Secretary, Ministry of Finance Vs. Md. Masdar Hossain and others, 52 DLR (AD) 82 20 BLD (AD) 104

The Supreme Court

Appellate Division

(Civil)

Present:

Mustafa Kamal CJ

Latifur Rahman J

Bimalendu Bikash Roy Choudhury J

Mahmudul Amin Choudhury J

Secretary, Ministry of Finance..... ....Appellant

Vs.

Md. Masdar Hossain and others..... ....Respondents

Judgment

December 2, 1999.

The Constitution of Bangladesh, 1972, Article 134

Article 152(1)

The judicial service is a service of the Republic within the meaning of Article 152(1) of the Constitution, but it is a functionally and structurally distinct and separate service from the civil executive and administrative services of the Republic.....76(1)

Articles 115, 133 & 136

The President can create and establish a judicial service and also a judicial magistracy and make rules and also the rules regarding suspension and dismissal
etc. These articles and the Service (reorganization and conditions) Act, 1975 have no manner of application in respect of judicial service and judicial magistracy.....76(2)

The Bangladesh Civil Service (reorganization) Order, 1980.

The creation of BCS (Judicial) Cadre along with other BCS executive and administrative cadres by Bangladesh Civil Service (Reorganisation) Order 1980 with amendment of 1986 is ultra vires the Constitution..76(3)

Article 115

Necessary steps be taken forthwith for the president to make Rules under Article 115 to implement its provisions which is a constitutional mandate.

Nomenclature of the judicial service shall be designated as the Judicial Service of Bangladesh or Bangladesh Judicial Service and a Judicial Service Commission constituted for recruitment in that sevice;..76(4)

Article 116, 116A and 133.

Law or rules or executive orders having the force of rules be framed relating to posting, promotion, grant of leave, discipline, pay allowances, pension etc be enacted or framed or made separately for judicial service and judicial magistracy.....76(5)

Article 115

Impugned orders are declared ultra vires the Constitution. The Government be directed to establish a separate judicial pay commission forthwith as a part of the rules to be framed under article 115 to review the pay, allowance and other privileges of the judicial service and the pay of the judicial service shall follow the recommendation of the commission..76(6)

Article 116

In exercising control and discipline of the judicial service and judicial magistracy opinion of the supreme court shall have primacy over those of the executive....76(7)

Article 116A and 132

Security of tenure, salary, other benefits, pension and independence from parliament and executive shall be secured framing law or rules or executive orders having the force of law under article 133.....76(8)

The Administrative Tribunal
The members of the judicial service are within the jurisdiction of the administrative tribunal.....76(10)
Power of the parliament

If the parliament so wishes it can amend the constitution to make the separation more

meaningful, pronounced, effective and complete..76(11)

Article 94(4), 116 A

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.....(57)

Lawyers Involved:

Mahmudul Islam, Attorney-General, instructed by Sharifuddin Chaklader, Advocate-on-Record— For the Appellant.

Dr. Kamal Hossain, Syed Ishtiaq Ahmed and Amir-ul-islam, Senior Advocates, instructed by Md. Aftab Hossain, Advocate-on-Record — For Respondent Nos. 75, 133 & 183.

Not represented ;Respondent Nos. 1-74, 82 & 184-223.

Civil Appeal No. 79 of 1999.

(From the Judgment and order dated 7-5-1997 passed by the High Court Division in Writ Petition No. 2424 of 1995).

Judgment:

Mustafa Kamal CJ.-

How far the Constitution of Bangladesh has actually secured the separation of the judiciary from the executive organs of the State and whether the Parliament and the executive have followed the constitutional path are the crux issues that fall to be determined in this appeal by leave by the Government appellant from the judgment and order dated 7-5-97 passed by a Division Bench of the High Court Division in Writ Petition No. 2424 of 1995.

2. 223 Writ petitioner-respondents who are either District Judges, Additional District Judges or Subordinate Judges or other judges in the subordinate judiciary filed the said Writ Petition impleading the appellant. Secretary, Ministry of Finance, Government of Bangladesh as respondent No. 3 and other Ministries and functionaries of the Government as respondent Nos. 1-2 and 4-6 in which a Rule Nisi was issued at the first instance to show cause as to why the Bangladesh Civil Service l-organisation) Order, 1980, purporting to incorporate “Judicial Service” within the Bangladesh Civil Services as one of the Cadre Services vide paragraph 2(X) thereof should not be declared as ultra vires the Constitution and unconstitutional, in particular violative of Articles 27 and 29 of the Constitution and why the impugned orders passed by the appellant dated 28-2-1994 and 2-11-1995 suspending and then canceling respectively an earlier order of the appellant dated 8-1-1994 regarding the pay and allowances of the respondents should not be declared ultra vires, malafide, discriminatory and violative of fundamental rights as guaranteed by the Constitution and to show cause as to why the attempt to treat the Judges of the subordinate Courts as part of the Civil Services Cadre meant for the executive branch of the Government and to subject them to any laws meant for the employees of the executive Government should not be declared as illegal and ultra vires the Constitution and why a separate set of rules for the Judges of the subordinate Courts should not be framed as contemplated under Article 115 of the Constitution. This Rule Nisi was issued on 19-11-1995.

3. On the application of the writ petitioner-respondents another Rule Nisi was issued calling upon the same respondents to show cause as to why the benefits allowed as per paragraph 3 of the impugned order dated 2-11-1995 vide Annexure F (1) to the officers of the other cadres should not be given also to the Senior Assistant Judges and the Assistant Judges of the judicial service of the Republic.

4. An affidavit-in-opposition was filed on behalf of the present appellant who as already noted, was respondent No. 3 in the writ petition, but no affidavit - in -opposition was filed by the other respondents. On 13-6-1996 when the matter came up for hearing before a Division Bench of the High Court Division the Court passed an order requesting the learned Attorney-General to appear in this case as it involved important questions of law having far reaching effect. The learned Attorney-General was notified and on 27-6-1996 this matter came up in the list and was adjourned on the prayer of the Government. Again this matter came up for hearing on 29-1-1997 when a Counsel for the Government stated that the learned Attorney-General had already written to the Government in respect of the reliefs sought for by the writ petitioners and prayed for some time for examination of the matter by the Government. The Division Bench adjourned the matter upto 24-3-1997. When the matter was taken up for hearing on 1-4-1997, a Counsel for the Government informed the Court that the learned

Attorney-General had written to the Government expressing an opinion favourable to the writ petitioners and that the Government had not filed any affidavit-in-opposition. The Division Bench noted that the learned Attorney-General had given his opinion favourable to the writ petitioners and that the other respondents had not appeared and contested the Rules Nisi. In such a situation, it appeared to the Division Bench that neither the Government had acted in the meantime in accordance with the opinion of the learned Attorney-General nor the Government was interested in contesting the Rules Nisi. So the Division Bench heard only the several learned Advocates for the writ petitioners and thereafter by judgment and order dated 7-5-1997 made the Rules Nisi absolute and gave certain other directions which will be noted in due course.

5. It is against the aforesaid judgment and order that of all the various Ministries and functionaries of the Government, named as respondents in the writ petition, only respondent No. 3 mentioned above obtained a leave to appeal.

6. The writ petitioner's basic cause of grievance emanates from Annexure-A to the writ petition, a Cabinet Secretariat, Establishment Division (Implementation Cell) Order dated 1-9-1980 contained in SRO No. 286-1/80/ED (IC)SII 92/80-98 calling the Order as the Bangladesh Civil Service (Re-organisation) Order, 1980 providing therein that there shall be 14 Bangladesh Civil Service Cadres, Bangladesh Civil Service (Judicial) being No. 2 (X) of them. The parent legislation that supports this Order is Annexure-B to the writ petition, namely, The Services (Re-organisation and Conditions) Act, 1975 (Act No. XXXII of 1975), hereinafter called the Act, conferring on the Government the power to create new services or amalgamate or unify existing services. In exercise of powers under section 5 thereof, the Government passed the Services (Grade Pay and Allowances) Order, 1977 fixing the grades, scales of pay etc of, inter alia, the subordinate judiciary, re-fixing them from time to time by issuing fresh Orders under section 5. By order dated 8-1-1994 the appellant in the Implementation Cell accepted in paragraph 3 thereof that the Bangladesh Civil Service (Judicial) officials perform a kind of work the nature and character of which is different and separate from others and on that ground and consideration re-fixed their present National Pay Scale, 1991, enhancing substantially their pay scale that was in force before 8-1-1994. However under the pressure of other Bangladesh Civil Service Cadres the appellant was forced to postpone implementation of the order dated 8-1-1994 by an order dated 28-2-1994 which has been impugned in the writ petition. By a further order dated 2-11-1995 the appellant re-fixed the scale of pay of Bangladesh Civil Service (Judicial) officers with effect from 3-1-1994, which the writ petitioners also challenged as being discriminatory and violative of their fundamental rights.

7. As the Division Bench of the High Court Division accepted fully all the submissions made by the several learned Advocates for the writ petitioners it will be enough to summarise the impugned judgment in its essentials which will reflect both the arguments and submissions of writ petitioners as well as the rationale of the impugned judgment.

8. Six broad points were urged by the petitioners and accepted by the High Division. They are the following:

(1) The term BCS (Judicial) is a misconception as judicial service is recognised treated separately in Articles 115, 116 and ll6 A of the Constitution and defined separately in Article 152(1) of the Constitution. The subordinate Courts are part and parcel of Part VI of the Constitution as a separate and independent entry and cannot be a part of the civil, administrative or executive service of the country. The definition of the "service of Republic" in Article 152(1) of the Constitution is broad and includes defence and judicial services, but that does not mean that judicial service or defence service is a part of the civil administrative service. The definition clause cannot bring judicial service within the ambit of executive or administrative service which is called Bangladesh Civil Service. Article 133 cannot be invoked for the judicial officers as there are separate provisions for them in Articles 115 and 116 of the Constitution. Judicial officers are not persons in service of the Republic for the purpose of Article 133 and hence the Rules regarding the appointment and conditions of service cannot be framed under Article 133. It will be totally unconstitutional if the subordinate courts are tagged with or brought under the control of the executive under Part IX or any other part of the Constitution; excepting Part VI. The judicial service cannot be legally brought within the ambit of Act No. XXXII of 1975 because if it is so done it will alter the very fundamental and basic structure of the Constitution relating to separate and independent judicial service as contained in Part VI of the Constitution. The inclusion of the judicial service under Bangladesh Civil Service (Re-organisation) Order, 1980 dated 1-9-1980 as Bangladesh Civil Service (Judicial) is ultra vires the Constitution. As the defence service is

under Part IV, so is judicial service under Part VI. In such a situation, the defence service has been correctly organised by separate Acts and Rules and in a similar way the judicial service shall have to be organised in accordance with the provisions of Part VI and the enactments and rules made thereunder.

(2) The writ petitioners have come up for a declaration that the judiciary has already been separated under Part VI and that the respondents should be directed to implement and carry out the mandate of the Constitution in pursuance of Articles 109, 115, 116 and 116A. In the instant case the High Court Division can direct the legislature and the executive to perform their functions which they are required to do under the Constitution. The State should provide immediately for bringing judicial service under the direct control of the High Court Division functionally and structurally and this direction was given by the High Court Division in exercise of power under Article 102(2) (a) (i) of the Constitution. The High Court Division, in its opinion, is competent to direct the respondents to make necessary Rules and/or enactment in order to enable the subordinate judiciary to function as an independent institution. Rules made under Article 115 may provide for independent Service Commission as well as independent Pay Commission for the purpose of appointment of judicial officers and magistrates performing judicial functions and for the purpose of fixing their scales and grades of pay commensurate with their recognised status in the Constitution.

(3) For effective implementation of the provisions of Articles 115 and 116 necessary Rules are to be framed by the President. Although Articles 115 speaks of appointment, it also means terms and conditions of service. Articles 115 and 116 require that not only requirement Rules but also Rules governing conditions of service of the judicial officers and magistrates performing judicial functions are to be made by the President. Since the rule making power of the President is wide, unlimited and absolute, the President can make any provision under these Rules that are necessary for carrying out the purposes of separation of judiciary from the executive.

