

LEX/BDAD/0182/2009

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IN THE SUPREME COURT OF BANGLADESH (APPELLATE DIVISION)

Civil Petition for Leave to Appeal No. 2221 of 2008 with Civil Petition for Leave to Appeal No. 2046 of 2008

Decided On: 25.02.2009

Bangladesh represented by the Secretary, Ministry of Justice and Parliamentary Affairs and Others **Vs.** Md. Idrisur Rahman, Advocate and Others
[Alongwith Civil Petition for Leave to Appeal No. 2222 of 2008]

And

Justice Syed Md. Dastagir Hossain and Others **Vs.** Md. Shamsul Huda, Additional Judge and Others
[Alongwith Civil Petition for Leave to Appeal No. 2056 of 2008]

Hon'ble Judges/Coram:

Md. Ruhul Amin, C.J., Mohammad Fazlul Karim, Md. Tafazzul Islam, Md. Joynul Abedin and Md. Abdul Matin, JJ.

Counsels:

For Appellant/Petitioner/Plaintiff: Mahbubey Alam, Attorney General with Enayetur Rahim, Additional Attorney General, instructed by A.S.M. Khalequzzaman, Advocate-on-Record in C.P. Nos. 2221 & 2222 of 2008 and T.H. Khan, Senior Advocate with Rafiqueul Huq, Senior Advocate, A.J. Mohammad Ali, Senior Advocate and Ahsanul Khan, Advocate instructed by Md. Taufique Hossain, Advocate-on-Record in C.P. Nos. 2046 & 2056 of 2008

For Respondents/Defendant: Dr. Kamal Hossain, Senior Advocate instructed by Syed Mahbubar Rahman, Advocate-on-Record for Respondent No. 1 in C.P. No. 2221 of 2008, M. Amir-ul Islam, Senior Advocate instructed by Md. Abu Siddique, Advocate-on-Record for Respondent Nos. 2-4 in C.P. No. 2221 of 2008 and for Respondent No. 1 Rokonuddin, Senior Advocate

JUDGMENT

Md. Ruhul Amin, C.J.

1. While agreeing with my learned brother M. A. Matin, J., I like to add a few words of my own. The facts of the cases have been narrated in details in the main judgment. So I do not like to re-state those.

2. In these cases non-appointments of some judges of the High Court Division are challenged and called in question on the ground that they have not been appointed under Article 95 of the Constitution inspite of consultation with the Chief Justice and favourable recommendation of the Chief Justice for such appointment as Judges.

3. It has been asserted by the writ petitioners that there is continuous and unbroken convention of consultation with the Chief Justice of Bangladesh regarding appointment of Judges and that has not been denied by the Government by filing any counter

affidavit. It is true that there has been unbroken and continuous convention of consultation excepting a breach in 1994 which was subsequently cured by consulting the Chief Justice and by issuing a fresh letter of appointment of the Judges by cancelling the earlier one which was issued without consulting the Chief Justice of Bangladesh. Therefore, the consultation with the Chief Justice must be effective consultation with its primacy.

4. In the case of S.P. Gupta and others Vs. President of India and others reported in AIR 1982 (SC) 149, the case of Supreme Court Advocates-on-Record Association Vs. Union of India reported in AIR 1994 page 269 and Special Reference No. 1 of 1998 and the case of Al-Jehad Trust Vs. Federation of Pakistan reported in P.L.D. 1996 Vol-1 page 324 the matter of consultation with the Chief Justice in the matter of appointment of Judges to the higher Judiciary was considered and it was held that consultation with the Chief Justice is a pre-requisite and the opinion of the Chief Justice shall have primacy.

5. It is pertinent to mention here that in India after the 3 Judges cases, the Law Commission of India considering all aspects of the matter, submitted its report with recommendation pointing out the bad aspects of the 3 Judges cases as under:

As already stated this delicate balance has been upset by the second Judges case (Advocates-on-Record Association Vs. Union of India), 1993 (4) (SCC) 441 and the opinion of the Supreme Court in the Presidential Reference (Reference No. 1 of 1998). It is time the original balance of power is restored.

6. This recommendation is mainly based on the views expressed by J.S. Verma, J. the author judge of the main judgment in the case of Advocates-on-Record Association Vs. Union of India, 1993 (4) (SCC) 441.

7. In the case of Anwar Hussain Chowdhury and others Vs. Bangladesh reported in 41 DLR (AD) 165 the independence of judiciary has been held to be a basic structure of our Constitution. In the case of Secretary, Ministry of finance Vs. Masder Hussain and others reported in 20 BLD (AD) 104 it was held that the independence of judiciary is one of the basic pillars of our Constitution and cannot be demolished or curtailed in any manner whatsoever except under the existing provisions of the Constitution.

8. Since in Articles 98 or 95 or other provisions of the Constitution, there is no prohibition in respect of consultation with the Chief Justice, and such consultation with the Chief Justice and its primacy being not in contrast with the provisions of Articles 48(3) and 55(2), the Prime Minister cannot advice contrary to the basic feature of the Constitution. Therefore, it appears that the independence of Judiciary being a basic structure of our Constitution, consultation with the Chief Justice in the matter of appointment of Judges with its primacy is an essential part of the independence of Judiciary.

9. We did not agree with the learned Judges of the High Court Division that there should be a collegium of Judges and the Chief Justice of Bangladesh will consult with them when he recommends the candidates for appointment as Judges. Despite the fact that we disagreed with the learned Judges of the High Court Division that the Chief Justice should consult with a collegium of Judges, there is also no bar for the Chief Justice to discuss with his colleagues who are best persons to adjudge the legal acumen of the persons reappointment as Judges and in fact the Chief Justice discusses with his colleagues before he recommends the names of the candidates for appointment as Judges.

10. As regard the oath it is to be mentioned here that under Article 98 of the Constitution a Judge is appointed for a fixed period of 2 years as an additional Judge and he takes oath as such. So, this oath cannot extend beyond the period of 2 years. But under Article 95 a judge is appointed without mentioning any period and he takes oath accordingly. This oath under Article 95 of the Constitution in common parlance is known as confirmatory oath. So, the two oaths are distinct and separate for all purposes.

11. Moreover, if a Judge after taking oath under Article 98 of the Constitution resigns before the expiry of two years or if he is not appointed under Article 95 before expiry of two years he can practice in the High Court Division. But after his appointment under Article 95 of the Constitution and taking oath as such if he resigns or otherwise ceases to hold office as a judge, he is debarred from practicing in the High Court Division.

12. Resultantly, the leave petitions are disposed of in terms and to the extent as indicated in the main judgment.

13. Mohammad Fazlul Karim, J: I have pursued the judgments of my brothers Md. Tafazzul Islam, Md. Joynul Abedin and Md. Abdul Matin, J.J.J, expressing their respective views particularly, relating to the maintainability of the leave petition filed by 29 sitting Judges of the High Court Division being aggrieved by the observations, affecting their individual rights and position as senior Judges of the Division and as to their standing to maintain the said petition. I could not persuade myself to agree on the views expressing lack of their standing to maintain the leave petition passed by my brother, Matin, J, holding.

This follows that the High Court Division is a unit of this Court with a co-ordinate jurisdiction and one Judge or a group of Judges can not challenge the judgment passed by another Judge or a bench of Judges since that will amount to challenging their own judgment which is not permissible in law.

.....Moreover if this is permitted the practice will destroy the tradition of high decree of comity among the Judges of the superior Courts which is essential for the smooth and harmonious working of the Supreme Court.

14. Since a controversy has arisen regarding the issue of the standing of the 29 permanent and confirmed sitting Judge of the High Court Division as stated above and the maintainability of their leave petition, a decision on the issue is necessary for proper disposal of the appeal.

15. The issue arose when 29 sitting permanent Judges of the High Court Division filed leave to appeal being aggrieved by the findings of the High Court Division made against their respective personal status and positions as the learned Judges of the High Court Division, in their absence without any notice of the rule to them or even without impleading them or any relief sought in the writ petition before the High Court Division to that effect. Because the learned sitting Judges were neither made parties nor any allegation was levelled against them in the writ petition but abruptly the impugned judgment of the High Court Division held contrary view regarding their respective status and seniority i.e. dislodging their existing seniority over the writ-petitioner whereby their existing constitutional position as to their posts and consequent seniority which was dislodged by the impugned judgment while appointing the writ petitioners as permanent Judges placing them over the said 29 permanent Judges breaking the chain of seniority as preserved pursuant to their position under Article 95 of the Constitution.

16. While summing up the views in the main judgment, Matin, J considered in general

terms the jurisdiction of each the Judges of the High Court Division exercising jurisdiction on behalf of the High Court Division which is an unit of the Court having co-ordinate jurisdiction and one Judge or group of Judges cannot challenge the judgment passed by another Judge or Bench of the Judges as that will amount to challenging their own judgment and has also spelt out the correct legal position regarding oath which is essential for entering of the offices under Articles 98 and 95 of the Constitution and that the Judges enter the office only after taking oath and accordingly set aside the finding of the High Court Division that the fresh oath is not necessary for the dropped ad-hoc Judges and their appointments shall be effective from the date of their respective date of non-appointment i.e. on the date scheduled to be deemed appointed under Article 95 of the Constitution.

17. Apart from above illegality the said finding of the High Court Division is also not sustainable for the simple reason of the provision of Article 148(1) of the Constitution providing that "A person elected or appointed to any office in "Third schedule", shall before entering upon the office make and subscribe an oath or affirmation (in the article referred to an oath) in accordance with that schedule. The 3rd schedule of the Constitution provides that;

Chief Justice or Judges. An oath (or affirmation) in the following forms shall be administered, in the case of the Chief Justice by the President, and in the case of a Judge appointed to a division, by the Chief Justice- "I, having been appointed Chief Justice of Bangladesh (or Judge of the Appellate/High Court Division of the Supreme Court) do solemnly swear (or affirm) that I will faithfully discharge the duties of my office according to law; That I will bear true faith and allegiance to Bangladesh: That I will preserve, protect and defend the Constitution and the laws of Bangladesh: And that I will do right to all manner of people according to law, without fear or favour, affection or ill-will.

18. From the above, it is very clear to note that the said provision of taking oath as provided under Article 148(1) in accordance with the "Third schedule" thereto is not an idle formality to be ignored or not to be adhered to upon their appointment as a Judge permanently or otherwise so as to avoid taking of oath. It is to be noted here that the said provision also appeared in their respective appointment letters issued to the Judges upon their appointment clearly specifying that the appointment under the Articles 95 and 98 of the Constitutions shall be effective from the date of taking oath. Thus, the mandatory obligation of taking 'Oath' of office as a Judge under the aforesaid Articles is sine qua non to be a Judge of either Division. But the High Court Division contrary to the provision of the Constitution as also reiterated by the respective notifications appointing each of them a Judge held that no fresh oath is necessary for the dropped out Judges, not being confirmed under Article 95 of the Constitution or their appointment shall be effective on and from the respective date of non-appointment.

19. But while considering the constitutionality and consequent obligation to subscribe to their respective 'oath' before assumption of the office of a Judge, Matin, J has negated the standing of the said aggrieved 29 Judges whose respective position as permanent Judge was dislodged by the impugned judgment of the High Court Division which has necessitated and compelled the aggrieved Judges to file the leave petition before this Division in order to ventilate their constitutional position assigned personally to them affected by the impugned judgment of the High Court Division i.e. placing the writ-petitioners above their position as Judges of the High Court Division on the plea that no fresh oath on being appointed as permanent Judges is necessary for the dropped out Judges or that their appointment shall be effective from their respective

date of non-appointment.

20. The word 'Citizen' has been derived from the Latin word 'civis' is no longer understood in the narrower sense of earlier times as an inhabitant of a city or a freeman having a family or a representative of a city in Parliament. In the case of Bangladesh-Vs-Professor Golam Azam 46 DLR (AD) 199, it has been held that 'By citizen we mean a person who is a member of an independent political community having rights and obligations under the Constitution and the law of the Country." Thus, "Citizenship though not mentioned as a fundamental right in our Constitution is to be considered as a right of all rights as on it depends on right to fundamental rights expressly provided for a citizenship in Part III and his right to seek Court's protection of those rights."

21. In the instant case, however, a lis has arisen as detailed in the case of the 29 permanent and confirmed Judges and all actions or decisions, judicial, quasi-judicial or administrative, affecting the individual right of the Judges are amenable to the judicial review under Article 102 of the Constitution.

22. Article 102 of the Constitution is primarily a vehicle or mechanism for realizing individual rights upon individual complaints and the Supreme Court being a forum, a medium or mechanism devised by the Constitution for the exercise of the judicial power of the people on behalf of the people, the people will always remain the focal point of concern of the Supreme Court while disposing of justice or propounding any judicial theory or interpreting any provision of the Constitution.

23. In the case of Kazi Muklesur Rahman-Vs-Bangladesh 26 DLR (SC) 44 quite early in our Constitutional journey the question of locus standi was given a liberal contour, in this manner:

It appears to us that the question of locus standi does not involve the Court's jurisdiction to hear a person but of the competency of the person to claim a hearing, so that the question is one of discretion which the Court exercises upon due consideration of the facts and circumstances of each case

24. In the Case of Dr. Mohiuddin Farooque-Vs-Bangladesh 49 DLR (AD) 1, it has been held that the words 'any person aggrieved' means only and exclusively individuals and excluding the consideration of people as a collective and consolidated personality will be a stand taken against the Constitution. There is no question of enlarging locus standi or legislation by the Court "the enlargement is writ large on the face of the Constitution." It has further been held that individual rights carry the only weight and the judiciary exists primarily to protect the capitalist rights of the individuals.....Thus, when a person has suffered a legal grievance or injury or adverse decision or wrongful deprivation or any action wrongful to his right, title to something is a "person aggrieved."

25. In view of the above, the 29 Judges personal position and seniority to their respective constitutional position they were holding have been dislodged behind their back by the judgment of the High Court Division. The seniority over the writ-petitioners as per constitutional provision who were Judges and were subsequently confirmed and their right, title and interest having been effected, undoubtedly and surely have locus standi.

26. The word locus standi, in Black's Law Dictionary of Bryan A. Garner, Seventh Edition, means "the right to bring an action or to be heard in a given forum."

27. In this regard, another aspect of the case could not be lost sight of as the appellant-Judges were neither given notice of the Rule nor were given any hearing before dislodging their constitutional position as a Judge and that because of the want of notice to a party against whom a cause has been set up and consequent lack of hearing, they could not agitate their grievance, if any, before the High Court Division and that they having been deprived of their existing and protected right, undoubtedly they have the standing to move this Division to get their position set at right and restored in accordance with the provision of the Constitution and the established norms attached to the position as a permanent Judges of the High Court Division and in that view of the facts and circumstances, the 29 permanent Judges were undoubtedly persons aggrieved and accordingly have resorted to the jurisdiction of this Division under Article 103 of the Constitution as being persons aggrieved under the Constitution and under the provision of the General Clause Act. It has been held in the case of University of Dhaka through its Vice-Chancellor and the Registrar of University of Dhaka-Vs-Zakir Ahmed: LEX/SCPK/0055/1964 : 16 DLR SC 722, pre-pounding the principle of natural justice "audi alteram partem" that before a person is punished an opportunity to show cause against the proposed punishment shall be afforded to him. The word audi alteram partem has been defined in the Judicial Dictionary, 13th Edition by K.J. Aiyar that "The doctrine of audi alteram partem" holds that natural justice has acquired legalistic and artistic connotation by the passage of time and is invoked in proceedings before judicial and quasi-judicial tribunals. As the principle of natural justice revolves around fairplay in action, justice should not only be done but must seem to be done.

28. Thus, it boils down that the principle of natural justice is to be observed in a proceeding affecting a person or property or other rights of parties concerned. Accordingly, the Court, thus, always adds rider to the observance of the principle of natural justice in the exercise of power under the Constitution and other concerned laws of the land and invariably interferes in case of absence of any prior notice and a failure to provide any chance of hearing and thus always interferes with such order passed there under for any such violation of principle of natural justice.

29. It is true that upon being appointed as a Judge under Articles 95 and 98 of the Constitution each of them exercises jurisdiction for and on behalf of the Judges of the High Court Division and accordingly acts as an unit of the said Court having a co-ordinate jurisdiction and one Judge or a group of Judges cannot challenge the judgment passed by another Judge or Bench of Judges as that would amount to challenge their own judgment in the matter of dispensation of justice sitting as a Judge of the Division. But in the instant case the aggrieved 29 Judges who were confirmed during the pendency of writ petition and under the Constitutional set up as detailed above, a Judge holds the position of a permanent Judge from the date of his taking oath, as such, they could not be dislodged by a person, earlier appointed as an additional Judge but was not confirmed. Such a person upon declaration by the High Court Division is eligible for appointment as a permanent Judge i.e. superseding 29 permanent Judges who earlier took oath upon being confirmed while the writ-petitioners were not confirmed. Accordingly, the said sitting 29 confirmed Judges who are holding the constitutional post, had reason to be aggrieved to secure their individual position as a Judge and are entitled to maintain an appeal in order to avoid infliction of any constitutional wrong affecting their individual legal entity, though unit of the entire body of Judges of the said Division and accordingly have standing to maintain the leave petition under Article 103 of the Constitution.

30. In view of the above, I am in agreement with the views expressed in this regard by

my learned brothers Md. Tafazzul Islam and Md. Joynul Abedin, J.J only while agreeing with the rest of the views expressed by my learned brother, Md. Abdul Matin, J in his illuminating judgment.

31. Md. Tafazzul Islam, J: I have gone through the judgments and orders dictated by my learned brother Md. Abdul Matin J and Md. Joynul Abedin J.

32. As it appears in view of the provisions of Article 94(4) of the Constitution and the interpretation of the words "shall be independent" as contained in Article 116A of the Constitution as given in Masdar Hossain's case, 20 BLD (AD) 104 and also the principles laid down in Sankar Chand's case, : MANU/SC/0065/1977 : AIR 1977 S.C. 2328, wherein the Supreme Court of India interpreting Article 50 of Indian Constitution, which is similar to Article 22 of our Constitution, held that a basic pillar of the Constitution can not be demolished or curtailed or diminished in any manner except by and under the provision of the Constitution and the Appellate Division applied the above view in Anwar Hossain's case, 41 DLR (AD) 165 and that there is also no bar either in Article 95 or Article 98 or any other provision of the Constitution in respect of consultation with the Chief Justice and further the primacy of the opinion of the Chief Justice is in no way in conflict with Article 48(3) of the Constitution and the advice of the Prime Minister is subject to Articles 22, 94(4), 95, 98, 116 and 116A of the Constitution and accordingly the Prime Minister, on the basis of Articles 48(3) and 55(2) of the Constitution, can not advice contrary to the basic feature of the Constitution so as to destroy or demolish the independence of judiciary and as such consultation with the Chief Justice with primacy of his opinion is an integral part of independence of judiciary which is ingrained in the very concept of the independence of judiciary embedded in the principle of Rule of Law.

