

Appointment of Supreme Court Judges in Bangladesh: An Alternative Interpretation of “Consultation”

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Abstract: *The Supreme Court of Bangladesh in the cases of Manabjamin and Idrisur Rahman held that in the matter of appointment of Judges of the Supreme Court “consultation” with the Chief Justice with primacy of his opinion is a condition of independence of Judiciary. I argue that the appointment of Judges of the Supreme Court by the Executive does not by itself fetter judicial independence provided that the other post-appointment conditions imposed by the Constitution are met. I further argue that Article 98 (appointment of Additional Judges) and Article 99 (permitting Judges to hold ‘judicial’ or ‘quasi-judicial’ offices after retirement) are provisions that compromise with the independence of Judiciary. The Court has never identified these provisions as potential or real threat to the independence of Judiciary. The Court rather over-focused on the mode of appointment as a major aspect of judicial independence. So far as the mode of appointment is concerned, I argue that the accountability of the Executive should be ensured politically and not judicially. This assumes that the whole of the accountability of the Government cannot be claimed to be ensured legally and the vice versa. In his dissent, Joynul Abedin J argued that the mode of appointment of Judges isn’t a component of judicial independence. However, this raises the question: if the Executive disregards the Chief Justice’s opinion, what then? Abedin J didn’t address the Executive’s political accountability in such a scenario. This leaves a gap in our jurisdiction regarding the justifiability of the Executive’s political accountability in Supreme Court Judge appointments. This article aims to fill that void by advocating for political accountability of Executive solely within this context.*

Keywords: Appointment of Judges, judicial independence, *Idrisur Rahman*, consultation, political accountability.

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I acknowledge that some parts of this article (Sections 3, 4 and 6) are a revised version of what I wrote in my PhD research. See, Moha. Waheduzzaman, *Doctrine of Political Question in Constitutional Litigation of Bangladesh: A Quest for Theoretical Framework*, Unpublished PhD Thesis (Dhaka: University of Dhaka, Department of Law, 2022) 199-205 and 229-236. I also acknowledge that I was University Grants Commission (UGC) PhD Fellow 2020 and the fellowship allowance made my PhD research to a large extent financially possible.

1. Introduction

The power to appoint persons in the highest constitutional offices of the State belongs to the Executive organ of the Government.¹ This article, however, deals only with Executive's power in appointment of the Judges of the Supreme Court. To appoint the Judges, the President is required by Article 95 (1) of the Constitution to consult with the Chief Justice of Bangladesh. What does "consultation" mean under Article 95 (1)? Does this only mean an 'empty formality' on the part of the Executive? Does the Constitution seek to achieve any meaningful purpose by means of such "consultation"? Should the opinion of the Chief Justice have primacy over the opinion of the Executive in case any conflict arises between them in such matter? These are some of the important questions associated with the interpretation of the term "consultation" under Article 95 (1) of the Bangladesh Constitution.

The Appellate Division of the Supreme Court of Bangladesh in *Bangladesh v Idrisur Rahman* held that consultation with the Chief Justice in appointing Judges under Article 95 (1) with primacy of opinion of the Chief Justice is a condition for independence of the judiciary.² The Court has further observed that independence of judiciary is an important aspect of 'rule of law' which is a part of the basic structure of the Constitution.³ Thus, according to Court's analysis, primacy of opinion of the Chief Justice in the matter of appointment of Judges of the Supreme Court may indirectly form part of the doctrine of basic constitutional structure of a country.

In this article, I dispute Court's claim that the opinion of the Chief Justice should get primacy over the opinion of the Executive regarding the appointment of Judges of the Supreme Court. I submit that the Supreme Court of Bangladesh has not been able to correctly interpret the term "consultation" within the framework of the Constitution. My main argument is that the appointment of Supreme Court Judges by the Executive is not in itself a condition that fetters judicial independence provided that the other post-appointment conditions for securing judicial independence are guaranteed.

I, therefore, propose to give an alternative interpretation of the term "consultation" reflecting on the conditions of judicial independence as well as the separation of powers among the organs of the Government. I argue that the Executive branch should remain only politically accountable to the people for any

¹ For Executive's power of appointment (the President in accordance with the advice of the Prime Minister) in Bangladeshi jurisdiction, see, for example, Articles 56 (2), 95 (1), 64 (1), 127 (1), 118 (1) and 138 (1) of the Constitution of the People's Republic of Bangladesh.

² *Bangladesh v Idrisur Rahman* 15 (2010) BLC (AD) 49 (hereafter *Idrisur Rahman (AD)*).

³ For basic structure doctrine in Bangladesh, see, *Anwar Hossain Chowdhury v Bangladesh* 1989 BLD (Spl) 1 (hereafter *Anwar Hossain Chowdhury*).

arbitrary disregard of the Chief Justice's opinion. The remedy thus lies not in judicial but in political means. This alternative interpretation of the term "consultation" would further the deeper objective of ingraining into any constitutional mind the value of extra-legal means of ensuring governmental accountability besides or in addition to legal means of ensuring such accountability.

