Separation of the Judiciary



Γ was on 5 August 2001, while opening the District Judge's Court at Cox's Bazar, that I announced that the direction of the Supreme Court in the case of Secretary Ministry of Finance and others vs. Md. Masdar Husain and others 52 DLR (AD) p.82 for the separation of the subordinate judiciary from the executive will be implemented within eight weeks. The judgement was delivered on 2 18 months before I made this announcement. I emphasized that it was the duty of any government to act in aid of the Supreme Court and thus implement the directions of that Court. On my return to Dhaka, I sat down with the officials of the Law Ministry to inquire about the progress they had made in the last 20 months and to my great dismay I learnt that except for abortive interministerial exercise, which produced nothing, there had been no progress in this regard.

The interministerial Committee met thrice. In the last meeting, a draft was prepared for establishing a judicial service consisting of persons holding judicial posts and magistrates exercising judicial functions and another set of rules was prepared regulating terms and conditions including postings, promotions, leave and discipline (except dismissal and suspension) of such persons. The Establishment Ministry prepared a set of rules providing for a separate service or cadre for magistrates exercising judicial functions. Quite naturally, the deliberations ended in discord and disagreement

The government had been dragging its feet on one excuse or another and the latest excuse was that a review petition was pending against the judgement of Masdar Husain's case. The review petition was dismissed by the Appellate Division on 21 June 2001. The review was filed on two issues only: firstly, on the constitution of a separate judicial service commission and secondly, about a judicial pay commission. With the dismissal of the review petition, there was no excuse left. The matter was lying in that state when the Caretaker

Government was installed. After my return from Cox's Bazar. I called the officials of the Law Ministry and asked them to start framing draft rules immediately for constituting a judicial service consisting of persons holding judicial posts and magistrates exercising the judicial judicial functions, service commission, and a separate pay commission for persons appointed in judicial service as directed by the Appellate Division. Lastly, the Appellate Division of the Supreme Court in its judgement had observed that so far as the magistrates performing judicia functions are concerned, for creating purely judicial magistrates divorced from their executive functions, it will be necessary to make consequential changes in the Code of Criminal Procedure and therefore the draft legislation to give effect to the judgement of the Appellate Division required a separate set of amendments of the various provisions of the Code of Crimina Procedure. The Appellate Division declared that the judicial service is a service of the Republic within the meaning of Art.152 (1) of the Constitution but structurally and functionally distinct and separate from the civil, executive, and administrative services. Consequently, the Court declared that the creation of BCS (judicial) cadre along with other BCS (executive and administrative) cadres in the Bangladesh Civil Service (Reorganization) Order 1980 is ultra vires the Constitution and as such the Civil Service Recruitment Rules 1981 are inapplicable to judicial service. BCS judicial cadre was created as if it was a civil service. This was not within the contemplation of the Constitution and therefore was violative of the constitutional scheme. Amalgamation is possible and permissible between allied

Court's directions are as follows: The President has to make rules under Art. 115 of the Constitution which occurs in the chapter on subordinate judiciary, for creating and establishing a judicial service and also a magistracy exercising judicial functions. As appointment includes suspension and removal, these rules should also regulate the suspension and dismissal of such persons in service. As part of the rules under Art. 115 a separate Judicial Pay Commission is to be established to review the pay, allowances, and other privileges of members of the judicial service which are to follow recommendations of the Pay Com-

services. Judicial officers may be

amalgamated with judicial magis-

trates pursuing a judicial career all

the way. But, according to the

Court, as oil and water cannot mix,

similarly the judicial, administrative,

and executive services are not

The Supreme

amalgamable.

service shall follow the language of the Constitution and shall be designated - Judicial Service of Bangladesh or Bangladesh Judicial Service, A Judicial Service Commission may be established by the President under the rules in Art. 115 with the majority of members from the Senior Judiciary of the Supreme Court and the subordinate Courts for the purpose of recruitment to the judicial service on merit which would also achieve equality between men and women in the recruitment.

(3) The terms and conditions of the service including discipline (except suspension and removal) have to be consistent with Art. 116 and Art. 116A, and are to be framed under Art. 133 for the judicial service and magistrates exercising judicial functions.