33. Further in terms of the views expressed by Dicey in "The Law of Constitution", AW Bradely and K.D. Ewing in "Constitutional and Administrative Law" 14th Edition, O. Hood Phillips and Jackson in "Constitutional law and Administrative Law" Fifth Edition and also the principles laid down by the Supreme Court of Canada in the case of Reference re-amendment of Constitution of Canada, 123 DLR (3rd) 1,84, Supreme Court of Pakistan in Al. Jihad Trust Case PLD SC 324, Supreme Court of India in the Second Judges Case AIR 1964 SC 268 and also the admission on the part of the Executive about the long and unbroken convention of our Consultation as is evident from the Notification dated 9th February 1994 issued by the Ministry of Justice, Law and Parliamentary Affairs and also in view of the assertions of Dr. Kamal Hossain, Senior Advocate, and the Chairman of the Draft Committee of the Constitution, Mr. M. Amirul Islam Senior Advocate and a member of the Draft Committee of the Constitution and Mr. Mahabuby Alam, the Attorney General, to the effect that consultation with the Chief Justice had been there althrough and even during Martial Law, and further, in terms of the constitutional mechanism the Supreme Court is designed to function independently as a guardian of the Constitution and as such the convention that the Chief Justice should be consulted and his opinion will have primacy is as good as any other provisions of the Constitution and is binding upon the Executive.

34. However, as held by Joynul Abedin J, since a judge is properly identified with the Court in relation to something done in exercise of the jurisdiction of the Court and his personality remains distinct and separate from the Court and as an individual, he can maintain action if he suffers legal wrong or legal injury and on the plain language of Article 103 of the Constitution there is no difficulty in holding that the petitioners of Civil Petitions for Leave to Appeal Nos. 2056 and 2046 of 2008 as sitting judges have standing to maintain the leave petitions filed by them in challenging the impugned judgment of the Special bench of the High Court Division.

35. Accordingly I agree with the view expressed by Matin J in his judgment except the view regarding the maintainability of the leave petitions.

36. The petitions are disposed of.

37. Md. Joynul Abedin, J: I have had the advantage of perusing the judgment of my learned brother, Md. Abdul Matin, J. Though I am in respectful agreement with most of the conclusions arrived at by him, yet having regard to the important constitutional points involved in the case, I would like to give my own reasons for those conclusions and would also add some of my views on a few other points.

38. In the background of the failure of the Government to appoint some Additional Judges of the High Court Division of the Supreme Court previously appointed under Article 98 of the Constitution as permanent Judges of the High Court Division under Article 95 of the Constitution, 3 (three) writ petitions being Writ Petition Nos. 1543, 2975 and 3217 of 2003 were filed challenging such non-appointment. Writ Petition No. 1543 of 2003 was filed by Md. Idrisur Rahman, an Advocate of the Supreme Court, Writ Petition No. 2975 of 2003 was filed by three aggrieved Additional Judges Md. Shamsul Huda, Faruque Ahmed and Hasan Foez Siddique and Writ Petition No. 3217 of 2003 was filed by Mr. Farhad Ahmed, another Advocate of the Supreme Court.

39. The learned Chief Justice subsequently in deference to the views expressed by the Writ Bench of two learned Judges of the High Court Division that the writ petitions involved constitutional questions of great public importance constituted a Special Bench of three learned Judges for disposal of the aforesaid three writ petitions.

40. Rule Nisi was separately issued in all the 3 (three) writ petitions on 4.5.2003 by the Special Bench making them (rules) returnable within 6 (six) weeks calling upon the Secretary, Ministry of Law and Justice, to show cause as to why non-appointment of the Additional Judges named in the writ petitions as permanent Judges in the High Court Division should not be declared illegal and without jurisdiction and why the respondent Government in the Ministry of Law and Justice should not be directed to appoint them as permanent Judges of the High Court Division in accordance with the recommendation of the Chief Justice of Bangladesh and also as to why the part of the Rules of Business, 1996 which purport to regulate matters relating to the appointments of the Additional Judges and Judges of the Supreme Court by the executive Government shall not be declared unconstitutional.

41. Before the date fixed for service return of the rules an application was filed by the writ petitioners in Writ Petition No. 2975 of 2003 for a direction upon the Secretary, Ministry of Law and Justice and the Registrar of the Supreme Court to produce papers relating to recommendation of the Chief Justice in connection with the appointment of six Additional Judges, namely, Abdul Hye, Md. Faruque Ahmed, Mohammad Marzi-ul-Huq, Md. Shamsul Huda, Abdur Razzak and Hasan Foez Siddique. The learned Attorney General opposed the prayer for production of papers on the ground that they were privileged documents. The Special Bench nonetheless by its order dated 27.5.2003 directed the Secretary, Ministry of Law, Justice and Parliamentary Affairs to produce the papers called for through the learned Attorney General.

42. The respondent Government thereupon acting through the Secretary, Ministry of Law, Justice and Parliamentary Affairs challenged the aforesaid order dated 27.5.2003 by filing Civil Appeal No. 50 of 2004, whereupon this court by judgment dated 18.3.2008 allowed the appeal by setting aside the aforesaid order dated 27.5.2003 with a direction to dispose of the said application for calling for the papers in the light of the

guidelines given as under:

The High Court Division shall hold a preliminary enquiry and determine the validity of the objections raised by the Attorney-General to the production of the paper containing opinion or recommendation of the Chief Justice and to hold enquiry into the questions as to whether the papers related to an affair of the State under section 123 (of the Evidence Act) or not. The High Court Division may require the appellants who are respondents in the writ petition to file affidavit-in-opposition pinpointing whether any such opinion or recommendation of the Chief Justice in writing is available and, if so, on which grounds the appellants are seeking for the privilege.

The High Court Division is further directed to ascertain whether the papers in question are relevant on the basis of which the Prime Minister advised the President and to ascertain whether such advice was relevant for the appointment. The High Court Division is further directed to ascertain whether the papers are necessary for the proper adjudication of the issues involved in the writ petition.

The High Court Division is to ascertain whether it can hold an enquiry into the possible injury to the public interest which may result from disclosure of the document in question of which privilege has been claimed and if it decides in the affirmative, then to decide the question of possible injury to the public interest which may result from the disclosure and lastly, the High Court Division is to decide what papers and relating to whom are to be called for and then to limit the enquiry as to the opinion of the Chief Justice only so far as it relates to the persons who are really seeking relief before the Court.

In all cases whenever a privilege is sought on the ground of immunity under law, the objection must be enquired into and if the Court decides that there is no immunity available then only may call for the documents, but in so calling the Court must decide whether it is calling for inspection of the Court or for disclosure to the public and if it is called for inspection only, it shall ensure adequate safe-guard against disclosure.

43. Although initially Writ Petition No. 1543 of 2003 was filed by Advocate Idrisur Rahman alone, two aggrieved Additional Judges, Abdus Salam and Momtazuddin Ahmed, subsequently applied for and were added as co-writ petitioner Nos. 2 and 3 by order dated 6.6.2008. Similarly, although Writ Petition No. 2975 of 2003 was initially filed by 3 (three) aggrieved Additional Judges, Md. Shamsul Huda, Faruque Ahmed and Hasan Foez Siddique, 5 (five) more aggrieved Additional Judges, namely Md. Abdul Hai, Md. Abdur Razzaque, Marzi-ul Huq, A.H.M. Shamsuddin Chowdhury and Md. Nizamul Huq also had themselves added as co-writ petitioner Nos. 4, 5, 6, 7 and 8 in the aforesaid writ petition by the order of the same date.

44. In all the aforesaid three writ petitions the common fact alleged was that the aforesaid 10 (ten) writ petitioners, who were appointed as Additional Judges, were dropped from being appointed as permanent Judges of the High Court Division under Article 95 of Constitution despite recommendations for such appointment by the Chief Justice and such non-appointment was unconstitutional.

45. The above writ petitions were heard during the emergency period of the caretaker Government, emergency having commenced since 1.11.2006. Although an Assistant Attorney General participated in the hearing opposing the rules but no affidavit-in-

opposition was filed by the Government. The Special Bench thereafter by the impugned judgment dated 17.8.2008 discharged the rule in Writ Petition No. 3217 of 2003 as not pressed and made the other two rules in Writ Petition Nos. 1543 and 2975 of 2003 absolute directing the respondent Government to appoint the following 10 (ten) Additional Judges as permanent Judges to the High Court Division with effect from the date as follows: Md. Abdus Salam and Md. Momtazuddin Ahmed with effect from 24th October, 2002; Md. Shamsul Huda, Faruque Ahmed, Hasan Foez Siddique, Md. Abdul Hye, Md. Abdur Razzaque and Md. Marzi-ul-Huq from 22nd February, 2003 and A.H.M. Shamsuddin Chowdhury and Md. Nizamul Huq from 3rd July, 2003 that is the date on which they were due to be confirmed treating the intervening idle period as special leave without pay on the following conclusions:

(i) the proposal and process for appointment of Judges to the Supreme Court in both the High Court Division and the Appellate Division should emanate from the Chief Justice of Bangladesh;

(ii) the opinion of the Chief Justice of Bangladesh in the matter of appointment of Judges to the Supreme Court is entitled to have the primacy;

(iii) in case of appointment to the High Court Division, the Chief Justice shall consult with two senior most Judges of the Appellate Division and equal number of Judges of the High Court Division to form his opinion and he shall also consult senior members of the Supreme Court Bar and the Attorney General; and in the case of appointment of Judges to the Appellate Division, he shall consult with three senior most Judges of the Appellate Division to form his opinion;

(iv) the President or the Government shall have no right to directly initiate the process for appointment of Judges to the Supreme Court by passing the Chief Justice of Bangladesh but the President/Government shall have the right of suggesting the names of suitable candidates for consideration of the Chief Justice for appointment to the Supreme Court;

(v) non-appointment of anyone recommended, on the ground of unsuitability, must be for good reasons, disclosed and conveyed to the Chief Justice with the reasons, materials and information to enable him to reconsider and withdraw his recommendation. If the Chief Justice after consultation with the above Judges in respect of particular appointments in the Division concerned, does not find it necessary to withdraw and again recommended, then the President must adhere to such recommendation;

(vi) the President as a Rule shall accept the recommendation of the Chief Justice for appointment of Judges. If the recommendation of the Chief Justice for appointment or non-appointment of any person as a Judge either to the High Court or the Appellate Division could not be accepted by the Government, it cannot outright reject such recommendation and go ahead with appointment of persons of its own choice. The Government in such case shall send the recommendation back to the Chief Justice for reconsideration on the reasons supported by materials and information conveyed by the Government;

(vii) after consideration of the reasons of the Government along with the materials and the information conveyed, the Chief Justice may withdraw his recommendation. But if he again recommends the same recommendation after consultation with the aforesaid senior most Judges of the Appellate Division for

appointment, the Government shall be obliged to complete the process of appointment;

(viii) appointment or non-appointment of an Additional Judge as Judge under Article 95 of the Constitution by the executive disregarding the recommendation of the Chief Justice violates the Constitution;

(ix) when the executive may not accept such recommendation of the Chief Justice for reasons to be recorded, it may request the Chief Justice for reconsideration on the materials and information conveyed;

(x) the Chief Justice shall then reconsider the case on the materials and information furnished, and if after such reconsideration, he again recommends for appointment or non-appointment, the executive would be left with no choice but to complete the process of appointment of such an Additional Judge on the basis of such recommendation;

(xi) after successful conclusion of the period under Article 98, a Additional Judge acquires legitimate expectation and he becomes entitled to be considered for appointment under Article 95 of the Constitution in the absence of positive valid reason(s) to be recorded by the executive; and

(xii) non-appointment of the petitioners, in the circumstances, as Judge of the High Court Division under Article 95 of the Constitution therefore violates the constitutional scheme and conventions and is accordingly, declared to be arbitrary, mala-fide, without any lawful authority and as such, of no legal effect.

46. 29 (twenty nine) sitting judges, who at the relevant time were appointed under Article 95 of the Constitution as permanent Judges of the High Court Division after completion of their tenure of two years as Additional Judges, felt aggrieved by the impugned judgment of the Special Bench and filed two civil petitions for leave to appeal being Civil Petition for Leave to Appeal Nos. 2046 and 2056 of 2008 for the reason that if the said 10 (ten) Additional Judges were appointed as permanent Judges with ante-dated seniority their seniority will be affected. The Government on the other hand also filed Civil Petition for Leave to Appeal Nos. 2221 and 2222 of 2008.

47. Senior Advocates Mr. T.H. Khan with Mr. Rafiqe-ul-Huq and Mr. A.J. Mohammad Ali appears for the petitioners (29 sitting Judges) in Civil Petition for Leave to Appeal Nos. 2046 and 2056 of 2008. Mr. Mahbubey Alam, the learned Attorney General with Mr. Enayetur Rahim, the learned Additional Attorney General appears for the Government in Civil Petition for Leave to Appeal Nos. 2221 and 2222 of 2008. Dr. Kamal Hossain, Mr. M. Amirul Islam and Mr. Rokonuddin Mahmood appear for the ten writ petitioner respondents Additional Judges.

48. Dr. Kamal Hossain at the outset took the floor out of turn and makes an emotional and passionate appeal that the leave petitions taken up for consideration be disposed of without granting leave with minor modification in the impugned judgment by rejecting the appointment of ten Additional Judges with effect from the due date of their confirmation pointing out that detailed argument and examination of various points involved would give rise to rancorous situation which would likely create bad blood and bitterness between the leave petitioner Judges and the respondent Additional Judges affecting the required congenial atmosphere in the Supreme Court for dispensing proper justice.

49. Mr. T.H. Khan the leading Counsel for the petitioners in Civil Petitions for Leave to Appeal Nos. 2056 and 2064 of 2008 on the other hand emphasising the need for close and careful scrutiny of the constitutional points involved contends that since the words 'after consultation with the Chief Justice' were omitted from Articles 95 and 98 of the Constitution by the Constitution (Fourth Amendment) Act, 1975 and the same were never restored till date by any subsequent amendment of the Constitution, it should be taken to be an important pointer that the constitutional scheme of consultation with the Chief Justice by the President in the matter of appointment of the Supreme Court Judges has been purposely abandoned and dispensed with. Consequently the question of giving 'primacy' to the opinion of the Chief Justice does not arise. In the same strain Mr. Khan submits that the scheme of the Constitution concerning the process of selection for appointment of Judges of the superior judiciary does not create any legal obligation upon the executive government to appoint the Additional Judges as permanent Judges on the expiry of their tenure as such Judges. Consequently the Additional Judges, in the event of their non-appointment as permanent Judges, have neither acquired any legal right for appointment nor created any legal obligation on the executive Government to appoint the Additional Judges as permanent Judges to the High Court Division.

50. Dr. Kamal Hossain, Mr. Amirul Islam and Mr. Rokonuddin Mahmood for the respondent Additional Judges while dismissing the contentions advanced by Mr. T.H. Khan argue with behemence that the omission of the consultation process from Articles 95 and 98 of the Constitution would not make any difference inasmuch as the practice and precedent of consultation with the Chief Justice in matters of appointment of Judges to the superior courts since the British Rule has become a constitutional convention enforceable as a constitutional law. Hence the consultation with the Chief Justice has become a constitutional imperative and since the Chief Justice is the head of the judiciary his expert opinion as to the selection of qualified persons for appointment as Additional or permanent Judges has a primacy.

51. Besides, Mr. Amirul Islam has also seriously contended against the maintainability of Civil Petition for Leave to Appeal Nos. 2046 and 2056 of 2008 filed by the 29 sitting Judges of the ground of their locus standi to challenge the impugned judgment referring to Article 111 of the Constitution submitting that the impugned judgment is binding on them.

52. The core points that are now raised for consideration are as under:

- (i) Whether the constitutional mechanism for appointment of Additional Judge and permanent Judge to the High Court Division and the Appellate Division of the Supreme Court by the President in consultation with the Chief Justice of Bangladesh is a constitutional imperative, (ii) Whether the opinion or recommendation of the Chief Justice has primacy in the matter of appointment of such Judges, (iii). Whether an Additional Judge has a right to a writ of mandamus to secure his appointment as a permanent Judge of the High Court Division when the Chief Justice recommends his case for appointment and (iv) Whether the leave petitions filed by the 29 (twenty nine) sitting Judges are maintainable.

53. The People of Bangladesh through a historic war for national independence established the independent sovereign People's Republic of Bangladesh and due to their love for democracy and their aspiration for establishing Bangladesh as a democratic polity with a parliamentary system of Government the Constitution of Bangladesh was adopted with effect from 16th December, 1972.

54. Under the Constitution the power of appointment of the Chief Justice and other Judges of both the divisions of the Supreme Court is conferred under Articles 95 and 98 of the Constitution on the President that is the executive. In the matter of appointment of the Judges of both the divisions of the Supreme Court the President is required to act on the advice of the Prime Minister under Article 48(3) of the Constitution. The Constitution, as originally framed, contained provisions requiring the President to consult the Chief Justice in the matter of appointment of the Additional, ad hoc and Permanent Judges. Article 95 deals with the appointment of regular or Permanent Judges to the High Court Division and Appellate Division and Article 98 deals with the appointment of the Additional Judges to the High Court Division and ad hoc Judges to the Appellate Division of the Supreme Court.

55. But this provision for consultation was omitted in January, 1975 by the Constitution (Fourth Amendment) Act, 1975 popularly known as fourth amendment. In other words, the constitutional requirement of consultation by the President i.e., the executive with the Chief Justice was done away with by the fourth amendment of the Constitution.

56. The object and the purpose for consultation is to select the best known for their high character and unquestionable integrity from amongst the large number of qualified persons. The power or act of appointment of a Judge to both the divisions of the Supreme Court is an executive power or act vesting in the President that is the executive. Such consultation is absolutely necessary for the independence of the judiciary which is one of the basic features of the Constitution. The fact that the provision of consultation was omitted by the fourth amendment of the Constitution is not of great significance inasmuch as notwithstanding the fourth amendment the process of consultation was continued.

57. S. Ratna Vel Pandian, J in the case of S.C. Advocates-on-Record Association VS. Union of India, : MANU/SC/0073/1994 : AIR 1994 SC 268 observed that "it falls upon the superior courts in large measure the responsibility of exploring the ability and potential capacity of the Constitution on a proper diagnostic insight of a new legal concept and making this flexible instrument serve the needs of the people of this great nation without sacrificing its essential futures and basic principles which lie at the root of Indian democracy."