The article consists of *seven* Sections. Following this introductory Section, Section 2 traces the historical background of the law of consultation in the post-independence Bangladesh. Section 3 reviews the judicial pronouncements involving interpretation of the term "consultation" in Bangladesh and some analogous jurisdictions, such as, India and Pakistan. Section 4 assesses the provisions of Bangladesh Constitution that guarantee or undermine independence of its Higher Judiciary and holds that appointment of Judges by the Executive is not a condition that in itself fetters judicial independence. Section 5, in contrast to the holdings of the Supreme Court, argues that the opinion of the Chief Justice may not get primacy over that of the Executive in the matter of appointment of Judges of the Supreme Court. Section 6 seeks to justify political accountability only of the Executive in the appointment of Judges of the Supreme Court. Section 7 summarizes the arguments of the article and concludes.

2. History of the Law of Consultation In Bangladesh

As per Article 94 of the Constitution, the Supreme Court of Bangladesh comprises of two divisions – the Appellate Division and the High Court Division. The Constitution enjoins the President to appoint the Chief Justice and the other Judges of the Supreme Court. Article 95 (1) originally required the President to consult the Chief Justice regarding appointment of the other Judges of the Supreme Court. But the provision of consultation was deleted by the Constitution (Fourth Amendment) Act, 1975.⁴ This amendment changed Article 95 (1) to the following effect:

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

Article 95 (1) was again amended by the Second Proclamation (Seventh Amendment) Order, 1976⁵ in the following manner:

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

This version of the Article commensurate with the original Article 95 although it somewhat designated the office of the Chief Justice as Chief Justice

⁴ Act No. II of 1975.

⁵ Second Proclamation Order No. IV of 1976.

of the Supreme Court instead of Chief Justice of Bangladesh. But the Second Proclamation (Tenth Amendment) Order, 1977⁶ again brought the Fourth Amendment change back in the Constitution:

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

However, the Judges of the Supreme Court were *conventionally* appointed in consultation with the Chief Justice even after the Fourth Amendment that for the first time did away with the requirement of consultation from Article 95 of the Constitution.⁷ Only one attempt was made in 1994 by the Executive to deviate from the convention but it was ably resisted by the Bench and the Bar unitedly.⁸ As a positive result, the factum of consultancy is reflected in the notification from 9th of February, 1994 till today.⁹ In the meantime, however, the Constitution (Fifteenth Amendment) Act, 2011¹⁰ has revived the original provision in the Constitution. Article 95 now reads as follows:

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.¹¹

Thus, after the Constitution Fifteenth Amendment, the provision of “consultation” is now not merely a *convention* but also a *law* of the Bangladesh Constitution. My aim in this article depends to a large extent on determining the true import of the word “consultation”. However, before I could elaborate my view on the point, it is necessary first to review critically the judicial decisions involving interpretation of the term “consultation” both in Bangladesh and in some other selected jurisdictions.

3. Judicial Decisions on the Mode of Appointment of Judges¹²

The Bangladesh Supreme Court has been inspired by the decisions of the Supreme Court of India in many of its judgments involving issues of constitutional

⁶ Second Proclamation Order No. I of 1977.

⁷ See, for detail, *State v Chief Editor, Manabjamin* (2005) 57 DLR (HCD) 448-50 (hereafter *Manabjamin*).

⁸ *ibid* 450.

⁹ *ibid*.

¹⁰ Section 31 of Act No. XIV of 2011.

¹¹ Emphasis added.

¹² This Section is a revised version of what I wrote in my PhD research. See, Moha. Waheduzzaman, *Doctrine of Political Question in Constitutional Litigation of Bangladesh: A Quest for Theoretical Framework*, Unpublished PhD Thesis (Dhaka: University of Dhaka, Department of Law, 2022) 200-01.

law.¹³ Regarding the current issue of appointment of Judges of the Higher Judiciary vis-a-vis judicial independence, the Court has also followed the judgments of Indian Supreme Court. Besides Indian judgments, the Court has also relied on a judgment of the Pakistan Supreme Court. Before embarking on the decisions of Bangladesh Supreme Court, I, therefore, prefer to cite those foreign decisions that have actually inspired the decisions of our Judiciary.

3.1 Indian Jurisprudence

While interpreting the expression “consultation”, the crux of the question is: should the opinion of the Chief Justice have primacy over the opinion of the Executive in the matter of appointment of Judges of the Supreme Court? In the Indian jurisdiction, the question came up for consideration in *SP Gupta v Union of India*¹⁴ and *Supreme Court Advocates-on-Record Association and another v Union of India*.¹⁵

In *SP Gupta*, the majority “held against the primacy though they were of the view that the consultation contemplated by the Constitution must be full and effective and by convention the views of the concerned Chief Justice and Chief Justice of India should always prevail unless there are exceptional circumstances which may impel the President to disagree with the advice given by the above constitutional authorities.”¹⁶ However, the majority Court in *Supreme Court Advocates-on-Record* held that “the Chief Justice of India’s opinion has primacy in the matter of appointment of the High Court and Supreme Court Judges.”¹⁷

3.2 Pakistani Jurisprudence

The same question came for consideration in Pakistan also. In *Al-Jehad*

¹³ For example, *Anwar Hossain Chowdhury* (n 3) that developed the basic structure doctrine in Bangladesh was inspired by the Indian case of *Kesavananda Bharati v State of Kerala* AIR 1973 SC 1461. Again, the Court provided extended meaning of the expression “life” appearing in Articles 31 and 32 of the Bangladesh Constitution being inspired by the Indian cases. See, Moha. Waheduzzaman, ‘Judicial Enforcement of Socio-Economic Rights in Bangladesh: Theoretical Aspects from Comparative Perspective’ in Dr. M Rahman (edn) (2011) *Human Rights and Environment* 57; Moha. Waheduzzaman, ‘Economic, Social and Cultural Rights under the Constitution: Critical Evaluation of Judicial Jurisprudence in Bangladesh’ (2014) 14 (1&2) *Bangladesh Journal of Law* 1; Moha. Waheduzzaman, ‘Inclusion and Enforcement of ESC Rights under State Constitutions: An Appraisal’ (2015) 3 *Jahangirnagar University Journal of Law* 55.

