In the Supreme Court of Bangladesh

High Court Division
(Special Original Jurisdiction)

Writ Petition No.2427/2011.

An application under Article 102 of the Constitution of the People's Republic of Bangladesh.

-And-

In the matter of
Public Interest Litigation (PIL)

And

In the matter of:
Advocate Manzill Murshid, Supreme Court Bar Association Building, Hall No. 2, P.S. Shahbag, Dhaka, Bangladesh And others

..... Petitioners.

Versus

Bangladesh, represented by The Cabinet Secretary, Cabinet Division, Bangladesh Secretariat, P.S. Shahbag, District: Dhaka and others.

..... Respondents.

Mr. Manzill Murshid, Advocate

..... Petitioners.

Mr. A. B. M. Altaf Hossain, D.A.G

..... Respondents

Heard and Judgment on: 15.6.2011.

Present:

Mr. Justice A.H.M. Shamsuddin Choudhury
And
Mr. Justice Gobinda Chandra Tagore.

A.H.M. Shamsuddin Choudhury, J:

The Rule was issued on following terms;

"Let a Rule Nisi calling upon the respondents to show cause as to why a direction should not be given upon the respondents to implement the recommendation of the Parliamentary Sub-Committee of Law, Justice and

Parliamentary Affairs about the Remuneration and Privileges of the Hon'ble Judges of the Supreme Court of Bangladesh (as of Annexure-D) and/or why such other or further order or orders as this Court may deem fit and proper, should not be passed."

The petitioners, stating that they are the president and secretary respectively of the organization named "Human Rights And Peace For Bangladesh"(HRPB), which body is engaged in promoting and defending human rights, working to establish rule of law and supporting the victims of human rights violations, felt dismayed at the deplorable state of the remuneration and privilege of the Judges of the Supreme Court of Bangladesh, which, as they reckon, are not enough and not commensurate with their status and duties; The petitioners apprehends that with such an ignominious scenario in the realm of the Supreme Court Judges' salary, independence of the Judiciary may turn out to be a distant dream.

The petitioners being conscious citizens and respectable members of the bar, are seeking direction upon the respondents requiring the latter to implement the recommendation, the Parliamentary Sub Committee on Law, Justice and Parliamentary Affairs had taken on the Remuneration and Privileges of the Hon'ble Judges of the Supreme Court of Bangladesh. The petitioners engage Article 102 of the Constitution to posit it as a public interest litigation.

The President of the People's Republic of Bangladesh has promulgated an Ordinance titled "The Supreme Court Judges (Remuneration and Privilege) Ordinance, 1978." Thereafter, time and again it has been subject to amendment in order to increase the Remuneration and Privilege of

the Hon'ble Judges of the Supreme Court of Bangladesh to keep the same responsive to the inflation and prices hiking.

The post of a Judge of the Supreme Court of Bangladesh is a Constitutional one. The remuneration and other privileges of the Hon'ble Judges of the Supreme Court of Bangladesh are not fixed and has never been treated in comparison with any other government functionary. Remuneration and other privileges of the Hon'ble Judges of the Supreme Court of India, Pakistan and Srilanka are much higher than that of the Judges of the Supreme Court of Bangladesh. Besides, considering the prevailing cost of living, the remuneration and other privileges of the Hon'ble Judges of the Supreme Court of Bangladesh stands in a state of shamble of **trepidationary** proportion. Demand has been raised by well meaning quarters for increasing the remuneration and other privilege of the Hon'ble Judges of the Supreme Court of Bangladesh. To consider the propriety of that demand, a committee, headed by Mr. Justice Mohammad Fazlul Karim, was formed to recommend acceptable remuneration and commensurate privileges of the Judges of the Supreme Court of Bangladesh.

