matter, which quite naturally is a matter of concern and anxiety for all of us. And it is more so when it relates to the supreme judiciary established by the Constitution and independence of the judiciary, which is so fundamental that as a basic feature of the Constitution it is unalterable even by amending power under the Constitution. The lawyers of the country stood at the forefront of the movement against autocracy and for restoration of democracy and made sacrifices and took punishment. In the end, before the fall of the autocrat, through the judgment of the Appellate Division of what is popularly known as the 8th Amendment Case Judgment finally had the unalterable basic feature concept accepted and declared by the Appellate Division of the Supreme Court. We are concerned because we feel that the executive authority of the Republic has made an inroad by the recent action in this

basic feature in so far it constitutes an interference with the independence of the supreme judiciary.

As has been said we undertook the task of seeking a resolution of the critical situation, which arose from the recent appointments to the Appellate Division of the Supreme Court. Our proposal is unanimously shared by the senior members of the Bar, who together engaged themselves in mutual consultations and upon an extensive exchange of views arrived at the agreed proposal. In doing so we have never intended or in fact acted in support of any particular group far less the group which adopted a mode of protest which we consider inappropriate and indeed expressly said so on that very day, i.e. 11 January 2001 while addressing a gathering mainly of the protestors who spontaneously assembled in the hall of the Supreme Court Bar Association to hear our views. It is known to all concerned at the Bar and outside that we took the initiative on that day to bring about an end to what was going on in the Supreme Court premises and we are thankful to God that we succeeded in creating a situation where the Supreme Court is continuing to function normally in the interregnum between then and now. We therefore, maintain that there is no basis for suggesting that we have acted for any particular group. Our proposal is that the remaining two recommendees be also appointed to the Appellate Division of the Supreme Court. The proposal has the support of the Chief Justice, who indicated that he was ready to take initial steps in this regard. The Chief Justice had indicated when sending four names that all were competent and that seniority should be respected. This recommendation was not followed, but no reason was conveyed back. The President too, was pleased to indicate that our proposal should be given due consideration by all concerned.

From the outset our role has been firstly, to normalize the situation and thereafter coolly to ponder

over larger constitutional issues involved in what was done in the matter of appointment of two judges to the Appellate Division of the Supreme Court. We were particularly concerned with the paramount question of maintaining the Independence of Judiciary which is an unalterable basic structure of our Constitution as declared by the Appellate Division of the Supreme Court in the judgment popularly known as the constitutional Eighth Amendment Case Judgment. This has been brought out with greater clarity in the judgement of Shahabuddin Ahmed, J, as his Lordship then was, and now the Hon'ble President of the People's Republic of Bangladesh:

"But in reality basic structure of the constitution are clearly identifiable. Sovereignty belongs to the people and it is a basic structure of the constitution. There is no dispute about it, as there is no dispute that

appointment of judges to the Appellate Division of the Supreme Court. It is our considered opinion that the established constitutional practice and convention of prior consultation by the President with the Chief Justice in the appointment of a judge to the Appellate Division is a logical consequence of an "Independent Judiciary" as a basic structure of the constitution. The time-honoured process for appointment of judges to the High Court in British times, and later to the High Court and the Supreme Court, called for consultation with the Chief Justice.

The Constitution of Bangladesh as adopted in 1972 in Article 95(1) provided that the Chief Justice shall be appointed by the President and other Judges shall be appointed by the President after consultation with the Chief Justice. The words "after consultation with the Chief Justice" were deleted by the Fourth

appointments and urged upon the Chief Justice not to give oath to those judges. This resolution was conveyed by the leaders of the Bar Council and Bar Association to the Chief Justice, who after consultation with all the judges informed that he would defer giving oath for two days, during which time the President and the Prime Minister may be approached to resolve the situation.

A delegation of senior lawyers met the President and Prime Minister. The Prime Minister having been informed of the consistent practice and convention regarding consultation with the Chief Justice agreed to cancel the appointments and revoked the Gazette Notification by which the appointments were made.