58. A careful examination of the constitutional provisions will show that the principle of rule of law has run across the entire fabric of the Bangladesh Constitution. The core concept of the rule of law is "be you ever so high, the law is above you". This reflects on the indispensable necessity that the edifice of judiciary has to be built on the foundation of the principle of independence of judiciary. Reference to some provisions in the Constitution such as Articles 94(4) and 116A reinforces and strengthens the view that the independence of judiciary and the Judges is a basic structure of our Constitution and this has been so recognized in the celebrated judicial pronouncements of the Appellate Division in two landmark judgments in the case of Anwar Hossain Chowdhury and others Vs. Bangladesh, 1989 BLD (SP1) 1 and Ministry of Finance Vs. Masdar Hossain, 2000 BLD (AD) 104. In the case of Anwar Hossain Chowdhury this court held "Independence of the Judiciary, a basic structure of the Constitution, is also likely to be jeopardised or affected by some of the other provisions in the Constitution. Mode of their appointment and removal, security of tenure particularly, fixed age for retirement and prohibition against employment in the service of the Republic after retirement or removal are matters of great importance in connection with the independence of Judges. Selection of a person for appointment as a Judge in disregard to the question of his competence and his earlier performance as an Advocate or a

Judicial Officer may bring in a "Spineless Judges" in the words of President Roosevelt; such a person can hardly be an independent Judge". In the case of Masdar Hossain it is held-

The independence of the judiciary, as affirmed and declared by Articles 94(4) and 116A, is one of the basic pillars of the Constitution and can not be demolished, whittled down, curtailed or diminished in any manner whatsoever except under the existing provisions of the Constitution.

59. In this background, it became a constitutional imperative that the President i.e. the executive was to appoint the Additional and permanent Judges in prior consultation with the Chief Justice of Bangladesh. This was precisely the reason that in the original Constitution there was a provision for consultation in the process of appointment of both the additional and permanent Judges of the Supreme Court in Articles 95 and 98 till this was discontinued by the fourth amendment of the Constitution with effect from 15th August, 1975. Since the fourth amendment of the Constitution, amongst others, affected one of the basic structures of the Constitution by destroying the independence of judiciary by eliminating the process of consultation in the matter of appointment of Judges in the superior Judiciary it is considered as invalid but for some unavoidable reason it could not have been set aside.

60. Since the process of prior consultation is essential for maintaining the judicial independence and integrity it becomes a constitutional necessity either to construe the provisions of Articles 95 and 98 to include the words "after consultation with the Chief Justice" or to read the provision of prior consultation in to these two Articles 95 and 98 for selection of Judges for appointment in the Supreme Court. Otherwise the very object for selection of the best and suitable candidate of high character and unquestionable integrity shall be defeated.

61. In the absence of the words "after consultation with the Chief Justice" in Articles 95 and 98 of the Constitution, as it stands now, we can avail of the process of prior consultation as a constitutional convention requiring the President to make appointment of Additional as well as permanent Judges to the Supreme Court. In other words, there is yet another way to achieve this constitutional objective by pleading constitutional conventions.

62. With the passage of time, in working a Constitution and running State affairs, many precedents occur and practices develop. When such precedents and practices are found to have been consistently followed, they are treated as constitutional conventions. Constitutional conventions are "rules of political practice which are regarded as binding by those to whom they apply, but which are not laws as they are not enforced by the Courts or by the House of Parliament". - Constitutional and Administrative Law, Fourth Edition, Page 77 by O'Hood Phillips.

63. Constitutional conventions are not only practiced and highly regarded and followed as enforceable law in matters of unwritten constitution but such conventions are equally followed as part of the constitutional law even where there is a written Constitution. In many countries conventions are treated as constitutional law and departure from this convention invokes serious criticism and creates political difficulties in running the government. According to K.C. Wheare "convention can become law also by judicial recognition" vide Modern Constitution Second Edition, Page 135. Kuldip Singh, J has observed in the case of S.C. Advocates-on-Record Association Vs. India, : MANU/SC/0073/1994 : AIR 1994 SC 268, relevant page 404 as under:

Once it is established in the court of law that a particular convention exists and the constitutional functionaries are following the same as a binding precedent then there is no justification to deny such a convention the status of law.

64. The Constitutional history of the Indian Sub-Continent unfolds that even during the British Rule the appointment of Judges to the superior Judiciary was an executive act. Both under the Government of India Act 1919 and 1935 the Crown used to appoint the Judges and there was no provision under the said Acts requiring the Crown to make such appointment in consultation with the Chief Justice. But nevertheless contemporary constitutional history shows that the Crown used to make the appointment of the Judges of the superior Judiciary with the concurrence of the Chief Justice of India. Under the Government of India Act, 1935, although the matter of appointment of Judges to the superior Courts remained as a matter of pleasure of the Crown but the Judges were given security of tenure up to the age of superannuation. The procedure for appointment that was followed was that the Governor of a Province used to consult the Chief Justice of the concerned High Court and then used to advise the Crown through the Secretary of the State of India with the recommendation of the Chief Justice. Then on the basis of above advice the appointments were made by the Crown and this procedure followed till 4th November, 1947. Even thereafter till the adoption of the Indian Constitution in 1950 the appointments of the Judges to the superior Courts were invariably made with the concurrence of the Chief Justice of India.

65. It can also be profitably stated that after the Pakistan was created by the historic division of India, in the Constitution adopted by Pakistan in 1956 and 1962 there was provision for the President of the Republic to make appointment of a Judge of the High Court in consultation with the Chief Justice of the Supreme Court as well as the Governor of the Province.

66. It can therefore be unerringly concluded that the convention for appointment of Judges in the superior Judiciary has been crystallized as a part of the constitutional law. In this view of the matter it can be concluded without any hesitation that the process of consultation has been fairly engrained in Articles 95 and 98 of the Bangladesh Constitution. Hence any departure or disobedience of this constitutional process of appointment shall be a subject matter judicial review.

67. The consultation would not only mean, full, effective, meaningful and purposive consultation but would also mean a conference between two most illuminative and informative persons connected with the appointment of Additional, ad hoc and permanent Judges to the Supreme Court on the basis of full and identical material before them. This would mean that both the President that is the executive and the Chief Justice of Bangladesh shall have full and conclusive deliberation as to the qualification of a candidate for judgeship to the superior Judiciary. The consultation should be taken to be constitutional imperative and it should be a transparent one and the process must precede the appointment of a Judge under Articles 95 and 98 of the Constitution.

68. The word 'consult' as understood in ordinary parlance means to ask or seek advice or the views of a person on any given subject i.e. to take counsel from another, but it does not convey that the consultant is bound by the advice of the consultee. In certain situations an expert in the field may be consulted but it is only to help the consultant to take a final decision.

69. The President would consult the Chief Justice and they may consult each other by

correspondence or by sitting across the table but this should be put on the record to make the consultation process more transparent, so that dispute or disagreement may be resolved without ambiguity. As per the scheme of our Constitution the proposal for appointment should emanate from the President and not from the Chief Justice.

70. The Chief Justice is the most competent person to evaluate the merit and efficiency of a person recommended for the judgeship. The President namely the executive is the proper authority who through the executive agency available to him may be able to report about the local position of the person proposed for judgeship, his character and integrity, his affiliations and the like which have a considerable bearing on the working of a person proposed for appointment as a Judge. It can not be said that the Chief Justice has been given any position of primacy or supremacy between him and the President. Though the opinion of the Chief Justice as pater familias, head of the Judiciary, is entitled to great respect and weight the President is not bound by the opinion of the Chief Justice. It is pointed that in the case of *State Vs. Chief Editor, Manabjain*, : LEX/BDHC/0113/2002 : 57 DLR 359, a Division Bench of the High Court Division has held that in the matter of appointment of Judges to the superior Judiciary the opinion of the Judiciary expressed through the Chief Justice of Bangladesh has primacy. But this is not considered as a sound proposition of law and is accordingly set aside.

71. The power or the act of an appointment of a Judge to the Supreme Court under Articles 95 and 98 of the Constitution is an executive power or act vesting in the President. The President is bound to act in this regard on the aid and advice of the Prime Minister or for that matter the Council of Ministers. In other words, the President shall exercise this power of appointment under Articles 95 and 98 subject to Article 48(3) of the Constitution. The appointment of Judges to the Supreme Court is made by the President in consultation with the Chief Justice subject to the aid and advice of the Prime Minister making the appointment as one with the sanction of the people inasmuch as the Council of Ministers represent the people in a Parliamentary form of Government. To hold otherwise would amount to rewriting the Constitution and is therefore not acceptable. Absolute discretion or the power of veto to the Chief Justice as an individual in the matter of appointments is not considered desirable so that there would remain some power with the executive to be exercised as a check whenever necessary. In the case of a candidate suitable for appointment as a Judge, the opinion of the Chief Justice of Bangladesh should have the greatest weight; the selection should be made as a result of a participatory consultative process in which the executive should have power to act as a mere check on the exercise of power by the Chief Justice of Bangladesh to achieve the constitutional purpose. The consultation with the Chief Justice of Bangladesh is made imperative to eliminate political influence even at the stage of the initial appointment of a Judge.

72. The President is required to make appointment of Judges to the superior judiciary on the advice of the Prime Minister having due regard to the opinion expressed by the Chief Justice after a full and effective consultation with him, but he is not bound by his opinion. But the President is not expected to do so unless there is imperative overwhelming reasons. In the democratic parliamentary form of Government the President is required to make appointment of Judges on the advice of the Prime Minister in order to have sanction of the people inasmuch as it is the people in which lies the sovereign power of a State. There should not be any apprehension that merely because the power of appointment is with the President meaning the executive, the independence of judiciary would become impaired. The true principle is that after such appointment the executive should have no scope for interference with the work of the

Judge or for that matter judiciary.

73. Though the President is not bound by the opinion of the Chief Justice save for a compelling and formidable reasons, there is no scope for the independence of judiciary to be impaired. The Constitution of Bangladesh attached so much importance to the independence of the judiciary the framer of the Constitution thought it necessary to place them beyond any controversy. In order to maintain independence of the Judges of the Supreme Court, the framers of the Constitution not only provided under Article 147 that the remuneration, privileges and other terms and conditions of their service shall not be varied to their disadvantage during their term of office, but also expressly declared in Article 94(4) that the Chief Justice and the other Justices of the Supreme Court shall be independent in the exercise of their judicial functions. It therefore naturally follows that the conduct of the Judges of the Supreme Court can not be discussed by the executive government or by the members of Parliament. The Rules of Procedure vide Rules 53, 63 and 133 provide that no question, motion or resolution, which contain reflection on the conduct of any Judge of the Supreme Court shall be admissible. The immunity under Article 78 of the members of Parliament in respect of what they say in parliament can not be construed as allowing them to make any statement or comment which may directly or indirectly undermine the independence of the Judges of the Supreme Court. Article 94(4) is an implied limitation on the freedom of speech of the members in Parliament.

74. It is canvassed at the Bar for the respondents that the appointment of an Additional Judge under Article 98 is a get way to the cadre of a permanent Judge under Article 95 of the Constitution and in that view of the matter an Additional Judge acquires a rig it or in the minimum has a legitimate expectation to be appointed as a permanent Judge to the High Court Division. Such contention apparently carries some weight for two reasons, (i) that such Judge acquires some experience for a initial tenure for two years and (ii) secondly fair play demands that he should not be asked to go back to the Bar. But in view of our constitutional scheme, which is different from that of India, the President appoints an Additional Judge for a period not exceeding two years and such appointment is not dependent on any purpose, such as to cope with any increased number of pending cases. In other words, an Additional Judges appointed without any kind of assurance or promise that on initial expiry of two years he will be reappointment for a further term or he will be afresh appointed as a permanent Judge. As in the case of initial appointment as Additional Judge under Article 98, so in the case of a fresh appointment after the initial tenure of two years expires, there is no legal right to be appointed nor does non-appointment give rise to any legal or constitutional infirmity so as to be the subject of judicial review.

75. If appointment of an Additional Judge is considered afresh, his experience as a Judge would be a point in his favour. At the same time any new fact, in favour or against, which has been discovered meanwhile cannot be ignored. The position is that even if an Additional Judge is not appointed afresh such non-appointment should not be taken to have cast any reflection or aspersion on the reputation or character of an Additional Judge inasmuch as he was appointed only for a particular period and not for a particular purpose. The Additional Judge can never be regarded as a professional. On the expiry of the initial tenure of the Additional Judge when he is to be considered for reappointment the whole gamut of consultation has to be gone over again. It should be born in mind that in no case the court should regard the appointment of Additional Judges as an appointment of permanent Judge nor can issue a direction to the government that the Additional Judges should be appointed now as permanent Judges.

76. Ordinarily, the presumption may arise that a person found suitable for appointment as an Additional Judge continues to be suitable for appointment as a permanent Judge. But circumstances may arise and events may take place meanwhile which bear adversely on the mental and physical capacity, character and integrity or other matters rendering it unwise to appoint him as a permanent Judge. It is reiterated that the Constitution does not confer any right upon an Additional Judge to claim, as of right, that he should be appointed again either as a permanent Judge or as an Additional Judge for a further period. A court of law has no power to give effect to any right not recognised by law. It is not the function of a court of justice to enforce or give effect to moral obligations which do not carry with them the legal or equitable rights. However, in case the Chief Justice makes a recommendation on the basis of the informations gathered by using all possible reliable sources and the President declines to appoint an Additional Judge as a permanent Judge for any irrelevant reasons and considerations he can approach the court for judicial review and in that event the court can not issue any direction upon the government under Article 102(2)(1) of the Constitution for his appointment inasmuch as the executive government is not required by any law to appoint him as a permanent Judge as envisaged under Articles 95 and 98 of the Constitution. But the court can ask the government to consider his case for appointment if there is any recommendation by the Chief Justice. The Indian Supreme Court has also expressed the same view in the case of S.P. Gupta and this position continues unaltered even after the cases of Supreme Court Advocates-on-Record Association Vs. Union of India : MANU/SC/0073/1994 : 1993 (4) SCC 441 and Special Reference 1 of 1998.

77. In this view of the legal position, the Full Bench has committed illegality in directing the Government for appointment of the 10 (ten) Additional Judges as permanent Judges of the High Court Division on the ground that the recommendation of the Chief Justice has primacy and the illegality has further been compounded due to the fact that the gap of 5-6 years between the act of non-appointment by the executive government and the direction of the Special Bench of the High Court Division by the impugned judgment has been treated as special leave without pay inasmuch as it is in utter violation of the provisions of the Supreme Court Judges (Leave, Pension and Privileges) Ordinance, 1982.

78. The principle of primacy of the recommendation or opinion of the Chief Justice has presently been seriously criticised in India itself which being its birth place. The representatives of the people, majority lawyers and Judges in India have taken a strong position against this principle which led the government of India to appoint Law Commission to examine and report. The Law Commission thereafter having carefully examined the cases of S.P. Gupta, Supreme Court Advocates-on-Record Association and Special Reference No. 1 of 1998 popularly called three Judges cases of the Indian Supreme Court submitted its report dated 21.11.2008 recommending reconsideration of the said three Judges cases to do away with the principle of primacy of the recommendations of the Chief Justice of India in matters of selection of Judges to the higher Judiciary.

79. It is pertinent to note that in the instant case the Special Bench of the High Court Division without further directing the Government to produce necessary papers evidencing recommendations of the Chief Justice for appointment or rejection by the government to appoint the said Additional Judges as permanent Judges directed the government by the impugned judgment to appoint them as permanent Judges of the High Court Division without being satisfied by reference to any record maintained in the office of the Ministry of Law or the office of the Chief Justice that there was in fact any recommendation by the Chief Justice for any or all the 10 Additional Judges. The

learned Judges of the Special Bench without exhausting all the means to inspect the documents as directed by this court in its judgment dated 18.3.2008 in connection with the instant case (vide Bangladesh Vs. Shamsul Huda, 60 DLR (AD) 124) decided the rule in favour of the 10 (ten) Additional Judges merely relying on the assertion made by the 10 (ten) Judges writ petitioners in their writ petitions without satisfying itself by calling for the necessary papers from the custody of the Registrar of the Supreme Court. This is a glaring instance of a perfunctory exercise of judicial power of review and is highly disapproved and deprecated. The learned Judges of the Special Bench ought at least to have directed the Registrar of the Supreme Court to produce the relevant papers allegedly containing the views and recommendations of the Chief Justice for their inspection just in case the Government maintained its refusal to produce any documents in this connection in order to find out the truth in the interest of proper justice.

80. Mr. T.H. Khan and Mr. Rafique-ul-Huq contend with some force that the impugned judgment in so far as it directs the Government to appointment the 10 (ten) Additional Judges as permanent Judges with effect from the date or dates they were allegedly due to be confirmed without oath is unconstitutional. Mr. Mahbubey Alam, the learned Attorney General and Mr. Amirul Islam however dismiss this argument submitting that no fresh oath is necessary when they are appointed as permanent Judges meaning that the oath taken by them as Additional Judges is good enough to perform as permanent Judge.

81. When a person upon selection through participatory consultative process is appointed by the President as a permanent Judge or an Additional Judge to the High Court Division or as an ad-hoc Judge or permanent Judge to the Appellate Division of the Supreme Court under Articles 95 and 98 of the Constitution he shall before entering upon his office as such Judge shall make and subscribe an oath or affirmation in form 6 (six) set out in Third Schedule as required under Article 148 of the Constitution. The appointment of a person as Additional, ad hoc or permanent Judge to the Supreme Court will not be consummated in the absence of any oath or affirmation in terms of form 6 (six) of the Third Schedule. It is stated that the word 'judge' mentioned in form 6 (six) of the Third Schedule shall mean and include not only permanent Judge but also Additional Judge as well as ad-hoc Judge. The observation made by the learned Judges of the Special Bench of the High Court Division in the impugned judgment that the respondent ten (10) Additional Judges will not require to make or subscribe any oath or affirmation in the event they are appointed as permanent Judges with effect from the date on which their tenure for two years as Additional Judge was to expire is contrary to and in violation of Article 148 of the Constitution and is struck-down as unconstitutional.

82. It is already seen that rule was prayed for and issued challenging part of the Rules of Business, 1996 in so far they relate to appointments of Additional and permanent Judges by the government. The rule having been made absolute without qualification the aforementioned Rules of Business should be taken to have been declared unconstitutional although no argument as well as discussion is seen to have been made in the impugned judgment. In this view of the matter it is considered necessary to address this aspect of the rule. It is stated that Chapter-II, Rule 7, schedule IV, Serial 50 and 54 of the said Rules of Business deal with appointment and resignation of permanent and Additional Judges requiring submission of concise and objective summary to the President and the Prime Minister stating the relevant facts and points for decision. Rule 7 is necessary in view of Articles 48(3), 95 and 98 of the Constitution. Hence to declare this Rule as unconstitutional would mean rewriting the Constitution and is therefore set aside.