On 31.5.2009 Mr. Justice Mohammad Fazlul Karim submitted his dossier to the Hon'ble Chief Justice of Bangladesh. His Lordships, along with other recommendations on privilege and monthly remuneration of the Supreme Court Judges, came up with the recommendation that the Hon'ble Chief Justice and other Judges of both the Divisions of the Supreme Court should be paid in following orders;

A. The Chief Justice:-

a) Monthly Remuneration Tk. 1,00,000/=

b) Judicial Allowance Tk. 25,000/= P.M

c) Sumptuary Allowance Tk. 25, 000/= P.M

d) Domestic Aid Allowance Tk. 15,000/= P.M Tk. 1,65,000.00/=

B. Judges of Appellate Division:-

a) Monthly Remuneration- Tk.90,000/=

b) Judicial Allowance Tk.25,000/= P.M

c) Sumptuary Allowance Tk. 10,000/= P.M

d) Domestic Aid Allowance Tk.10,000/= Tk. 1,35,000.00/=

C. Judges of the High Court Division:-

a) Monthly Remuneration Tk.80,00/=

b) Judicial Allowance Tk. 25,000/= P.M

c) Sumptuary Allowance Tk. 7,500/= P.M

d) Domestic Aid Allowance-Tk. 7,500-= P.M

On 1.6.2009, the Registrar of the Supreme Court of Bangladesh addressed a letter to the Secretary, Ministry of Law, Justice and Parliamentary Affairs, annexing the report of the Committee on pay and privilege of the Judges of the Supreme Court of Bangladesh. The report was sent to the authorities with a view to have the remuneration and other privileges of the Judges of the Supreme Court of Bangladesh, increased. They were also urged to take steps as per the report.

On 4.6.2009 the Secretary Ministry of Law, Justice and Parliamentary Affairs, on principle, endorsed the proposed sums and transmitted the same to the Ministry of Finance for their consent. It was also mentioned in the summary that the increased remuneration and privileges of the Judges may be included by occasioning necessary amendment to the Supreme Court

Judges (Leave, Pension and Privilege) Ordinance 1982 and the Supreme Court Judges (Remuneration and Privilege) Ordinance 1978.

The matter was discussed in the 7th meeting of the Parliamentary Standing Committee, held on 7.5.2009, and a sub committee was formed, consisting five Parliament Members. The sub committee discussed the matter in their meeting, dated 11.6.2009, 9.12.2009 and 11.1.2010. Taking into account all the attendant, introspective and apposite circumstances, the Sub-Committee recommended that the remuneration of the Hon'ble Chief Justice be Tk. 1,00.000/=, those of the Judges of the Appellate Division be and the High Court Division be Tk. 90,000 and Tk. 80.000 respectively. They also recommended escalation in the privileges.

Notwithstanding the aforementioned recommendation of the Parliamentary Sub Committee, the Ministry of Finance, at the time of giving their consent, remained intransient as to the recommendation of the Sub-Committed and the report of the Committee on Pay and Privileges the Judges of the Supreme Court of Bangladesh led by Justice Mahammed Fazlul Karim, constituted for the purpose. Instead, on 14.2.2010, the Ministry of Finance gave their consent for paying the Hon'ble Chief Justice Tk. 56,000/=as remuneration, the Judges of the Appellate Division Tk. 53, 100/= and the Judges of the High Court Division Tk. 47, 000/-, being totally oblivious of the cited recommendation. Other privileges consented to by the said Ministry did not reflect the recommendation of the said Sub- Committee either.

On 24.7.2010, the respondents were asked to implement the recommendation of the Parliamentary Sub Committee, but in vain. So, it is understandable that the request would not been heeded to.

The petitioners further averred that a Senior Session Judge is drawing about Tk. 35,600/= a month in addition to which he receives 30% Judicial allowance at Tk. 10,680/= which bring his income to Tk. 46,280/- plus other allowances. District Judges posted in the Hill Tracts get an additional amount which enhance their income to taka. Tk. 49280/=. Hence, it is evident that the salary including judicial allowances of the District Judge is more than what the Hon'ble Judges of the Supreme Court of Bangladesh get. This is thoroughly irrational.

The duty and responsibility the Judges are tied with are very stringent and mind bogging indeed. Yet the respondents, in the instant event, have **flabbergastedly** forsook the duties and responsibilities they had been vested with and thereby had failed to take steps to implement the recommendation of the Parliamentary Sub-Committee.

None of the respondents filed any affidavit in opposition.

As the Rule matured for hearing, Mr. Manzill Murshed, representing the petitioner, projected the bleak and ineffable scenario that keeps the state of Supreme Court Judges' salary surrounded by mist.