(4) For separation of the subordinate judiciary from the executive no further constitutional amendment is necessary. Article 109 of the Constitution brings subordinate courts and tribunals under the control and superintendence of the High Court Division. Necessary rule-making power has been given making the Supreme Court as the real wielder of authority in framing rules under Article 115 of the Constitution. Read with Articles 116 and 116A of the Constitution the subordinate judiciary has already been separated from the executive in the constitutional scheme. In the Fundamental Principles of State Policy Article 22 of the Constitution provides that the State shall ensure the separation of the judiciary from the executive organs of the State. This principle shall be applied by the State in the making of laws and Article 22 was not meant for beautifying the Constitution as an ornament. The will of the people was entitled to be implemented within a reasonable time and the period of 25 years from independence is definitely a reasonable period to implement the cherished will and desires of the people. The Supreme Court alone shall have overall control, supervision and management over the subordinate courts and over magistrates exercising judicial functions and the executive will have no control, supervision and management over them in any manner whatsoever.

(5) Judicial officers do not come within the jurisdiction of the Administrative Tribunal as their service conditions are governed and determined by/or under Chapter II of Part VI of the Constitution. Courts or Judges are not subordinate to the said Tribunal and hence Judges or the Courts are not to seek relief from the Administrative Tribunal.

(6) Some unreasonable conditions were attached with the pay scales of the Subordinate Judges, Additional District and Sessions Judges and District and Sessions Judges, which were not attached in respect of pay scales and allowances of other Bangladesh Civil Service Cadre holders. The impugned orders Annexures F & F(1) so far as the same relate to the writ petitioners and other judicial officers, are, ultra vires, the Constitution being violative of Articles 27 and 29 of the Constitution. The benefits given by order dated 8-1-1994 had been abruptly and arbitrarily taken away by Annexures F & F(1) without assigning any reason and the earlier order dated 8-1-1994 was acted upon and the same created a vested right in favour of the judicial officers. Annexure E dated 8-1-1994 shall stand valid and shall continue till new pay scales are fixed in future by framing necessary enactment and/or rules pursuant to the impugned judgment.

9. The final orders that the Division Bench in the writ petition passed were as follows:

> (i) The impugned orders dated 28-2-1994 and 1-11-1995, Annexures F & F (1) respectively are declared to have been

made and issued without lawful authority and are of no legal effect, being ultra vires the Constitution.

(ii) It is clear that the Service Cadre made under paragraph 2(X), namely, Bangladesh Civil Service (Judicial) as contained in the Bangladesh Civil Service (Re-organisation) Order, 1980 vide Annexure A with amendment (dated 31-8-86), is ultra vires the Constitution.

(iii) It is further declared that all the judicial officers of Bangladesh, i.e., all Judges of different courts from Assistant Judges to the District and Sessions Judges are not required to go and submit before the Administrative Tribunal for any grievance with respect to their service conditions and the said Judges and magistrates performing judicial functions shall be guided under Articles 115, 116 and ll6 A and according to the findings in the impugned judgment made above.

(iv) It is declared that in order to give effect, carry out and implement fully the separation of judiciary from executive organ of the State no constitutional amendment will be necessary as the provisions for such separation are there in the Constitution itself. It is directed that the services of the judicial officers and magistrates performing judicial functions shall be known as "Judicial Service of Bangladesh" under the direct control and supervision of the Supreme Court.

(v) It is also declared that refixation of National Pay Scale, 1991 as enumerated paragraph No. 3 of Services (Pay Allowances) Order, 1991 dated 8-1-94 Annexure F so far as the writ petitioners concerned shall stand valid and the same will continue until necessary rules/enactment made;

(iv) Assistant Judges and Senior Assistant Judges will continue to get their salaries and allowances as they are now getting which not be less than those that are admissible under paragraph No. 3 of Annexure F(1);

(vii) Respondent Nos. 1, 2 and 4 shall take immediate step to make necessary rules under Article 115 or make enactment to give effect and carry out the purposes of the Constitution, particularly of Articles 109, 115, 116 and 116A read with Articles 8 and 22 of the Constitution:

(viii) If the present pay scales of the petitioners and other judicial officers are amended or enhanced or new pay scales given before making rules under Article 11 the same of the said judicial officers a Magistrate shall be made and/or done keeping conformity with the pay scales as are now declared for them in the impugned judgment.

10. Leave was granted on the submissions Mr. Mahmudul Islam, the learned Attorney-General to consider the following submissions of appellant, namely, first, that the judicial officers other officers of the Civil Services fall into well-defined different classes, all of them being members of the service of the Republic in respect of the Government of Bangladesh which includes the Parliament, executive and the judiciary. There can be no question of discrimination of judicial officer and the other officers of the Civil Service and the High Court Division was wrong in declaring Annexures-F & F(1) to be discriminatory without lawful authority.

Secondly, no discrimination in fact having been made, the High Court Division was finding discrimination of judicial officers without properly examining the provisions of Annexures-F & F(1).

Thirdly, having regard to the status of Government service which permits changes in the service conditions by the Government and in the absence of any prohibition in varying terms and conditions of service and particularly in view of the provisions of Article 136 of the Constitution, the High Court Division was wrong in holding that imposition of conditions in Annexure F(1) in respect of judicial officers in without lawful authority.

Fourthly, upon a complete misinterpretation of the provisions of the Constitutional and its scheme as made explicit in Parts VI and IX of the Constitution the High Court Division wrongly held that the inclusion of Judicial officers in the Bangladesh Civil Service (Re-organisation) Order, 1980 is ultra vires the Constitution.

Fifthly, the High Court Division was wrong in taking the view that judicial officers are outside the purview of Part IX of the Constitution and that Articles 133 and 136 have no application in their cases, thereby depriving judicial officers of the benefit of fundamental rights under Article 29 and benefit of Article 135 of the Constitution.

Sixthly, the High Court Division failed to make a distinction between Court and its presiding officer and they has led the High Court Division to take a wrong view of Articles 109 and 117 of the Constitution and to hold that judicial officers

need not approach the Administrative Tribunal for relief.

Seventhly, in the face of express provisions of Article 116 of the Constitution, the High Court Division was wrong in holding that the Supreme Court alone shall have overall control, supervision and management of the judicial officers.

Eighthly, the High Court Division was wrong in ignoring the express provisions of the Constitution and has given directions contrary to the provisions of the Constitution by creating a judicial service of Bangladesh under the direct control and supervision of the Supreme Court.

Ninthly, the High Court Division traveled beyond its jurisdiction in directing adoption of legislative measures by the Government in violation of the principle of separation of powers adopted by the Constitution.

And lastly, the present appeal involves important questions of law relating to the interpretation of the Constitution.

11. While Mr. Mahmudul Islam, learned Attorney- General made his submissions for the appellant. Mr. Amir-Ul-Islam, learned Counsel made the main submissions on behalf of the respondents. Their respective submissions will be reflected all over this judgment. Dr. Kamal Hossain and Syed Ishtiaq Ahmed made some short submissions on behalf of the respondents which will also be noted. Before we advert to their respective submissions, we shall take note of the main constitutional provision involved in this appeal.

12. The original and unamended Constitution of 1972 contained a sub-heading "Subordinate Courts" in Chapter II of Part VI of the Constitution in the following terms:

"Chapter II"-Subordinate Courts
114. Establishment of subordinate courts.- There shall be in addition to the Supreme Court such courts subordinate thereto as may be established by law.

115. Appointments to subordinate courts.- (1) Appointments of persons to offices in the judicial service or as magistrates exercising judicial functions shall be made by the President-

(a) in the case of district judges, on the recommendation of the Supreme Court; and

(b) in the case of any other person, in accordance with rules made by the "President in that behalf after consulting the appropriate public service commission and the Supreme Court.

(2) A person shall not be eligible for appointment as a district judge unless he-

(a) is at the time of his appointment in the service of the Republic and has, for not less than seven years, held judicial office in that service; or

(b) has for not less than ten years been an advocate.

116. Control and discipline of subordinate courts.- The control (including the power of posting, promotion and grant of leave) and discipline of persons employed in the judicial service and magistrates exercising judicial functions shall vest in the Supreme Court."

13. "Judicial Service" was defined in Article 152(1) of the Constitution as follows:

"judicial service" means a service comprising persons holding judicial posts and being posts superior to that of a district judge;"

"District Judge" was defined as follows:
"district judge" includes additional district judge;"

14. Article 152(1) also defined "the service of the Republic" in the following terms:

"the service of the Republic" means any service, post or office whether in a civil or military capacity" in respect of the Government of Bangladesh, and any other service declared by law to be a service of the Republic;"

15. Article 152(1) of the Constitution also gives an inclusionary definition of the words "the State" as follows:

"the State" includes Parliament, the Government and statutory public authorities;"

16. The Constitution contains provisions for the Services of Bangladesh in Part IX, Chapter I which are as follows:

> "133. Subject to the provisions of this Constitution Parliament may by law regulate the appointment and conditions of service of persons in the service of the Republic:
>
> Provided that it shall be competent for the President to make rules regulating the appointment and the conditions of service of such persons until provision in that behalf is made by or under any law, and rules so made shall have effect subject to the provisions of any such law.
>
> 134. Except as otherwise provided by this Constitution every person in the service of the Republic shall hold office during the pleasure of the President.
>
> 135. (1) No person who holds any civil post in the service of the Republic shall be dismissed or removed or reduced in rank by an authority subordinate to that by which he was appointed.
>
> (2) No such person shall be dismissed or removed or reduced in rank until he has been given a reasonable opportunity of showing cause why that action should not be taken:
>
> Provided that this clause shall not apply-
>
> (i) where a person is dismissed or remove or reduced in rank on the ground of conduct which has led to his conviction in a criminal offence; or
>
> (ii) where the authority empowered dismiss
> or remove a person or to reduce him in rank is satisfied that, for a reason recorded by that authority in writing, it is not reasonably practicable to give that person an opportunity of showing cause; or
>
> (iii) where the President is satisfied that in the interests of the security of the State it is not expedient to give that person such an opportunity.
>
> (3) If in respect of such a person that question arises whether it is reasonably practicable to give him an opportunity to show cause in accordance with clause (2), the decision thereon of the authority empowered to dismiss or remove such person or to reduce in rank shall be final.
>
> (4) Where a person is employed in the service of the Republic under a written contract and that contract is terminated by due notice accordance with its terms, he shall not, by reason thereof, be regarded as removed from office for the purposes of this article.
>
> 136. Provision may be made by law for the reorganisation of the service of the Republic by the creation, amalgamation or unification services and such law may vary or revoke any condition of service of a person employed in the service of the Republic."

17. Unnoticed by the learned Counsels of both sides and the High Court Division is sub-paragraph (6) of paragraph 6 of the Fourth Schedule to the Constitution (Transitional and temporary provisions) which without any subsequent amendment so far provides as follows:

> "(6) The provision of Chapter II of Part VI (which relate to subordinate courts) shall be implemented as soon as practicable, and until such implementation the matters provided for in that Chapter shall (subject to any other provision made by law) be regulated in the manner in which they were regulated immediately before the commencement of this Constitution."

Article 150 of the Constitution provides as follows-

> "150. The transitional and temporary provision set out in the Fourth Schedule shall have effect notwithstanding any other provisions of this Constitution."

18. Articles 115 and 116 were amended by the Constitution (Fourth Amendment) Act, 1975 (Act II of 1975) and a new Article 116A was inserted thereby. Later, a further amendment in Article 116 was made by the Second Proclamation

(Fifteenth Amendment) Order, 1978 (Second Proclamation Order No. IV of 1978) so that the present Chapter II of Part VI stands as follows-

> ''114. There shall be in addition to the Supreme Court such courts subordinate thereto as may be established by law.
>
> 115. Appointments of persons to offices in the judicial service or as magistrates exercising judicial functions shall be made by the President in accordance with rules made by him in that behalf.
>
> 116. The control (including the power of posting, 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 exercise by him in consultation with the Supreme Court.
>
> 116A. Subject to provisions of the Constitution, all persons employed in the judicial service and all magistrates shall be independent in the exercise of their judicial functions.''