¹⁴ *SP Gupta v Union of India* AIR 1982 SC 149 (hereafter *SP Gupta*).

¹⁵ *Supreme Court Advocates-on-Record Association and another v Union of India* AIR 1994 SC 268 (hereafter *Supreme Court Advocates-on-Record*).

¹⁶ See, *Manabjain* (n 7) 442.

¹⁷ *ibid* 443.

Trust v Federation of Pakistan,¹⁸ the Pakistan Supreme Court after considering the relevant provisions of the Constitutions of Pakistan and India and the background of the legal system of both the countries and the leading decisions on the point, concurred with the majority view of the famous Indian decision of *Supreme Court Advocates-on-Record*.¹⁹

Ajmal Miah J observed that “the power of appointment of Judges in the superior courts had direct nexus with the independence of judiciary.”²⁰ His lordship emphasized that the words ‘after consultation’ “involve participatory consultative process between the consultees and the Executive. It should be effective, meaningful, purposive, consensus-oriented, leaving no room for complaint or arbitrariness or unfair play.”²¹

Indeed, the Judges of the Superior Courts of both Pakistan and India noted that the Chief Justice is “well equipped to assess as to the knowledge and suitability of a candidate for judgeship in the superior courts,” whereas the Executive is “better equipped to find out about the antecedents of a candidate and to acquire other information as to his character and conduct.”²² Hence, in view of the Judges of these jurisdictions, the Chief Justice’s opinion should have primacy as to the candidate’s knowledge and intellectual ability for judgeship, whereas the Executive’s opinion should have primacy as to the candidate’s antecedents, and character and conduct.²³

3.3 Bangladeshi Jurisprudence

Following the footsteps of Indian and Pakistani verdict, the High Court Division in an *obiter dictum* observed that the opinion of the Chief Justice of Bangladesh should have primacy over that of the Executive in the matter of appointment of Judges of the Supreme Court.²⁴ Regarding the primacy of CJ’s opinion and its proximity with independence of judiciary, the Court boldly asserted the following:

“Therefore, we are of the firm conviction that in the matter of appointment of judges of the High Court Division of this Court a prior consultation with the Full Court is a must and their opinion must have a primacy and be binding on the

¹⁸ *Al-Jehad Trust v Federation of Pakistan* 1996 PLD SC 324.

¹⁹ *Supreme Court Advocates-on-Record* (n 15) and texts accompanying note 17. See, *Manabjamin* (n 7) 446-47.

²⁰ See, *Manabjamin* (n 7) 447.

²¹ *ibid.*

²² *ibid.*

²³ *ibid.*

²⁴ *Manabjamin* (n 7).

Executive. Otherwise not only the independence of the judiciary which is one of the basic features of the Constitution will be destroyed but spineless, pliant and submissive persons would be appointed by the Executive on extraneous grounds which would not be conducive to justice.”²⁵

The Court also thought it to be the only way to secure judicial independence: “The concept of independence of judiciary cannot be ensured unless the exclusion of the final say of the Executive in the matter of appointment of judges is done away and that is the only way to maintain the independence of the judiciary.”²⁶

In *Idrisur Rahman v Bangladesh* involving specifically the issue of appointment of Judges, the High Court Division again was of the view that the opinion of the Chief Justice is entitled to have primacy over that of the Executive in appointing Judges of the Supreme Court.²⁷ On appeal, the Appellate Division in *Bangladesh v Idrisur Rahman* affirmed the holding of the High Court Division subject to the modification that the opinion of the Executive is entitled to have primacy in the matter of antecedent of the candidate.²⁸ Writing for the Court, MA Matin J observed that the appointment of Judges of the Higher Judiciary with primacy of opinion of the Chief Justice is a condition for ‘rule of law’ and independence of judiciary:

“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.”²⁹

It transpires two things from the observations and decisions of the Bangladeshi cases of *Manabjamin*, *Idrisur Rahman (HCD)* and *Idrisur Rahman (AD)*: *first*, mode of appointment of Judges of the Higher Judiciary forms part of the aspect of independence of judiciary; *second*, the opinion of the Chief Justice will get primacy over that of the Executive in case any conflict arises regarding the appointment of Judges of the Higher Judiciary. As has already been manifested in the Introduction, on both counts I hold a view contrary to the view held by the Supreme Court. To establish my point, I first come to deal with the components of judicial independence aspect.

²⁵ *ibid* 456 (per Syed Amirul Islam J).

²⁶ *ibid*.

²⁷ *Idrisur Rahman v Bangladesh* (2009) 61 DLR (HCD) 523 (hereafter *Idrisur Rahman (HCD)*).

²⁸ *Idrisur Rahman (AD)* (n 2) 107.

²⁹ *ibid* 95.