83. It is contended by Mr. Amirul Islam that since in view of Article 111 of the Constitution the impugned judgment of the Special Bench is binding on the High Court Division and its Judges, Civil Petition for Leave to Appeal Nos. 2056 and 2064 of 2008 filed by the 29 sitting Judges of the High Court Division challenging the impugned judgment in so far as it affects their seniority are not maintainable. Learned brother Md. Abdul Matin, J has endorsed this view in the following terms:

This follows that the High Court Division is an unit of this Court with a co-ordinate jurisdiction and one Judge or a group of Judges can not challenge the judgment passed by another Judge or a bench of Judges since that will amount to challenging their own judgment which is not permissible in law. Moreover if this is permitted the practice will destroy the tradition of high decree of comity among the Judges of the Superior Courts which is essential for the smooth and harmonious working of the Supreme Court.

84. I however respectfully disagree with this view, 29 sitting Judges of the High Court Division preferred the said two leave petitions as aggrieved Judges in their personal capacity with a view to securing their seniority and they did it not as Judges sitting as a court for deciding a list between two or more parties. A Judge becomes synonymous with the court only when he acts in exercise of the jurisdiction of the court. The synonymity does not go beyond that. It would be unreasonable to extend it to the person of a Judge completely and for all purposes. It is true that there can not exist a court without a Judge and indeed Judges are structural components of courts. They are often used interchangeably as synonymous. But this is not to say that the distinction between a Judge as an individual and the court as scat of Justice as an institution is completely obliterated. The two remain distinct entities. A Judge is properly identified with the court in relation to something done in exercise of the jurisdiction of the court. His personality remains distinct and separate from the court. As individual, he can maintain action if he suffers legal wrong or legal injury. On the plain language of Article 103 of the Constitution there is no difficulty in, holding that the petitioners as sitting Judges have standing to maintain the leave petitions filed by them as stated above in challenging the impugned judgment of the Special Bench of the High Court Division.

85. In the event of a sitting Judge of either divisions of the Supreme Court suffers any legal wrong or injury in respect of his privileges and other terms and conditions of his service including his seniority he has a right to defend the same. This right is secured and protected under Article 147(2) of the Constitution which reads as under:

The remuneration, privileges and other terms and conditions of service of a person holding or acting in any office to which this article applies shall not be varied to the disadvantage of any such persons during his term of office.

86. Further if a right or privilege of a sitting Judge is sought to be denied citing the provision of Article 111 of the Constitution that will not only be contrary to rule of law but would also be contrary to constitutionalism being in violation of his fundamental rights guaranteed under Articles 27 and 31 of the Constitution. Further this would also amount to a denial of his right of access to justice which is an inviolable right secured and ensured in the Constitution and equally founded in the doctrine of due process of law.

87. The learned Judges of the Special Bench have laid down as many as 12 norms or guidelines describing them as conclusions for appointment and non-appointment of Judges to the Supreme Court. These are guidelines in the guise of norms intended to be

followed as legal principles by the Government for making appointment. But these norms or guidelines can not partake the character of law as they are not discernible within the parameter of the Constitution. It would therefore be hazardous to lay down any such guidelines in this behalf as they are hit by Article 65 of the Constitution inasmuch as these guidelines are not deduced on construction of the relevant provisions of the Constitution, namely Articles 95 and 98. It would also not be wise to attempt laying down guidelines on one's impressions about the working of the selection and appointment process. These norms are therefore disapproved and struck-down as erratic and illegal being contrary to the scheme of the Constitution.

88. Before I conclude there is yet another last but important point to look into. As already stated above, out of the 4 (four) leave petitions under consideration two of them being Civil Petition for Leave to Appeal Nos. 2221 and 2222 of 2008 are filed by the Government. On the date of commencement of hearing of the leave petitions the learned Attorney General made verbal prayer to allow the Government to withdraw from the case as according to him the Government would not like to press the leave petitions. It is reiterated that the impugned judgment has given rise to some constitutional points of public importance. Now the question is - does it lie in the power of the Government to withdraw from a case involving constitutional points of public importance. When a political party is voted to power and forms the government in a democratic system, in the famous saying of the former President of the United States of America Abraham Lincoln, it becomes the Government by the people, of the people and for the people. The Government becomes the Government of the people irrespective of cast and creed, allegiance and affiliations. Hence it will not be compatible with the government for the mandate given to it by the people either to become partisan or adversary to the people or any section or group thereof. Government is thus debarred from taking any partisan or adversary roll in any civil or criminal proceeding against any individual or section of people. It is to be recalled that the concerned 3 (three) writ petitions were in effect filed against Bangladesh as a State represented by the government in the Ministry of Law, Justice and Parliamentary Affairs. In other words, Bangladesh was the respondent in the writ petitions and after the impugned judgment was given by the High Court Division it was Bangladesh and not the government of Bangladesh which filed the said two leave petitions. The learned Attorney General of Bangladesh being the principal law officer of the Republic is also regarded as the Attorney of the people. It is as per the practice and Rules of the Supreme Court that the Judges of both the divisions have the privilege to call upon the Attorney General to address them on any important legal or constitutional issues involved in any case pending before them. The some total of the principle is that the government through its principal law officer shall always be available to squarely present the case in law and fact to assist the court to arrive at a just finding and to do an even-handed justice. There is yet another important aspect in the case which deserves profound consideration. If the prayer for withdrawal is conceded, the consequence would be to leave the constitutional issues of public importance unresolved and unsettled and this would not only deprive the highest court to resolve the constitutional issues by interpreting the relevant constitutional provisions which is its sole domain but this would also deprive one party or the other of real justice and help another to obtain illegal gain. In this view of the matter the prayer for withdrawal of the government from the case in hand is unacceptable and is rejected.

89. This court by a short-order dated 2.3.2009, which forms part the judgment in the case, stated in item 3 thereof that in the matter of selection of the Judges the opinion of the Chief Justice would be dominant in the area of legal acumen and suitability for the appointment and in the area of antecedents the opinion of the executive would be

dominant and these two together should function to find out the most suitable candidates for appointment of Judges through transparent process of consultation. This court in item 5 of the short order stated that the government could consider the case of appointment of the said 10 Additional Judges in the light of what is stated in item 3 above. In other words, it is intended that in case the government deems it expedient to appoint the said 10 (ten) Additional Judges as permanent Judges to the High Court Division it would apply its mind to the question whether such Additional Judges currently possesses the requisite fitness and suitability for being appointed as permanent Judges. It should be again seen whether they are physically, intellectually and morally fit and suitable to be appointed as Judges and it would be contrary to public weal to appoint them if they do not possess the requisite fitness and suitability. The Chief Justice shall also consider whether the said Additional Judges, whose terms expired 5-6 years ago, are fit and suitable to be appointed as permanent Judges now.

90. In the light of the discussions made herein above the leave petitions are disposed of.

Md. Abdul Matin, J.

91. These four petitions for leave to appeal are directed against the judgment and order dated 17.07.2008 passed by the Special Bench of the High Court Division in Writ Petition No. 1543 of 2003 heard analogously with Writ Petition Nos. 2975 and 3217 of 2003.

92. Leave Petition No. 2221 of 2008 was filed by Bangladesh against Md. Idrisur Rahman, Advocate and others, Leave Petition No. 2222 of 2008 was also filed by Bangladesh against Md. Shamsul Huda and others, Leave Petition No. 2046 of 2008 was filed by Justice Syed Mohammad Dastagir Husain and others against Md. Shamsul Huda and others and Leave Petition No. 2056 of 2008 was filed by Justice Syed Mohammad Dastagir Husain and others against Md. Idrisur Rahman, Advocate and others. All the leave petitions have been heard together and are being disposed of under this judgment.

93. One Md. Idrisur Rahman, an Advocate of the Supreme Court filed Writ Petition No. 1543 of 2004, three former additional Judges, who were not confirmed filed Writ Petition No. 2975 of 2003 and one Mr. Farhad Ahmed, an Advocate of the Supreme Court, also filed Writ Petition No. 3217 of 2003 before the High Court Division and Rule was obtained in the following terms:

Let a Rule nisi issue calling upon the respondent, Bangladesh to show cause why non-appointment of ten additional Judges in the High Court Division shall not be declared to have been done illegally and without legal authority and to be of no legal effect and why the respondent should not be directed to appoint them as Judges of the High Court Division in accordance with the recommendation of the Chief Justice of Bangladesh and/or such other or further order or orders as to this court may seem fit and proper and also as to why the portion of the Rules of Business 1996 which purports to regulate matters relating to the appointment of additional Judges and Judges of the Supreme Court by the executive organs of the State shall not be declared repugnant to the Constitution, ultra-vires and unconstitutional.

94. In view of the Constitutional questions raised in the matters a Special Bench was constituted by the Hon'ble Chief Justice of Bangladesh by order dated 20.04.2003 and in Writ Petition No. 2975 of 2003 an application was filed for a direction upon Secretary,

Ministry Law and Justice and Parliamentary Affairs and the Registrar of the Supreme Court to produce the papers relating to recommendation of the Hon'ble Chief Justice in connection with appointment of six Judges.

95. The Special Bench directed Secretary, Ministry of Law, Justice and Parliamentary Affairs to produce the relevant papers containing the opinion of the Hon'ble Chief Justice by its order dated 27.05.2003. The said direction was challenged before this Division in Civil Petition for Leave to Appeal No. 635 of 2003. This Court by order dated 18.03.2008 allowed Civil Appeal No. 50 of 2004, set aside the order dated 27.05.2003 of the High Court Division and directed the High Court Division to dispose of the application in the light of the judgment of this Court in the said appeal.

96. It does not appear that the application for direction to produce the papers has been disposed of by the High Court Division in the light of the observations of this Court.

97. It does not also appear that the matter was at all an issue before the High Court Division since no affidavit was filed by the Government as directed by this Court and the High Court Division presumed rightly that the recommendation of the Hon'ble Chief Justice is not challenged by the Government and the papers sought for were not at all necessary for disposal of the writ petitions.

98. It appears that there was no argument on the question before the High Court Division. The presiding Judge has not touched this point in his lengthy judgment. But curiously enough the other Judge (Justice S. K. Sinha) made out a point on "privileged documents" in his separate judgment and dealt with the matter although he concluded as under:

Since the Government did not file affidavit-in-opposition, we presumed that there was proper recommendation of the CJB relating to the petitioners' appointment and therefore, we refrained from calling for the papers for avoiding the delay in the disposal of the matters.

99. In the lengthy discussion Articles 102, 95, 48, 55 and other articles of the Constitution have been considered in addition to Sections 123 and 162 of the Evidence Act.

100. It may be mentioned here that this Court is repeatedly holding that in deciding a case the Court should not enter into academic discussion. This Court has further held that if a case can be disposed of without interpreting the Constitutional provisions such interpretation should be avoided. Interpretation of the Constitution is called for only when it is essentially necessary for adjudication of the case.

101. Thomas M. Cooley in his classic Treatise on "Constitutional Limitations" at page 163 wrote as under:

Neither will a court, as a general rule, pass upon a constitutional question, and decide a statute to be invalid, unless a decision upon that very point becomes necessary to the determination of the cause. "While the courts cannot shun the discussion of constitutional questions when fairly presented, they will not go out of their way to find such topics. They will not seek to draw in such weighty matters collaterally, nor on trivial occasions. It is both more proper and more respectable to a coordinate department to discuss constitutional questions only when that is the very *lis mota*. Thus presented and determined, the decision carries a weight with it to which no extra-judicial disquisition is entitled." In

any case, therefore, where a constitutional question is raised, though it may be legitimately presented by the record, yet if the record also presents some other and clear ground upon which the court may rest its judgment, and thereby render the constitutional question immaterial to the case, the court will take that course, and leave the question of constitutional power to be passed upon when a case arises which cannot be otherwise disposed of, and which consequently renders a decision upon such question necessary.

102. In the case of *The State Vs. Moyez Uddin Sikder and others* in Criminal Appeal No. 65 of 2007 this court considered the case of *Basheshar Nath Vs. Commissioner of Income Tax, Delhi and Rajasthan* and another reported in AIR 1959 (SC) 149 where it was held that the Supreme Court should not give decision on any law which is not strictly necessary for disposal of the case before it.

103. This Court in the said case reiterated what was held in the case of *Kudrat-E-Elahi Panir Vs. Bangladesh* reported in 44 DLR (AD) 319 where it was held:

Therefore the broad decision that a law can be declared void in case of a conflict with any provision of Part II of the Constitution was uncalled for and made on hypothetical facts. This, as a rule, the Courts always abhor. The Court does not answer merely academic question but confines itself only to the point/points which are strictly necessary to be decided for the disposal of the matter before it. This should be more so when Constitutional questions are involved and the Court should be ever discreet in such matters. Unlike a civil suit, the practice in Constitutional cases has always been that if the matter can be decided by deciding one issue only no other point need be decided.

104. But it appears that the High Court Division did not pay any attention to such direction of this Court which is highly deprecated.

105. In the present case no affidavit was filed claiming the privilege and the High Court Division itself held that there was no necessity for calling for the papers and therefore the whole exercise in the separate judgment was uncalled for and purely academic in absence of any issue and therefore the discussion and findings on "privileged documents" are hereby expunged.

106. On the point of justiciability the Indian Supreme Court in the 2nd Judges case held as under:

This is also in accord with the public interest of excluding these appointments and transfers from litigative debate, to avoid any erosion in the credibility of the decisions, and to ensure a free and frank expression of honest opinion by all the constitutional functionaries, which is essential for effective consultation and for taking the right decision. The growing tendency of needless intrusion by strangers and busy-bodies in the functioning of the judiciary under the garb of public interest litigation, inspite of the caution in *S.P. Gupta (: MANU/SC/0080/1981 : AIR 1982 SC 149)* while expanding the concept of locus standi, was adverted to recently by a Constitution Bench in *Raj Kanwar, Advocates V. Union of India, : MANU/SC/0222/1993 : (1992) 4 SCC 605*. It is, therefore, necessary to spell out clearly the limited scope of judicial review in such matter, to avoid similar situations in future. Except on the ground of want of consultation with the named constitutional functionaries or lack of any condition of eligibility in the case of an appointment, or of a transfer being made without the recommendation of the Chief Justice of India, these matters

are not justiciable on any other ground, including that of bias, which in any case is excluded by the element of plurality in the process of decision making.

107. In the same case in the summery of conclusions in No. 11 the Indian Supreme Court held:

Only limited judicial review on the grounds specified earlier is available in matters of appointments and transfers.

108. We are in respectful agreement with the above views of the Indian Supreme Court and on this reason all the observation and findings in the High Court judgment on bias and malafide are hereby expunged.

109. In Leave Petition Nos. 2221 and 2222 of 2003 filed by the Government of Bangladesh the learned Attorney General submitted that he will not press the petitions.

110. Dr. Kamal Hossain and Mr. M. Amir-ul Islam, learned Counsel appearing for the respondents in the aforesaid leave petitions submitted that the leave petitions can be disposed of with modification and observations if required and this Court should do complete justice in accordance with Article 104 of the Constitution.

111. Mr. T. H. Khan, learned Counsel appearing for the petitioners in Civil Petition for Leave to Appeal No. 2046 of 2008 and Mr. Rafique-ul Huq, learned Counsel appearing the petitioners in Civil Petition for Leave to Appeal No. 2056 of 2008 submitted that the leave should be granted since important questions of the interpretation in respect of Constitutional provisions are involved. They also referred to the observation of the Other Judge in a separate judgment (Justice S. K. Sinha) to the effect:

Yet I would like to give my reason since the points involved in these petitions are on the Constitutional question of special importance in relation of the powers of the Executive to appoint Judges of the highest judiciary of the country.

and submitted that in this case certificate ought to have been granted suomoto by the High Court Division and in view of the seriousness of the matter leave should be granted.

112. Mr. M. Amir-ul Islam, learned Counsel appearing for the respondents submits that the Civil Petition for Leave to Appeal Nos. 2046 and 2056 of 2003 at the instance of some sitting Judges of the High Court Division are not at all maintainable in view of Article 111 of the Constitution. Article 111 runs as under:

The law declared by the Appellate Division shall be binding on the High Court Division and the law declared by either division of the Supreme Court shall be binding on all courts subordinate to it.

113. He further submits that in view of Rule 7 of the High Court Division Rules the leave petitions are not maintainable. Rule 7 provides:

Every decision of a Full Bench shall be treated as binding on all Division Courts, and Judges sitting singly, upon the point of law or usage having the force of law determined by the Full Bench, unless it be subsequently reversed by a larger Bench, specially constituted, consisting of such number of Judges as in each case shall have been fixed by the Chief Justice, or unless a contrary rule be laid down by the Supreme Court.

114. Mr. Amir-ul Islam submits that the High Court Division is one and single unit of the Supreme Court and even a judgment by a Single Judge is deemed to be a judgment of the High Court Division as a whole and therefore, the respondents cannot file a leave petition against their own judgment.

115. He submits that Rules 6 and 7 of chapter VII if read together the judgment of the High Court Division is a judgment of the Full Court specially appointed as the bench was constituted of three Judges and therefore it is binding upon the leave petitioners in the aforesaid two leave petitions.

116. Mr. Rafique-ul Huq, learned Counsel appearing for the petitioner Judges submits that since the judges are affected by the judgment they are entitled to file the leave petitions.

117. Article 94 of the Constitution provides:

1. There shall be a Supreme Court of Bangladesh (to be known as the Supreme Court of Bangladesh) comprising the Appellate Division and the High Court Division.

2. The Supreme Court shall consist of the Chief Justice, to be known as the Chief Justice of Bangladesh, and such number of other Judges as the President may deem it necessary to appoint to each division.

118. It appears that this article speaks of totality of the jurisdiction conferred on the High Court Division by the Constitution and law and is exercised by the individual group of Judges sitting singly or in Benches. In this context each Judge is the High Court Division. That explains why orders, judgments and decrees passed and summons and warrants issued under the direction of a Judge are expressed in the name of the High Court Division and not in the name of the individual Judge. Moreover Article 111 specifically provides that the law declared by the Appellate Division shall be binding upon the whole nation including the High Court Division and subordinate Courts and the law declared by the High court Division shall be binding upon the subordinate courts and for that matter binding upon the whole nation unless set aside by the Appellate Division. Therefore, a decision given by a Judge of the High Court Division carries the authority conferred by Constitution and law on the High Court Division and not the authority of an individual Judge.

119. This follows that the High Court Division is an unit of this Court with a co-ordinate jurisdiction and one Judge or a group of Judges cannot challenge the judgment passed by another Judge or a bench of Judges since that will amount to challenging their own judgment which is not permissible in law. Reference may be made of the case of Abrar Hassan Vs. Govt. of Sind reported in P.L.D 1976 S.C page 315.