19. The Services (Reorganisation and Conditions) Act, 1975 (Act No. XXXII of 1975), shortly the Act, was enacted in July 1975, but it was given a retrospective effect from the 1st July 1973. Under section 4 thereof the Government was given the power to reorganise the services of the Republic and for that purpose create new services or amalgamate or unify existing services. Section 5 authorised the Government to prescribe grades and scales of pay and other terms and other terms and conditions of service with a view to bringing uniformity in the grades and scales of pay of different persons or classes of persons. Section 7 provided that an order under section 4 or 5 may vary or revoke any condition of service of a person employed in the service of the Republic and no such person shall be entitled to any compensation for such variation or revocation of any condition of his service to his disadvantage. All those powers were conferred on the Government, not only on the strength of Article 136 of the Constitution but also on the authority of paragraph 10 of the fourth Schedule (Transitional and temporary provisions) of the Constitution which is as follows:

> “10. (1) Subject to this Constitution and to any other law-
>
> (a) any person who immediately before the commencement of this Constitution was in the service of the Republic shall continue in that service on the same terms and conditions as were applicable to him immediately before such commencement:
>
> (b) all authorities and all officers, judicial, executive and ministerial throughout Bangladesh exercising functions immediately before the commencement of this Constitution, shall, as from such commencement, continue to exercise their respective functions.
>
> (2) Nothing in sub-paragraph (1) of this paragraph shall-
>
> (a) derogate from the continued operation of the Government of Bangladesh (Services) Order, 1972 (President’s Order No. 9 of 1972),or the Government of Bangladesh (Services Screening) Order, 1972 (President’s Order No. 67 of 1972); or
>
> (b) prevent the making of any law varying or removing the conditions of service (including remuneration, leave, pension rights and rights relating to disciplinary matters) of persons employed at any time before the commencement of this Constitution or of continuing in the service of the Republic under the provision of this paragraph.

20. By SRO No. 286- 1/80/IED(IC)SII-92/80- 98 dated 1-9-80 the Establishment Division of the Cabinet Secretariat notified in the Official Gazette the Bangladesh Civil Service (Re-organisation) Order, 1980 in exercise of powers conferred by section 4 of the Act. By paragraph 2 of that Order 14 Bangladesh Civil Service Cadres were created of which BCS (Judicial) was No. X. This Order was further amended by an SRO dated 31-8-1986 whereby as many as 30 Service Cadres were created BCS (Judicial) being No. XVI. By a further SRO dated 1 January 1981 Bangladesh Civil Service Recruitment Rules, 1981 were framed by the President in exercise of powers conferred on him by the proviso to Article 133 of the Constitution. These Recruitment Rules, separately made for separate cadres were made applicable to all Service Cadres created by the aforementioned SROs, including BCS (Judicial).

21. It will be seen therefore that the Act itself emanated from the substantive law-making power of the Parliament under Article 136, that the Government created Bangladesh Civil Service Cadres under section 4 thereof under a delegated power and that the President framed Recruitment Rules in exercise of power under the proviso to Article 133 of the Constitution.

22. Neither the Parliament nor the Government nor the President took any notice of the provisions of the Constitution contained in Chapter II of Part VI of the Constitution, notwithstanding the mandate of the Constitution contained in sub-paragraph (6) of paragraph 6 of the Fourth Schedule to the constitution.

23. Now the respondents say, exclude Part IX altogether from the judicial service and apply only Chapter II of Part VI to the said service and the appellant says, apply both Chapters and Parts to the extent applicable to the judicial service and preserve and maintain the harmony in the Constitution.

24. Dr. Kamal Hossain has drawn our attention to the original and unamended Chapter II of Part VI of the Constitution and has also referred to the Eighth Amendment case (Anwar Hossain vs. Bangladesh, BLD 1980 Special Issue 1) and submits that the independence of the judiciary has been accepted by this Court to be a basic structure of the Constitution. He submits that although the Fourth Amendment of the Constitution damaged the basic structure of the Constitution the Second Proclamation (Fifteenth Amendment) Order, 1978 held the pillar up by providing for "consultation with the Supreme Court" in Article 116. He urge to take into consideration the contemporaneous concepts on the independence of the judiciary relies upon page 558 of the "Constitutional Law of Bangladesh" by Mahmudul Islam (the present Attorney-General). He also relied upon the case of Chandra Mohan vs. State of Uttar Pradesh 1966 (SC) 1987 and recounts the history of the Provincial Civil Services (Judicial Branch) from paragraph 20 thereof. He also relied upon the case of Chandramouleshwar Prasad vs. The Patna High Court, AIR 1970 (SC) 370, and relies upon the meaning of "consultation" given in that decision while commenting on Article 116. Dr. Kamal Hossain refers to the books of Herbert Morrison "Government and Parliament" and to Harold J Laski's "Grammar of Politics" at pages 128 and 129 to emphasise the difference between the functions of the administrative executive service and the judicial service. The former performs the function of assisting the political executive in framing policies and also in executing policies while the judiciary administers justice without fear or favour the judiciary judges the administrative service administers administrative law. They are not policy framers and policy-executors. Relying "upon the case of Chief Justice of Andhra Pradesh vs. LVA Dikshitulu, A1R 1979 SC 193, he submits that the word "appointments" in Article 115 of our Constitution has been used in a wide sense so as to cover the whole body of terms and conditions of service of the members of the judicial service. We shall or differ from his submissions in course of our discussions.

25. At the heart of the controversy lies the issue whether the members of the judicial service are in the service of the Republic or not.

26. Mr. Amir-ul- Islam submits that the definition of the service of the Republic means any service in respect of the "Government of Bangladesh". By "Government of Bangladesh" what is meant is the executive Government that discharges the executive administrative functions of the State. The judicial officers not being executive functionaries cannot be said to be in a service "in respect of the Government of Bangladesh". The learned Attorney-General, on the other hand, had referred to certain text books viz., the "Government of Modern States" by Willoughby at pages 4 and 2l6, and Administrative Law" by Bradley and Ewing, 12th Edition, Chapter V at pages 86 and 94 and "Indian Constitutional Law" by Jain, Fourth Edition, at pages 16 and 159 and submits that the word "Government" in the definition "the service of the Republic" has been d in a generic sense including the parliament, executive and judiciary. Further, Article 1 of the Constitution provides that "Bangladesh is a unitary, dependent, sovereign Republic to be known as the People's Republic of Bangladesh". The word "Government" means Government of the People's Republic of Bangladesh. Under Article 146 of the Constitution "The Government of Bangladesh may or be sued by the name of Bangladesh". When the Government is sued it is the Republic which is sued. Court decrees against the Government constitute a charge on the consolidated fund. Under 87(1) "There shall be laid before Parliament, respect of each financial year, a statement of the estimated receipt and expenditure of the for that year, in this Part referred to as the annual financial statement." Article 87(1) is the crux of the matter in the interpretation of the word "Government". The annual financial statement Article 87(1) not only contains estimated receipts and expenditure of the executive Government but also of the parliament and the judiciary. Under Article 90 a yearly appropriation act is passed by the Parliament to make the expenditure charged on the consolidated fund as shown in

the annual financial statement and as laid before Parliament. Government, therefore, is a generic term, he submits. He further points out that the High Court Division towards the end of the impugned judgment conceded that judicial service is a service of the Republic in a limited sense. The proposition thus laid down is vague and uncertain and will lead to uncertainly according to him. To avoid recurring debates and controversies it will be wise and prudent, he submits, to treat the judicial service as a species of the service of the Republic and not to treat it as a service completely divorced from the service of the Republic. To do otherwise will bring disharmony in the interpretation of the Constitution, he submits.

27. We shall answer what is meant by "Government" in the definition of "the service of the Republic" by taking note of the fact that the Constitution uses that word both in the sense of executive government and in a generic sense. Article (1)(e) and Chapters I, II, IIA and III of Part IV use the word in the sense of executive Government. But Chapter II of Part V. "Legislative and Financial Procedure" uses the word "Government" in a generic sense, meaning the Republic as a whole. Part IV is concerned with "the Services of Bangladesh", not just one service. In the definition of "the service of the Republic", a broad distinction has been drawn between civil service and military service. All those who are civilian public officers are entitled to the protection of Article 134. The Constitution in Article 152(1) defines "public officer" as meaning "a person holding or acting in any office of emolument in the service of the Republic". Persons appointed to the Secretariat of Parliament and the Staff of the Supreme Court, although governed by separate terms and conditions of service, are entitled to the protection of Article 134, because they are public officers holding or acting in an office of emolument in the service of the Republic. They are not in the executive administrative service of the executive Government of Bangladesh, but broadly, and in a generic sense, in a service in respect of the Government of Bangladesh. The definition of "the service of the Republic" uses the word "Government" in a generic sense. Hence on that ground the members of the judicial service cannot be excluded from the ambit of "the service of the Republic".

28. The High Court Division has held that (a) the Constitution has specified separate and distinct judicial service in Articles 115,116 and 116A of the Constitution. (b) It has also separately defined judicial service in Article 152(1). (c) The defence service (Chapter IV of Part IV), the Parliament Secretariat (Chapter 1 of Part V. Article 79), and staff of the Supreme Court (Chapter I of Part VI. Article 113) have been dealt with separately in the Constitution. It follows therefore that the judicial service shall be governed by separate provisions contained in Chapter II of Part VI. Mr. Amir-ul Islam has additionally argued that Judges are appointed on the doctrine of good behaviour, but if -they are treated to be in the service of the Republic then they will hold office during the pleasure of the President under Article 134 which strikes at the very root of the independence of the judiciary. Besides, the language of Part IX is such that it cannot be meant for judicial officers exercising judicial functions.

29. The learned Attorney-General argues, on the other hand, that the judicial officers have been designated as belonging to Bangladesh Civil Service Cadre, not because they perform the executive functions of the Government, but for the purpose of distinguishing them from military service. He submits that the service of the Republic is a genus of which judicial service is a species. He does not object to a change in the nomenclature of BCS (Judicial), but insists that their terms and conditions of service are governed by Article 133, not by Chapter II of Part VI, although he ultimately concedes that part of the terms and conditions of service of the judicial service is governed by Chapter II of Part VI.

30. Let us see to resolve this controversy whether Chapter II of Part VI is a self-contained provision of the Constitution or not. Let us also examine Part IX and sub-paragraph (6) of paragraph of the 6 of the Fourth Schedule to the Constitution. This exercise will help us in finding out whether chapter II of Part VI contains a full-fledged alternative to Article 133 or not. Our answers to the various issues raised by the learned Counsels will also be revealed by during this exercise.

31. We shall consider Article 114 first, this Article provides that in addition to the Supreme Court such courts may be established by law as are subordinate thereto. The constitutional implication of this Article is that the subordinate judiciary unlike the Supreme Court of Bangladesh, is not a creature of the Constitution but of law. Its statute is not the same as that of the Supreme Court. The Constitution has guaranteed the independence of the Judges of the Supreme Court in exercise of judicial functions by making some provisions in the Constitution. There are provisions regarding appointment of Judges, their tenure of office, their removability only after being tried by their on peers in the Supreme Judicial Council where thy have the fullest opportunity to defend themselves, their salary being chargeable on

the consolidated fund and a provision in Article 147 that the remuneration, privileges and other terms and conditions of the Judges of the Supreme Court shall not be varied to their disadvantage during their terms of office. No such guarantees of specific nature have been given to the members of the judicial service in the Constitution. A question may arise as to whether any Court can be established by law without being subordinate to the Supreme Court, i.e. whether a set of courts can be establish outside the reach of the Supreme Court and another set within its reach, but that is not a question involved in this appeal.

32. In Article 115 it is the President who has been vested with the primary power, as distinguished from contingent power, to frame rules with regard to appointments of persons to offices in the judicial service or as magistrates exercising judicial functions. This rule making power of the President is constitutionally different in content and effect from the contingent rule making power of the President in the proviso to Article 133 of the Constitution.

33. The President may by order or by making rules, as the case may be, make provision for certain matters until the Parliament enacts to that effect. As and when laws are made by Parliament, either the Presidential orders or rules go out of existence or they exist to the extent not in conflict with laws made by the Parliament. This is called the contingent rule-making power of the President and examples of this power are to be found in our Constitution in Articles 62(2), 75(1)(a), 79(3), 85, 127(2), 128(3), proviso to Article 133, Articles 138(2) and 147(1)(b).

34. The President is also designated as a rule approving authority under the Constitution. No rules can be framed without his prior or subsequent approval. Examples are Article 107(1) and Article 113(1) of the Constitution.