4. The Guarantee of Judicial Independence in the Constitution³⁰

Given that the issue of judicial independence cannot be examined exhaustively within a limited space, I seek to reflect on the essential pre-requisites of judicial independence only in brief. I hold three features as the essential or vital components of judicial independence: (a) security of tenure; (b) adequate remuneration and privileges; (c) prohibition of procuring post-retirement benefit.³¹ The Bangladesh Constitution secures first two of the enumerated conditions of judicial independence whereas contains provisions as to the third that hinder judicial independence.

Under Article 96, a Judge of the Supreme Court shall hold office until he attains the age of sixty-seven years. Before the stipulated period, a Judge of the Supreme Court can be removed from office by the President only when Supreme Judicial Council (SJC) reports to the President that the concerned Judge has ceased to be capable of properly performing the functions of his office by reason of physical or mental incapacity, or has been guilty of misconduct.³² Noticeably, the SJC shall consist of the Chief Justice of Bangladesh, and the two next senior Judges.³³ No member is thus from the Executive or the Legislative wings of the Government.³⁴ This ensures security of tenure of Judges at its highest possible form though in a way that violates the system of checks and balances.³⁵

Adequate remuneration and privileges include three things: (i) salaries and other allowances of a Judge should be such that he can easily maintain a reasonable standard of living; (ii) conditions of salaries and privileges should not be varied to the disadvantages during tenure of his office; (iii) he should receive pension so that during his tenure he needs not to indulge in corrupt practices

³⁰ This Section is a revised version of what I wrote in my PhD research. See, Waheduzzaman (n 12) 202-04.

³¹ Here I deal only with the conditions of independence of Higher Judiciary. For independence of Lower Judiciary, see, *Secretary, Ministry of Finance, Government of Bangladesh v Masdar Hossain & others* (2000) 20 BLD (AD) 126, 133-35.

³² See, Article 96 (5) of the Bangladesh Constitution.

³³ See, Article 96 (3) of the Bangladesh Constitution.

³⁴ The 1972 original Constitution vested in parliament the power of removal of Supreme Court Judges. It was amended by a Proclamation to transfer the power from parliament to President via the Supreme Judicial Council. [See, the Second Proclamation (Tenth Amendment) Order, 1977 (Second Proclamation Order No. 1 of 1977)]. This change was upheld by the Appellate Division in the Constitution 5th Amendment Case: *Khondker Delwar Hossain v Italian Marble Works Ltd.* (2010) 62 DLR (AD) 298. The Constitution 16th Amendment (Act XIII of 2014) again restored the power in the Parliament. The Appellate Division, however, has declared the amendment unconstitutional and void in the Constitution 16th Amendment Case: *Bangladesh v Adv. Asaduzzaman & Others* 2017 CLR (Spl) 215.

³⁵ The American Constitution or the governmental structure is usually characterized by the system of 'checks and balances'. For detail on 'checks and balances', see, Waheduzzaman (n 12) 158-159.

and can lead a respectful life after retirement.³⁶ The Constitution ensures these if Article 88 is read with Article 147 and Rule 119 of the Rules of Procedure. While Article 88 provides that the salary of a Judge shall be charged on the consolidated fund of the Republic, Rule 119 provides that such charges shall not be voted in the Parliament, nor shall any cut motion be brought in respect of the demands made in this regard. Article 147 (2) provides that remuneration and privileges of a Judge shall not be varied to the disadvantage during his term of office.

The third element of judicial independence i.e., the prohibition of procuring post-retirement benefit is intended to immune Judges from all sorts of “allurement for future gain while discharging his judicial duty.”³⁷ To attain the objective, Article 99 disqualifies Judges from holding any ‘office of profit’ in the service of the Republic after retirement or removal therefrom. However, they may hold any ‘judicial’ or ‘quasi-judicial’ office after retirement. These exceptions frustrate the very objective of why Article 99 was embodied in the Constitution.³⁸

Like Article 99, Article 98 is also a threat to judicial independence that authorizes the President to appoint ‘Additional Judges’ for a period not exceeding two years. A Judge appointed under Article 98 may be tempted to pass favorable judgments to the Government with a view to being appointed permanently under Article 95 of the Constitution.³⁹

But in no cases the Supreme Court has pointed out Articles 98 and 99 of the Constitution as provisions that violate judicial independence or are hindrances to pronounce impartial judgments. On the contrary, the Court has focused more on the mode of appointment of Judges by the Executive itself. But as has already been pointed out, the mode of appointment threatens judicial independence only when Judges are appointed temporarily as ‘Additional Judges’ under Article 98 of the Constitution. Joynul Abedin J in his dissenting judgment in *Idrisur Rahman (AD)* stresses on the post-appointment conditions of judicial independence rather than the mode of appointment by the Executive itself:

“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

³⁶ For detail, see, M Jasim Ali Chowdhury, *An Introduction to the Constitutional Law of Bangladesh*, (Northern University Bangladesh: 2010) 438.

³⁷ *ibid.*

³⁸ Already we have got many instances of Judges holding judicial, quasi-judicial or even non-judicial offices after their retirement. See, M Jasim Ali Chowdhury, ‘Judiciary and the Dilemma of Office of Profit: A Pandora’s Box’ (2006) 11 *Chittagong University Journal of Law* 59.