In the light of the declarations and directions, the Drafting Wing of the Ministry of Law got down to the work immediately, and finally towards the beginning of September, that is in about four weeks after made the announcement at Cox's Bazar, the first set of draft rules was ready. The then Attorney General, Mr. Mahmudul Islam, on my request, put in hard work and labou to go through the draft rules and more particularly, the proposed amendments of the Code of Crimi nal Procedure, for which I am grateful to him. He is a person very well versed in law and more particularly Constitutional law. That is why I requested him for help, which he so kindly provided. In the final drafts of the proposed legislation, Mr. Muyeed Chowdhury, Adviser in charge of principally the Ministry of Information who showed great interest in the contents of these. made some suggestions which were incorporated. The final drafts of the set of rules providing firstly. for the creation and composition of Judicial Service, Appointment to that Service, Suspension of and Removal of persons appointed to that Service, and establishment of the Judicial Pay Commission, were framed. These Rules were to be made under Art. 115 of the Constitution, which according to the Appellate Division, is a constitutional mandate, not merely an enabling power. This rule making power of

make laws regarding this. The first set of Rules regarding appointment, suspension, and dismissal of persons appointed to the judicial service including magistrates exercising judicial functions, and establishment of Pay Commis-

the President to appoint persons to

the judicial service gave direct

primary and plenary powers, which

even Parliament cannot exercise.

Art. 115 of the Constitution is such a

power of the President regarding

appointments of persons to the

judicial services or magistrates

exercising judicial functions. As we

have said, even Parliament has no

authority under the Constitution to

sion provided for the following: (a)creation of Bangladesh Judicial Service consisting of persons in this judicial service and magistrates

exercising judicial functions; (b)qualification, age, and other terms and conditions for entry into this service, that is as Assistant Judge and Judicial Magistrate;

(c) for equality between men and men for entry into the service:

(d) for probation on appointment of persons at the point of entry in the service, the duration of such probation, and determining the method of training and examination of the probationers;

(e) suspension and removal of persons in the judicial service.

As regards equality in appointment, the Rules provided that a quota of 20% shall be reserved for women. However if it is possible to appoint 20% from among the women on merit, the quota will no longer be reserved, otherwise women will continue to be appointed to fill up the 20% guota. The quota will be ineffective where the appointment of women at the entry point rises to 50%.

The judicial service and judicial magistracy together constituted Bangladesh's judicial service. As a temporary interim provision, it was provided that for four years the magistrates exercising functions of judicial magistracy that the appropriate authority may retain them on deputation. Special provisions were made for members of the judicial magistracy absorbed in the judicial service to exercise the option to remain or return to his riginal service within one year of the Rules becoming effective. Similarly, any government officer outside the service desiring to be absorbed in the service may apply to the appropriate appointing authority within one year of the Rules being effective. For such absorption, the officer has to have the experience of a magistrate or of any officer in the judicial service and must have a second class in his graduation degree in Law.

These service Rules provided for the creation and establishment of the Judicial Pay Commission consisting of:

(1) A Judge of the High Court Division nominated by the President in consultation with the Chief Justice of Bangladesh, who shall be the Chairman of the Commission, Registrar Supreme Court

ex officio, Secretary Ministry of Law

ex officio, Secretary Ministry of Finance ex officio, Secretary Ministry of

Establishment*ex officio*. The second set of Rules con-

service of persons in the judicial service and the judicial magistracy as in the schedule of the Rules. Such terms and conditions included: promotion. (2) leave. (3) discipline (except suspension

(4) other terms and conditions of service. The Rules also provided for deputation of persons appointed in the judicial magistracy for four

and removal), and

years from the date the Rules became effective. It also provided that the views of the Supreme Court in all these matters will have primacy over the views of the executive authorities.

The third set of Rules provided for the creation and establishment of the Judicial Service Commission consisting of the following persons: (1) A Judge of the Appellate Division who shall also be the Chairman of the Commission to be nominated by the President in consultation with the Chief Justice of Bangladesh and another member to be nominated by the President in consultation with the Chief Justice being a Judge of the High Court Division of the Supreme Court.

(2) Secretary Minister of Law ex

(3) Registrar Supreme Court ex

(4) District Judge Dhaka ex officio.

