

...look at core issues

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a sitting Judge of the Appellate Division of the Supreme Court as the Chief Election Commissioner, now being declared illegal in a PIL case filed by an Advocate of Supreme Court.

We need to rethink about the judges performing functions of an election commissioner or a member of the caretaker government. The experts suggest that the global research on this topic indicate that judges in top review courts are reaching decisions that often have far-reaching social and political implications, and greater emphasis must therefore be placed in the appointments process on their accountability. The case for such processes as public interviews designed to provide the public with some knowledge about the values and attitudes of these powerful decision makers, is much more persuasive at the top court level. It is also arguable that threat to judicial independence posed by such arrangements is reduced at this level. Judges in these courts have reached the top of the career ladder and are not looking for promotion, thus they are better able to withstand pressure from the selectors once on the bench.

The global research in this respect have also identified that the qualities and characteristics required of a judge presupposes an assumption about what judges do. There is a sharper distinction in some systems between the work of trial courts and top review courts. The upper courts are increasingly required to assess policy implications and reaching politically and socially sensitive decisions. The characteristics, backgrounds, knowledge and skills required of judges appointed to trial courts are bound to be different from those skills and qualities required for top review courts. The idea that thirty years as an advocate is the best possible training for both types of court, traditionally entrenched in many common law systems, is now increasingly being questioned. Same question is raised today whether the eligibility qualification under Article 95(1) requiring 10 years practice at the Bar or being a Judge on the Bench is sufficient qualification or criteria for choosing a Judge.

While talking about the reforms, very little is said about judicial reform. We are talking about only sharing power. Not about the quality or content nor about the process or the system. Same is true also about administrative or political reform. We hardly know, what we are talking about. In absence of a thorough research and without identifying the object and philosophy as to what we want to achieve, talk about reform could become a meaningless rhetoric.

Bangladesh must be careful not to fall into the trap. Dishing out the old system in the name of reform may be replacement of personalities and representing different interest groups. It may merely mean another form of power sharing in the name of a reform. It is easy to form a Judicial Appointment Commission. What we need first is a Judicial Reform Commission, who must identify the maladies and deficiencies in our recruitment system. How can we remedy the present situation when appointments are made not on objective criteria and evaluation nor looking for right qualities in some one to be able to dispense even handed justice. On a subjective criterion, PM or a Minister or their nominees from the Legislative and Executive may end up choosing loyalist. If subjective judgment is not replaced by an objective criterion, a loyalist is not going to be replaced by a free thinking judge of stern fibre. We must therefore review

the qualification for becoming a judge under Article 95(2) seeking creative innovation as can be carved out under Article 95 (2) (c) by adding new requirements for qualifying through a selection process. A bureaucracy heavy Judicial Service Commission (JSC) for recruiting subordinate courts has been installed (with a very limited power) and gives no sign of any improvement in the recruitment system as already manifested in recently recruited 350 judges.

If the gap between the different ranks of judges is growing, it is best to have separate appointment processes for them (as in many European systems), or to employ essentially the same system (as in many common law systems).

This increasing global interest in judicial selection across different political systems can be seen in both common law and civil law systems and includes the full range of appointments processes found within them.

The recruitment and appointment process of the judiciary

The first cornerstone being the most crucial for ensuring independence of the judiciary is the choice of the mode for recruitment of judges.

In any State governed by the rule of law, it is vital for citizens to have an effective right to have this grievance placed before the judges capable of freely assessing the cases submitted to them, with demonstrable competence. These qualities depend on the selection, recruitment and training systems of the judges. There should be a solid link between the selection and recruitment of judges on the one hand, and their initial training on the other.

This right to a competent, impartial and independent judge could only be effective in the guaranteed absence of political or executive influence over the exercise of judicial functions. Thus it is necessary to entrust the management of judicial careers, right from the selection stage, to an independent body.

The training system must provide judges with the necessary tools for developing analytical skills, reasoning and making decisions. The training should therefore be pluralist in order to enable judges to manage the cases submitted to them independently, impartially, open-mindedly and with sound knowledge of societal problems.