Mr. Murshed was rather imbued to submit that given the nature of the functions the judges perform, the salary they receive can very aptly be described as impecunious. He went on to argue that people who hold the guardianship of the Constitution can, by no yardstick, be paid such miserable sums.

According to him the respondents' decision to ignore the Parliamentary Sub-Committees decision is simply unreasonable and devoid of the sense of proportionality.

Mr. A. B. M. Altaf Hussain, the learned Deputy Attorney General found no reason to resist the Rule.

The questions we are to address are whether or not the respondents acted unreasonably by obliterating the recommendations the Parliamentary Sub-Committee on law Justice and Parliamentary Affairs as well as the Committee consisting His Lordship Justice Fazlul Karim, put forward, and, if the first question is answered affirmatively, whether an order of Mandamus, requiring the respondents to give effect to the Parliamentary Sub-Committee's recommendation, ought to be issued.

Our Considered view is that to defoliate the maze that obscure the issues the petition has engendered, we are required to explore a number of areas that are pertinent. They orbit round the natures of the job the Supreme Court Judges perform, their responsibilities and, ofcourse, the impact of their functions on the nation.

Superior Court Judges in a democracy stand on a unique platform. Like some other constitutional functionaries, such as the Election Commissioners, and the like, they are neither political postulants, nor civil servants in the employment of the government. Jobs performed by the superior Judges are also diametrically at variance with those of the Ministers or the bureaucrats. Unlike the Ministers, Judges do not formulate government policies and unlike the bureaucrats, they do not implement such policies. Nature of the Jobs the superior Judges perform are best reflected in

the following passages, reproduced from the book, titled English Legal System "12th Edition, authored by Prof Garry Slapper & David Kelly; "Judges hold a position of central importance in relation to concept of Rule of Law. They are expected to deliver Judgment in completely impartial manner through a strict application of the law without following their personal preference or fear or favour ..... This desire for impartiality is reflected in the Constitutional position of the Judges. In line with Mostesquie's classic exposition of the separation of powers, the Judiciary occupy a situation apart from the legislative and executive arms of the State and operate independently of them". (Page 199).

Max Webber, an US political sociologist, in constructing what he envisaged as an ideal model of rational legal system, observed; "individuals exercising governmental authority must exercise it in accordance with universal rules and procedures; their discretion, unlike traditional or characteristic rulers, is very limited. Administration of Justice is a crucial, highly interconnected element of such a system. It is staffed by well-trained legal professionals chosen on the basis of merit. Justice is administered by a branch of the governmental system which is independent of the system's other branches. The internal procedures and customs are designed to procedures; decisions are thus deemed objective and universally applicable. The Jurisdiction of these legal system is clearly delineated. And what is perhaps most important of all is that the enacted rules for operating the system not only are universal and objective in substance, but are enacted by means of a process determined by legal or constitutional criteria." ("Judges and Justices" by Prof. Justin R Schmidhauser, page 4).

In describing the roles of the Judges, Justice Aharon Barak in his book, “The Judges IN A NEW DEMOCRACY” expressed; “The Law regulates relationship between the people. It reflects the values of society. The role of the Judge is to understand the purpose of law in society and to help the law achieve its purpose. But the law of a society is a living organism. It is based on a factual and social reality that is constantly changing. Sometimes the change is drastic and easily identifiable. Sometimes the change is minor and gradual, and can not be noticed without the proper distance and perspective. Law’s connection to this fluid reality implies that it too is always changing. Sometimes a change in the law precedes societal change and is even intended to stimulate it. In most cases, however, a change in the law is the result of a change is social reality..... Just as change in social reality is the law of life, responsiveness to change in social reality is the life of law. ..... The Judge has an important rule in the legislative project. The Judge interprets statutes. Statutes can not be applied unless they are interpreted. The Judge may give a statute a new meaning, a dynamic meaning, that seeks to bridge the gap between law and life’s changing reality without changing the statute itself. The statute remains as it was, but its meaning changes, because the court has given it a new meaning that suites the new social needs. The court fulfils its role as the Junior partner in the legislative project. It realise the Judicial role bringing the gap between law and life.” (Page 1, 4, 5).