35. As distinguished from the above role of the President the Constitution also conferred on the President the direct primary and plenary power of framing rules which even the Parliament cannot frame and which have an immediate legislative effect. One example is Article 55(6) of the Constitution which provides that "the President shall make rules for the allocation and transaction of the business of the Government". Article 115 of the Constitution provides another example of such a direct, primary and plenary power of the President to make rules with regard to appointments of persons to offices in the judicial service or as magistrates exercising judicial functions. The Parliament has no authority under our Constitution to make laws or the Government has no authority to pass orders or frame rules on this subject. The Parliament also cannot delegate to the executive Government the authority to pass any executive order on the subject. Nor does the Constitution require that the President shall exercise his power under Article 115 in consultation either with the Supreme Court or with any public service commission. In the original unamended Constitution of 1972, Article 115 required the President to make appointments of District Judges on the recommendation of the Supreme Court and in the case of any other persons in accordance with rules made by him after consulting the appropriate public service commission and the Supreme Court. After amendment the recommendatory role of the Supreme Court in the case of appointment of District Judges and the consultative role of the appropriate public service commission and the Supreme Court in the case of appointment of any other persons in the judicial service have been done away with. We cannot ignore the effect of amendment in Article 115 while interpreting it. If we hold that the recommendation or consultation with the Supreme Court is still necessary under Article 115, we cannot by any means explain the necessity of omission of recommendation and consultation in the amendment of Article 115. The direction of the High Court Division, placing the judicial service of Bangladesh under the "direct control and supervision of the Supreme Court of Bangladesh" appears to us to be in direct conflict with the express provisions of Article 115. We do not uphold this direction.

36. Power to appoint under section 16 of the General Clauses Act, 1897 which applies in relation to the Constitution under Article 152(2) of the Constitution, carries with it the power to suspend or dismiss. It has been argued by Mr. Amir-ul Islam that the President has also the authority to make rules regarding suspension and dismissal in exercise of his power under Article 115.

37. The rule-making power of the President in relation to appointments includes, in our opinion, the rule making power to create a judicial service in the first place, to prescribe qualifications for appointment (as is contained in Article 95(2) in respect of Judges of the Supreme Court), the manner and method of recruitment and all pre-appointment matters required to be covered by rules. The power to suspend or dismiss, like the power to appoint, is an executive power no doubt, as has been rightly argued by the learned Attorney-General. But if the executive power to appoint includes the power to suspend or dismiss, and if Article 115 gives the President the rule-making power

in respect of appointment, then we do not see why the word "appointments" in Article 115 should not be given its full meaning both in the executive and rule making spheres and why rule-making power of "appointment" should not extend to rule-making power to suspend or dismiss. True, the "control" over discipline is a subject matter of Article 116 and the power of control is also an executive power, but reading Articles 115 and 116 together we find that the President will make rules regarding suspension and dismissal under Article 115 and frame the rules in such a manner that he will leave the control to himself, to be exercised in the manner contained in Article 116. Article 65 of the Constitution vests the legislative power of the Republic in the Parliament. A plenary rule-making power of the President has the same legislative effect as an Act of Parliament. Nothing should be read or implied or construed in any provision of the Constitution which widens or narrows the law making power of any other organ, because any such interpretation will pro tanto correspondingly narrow or widen the vested law making plenary power of the Parliament. But Article 115, by using the word "appointments" and Article 152(2), by making the General Clauses Act, 1897 applicable to the Constitution, widened the scope of rule-making power of the President under Article 115 so as to include rule-making power of suspension and dismissal as well.

38. With regard to recruitment rules, we must point out that Article 140 of the Constitution is inapplicable to members of the judicial service, unless the President incorporates the same in Recruitment Rules to be made under Article 115, While making Recruitment Rules under Article 115 it has to be borne in mind that Article 116A will be meaningless without judicial autonomy-Judicial autonomy requires that judicial appointments shall be made on merit by a separate judicial service commission which may be established either by a Statute or by the President while framing rules under Article 115. The Judicial Service Commission, as the contemporaneous thinking goes, shall consist of a majority of members drawn from the Senior Judiciary, both from the Supreme Court and the subordinate courts. Appointments to all levels of the judiciary should have, as an objective, the achievement of equality between men and women. Recommendation for judicial appointment should come from the said commission. This is a minimum initial guarantee of judicial independence under Article 116A when a maiden exercise of rule making is made by the 1 under Article 115.

39. Reading Article 115 as we have done, we find no constitutional basis of the exercise of Government power in creating BCS (Judicial) Service Cadre under the SRO dated 1 September, 1980 and 31 August 1986. The learned Attorney-General has conceded that the general provision of the Constitution will prevail subject to special condition. This is a golden rule of construction not only of a statute but also of a Constitution. Article 133 and Article 136 of the Constitution are general provisions, but Article 115 is a special condition. This power of the President cannot be obliterated when the Parliament makes or exhausts its exercises under Article 136. The President is not empowered to act under the proviso to Article 133 what he is required to do under Article 115. These are distinct and separate powers. The Parliament in exercise of its power under Article 136 cannot usurp the primary rule-making power of the President under Article 115. Article 136 will always have to be read keeping in view the fact that the reorganisation of the services of the Republic cannot be allowed by amalgamating or unifying the judicial service with any other civil administrative executive services of the Republic or by placing the judicial service on a par with the civil administrative executive services on making it one of the many Cadre services of the Bangladesh Civil Service. The judicial service has a permanent entity as a separate service altogether and it must always remain so in order that Chapter 11 of Part VI is not rendered nugatory.

40. The Services (Reorganisation and Conditions) Act. 1975 (Act No. XXXII of 1975) defines "service" in section 2(d) as "service includes any post or office". We do not ascribe any motive to the Parliament and do not think that the Parliament was oblivious of the fact that judicial service cannot be included within the purview of "any post or office"; which includes post or office of civil administrative cadres. In so far as appointments of persons to offices in the indicial service or as magistrates exercising judicial functions is concerned, the rule-making power is solely that of the President. Therefore those sections of the Act which have been construed, interpreted, and applied by the Government as an enabling power (a) to create a judicial service, (b) to provide for its rules of recruitment and (c) to frame other terms and conditions of service including grades and scales of pay in the same breath and on a par with civil administrative executive services, have been totally misconstrued misinterpreted, and misapplied.

41. The creation of a BCS (Judicial) Cadre as if it is a civil service was not only within the contemplation of Article 136, but was also violative of the constitutional scheme.

Amalgamation is possible and permissible between allied services. Judicial service may be amalgamated with judicial magistrates pursuing a judicial career all the way. But as oil and water cannot mix, the judicial and civil administrative executive services are non-amalgamable.

42. We have held earlier in the case of Mujibur Rahman (Md.) vs. Government of Bangladesh, 44 DLR (AD) 111 Para 71, that both "the Supreme Court and the subordinate courts are the repository of judicial power of the State." Functionally and structurally judicial service stands on a different level from the civil administrative executive services of the Republic. While the function of the civil administrative executive services is to assist the political executive in formulation of policy and in execution of the policy decisions of the Government of the day, the function of the judicial service is neither of them. It is an independent arm of the Republic which sits on judgment over parliamentary, executive and quasi-judicial actions, decisions and orders. To equal and to put, on the same plane the judicial service with the civil administrative executive services is to treat two unequal as equals. Article 116A of the Constitution was also lost sight of and it was conveniently forgotten that all persons employed in the judicial service and all magistrates are independent in the exercise of their judicial functions while the civil administrative executive services are not. The Government was also unmindful of the fundamental right enshrined in Article 35(3) of the Constitution which provides that "Every person accused of a criminal offence shall have the right to a speedy and public trial by an independent and impartial court or tribunal established by law." Every person means both a citizen and a non-citizen. In Walter Valente vs. Her Majesty the Queen, (1985) 2 RCS the Supreme Court of Canada held that "the concepts of "independence" and "impartiality", although obviously related, are separate distinct values or requirements. "Impartiality" refers to a state of mind or attitude of the tribunal in relation to the issues and the parties in a particular case. "Independence" reflects or embodies the traditional constitutional value of judicial independence and connotes not only a state of mind but also a status or relationship to others- particularly to the executive branch of government- that rests on objective conditions or guarantees. Judicial independence involves both individual and institutional relationships: the individual independence of a Judge as reflected in such matters as security of tenure and the institutional independence of the court as reflected in its institutional on administrative relationships to the executive and legislative branches of government" We fully subscribe to this view which has been restated by the Supreme Court of Canada in later cases, as late as in 1997.

43. The constitutional fallacy of treating the BCS (Judicial), as just one of the many cadres of civil administrative executive services of the Republic is that it has compromised, jeopardised and destroyed the institutional independence of the Judges of the subordinate courts. The result is not far to seek. The civil administrative executive Services have righteously regarded and treated the BCS (Judicial) Cadre as just one of the Executive Service Cadres like them and have always resented any extra consideration or remuneration in their favour. They have validly argued that if the judicial officers are entitled to higher privileges because of the sedentary nature of their work the BCS. (Secretariat) Cadre is also entitled to the same consideration because the nature of their work is also sedentary. The basic realisation that the members of the judicial service perform the judicial functions of the Republic while the civil administrative services perform a different kind of work altogether has never dawned on them from the very beginning. This amalgamation or mixing up or tying together of the judicial service with other civil administrative services has been a monumental constitutional blunder committed during the early years of liberation, the harmful legacy of which is the dogged and headstrong denial of the proper and rightful institutional status of the members of the judicial service and of magistrates exercising judicial functions at the implementational stage.

44. The status given to them under our Constitution is not very different from that given by the Indian Constitution to the Indian Subordinate judiciary and it will be profitable to quote a from a decision of the Indian Supreme Court in India Judges Association and others vs. Union of Power of the President in respect of appointments of India and others, (1993) 4 SCC 288 as follows:

> "The judicial service is not service in the sense of "employment", The Judges are not the employees As members of the judiciary they exercise the sovereign judicial power of the State. They are holders of public offices same way as the members of the council of ministers and the members of the legislature. When it is said that in a democracy such as ours, the executive, the legislature and the and the judiciary constitute the three pillars of the State, what is inapplicable to intended to be

> conveyed is that the three essential functions of the State are entrusted to the three organs of the State and each one of them in turn represents the authority of the State. However, those who exercise the State power are the Ministers, the Legislators and the Judges, and not the members of their staff who implement or assist in implementing their decisions. The council of ministers on the political executive is different from the secretarial staff or the administrative executive which carries out the decisions of the political executive. Similarly, the Legislators are different from the legislative staff. So also the Judges from the judicial staff. The parity is between the political executive, the Legislators and the Judges and not between the Judges and the administrative executive. The Judges, at whatever level they may be, represent the State and its authority unlike the administrative executive or the members of the other services. The members of the other services, therefore cannot be placed on a par with the members of the judiciary, either constitutionally or functionally. Therefore, while determining the service conditions of the members of judiciary, a distinction can be made between them and the members of the other services."

45. The major constitutional blunder that has been made is that the Parliament forgot that neither Parliament in exercise of its power under Article 136 of the Constitution nor the President in exercise passage of his power under the proviso to Article 133 of the Constitution can usurp the primary rule-making power of the President in respect of appointment of persons to offices in the judicial service or as magistrates exercising judicial functions. Therefor, the creation of a BCS (Judicial) Cadre along with civil administrative cadres by the Bangladesh Civil Service (Reorganisation) Order 1980 with amendment of 1986 has been rightly declared to be ultra vires the Constitution by the High Court Division. Further, the Bangladesh Civil Service Recruitment Rules, 1981 made by the President in exercise of the power conferred by the proviso to Article 133 of the Constitution are members of the judicial service and to magistrates exercising judicial functions.

46. While making the Bangladesh Civil Service (Reorganisation) Order, 1980 the Government had forgotten that the presiding officers of the Subordinate courts have been placed in a service the nomenclature of which has been designated in the Constitution which calls it a "judicial service" It should be so known formally in accordance with the constitutional nomenclature. If the Constitution provides that the Supreme Court will be known as the Supreme Court of Bangladesh (Article 94) then the Supreme Court cannot be designated in any other language. It will have to be known as the Supreme Court of Bangladesh. Similarly, when the Constitution provides that there will be a judicial service then that service cannot be designated as BCS (Judicial). That it has been done to distinguish it from military service is not only inappropriate explanation but also a convenient way to perpetuate the equalisation of judicial service with civil administrative executive services. The Judicial Service can never be a co-ordinate branch of the Civil Services. The connotations of the two services are fundamentally opposed to each other. It will be known either as the Judicial Service of Bangladesh or as Bangladesh Judicial Service. A subordinate legislation cannot delegate to a specified authority the power to change the identity, status and nomenclature of a constitutionally designated service.