(5) A member of the Civil Service

Commission being nominated by

the President in consultation with

the Chairman of the Civil Service

(6) The Dean of the Faculty of Law

The functions of the Commission

(1) conducting selection and exami-

nation of qualified persons for

appointment to the judicial service

(2) to advise the President on any

matter on which such advice is

referred to the Commission by the

(3) to discharge such responsibility

The last set of Rules concerned

consequential changes in the Code

of Criminal Procedure. This was a

difficult exercise. But for Mahmudul

Islam's tiring efforts these could not

have been meticulously clear and

Final drafts of all these Rules

were ready by 20 September 2001.

I began encountering difficulties

and resistance thereafter. I dis-

cussed the matter with the then

Cabinet Secretary Dr. Akbar Ali

whom I found as having an enlight-

ened and correct view of the Consti-

tution, and to be a dedicated.

devoted, and honest civil servant.

In 1996, when I became an Adviser

in the Caretaker Government in

charge of the Ministry of Law, Dr.

Akbar Ali was Secretary in the

Ministry of Finance and we had

developed a better understanding

of each other since then. He told

me that the Draft should be distrib-

uted to some secretaries who were

of Dhaka University ex officio.

were to be as follows:

and judicial magistracy,

President for such advice,

as may be conferred by law

Commission.

functions in administrative services. The option was to be exercised within one year of the rules becoming effective. These were officers who got appointed as executive officers in administrative services. Therefore it was right and proper that they should have the option to return to these services if they wished to do so. After this process was over, at the point of entry, anyone who qualifies for judicial service will join the service as Assistant Judge and will be assigned the magisterial power and functions as magistrates or both as magistrate and Assistant Judge as the case may be. As a Senior Assistant Judge, they are generally assigned powers of a magistrate first class and when they become a subordinate judge, that is Joint District Judges, they have sessions' powers, that extends up to the Session Judge and the District As regards the existing magistrates performing judicial functions, they will continue to function as before and on being absorbed in judicial service in exercise of their option, they will have the seniority and equivalence of positions in judicial service up to Senior Assistant Judge. The others who go back to the administrative service, will have their

seniority intact from their date of

entry in the administrative service.

The draft scheme provided by the

secretaries at the time of the meet-

ing was based on a very faulty

assumption that magistrates exer-

cising judicial functions are not

included in judicial service as

directed by the Court. Conse-

quently, they were of the view that

only the officers of the Civil Service

(judicial) cadre are to be included in

he judicial service and under the

Constitution, magistrates exercis-

ing judicial functions cannot be

included in the service and the draft

rules circulated to them, creating

and establishing an unified judicial

service including magistrates

performing judicial functions was in

violation of Art. 152(1) of the Consti-

tution, which defined judicial ser-

vice and is contrary to the judge-

ment of the Appellate Division,

particularly that of Justice Latifur

Rahman. This was an understand-

ing of the Constitution and of the

judgement of the Appellate Division

which is obviously erroneous. The

officers are not to be blamed for

this, but it goes without saying that

any real understanding of a judge-

ment relating to a constitutional

question can be made by a person

who is an expert, experienced, and

is knowledgeable about the Consti-

tution. Nobody would expect such

expertise and knowledge on the

part of officers of the administrative

service. Another objection which

arose was about the authority that

drafted the set of rules. In their

view, it is only the Establishment

Ministry that can draft such rules.

But when confronted with the rules

of business, which authorized the

Chief Adviser or the Prime Minister

to condone and to act in modifica-

tion of these rules, they did not have

The press was positive and very objective in their approach to the question of separating of the

judiciary from the executive. They lent their support all the way and wished that the work be

magistracy" service more nakedly administrative. It said that Service Post means the posts in the Schedule of those rules. These posts are: Chief Judicial/Chief Metropolitan Magistrate, 50% of whom will be appointed by promotion of Additional Chief Judicial/Additional Chief Metropolitan Magistrate, and 50%, if the suitable candidates is not found, by transfer from the equivalent posts of BCS (Administrative) Cadre; (2) Additional Chief Judicial/Additional Chief Metropolitan Magistrate, 50% by promotion from Senior Judicial Magistrate/Metropolitan Magistrate; and if no suitable candidate is found, 50% from BCS (Administrative) Cadre by transfer from an equivalent post; (3) Senior Judicial Magistrate/Metropolitan by promotion from judicial magistrate, and if no suitable candidate is found, then 50% from BCS (Administrative) Cadre by transfer from an equiva lent post.