120. Moreover if this is permitted the practice will destroy the tradition of high decree of comity among the Judges of the Superior Courts which is essential for the smooth and harmonious working of the Supreme Court. This reason was considered to be the main ground for Justice Shahabuddin Ahmed for declaring the amendment of Article 100 of the Constitution ultra vires in 8th amendment case as his Lordship held:

"The impugned Amendment of Article 100 has broken the "oneness" of the High Court Division and thereby damaged a basic structure of the Constitution; as such, it is void" (Anwar Hossain Chowdhury and others Vs. Bangladesh 41 DLR (AD) Page 165).

121. As per Article 104 of the Constitution this Division has power to issue such directions, orders, decrees or writs as may be necessary for doing complete justice in any cause or matter pending before it, including orders for the purpose of securing the attendance of any person or the discovery or production of any document

122. Moreover Order XXXIV Rule 5 of the Supreme Court of Bangladesh (Appellate Division) Rules, 1988 runs as under:

The Court shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the Court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection.

and Rule 8 provides:-

Nothing in these Rules shall be deemed to limit or otherwise affect the inherent powers of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court.

123. Besides Order 31 of the said Ruls authorises this Court to hear the learned Attorney General if this Court is of the opinion that for the justice of the case his assistance is so required. In fact this Court had the privilege of hearing the learned Attorney General at length. Besides this Court also heard Dr. Kamal Hossain, Mr. M. Amir-ul Islam, Mr. T. H. Khan, Mr. Rafique-ul Huq and Mr. Rokonuddin Mahmud, all Senior Counsels of the Court for six days and important Constitutional questions having been fairly presented before us, we cannot shun the discussions of the Constitutional questions and decisions thereon and therefore we have decided to dispose of the matter on merit.

124. The short facts giving rise to the present petitions are as under:

125. In writ Petition No. 1543 of 2003 it was stated that the President of the Republic by its order dated 24.10.1999 appointed Mr. Md. Abdus Salam and Md. Momtazuddin Ahmed along with six others as Additional Judges of the High Court Division. After completion of two years, the Chief Justice, Mr. Mahmudul Amin Chowdhury having been satisfied with their performance, conduct and integrity recommended five Additional Judges, namely, Mr. Justice Md. Abdur Rashid, Mr. Justice Md. Khademul Islam Chowdhury. Mr. Justice Sikder Mokbul Hoque. Mr. Justice Surendra Kumar Sinha and Mr. Justice Md. Abdul Wahab Mia for appointment of Judges of the High Court Division and the President accordingly appointed them as Judges on the basis of such recommendation. The Chief Justice however recommended other three Additional Judges for appointment as such for a further period of one year. Accordingly, the President was pleased to extend the service of Mr. Justice Md. Abdus Salam, Mr. Justice Arayesuddin and Mr. Justice Momtazuddin Ahmed for one year with effect from 24.10.2001.

126. After completion of said extended period of one year as additional Judges, the Chief Justice recommended them for appointment as Judges of the High Court Division on being satisfied on their performance, conduct and integrity. The President however appointed Mr. Justice Arayesuddin as Judge of the High Court Division under Article 95 of the Constitution with effect from 24.10.2002 but did not appoint Mr. Justice Md. Abdus Salam and Mr. Justice Md. Momtazuddin Ahmed despite the recommendation of

the Chief Justice.

127. Non-appointment of said petitioners was published in the daily Bangladesh Observer dated 24.10.2002. On 26.10.2002 a number of Senior Advocates abstained from attending the Court to register their protest and grievance at the fact that the President did not confirm Mr. Md. Abdus Salam and Mr. Momtazuddin Ahmed as Judges of High Court Division in spite of recommendation of the Chief Justice. Senior advocates then met the Chief Justice to communicate their concern about the disregard of his recommendation for confirmation of said two Additional Judges. On 27 October 2002, news reports appeared in the daily Bangladesh Observer that Chief Justice had indicated that he had recommended said Additional Judges for appointment as Judges as their performance was satisfactory.

128. It was stated that said two Additional Judges dispensed justice for three years and the Chief Justice had expressly recommended them to be fit for appointment as Judges of the High Court Division but notwithstanding this fact and disregarding the recommendation, the President did not appoint them without communicating any reason either to Chief Justice or to said Additional Judges.

129. On the advice of the Prime Minister, the President having consulted with the then Chief Justice, Mr. Md. Latifur Rahman, on 27.05.2000 appointed Mr. Justice N.K. Chakraborty, Mr. Justice A. K. M. Shafiuddin, Mr. Justice A.F.M. Mesbahuddin, Ms. Justice Nazmun Ara Sultana and Mr. Md. Monsurul Hoque Chowdhury as Judges of the High Court Division. On 28.05.2000 the Chief Justice gave them oath. After successful completion of two years Additional Judges, Mr. Justice Mahmudul Amin Chowdhury as Chief Justice on being satisfied with the performance, conduct and integrity recommended Mr. A.K.M. Shafiuddin, Mr. A.F.M. Mesbahuddin, Ms Nazmun Ara Sultana and Mr. Md. Munsurul Hoque Chowdhury for appointing them as regular Judges under Article 95 of the Constitution. In spite of the recommendation of the Chief Justice, the President appointed Madam Justice Nazmun Ara Sultana only as Judge of the High Court Division under Article 95 of the Constitution and did not appoint others.

130. In writ Petition No. 2975 of 2003, it is stated that President appointed nine Additional Judges, namely, Mr. Abdul Hye, Mr. Md. Faruque Ahmed, Mr. Md. Marzi-ul Huq, Mr. Md. Shamsul Huda, Mr. Altaf Hossain Khan, Mr. Md. Abdur Razzaque, Mr. Syed Mahmud Hossain, J, Mr. Md. Iman Ali, J and Mr. Hasan Foez Siddique. The Chief Justice gave them oath on 22.02.2001. Mr. Justice Altaf Hossain Khan died on 10.07.2002. After completion of two years, the Chief Justice satisfied with the performance, conduct, integrity and suitability recommended all of them for appointment of as Judges in the High Court Division. The President however appointed Mr. Justice Syed Mahmud Hossain and Mr. Justice Md. Iman Ali only as Judges of the High Court Division under Article 95 of the Constitution but did not appoint Mr. Md. Abdul Hye, Mr. Md. Faruque Ahmed, Mr. Md. Marzi-ul Hoq, Mr. Md. Shamsul Huda, Mr. Md. Abdur Razzak and Mr. Hasan Foez Siddique despite the recommendation of the Chief Justice. On 21.02.2003 senior members of the Bar including the President Mr. Ozair Farook and Mr. Abdul Matin Khasru, former Law Minister, the Ministry of Law, Justice and Parliamentary Affairs met the Chief Justice.

131. In the course of discussion, Chief Justice disclosed that he had recommended them for appointment as Judges. Petitioner Mr. Md. Shamsul Huda and Md. Faruque Ahmed also met the Chief Justice on 21.02.2003 who told them that he recommended them for appointment as Judges of the High Court Division. He also disclosed that before such recommendation he had discussed with other Judges of the Appellate

Division.

132. On 23.02.2003 fact of recommendation and protest of the lawyers against non-appointment were widely circulated in the national media. Reaction of Mr. Abdul Matin Khasru, former Law Minister was published. Mr. Moudud Ahmed, the then Law Minister was reported to have said that the provision for consultation was omitted by amendment of the Constitution during the period of Awami League Government in 1975. Recommendation of the Chief Justice was however seriously considered but Constitutional power for appointment vests in the President. In an interview to a private television channel, he also said that there were Constitutional convention of taking recommendation from the Chief Justice. Over the non-appointment of such large number of Additional Judges there were agitation in the Bar which was widely reported in the national media, both print and electronic.

133. It was stated that the petitioners dispensed justice for two years and the Chief Justice recommended them to be fit for appointment as Judges of the High Court Division. But notwithstanding this fact and disregarding the recommendation, the President did not appoint them without giving or communicating any reason to the Chief Justice or to any of Additional Judges.

134. It does not appear from the judgment of the presiding Judge Mr. Justice M.A. Rashid as to what was the case of the petitioners of leave Petition Nos. 2221 and 2222 of 2008 before the High Court Division. There is no reference of affidavit. We however find from the judgment of Mr. Justice S.K. Sinha, second judgment, a short discussion which runs as under:

Learned Assistant Attorney General frankly concedes that he has no objection in allowing the petitions and in the appointment of the petitioners. He admits that the petitioners have illegally not been appointed by the past government as Judges. He, however, faintly argues that in view of the deletion by the constitution (Fourth Amendment) Act, 1975, the requirement of consultation with the CJB in matters of appointment of Judges has become a mere routine work, inasmuch as, under the present constitutional provisions the President has prerogative under Article 95(1) of the Constitution in the matter of appointments and he is not bound to follow the convention. According to the learned Assistant Attorney General a constitutional convention will not prevail over the constitutional provisions. Learned Assistant Attorney General has referred a decision in the case of S.N. Goswami, Advocate and another Vs. Government of Bangladesh, : LEX/BDHC/0060/2001 : 55 DLR 332 in support of his contention.

135. From the Leave Petition in Petition No. 2222 of 2008 the case of the petitioner is reflected in ground No. 1 which runs as under:

The High Court Division has failed to consider the Constitutional scheme in respect of appointment of Judges in the Supreme Court as after the fourth amendment of the constitution, the requirement of consultation with the Hon'ble Chief Justice in the matter of appointment of Judges has become a mere routine work as under the present Constitutional Provisions the president has prerogative under Article 95(1) of the Constitution in the matter of appointments and he is not bound to follow the convention and as such the impugned judgment and order of the High Court Division is bad in law and the same is liable to be set aside.

136. In Leave Petition No. 2221 of 2008 there are additional two grounds which run as under:

The High Court Division erred in law in not considering that a Constitutional convention will not prevail over the Constitutional Provisions under a written Constitutional Scheme and as such the impugned judgment and order of the High Court Division is bad in law and the same is liable to be set aside.

The High Court Division erred in law in directing appellant to complete the process of appointment of the respondents from their said due date of confirmation seriously violating seniority of the other Judges since 24 October, 2002 though they were not made parties to the writ petition and as such the impugned judgment and order of the High Court Division is bad in law and the same is liable to be set aside.

137. It appears that in the High Court Division the learned Assistant Attorney General conceded that the writ petitioner Judges were illegally dropped and the executive had no objection if they were appointed. In this Court also the learned Attorney General himself appeared and submitted papers to show that he had been in the vanguard of the struggle for establishment of the Rule of Law as a leader of the Bar Association and he has definite instruction not to contest this matter any further. The learned Attorney General being imbued with a sense of affirmative constitutional duty to establish independence of judiciary and being true to his commitment and philosophy is ready to accept on behalf the executive that consultation with the Chief Justice is an integral part of such independence and the respondent Judges should not have been dropped from being appointed in utter disregard of the recommendation of the Chief Justice. The learned Attorney General also admits that consultation with the Chief Justice is a binding convention which was never breached except in 1994 when in the face of national protest the notification issued in violation of recommendation of the CJB was subsequently cancelled and a revised notification was issued after due and effective consultation with CJB.

138. Mr. Amir-ul Islam appearing for the writ petitioner Judges has taken us through the Judges case I, II, III, namely, the case of S.P. Gupta and others Vs. President of India and others reported in AIR 1982 S.C. Page-149, the case of S.C. Advocates-on-Record Assn. Vs. Union of India reported in AIR 1994 Page-268, Special Reference No. 1 of 1998 and the case of Al-Jehad Trust Vs. Federation of Pakistan reported in PLD 1996 Vol-1 Page-324.

139. He submits that in the matter of appointment of the Judges consultation is mandatory and consultation with Chief Justice imply consultation with a plurality of Judges i.e. a collegium of Judges comprising of Chief Justice and two other Senior Judges of the Appellate Division, two other Senior Judges of the High Court Division and others and opinion of the Chief Justice so given must have primacy in the matter of all appointments and non-appointments.

140. He further submits that such consultation must be effective, meaningful, purposive, consensus-oriented, leaving no room for complaint of arbitrariness or unfair play.

141. He further submits that convention once recognized and acted upon has a binding force as good as any provision of constitution and there is no difference between such convention and a provision of the constitution.

142. He submits that once it is found that the Judge writ petitioners were illegally dropped they should be restored to their previous position when they were dropped and since they took oath after appointment under Article 98 of the Constitution they do not need oath afresh when appointed under Article 95 of the Constitution.

143. He lastly submits that the principle of distributive and corrective justice must be considered in the case of Judges and submitted that a distributive justice is based on the principle that there has to be equal distribution among equals and corrective justice seeks to restore equality when this has been disturbed, eg by wrongdoing.

144. He has referred Dias on jurisprudence 5th Edition Page-65.

145. Mr. T.H. Khan, learned Counsel submits that convention cannot be equated with constitutional provision. He admits that there had been consultation always. There has been consultation with Chief Justice in the matter of appointment but such consultation was ex-gratia and cannot be equated with the consultation as available in the very Constitutions in Pakistan and India and therefore the Judges cases I, II, III and Al-Jehad Trust Vs. Federation of Pakistan case are not applicable in our jurisdiction inasmuch as after 1975 i.e. 4th amendment there is no provision in the Constitution for consultation with the Chief Justice at the time of appointment of the Judges.

146. He further submits that taking oath is mandatory both after appointment under Articles 98 and 95 of the Constitution and a Judge will be deemed to have entered into office only after taking such oath and not before.

147. He lastly submits that in the name of interpretation Articles 95 and 98 cannot be rewritten by Supreme Court by insertion of the provision of consultation and primacy which are not there in the Constitution and this can be done only by the parliament, not by this court.

148. Mr. Rafique-ul Huq criticized the High Court judgment attacking the norms and direction and submitted that these are in direct conflict with the Constitution and one cannot enter into office even if appointed under Article 95 without taking fresh oath as mandated by Article 148(3) read with 3rd schedule of the Constitution.

149. In order to appreciate the arguments so advanced it is apposite to consider the Constitutional provisions in respect of consultation.

150. Article 95(1) of the Constitution before 4th amendment was as under:

95. (1) The Chief Justice shall be appointed by the President, and the other Judges shall be appointed by the President after consultation with the Chief Justice.

151. Article 95(1) after the amendment of 1975 runs as under:

95.(1) The Chief Justice and other Judges shall be appointed by the President.

152. Thus it appears that at the moment the expression 'after consultation with the Chief Justice is' not there in Article 95(1) of the Constitution.

153. Article 98 of the Constitution before 4th amendment was as under:

Notwithstanding the provisions of Article 94, if the President is satisfied, after consultation with the Chief Justice, that the number of the judges of a division

of the Supreme Court should be for the time being increased, the President may appoint one or more duly qualified persons to be additional judges of that division for such period not exceeding two years as he may specify, or if he thinks fit, may require a judge of the High Court Division to sit in the Appellate Division for any temporary period:

Provided that nothing in this article shall prevent a person appointed as an additional judge from being appointed as a judge under Article 95 or as an additional judge for a further period under this article.

154. Article 98 after the amendment of 1975 runs as under:

Notwithstanding the provisions of Article 94, if the President is satisfied that the number of the Judges of a division of the Supreme Court should be for the time being increased, the President may appoint one or more duly qualified persons to be additional judges of the division for such period not exceeding two years as he may specify, or, if he thinks fit, may require a judge of the High Court Division to sit in the Appellate Division for any temporary period as an ad hoc Judge and such Judge while so sitting, shall exercise the same jurisdiction, powers and functions as a Judge of the Appellate Division:

Provided that nothing in this article shall prevent a person appointed as an additional judge from being appointed as a judge under Article 95 or as an additional judge for a further period under this article.

155. However the word 'consultation' is still there in Article 116 of the Constitution. Article 116 runs as under:

116. The control (including the power of positing, promotion and grant of leave) and discipline of persons employed in the judicial service and magistrates exercising judicial functions shall vest in the [President] [and shall be exercised by him in consultation with the Supreme Court].

156. The expression 'consultation' came up for consideration in the case of Secretary, Ministry of Finance Vs. Mr. Md. Masdar Hossain reported in 20 BLD (AD) 2000 Page-104 and this Court held as under:

Having dealt with 5 reasons for not holding that Article 116 contains rule-making power, we pause here and reflect on the words "in consultation with the Supreme Court" contained in Article 116. We have no doubt in our mind that the President in Article 116, as Syed Ishtiaq Ahmed rightly points out, in effect means the Prime Minister or the Chief Political Executive of the country, in view of Articles 48(3) and 55(2). The President wields control over the Presiding Officers of subordinate courts in a wide variety of fields. The Prime Minister has therefore become in reality the real wielder of power in this regard. The Prime Minister being a political person on whom is vested the executive power of the Republic needed a check on such a sweeping and absolute power. Dr. Kamal Hossain rightly termed the words "in consultation with the Supreme Court" as a pillar which held up the independence of the judiciary as a basic structure of the Constitution. In order that this pillar may not end up as a bamboo pillar the word "consultation" has to be given some teeth, or else, as Syed Ishtiaq Ahmed rightly pointed out. Articles 116 and 116A will be only mocking birds. What is that teeth? Are mere meaningful and substantive consultations and full disclosure of all connected facts during consultations enough? These are no

doubt essential and necessary requirements in the process of consultation, but the end-result shall be the primacy of the views and opinion of the Supreme Court which the Executive shall not disregard, for it is the Supreme Court, not the political executive, which is the best judge of judicial matters and judicial officers. Mr. Amir-Ul Islam has forcefully argued on the primacy of the views and opinion of the Supreme Court under Article 116 and we fully uphold his submission. We hold that under Article 116 the views and opinion of the Supreme Court on any matter covered by that Article shall get primacy over the views and opinion of the Executive.

157. It is true that "consultation" was considered in the light of Article 116 of the Constitution but nevertheless the same principle all the more applies in the matter of appointment of judges of the Supreme Court under Articles 98 and 95 of the Constitution because without the independence of the Supreme Court there can not be any independence of the subordinate courts and minus the consultation and primacy the separation of judiciary from the executive will be empty words.

158. The principle of consultation with primacy of opinion of the Chief Justice is no longer res-integra and being an integral part of independence of judiciary is inherent in the very scheme of the Constitution.

159. Article 94(4) runs as under:

Subject to the provisions of this Constitution the Chief Justice and other Judges shall be independent in the exercise of their judicial functions.

160. This word "independent" also occurs in Article 116 A of the Constitution which runs as under:

116A. Subject to the provisions of the Constitution, all persons employed in the judicial service and all magistrates shall be independent in the exercise of their judicial functions.