³⁹ See, M Harunur Rashid, ‘Appointment of Additional Judges: A Threat to the Independence of Judiciary’ 9 *MLR Journal* 36; Justice Amirul Kabir Chowdhury, ‘The Independence of Judiciary’ 11 *MLR Journal* 33; HK Abdul Hye, ‘Appointment and Removal of Judges’ 49 *DLR Journal* 11.

appointment the executive should have no scope for interference with the work of the Judge or for that matter judiciary.”⁴⁰

But, as already stated, the Constitution amply safeguards the post appointment conditions of security of tenure, and adequate remuneration and privileges. To emphasize again, if anything that compromises with the independence of Judges it is the provision of ‘Additional Judges’ under Article 98 and the provision of post-retirement holding of ‘judicial’ or ‘quasi-judicial’ offices under Article 99 of the Constitution. Executive appointment of Judges in itself thus does not form part of the aspects of judicial independence as has been observed and held by the Supreme Court in *Manabjamin, Idrisur Rahman (HCD)* and *Idrisur Rahman (AD)*.⁴¹ If appointment of Judges by the Executive does not in itself form part of the independence of judiciary, then, what is the true import of the expression “consultation” under Article 95 (1) of the Constitution? It is this question that I shall now deal with in the following Section of the article.

5. True Import of the Term “Consultation”

In the preceding Section, I have argued to dispel the contention of the Judges that “the power of appointment of Judges in the superior courts had direct nexus with independence of judiciary” – Ajmal Miah J;⁴² or, that “the concept of independence of judiciary cannot be ensured unless the exclusion of final say of the Executive in the matter of appointment of judges is done away” – Syed Amirul Islam J;⁴³ or, that “that is why appointment of Judges is the key to the independence of judiciary” – MA Matin J.⁴⁴ I did not find any reason why the question of mode of appointment may become so important when the post-appointment conditions as to the tenure and adequate remuneration and privileges are well secured. It is on the background of this understanding that I shall try to ascertain the true import of the expression “consultation”.

The Judges have acknowledged two aspects of a person while appointing him as a Judge in the Higher Judiciary: *first*, his knowledge and intellectual ability and *second*, his antecedents, character and conduct. And they are of the view that Chief Justice is best equipped to know about the former while Executive is better equipped to know the latter. The High Court Division of the Supreme Court in *Idrisur Rahman (HCD)*⁴⁵ imparted absolute primacy of the opinion of the Chief Justice over that of the Executive in the matter of appointment of Judges. However,

⁴⁰ *Idrisur Rahman (AD)* (n 2) 70.

⁴¹ See, *supra* texts accompanying notes 24-29.

⁴² See, *supra* texts accompanying note 20.

⁴³ See, *supra* texts accompanying note 26.

⁴⁴ See, *supra* texts accompanying note 29.

⁴⁵ See, *Idrisur Rahman (HCD)* (n 27).

on appeal in *Idrisur Rahman (AD)*,⁴⁶ the Appellate Division acknowledged that the Executive is entitled to have primacy in the matter of antecedent of the candidate.⁴⁷ In short, the Chief Justice's opinion is entitled to have primacy only with respect to the candidate's knowledge and intellectual ability.

And the *primacy* status of the opinion of the Chief Justice is grounded on the reasoning that he being the Chief Justice is better equipped to know people with high legal acumen, knowledge and ability to be appointed as Judges of the Superior Court. But I hold that on this reasoning alone, the opinion of the Chief Justice cannot claim superiority over that of the Executive because Executive also can know about a candidate's skill and intellectual ability using its different avenues, such as, the office of the Law Ministry or the Attorney General's office. One might argue at this stage that Executive may know well who are the best ones to be appointed as Judges of the Superior Court but for party interest or for any other extraneous grounds may not appoint them. Instead, they may go for those who belong to their ideology or will remain submissive to them.

If the ideology concern is raised, then, I would say that it is quite natural that a party in power would expect to appoint in the highest constitutional offices of the State those who share their ideology. And this might happen even in the cases of appointment of Judges of the Superior Courts. This routinely happens for United States when the US President appoints Judges in the US Supreme Court. And when this happens there in USA nobody raises concerns of independence of judiciary. Because they know when a Judge of the Superior Court is appointed, he takes oath and in whatever ideology he may belong to he can perform his judicial duties fearlessly if his post-appointment conditions, particularly the security of tenure and adequate remuneration and privileges, are well secured by the Constitution.

At this stage, the concern of Syed Amirul Islam J should also be addressed. The learned Judge in *Manabjamin* observed that if the Chief Justice's opinion is not entitled to have primacy over that of the Executive, 'spineless, pliant and submissive persons would be appointed as Judges on extraneous grounds'.⁴⁸ This observation of the learned Judge tantamount to taking away of a constitutionally granted power upon the Executive on a mere fear that it would be abused. But a power granted upon Executive cannot be taken away, as, in the instant case, in favor of the Chief Justice on the ground that it has the chance of being abused. I might draw here the analogy of legislature's power of making law. If any law passed by the legislature is incompatible with the Constitution, the Court may declare the law void and unconstitutional. But the Court cannot take away the

⁴⁶ See, *Idrisur Rahman (AD)* (n 2).

⁴⁷ See, *supra* texts accompanying note 28.

⁴⁸ See, *supra* texts accompanying note 25.

power itself on a fear that the legislature would abuse its power of law making or would pass law in repugnance to the Constitution.