The current recruitment and appointment process of judges in the Supreme Court of Bangladesh

Factors Affecting the Independence of Judiciary
(i) Executive Head Exercising Absolute Power:

We all are aware of the event which took place in 1994 when nine judges were appointed without proper consultation with the then Chief Justice Mr. Shahabuddin Ahmed. At the National Convention of the lawyer, the then Chief Justice Mr. Shahabuddin Ahmed said 'I am Mr. nobody when it comes to appointment of judges'. The senior members of the Bar met the President and PM, CJ and the full Court. Without narrating the details of the dialogue, which took place during those meetings, it would suffice to say that the leaders of the Bar were able to persuade the then PM who cancelled the appointment and sent the file to the CJ. As per the opinion of the CJ, seven out of nine were appointed. It was so gazetted incorporating those words "in consultation with the Hon'ble Chief Justice." Though the Bar was not convinced about each of those seven, it was persuaded to accept the same as the restoration of convention

for consultation. It was a great day, we thought. Our assumption was that no CJ would fail in the appropriate scrutiny and they in turn will not act arbitrarily and blindly. CJ would consult with senior judges and the senior members of the Bar; but that has not been the case experienced since then.

We were equally disappointed in 2001 when sixteen judges appointed during the tenure of the previous government were en masse refused confirmation in spite of their performance being above board. Lawyers from the Bar were in one opinion that they deserved confirmation by any standard. We learnt that the advice and recommendation of the CJ was not given any heed to.

Both the SCBA and Bar Council wrote to the PM hoping that this departure from the Convention could be reversed and the Constitutional Convention restored. No response nor even an acknowledgment letter followed. Same was the fate of a similar letter addressed by Senior Advocates led by Syed Ishtiaq Ahmed, Dr. Kamal Hossain and others.

In order to resolve this issue of great public importance cases were filed in order to reassert the entitlement of the judges to be so confirmed as per opinion of the Chief Justice. A Special Bench was constituted. Court ordered for the file containing the consultative process and the correspondence exchanged in this respect with the law Ministry to be placed. The then Attorney General (presently the Law Adviser) wanted stay of the order. The Appellate Division not only granted the stay of that particular order, it stayed the entire proceeding and hearing of the case. Until this day, the matter is stuck. Meanwhile some of the judges of the Special Bench already elevated and retired. The issue remains unresolved, though the matter concerns the independence and quality of the judiciary which is of great public importance. This is a sad testimony of our commitment for independence of the Judiciary. Besides, it could have been most appropriate an opportunity for the Court as in other jurisdiction have done to lay down the Constitutional norms and practices to be followed in appointing the Judges and as to their confirmation. After several prayers recently the case came on the list and again disappeared and could not be heard. Highest Court of the Land has failed to act in removing the deadlock created by itself without any reasoned order for last four years. Who then is going to protect the independence of their own Judges, not to say about the independence and freedom of a private citizen from arbitrary act or omission of the executive or a law enforcing state agency.

In the meanwhile, judges have been appointed without meaningful consultation either with the seniors in the Bar or the Bench by the CJ. As a result, most of the judges, being appointed during the preceding government are perceived as being party loyalists. There has been a lot of public criticism of such manner of appointment lacking transparency and any objective criteria. It is also widely perceived by the Bar that the competence, qualification, experience and commitment for the institutional integrity has not been of much consideration. It is therefore a widely shared opinion that before any appointment of judges to this high Constitutional post is made a wide and effective consultation must be held, both among the senior judges as well as among the senior members of the Bar. Similarly, the same should also take place while confirming the judges. This is nothing against any judge so

appointed but against the process itself. Public confidence being the most powerful strength of the judiciary, transparency, objective standard and fairness in the process of appointment is most crucial for building that confidence to start with. Consultation process having not worked properly, there is now the trend for Independent Judicial Appointment Commission. A law has been handed down as we learn from the press to our surprise. A Commission has been formed for selection of judges including the Law Minister and the Law Secretary and two legislator nominees of two chiefs of the parties. It is not understood by the Bar and the people in general why one needs the Law Secretary and a Minister and two legislative nominees of the political chiefs to be on the board for appointment of judges. It looks like sharing the executive fiat through four different hands giving them share in their choice in judges. It may be at best termed as power sharing rather than creating an independent Judicial Appointment Commission. This violates the doctrine of separation under the Constitution expounded by authorities re-enforced in Masdar case. Besides, it undermines the independent status of the judges to be selected in this process. Judges who are recruited should feel in his/her mind from day one that (s)he has been chosen as a judge only on the basis of his/her quality and for merits only and for no other consideration. This would help boost the moral of the Judge feeling so proud and dignified. This will help protect his/her integrity all through the career. The choice if based on subjective evaluation by those individuals in the Commission, (s)he will lose that pride and integrity from the very beginning.