161. The expression "shall be independent" came up for consideration in the aforementioned case of Secretary, Ministry of Finance Vs. Mr. Md. Masdar Hossain and this Court considered both Article 94(4) as well as 116A of the Constitution quoted above and held as under:

The independence of the judiciary, as affirmed and declared by Articles 94(4) and 116A, is one of the basic pillars of the Constitution and cannot be demolished, whittled down, curtailed or diminished in any manner whatsoever, except under the existing provisions of the Constitution. It is true that this independence, as emphasized by the learned Attorney General, is subject to the provisions of the Constitution, but we find no provision in the Constitution which curtails, diminishes or otherwise abridges this independence. Article 115, Article 133 or Article 136 does not give either the Parliament or the President the authority to curtail or diminish the independence of the subordinate judiciary by recourse to subordinate legislation or rules. What cannot be done directly, cannot be done indirectly.

162. Therefore the expression "independence of judiciary" is also no longer res-integra rather has been authoritatively interpreted by this Court when it held that it is a basic pillar of the Constitution and cannot be demolished or curtailed or diminished in any manner accept by and under the provision of the Constitution. We find no existing

provision of the Constitution either in Articles 98 or Article 95 of the Constitution or any other provision which prohibits consultation with the Chief Justice. Therefore consultation with the Chief Justice and primacy is in no way in conflict with Article 48(3) of the constitution. The Prime minister in view of Article 48(3) and 55(2) can not advice contrary to the basic feature of the constitution so as to destroy or demolish the independence of judiciary. Therefore the advice of the Prime minister is subject to the other provision of the Constitution that is Articles 95, 98, 116 of the constitution.

163. The independence of judiciary has also been held to be a basic structure of our Constitution in the case of Anwar Hossain Chowdhury and others Vs. Bangladesh reported in 41 DLR (AD) 165 wherein it was held as under:

This point may now be considered. Independence of judiciary is not an abstract conception. Bhagwati, J: said "if there is one principle which runs through the entire fabric of the Constitution, it is the principle of the rule of law and under the Constitution, it is the judiciary which is entrusted with the task of keeping every organ of the State within the limits of the law and thereby making the rule of law meaningful and effective." He said that the Judges must uphold the core principle of the rule of law which says-"Be you ever so high, the law is above you." This is the principle of independence of the judiciary which is vital for the establishment of real participatory democracy, maintenance of the rule of law as a dynamic concept and delivery of social justice to the vulnerable sections of the Community. It is this principle of independence of the judiciary which must be kept in mind while interpreting the relevant provisions of the Constitution (S.P. Gupta and others Vs. president of India and others AIR 1982 SC at page 152).

Independence of the Judiciary, a basic structure of the Constitution, is also likely to be jeopardised or affected by some of the other provisions in the Constitution. Mode of their appointment and removal, security of tenure particularly, fixed age for retirement and prohibition against employment in the service of the Republic after retirement or removal are matter of great importance in connection with the independence of Judges. Selection of a person for appointment as a Judge in disregard to the question of his competence and his earlier performance as an Advocate or a Judicial Officer may bring in a "Spineless Judges" in the words of President Roosevelt; such a person can hardly be an independent Judge.

164. Thus it appears that independence of judiciary is a basic structure of our Constitution and in order to ensure the independence, separation of power as contemplated under Article 22 of the Constitution which is a sine quo non for such independence, must be fully implemented. Article 22 runs as under:

The State shall ensure the separation of the judiciary from the executive organs of the State.

165. In this connection it is profitable to quote Justice Bhagwati, J. (as the learned Chief Justice of India then was) in Sankal Chand (:MANU/SC/0065/1977 : AIR 1977 SC 2328) while dealing with concept of independence of judiciary and describing the role of Article 50 of Indian constitution which is similar to our Article 22 quoted above) when he said:

And hovering over all these provision like a brooding omnipresence is Article 50 which lays down, as a Directive Principle of State Policy, that the State shall

take steps to separate the judiciary from the executive in the public services of the State. This provision, occurring in a chapter which has been described by Granville Austin as "the conscience of the Constitution" and which embodies the social philosophy of the Constitution and its basic underpinnings and values, plainly reveals, without any scope for doubt or debate, the intent of the constitution-makers to immunise the judiciary from any form of executive control or interference.

166. We agree, with approval, with Justice Bhagwati and add further that although Article 22 has been implemented to a great extent through the judgment of this Court through Masdar Hossain's case but until and unless the unamended Article 115 and 116 of the 1972 Constitution are restored vesting the control of the subordinate judiciary in the Supreme Court, the separation of judiciary will remain a distant cry and a music of the distant drum.

167. Therefore it follows that consultation with the Chief Justice with primacy is an essential part of independence of judiciary which is ingrained in the very concept of independence embedded in the principle of rule of law and separation of judiciary from the executive and is not in conflict with Article 48(3) of the constitution.

168. The judiciary is a cornerstone of our Constitution, playing a vital role in upholding the rule of law. Government must be conducted in accordance with the law and, for there to be confidence that this happens in practice, the law must be administered by a judiciary that is independent of Government. The process by which Judges are appointed is therefore key to both the reality and the perception of independence. The whole scheme is to shut the doors of interference against executive under lock and key and therefore prudence demands that such key should not be left in possession of the executive.

169. Let us now consider the question of convention of consultation, vis-a-vis the Constitutional consultation and how far the conventional consultation can be enforced.

170. Dicey in his 'The Law of Constitution' (1885) Page-23 and 24 wrote as under:

The rules which make up constitutional law, as the term is used in England, include two sets of principles or maxims of a totally distinct character.

The one set of rules are in the strictest sense 'laws', since they are rules which (whether written or unwritten, whether enacted by statute or derived from the mass of custom, tradition, or judge-made maxims known as the common law) are enforced by the Courts; these rules constitute 'constitutional law' in the proper sense of that term, and may for the sake of distinction be called collectively 'the law of the constitution'.

171. The other set of rules consist of conventions, understandings, habits or practices which, though they may regulate the conduct of the several members of the sovereign power, of the Ministry of the other officials, are not in reality laws at all since they are not enforced by the courts. This portion of constitutional law may, for the sake of distinction, be termed the 'conventions of the constitution', or constitutional morality."

172. A W Bradley and K D Ewing in their 14th edition of "Constitutional and Administrative Law" observed that. The role of the monarch in the conduct of government has almost disappeared since the 18th century without a series of statutes removing one royal power after another. In the same way, many powers have been

acquired by the Prime Minister by the operation of convention rather than as the result of legislation. Conventional rules may be used for discreetly managing the internal relationships of government while the outward legal form is left intact. At any given time, it may be difficult to tell whether practice on a certain matter has hardened into a rule, particularly when the practice is negative in character. A recent instance has concerned whether the Lord Chancellor, as a member of the government, may properly sit as a judge to decide appeals in the House of Lords. When Lord Irvine was Lord Chancellor, he insisted on retaining his right to sit as a judge, but when Lord Falconer was appointed to the office in June 2003, he declared that he would not do so. This statement could have been sufficient to establish a new convention binding on future Lord Chancellors. In fact, it was precursor of the Constitutional Reform Act 2005, which took away the judicial role of the Lord Chancellor."

173. The authors further observes, "The Supreme Court of Canada stated that the main purpose of conventions is to ensure that the legal framework of the constitution is operated in accordance with the prevailing constitutional values of the period." The Reference was made of "Reference re Amendment of the Constitution of Canada 125 DLR (3d) 1, 84, which case we shall shortly discuss hereinafter.

174. The same authors while dealing with the attitude of the courts in the matter of convention gave the example of The Crossman diaries case, and observed:

"The Corssman diaries case, in which the Attorney-General tried to prevent a newspaper publishing the diaries of a former Cabinet minister, is an outstanding illustration of the inter-relation of legal and non-legal rules. In this case, an attempt was made by the Attorney-General to prevent the breach of a conventional rule and to establish the existence of a legal obligation. The court held that former Cabinet ministers could be restrained by injunction from publishing confidential information which came to them as ministers, since there was a legal obligation to respect that confidentiality." They referred A-G v. Jonthan Cape Ltd. {1976} QB 752; ch 13 B.

175. O. Hood Philips and Jackson in their Constitutional Law and Administrative Law, Eighth edition 2001 referred to the case Re Amendment of the Constitution of Canada, which we shall discuss hereinafter, as under:

The case Re Amendment of the Constitution of Canada that came before the Supreme Court of Canada in 1981 is of great interest as being a unique discussion of constitutional convention by a Commonwealth court of the highest standing, especially since a case of this kind could never come before British courts who have no jurisdiction to determine such matters.

Sir W. Ivor Jennings, in his book "Law and the Constitution" Fifth Edition, in explaining the role of conventions, says,

Thus within the frame work of the law there is room for the development of rules of practice, rules which may be followed as consistently as the rules of law, and which determine the procedure which the men concerned with the Government must follow.

176. He also said for establishment of a constitutional convention:

A single precedent with a good reason may be enough to establish the rule. A whole string of precedents without such a reason will be of no avail, unless it is

perfectly certain that the persons concerned regarded them as bound by it.

177. Thus it appears that the distinction made by Dicey has been rejected by Sir W. Ivor Jennings who argued that enforceability by the courts was not a valid basis for a distinction between laws and conventions and that both rested essentially on the acquiescence of those to whom they applied (The Law and the Constitution (5th edn 1959), p-103-36.

178. This view of Sir W. Ivor Jennings is now holding the field in Canada, India and Pakistan. In Al-Jehad Trust Case Justice Ajmal Mian, J. of Pakistan Supreme Court observed as under:

I am inclined to hold that the distinction which was brought out by A.V. Dicey in 1885 between laws and conventions as to the enforceability and non-enforceability by the Courts is no longer holding the field. With the passage of time, the other eminent Jurists have not adhered to the above distinction. They have emphasised the importance of the Constitutional conventions for proper operating/functioning of the Constitutions. Jennings has put it very beautifully by explaining that the Constitutional conventions provide "flesh which clothes the dry bones of the law; they make the legal Constitution work; they keep in touch with the growth of ideas." The above view has been reiterated by the other Professors/Jurists of international repute.

179. In Indian jurisdiction, in the second Judges case, AIR 1994 page-268 Justice Kuldip Singh considered large number of decisions on convention and quoted K.C. Wheare in modern constitution 1966 edition when he said,

Conventions can become law also by judicial recognition.

180. His Lordship considered in para-367 and 368 as under:

There is abundant authority to show that the Courts have recognized the existence of the conventions and have relied upon them as an aid to statutory interpretation. In *Reyder V. Foley* (1906) 4 CLR 422, the High Court of Australia held that as conventional practice it was the minister who was acting on behalf of the government. Similarly, in *commercial Cable Company V. Government of New-foundland*, (1916) 2 AC 610, the Judicial Committee of Privy Council interpreted the word "government" to mean as minister in charge on the basis of an established convention. In *British Coal Corporation Vs. The King* (1935) AC 500, the Judicial Committee of Privy Council notice the convention that His Majesty in council was bound to give effect to the report of the Judicial Committee. In this respect we may also refer to *Robinson Vs. Minister of Town and Country Planning*, (1947) KB 702. *Liversidge Vs. Anderson*, (1942) AC 206, *Copyright Owners Reproduction Society Limited Vs. E.M.I. (Australia) Pvt. Limited*, (1958) 100 CLR 597, *Adgbenro Vs. Akintola*, (1963) AC 614, *Attorney General Vs. Jonathan Cape Limited (Crossman Diaries case)* (1976) QB 752, *R V. Secretary of State for Home Department, Ex p. Hosenball*, (1977) 1 WLR 766 and *Re-amendment of the Constitution of Canada* (1981) 123 DLR (3rd) 1.

181. We are of the view that there is no distinction between the "constitutional Law" and an established "constitutional convention" and both are binding in the field of their operation. Once it is established to the satisfaction of the Court that a particular convention exists and is operating then the convention becomes a part of the "Constitutional law" of the land and can be enforced in the like manner."

182. In the instant case the writ petitioner asserted and filed affidavits in support of continuous and unbroken convention of consultation. There is no affidavit by the executive to deny such assertions and therefore there is an admission on the part of the executive about the long and unbroken convention of consultation. This convention was however breached by the executive in 1994 when 9 Additional Judges were appointed to the High Court Division without consultation with the Chief Justice. Following the protest, the notification was rescinded and fresh appointments were made, recognizing in the fresh notification itself that the appointments were made in consultation with the Chief Justice.

183. The notification dated 09.02.1994 is quoted bellow:

গণপ্রজাতন্ত্রী বাংলাদেশ সরকার
আইন, বিচার ও সংসদ বিষয়ক মন্ত্রণালয়
বিচার শাখা-৪

প্রজ্ঞাপন

এস/আর,ও, নং-৫৪-আইন/৯৪

তারিখ: ২৭শে মাঘ, ১৪০০ বাং

৯ই ফেব্রুয়ারী ১৯৯৪ইং

ইং ০৩-০২-৯৪ তারিখের এস, আর, ও, নং-৩৭, ৩৮, ৩৯, ৪০, ৪১, ৪২, ৪৩, ৪৪, ৪৫, আইন/৯৪ বাতিলক্রমে গণপ্রজাতন্ত্রী বাংলাদেশ সংবিধানের ৯৮ অনুচ্ছেদ প্রদত্ত ক্ষমতাবলে রাষ্ট্রপতি বাংলাদেশের প্রধান বিচারপতির সংগে পরামর্শ করিয়া নিম্নলিখিত ৯(নয়) জনকে শপথ করিবার তারিখ হইতে দুই বৎসরের জন্য বাংলাদেশ সুপ্রীম কোর্টের হাইকোর্ট বিভাগের অতিরিক্ত বিচারক নিয়োগ করিয়াছেনঃ-(the underlines is ours)

- ১। জনাব মোহাম্মদ আসাদুজ্জামান, এ্যাডভোকেট সুপ্রীম কোর্ট।
- ২। জনাব মোহাম্মদ নূরুল ইসলাম, সলিসিটর (যুগ্ম-সচিব), আইন বিচার ও সংসদ বিষয়ক মন্ত্রণালয়।
- ৩। জনাব কাজী এ.টি মনোয়ার উদ্দিন, এ্যাডভোকেট সুপ্রীম কোর্ট।
- ৪। জনাব মোহাম্মদ ফজলুল হক, এ্যাডভোকেট সুপ্রীম কোর্ট।
- ৫। জনাব মোহাম্মদ হামিদুল হক, জেলা জজ, বরিশাল।
- ৬। জনাব এম, বজলুর রহমান তালুকদার, এ্যাডভোকেট সুপ্রীম কোর্ট।
- ৭। জনাব সৈয়দ আমিরুল ইসলাম, এ্যাডভোকেট সুপ্রীম কোর্ট।
- ৮। জনাব এম.এম. রুহুল আমিন, জেজা জজ যশোর
ও
- ৯। জনাব মোহাম্মদ তফাজ্জল ইসলাম, এ্যাডভোকেট সুপ্রীম কোর্ট।

রাষ্ট্রপতির আদেশক্রমে

স্বাঃ/অস্পষ্ট

(মীর্জা আসাদুজ্জামান-আল-ফারুক)

সচিব।

নং-৮২(২২)-বিচার-৪/১ এইচ-১/৯১(অংশ)

তারিখ : ২১-১০-১৪০০ বাংলা

০৯-০২-৯৪ইং"

184. The notification indicates two things, that there are a precedence that consultation was made invariably at all time without any breach. The single breach was resisted and

corrected by aforesaid notification. Secondly the 'actors' in the language of Sir W. Ivor Jennings, believed that they were bound by the convention and thirdly there is good reason for the convention.

185. The views of Sir W. Ivor Jennings was followed by the Supreme Court of Canada. The Canada Government sought patriation of the Constitution in the early 1980s, but agreement on the new settlement could not be reached with the provinces. When the Government decided to proceed without it some of the provinces challenged the legality of the Government's actions in the Courts. The Supreme Court held that, although no rule of law existed which established provincial consent as a prerequisite to any Constitutional amendment, there was a convention that such consent would be obtained. The Government thereupon delayed its plans and held further negotiations in which nine of the ten provinces agreed to revise Federal proposals which formed the basis of Canada's 1983 Constitution.

186. The Supreme Court of Canada in the case of Re-amendment of the Constitution of Canada 123 DLR (3rd) 1 accepted the definition of convention in both reference Nos. 1 and 2 given by Freedman C.J.M. who defines convention as under:

What is a constitutional convention? There is a fairly lengthy literature on the subject. Although there may be shades of difference among the constitutional lawyers, political scientists, and Judges who have contributed to that literature, the essential features of a convention may be set forth with some degree of confidence. Thus there is general agreement that a convention occupies a position somewhere in between a usage or custom on the one hand and a constitutional law on the other. There is general agreement that if one sought to fix that position with greater precision he would place convention nearer to law than to usage or custom. There is also general agreement that "a convention is a rule which is regarded as obligatory by the officials to whom it applies" Hogg, Constitutional Law of Canada (1977), p.9.

187. At page 888 of the First Reference, the majority opinion adopted the following passage of Sir W. Ivor Jennings, The Law and the Constitution (5th ed., 1959) at p.136):

We have to ask ourselves three questions: first, what are the precedents; secondly, did the actors in the precedents believe that they were bound by a rule; and thirdly, is there a reason for the rule? A single precedent with a good reason may be enough to establish the rule. A whole string of precedents without such a reason will be of no avail, unless it is perfectly certain that the persons concerned regarded them as bound by it.

In the 1st reference the Supreme Court of Canada recognized a convention of a "substantial degree of provincial consent" but in the 2nd reference refused to declare a convention of unanimity of consent of all the ten provinces of Canada relying on the Jennings' test.

The Supreme Court also considered Jennings opinion in his book at page 81, "convention" implies some form of agreement, whether expressed or implied

At page 117 Jenning writes "conventions are like most fundamental rules of any constitution in that they rest essentially upon general acquiescence."

188. At page 135 of the book Jenning writes:

if the authority itself and those connected with it believe that they ought to do so, then the convention does exist. This is the ordinary rule applied to customary law. Practice alone is not enough. It must be normative.

189. Following Hogg, (Constitution Law of Canada (1997), at p.9: the Supreme Court of Canada endorsed the view "a convention is a rule which is regarded as obligatory by the officials to whom it applies."

190. Considering this test the 2nd reference was rejected holding that:

Quebec has no conventional power of veto over constitutional amendments affecting the legislative competence of the Province.