47. By authorising the Government without any reservation to create or amalgamate the services of the Republic, the Parliament in exercise of its powers under Article 136 of the Constitution has in theory authorised the Government to exercise its option both to create or to abolish the BCS (Judicial) Service altogether. If the words "amalgamation or unification of service" in Article 136 are allowed to be interpreted to mean that the judicial service is also a branch of civil service which Consists of civil administrative executive services than there will be no bar in law in extinguishing the judicial service. On theory, the Parliament will be free to legislate and the Government will be free to pass an order that members of BCS (Administration) or BCS (Foreign Affairs) will administer the judicial service. Those words therefore cannot ever mean that either the judicial service will be a branch of civil service which consists of civil administrative executive services of that the judicial service will be abolished and replaced by the Civil Service. Act No. XXXII of 1915 is fraught with incalculably dangerous and ruinous consequences and in upholding and reiterating the independence of the judiciary as a basic structure of the Constitution we cannot give such a meaning to Article 136 which will carry with it the germs of the potential destruction of judicial service.

48. We now come to consider Article 116 of the Constitution. It has been vigorously argued on

behalf of the respondents by both Mr. Amir ul Islam and Syed Ishtiaq Ahmed that the word "control" in Article 116, read with Article 115, includes the making power of the President in consultation with the Supreme Court in respect not only of posting, The promotion, grant of leave and discipline but also of the entire gamut of terms and conditions of service of persons employed in the judicial service and magistrates exercising judicial functions. Syed Ishtiaq Ahmed has additionally argued that Article 109 of the Constitution having provided that the High Court Division shall have superintendence and control over all Courts and tribunals subordinate to it, the word "control" used in both Articles 109 and 116 has to be reconciled. The first step is to take out the subordinate judiciary from the ambit of Part IX of the Constitution and the second step is to interpret the word "control" to mean not only control over the Courts and tribunals but also over their presiding officers. Article 109, he submits, is a departure from the Constitution of Pakistan of 1962 to ensure independence of higher judiciary. The habitat of Article 109 is in the Chapter of the Supreme Court. Its habitat is higher and it is a charter of independence of the higher judiciary exercising control over not only the Courts and tribunals but also over their presiding officers. Syed Ishtiaq Ahmed goes on to argue that Article 116 is merely formalistic in view of Article 48(3) of the Constitution which requires the President to act in accordance with the advice of the Prime Minister in the exercise of all his functions, save only that of appointing the Prime Minister and the Chief Justice and also in view of Article 55(2) of the Constitution providing that the executive power of the Republic shall, in accordance with this Constitution, be exercised by or on the authority of the Prime Minister. Syed Ishtiaq Ahmed submits that in the amended Article 116 the control has been vested formally in the President but actually and in reality in the Prime Minster who is the executive head. The real saving is the provision of consultation with the Supreme Court and if Articles 109 and 116 are read together they mean that the real control over both the Courts and tribunals and their presiding officers will be exercised by the Supreme Court. Necessarily, therefore, he submits, rules have to be framed under Article 116 covering the entire terms and conditions of service of persons employed in the judicial service and magistrates exercising judicial functions. Otherwise, he submits, Articles 116 and 116A will only be mocking birds and the Subordinate judiciary will be denude of the guarantee of independence enshrined in Article 116A.

49. We find the following reasons for not agreeing with the above submissions of the learned Counsels for the respondents:

a) The power that has been vested in the President under Article 116 is the power of control (including some enumerated subjects) and discipline of persons employed in the judicial service and magistrates exercising judicial functions. This appears to us, as forcibly argued by the learned Attorney-General, to be purely an executive power and not a legislative power. The learned Attorney General has rightly pointed out that wherever the Constitution confers upon the Parliament or the President a legislative power to enact or to make rules for the terms and conditions of service of any category of employees, the Constitution employed the words "the conditions of service". As examples, the learned Attorney- General cites Article 62(2) (regulating the discipline and other matters relating to the defence services), Article 79(2)(3) (regulating the recruitment and conditions of service of persons appointed to the secretariat of Parliament), Article 113(2) (the conditions of service of members of the staff of the Supreme Court) and the proviso to Article 133 (appointment and the conditions of service of persons in the service of the Republic). The constitutional proposition is that conferment of legislative or rule-making power has to be specific and definite. It can also be implied, but it must be necessarily implied. There is no such necessary implication, he submits. It appears to us that this submission of the learned Attorney General is not a mere lexicographic exercise as commented upon by Mr. Amir-ul Islam. The challenge thrown to us in this appeal is to exclude Part IX of the Constitution altogether from the purview of judicial service and to locate and fix provisions in Chapter II of Part VI as a complete alternative to Part IX containing provisions for the entire terms and conditions of service of the judicial service by the rule-making power of the President. We have located, and described the extent of the rule-making powers of the President in Article 115. But we are frankly unable to locate any rule-making power in Article 116. A rule-making power cannot be so easily implied when the makers of the Constitution did not lack in expression while bestowing an authority with rule making power as in Articles 62(2), 79(2)(3), 113(2), 115 and the proviso to Article 133. We have been urged to read Articles 115 and ll6 together. We have so read. We find Article 115 to contain both executive and legislative powers to the extent described by us earlier but Article ll6 contains only an executive power and the manner of its exercise. We are unable to read any rule-making authority in Article 116.

(b) The areas where "control" in Article 116 will be vested in the President has been illustrated by some inclusionary items like the "power" of posting, promotion and grant of leave. We hold that this is illustrative, not exhaustive. The control may even extend to salary, remuneration and other privileges. We have no ground to object to a wide measure of "control" over an ever-increasing area, because the more the area extends, the more the Supreme Court is drawn in. But we do not see how in the absence of any positive language the President can frame rules under Article 116 with regard to such a potentially varied field.

c) Magistrates exercising judicial functions do so only temporarily and do not as yet fall within judicial service. They are purely executive officers performing judicial functions for the time being, their appointment is governed by Article 115, control over them is vested in the President as long as they exercise judicial functions, but their terms and conditions of service are governed by Article 133. District Magistrates, Additional District Magistrate, Chief Metropolitan Magistrates. Metropolitan Magistrates, etc., who are purely executive officers, are performing judicial functions. If and when an issue is raised as to whether in view of the Fundamental Right contained in Article 35(3) executive officers can at all perform purely judicial functions, that question may be examined in future, but for the present it seems to be incongruous that magistrates performing judicial functions will be governed in their terms and conditions of service by Article 116, but as soon as they are reverted back to executive work, their terms and conditions of service will be governed by Article 133. By amending the Code of Criminal Procedure, the Government can create purely Judicial Magistrates and make Article 116 meaningful.

d) Some decisions from the Indian jurisdiction have been cited to impress upon us that the word "control" means that the control is over both the Courts and tribunals and their presiding officers. That this is so under the Indian Constitution is clear from a reading of Article 235 which is as follows-

> "235. The control over district courts and courts subordinate thereto including the posting and promotion of, and the grant of leave to, persons belonging to the judicial service of a State and holding any post inferior to the post of district judge shall be vested in the High Court but nothing in this article shall be construed as taking away from any such person any right of appeal which he may have under the law regulating the conditions of his service or as authorising the High Court to deal with him otherwise than in accordance with the conditions of his service prescribed under such law."

It is in the context of the language employed in Article 235, that the Supreme Court of India held in the case of Chief Justice of Andhra Pradesh Vs. LVA Dikshitulu, AIR 1979 SC 193 =1979(2) SCC 34 that the control over the subordinate judiciary vested in the High Court under Article 235 is exclusive in nature, comprehensive in extent and effective in operation. It comprehends a wide variety of matters. Among others, it includes disciplinary jurisdiction, suspension from service, transfer, promotion, premature or compulsory retirement, etc. But control apart, the terms and conditions of service of the members of the subordinate judiciary in India are governed by Article 309 under Part XIV relating to "Services under the Union and the States". The term "control" has been extended to cover an executive power of control over a wide variety of subjects, but not to the rule power.

Our constitutional scheme is different from India's. In Article 109 of our Constitution the High Court Division has been given superintendence and control over all courts and tribunals subordinate to it In Article 116 the control and discipline of persons employed in the judicial service and magistrates exercising judicial functions has been vested in the President who shall exercise the same in consultation not with the High Court Division but with the Supreme Court. Our Constitution, therefore, makes a difference in the subject matter and authority of control and vesting. The Courts and tribunals will be under the superintendence and control of the High Court Division, being subordinate to it: but the control and discipline of persons employed in the judicial service and magistrates exercising judicial functions is vested in the President. This distinction stares in the face of our Constitution. There is a diarchy in our constitutional scheme.

e) Regarding the lack of any express rule making provision in Article 116 with regard to salary, remuneration, etc. of the members of the judicial service Mr. Amir-ul Islam submits that the void can be filled up by taking recourse to the doctrine of implied power used by this Court in the case of Mujibur Rahman (Md.) vs. Government of Bangladesh, 44 DLR (AD) 111, para 85. But the learned Attorney-General rightly replied which we accept that the doctrine of implied power is available only when there is a presence of legislative power in order to fill up the ancillary or subsidiary matters not taken

care of by express legislation. As Article 116 is devoid of any legislative or rule-making power the doctrine of implied power cannot be invoked in the circumstances.

50. Having dealt with 5 reasons for not holding that Article 116 contains rule-making power, we pause here and reflection the words "in consultant on 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 be given some teeth, or else, as Syed Ishtiaq Ahmed rightly, pointed out, Articles 116 and 116A will be only making binds. 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 UI 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."

51. Thus while we reject the decision of the High Court Division that the members of the judicial service are not in the service of the Republic and do hold that they are in the service of the Republic. We hold at the same time that the High Court Division was correct in holding that the definition of "the service of the Republic" in Article 152(1) is broad and includes defence and judicial services, but that does not mean that the judicial service or the defence service is a part of the civil or administrative service. As we said, Part IX of the Constitution contains the heading "The Services of Bangladesh", not just one service. Chapter I of Part IX, which begins with Article 133, is entitled "Services" Services of different categories and status are included in the service of the Republic. Members of the judicial service wield the judicial powers of the Republic. They cannot be placed on par with the civil administrative executive services in any manner. Their nomenclature of service must follow the language employed by the Constitution. Formation and composition of the judicial service and recruitment and appointment rules of the judicial service are to be made under Article 115 by the President. Service rules regarding posting. promotion, grant of leave, salary, remuneration and other privileges shall be made separately in each case from the civil administrative executive service Cadre rules under Article 133 or when applicable, under Article 136, and those separate rules shall, be consistent with Articles 116 and 116A.

52. If the above conditions are fulfilled (together with a further condition which we will presently discuss), it really does not matter who frames the rules regarding the terms and conditions of service of persons employed in the judicial service. The Indian Supreme Court held in the case of BS Yadav vs. State of Haryana, AIR 1981 (SC) 561 as follows-

"But, what is important to bear is mind is that the Constitution which has taken the greatest care to preserve the independence of the judiciary did not regard the power of the State legislature to pass laws regulating the recruitment and conditions of service of judicial officers as an infringement of that independence."

53. The Supreme Court of Canada has considered in Walter Valente vs. Her Majesty the Queen, (1985) 2 RCS 673 what is meant by an independent tribunal in section 11(d) of the Canadian Charter of Rights and Freedom which provides:

"11. Any person charged with an offence has the right………………………… (d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal:"

The Supreme Court of Canada held that-

"section 11(d) cannot be construed and applied so as to accord provincial Court judges the same constitutional guarantees of security of tenure and security of salary and pension as superior Court Judge for that construction would, in effect, amend the judicature provisions of the Constitution. The standard of judicial

independence cannot be a standard of uniform provision but rather must reflect what is common to the various approaches to the essential conditions of judicial independence in Canada." (P. 675).

54. Later on the Supreme Court of Canada in re: Provincial Court Judges considering a number of appeals and references together including remuneration of judges reiterated the same view in 1997.