Later after due consultation with the Chief Justice the names of the two of the judges earlier appointed were dropped and the remaining

Independence of the Supreme Judiciary is recognized as an unalterable basic feature of our Constitution. Consequently no appointment can be made by the President to the Appellate Division of the Supreme Court unless it is in conformity with the opinion and recommendation of the Chief Justice.

The consultation is a function assigned to the President. Seeing that a departure has been made in appointing judges to the Appellate Division from the order in which the recommendation of the Chief Justice has been made, the question naturally arises whether the President consulted the Chief Justice and whether the later consented to this departure. It is our understanding that no such thing was done. The President has proceeded to appoint following the advice of the Prime Minister. The Constitutional position in this regard

Authoritative pronouncements of the Supreme Court of India in S.P. Gupta's case (reported in 1994 AIR Supreme Court 268) stated in clear terms that the constitutional purpose to be served by these provisions [provisions relating to appointment of judges] is to select the best from amongst those available for appointment as Judges of the superior judiciary, after consultation with those functionaries who are best suited to make selection. The summary of conclusions reached by majority underscored importance of consultation and the primacy to be accorded to the opinion of the Chief Justice as follows:

1. All the Constitutional functionaries must perform this duty collectively with a view to reach an agreed decision so that the occasion of primacy does not arise [para 486];

2. In case of Supreme Court the proposal is to be initiated by the Chief Justice of India and in the case of a High Court by the Chief Justice of that High Court.

3. In the event of conflict of opinion the view of the Chief Justice of India has primacy;

4. No appointment of any Judge to the Supreme Court or any High Court can be made unless it is in conformity with the opinion of Chief Justice of India [paras 396, 411 (2)-(4)];(6);

5. In exceptional cases, for stated strong and cogent reasons, disclosed to the Chief Justice of India indicating that the recommendee is not suitable for appointment, the appointment recommended by the Chief Justice of India may not be made. But in case the Chief Justice of India reiterates his recommendation then the appointment should be made in accordance with his recommendation.

The Supreme Court of India in support of its views regarding selection of judges for appointment in the higher judiciary made the following observation: [I]he persons

to be selected for appointment to judicial officers are only those who are functioning within the judicial sphere and are known to the Judges of the Superior Courts. The executive can have no knowledge about their legal acumen and suitability for appointment to the high judicial offices. In the process of consultation the expertise, to pick-up the right person for appointment, is only with the Judiciary.

Constitutional jurisprudence and the constitutional practice, underscore the critical role of the independence of judiciary and of ensuring that the matter of appointment the executive does so after effective consultation with appropriate persons, in particular relevant constitutional functionaries, and principally with the Chief Justice. Effective consultation means that if recommendation of the Chief Justice is to be departed from, in particular, where his recommendation is that seniority should be respected, a departure from it needs cogent reasons to be given and this to be conveyed back to the Chief Justice, so that he may further comment upon it. It is this exchange of views, with supporting facts and reasons, which is an essential requirement of effective consultation.

In our role we have been moved by concern to uphold the independence of the judiciary by ensuring that the appointment of judges of the Appellate Division and the High Court Division is made after effective consultation with constitutional functionaries, in particular the Chief Justice; and did not raise any issue regarding lack of consultation with the legal profession. We have been specially mindful that all concerned shall respect the constitution and comply with constitutional mandates.

The Committee of senior advocates of the Bangladesh Supreme Court comprised Barrister Syed Ishaq Ahmed, Dr. Kamal Hossain, Barrister Moinul Hossain, Mr. Abdul Malek and Dr. M. Zahir

## Constitutional jurisprudence and the constitutional practice, underscore the critical role of the independence of judiciary and of ensuring that the matter of appointment the executive does so after effective consultation with appropriate persons, in particular relevant constitutional functionaries, and principally with the Chief Justice.

basic structure cannot be wiped out by amendatory process..... Supremacy of the Constitution as the solemn expression of the will of the people, the Democracy, Republican Government, Unitary State, Separation of Powers, Independence of the Judiciary, Fundamental Rights are basic structures of the constitution. There is no dispute about their identity.... These are structural pillars of the Constitution and they stand beyond any change by amendatory process."