As the Court cannot take away the law-making power from Parliament, in the same way, the Court cannot also take the constitutionally granted power of appointment away from the Executive.⁴⁹ Giving primacy to the opinion of the Chief Justice even if that is with respect to the candidate's knowledge and intellectual ability is in substance taking the power away from Executive to the Judiciary. But the Constitution has vested the power of appointment upon Executive and not upon Judiciary.⁵⁰

I am, therefore, of the view that "consultation" is rather a sort of advice tendered by the Chief Justice to the Executive. The legal import of "consultation" may be compared with advisory opinion of the Appellate Division under Article 106 of the Constitution. Advisory opinion under the said Article carries only persuasive force and hence is not authoritatively binding upon the Executive. In a similar way, the Executive cannot be said to be absolutely bound by the opinion of the Chief Justice in the matter of appointment of Judges of the Supreme Court. The Executive being the consulter is required by law (Article 95 (1)) to seek the opinion or advice of the Chief Justice. The term "consultation" thus implies *opinion* or *advice*, and *opinion* or *advice* cannot be the same thing as absolutely binding norm, in this case, upon the Executive.

The advisory opinion under Article 106 being rendered by the Apex Court though not binding upon the Executive is entitled to due weight and respect. Similarly, the opinion of the Chief Justice under Article 95 (1) though not binding upon the Executive is entitled to due weight and respect. And in the usual course of action the "consultation" may be seen to be full and effective, and the opinion of the Chief Justice may also be seen to always prevail but so far, the law is concerned, it cannot be said that in case any conflict arise between the Chief Justice and the Executive, the opinion of the Chief Justice is entitled to have primacy over that of the Executive.

In view of the above understanding as to the true import of "consultation", I am of the view that in case there is any arbitrary disregard of the opinion of the Chief Justice, the remedy lies not in courts but in political means. The accountability of the Executive Government should be ensured politically only

⁴⁹ It should be borne in mind that appointment inherently or by nature is an executive function. Besides appointing the Judges of the Supreme Court, the Executive (President in accordance with the advice of the Prime Minister) appoints also the Ministers, the Attorney-General, the Comptroller and Auditor-General, the Chief Election Commissioner and Election Commissioners and Chairman and other Members of Public Service Commission. See, *supra* note 1.

⁵⁰ *ibid.*

and not legally. In *Idrisur Rahman (AD)*,⁵¹ Joynul Abedin J in his dissenting Judgment rightly appreciated that independence of judiciary does not become impaired merely because the power of appointment resides with the Executive.⁵² His lordship stressed on the post appointment conditions of securing judicial independence⁵³ as I do/did in this article.⁵⁴

However, the dissenting judgment of Joynul Abedin J did not speak of the justifiability of political accountability only of the Executive in case of arbitrary departure from the opinion of the Chief Justice. Indeed, this aspect has so far remained unattended or absent in legal literature also. There is a need to fill this vacuum in our jurisdiction. It is, therefore, the aspect of political accountability of the Executive that I shall now deal with in a Judges appointment context.

6. Political Accountability of the Executive in the Appointment of Judges⁵⁵

The power of appointment of Judges though resides with the Executive, it does not mean that the Executive would exercise the power arbitrarily. In these cases, the question of accountability of the Executive whether legal or political does not arise at all. However, if the power is alleged to have been exercised arbitrarily, I hold that the remedy should lie in political means only and not in judicial process. This is the central thrust of argument of the article as to the Executive branch's responsibility in case of appointment of Judges of the Supreme Court. Acknowledgement of this proposition exists in judicial utterances of our jurisdiction itself though *not* exactly in a Judges appointment context.

The Constitution embodies in Part II the Fundamental Principles of State Policy (FPSP). But unlike the Fundamental Rights (FRs) of Part III, the FPSP have been expressly declared judicially non-enforceable by Article 8 (2). However, the former part of the same Article 8 (2) states that FPSP "shall be fundamental to the governance of Bangladesh, shall be applied by the State in the making of laws, shall be a guide to the interpretation of the Constitution and of other laws of Bangladesh, and shall form the basis of the work of the State and of its citizens." In the case of *Kudrat-E-Elahi Panir v Bangladesh*, Naimuddin Ahmed J perceived positive and negative enforcement of FPSP and held that only positive enforcement of FPSP is barred by Article 8 (2).⁵⁶

⁵¹ *Idrisur Rahman (AD)* (n 2).

⁵² See, *supra* texts accompanying note 40.

⁵³ *ibid.*

⁵⁴ See generally, *supra*, Section 4 of this article.

⁵⁵ This Section is an abridged and revised version of what I wrote in my PhD research. See, Waheduzzaman (n 12) 229-236.

⁵⁶ *Kudrat-E-Elahi Panir v Bangladesh* (1992) 44 DLR (HCD) 179.