As the Indian Supreme Court stressed, it is the constitutional device of Judicial review by which, the Superior Courts keep Rule of Law afloat, elaborating, “Since the state or the public authority act in exercise of their

executive and legislative power, they are amenable to Judicial review.....Judicial review of administrative action is, therefore, an essential part of the rule of law" (state of Bihar-v-Subhash Singh AIR 1997 S.C. 1390).

The work pattern and professional pre-occupation of Judges mostly remain beyond comprehension, not only of the general mass, but also of those at the helm of state affairs. Such obtrusive indifference propelled Chief Justice Harlan Fiske Stone to write to President Truman of the United States in following terms;

"Few are aware that neither my predecessor, nor 1, in more than twenty years since I have been a Justice of the Supreme Court, have been able to meet the daily demands upon us without working nights and holidays and Sunday. The administration duties of the Chief Justice have increased and many other duties have been imposed on him by acts of Congress which my predecessors were not called on to perform.....Unlike the functions of an executive officer, practically none of these can be delegated (13th February 1946: cited at page 125 of the book titled "Judges and Justices", supra).

To allay the obfuscation of those who fail to weigh Judges' function in true perspective, Justice william Brenan Jr. stated;

"The writing of opinion is not easy work. It always takes weeks, and sometimes, months. The most painstaking research and care go into the task. Research, ofcurse, concentrate on relevant legal materials-precedents particularly. But Supreme Court cases often require also some familiarity with other disciplines-history, economics, the social and other sciences-and

the authorities in these area are, too consulted" ("An Affair with Freedom Supra, page 336-338, also reproduced at page 192-193 of The book, "Judges and Justices", supra).

Justice Blackmum of the United States Supreme Court, on the work load one had to assume as a Judge of the Supreme Court, expressed; "I have never worked harder and more concentratedly than since I came to Washington Just five years ago. I thought I had labored to the limits of my ability in private pracitice, in my work for a decade as a member of the Section of Administration of the Mayo organisation, and as a Judge of the Court of Appeals. Here, however, the pressure is greater and more constant, and it relents little even during summer months. One, therefore, to a large extent relies on experience and an innate and, hopefully, developed proper judicial reaction. One had better be right! Good health is an absolute requisite. The normal extracurricular enjoyment of life become secondary, if it can be said that they exist at all. "(Page 185, Judges and Justices, supra).

Similar assertion on workload is detectable from Mostafa Kamal J's following observation; "Snatching some times away from my days' (and night's) Court work, I have prepared these lectures all alone in my study." (Kamini Kumar Dutta Memorial Law Lectures 1994: Bangladesh Constitution: Trends and Issues: Page VIII).

The widely nurtured view is that Judges are of necessity workaholic. Isolation and reclusiveness in Judicial function is yet another factor that makes them different.

Unlike functionaries in other organs of the state, Judges are not accountable to others, but to their conscience only. This aspect has been

astutely beamed by Justice Felix Frankfurter of the US Supreme Court, who wrote; “By the very nature of the functions of the Supreme Court, each member of it is subject only to its own sense of trusteeship of what are perhaps the most revered tradition in our national system “(The Administrative Side of Chief Justice Hughes” by Felix Frankfurter, published in Harvard Law Review 58 Nov. 1949 page 4).

It is reckoned that it is this sense of trusteeship that makes the Supreme Court, the keeper of the nation’s conscience.

It is, by no means, the work load or accountability to conscience alone that place the superior Judges on a **suigeneris** position: the overriding impact that their decisions entail are of great signifance in considering their position in the state. To glorify this aspect, Marjorie Fribourg in her book “The Supreme Court in American History” states; “Chief Justice Marshall, by his brilliant Management of the whole situation, had won his own fight for the Court and the Constitution. He had Majestically warned the members of the executive department that they must obey the law or be answerable to the Courts. He had explained to the legislature, in a manner no longer to be refuted, that the Court could override any unconstitutional act; and he had thereby, established the Court as the guardian of Constitutional law.” (Page-28). With a similar vocabulary Prof. Richard B Morris of the Ivy League University of Columbia had emphasised; “The Supreme Court is the Conscience of the Constitution. No more powerful voices in its defence can be raised in the land than these of the nine black robed Justices whose decisions affect the live of everyday American in ways that the founding

father never envisaged. (“The Supreme Court in American History”: by Marjorie Friboury, 1965: Foreword).