It is our view that in the constitutional scheme mandating the Independence of the Supreme Court, which is recognised as the basic feature, independence will be a misnomer if the opinion of the Executive is to prevail over the opinion of the Chief Justice of Bangladesh in the matter of

Amendment. Notwithstanding this amendment, when this question arose subsequently, namely, whether the time-honoured practice of consultation would be followed or not, an opinion was formally recorded that the practice of consultation should be followed, and every appointment made since was made in conformity with that practice, so that this has become by now a binding convention of the constitution.

An issue arose in 1994 when nine judges were appointed by the then Government without any consultation with the Chief Justice. The then Chief Justice, Mr. Justice Shahabuddin Ahmed, having indicated this to a national lawyers' conference on the very day of such appointment, the conference had by a unanimous resolution expressed its disapproval of such

judges were appointed in accordance with the recommendation of the Chief Justice

The significance of this event is that it was an acknowledgement that the Constitution manifestly envisages and requires that appointment of judges to the High Court Division and the Appellate Division be made after consultation with the Chief Justice. Such appointments are not a matter of any unfettered discretion of the Executive but a constitutional responsibility of the President, which has to be exercised after consultation with the Chief Justice.

The Constitutional convention that the opinion and recommendation of the Chief Justice in the matter of appointment of judges is binding on the Executive is so firmly established that it has to be read into the Constitution. More so, because,

is that non-appointment of any one by the President on the ground of non-suitability must be on good and cogent reasons disclosed to the Chief Justice, who if convinced may withdraw his recommendation. But even then in such rare cases if the Chief Justice on due consideration of the reasons disclosed to him the recommendation is re-iterated by the Chief Justice with equally good and cogent reasons for not withdrawing his opinion and recommendation, undoubtedly the recommendation has the primacy. It is our understanding that at no stage before the appointment made by the Executive the Chief Justice had ever had any opportunity to be consulted for withdrawal of his recommendation.

Therefore, we submit with great respect that the Constitutional convention has been contravened.

# Human Rights Practices in Bangladesh

## CONTINUED FROM PREVIOUS PAGE

According to the Government, 801 persons were under SPA detention at year's end: 416 for terrorism, 301 for smuggling, and 84 for anti-social activities. This was 180 fewer than the 981 persons under detention as of January 1, and a substantial decrease from the approximately 2,000 persons under SPA detention in mid-1997. According to the Government, authorities detained 1,331 persons under the SPA and released 1,511 SPA detainees during the year.

In response to a deteriorating law and order situation, Parliament passed the restrictive new PSA in January; the law became effective in February. The law established special tribunals to hear cases under the act, and made such offenses non-bailable. Opposition leaders expressed fears that the law would be used to arrest political opponents of the ruling party, as the law, like the SPA, allows police to circumvent normal procedures designed to prevent arbitrary arrest, and precludes detainees from being released on bail, which often is the result of arrests based on little or no concrete evidence. According to the Government, 1,350 persons were arrested under the PSA during the year: 445 for interfering with tenders and 905 for damaging vehicles or obstructing traffic. Of those, 450 persons were released, 140 within 1 month, 301 within 3 months, and 9 within 6 months of detention. According to a human rights organization, 3,763 persons were accused under the PSA from February through August 10. Of these persons, 1,285 eventually were arrested. Another human rights organization reports that from June 1 to September 15, 1,166 persons were accused under the PSA, of whom 90 belonged to the BNP, 29 to the Awami League, and 32 to the Jamaat-e-Islami.

On December 26, BNP Member of Parliament Morshed Khan went to a shop to inquire about the identity of some youths who had attacked his son over a minor traffic incident. According to Khan, a mob of several dozen youths with weapons and sticks gathered around the shop to attack him. He quickly left. After the incident, a PSA case was filed against Khan and his son for allegedly stealing cash from the shop. In contrast no PSA case was filed against any member of the Awami League student front, the BCL, when they incited a riot on December 14 after announcement of the split verdict in the Sheikh Mujibur Rahman murder case. BCL activists had taken to the streets, smashing and burning hundreds of vehicles, and one auto-rickshaw driver was shot and killed. No PSA charges were filed against BCL leader Humayetudinn, whose photo appeared in numerous newspapers, wielding a gun during the incident, nor against others identified as participants in this violence.