His lordship also entered into academic discussion and asked whether the High Court Division can declare a law passed by Parliament void which flagrantly violates any FPSP. On appeal, the Appellate Division in *Kudrat-E-Elahi Panir v Bangladesh*⁵⁷ condemned Naimuddin Ahmed J for speculating on hypothetical question. However, in the context of the present article, the question raised by Naimuddin Ahmed J in relation to FPSP and its answer remains pertinent. What if really the Government instead of adopting legislative and other measures to implement FPSP enacts law that manifestly violates FPSP? Due to the express bar of Article 8 (2) if the Court cannot declare the law void, how would the accountability of the Government be ensured in this regard? Interestingly and significantly, the Appellate Division justified political accountability in these words:

“A hypothetical question has been posed. Parliament passes a law which glaringly violates and flouts a fundamental principle of state policy, and if its vires is challenged solely on the ground of inconsistency with that principle and on no other ground whatsoever, will the High Court Division declare or not declare the law void? It is a madness scenario. The learned Counsel could not show any such legislation in this sub-continent, but suppose, Parliament is struck with such madness, is the High Court Division in its writ jurisdiction the only light at the end of the tunnel? *What does public opinion, political party and election do if Parliament goes berserk?*”⁵⁸

The Court thus urged *public opinion, political party and election* to play its role so that the elected branches by adopting legislative and other measures might not whittle down the FPSP instead of implementing them. Besides legal process, these are effective means of protest and disapproval of governmental actions. These should always remain alive in a democratic polity to check abuses of power, arbitrary and capricious exercise of discretion, and thereby ensuring accountability by extra-legal means. The constitutional system of UK is a glaring example of how the democratic and constitutional values are protected and sustained by extra-legal means besides judicial process.

Due to the operation of ‘parliamentary sovereignty’, the British courts cannot even declare a law passed by British Parliament void for its incongruence with the Constitution. If any law passed by the British Parliament is inconsistent with the Constitution, the Constitution is presumed to be *pro tanto* amended by the said law. The extent of power of the British Parliament is sometimes expressed by saying that the British Parliament can make and unmake any law or can do and undo anything except making a man woman or *vice versa*. There are thus

⁵⁷ *Kudrat-E-Elahi Panir v Bangladesh* (1992) 44 DLR (AD) 319.

⁵⁸ *ibid* 347 (emphasis added) (per Mustafa Kamal J).

no *legal* limitations on the power of British Parliament.⁵⁹ Does this mean that the British Parliament can enact (or, in fact enacts) law as it pleases? The British Parliament neither enacts nor would enact arbitrary law. Not because there are no *legal* limitations on its power but because of the fear of public censure and disapproval.

Whereas the UK constitutional system effectively functions without even judicial review of laws, in jurisdictions like us we seek to ensure everything through courts or by means of judicial process. And we seek so even in those areas of elected branches' responsibility where the Constitution imposes no limitation on their power. If Constitution itself places no limitation, the judicially crafted *implied* limitation simply invades 'separation of powers' maintained in the Constitution.

In view of the above, I hold that the issue of appointment of Judges of the Higher Judiciary so far that relates to their mode of appointment should be placed beyond judicial reach. The Executive branch's accountability as to them should be ensured by political or extra-legal means only. If somebody is still not convinced, I would remind that even *Almighty* has created his creations in pair: men and women; good or bad; right or wrong; and so on.⁶⁰ 'Reason and belief', 'unitary or federal', 'parliamentary or presidential', 'law and fact', 'legal or extra-legal' are pairs of the same kind. It is not that these pairs are always antithesis to each other, but they may also be complementary to each other.

Hence, legal and political accountability of Government are not antithesis but complementary to each other. The whole of governmental accountability cannot be claimed to be ensured legally and the *vice versa*. In this article, I admit this and place the Executive branch's responsibility as to the appointment of Judges of the Higher Judiciary beyond judicial sphere and reposes them on the judgment of people alone.

While the above should be enough to argue for political accountability only of the Executive branch, any practical example would surely add some more impetus to the argument. Does any such example exist in our jurisdiction? I note that as the judicial utterances of extra-legal means of accountability exist,⁶¹ so does the real example of checking arbitrary exercise of power and thereby ensuring accountability by such means. And it exists in relation to the issue of appointment of Judges of the Supreme Court itself.

⁵⁹ However, the British Parliament cannot now enact law inconsistent with the provisions of Human Rights Act, 1998. If a law is inconsistent with the Human Rights Act, the British courts even then cannot declare the law void; it can only issue a 'declaration of incompatibility'. It then becomes the responsibility of the Parliament to amend the law so as to remove the inconsistency. This is how the 'parliamentary sovereignty' is still technically retained in England.

⁶⁰ Holy Quran, Surah An-Naba, Verse 8.

⁶¹ See, *supra* texts accompanying note 58.

The 1972 original Constitution provided that “the Chief Justice shall be appointed by the President and other Judges shall be appointed by the President after consultation with the Chief Justice.”⁶² Likewise, the President was also required to consult the Chief Justice to appoint Additional Judges under Article 98 of the Constitution. By the Constitution (4th Amendment) Act, 1975⁶³ the phrase ‘after consultation with the Chief Justice’ was omitted both from Articles 95 and 98 of the Constitution.⁶⁴ However, even after the 4th Amendment, “the Judges were appointed in consultation with the Chief Justice of Bangladesh even during the Martial Law regime though the matter of consultation was not reflected in the notification.”⁶⁵

The state of consultation by convention continued until February 1994. On 2nd February 1994 nine Judges were appointed in the High Court Division neglecting the convention of consultation.⁶⁶ On 3rd February, the then Chief Justice Shahabuddin Ahmed brought it to the notice of the Bar that nine Judges were appointed by the President (the Executive) without any prior consultation with him and the Chief Justice is “Mr. Nobody” in the matter of appointment of Judges of this Court.⁶⁷ After this disclosure by the Chief Justice, the matter was taken up by the Bar and they launched a movement for cancellation of the appointment of the said nine Judges. The Government withdrew the earlier notification, and a fresh notification was issued on 9th February 1994 and in that notification for the first time after the 4th amendment it was mentioned that the appointment of Judges was made by the President in consultation with the chief Justice.⁶⁸

Thus, along with judicial utterances of ensuring governmental accountability by extra-legal means⁶⁹ practical example of such ensuring also exist in our jurisdiction itself. Hence, besides the elected branches, the judiciary should also remain within bounds in exercise of its power under the Constitution. In *Abdul Mannan Bhuiyan v State*,⁷⁰ MA Matin J, therefore, rightly observed:

“It is true that there is no such thing as absolute or unqualified separation of power in the sense conceived by Montesquieu but there is however, a well-

⁶² Article 95 (1) of the original Constitution of 1972.