No amendment of Criminal Procedure Code was suggested.

These rules gave an impression of the matter moving from "Phillip drunk to Phillip sober". There cannot be a better hotchpotch of executive-judicial functions forbidden by Constitution and repeatedly emphasized and interpreted by the judgement as being so forbidden. Sometime towards the third

week of August, the President

wanted to see the judgement of the

Appellate Division, which I sent to

him promptly, and if I remember

correctly, a set of rules which were

yet to be finalized. But it was a

complete set of rules nonetheless.

I had the privilege of discussing the

matter with the President who did

not express any view one way or the

other. But later in his meeting with

some Senior Advocates of the

Supreme Court and with the Attor-

ney General, I understand that he

had eventually agreed to approve

the rules and to make effective the

changes in the Code of Criminal

Procedure on being presented to

him for signature and approval after

So far as the political parties

were concerned, BNP and Awami

League supported the idea of

separation and made their stand

elections, parties had been pledg-

ing in their election manifesto for

separation of the judiciary from the

executive. The work nonetheless

remained undone. The former Law

Minister of Awami League, Mr.

Abdul Matin Khusro in his state-

ment, lent support to the separation

of judiciary from the executive but

the work, which is said to have been

undertaken by the Awami League

government could not be com-

pleted. One of the former Ministers

of the BNP and a member of the

outgoing Parliament went further

and said that no elected govern-

ment would be able to affect sepa-

ration and the caretaker govern-

ment was the most suited to bring

this about. The Chief Adviser also

said in his meeting with the editors

that he supported our efforts to

effect the separation of the judi-

In all previous

completion of all the formalities.

known publicly.

into power after elections will decide this question. If their grievances are not met by 13 September, they threatened to abstain from election duties and the elections were due to be held on 1 October 2001. On the other hand, a report published on 27 September 2001 pointed out that the Awami League and the BNP both supported the move for separation and therefore there was no controversy about the caretaker government affecting this separation. Whatever objection to competence of the Caretaker Government to undertake this task was raised earlier was feeble and was resolved when it was pointed out that it was not a policy matter but merely implementing a judgement of the Appellate Division, which every government is under the obligation to implement. The report also pointed out that senior and experienced lawyers were of the opinion that the new extension granted by the Appellate Division will enable the Caretaker Government to affect separation within their tenure. The paper said that they wanted to see the work completed by the Caretaker Government. It also opined that this is also the expectation of the people of the country. Therefore, it would expect that implementation of the directions of the Supreme Court should be made without any delay.

completed during the tenure of the Caretaker Government. Perhaps this feeling emanated from the fact that in the past, for decades the political parties had promised for such separation in their election manifesto and subsequently in their statements but had never been able to do so. ceived concern that such separation would require an amendment of the Constitution. I said more than once that an amendment of the Constitution will make it more effective but within the framework of existing provisions in the Constitution, the Appellate Division on interpretation had made the various directions, which, if implemented would separate the judiciary from the executive. The Appellate Division in the judgement has itself said "If the Parliament wishes, it can extend the frontiers of the separation of the judiciary from the executive organs of the state by a constitutional amendment, the door to which should not be closed by holding that no amendment is necessary. We have identified and delineated the extent of separation that already exists and would rather invite the Parliament to bring a constitutional amendment to make separation further and complete" This was the total scenario in which

this question existed. On election day or before that time, nothing untoward happened and of course we have not steamrolled the separation rules. We decided in consultation with the Chief Adviser to bring it up at the last meeting of the Council of Advisers which was expected to be held on 2 October but was actually held on 3 October 2001. We were to approve the rules the same day and submit them to the President through the Chief Adviser for signature and promulgation and the Ordinance amending the Code of Criminal Procedure. The summary for the Chief Adviser, as usual, was prepared which after the meeting of the Advisory Council, he would sign