Numerous court cases have been filed against opposition M.P.'s and activists, on charges ranging from corruption to murder. In June 1999, the Prime Minister told Parliament that more than 70 current BNP M.P.'s were under investigation for alleged corruption during the previous administration. In a case that appears to be politically-motivated, a senior leader of the opposition Islami Oikkyo Jote was detained from September 5 to November 7 under the SPA on the basis of his alleged involvement in undefined "anti-State activities."

It is difficult to estimate the total number of detentions for political reasons. In some instances criminal charges may apply to the actions of activists, and many criminals claim political affiliations. Because of crowded court dockets and magistrates who are reluctant to challenge the Government, the judicial system does not deal effectively with criminal cases that may be political in origin. There is no independent body with the authority and ability to monitor detentions, or to prevent, detect, or publicize cases of political harassment. Most such detentions appear to be for short periods, such as several days or weeks. Defendants in most cases receive bail, but dismissal of wrongful charges or acquittal may take years.

## Denial of Fair Public Trial

The Constitution provides for an independent judiciary; however, under a longstanding "temporary" provision of the Constitution, some subordinate courts remain part of the executive and are subject to its influence. The higher levels of the judiciary display a significant degree of independence and often rule against the Government in criminal, civil, and even politically controversial cases; however, lower level courts are more susceptible to pressure from the executive branch. There also is corruption within the legal process, especially at lower levels.

There continued to be tension between the executive and the judiciary during the year. In 1999 the Government charged that the High Court granted bail to criminals indiscriminately, crippling efforts to combat crime. In January Parliament hastily passed the Public Safety Act, citing the ready availability of bail for criminal offenses as one of its motivations. In October

the court dismissed a case of contempt of court against Prime Minister Sheikh Hasina for her criticism of the court, but cautioned her against making statements not based on fact.

On December 14, the High Court issued a split verdict in the murder case of Sheikh Mujibur Rahman, founder of the country and father of the Prime Minister, along with 21 members of his family. The senior judge in the case upheld the convictions and death sentences of 10 of the 15 previously convicted persons, while the junior judge upheld the convictions and death sentences of all 15 of the convicted. The Prime Minister expressed her disappointment that both judges did not uphold the death sentences for all 15, and ruling party Chhatra League activists rioted in the streets, smashing and burning hundreds of cars in protest of the split verdict.

Persons may be tried in absentia, although this rarely is done. In November 1998, 15 of the 19 defendants tried for the 1975 killing of then-President Sheikh Mujibur Rahman and 21 of his family members were convicted and sentenced to death, and 4 persons were acquitted. Fourteen of the defendants were tried in absentia, and 12 of them were convicted. In April when the High Court began its automatic review of the death sentences, the first two judges assigned to the case recused themselves, declaring that they were unable to hear the cases impartially, prompting heavy criticism from the Government. After the second recusal, government supporters marched to the High Court Building wielding sticks and clubs, and called for the execution of the sentences issued at the trial. Some members of the Cabinet, including the Home Minister, participated in a rally that threatened action against the judges for their failure to take on the case. The Prime Minister expressed sympathy with those persons protesting against the judiciary. Many observers believe that the High Court judges recused themselves because government interest in and pressure regarding the case were not conducive to a neutral judicial review of the trial; however, the judges have not explained their decisions, and there is no direct evidence to substantiate such allegations.

A major problem of the court system is the overwhelming backlog of cases, and trials under way typically are marked by extended continuances while many accused persons remain in prison. These conditions, and the corruption encountered in the judicial process, effectively prevent many persons from obtaining a fair trial or justice. According to one independent sample survey conducted by Transparency International Bangladesh, over 60 percent of the persons involved in court cases paid bribes to court officials. Because of the difficulty in accessing the courts and because litigation is time consuming, alternative dispute resolution by traditional village leaders, which is regarded by some persons to be more transparent and swift, is popular in rural communities. However, these mechanisms also can be subject to abuse.

The Government states that it holds no political prisoners, but the BNP and human rights monitors claim that many opposition activists have been arrested and convicted under criminal charges as a pretext for their political activities. It is not clear how many such prisoners actually are being held.