55. We hold similarly (and this is the further condition) that so long as the essential approaches to the substantive conditions of independence exists in the laws or rules framed under Articles 115, 133 or 136, the power of the Parliament to make laws or the plenary or contingent power of the President to make rules regulating the terms and conditions of service of members of the judicial service cannot be regarded as an infringement of their independence.

56. We shall now consider Article I 16A of the Constitution. It is interesting to note that the Constitution uses a common expression of independence in three places.

Article 94(4) of the Constitution says:

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

Article 116A of the Constitution says:

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

Article 118(4) of the Constitution says:

(4) The Election Commission shall be independent in the exercise of its functions and subject only to this Constitution and any other law."

57. 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 emphasised 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.

58. Reverting to the case of Walter Valente vs. Her Majesty the Queen, (1985) 2 RCS 673, we find that the Supreme Court of Canada listed three essential conditions of judicial independence. To cite from the said case, ". . . Security of tenure because of the importance traditionally attached to it, is the first of the essential conditions of judicial independence for purposes of section 11(d) of the Charter. The essentials of such security are that a Judge be removed only for cause, and that cause be subject to independent review and determination by a process at which the Judge affected is afforded a full opportunity to be heard. The essence of security of tenure for purposes of section 11(d) is a tenure, whether until an age of retirement, for a fixed term, or for a specific adjudicative task, that is secure against interference by the Executive or other appointing authority in a discretionary or arbitrary manner." (P.675).

59. Such security of tenure is already assured by Article 135 of the Constitution in the case of permanent appointments notwithstanding the fact that the subordinate judiciary holds office during the pleasure of the President under Article 134. So long as the protection under Article 135 remains, the doctrine of pleasure, which was described as an anathema to judicial independence by Mr. Amir-ul Islam, cannot impair or destroy the security of tenure of the subordinate judiciary. We are not impressed by the submission of Mr. Amir-ul Islam that the protection of Article 135 is redundant for the subordinate judiciary, because a part of the protection may be covered by the principle of natural justice, but the provision for a second show cause notice cannot be covered without the protection of Article 135. The fundamental right of equality of opportunity and non-discrimination in respect to employment or office in the service of the Republic Article 29 will not be available to the judicial service if it is taken out of Part IX altogether.

60. The second essential condition of judicial independence is security of salary or other remuneration and, where appropriate, security of pension. Again to quote from the cited

Canadian case. -The essence of such security is that the right to salary and pension should be established by law or rules and not be subject to arbitrary interference by the Executive in a manner that could affect judicial independence. In the case of pension, the essential distinction is between a right to pension and a pension that depends on the grace or favour of the Executive." (Ibid. p-676) The Supreme Court of Canada held and we agree with the view that although it may be theoretically preferable that judicial salary should be fixed by the legislature rather than the executive Government and should be made a charge on the consolidated fund rather than requiring annual appropriation, neither of these features should be regarded as essential to the financial security that may be reasonably perceived as sufficient for independence under Article 116A. It is desirable that the right to salary and pension of the subordinate judiciary be established by law and there should be no way in which the executive could interfere with that right in a manner to affect the independence of the subordinate court judges.

61. The third essential condition of judicial independence is institutional independence of the subordinate judiciary, especially from the Parliament and the Executive. It must be free to decide on its own matters of administration bearing directly on the exercise of its judicial functions. The Supreme Court of Canada held and we respectfully agree with the view that judicial control over such matters as assignment of Judges, sittings of Courts and Court list is an essential or minimum requirement for institutional Independence. The judiciary must be free actual or apparent interference or dependence upon especially the executive arm of Government. It must be free from powerful non-governmental interference like pressure from corporate giants, business or corporate bodies, pressure groups, media, political pressure, etc.

62. There are two other essential conditions of judicial independence in the special context of Bangladesh the first of which- judicial appointment has already been touched upon by us. Judicial appointments should normally be permanent. When contract appointment is inevitable it should be subject to appropriate security of tenure free from arbitrary interference by the executive. Recruitment to the judicial service shall be made by a separate judicial services commission with a majority of members from the senior judiciary and with the objective of achieving equality between men and women. Judicial vacancies should be advertised. Recommendations for appointment on merit should come from the commission.

63. The next essential condition of judicial independence in the special context of Bangladesh is administrative and financial independence. The dependent of the Supreme Court (a Division of which supervises and controls the courts and tribunals subordinate to it) on the executive branch for resources is another factor which impairs its independence including its functions under Article 109. "The judiciary has no power to the purse At best it has to act within the allocation of funds made to it in the annual budget If the judiciary wants to introduce modern science and technology in the functions of the court system, to expand its facilities" or appoint more judges to expedite the disposal of cases, it has to depend on funds to be made available by the executive. Thus, the executive can twist the arm of the judiciary if it does not behave to its liking. This absence of financial autonomy has adverse impact on the independence of the judiciary as an institution "(Paper on the Independence of the Judiciary by Chief Justice Anthony Gubbay of Zimbabwe" published in "Parliamentary Supremacy and Judicial Independence A Commonwealth Approach" by Cavendish Publishing Ltd, London & Sydney, P 50).

64. The financial independence of the Supreme Court is inextricably connected with the functioning of the subordinate judiciary as the High Court Division has a controlling role and a supervisory role and the Supreme Court has a consultative role connected with the subordinate judiciary. Financial independence of the Supreme Court can be secured if the funds allocated to the Supreme Court in the annual budgets are allowed to be disbursed within the limits of the sanctioned budgets by the Chief Justice without any interference by the Executive i.e. without seeking the approval of the Ministry of Finance or any other Ministry. The Chief Justice will be competent to make reappropriation of the amounts from one head to another, create new posts, abolish old posts or change their nomenclature, to upgrade or downgrade, etc as per requirements, provided the expenditure incurred falls within the limits of the budget allocation. To ensure financial discipline an Accounts Officer of the Accountant General may sit in the Supreme Court premises for pre-audit and issue of cheques. The executive control over the financial independence of the Supreme Court will thus be eliminated.

65. The civil administrative service cadres have not been given the same independence in the exercise of their executive functions as the Supreme Court or the subordinate judiciary or the election commission has been given under

our Constitution. It is therefore, a negation of the express intendment of the Constitution to lump up the appointment recruitment and conditions of service including pay etc, of the members of the judicial service and the holders of Civil administrative posts. The Government has been treating two unequals as equals. There shall be a completely different pay commission to consider the grade and scale of pay of the members of the judicial service which shall not suffer parallelism with any supposedly corresponding Civil administrative post. The very concept of weighing two different classes of persons in the service of the Republic in the same scale and to fix for them corresponding grade and scale of pay is a twisting of the Constitutional scheme and is an anathema to the concept of judicial independence. Under Article 136 and paragraph 10(2)(b) of the Fourth Schedule to the Constitution the making of any law varying or removing the conditions of service of a person employed in the service of the Republic has been preserved, but insofar as the judicial service is concerned, Parliament cannot by law abolish the judicial service altogether and cannot amalgamate or unify the judicial service with other civil administrative service cadres or place them on par in respect of their conditions of service, salary and other benefits. That will be doing violence to the separation of powers as contained in the constitution.

66. In Canada there was a reduction of salaries of provincial Court Judge in pursuance of a province's Budge Deficit Reduction plan. It was a part of an overall public economic measure. In remuneration of Judges of the Provincial Court of Prince Edward Island, decided in 1997, the Supreme Court of Canada held that "as a general constitutional principle, the salaries of provincial Court Judges can be reduced, increased or frozen as part of an overall public economic measure which affect the salary of all or some persons who are remunerated from public funds or as part of a measure which is directed at provincial Court Judges as a class". (P 13 of the unofficial Report). However, the Supreme Court of Canada cautioned that "to avoid the possibility of, or the appearance of political interference through economic manipulation, a body such as a commission, must be interposed between the judiciary and the other branches of Government. The constitutional function of this body would be to duplicities the process of determining changes to or freezes in judicial remuneration. This objective would be achieved by setting that body the specific task of issuing a report on the salaries and benefits of judges to the executive and the legislature, "(p 14 of the unofficial Report). The report will not be binding but will not be set aside lightly. A measure directed at judges alone may require a somewhat fuller explanation. The Supreme Court of Canada further cautioned that under no circumstances is it permissible for the judiciary not only collectively through representative organisations but also as individuals to engage in negotiations over remuneration with the executive or representatives of the legislature. Any such negotiation would be fundamentally at odds with judicial independence. That does not preclude the Chief Justice or Judge or bodies representing Judges, however, from expressing concerns or making representations to Governments regarding judicial remuneration. Any reduction to judicial remuneration cannot take those salaries below a basic minimum level of remuneration which is required for the office of a Judge. Public confidence in the independence of the judiciary would be undermined if Judges were paid at such a low rate that they could be perceived as susceptible to political or other pressure or inducement through economic manipulation. The Supreme Court of Canada directed that this intermediary body between the judiciary and the other branches of the Government must convene if a fixed period of time has elapsed since its last report in order to consider the adequacy of Judges salary in the light of cost of living and other relevant factors. The Supreme Court of Canada declared the salary reduction as unconstitutional since it was made by the legislature without recourse to an independent, objective and effective process for determining judicial remuneration.

67. Will there be a different condition of independence of the subordinate judiciary in Bangladesh? Definitely not especially when the subordinate judiciary in Bangladesh and Canada stand more or less on the same constitutional footing. These conditions of judicial independence will be reflected while making rules under Article 115, enacting laws or making rules under Article 133 or enacting laws or making Orders under Article 136.

68. We may now come to consider the implications of sub-paragraph (6) of paragraph 6 of the Fourth Schedule to the Constitution. Neither the Government of India Act of 1935 nor the 1956 or 1962 Constitutions of Pakistan contained any implied or express provision for independence of the subordinate judiciary. In British India the same members of the Indian Civil Service came to occupy both civil administrative posts and the higher or subordinate judicial posts. This practice was discontinued in India after the creation of Indian Administrative Service, but it was fully operative in the then Pakistan before 16 December, 1971

so much so that even in the sixties members of the Civil Service of Pakistan were appointed as Additional District and Sessions Judges. One of them rose to be the Chief Justice and later President of Bangladesh. The Administrative Civil Service and the Judicial Service were all mixed up but the Constitution of Bangladesh in no uncertain terms intended that judicial service shall not be regulated in the manner in which they were regulated immediately before the commencement of the Constitution. Special provisions were media relating to subordinate courts in Chapter II of Part VI and the said sub-paragraph (6) clearly intended that pre-constitutional arrangements will be a purely temporary and transitional arrangement and that the provisions of Chapter II of Part VI shall be implemented as soon as practicable," and shall not be kept as mere ornamentations in the Constitution. It was intended that the appointment of persons to offices in the judicial service or as magistrates exercising judicial functions or the control and discipline of such persons shall be regulated in the manner as those were regulated before the Constitution came into force then those matters would have been placed in Part IX of the Constitution. The Constitution therefore clearly intended that the rules of recruitment and appointments of persons to such offices and the control and discipline of them shall be regulated in a manner different from other services governed by Part IX of the Constitution. Over and above Article 116A confers on such persons an independence in the exercise of their judicial functions which was not there in the earlier constitutions governing the field. The provisions of Chapter II Part V of the Constitution put the members of the judicial service as a class apart from the executive and administrative civil services of the Republic. Articles 133 and 136 of the Constitution are applicable to them, but they are to be treated as a class apart from other services of the Republic as a distinct entity, never to be treated alike or merged or amalgamated with any other service, except with a service of allied nature.