191. Following the above decision of the Supreme Court of Canada we can also apply the Jennings test in this case.

192. First what are the precedents? The precedents are the impregnable mass of evidence given by respondents including the statements made by no less persons than Dr. Kamal Hossain, one of the founding father's of the constitution being chairman of the draft committee, Mr. M. Amirul Islam a member of the draft committee and Mr. Mahbubey-Alam the present Attorney General. These leaders of the Bar, also former Presidents of the Supreme Court Bar, had been in the vanguard of the struggle for establishment of independence of judiciary and rule of Law. They asserted that consultation had been there all through. Dr. Kamal Hossain further asserted that they quoted the statement of Justice Kemal Uddin Hossain, former Chief Justice of Bangladesh to the Prime Minister to the effect that even during the Marshal Law this convention of consultation was never breached and it is only then that the notification, dated 9 the of February 1974 as evidenced by annexure No. 4 page 8 of additional paper book submitted by Attorney General, was issued cancelling the earlier notification issued without the consultation with the Chief Justice. It is therefore admitted position that convention of consultation was never breached before 1994 or after 1994 and once breached it was corrected admitting and recognizing the convention.

193. This testimony of Dr. Kamal Hossain has been supported by the learned Attorney General, Mr. Mahbubey Alam. It is pertinent to mention that learned Attorney General is the holder of a constitutional office as the highest law officer of the republic and he is the leader of the entire Bar of the country in view of the fact that he is the ex-officio Chairman of the Bar Council and he is the link between the executive and judiciary and is a proper person to be considered in the list of the 'actors' in the matter.

194. This shows that the executive, the judiciary and the Bar who are the main 'actors' believed that they were bound by the convention.

195. The 3rd question is as to the reason of such convention. The answer needs elaboration.

196. Ours is a written constitution. Article 1 provides that Bangladesh is a sovereign Republic and Article 7 says that constitution is the solemn expression of the will of the people and it is the Supreme Law of the land and if any law is inconsistent with the constitution that law will be void. This article starts with "Supremacy of the Constitution".

197. Part-III of the constitution incorporated the fundamental rights of the citizens which is our bill of rights similar to charter of rights. Article 44 gives every citizen a

right for the enforcement of the fundamental rights in accordance with Article 102 of the Constitution which empowered the High Court Division of the Supreme Court the authority of judicial review to oversee the exercise of executive and legislative power of the state to ensure that the two other organs of the State do not transgress their respective limits in such exercise and Article 94 provides for a judiciary and has established a Supreme Court having two Divisions to ensure and protect the Supremacy of the Constitution. Besides Article 35(3) provides that every person accused of a criminal offence shall have a right to speedy and public trial by an independent and impartial court or tribunal established by law and Article 94(4) provides that the Chief Justice and other Judges shall be independent in the exercise of their judicial functions.

198. Thus it appears that the Supreme Court is designed to function independently as the guardian of the constitution. This is because whenever a constitution is justiciable, i.e., enforceable in a Court of law, the judiciary becomes the guardian of the constitution. Dicey, (10th Ed. P-137) writes:

This system (referring to the American), which makes the Judges the guardians of the Constitution provides the only adequate safeguard which has hitherto been invented against unconstitutional legislation.

199. Our constitution has not only taken care to empower the Supreme Court to limit the power of the legislature in law making but has also authorized the Court to function as the bulwarks of the constitution against executive encroachment on the life and property of the citizen and against any breach of their fundamental rights.

200. Since ours is a limited Government the limitations imposed by the constitution can only be "preserved in practice, in the words of Hamilton, in "no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing."

201. Hamilton went on to say, "Some perplexity respecting the right of the courts to pronounce legislative acts void, because contrary to the Constitution, has arisen from an imagination that the doctrine would imply a superiority of the judiciary to the legislative power. It is urged that the authority which can declare the acts of another void must necessarily be superior to the one whose acts may be declared void."

202. Alexander Hamilton further writes, "there is no position which depends on clearer principles than that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void. No legislative act, therefore, contrary to the Constitution, can be valid. To deny this would be to affirm that the deputy is a grater than his principal; that the servant is above his master, that the representatives; of the people are superior to the people themselves; that men acting by virtue of powers may do not only what their powers do not authorize, but what they forbid.It is far more rational to suppose that the courts were designed to be an intermediate body between the people and the legislature in order, among other things, to keep the later within the limits assigned to their authority.....the constitution not to be preferred to the statue, the intention of the people to the intention of their agents." (The Federalist Papers No. 78 by Alexander Hamilton, pages-465 and 466)

203. The position of our Supreme Court and the judiciary can be stated in the language of the celebrated Montesquieu when he said, "of the three powers above mentioned judiciary is next to nothing" and "there is no liberty if the power of judging be not separated from the legislative and executive powers." (Spirit of Laws, Vol-I, pages-186)

and 181)

204. In this connection it is pertinent to refer to the eloquent statement of Chief Justice John Marshall who said, "The judicial department comes home in its effects to every man's fireside. It passes on his property, his reputation, his life, his all. Is it not, to the last degree important, that the judge should be rendered perfectly and completely independent, with nothing to influence or control him but God and his conscience." (Proceedings and Debates of the Virginia State Convention of 1829-30 (1830), page-616)

205. It is therefore evident that the Supreme Court occupies a unique position of the "balance wheel" and its independence is the capstone of our constitutional-democratic state under the rule of law.

206. The expression of rule of law has number of different meanings and corollaries. Its primary meaning is that everything must be done in accordance to law, in other words, it speaks of rule of law and not of men and everybody is under the law and nobody is above the law. The other meaning of the rule of law is that Government should be conducted within a frame work of recognized rules and principles which restrict discretionary power and our constitution is the embodiment of the supreme will of the people setting forth the rules and principles. But the most important meaning of rule of law is that the disputes as to the legality of acts of the Government are to be decided by Judges who are independent of the executive.

207. Therefore, the appointment of Judges is of crucial importance. The common sociopsychological experience is that "the incumbent in an office remains indebted to those responsible for his designation holds specific dangers in the case of judicial function. In particular, if the designation has been influenced by political considerations, the beneficiary is exposed to the human temptation to repay his debt by a pliable conduct of his office." (political power and the Governmental process by Karl Loewenstein)

208. Harold J. Laski in his "Grammar of Politics" at page-541 quoted with admiration the famous saying of Henry Sidgwick from Elements of Politics, Page-481 as under:

The importance of the judiciary in political construction is rather profound than prominent. On the one hand, in popular discussion of forms and changes of Government, the judicial organ often drops out of sight; on the other hand, in determining a nation's rank in political civilization, no test is more decisive than the degree in which justice, as defined by the law, is actually realised in its judicial administration both as between one private citizen and another, and as between private citizens and member of the Government.

209. This is why appointment of Judges is the key to the independence of judiciary and the convention of consultation with the Chief Justice with primacy of his opinion is essentially ingrained in the very concept of independence of judiciary, rule of law and supremacy of the constitution. These are the reasons of the convention of consultation.

210. This follows that consultation with the Chief Justice with primacy of his opinion as convention is as good as any other provision of the constitution and is binding upon the executive.

211. Apart from Article 22 of the Constitution which is a cornerstone of the independence of judiciary by separating it from the executive we may locate the

presence of this 'consultation' in the very preamble of the Constitution which speaks of "absolute trust and faith in the Almighty Allah" and Articles 8(1) and 8(1A) of the Constitution which provide:

The principles of absolute trust and faith in the Almighty Allah, nationalism, democracy and socialism meaning economic and social justice, together with the principles derived from them as set out in this Part, shall constitute the fundamental principles of state policy.

212. It appears that Articles 8(1) and 8(1A) were noticed by this Court in the case of Haffzur Rahman Vs. Shamsun Nahar Begum reported in 51 DLR (AD) 172. In para 93 this Court noted:

We have also been rightly reminded of Article 8(1) of the Constitution which says that "The Principles of absolute trust and faith in the Almighty Allah..... shall constitute fundamental principles of state policy" and of Article 8(1A) of Constitution which says that "absolute trust and faith in the Almighty Allah shall be the basis of all actions."

213. But it appears that the expression "absolute trust and faith in Allah" was not discussed or interpreted nor the expression "the principles of absolute trust and faith" were illustrated. It is here in the above articles that we can safely locate the principle of "consultation" in all actions which is the necessary implication of these articles.

214. The expression "principles of trust and belief in Allah" is traceable in Sura XLII verse 36 which has been translated by Allama Abdullah Yusuf Ali as under:

Whatever ye are given (here)

Is (but) a convenience

Of this Life: but that

Which is with Allah

Is better and more lasting:

(It is) for those who believe

And put their trust

In their Lord;

(The underlings are ours)

215. The English version of verse 38 runs as under:

Those who hearken

To their Lord, and establish

Regular prayer; who (conduct)

Their affairs by mutual

Consultation;

Who spend out of what

We bestow on them

For sustenance;

(The underlings are ours)

216. While explaining consultation in note 4579 Allahma Abdullah Yusuf Ali writes:

4579. "Consultation." This is the key word of the Sura, and suggests the ideal way in which a good man should conduct his affairs, so that, on the one hand, he may not become too egotistical, and, on the other, he may not lightly abandon the responsibilities which devolve on him as a Personality whose development counts in the sight of God. This principle was applied to its fullest extent by the holy Prophet in his private and public life, and was fully acted upon by the early rulers of Islam. Modern representative government is an attempt-by no means perfect-to apply this principle in State affairs.

(The underlings are ours)

217. Let us see how far the holy Prophet (peace be upon him) applied this principle of consultation in his public life.

218. After the defeat in the battle of Badr the Maccans under the leadership of Abu Sufian decided to take revenge and marched against Madina-the newly born republic created under the Madina charter-the first written constitution of the world. The news alarmed the Prophet(s). He summoned his followers both Ansar and Muhazirin, even Abdullah Ibne Obai-the hypocrite. Most of the elders decided to fight from within Madina. Prophet(s) agreed with them. But the new converts seriously objected. They proposed to go out of Madina and fight the enemy at Ohud. The matter was put to votes. The new coverts won. The Prophet(s) agreed with the majority decision and laid the foundation of democracy based on mutual consultation.

219. Apart from this constitutional provision providing for mutual consultation the "consultation" can be traced in our constitutional history. Mention may be made of the proclamation of our independence dated 10th of April, 1971 which is comparable only to American Declaration of Independence, "provided that we.....having held mutual consultations.....declared and constituted Bangladesh to be a sovereign peoples republic."

220. Therefore even the proclamation of independence was the result of mutual 'consultations' and not exercise of one individual.

221. Benjamin N. Cardozo in his "The Nature of the Judicial Process" speaks of three methods of judicial process. One is the method of philosophy, the other methods are of history tradition and sociology. The philosophy of consultation thus appears ingrained in the preamble of Constitution and in articles 8(1) and 8(1A) of the Constitution. It is also available in history as has been discussed above with reference to our proclamation of independence and the incidents of 1994 which is testified by the revised notification quoted herein before.

222. So far the oath is concerned it will suffice to quote Article 148(3) of the Constitution which runs as under:

Where under this Constitution a person is required to make an oath before he enters upon an office he shall be deemed to have entered upon the office immediately after he makes the oath.

223. Third schedule serial 6 runs as under:

6. Chief Justice or Judges.- An oath (or affirmation) in the following forms shall be administered, in the case of the Chief Justice by the President, and in the case of Judge appointed to a division, by the Chief Justice-

I,....., having been appointed Chief Justice of Bangladesh (or Judge of the Appellate/High Court Division of the Supreme Court) do solemnly swear (or affirm) that I will faithfully discharge the duties of my office according to law:

That I will bear true faith and allegiance to Bangladesh.

224. Article 148 read with the third schedule, 6 makes it clear that Judges will enter into office only after taking oath and not before. Moreover articles 95, 98, 99 read together will show that the Judges appointed under Article 98 take oath as Additional Judges not as permanent Judges as under articles 95 and 99 provides that the Additional Judges do not suffer any disabilities in practicing or acting before any court if they are not appointed under Article 95(1) but the other Judges who are appointed under Article 95 must suffer the disabilities mentioned in Article 99 of the Constitution. Judges appointed under Article 98 enter into the office with full knowledge of two years tenure whereas there is no mention of any limit of tenure in case of those taking oath under Article 95 and their oath expires after the two years. It is true that there is no distinction between Additional Judges and the permanent Judges in respect of status but then they take two different type of oath. In case of Additional Judges they take oath as Additional Judges whereas in case of permanent Judges there is no mention of the word "Additional" in the oath. Besides Additional Judges once appointed perform all sorts of judicial work sitting in the Constitutional Benches and therefore they must take oath and therefore oath is essential both in the case of appointment under articles 98 and 95 of the Constitution.

225. Mr. M. Amir-ul Islam, the learned Counsel submitted that the principle of distributive and corrective justice demand that the Judges illegally dropped should be restored to their previous position.

226. It appears that the idea of corrective justice comes down to us from Aristotle. Its principle is applicable in common law fields as torts and contracts. Distributive justice is justice in the distribution by state of money, honors and other things of value- requires distribution according to merit. Corrective justice applies not to awards but to transactions.

227. All that the law is concerned with is that, of two party before it, one has got an unfair advantage and the other has suffered an unfair disadvantage. There is, therefore, a wrong which needs redress-an inequality which has to be equalized. (H. H. Joachim, Assistotle: The Nicomachcan Ethics: A Commentary 144 and also "The Problems of Jurisprudence" by Richard A. Posner, Harvard, paper book edition 1993 page-313).

228. In the instant case there is no such case of taking advantage by one party or the other. The other group of sitting Judges have not taken any advantage over the dropped Judges. The illegality was done by the executive. That illegality cannot be corrected at

the cost of sitting Judges who have not done any wrong to anybody. Therefore the question of corrective justice does not apply in this case.

229. As to the norms I-XII set out by the High Court Division it appears that No. I-XI relate to the procedure of appointment of Judges. It may be pointed out that legal norms are not legal principles, one cannot be confused with the other-Entscheidungsnormen with Rechtssatze [The Nature of the Judicial Process by Benjamin n. Cardozo] page 104, and norms do not bind any body unless declared Law by the court and direction is given to obey them. It appears that the High Court Division was conscious of this position and no declaration or direction has been given in respect of norms I-XI. Number XII is the declaration with regard to non-appointment.

230. However our view as to norm No. 1 is that under our constitutional scheme CJB is the consultee and not consultor and therefore the process of consultation is supposed to emanate from the consultor unless the Law is changed. There is no convention or any law on this point.

231. As to norm No. 2 there is no cavil. However it can not negate the role of the executive altogether in case of antecedent of a nominee.

232. Norm No. III speaks of collegium. There is no law or convention on this point. If this is to be introduced it needs constitutional reform. Moreover this system is not working in India which is evident from the report of the Law Commission of India which we shall discuss herein after (Report No. 214 dated 21.11.2008).

233. Norms no. IV-X are only expansion of norm no. I-III.

234. As to legitimate expectation of additional Judges as in no. XI it appears that in the case of S. P. Gupta Indian Supreme Court held as under:

There can, therefore, be no doubt that an additional judge is not entitled as a matter of right to be appointed as additional judge for a further term after the expiration of his original term or as a permanent judge. The only right he has (is) to be considered for such appointment and this right also belongs to him not because clause (1) of Article 224 confers such right upon him, but because of the peculiar manner in which clause (1) of Article 224 has been operated all these years.

235. It does not appear that this view of the Indian Supreme Court has been overruled in the other two Judges cases and therefore still holds the field in India. We are of the view that the right is only to be considered for appointment under Article 95(1) of the constitution and not beyond.

236. As to norm No. XII which is a declaration, we accept it in substance, not in this form. A negative declaration can not be given. It can be declared that the respondents were illegally dropped from being appointed under Article 95(1) of the Constitution since the recommendation of the CJB was ignored without any reason and with out any further meaningful consultation.

237. The historical method as advocated by Cardozo demands us to compare the system of appointments in other countries.

238. The position in United States of America is as under:

239. Federal Judges are nominated by the President of the United State. However,

although Article 111 of the United States constitution allows the President to nominate any individual, regardless of their qualifications, all federal appointments must be confirmed by the legislature. This involves a simple majority vote in the upper house of Congress (the Senate).

240. The judiciary and legal professions play no part in nominating or appointing federal judiciary.

241. Prior to the Senate vote, judicial nominations are put before the United States Senate Committee on the judiciary where a decision is made on whether to provide a positive, neutral or negative report to the Senate. In practice, nominations for judicial office are rarely rejected by the house.

242. This selection process applies to Supreme Court Judges, Circuit Court judges and District judges.

Membership

The United States Senate Committee on the judiciary is a standing committee in the Senate. The committee consists of 18 members, with equal membership from the majority and minority parties, and a chair from the majority party. The chair primarily controls the business of the committee, but has the casting vote in the event of a tie.

243. The Committee is responsible for holding public hearings where judicial nominees are questioned by committee members regarding their suitability for appointment. There recommendation to be made to the Senate is agreed at the close of the hearing by majority vote."

244. The position in South Africa is as under:

Following democratic elections in 1994, and the ensuing constitutional reforms, the independence and power of the judiciary was increased. Prior to 1994 judicial selection was controlled entirely by the executive. Judges were appointed directly by the Minister of Justice and magistrates were civil servants, answerable to senior officials, who controlled salaries and promotion.

245. The Bill of Rights 1994 established, along with a Constitutional Court that has the power to invalidate legislation, a Judicial Service Commission to govern the higher judiciary. (A separate Magistrates Commission was established to govern the lower judiciary). It is prescribed within the constitution that Judges cannot be appointed without the participation of the Judicial Service Commission. The degree to which the JSC participates in appointment and the extent to which it can prescribe appointments varies by the type of judicial office.

Membership

The Judicial Service Commission (JSC) consists of 23 members, and includes representatives from the executive, the judiciary and the legal professions:

- * The Chief Justice (Chairperson)
- * The President of the Supreme Court of Appeal
- * A judge president (head of a High Court and 'designated by' all

judges as president)

- * Five members of the legal profession (appointed by the President upon nomination by their constituencies-two advocates, two attorneys and one legal academic)

- * The Minister of Justice

- * Six members of the National Assembly ('designated by' the National Assembly, three of whom must be members of the opposition party)

- * Four members of the National Council of Provinces

- * Four individuals chosen by the President after consulting with the leaders of all parties in the National Assembly.

246. The JSC is obliged by Section 174 of the constitution to consider the need for the judiciary to reflect the racial and gender composition of South Africa when making judicial appointments.

247. The degree to which the JSC has determinative control the appointment of judges increases according to the extent of a judge's powers. For example, the President can only make appointments to the High Court on advice from the JSC. However, appointments to the Constitutional Court, the President of the Supreme Court of Appeal and the office of Chief Justice are the prerogative of the President as the head of the National Assembly. In respect of the appointment of Constitutional Court judges the JSC provides the President with a list of nominees. The President appoints an individual from this list after consulting with the Chief Justice (who is head of the Constitutional Court)."

248. The position in India is as under:

The Indian Constitution, established following independence from British colonial rule in 1950, sets out the process for the appointment of Supreme Court and the High Court (state level) judges. Judges are appointed by the President on advice from the Chief Justice and other senior judges.