Chief Justice Marshall, who felt that the national power was exercised by the Supreme Court in the national interest as the Constitution intended, (Marbury-V-Madison 1803), insisted; “It is emphatically the province and duty of the Judicial department to say what the law is.”

Did Justice Frankfurter not say that the Constitutes is what the Judges say it is?

Badrul Haider Chowdhury J portrayed the Superior Courts’ power with meticulous precision through his following observation, “The superior court has always the power to decide its own jurisdiction and this exercise is nothing but the exercise of judicial power (Khandakar Ehteshamuddin Ahmed @ Iqbal-Bangladesh 33 DLR(AD) 154.

Majorie Friboury in her book, “The Supreme Court in American History”, supra, explicated the omnipotence of the US Supreme Court in following language; “Besides having this tremendous power, the Justices of the Supreme Court can side with an individual in his struggle for Justice against a department of the executive, for the constitutional interpretation made by the Justice are superior to either ordinary law or executive order. The Court was designed by the Founding Fathers to keep the States, the Congress and the President with the bounds of their stated powers in order to preserve the Constitution. They made the Constitution difficult to amend because it was there that they stated those broad principles with which they intended to protect the common citizen from tyranny by either the government or the majority of the people. They then left it up to the Court to

see that these principles of liberty and Justice for all were not violated. Thus the Supreme Court often becomes the communities conscience. As it neither controls government's purse nor its sword, it relies mostly on the force of its moral Judgment, its legal and traditional prestige and the educational impact of its words to compel obedience to its dictates." (Page X: Introduction).

Chief Justice Marshall stated that besides limiting the powers of the President and the legislature, the Constitution made the Judiciary an independent branch of the government and that if congress were to pass a tyrannical law, the Supreme Court Justices would declare it void and that there is no other body that can afford such protection (Marbury-V-Madison, Supra).

Chief Justice Warren Burger of the US Supreme Court expressed; "A denial of Constitutionally protected rights demands Judicial protection; our oath and our office requires no less of us." Baker-v-Carr (396 US 186:1962).

Judge Bertram Hornell of the New York State Supreme Court, expressed in his book, "Making Sense of the American Legal System, Law, Lawyers and Laymen"; "The individual power of a Judge is real. Legislators act in large group to adopt the resolutions that provide laws. Exceptionally, among his own staff, or within an unusual delegation; no single legislator has the personal power to order anything done. Even mayors and governors do not wield the awesome personal powers of the man in the robe "(Page 249).

He was a quite blunt, but frank, in reminding his audience, when he sought election to the New York Court of Appeal, that the importance of the function of a judge overrides those of others, in following terms;

"Do you realise that of all the candidates in this room, for governor, the United States Senate, Attorney General, Comptroller and all legislators, only one here [that was me, then a Supreme Court Justice] has the power by a simple stroke of his pen or sound of his voice, to have you put to death, to cage you up like an animal for the rest of your life, to take your child away from you, to pay out enough money to bankrupt you, to foreclose your home?" ("Page 250, supra).

Although his deliberation sounded a bit supercilious, none doubted, the reality behind what he uttered, and, as he tells his readers, the congregation fell silent and he had their ears.

The most illustrious description on the overriding impact of superior Court's Jurisdiction and decisions has however, been provided by the Indian Supreme Court in Special Reference No. 1 of 1964, (AIR 1965 S.C. 747) by proclaiming that the Superior Courts are the ultimate authority to decide on the validity of a warrant issued by the Parliament to commit a person for alleged contempt of Parliament and that it is competent of the High Court to issue writ of habeas corpus, and to pass interim orders restraining the speaker of the Legislative Assembly and others from implementing direction of the Legislative Assembly.