⁶³ Act II of 1975.

⁶⁴ However, the original provision has again been revived by the Constitution (15th Amendment) Act, 2011. See, *supra* notes 10 & 11 and the accompanying texts.

⁶⁵ *Manabjamin* (n 7) 448.

⁶⁶ *ibid.*

⁶⁷ *ibid.*

⁶⁸ *ibid* 449.

⁶⁹ See, *supra* texts accompanying note 58.

⁷⁰ *Abdul Mannan Bhuiyan v State* (2008) 60 DLR (AD) 49.

marked and clear-cut functional division in the business of the Government and our judiciary is to oversee and protect the *overstepping not only of other organs of the Government but also of itself.*⁷¹

I hold that the Judiciary would overstep its limit if it claims supremacy over the Executive in the matter of appointment of Judges of the Supreme Court. Chief Justice's opinion is entitled to due weight and ordinarily to be followed but legally speaking his opinion cannot claim superiority over that of the Executive in case a conflict really arises between them. The remedy for any arbitrary disregard of the Chief Justice's opinion should lie not in courts but in political means only.

7. Conclusion

The power of appointment of Judges is one of the appointing powers of the Executive. To appoint someone in the highest constitutional offices of the State (the President in accordance with the advice of the Prime Minister) the Executive is not required by the Constitution to consult with any other person.⁷² On the contrary, the Executive is required by the Constitution to consult the Chief Justice to appoint Judges of the Supreme Court. But simply because of the requirement of "consultation", the power of appointment of Judges does not cease to be a power of appointment. Hence, like any other power of appointment, the final say regarding the appointment of Judges resides (or should reside) with the Executive. Thus, the true import of the word "consultation" should be only of persuasive force or authority like the advisory opinion of the Appellate Division under Article 106 of the Constitution.

It is not that in every case there would be conflict of opinion between the Chief Justice and the Executive. When no conflict arises, the question of ascertaining the true import of "consultation" is of no practical significance. Again, if the Executive's departure from the opinion of the Chief Justice is for any good reason, the action of the Executive is justified. It is only when the Executive disregards the opinion of the Chief Justice arbitrarily the question of *primacy* is of significance. In such cases, I argue that the opinion of the Executive should get primacy and the remedy for such arbitrary disregard lies not in judicial forums but in political means only.

In such view of the matter, I could not but hold that the *mode* of appointment of Judges cannot be regarded as one of the aspects of judicial independence. My view, thus, runs contrary to the view of the Judges in *Manabjamin*,⁷³ *Idrisur*

⁷¹ *ibid* 54 (emphasis added).

⁷² See, *supra* note 49.

⁷³ See, *Manabjamin* (n 7).

*Rahman (HCD)*⁷⁴ and *Idrisur Rahman (AD)*.⁷⁵ In these cases, the learned Judges exaggerated the mode of appointment as one aspect of judicial independence while remaining silent as to the post-retirement holding of ‘judicial’ or ‘quasi-judicial’ offices under Article 99 and the appointment of Additional Judges under Article 98 of the Constitution. I argue Article 98 and Article 99 as threats to independence of Higher Judiciary in Bangladesh and mode of appointment does not in itself impair independence provided that the post-appointment conditions of judicial independence are well guaranteed by the Constitution.⁷⁶

Coming back to the political accountability aspect again, my argument on political accountability of the Executive assumes that the whole of governmental accountability cannot be claimed to be ensured legally and the *vice versa*.⁷⁷ Hence, I suggest political accountability only of the Executive for arbitrariness in their action pertaining to appointment of Judges of the Supreme Court. In civilized nations, such as, in the United Kingdom, both judicial forums and political means co-exist to ensure accountability of the Government.

In my view, nations that are more civilized and advanced keep scope for ensuring governmental accountability by political means besides the regular judicial process. Perhaps this is conducive for preserving ‘separation of powers’ also. Constitution mandates not only for ‘rule of law’ but also for ‘separation of powers’. The idea of political accountability in a Judges appointment context of this article may generally act as a bridge between ‘rule of law’ at the one hand and ‘separation of powers’ at the other hand. The Judges and the other stakeholders should be open enough to ingrain it into their mind that the legal and political accountability together can truly ensure responsible Government. If that happens, Governments of today’s world including the one that prevails in Bangladesh would probably move one step forward towards being a successful regime/s in a constitutional democracy.

⁷⁴ See, *Idrisur Rahman (HCD)* (n 27).

⁷⁵ See, *Idrisur Rahman (AD)* (n 2).

⁷⁶ See generally, *supra*, Section 4 of this article.

⁷⁷ See generally, *supra*, Section 6 of this article.