69. The dispute regarding pay emanates from have been notified separately as a class apart from the grades, pay and allowances of the members of the judicial service with those of the executive and administrative civil service of the Republic Section 5 of the Act conferred n the Government the power to prescribe unified grade and scale of pay and the members of the judicial service were also included in this exercise. The result has been that. in exercise of the powers conferred by section 5 of the Act the Government in the Ministry of Finance (Implementation Division) passed successive orders called Services (Grades, Pay and Allowances) Order from time to time and fixed and re fixed the grades and scales of pay of the members of the judicial service under the heading "Justice Branch", Members of the judicial service found to their dismay that they were considered to be holding "posts of the Ministry of Law and Parliamentary Affairs" By order dated 8-1-94 they were given an enhanced pay scale under section 5 of the Act in view of the special and separate nature of their work but in view of continued representations from other Cadre and non-Cadre services the Government postponed the implementation of the order dated 8 1-94 by an order dated 28-2-94. In the meantime, however, the increased pay scale had already been given effect to and the members of the judicial service were already drawing the enhanced salary. Finally, by order dated 2-11-95 the Government changed the scale of pay of BCS (Judicial) officers after considering a report of a Committee which investigated into the competitive claims of other administrative service cadres. 70. The High Court Division found discrimination in the impugned order dated 2 11-95 and set in at naught on some other grounds as well. We do not subscribe to those reasonings. The basic constitutional objection to this kind of treatment of judicial service in respect of their grades, pay and allowances is, that they have been treated as if they are one of the many executive and administrative civil service cadres of the Republic which they are not. Their pay and allowances ought to have been investigated separately by a separate judicial pay commission as an essential prerequisite of their independence and their pay and allowance notified separately as a class apart from the executive and administrative civil services of the Republic. Chapter II and Part VI of the Constitution was in the nature of the clarion call upon the executive branch of the Government to change their mind-set and to come to regard the judicial service as a separate class and entity within the service of the Republic. The executive Government and the Parliament failed to implement Chapter II of Part VI even though the Parliament passed the Act as early as in July, 1975 and thereby failed to implement the constitutional mandate. The colonial tradition and the judicial services continued to inhibit the mind of the Parliament and the Executive and the pay and allowance of the judicial service continued to be a subject matter of repeated interference, manipulation and jealousy among the executive and administrative services of the Republic which wields the real power of determining their pay and allowances. We strike down the impugned orders dated 24-2-94 and 2-11 -95 not on the reasoning furnished by the High Court Division, but on the ground that the

fixation of grades and scales of pay of the subordinate judiciary was unconstitutional since it was made by a legislative act and governmental order without recourse to an independent, objective and effective process for determining judicial remuneration. We therefore propose to direct that a separate judicial pay commission be established to review the pay, allowances and other privileges of the members of the judicial service and the review shall take place at stated intervals taking into account the increase in the cost of living and the pay, allowances and privileges that are commensurate with the independence of the subordinate judiciary. Until then, the status quo ante as on 8-1-94 will remain and if pay increases are effected in respect of others the judicial service shall also get an increase commensurate with their special status and present pay.

71. The learned Attorney General has argued that the High Court Division was wrong in holding that judicial officers need not approach the administrative tribunal for relief. He submits that the High Court Division has taken a wrong view of Articles 109 and 117 of the Constitution.

72. The administrative tribunals are sanctioned by the Constitution and in our view, the independence of the subordinate judiciary will in no way be compromised if the members of the judicial service are to seek relief before the administrative tribunal in respect of matters relating to or arising out of their terms and conditions of service, including the matters provided for in Part IX and in respect of the award of penalties or punishments meted out to them. We therefore do not uphold this part of the direction of the High Court Division.

73. The learned Attorney-General has argued that the judiciary cannot direct the Parliament to adopt legislative measures or direct the President to frame rules under the proviso to Articles 133 of the Constitution and he has rightly relied upon certain decisions of this Court in support of his contention. Although we shall depart in some ways from the direction given by the High Court Division, we think that in the present case there is a constitutional deviation and constitutional arrangements have been interfered with and altered both by the Parliament by enacting the Act and by the Government by issuing various Orders in respect of the judicial service. For long 28 years after liberation sub-paragraph (6) of paragraph 6 of the Fourth Schedule to the Constitution remains unimplemented. When Parliament and the executive, instead of implementing the provisions of Chapter II of Part VI follow a different course not sanctioned by the Constitution, the higher judiciary is within its jurisdiction to bring back the Parliament and the executive from constitutional derailment and give necessary directions to follow the constitutional course. This exercise was made by this Court in the case of Kudrat-e-Elahi Panir vs. Bangladesh, 44 DLR (AD) 319. We do not see why the High Court Division or this Court cannot repeat that exercise when a constitutional deviation is detected and when there is a constitutional mandate to implement certain provisions of the Constitution. The Supreme Court of Pakistan too, consistent with the mandate contained in Article 175 of the present Constitution of Pakistan, to secure the separation of the judiciary from the executive, issued directions in the nature of adoption of legislative and executive measures in the case of Government of Sindh vs. Sharaf Faridi PLD 1994 (SC) 105.

74. The High Court Division held that for separation of the subordinate judiciary from the executive no further constitutional amendment is necessary. Mr. Amir Ul-Islam has also emphasised that it is already there in the Constitution and the Fundamental Principles of State Policy in Article 22 merely says that “the State shall ensure the separation of the judiciary from the executive organs of the State”. i.e., the State shall only ensure what is there already in the Constitution. If that is so, Chapter II of Part VI should have been a full fledged and complete alternative to Part IX and the Executive should have no role in it which we have found not to be so. Executive magistrates and Judicial magistrates have not been separated. They and the judicial officers have not been brought under the sole control and rule-making authority of the Supreme Court. If the Parliament wishes, it can extend the frontiers of separation of judiciary from the executive organs of the state by a constitutional amendment the door to which should not be foreclosed by holding that no amendment is necessary. We have identified and delineated the extent of separation that already exists and we would rather invite the parliament to bring a constitutional amendment to make the separation further and complete.

75. We passed a short order on 2-12-99 on the conclusion of the hearing on 30-11-99 in the following terms:

“The appeal is partly allowed without any order as to cost. The direction of the High Court Division with regard to payment of salary and other benefits will continue. Judgment containing directions, orders, observations and guidelines follows”.

76. The above are the observations, guidelines, elaborations and acceptance or rejection of some parts of the impugned judgment now we come to the operative part of our judgment reflecting the summary of our conclusions-

1) It is declared that the judicial service is a service of the Republic within the meaning of Article 152(1) of the Constitution, but it is a functionally and structurally distinct and separate service from the civil executive and administrative services of the Republic with which the judicial service cannot be placed on par on any account and that it cannot be amalgamated, abolished, replaced, mixed up and tied together with the civil executive and administrative services.

2) It is declared that the word "appointments" in Article 115 means that it is the President who under Article 115 can create and establish a judicial service and also a magistracy exercising judicial functions, make recruitment rules and all pre appointment rules in that behalf, make rules regulating their suspension and dismissal but Article 115 does not contain any rule-making authority with regard to other terms and Conditions of service and that Article 133 and Article 136 of the constitution and the Services (Reorganisation and conditions) Act, 1975 have no application to the above matters in respect of the judicial service and magistrates exercising judicial functions.

3) It is declared that the creation of BCS (Judicial) Cadre along with other BCS executive and administrative cadres by Bangladesh Civil Service (Reorganisation) Order 1980 with amendment of 1986 is ultra vires the Constitution, It is also declared that Bangladesh Civil Service Recruitment Rules, 1981 are applicable to the judicial service.

4) The appellant and the other respondents to the writ petition are defected that necessary steps be taken forthwith for the president to make Rules under Article 115 to implement its provisions which is a constitutional mandate and not a mere enabling power. It is directed that the nomenclature of the judicial service shall follow the language of the Constitution and shall be designated as the Judicial Service of Bangladesh or Bangladesh Judicial Service. They are further directed that either by legislation on by Framing Rules under Article 115 or by executive order having the force of Rules a Judicial Services Commission be established forthwith with majority of members from the Senior Judiciary of the Supreme Court and the subordinate courts for recruitment to the Judicial service on merit with the objective of achieving equality between men and women in the recruitment.

5) It is directed that under Article 133 law or rules or executive orders having the force of Rules relating to posting promotion, grant of leave, discipline (except suspension and removal), pay, allowances, pension (as a matter of right not favour) and other terms and conditions of service, consistent with Articles 116 and 1 16A as interpreted by us, be enacted or framed or made separately for the judicial service and magistrates exercising judicial functions keeping in view the constitutional status of the said service.

6) The impugned orders in the writ petition dated 28-2-94 and 2-11-95 are declared to be ultra vires the Constitution for the reasons to the judgment. The appellant and the other respondents to the writ petition are directed to establish a separate Judicial pay Commission forthwith as a part of the Rules to be framed under Article 115 to review the pay, allowances and other privileges of the judicial service which shall convene at stated intervals to keep the process of review a continued one. The pay etc of the judicial service shall follow the recommendations of the Commission.

7) It is declared that in exercising control and discipline of persons employer in the judicial service and magistrates exercising judicial functions under Article 116 the views and opinion of the Supreme Court shall have primacy over those of the Executive.

8) The essential conditions of judicial independence in Article 116A, elaborated in the judgment, namely (1) security of tenure, (2) security of salary and other benefits and pension and (3) institution independence from the parliament and the Executive shall be secured in the law or rules made under Article 133 or in the executive orders having .the force of Rules.

9) It is declared that the executive Government shall not require the Supreme Court of Bangladesh as to seek their approval to incur any expenditure on any item from the funds allocated to the Supreme Court in the annual budgets, provided the expenditure incurred falls within the limit of the sanctioned budgets as more fully explained in the body of the judgment Necessary administrative instructions and financial delegations to

ensure compliance with this direction shall be issued by the Government to all concerned including the appellant and other respondents to the writ petition effective by 31-5-2000.

10) It is declared that the members of the judicial service are within the jurisdiction of the administrative tribunal. The declaration of the High Court Division to the opposite effect is set aside

11) The declaration by the High Court Division that for separation of the subordinate judiciary from the executive no further constitutional amendment id necessary is set aside. It the parliament so wishes it can amend the constitution to make the separation more meaningful, pronounced, effective and complete.

12) It is declared that until the Judicial pay Commission gives its first recommendation the salary of Judges in the judicial service will continue to be governed by status quo ants as on 8-1-94 vide paragraph 3 of the order of the same date and also by the further directions of the High Court Division in respect of Assistant Judges and Senior Assistant Judges. If pay increases are effected in respect of other services, of the Republic before the Judicial pay Commission gives its first recommendation the members of the judicial service will get increases in pay etc commensurate with their special status in the Constitution and in conformity with the pay etc, that they are presently receiving.

The appeal is partly allowed in the above forms without any Order as to cost.

Latifur Rahman J.-

In this momentous judgment I want to share my thoughts with my Lord, the Chief Justice as this case involves a vital question of separation of judiciary from the executive organs of the state and independence of judicial service and steps have been taken to separate the judiciary from the executive organs of the State as distinct and separate from executive and other Cadre services of the State as reflected in the Constitution of the People's Republic of Bangladesh. I agree with the reasoning of the main judgment.

78. Article 22 of the Constitution provides that the State shall ensure the separation of Judiciary from the executive organs of the State. Though 29 years have elapsed since making of the Constitution and in coming into force on effective steps have been taken to separate the judiciary from the executive organs of the State. Article 150 of our Constitution speaks of transitional and temporary provision set out in the 4th schedule which shall have effected withstanding any other provisions of the Constitution. sub paragraph 6 of paragraph 6 of transitional and temporary provision of the 4th schedule relating to judiciary, contemplates that provisions of Chapter II of part VI (which relate to subordinate courts) shall be implemented as soon as practicable, and until such implementation the matters provided for in that Chapter shall (subject to any other provision made by law) be regulated in the manner in which they were regulated immediately before the commencement of this Constitution. Thus it appears that it was a constitutional mandate to comply with the provision of Chapter II of part VI as soon as practicable. But the mandate remained unimplemented for such a long span of time. The separation of the judiciary is essential to keep up the total independence of all subordinate Courts from the lowest rung to the highest. It is needless to say that the judiciary must be independent. This independence of Judiciary has been loudly pronounces and made the Hillman of our Constitution. In all Constitutions, which adopt principles of trichotomy of power, the division of power amongst the legislative, executive and judicial branches of the government is taken for, granted. And it is absolutely necessary that it should be so sub article 4 of Article 94 reads as follows:

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

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

There is no ambiguity whatsoever as to the independence of the judiciary as a whole in Bangladesh as reflected in our Constitution. As water of fact, all Judges are supposed to be independent. An independent judiciary is the conscience - keeper of the State. As we will unfold the facts of the case we will gradually examine the constitutional mandate for an independent judiciary in Bangladesh.