I have earlier dispelled a miscon-

namely the Daily Pratahmalo and the Ingilab of 8 August 2001 and the Daily Dinkal of 14 August 2001 also same lines. The former Chief Justice of Bangladesh, Mr. Justice Mahmudul Amin Chowdhury, in his farewell address to the Full Court on 17 June 2002, which was in Bengali, and rendered in English, said as follows: "From the newspapers, it appears that our directions are not being implemented for the time being, although we have issued strict orders in this regard. There is no scope here to create a separate criminal justice delivery system, but from the papers it appears that on behalf of administrative service, the offices are making efforts in estaband forward the full set of rules to the President. We expected the

lishing a separate criminal justice delivery system. This is wholly in contravention of the Constitution executive services are not. and our judgement. This is merely an excuse for not implementing the direction of the Appellate Division of the Supreme Court. I feel that for the greater interest of the nation and democracy, the directions of this Court should be implemented functions. soon to implement the directions of Supreme Court is a constitutional

obligation of the government. Nobody's wish or advantage or disadvantage or objection in this regard can be contrary to the Contitution or judgement of the Appellate Division. I did not know that to implement the directions of this Court and of the Constitution one has to have the opinion of a special class of people. But in reality, that is what is happening. I hope that the provisions of the Constitution will be kept aloft and by doing this, democracy will be practiced correctly and the State will benefit" (Daily Ittefag of 19 June 2002). Former Chief Justice Mustafa Kamal in his statement published in The Daily Star of 18 June 2002 under the heading 'No Reason To Delay Judiciary Separation" said:

"The government's failure to implement these directions by May 30 was largely due to the objection by the BCS administration cadre to forming a unified judicial service called Bangladesh Judicial Service. The administration that now runs the magistracy demands a separate service.

'The administration wing of the government cannot assume judicial duties both civil and criminal'. he said, explaining the 12 point directives and ruled out the scope for a separate system of the administration cadre-run magistracy."

newspaper reports, that though the

the Pay Commission, the administration cadre stood in the way of establishing a united judicial ser-

unfortunately I could not fulfill my

promise that I would not return

home before affecting the separa-

tion of the judiciary from the execu-

tive. On 10 October, I returned

home without having succeeded in

separating the judiciary. I was a

deeply frustrated person. We all

suffer for our failures; but this one

rejoicing and fulfilment for me when

this government affects the separa-

tion by giving effect to the rules and

adding an amendment to the Code

objective in their approach to the

question of separating of the judi-

ciary from the executive. They lent

their support all the way and wished

that the work be completed during

the tenure of the Caretaker Govern-

ment. Perhaps this feeling ema-

nated from the fact that in the past,

for decades the political parties had

promised for such separation in

their election manifesto and subse-

quently in their statements but had

never been able to do so. Knowing

that when I made the commitment

to finish this separation within eight

weeks, I meant business and it was

serious and meaningful commit-

ment and the support and encour-

agement given by the press was a

great help in sustaining our efforts

n taking firm steps in affecting the

separation of the judiciary. In the

beginning, various newspapers

made editorial comments following

Manab Zamin came out with an

editorial on 8 August 2001 in which

they pointed out that this demand

was clearly agreed in the November

Declaration of 1990, which was a

joint declaration of the parties of the

movement against authoritarian-

ism. But, neither BNP, which

formed government in 1991, nor

Awami League, which formed

government in 1996, fulfilled this

promise. They also mentioned that

there is popular support for fulfil-

ment of this pledge and there is no

legal, constitutional or even political

impediments, as both the major

parties have given their commit-

ment and will have support in this

regard. The Daily Shanabad of the

same date in its editorial comments

narrating the past disappointing

state of affairs in this field, in their

editorial wished that the Caretaker

Government would be able to

accomplish this task. It also noted

that while at the Bar, I was one of the

counsels in this case, now the file is

lying at my table and pointed out

that there is no need for constitu-

tional amendment for doing this and

rightly so. They also pointed out

that there will be a need for an

Ordinance which the President of

the caretaker government had

made in 1991 in repealing the

provisions relating to press freedom

in the Special Powers Act, and if I

may say, the President did so in

1996 while amending the provi-

sions of the Representation of

People Order. The other papers

The Daily

my announcement.

The press was positive and very

With hope I live on for the day of

was unbearable.

of Criminal Procedure.

He believed that the 1999 judgement of the Appellate Division made no mistake about it. "There is a constitutional bar to allowing the administration to take part in judicial work". The function/work clearly belongs to the judicial wing of the State in which the administration itself is sometimes the complainant or informant or accused, he said.

"To implement the decisions of the highest court, it may not be necessary, to constitute a cabinet committee, depending on the nature of the decisions.