## Arbitrary Interference with Privacy, Family, Home, or Correspondence

The law requires authorities to obtain a judicial warrant before entering a home; however, according to human rights monitors, police rarely obtain warrants, and officers violating the procedure are not punished. In addition the SPA permits searches without a warrant.

The Government sometimes punishes family members for the alleged crimes of others. According to one human rights organization and a published account by one of the victims, on the evening of June 17, police raided a house in the Khilgaon section of Dhaka, and after failing to locate their intended target, arrested his parents and beat his sisters. In November when police could not find Bahauddin, editor of an opposition paper, to arrest him under charges of sedition, they arrested his brother, Mainuddin, instead. Mainuddin was not connected with the sedition charge; however, police arrested him under the SPA.

The Special Branch division of the police, National Security Intelligence, and the Directorate General of Forces Intelligence (DGFI) employ informers to report on citizens perceived to be political opponents of the Government and to conduct surveillance of them. Political leaders, human rights activists, foreign NGO's, and journalists report occasional harassment by these security organizations. For example, representatives from one human rights organization report that police harassed their representatives in Comilla and Chittagong.

## Freedom of Speech and Press

The Constitution provides for freedom of speech, expression, and the

press, subject to "reasonable restrictions" in the interest of security, friendly relations with foreign states, public order, decency and morality, or to prohibit defamation or incitement to an offense; however, there were numerous examples of the Government limiting these rights in practice. Some government leaders encouraged violence against journalists by ruling party members.

Newspaper ownership and content are not subject to direct government restriction. However, if the Government chooses, it can influence journalists through financial means. Government-sponsored advertising and allocations of newsprint imported at a favorable tariff rate are central to many newspapers' financial viability. Government-sponsored advertising is the largest source of revenue for many newspapers. In allocating advertising through the Department of Films and Publications, the Government states that it considers circulation of the newspapers, wage board implementation, objectivity in reporting, coverage of development activities, and "attitude towards the spirit of Bangladesh's War of Liberation." Commercial organizations often are reluctant to advertise in newspapers critical of the Government due to fear of unspecified governmental or bureaucratic retaliation.

Attacks on journalists and newspapers, and efforts to intimidate them by government leaders, political party activists, and others frequently occurred. Such attacks by political activists are common during times of political street violence, and some journalists also were injured in police actions.

On January 15, three unidentified persons shot and killed journalist Mir Illais Hossain in Jhenaidah. The journalist, also the leader of a leftist party, allegedly had received death threats a few weeks before the killing and had requested police protection. Four persons were arrested for their suspected involvement in the murder. By year's end, charges had not been filed.

On July 16, two men entered the Jessore office of the Bangla-language daily Janakantha and shot and killed reporter Shamsur Rahman. Rahman had been reporting on the activities of criminal gangs in the southwest part of the country, and the relationship of those gangs to the national political parties. By September 15, 12 persons had been arrested in connection with the murder. By year's end, charges had not been filed.

On October 25, State Minister for Social Welfare Mozammel Hossain (the person in charge of overseeing relief operations in Sathkira district) reportedly actively encouraged ruling party members to attack physically the press by saying "Wherever you will find journalists, break their bones." On October 26, a group led by local Awami League leader Nurul Islam ransacked the office of the local daily "Sathkhir Chitro" and assaulted Anisur Rahim, the newspaper's editor, with knives and a revolver, hospitalizing him.

According to the International Freedom of Expression Exchange, on October 27, Monwar Islam, senior journalist and secretary-general of the Dhaka Reporters Unity (an organization for reporters working in Dhaka) narrowly escaped an abduction attempt, allegedly because of his reporting. By year's end, no investigation had been conducted, and Islam had fled the country.

Virtually all print journalists practice self-censorship to some degree, and are reluctant to criticize politically influential personalities in both the Government and the opposition; however, some journalists do make such criticism. Many journalists cite fear of possible harassment, retaliation, or physical harm as a reason to avoid sensitive stories. For example, in March the Laxmipur correspondent of a leading Bangla-language newspaper was arrested under the PSA, following a report he published on police involvement in mass cheating during high school examinations. The journalist was released in November as the Government failed to prove the charge against him in the PSA Tribunal. On May 28, Aminur Rahman Taj, a reporter from "Ajker Kagoj," a leading Bangla-language newspaper, was arrested without a warrant and later was accused of defamation of character.