79. The facts leading to the writ petition have found graphic description in the judgment of the learned Chief Justice.

80. The main grievance of the writ petitioner-respondents is that Bangladesh Civil service (Re organization) order, 1980 providing Bangladesh Civil Service (Judicial) in paragraph 2(x) is ultra vires the constitution. It may be mentioned here that Services (Re-organization and condition) Act, 1975 (Act XXXI of 1975) authorised the Government to create new services or amalgamate or unify the existing services. As a result of this Act, the grade, pay, allowances of the members of the Judicial service were finally fixed by Annexure-E dated 8-1- 94 while refixing pay and allowances of the members of the judicial service it was taken into consideration that nature and kind of the work of the members of the Judicial Service is totally different and separate from other services. By Annexure-E the pay scale of the judicial officers was finally fixed. But ultimately due to the pressure of the members of the Bangladesh Civil service Cadre, by Annexure-F dated 28-2-94, -Annexure-E was suspended and by further order dated 2-11-95 (Annexure-F1) the Scale of pay of judicial was refixed. This really gave rise to the cause of action of the writ petitioners.

81. The fundamental question that is to be considered first, in this case is, whether judicial service has a separate entity within the scheme of the Constitution from other Cadre services. To understand the meaning and connotation of judicial service in the context of the Constitution of Bangladesh it will be necessary to look into the interpretation as given in Article 152(1) of the Constitution. As per article 152(1) of the Constitution judicial service means a service comprising persons holding judicial posts not being posts superior to that of District Judge. Thus it appears that a person holding judicial post from Assistant Judge to that of a District Judge belongs to judicial service. Chapter II of part VI of the Constitution deals with subordinate courts. Articles 115, 116 and 1 16A speak of persons employed in judicial service and magistrates exercising judicial functions. Thus, it is clear that the members of the judicial service and the magistrates exercising judicial functions exercise judicial power of the State as distinct and separate from executive power and other Cadre services of the State. Further, Article 116A also contemplates that the members of the judicial service and magistrate exercising judicial functions shall be independent in the exercise of their judicial functions. It is to be borne in mind that judicial function is distinct from other functions as visualized in the Constitution itself.

82. The primary question now is whether the inclusion of the members of the judicial service and the magistrates exercising judicial function within Bangladesh Civil service, as encadred vide paragraph 2(x) of the Act XXXIII of 1975 is ultra vires the Constitution. To understand the true import of judicial service it is worthwhile to look into the import of Article 152(1) of the Constitution. “The service of the Republic” means any service, post or office whether in a civil or military capacity, on respect of the Government of Bangladesh, and any other service declared by law to be a service of the Republic. In the same article, public officer has been defiance which means “public officer means a person holding or acting in any office of emolument in the service of the Republic.” In broad concept the service of the Republic means all services of Bangladesh. It is a generic term and person who is getting emolument because of his service in the Republic is a public officer. In that sense, the member of the judicial service and the magistrate exercising judicial functions are no doubt public officers in the generic term. But within the scheme of the Constitution of the people’s Republic of Bangladesh the nature of judicial service has been contemplated as distinct and separate from other works performed by other officers of other Cadre services. The judicial service is, of course, included in the definition of service of the Republic but they have been separately treated within the scheme of the Constitution as reflected in Articles 115, 116, 116A and 152(1) of the Constitution. The persons employed in the defence service of the Republic are also in the service of the Re but their nature of work is separate and that is why they have been separately treated in different places of the Constitution. The emphasis of the members of the judicial service and Magistrate exercising judicial functions have been clearly spelt out in Chapter II of part VI of the Constitution which speaks of subordinate courts. Thus, members of the judicial service and the magistrates exercising judicial functions are in fact distinct from other services and in that view of the matter, it is totally wrong to categorize members of the judicial service and the magistrates exercising judicial functions as members of the Bangladesh Civil services as enumerated in paragraph 2(x) of the Bangladesh Civil service (Reorganization) order, 1980. Thus, inclusion of the judicial service under Bangladesh Civil service (Reorganization) Order, 1980 dated 1-9-80 as Bangladesh Civil judicial is ultra vires the Constitution.

83. The judicial service and the magistrates exercising judicial functions having been separately contemplated in Articles 125, 116 and 116A of the Constitution, there members of judicial service and magistrates exercising judicial functions cannot be legally brought

within the ambit of Act XXXII of 1975 in view of the nature of the work they exercise in the Republic i.e. the judicial power of the State. In the Constitutional scheme, the judiciary, legislative and executive branches are separate organs of the State and judiciary has been separately treated in part VI of our Constitution where in Chapter I speaks of the supreme Court, Chapter II Subordinate Courts and Chapter III Administrative Tribunals. The Constitution having proclaimed separate judicial service and having also proclaimed independence of all judicial officers in the exercise of their judicial functions they cannot be tagged with other services which will militate the fundamental concept of separation of power between three organs of the State and independence of judiciary as contemplated in Article 116A of the Constitution. Thus, I fully agree that the final order of the Division Bench of the High Court Division so far it relates to encadrement of the Member of the Bangladesh Civil service in paragraph 2(x) of Bangladesh Civil service (Reorganization) Order, 1980 as ultra vires the Constitution.

84. Apart from this, Article 109 speaks of the superintendence and Control over all courts and tribunals by the High Court Division. The learned Attorney General candidly argued that Article 109 of the Constitution speaks of supervisory power as given to the High Court Division over the subordinate Courts, but this has got nothing to do with the power of posting, promotion and grant of leave and discipline of persons in the judicial service and magistrates exercising judicial functions. The learned Attorney General submitted that as per Article 116 of the Constitution the control and discipline of the members of judicial service and magistrates exercising judicial function really vest in the president and the same shall be exercised by him in consultation with the supreme Court. Thus he submits that as per Article 116 of the Constitution in case of posting, promotion and grant of leave and all disciplinary matters in respect of the persons enumerated in article 116 are to be exercised by the president in consultation with the Supreme Court. Under Article 116 of the Constitution the power though vests in the president but the constitutional mandate of consultation on makes it imperative that the opinion of the Supreme Court shall take precedence over the decision of the president. The learned Attorney General rightly pointed out that Article 116 speaks of vesting of control and discipline in the president of persons in the judicial service and magistrates exercising judicial functions that too in consultation with the Supreme Court to safeguard independence of judiciary. This provision of the constitution clearly reflects the independence of the judiciary. It will be necessary here to consider Articles 115. Article 115 reads as follows:

“Appointments of persons to the office in the judicial service or as magistrates exercising judicial functions shall be made by the president in accordance with the rules made by him in that behalf”.

As a matter of fact, no rule or law has been framed by the President till today in respect of the appointment of persons in the office of the judicial service or as magistrates exercising judicial function. On the president of the Republic a solemn duty is cast to make Rule regarding the appointments of persons in the judicial service and magistrates exercising judicial functions. The power given under Article 115 is built in power of the president under the Constitution to frame rules. This is the plenary power of the president to frame rules and this take immediate effect on the rules being made by the president. This legislative field has been exclusively given to the president by the Constitution. This rule making power of the president contemplates the manner, method, qualifications and other ancillary matters required to be covered by the rules before appointment of members of judicial service and magistrates exercising judicial functions. The President will also make separate rules regarding suspension and dismissal and other disciplinary procedures under Article 115. It is for the rule making authority, namely, the president to decide the manner and method of appointment of members of judicial service and magistrates exercising judicial function. In this regard the President is the supreme legislative authority to decide the qualifications, manner and method of such appointments. The president by the Rule-making authority can make Rules for appointments of persons to the offices in the judicial service or as magistrates exercising judicial functions, with separate service conditions. In that view of the matter, I hold that the High Court Division correctly held that under Article 115 of the Constitution separate Rules may be framed by the president, Mr. Mahmudul Islam, learned Attorney- General very candidly submitted that Rules should be made by the president under Article 115 of the Constitution for the members of the judicial service and for magistrates exercising judicial function.

85. The learned Judges of the High Court Division also held that part IX of the Constitution which deals with services of Bangladesh will not be applicable in the case of subordinate judiciary, namely, members of judicial service and magistrates exercising judicial functions. It may be stated here that part VI contemplates

judiciary as a whole as an organ of the State and part IX speaks of Services of Bangladesh. It cannot be denied that the members of the judicial service and magistrates exercising judicial functions are broadly in the service of Bangladesh. Chapter I of part IV speaks of "The Services of Bangladesh", Members of Judicial service and Magistrates exercising judicial functions of the state are in the service of Bangladesh and as such their terms and conditions of service can be separately made under Article 133 of the Constitution. It is to be borne in mind that the essential safeguard of independence of judiciary as contained in part II of Chapter VI of the Constitution should be maintained by the law making authority as contemplated within the scheme of our Constitution. Article 135 of the Constitution speaks of Constitution protection of all persons holding civil posts in the service of the Republic. The members of judicial service and magistrates exercising judicial functions are in the service of the Republic holding civil posts and as such they cannot be deprived of this constitutional protection. Article 135 of the Constitution deals with dismissal removal or reduction in rank of a person who holds a civil post. The Members of judicial service and magistrates exercising judicial functions are no doubt holding civil posts and public officers as they get emolument and render service to the Republic. Learned Attorney General candidly submitted that harmonious interpretation must be given to all relevant provisions of the constitution and in elaborating his argument be submitted that for framing of Rules of recruitment of judicial officers and magistrates exercising judicial functions the president is to make rule under Article 115 which is distinctly separate in character from Article 133. We also find that procedure as enumerated in Article 135 of part IX is in no way in conflict with Articles 115 and 116 and as such the learned Judges of the High Court Division erred in law in holding that Chapter IX shall not apply incase of members of judicial service and magistrates exercising judicial service. Further, I also find that members of judicial service and magistrates exercising judicial functions of the State cannot be deprived of the benefit of Fundamental. Rights as contemplated in articles 27, 29 and 135 of the Constitution which speaks of a procedural safeguard and the benefit of a second show cause notice. In that view of the matter, I hold that the judicial officers and magistrates exercising judicial functions are amenable to the benefits as provided in Article 135 and they are subject to the jurisdiction of the Administrative Tribunal. As a matter of fact, members of the judicial service and judicial magistrates are amenable to the jurisdiction of the Administrative Tribunal which is a creation of the Constitution.

86. Article 136 of part IX speaks of reorganization of service of the Republic by creation, amalgamation or unification of services and such law may vary or revoke any condition of derive of a person employed in the service of the Republic. This concept of reorganization of service is available to all other civil posts including executive service of Republic other than members of the judicial service and magistrates exercising judicial functions as they have been treated separately under articles 115, 116 and 116A of the Constitution. Article 136 refers to all general services of civil posts. Judicial service has been separately treated in the relevant constitutional provisions and as such conditions of service is to be separately framed under Article 133 and it cannot be tagged as Bangladesh Civil Service (Judicial) under paragraph 2(x) of Act XXII of 1975.

87. In view of the nature of work that the judicial officers are performing the benefit that has been given by Annexure-E dated 8-1-94 should continue in respect of judicial officers till new rules are made under Article 115 of the Constitution by the president.

88. The learned Judges of the High Court Division were absolutely wrong in holding that in order to give effect, carry out and implement fully the separation of the judiciary from the executive organs of the state no constitutional amendment is necessary is wholly wrong and untenable. Article 22 contemplates separation of judiciary from the other organs of the State and it is for the legislature to decide on this issue. Further, if we say that no constitutional amendment is necessary then the existence of Article 22 will be nugatory which cannot be the intentions of the framers of the Constitution. Further, if the legislature in its wisdom think of granting meaningful and effective separation of judiciary from the executive organs of the state, the Constitutional Court cannot shut out the legislature. Hence this observation of the High I Court Division was uncalled for within the scope of the writ petition.

89. The written Constitution of Bangladesh has placed the Supreme Court in the place of the guardian of the Constitution itself. It will not countenance to any inroad upon the Constitution. A reference to Articles 94, 95,96 and 147 of the Constitution clearly reveal the independent character of the Supreme Court. Chapter-II of part- VI of the Constitution allots a separate and distinct existence of judicial service and magistrates exercising judicial function. Under Article 109 the High Court

Division of the Supreme Court has been vested with the powers of superintendence and control over all courts tribunals subordinate to it, That being so, it cannot be questioned that the supreme Court has been envisaged in the Constitution as an independent institution. For its institutional independence I, therefore agree that the Supreme Court ought to get financial independence for effective and meaningful discharge of its constitutional functions.

For the above reasons, I concur with the judgment.

Ed.