'But, since, our decisions implied thorough shake-up and recasting of the judicial and administrative wings of the country, perhaps the Cabinet Committee was considered to be a legitimate body to examine the details and consequences of these decisions'.'

Referring to the Review Petition which was brought and dismissed by the Appellate Division, he said that the review was limited to two points. The points focused mainly on the constitution of a separate Judicial Service Commission and the constitution of a separate Judithat the government lost the review case before the Appellate Division.

He went on to say: "The spirit of the judgement is that the administration will dissociate itself from iudicial work completely and the judicial service will be a distinct branch of the government judging both parliament and executive. We have interpreted Art. 35(3) which says, every person accused of a criminal offense shall have the right to a speedy and public trial by an independent and impartial court or tribunal established by the Law..

If the administration continues to do as it used to do for 250 years. Art. 35(3) will remain as a decorative piece in the Constitution flouted by the government. We wanted to give real meaning

to the word "independent", I think the whole country is bound by this

The leading judgment of the Appellate Division was delivered by the former Chief Justice Mustafa Kamal. It is a historical and landmark judgement presented to the nation as a parting gift, as he retired within a couple of days after this judgement. We may call this his last judgement. At various places in the judgement, what he said in the statement are emphasized. The

judgement said: (1) The creation of a BCS (judicial) cadre as if it was a civil service was not within the contemplation of the Constitution and therefore violative of the constitutional scheme. This BCS (Reorganization) Order 1980 creating judicial and executive and administrative cadres are ultra vires the Constitution. Amalgamation is possible and permissible between allied services. Judiciary officers may be amalgamated with judicial magistrates pursuing a judicial career all the way. But, according to the Court, as oil and water cannot mix the judicial, administrative and executive services are not amal-

gamable. (2) Judiciary is an independent arm of the Republic, which sits in judgement over the parliament. executive, and judicial actions, decisions and orders. To equalize and put them on the same plane the judicial service and civil and administrative services, is to treat two unequals as equals. Art. 116A of the Constitution was also lost sight of, and it was conveniently forgotten that all persons employed in the judicial service and all magistrates exercising judicial functions are independent while civil and

The BCS Recruitment Rules 1981 made by the President in exercise of the power in Art. 133 of the Constitution are inapplicable to members of the judicial service and magistrates exercising judicial

Can there be, after these observations in the judgement and in the light of which the statements are made by the retiring Chief Justice Mahmudul Amin Chowdhury and the former Chief Justice Mr. Justice Mostafa Kamal, the authors of the leading judgment, any doubt that they are talking of a unified judicial service and meant it to be so consisting of officers from the judicial service and magistrates who will perform solely judicial functions and no other. The views of the administrative services and of the crusading administrative officers are unreasonable and irrational to say the least and I only hope that they will see good reason and rise above their petty self-interest and support democratic order, constitutional provisions, and abide by the letter and spirit of the judgement of the Appellate Division of the Supreme Court. I said this many times when I met them and now it is being said by the Former Chief Justice delivering the leading judgement and another Chief Justice. Mr. Justice Mahmudul Amin Chowdhury, in his farewell address on 17 June 2002, who was a party to the judgement. The views of Mr. Justice Latifur Rahman who was also a party to the judgment is by now well known. This should be enough clarification

He further said, referring to

The former Chief Justice of Bangladesh, Mr. Justice Mahmudul Amin Chowdhury, in his farewell address to the Full Court on 17 June 2002... said... 'I feel that for the greater interest of the nation and democracy, the directions of this Court should be implemented soon to implement the directions of Supreme Court is a constitutional obligation of the government'.

considered to be the Secretaries concerned I circulated accordingly the full set of drafts to him, the Secretary of Finance, Home Secretary and Establishment Secretary and Secretary Roads and Railway Division The concern of this last Secretary was because of his connection with the Civil Services Association. Three or four days after I circulated these drafts, I requested the Secretaries to come my offices on 24 September 2001. At the meeting, I requested the Attorney General, the Cabinet Secretary, and the Law Secretary to be present along with the other Secretaries named above. They attended.