Judiciary must be built on the basis of meritocracy and those who are loyal to the Constitutional and institutional values and able to defend those values at any cost even at the risk of incurring disfavour of the high political office. This must be the only criteria. This loyalty to the constitution and rule of law is distinct from loyalty to individual or any particular regime. As an American judge observes that 'men are often bribed by their loyalties and ambitions than by money'. It is therefore important to ascertain that those who are going to be inducted as the judges for the new generation are free from such influence and loyalties. They hopefully will not be espousing their own cause i.e. elevation to higher position or any favour or a public office after their retirement.

In the case of Abdul Bari Sarker vs Bangladesh, Shahabuddin Ahmed CJ held that: "...then a Judge, while in the service of the Supreme Court might be tempted to be influenced in his decisions in favour of the Authorities keeping his eye upon a future appointment. This Article, after amendment, lifted the embargo partially making a retired Judge eligible for appointment "in a judicial or quasi-judicial office"... If it is not thought expedient to make statutory provision in the case of such appointment, it is better that the original Article 99 be restored putting total ban on appointment of a retired Judge to any public office whatever."

(ii) Image and integrity of the Judiciary.
Judges are oath bound to ensure justice for the people "without fear or favour". Their independent functioning therefore cannot be interfered in any manner whatsoever.

Deconstitution of Benches, abrupt withdrawal of jurisdiction, or staying the case in the midst of hearing, staying the interim order of the High Court Division all of these undermine the efficacy of the system as a whole. These interventions may be perceived as arbitrary interference with the independence of Judges and at the end undermining Rule of Law and the image of the judiciary. Such exercise of power undermining the judicial process of the Court in history brought many collapses of the Rule of Law often contributing to lawlessness. Independence of the judiciary can thus be obliterated through interference of the Hon'ble Chief Justice if Benches are constituted and deconstituted in an arbitrary and abrupt manner as were witnessed in the past.

The power of constitution of Benches of the Chief Justice is an administrative power which ought not to in any way interfere with the independence of Judges however remotely this may create a demoralizing effect. Any perception relating to wrong judgments from the High Court Division can be dealt with by the Appellate Division in an appeal but not by the Chief Justice exercising his administrative power by withdrawing jurisdiction which can easily be perceived as an arbitrary intervention nor can be perceived bona fide.

Suggestions for transparency and accountability in the selection process of Judges in the Supreme Court

We must take into consideration the sea change which has taken place in other countries and jurisdictions. The Judicial appointment is no longer made by the judicial hierarchy through consultations alone even in England and Wales. They used to have an elitist approach but a drastic change has been introduced in the entire appointment process. It is now open and transparent, fair and competitive. They encourage successful and meritorious people in the profession to participate in an open competition and an independent Judicial Appointment Commission has been created to select candidates for office.

The approach taken in England and Wales

In England and Wales, JAC selects candidates for judicial office. It does so on merit, through fair and open competition, from the widest range of eligible candidates. JAC is an independent Non Departmental Public Body set up by the Constitutional Reform Act in 2005 to select judicial office holders. From 3 April 2006, JAC assumed responsibility for making

selections for the appointment of judicial office-holders. For the first time in 900 years, the Lord Chancellor no longer has the sole power to select which judge to appoint. Instead the JAC select and make a recommendation to him. He can reject that recommendation but he is required to provide his reasons to the JAC.

Under CRA 2005, JAC have very specific duties in selection of judges and tribunal members, both legal and non-legal.

Its statutory responsibilities are:

- a) to select candidates solely on merit;
- b) to select only people of good character;
- c) to have regard to the need to encourage applications from a wider range of candidates.

The procedure for selection in the UK

1. JAC's role in the judicial appointments process begins when it receives a request from Her Majesty's Courts Service (HMCS).

2. JAC then seeks out the very best candidates, using the processes and the qualities and abilities relevant to that post as described."

3. JAC then recommends to the Lord Chancellor one candidate for each vacancy. The Lord Chancellor can reject that

recommendation but he is required to provide his reasons to the Commission. He cannot select an alternative candidate.

The approach taken in Scotland

The Judicial Appointments Board advertises all positions within its remit as widely as possible and requires candidates to fill in a detailed application form with three named referees. In assessing a candidate, the Board cannot make use of personal knowledge of a candidate since applicants would expect to be judged on objective, open, transparent criteria and not to have their progress hindered or assisted by 'unofficial knowledge' that would not be put to them or be open for verification. All interviewing panels consist of equal numbers of lay and legal members of the board and are chaired by one of the lay members. Finally, during the interviews the judicial members have no particular primacy in the questioning so as to ensure that the judiciary do not exercise undue influence over the remainder of the board. Furthermore, in order to obtain adequate, reliable and verifiable information on every candidate, the Board developed the application form into a formidable document in which candidates are required to demonstrate (with examples

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