The Indian Supreme Court came up with the following observations;

(1) that it was competent for the Division Bench of the High Court to entertain and deal with petition of K challenging the legality of the sentence of

imprisonment imposed upon him by the Legislative Assembly for its contempt and for infringement of its privileges and to pass orders releasing K on bail pending the disposal of his said petition; (Paras 143, 197)

(2) that K by causing the petition to be presented on his behalf to the High Court, the Advocate by presenting the said petition, and the two Judges of the Division Bench by entertaining and dealing with the said petition and ordering the release of K on bail pending disposal of the said petition, did not commit contempt of the Legislative Assembly; (Paras 143, 200)

(3) that it was not competent for the Legislative Assembly to direct the production of the said two Judges and the Advocate before it in custody or to call for their explanation for its contempt; (Paras 143, 2001)

(4) that it was competent for the Full Bench of the High Court to entertain and deal with the petitions of the said two Judges and the Advocate, and to pass interim orders restraining the Speaker of the Legislative Assembly and others from implementing the aforesaid direction of the said Legislative Assembly, and (Paras 143, 203)

(5) that in a case arising out of a contempt alleged to have been committed by a citizen who is not a member of the

> House of Legislature outside the four-walls of the legislative chamber, a Judge of a High Court who entertains or deals with a petition challenging any order or decision of a Legislature imposing any penalty on the petitioner or issuing any process against the petitioner for its contempt, or for infringement of its privileges and immunities, or who passes any order on such petition, does not commit contempt of the said Legislature; and the said Legislature is not competent to take proceedings against such a Judge in the exercise and enforcement of its powers, privileges and immunities. (Paras 143, 204).

In exposing the general ignorance about the nature of superior Judges' works, Justice Michael Kirkby of Australia was quite unequivocal in lamenting; "Their (Judges) values and occasional idiosyncrasies, their particular models of analyses and writing, and their special interest were often known to us who read their Judicial opinions. However, for the general public and even for most persons serving in the other branch of the government.....such elements of their personality, and anything more, would generally have constituted unexplored territory.....Once it is appreciated that final courts in particular, are obliged to analyse evidence and legal questions and solve disputes, in part by reference to considerations of legal principles and legal policy, the notion that the Judges are operating on a kind of automatic pilot of purely technical law, will almost certainly become untenable.....Just as Parliament has their functions in our

governance, and law making, so have the Courts. The Courts develop the common law in a principled way. They give reasons for what they do. They constantly strive for the attainment of consistency with established legal principles as well as Justice" (From House of Lords to Supreme Court: James Lee, pages 14, 15, 16, 17).

Lord Binghan, former Lord Chief Justice of the UK, bluntly sought to put them on silence who purport to undermine role of the superior Judges with such suggestions that they only apply the law, rather than developing it, expounding, ".....this is a view, which has a few, if any adherents today. Some Judges such as the late Lord Denning, are proud of their role in developing the law; most are reticent. But cases are brought raising noble questions, and the Judges have to answer them. Their answers will often make law, whatever answers they be, one way or the other. So Judges do have a role in developing the law, and common law has grown up as a result of their doing just this" (Rule of Law by Tom Bingham, Penguine 2010, page 45).

It may, in this context be reminisced that most of the general laws that we have inherited through the Code of Civil Procedure, Code of Criminal Procedure, Penal Code, Contract Act, specific Relief Act, Companies Act 1913, Transfer of Properties Act, are mostly the codified versions, enacted for this sub-continent, of what grew in England as Judge made laws for the UK, rather than Parliament enacted, laws.

Lord Justice Denning (as he then was) in exposing the fact that Judges actually develop the law with the pace of time, observed as early as 1954, "If we never do anything which has not been done before, we shall never get

anywhere. The law will stay still whilst the rest of the world goes on: and that will be bad for both" (Packer-v-Packer 1954).

Lord Mackay, a former Lord Chancellor of the UK, in delivering Hamilyn Lectures in 1993, observed that a good sound Judgment is based on knowledge of law, a willingness to study all sides of an argument with an acceptable degree of openness and an ability to reach a firm conclusion and to articulate" ("The English Legal System" by Garry Slapper of David Kelly, 12th Edition, page 214).

An English Bar Council Review Body, headed by former Appeal Court Judge, Sir Iam Glidewell, profiled that given the increased role of the Judiciary in matters relating to the review of administrative decisions, devolution issues and human rights, it was no longer constitutionally acceptable for Judges to be appointed by the government of the day" (Supra, Page 218).

Judge Bertram Harnett of the New York State Supreme Court, in his book, "Making Sense of American Legal System: Law, Lawyers and Laymen, supra, expressed; "The expectation that people have of Judges are very high, may be too high. (.....There is) a great loss of human perspective in being a Judge. In their courtroom and essentially in all their working days, Judges set every pace and tone" (pages 231. 232, 250).