At the meeting, the views of the officers of the administrative services were made known and it appeared that they were not in favour of a unified judicial service consisting of the existing members of the judicial service and judicial magistracy. In other words, they wanted a separate cadre for judicial magistracy, but were not very clear how the line of promotion was to be determined, so that eventually they would qualify to be Judges of the High Court Division of the Supreme Court. Under the dispensation of a unified judicial service, the draft of which was circulated, for the existing judicial magistracy who are absorbed on deputation as a transitional and temporary measure in order that existing cases pending in the Magistrate's Courts continue to be tried and disposed of, we proposed a four year period on such deputation which would obviously be without any executive functions. It was further provided that after one year of the Rule becoming effective, the magistrates so absorbed on

deputation will have the option to

remain in judicial service or opt out

an answer. The rules prepared by Establishment Division with regard to the service, consisting of judicial magistracy and the terms and conditions of service, were made available to me in the Law Ministry a couple of days before I proposed to Council for approval.

take the matter to the Advisory In this exercise. I have had all the support of the Chief Adviser from the very beginning. As I said, the administrative officers were suffering from a very serious misconception and misunderstanding of the Constitution and the interpretation of several provisions in the judgement, which "delineated and defined the extent of separation that already exists". In the memorandum of the Cabinet Division forwarding the Rules establishing Judicial Magistracy, they went even to the length of saying that the Draft Rules for creating and establishing judicial service including magistrates' exercising judicial function is contrary to the definition of judicial service in the Constitution and is also contrary to the judgement. This, in view of the Constitution and judgement was so fundamentally erroneous, that it can be said to be a bliss indeed.

I have stated the "oil and water" analogy in the judgement in pointing out that these are unmixable; so are judicial, administrative and executive services. But judicial service may be amalgamated with "judicial magistrates pursuing iudicial careers all throughout". Yet the administrators' scheme of a separate set of a Rules establishing "Judicial Magistracy", provided that it would comprise 50% of Assistant Commission from BCS (Adminis-

trative) Cadre by transfer.

The Second set of the administrators' Rules made the "judicial

After our determination to go ahead with the idea of effecting separation of the judiciary from the executive was known, it appeared from newspaper reports as well as from inside the government that dissatisfaction among the officers from of the Civil Service cadre was spreading fast and that they were thinking of concerted action in the future .We were concerned because, with the general elections ahead we had to exercise caution so that the elections were not jeopardized for any reason. There was a report published in the Daily Ajker Kagoj about these officers being angry, dissatisfied and that this was spreading fast and likely to have serious repercussions on the ensuing elections and that the Caretaker Government would face serious and grave difficulties. The report further said that the officers of administrative service cadre are going to call a conference from where they will declare a programme for movement in this regard. It said if the rules are put into effect, the administration in the whole country will be heated up and there may be a rebellion among them, which will surely make it problematic for the Caretaker Government to hold elections freely and fairly. On 11 September, a news item in the Daily Banglabazaar Patirka said if this is not stopped within three days, they would submit a memorandum to the Chief Adviser on 13 September. The officers numbering about 250 had met in the Association's office, where they expressed the view that the work of separation cannot be undertaken by the Caretaker Government and only the elected government was competent to do so. The government which comes

and the Ordinance with his signature on the same day to the Ministry of Law. While we gathered in the Cabinet Room waiting for the Chief Adviser to arrive, I was called by the Chief Adviser to meet him at his office, situated a little way away in the same building where the Cabinet Room is. At the meeting, the Chief Adviser told me about a phone call he had received a little while ago from Begum Khaleda Zia saying that today their party has returned in great majority and she expected to form the government and asked whether the Chief Adviser would leave this matter for her to do. She also told him that it was one of their election pledges which they were committed to fulfill. The Chief Adviser asked my views and I in turn asked him what he had He told me that he thought it right that we should concede to the request of the elected government. I agreed with him in good faith and in honest belief that Begum Khaleda Zia as Prime Minister will surely do as she promised to the Chief Adviser and before that, to the people of the country. At the meeting of the Council of Advisers, which commenced after our return, we noted this and our approval to the draft leaving it at this with our observations that we hoped the elected government would affect the senaration of the judiciary from the

President would return the rules

executive. We left the draft rules with the Cabinet Division, a set of which was already with the Ministry of Law. I promised to effect separation within eight weeks on 6 August 2001 at Cox's Bazar. I could finalize the draft rules before that time but

government had finalized the draft rules for the Judicial Service and Syed Ishtiag Ahmed, barrister, is former two-term adviser to caretaker government and eminent constitutional lawver

for those who do not understand or

are misquided.