249. In India there is no independent advisory board or judicial selection committee. The legislature plays no role in the appointment of judges.

Supreme Court Judges

The Judges of the Supreme Court are appointed after consultation with the Supreme Court. The Chief Justice is always consulted in the case of a judge other than the Chief Justice. Supreme Court judges cannot be removed from office unless by order of the president and sanctioned by a majority vote in both Houses of Parliament.

250. In order to be appointed as a judge of the Supreme Court an individual must be a citizen of India and must have been a Judge of the High Court for at least five years or an Advocate of a High Court for at least 10 years.

High Court Judges

High Court judges are appointed after consultation with the Chief Justice, the

Governor of the state and the Chief Justice of the state High Court.

Provisions exist for the appointment of a Judge of a High Court as an ad-hoc Judge of the Supreme Court and for retired Judges of the Supreme Court or High Courts to sit and act as Judges of that Court.

251. The position in Prance is as under:

Judges in Prance are civil servant, but enjoy special statutory protection from the executive. There are special procedures for naming, promoting and removing them, depending on the status of the courts in which they sit. Specifically, the appointments of most judges have to be approved by the Consil Superieur de la Magistrature (High Council of the Judiciary), in which representatives of the judges sit, and they may not be removed from office without specific disciplinary proceedings conducted before the Council, with due process.

252. The Ministry of Justice has responsibility for the administration of the judicial system, such as the payments of salaries or the construction of new court buildings. It also funds and administers the prison system.

Membership

The Higher Council of the Judiciary is made up of 12 members as follows:

- * five elected by judges
- * one public prosecutor
- * one councillor of state chosen by his/her peers
- * three individuals nominated one each by President of the Republic, the Senate and national Assembly; and
- * two ex-officio members-the President of Republic and the Minister of Justice.

A table showing analyses of judicial appointments is given below:

Table 1: Analysis of system for judicial appointments in other jurisdictions

Country	Nomination/recommendation			Appointment		Combined Selection and appointment by a separate appointments commission
	Recommendation or screening by a separate appointments committee	Nominations made by the executive	Consultation with the Judiciary/ Attorney General	Appointments by the executive	Appointments must be confirmed by the legislature/A appointments must be confirmed by the legislature	
Australia			X	X		
Canada	X			X		
Cyprus			X	X		
Czech Republic				X		
France	X ²³		X	X		
Germany	X		X	X		
Hungary	X			X		
India			X	X		
Ireland	X			X		
Israel		X			X	
Italy						X
Malta	X ²⁴			X		
New Zealand			X	X		
Poland			X	X		
South Africa	X		X	X		
Spain			X			X
Sweden			X			X
UK	X		X	X		
USA		X			X	

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Quoted from "The Governance of Britain-Judicial appointment-presented to British parliament by lord chancellor and secretary of state for Justice by command of Her Majesty the Queen-October 2007.

253. The position in England has been explained by Colin Turpin and Adam Tomkins in "British Government and the Constitution" Sixth Edition as under:

The Constitutional Reform Act 2005 placed the system of judicial appointments on a modern footing. The role of the Lord Chancellor remains important, in advising the Queen on appointments to high judicial offices and in himself appointing many judicial office-holders, for instance Assistant Recorders,

deputy District Judges, justice of the peace, and chairmen and members of a great number of tribunals. His role is, however, complemented by sections 63-107 of the Act, which established a new Judicial Appointments Commission of fifteen members: a lay person as chairman; five judicial members; two members from the legal professions; five lay members; a tribunal chairman, tribunal member or arbitrator; and a justice of the peace. Commissioners are appointed by the Queen on the recommendation of the Lord Chancellor who acts in accordance with procedures, set out in Schedule 12 to the Act, which are designed, through the involvement of the judges' Council or an independent panel, to exclude partisan considerations from appointments.

254. The Judicial Appointments Commission has a critical role in the appointment of the lord Chief Justice, other Heads of Division, Lords Justices of Appeal, High Court Judges and other judicial office-holders. When an appointment is to be made, the Commission (in the case of High Court Judge or listed office-holder) or a selection panel appointed by it (in the case of the Lord Chief Justice, Head of Division or Lord Justice of Appeal) decides upon the selection process to be applied and proceeds to apply it. Its selection of one person is presented in a report to the Lord Chancellor. (What follows is described herein summary form: for the full details see Sections 67-96 of the Constitutional Reform Act.)

255. On receiving the report (stage 1) the Lord Chancellor has three options: (a) to accept the selection; (b) to reject it; (c) to require the Commission or panel to reconsider the selection. Following a rejection or requirement to reconsider, the Commission or panel must again make a selection. The Lord Chancellor has then (stage 2) the same three options: to accept, reject or require reconsideration; but he may reject the selection only if it was made following a reconsideration at stage 1, and may require reconsideration of the selection only if it was made following a rejection at stage 1. Following a further selection after rejection or reconsideration at stage 2, the Lord Chancellor must, at stage 3, accept the selection. If the Lord Chancellor rejects or requires reconsideration of a selection stages 1 or 2, the Commission or panel in proceeding to a further selection may not select the person rejected, but following a reconsideration may select the person reconsidered. Selection by the Commission or a selection panel 'must be solely on merit'; subject to this the Commission must in performing its functions 'have regard to the need to encourage diversity in the range of persons available for selection for appointments' (sections 63-64 of the Act)."

256. So far India is concerned after the three Judges cases the Law Commission of India considered the outcome of the three judges cases I, II, and III by the Indian Supreme Court and submitted its report No. 214 of dated 21.11.2008 mentioned hereinbefore with a proposal of reconsideration of the Judges cases I, II and III, namely-S.P. Gupta Vs. UOI reported in: MANU/SC/0080/1981 : AIR 1982 SC 149, Supreme Court Advocates-on-Record Association Vs. UOI reported in: MANU/SC/0073/1994 : 1993 (4) SCC 441 and Special Reference 1 of 1998 reported in: MANU/SC/1146/1998 : 1998 (7) SCC 739.

257. In the report it discussed the evil affects of the three judgments-judges cases I-III. The relevant portion of the report runs as under:

As already stated this delicate balance has been upset by the 2nd Judges case (Advocate on Record Association Vs. Union of India 1993(4) SCC 4412 and the opinion of the Supreme Court in the Presidential Reference (Special Reference No. 1 of 1998). It is time the original balance of power is restored.

258. The above recommendation for the need for an urgent and immediate review of the present procedure for appointment of judges is further fortified by the views expressed by Justice J.S. Verma, who wrote the lead judgment in *Advocates on Record Vs. Union of India*: MANU/SC/0073/1994 : 1993 (4) SCC 441, by his forthright views expressed in an interview in the *Front Line Magazine* dated 10.10.1998. The relevant portion is reproduced below:

When asked "you said in one of your speeches that judicial appointments have become judicial disappointments. Do you now regret your 1993 judgment? Justice Verma stated "My 1993 judgment, which holds the filed, was very much misunderstood and misused. It was in that context I said the working of the judgment now for sometime is raising serious questions, which cannot be called unreasonable. Therefore, some kind of rethink is required. My judgment says the appointment process of High Court and Supreme Court Judges is basically a joint or participatory exercise between the executive and the judiciary, both taking part in it.

259. Broadly, there are two distinct areas. One is the area of legal acumen of the candidates to adjudge their suitability and the other is their antecedents. It is the judiciary, that is, the Chief Justice of India and his colleagues or, in the case of the High Courts, the Chief Justice of the High Court and his colleagues (who) are the best persons to adjudge the legal acumen. Their voice should be predominant. So far as the antecedents are concerned, the executive is better placed than the judiciary to know the antecedents of candidates. Therefore, my judgment said that in the area of legal acumen the judiciary's opinion should be dominant and in the area of antecedents the executive's opinion should be dominant. Together, the two should function to find out the most suitable (candidates) available for appointment."

260. The views of the Parliamentary Standing Committee on Law & Justice recommended the scrapping of the present procedure for appointments and transfers by Supreme Court and High Court Judges are of great relevance in this context. As reported in the *Hindustan Times* of 20.10.2008 "the Law Ministry has agreed to review the 15 years old system after the Parliamentary Standing Committee on Law & Justice recommended doing away with the committee of judges (Collegium). Presently, the collegium decides the appointments and transfer of judges. Interestingly, the recommendations come close on the heels of recent cases of corruption against Judges of the courts in the country. Law Minister H.R. Bhardwaj told *Hindustan Times* that the House Committee's recommendation had been accepted, and an action-taken report prepared by the Ministry would now be placed before Parliament. "Collegium system has failed. Its decisions on appointments and transfers lack transparency and we fell courts are not getting judges on merit. (...) The government cannot be a silent spectator on such a serious issue", Bhardwaj said. The House Committee had said:

Through a Supreme Court judgment in 1993, the judiciary wrested the control of judges appointments and transfers. The collegium system has been a disaster and needs to be done away with". H.R. Bhardwaj, Minister of Law & Justice, said "it is the right time to review this important matter.

261. There was no problem till 1993 when the judiciary tried to re-write the Article of the Constitution dealing with appointments. They created a new law of collegium which was wrong. In a democracy, the primacy of Parliament cannot be challenged", he said.

262. The Chairman of the Departmental Related Parliament Standing Committee of

Personnel, Public Grievances Law and Justice in its 28th Report presented to the Hon'ble Chairman of Rajya Sabha on August 2008 has stated thus:

I would like to conclude by saying that the Government should expeditiously see to it that appointment of Judges in High Courts and Supreme Court are done in a transparent way. We have recommended in two ways: One is, we have to see to it that the collegium system has to be done away with, since appointments will be delayed, we have said that from the very beginning of identifying the eligible persons, the various places of recommendations, be it at the level of the High Courts, or, at the Governor's level or at the level of the Departments, and finally be the Supreme Court, should be transparent, and this should be put up in the web site then and there so that the person, who is going to occupy the Constitutional place, is known to the public, and their background should be allowed to be discussed by the public and, finally, it has to go through the process of issuing warrant by the President of India. But, what is happening presently is that from the day one of identifying the person till the issuance of the warrant, nothing is known to anybody except to the persons who are involved in it. Even the persons, who are identified and who are going to be made as judges of the High Court or the Supreme Court, may not know about it. This type of secrecy is not good for democracy.

263. It may be noted in this context that in every High Court the Chief Justice is from outside the State as per the policy of the Government. The senior most Judges who form the collegium are also from outside the State. The resultant position is that the judges constituting the collegium are not conversant with the names and antecedents of the candidates and more often than not, appointments suffer from lack of adequate information.

264. Two alternatives are available to the Government of the day. One is to seek a reconsideration of the three judgments aforesaid before the Hon'ble Supreme Court. Otherwise a law may be passed restoring the primacy of the Chief Justice of India and the power of the executive to make the appointments."

265. It further appears that Justice V.R. Krishna Iyer also criticized the present system of appointment of Judges in India in one article published in the Hindu dated August 7, 2001.

266. From the above it appears that the balance of independence and accountability of system of appointment was sought to be provided in Constitution of USA but none of the parliamentary democracies have adopted that system. The parliamentary world shows a tendency to give an independent nominating commission or council the function of selecting the best candidates for judicial office and the President and Prime Minister who is accountable to the parliament the power to appoint Judges on the basis of recommendations from the nominating body. There are many variations on the nominating commission model. South Africa is the only example of nominating commission using public interviews in developing its short list of candidates for vacancies on SAs Constitutional Court.

267. There is an old saying that let the fools fight for the forms of Government, that form of the Government is best that administers best. This is equally true in case of legal system. It is not the form of the system which is important. It is the result that the system produces which is important. Therefore it is the end result which is important. However, there are some universal principles and one of such principles is that in the

matter of appointment of Judges judiciary must have the last say and that say can be articulated most efficiently only by the Chief Justice who is most competent and well equipped and well posted with facts to give his considered opinion. While giving such opinion it is implied that he will discuss with his senior colleagues and other important members of the Bar but the concept of collegium is neither in our Constitution nor it has developed as a convention. If there is really any wisdom in the concept of collegium, that can be provided for only by Constitutional reform and not otherwise. Foreign system can advise but can not command.

268. In the short order on 2nd March, 2009 we referred to a transparent process of consultation. The word transparent needs some explanation. The dictionary meaning as per Black's Law Dictionary 8th Edition Page-1537 of the word is openness, clarity, lack of guile and attempts to hide damaging information, the word is used of financial disclosures, organizational policies, law making and other activities where organizations interaction with the public. By the expression we mean that the process of consultation and appointment of the Judges must be transparent, fair and robust enough to ensure that only those candidates with the highest professional qualifications and standards of personal integrity are allowed to sit on the bench. Fair, independent and transparent appointment processes will not only provide independence but also accountability to the system. A clear, objective criteria aiming at ascertaining the professional qualifications and integrity of the candidates and high standards based on the values and the spirit of the constitution will be the prerequisite in the assessment of the candidates. Therefore the entire process of consultation leading to appointment should be put into writing containing the materials considered against each candidate in support of their suitability.

269. Mr. T. H. Khan has paused a serious question-Can the Judges legislate? Our answer is that the great body of the common law or unwritten law is entirely the product of decided cases accumulated in series of reports extending backwards to the reign of Edward the 1st at the close of 13th century and are all judge made laws. It is profitable here to quote Justice Oliver Wendell Holmes, JR. when he said:

I recognize without hesitation that Judges must and do legislate, but they do so only interstitially; they are confined from molar to molecular motions. A common-law judge could not say. I think the doctrine of consideration a bit of historical nonsense and shall not enforce it in my court.

270. The question of Mr. T.H. Khan can be answered in the language of Justice Cardozo in the following terms:

I think the tone and temper in which the modern judge should set about his task are well expressed in the first article of the Swiss Civil Code of 1907, an article around which there has grown up a large body of juristic commentary. "The statute," says the Swiss Code, "governs all matters within the letter or the spirit of any of its mandates. In default of an applicable statute, the judge is to pronounce judgment according to the customary law, and in default of a custom according to the rules which he would establish if he were to assume the part of a legislator. He is to draw his inspiration, however, from the solutions consecrated by the doctrine of the learned and the jurisprudence of the courts- par la doctrine et la jurisprudence.

271. The judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant roaming at will in pursuit of his own ideal of beauty

or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to "the primordial necessity of order in the social life. Wide enough in all conscience is the field of discretion that remains."

(The underlings are ours)

272. We therefore sum up as under:

- 1.** The High Court Division while exercising its jurisdiction under Article 102 or under any other article like Article 108 of the Constitution should not enter into academic discussion and will not pass upon a constitutional question unless a decision upon that very point becomes necessary to the determination of the cause and will not go out of their way to find such topics. Where a constitutional question is raised and if the record presents some other and clear ground upon which the court may rest its judgment the court will take that course and leave the question of constitutional interpretation to be decided in an appropriate case which cannot be decided without such interpretation.
- 2.** Each Judge in the High Court Division exercises jurisdiction on behalf of the High Court Division which is an unit of this Court having co-ordinate jurisdiction and one-Judge or group of Judges cannot challenge the judgment passed by another Judge or Bench of the Judges as that will amount to challenging their own judgment.
- 3.** Independence of judiciary affirmed and declared by the Constitution is a basic structure of the Constitution and cannot be demolished or diminished in any manner. There is no provision in the Constitution either authorising the President or for that matter the Prime Minister in view of Article 48(3) of the Constitution to curtail or diminish such independence.
- 4.** Consultation with the Chief Justice with primacy of his opinion in the matter of appointment of Judges and the administration of judiciary is an essential part of independence of judiciary ingrained in the very concept of independence embedded in the principle of rule of law and separation of judiciary from the executive and is in no way in conflict with Article 48(3).
- 5.** Convention when recognized and acted upon is as good as constitutional law and the provisions of the constitution and is binding like any other principle of law.
- 6.** The convention of consultation with the Chief Justice in the matter of appointment of Judges under Articles 95 and 98 of the Constitution has hardened and matured into a rule of law having been recognized and acted upon by all the 'actors' in the matter and therefore is binding upon the executive.
- 7.** All the remarks and findings on "privileged documents" in the judgment of the High Court Division are expunged.
- 8.** All the remarks and findings about malafide and bias in the judgment of the High Court Division are expunged.
- 9.** Except on the ground of want of consultation with the CJB or lack of any

condition of eligibility the cases of appointment of Judges shall not be justiciable on any other grounds including bias and malafide.

10. Oath is essential both before entering into office of the Judges appointed under articles 98 and 95 of the Constitution and the Judges shall be deemed to have entered into office only after taking oath. The finding of the High Court Division that fresh oath is not necessary for the dropped Judges or that their appointment shall be effective from the respective date of non-appointment that is the date they were scheduled to be appointed are set aside.

11. As to the legitimate expectation of the Additional Judges it is held that they only have the right to be considered for appointment under Article 95(1) of the Constitution.

12. As to the norms set forth by the High Court Division it is held that the norms should not be confused with legal principles. Norms I, III to XI are not approved. Norm No. II to the effect that opinion of the CJB in the matter of appointment of Judges to the Supreme Court is entitled to have primacy, is approved with modification that the opinion of the executive will have dominance in the matter of antecedent of the candidate only. Norm No. XII is modified to the effect that the writ petitioner Judges were illegally dropped from being appointed as Judges of the Supreme Court of Bangladesh under Article 95(1) of the Constitution as the opinion of the CJB was totally ignored without any cogent reason.

273. On 2nd March, 2009 we passed the following short order:

For reasons to be recorded later on in details we hereby pass the following short order:

1. In the matter of appointment of Judges under Articles 98 and 95 of the Constitution the Convention of consultation having been recognized and acted upon has matured into Constitutional Convention and is now a Constitutional imperative.

2. Such consultation is inherent in our Constitutional scheme and is ingrained in the principle of independence of judiciary being essentially the basic structure of our Constitution embedded in the principle of Rule of Law.

3. In the matter of selection of the Judges the opinion of the Chief Justice should be dominant in the area of legal acumen and suitability for the appointment and in the area of antecedents the opinion of the executive should be dominant. Together, the two should function to find out the most suitable candidates available for appointment through a transparent process of consultation.

4. Oath under Articles 98 and 95 of the Constitution are separate and distinct and are required to be administered and made before one enters upon an office and a Judge will be deemed to have entered upon the office immediately after he makes the Oath and not before, in both cases.

5. The cases of Md. Abdus Salam, Md. Mamtazuddin Ahmed, Md.

Shamsul Huda, Faruque Ahmed, Hasan Foez Siddique, Md. Abdul Hye, Md. Abdur Razzaque, Md. Marzi-ul Huq. Md. Nizamul Huq and A. H. M. Shamsuddin Chowdhury be considered in terms of the aforesaid guidelines.

274. The short order shall form part of the judgment. These petitions are accordingly disposed of.

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