Sir Neil MacCormick, a former President of the Society of Public Teachers of Law, stated, "Judges in Court everywhere have become more explicit in their reflection about their reasoning and argumentation, have joined issue with scholars on many occasions. They continue, of course, to write and issue opinions on cases they decide, furnishing an astonishingly

rich repository of practical arguments at work". (From House of Lords to Supreme Court, supra, page 3).

Baroness Hale of the newly set up Supreme Court of the UK observed that through their decisions the House of Lords provided, and the new Supreme Court has, with its first year of Judgment, began to provide the "grist to the advocates and academies' mills" (OBG-V-Allan 2008 Ac-1).

Lord Hope, while paying tribute to the Judicial body of the House of Lords on its cessation from the Legislative House of Lords, unequivocally asserted that it is the Judicial work of highest quality that made the whole of the House of Lords a byword: it is its Judicial role that enhanced the reputation of the whole House through the common law world and beyond, made it a brand name, so much so that the decision to end its appellate Jurisdiction caused almost universal surprise overseas. (From House of Lords to Supreme Court, supra, page 4).

Lord Denning in Attorney General-V-Mulholland (1963 2QB 477) summarised the role of a judge, saying;

> "A judge is the person entrusted, on behalf of the community, to weigh these conflicting interests to weigh on the one hand the respect due to confidence in the profession and on the other hand the ultimate interest of the community in justice being done - - --."

Through the above scripted passages Lord Denning revealed how the difficult job of striking the balance between individual liberty, a fair criminal trial, non **retrospectivity**, privacy and property rights as against official power, are performed by the Judges.

In his work “Freedom Under the Law”, Lord Denning reiterated a Judge’s rather complicated task of balancing exercise, stating;

“At everypoint, however, these powers involve interference with private rights and interests; and granting that private rights must often be sub-ordinated to the public good (my emphasis) it is essential in a free community to strike a just balance in the matter” (page 99).

Prof. Claire Palley, Principal, St. Annes College, Oxford, in evaluating Lord Denning as a jurist said, “In any event if philosophy could provide an effective guide to good decision making, and they have not the time to philosophies, then philosophers would long ago have harnessed as judges. The reality is that applying principles or rules to facts is extra ordinarily difficult, and, apart from plea of guilt there is no open and shut case.” (Page 261, Lord Denning. The Judge and the Law).

Lord Denning himself said; “One of the most important tasks of the Courts is to see that the powers of the executive are properly used, that is used honestly and reasonably”.

In illustrating the complexities that have permeated into the legal world through the influx of time, Lord Devlin said; “When Tom (Lord Denning) and I were young, the law was stagnant. The old fashioned Judge looked to the letter of the statute and for the case on all fours. He knew that he had to do Justice according to law. Either he assumed that the law, when strictly applied, would always also do Justice or else he decided that, if it did not, it was not his business to interfere. Today this is not the idea. No statement of the law, be it a precedent or statute, is ever final: it is to be read in its context and its context can change. A judge must never assume that the

law always and in all circumstances does complete justice. That would be an impossible task to put upon any lawmaker. To do justice according to law the judge must keep his eyes on the justice of the case as well as on the text of the law." Forward for the book "Lord Denning". The judge and the law').

Lord Devlin went on to write; "Lord Denning, I believe, thought differently. He thought, as Radcliff did not, that "Judges in our society could remake the body of the law they administer into what they may approve as a shape of greater justice", (supra, page VII).

To unveil the truth that most Judges aspire to place Justice above law, Lord Devlin continued, saying; "In the phrase due process of law, in the Fifth and Fourteenth amendments, the law is not the law as it is but the law as it ought to be, what justice Frankfurter describes as "these cannons of decency and fairness which express the notion of justice of English speaking people . . . . Has Lord Denning succeeded in giving practical effect to his conception that justice is above the law?" (supra, page VIII of VIII).

Lord Denning expressed, "we sit here to find out the intention of Parliament and of Ministers and carry it out, and we do this better by filling in the gaps and making sense of the enactment than by opening it up to destructive analyses" (Mayor of St. Mellon's RDC-V-Newport Corporation 1952 AC 189).