In June a leading English-language newspaper ran a story about three sons of M.P.'s who were allowed to leave the country after being implicated in criminal cases. When the story was quoted in foreign newspapers, an official from the Prime Minister's Office pressured the newspaper's management to fire the author of the story. The author resigned under pressure a few days later. On August 6, a daily newspaper in Chittagong issued a notice retracting a story it had run the previous day, implying that a ruling party faction was involved in the July 12 murders of eight persons in a van. The reporter who authored the original story was fired. According to press reports, the General Secretary of a local Awami League chapter declared at

a public rally in Laxmipur on October 4, that he would "chop off the hands and legs" of journalists who continue to write about him. He threatened to "throw opposition activists into the river" if they came out against him, and to take action against the police if they tried to arrest him. An Awami League Presidium member and government minister was "chief guest" at this Laxmipur rally. Two days later, armed men in Laxmipur injured a newspaper reporter in an attack.

Journalists and others potentially are subject to incarceration as a result of criminal libel proceedings filed by private parties. Ruling party M.P.'s filed separate criminal libel suits against several newspapers after articles were published that the politicians viewed as false and defamatory. The journalists in all cases received anticipatory bail from the courts, and none of the cases moved to trial.

On June 29, the Government banned a book written by Matur Rahman Rentu, a former aide to Awami League president and current Prime Minister Sheikh Hasina, on the grounds that it contained materials that could provoke hatred and malice toward the Government. The author was shot and injured by unidentified assailants in Dhaka after his book first was released.

The Government owns and controls radio and television stations. The activities of the Prime Minister occupy the bulk of prime time news bulletins on both television and radio, followed by the activities of members of the Cabinet. Opposition party news gets little coverage.

## Freedom of Peaceful Assembly and Association

The Constitution provides for freedom of assembly, subject to restrictions in the interest of public order and public health; however, the Government frequently limits this right. Section 144 of the Criminal Procedure Code allows the Government to ban assemblies of more than four persons. According to one human rights organization, the Government imposed Section 144 bans 33 times during the first 9 months of the year. The Government sometimes uses Section 144 to prohibit rallies for security reasons, but many independent observers believe that such explanations usually are a pretext. Supporters of the ruling party frequently will schedule their own rallies for the same venue and time as scheduled opposition rallies and meetings, thus providing the Government a basis for imposing Section 144 for security reasons.

Authorities also permit ruling party activists to blockade roads and take other steps to disrupt opposition events. During nationwide general strikes called by the opposition, ruling party activists routinely intimidate opposition supporters and seek to coerce shopkeepers and drivers to ignore the strike.

## Governmental attitude regarding international and nongovernmental investigation

The Government generally permits human rights groups to conduct their activities. A wide variety of groups publish reports, hold press conferences, and issue appeals to the Government with regard to specific cases. While human rights groups often are sharply critical of the Government, irrespective of the ruling party, they frequently practice self-censorship, particularly on some politically sensitive cases and subjects. In the past, the Government has consulted with human rights groups on some draft legislation and taken their views into account. In January after discussions between the Government and some women's rights groups and NGO's, Parliament passed the Women and Children Repression Prevention Act. However, the Government continues to refuse to register the Bangladesh Section of Amnesty International, which since 1990 has applied several times for registration under the Societies Registration Act. Without this registration, a voluntary organization cannot receive funding from abroad.

In the past, the Government has put pressure on individual human rights advocates, including by filing charges that are known to be false. Such pressure also has included long delays in issuing re-entry visas for international human rights activists. Missionaries who advocate human rights have faced similar problems.

In the past, human rights organizations have reported that the Government has put pressure on them usually in the form of harassment by the intelligence agencies and threats from activists of the ruling party. During the year, the Government acceded to the U.N. International Covenant on Civil and Political Rights.

This is an abridged version of the annual State Department Human Rights Report released by the Bureau of Democracy, Human Rights and Labor in Washington, February 26, 2001.