Profs. S. Corwin and Jack W Peltoson wrote; "Judges both lead and respond to the values of the nation" (Understanding the Constitution" by Prof S. Corwin and Prof Jack W Peltson).

Mostafa Kamal J said "constitutional development is no doubt an evolution of the constitution through judicial decisions, but judicial

decisions on the constitution are the outcome of dedicated lawyering backed by intensive academic studies.

The role the Judges is no doubt important, but it is practicing lawyers who open the multiple keys to the constitution and show to the judges the wealth contained in it. A responsive judge picks up the wealth thus exposed, although there have been and are judges in all jurisdictions who need no keys. The wealth of the Constitution is stored in their wisdom. The lawyer has to know to pick it up in bits and pieces. (Kamini Kumar Datta Memorial Lectures, supra, pages V, VI).

One must not be oblivious of the fact that unlike other state functionaries, a Judges takes decisions and, writes his Judgments all on his own without being assisted or advised by any assistant, advisor or colleague and it is this state of solitude in the decision taking and delivering process which is one of the significant attributes that sifts a Judge from other state functionaries.

In heralding the universally recognised theme that the Parliament's legislative function is amenable to Supreme Courts reviewing Jurisdiction in the countries with written constitution, and describing judicial review as the "soul of the judiciary in a written constitution" (Page VIII), Mustafa Kamal J put on record his following assertion; "The doctrine of legislative supremacy in the United Kingdom is not available in a written Constitution which contains a constitutional system of restraint giving the superior court a power of judicial review.

A written Constitution is a mandate for limited government, each organ of the state is limited and controlled by the jurisdiction conferred on it

by the Constitution and thereby obliged to act within the limitation imposed by the Constitution. No organ of the state is superior to the other. It is the Constitution which is superior to all the organs of the state. The Supremacy of the Constitution is articulated in Article 7(2)" (page 19, supra).

Justice Mukherjee of India, to illustrate this point expressed; "There is a basic difference between the Indian and the British Parliament in this respect. There is no Constitutional limitation to restrain the British Parliament from assigning its powers where it will, but the Indian Parliament qua legislative body, is fettered by a written Constitution and it does not posses the sovereign powers of the British Parliament". (AIR 1951 S.C 401).

Prof. Hilair Barnet, in the context of written Constitution, by referring to what KC Wheare stated, observed; "All powers entrusted to the government comes from the people: it is accordingly understandable that, under such a Constitutional scheme, there is a strongly held view that government holds its power on trust for the people.

It may be said, as a result, that both law making and executive powers are conditionally conferred on those who hold public offices, subject to the doctrine of trust which will be enforced by the COURTS in the name of the people." (Constitutional and Administrative law, Hilair Barnet 5th Edition page 169).

Prof. SW Bradley and KD Eving state; "The doctrine of legislative supremacy distinguishes from the United Kingdom those countries in which a written Constitution imposes limits on the legislature and entrusts the ordinary Courts or a Constitutional Court to decide whether acts of the legislature comply with the Constitution. In Marbury-v-Madison the US

Supreme Court held that the Judicial function vested in the Court necessarily carried with it the task of deciding whether an act of Congress was or was not in conformity with the Constitution. In a legal system which accepts Judicial review of legislation, legislation may be held invalid on a variety of grounds" (Constitutional and Administrative law, 15th Edition, page 55).

Sir Ivor Jennings, a universally acclaimed Constitutional Jurist, who truly put himself one step ahead of AV Dicey in projecting the untrammeled power of the British Parliament, suggesting that the British Parliament is so sovereign that it can even, theoretically, if it so wishes, make a man a woman and vice versa, emphatically wrote that this epistemology can not extend to a country with a written Constitution where legislative action is reviewable by the Court. He wrote; "Indeed, in modernn constitutional law it is frequently said that a legislature is sovereign within its power. This is, ofcourse, pure nonsense if sovereignty is supreme power, for there are no powers of a sovereign body; there is only the unlimited power which sovereignty implies.....The difference is this . In one case there is sovereignty. In the other, the courts have no concern with sovereignty, but only with the established law" (Law and the Constitution by Sir Ivor Jennings, pages 151/152).

Prof. Marshall also scripted identical assertion.

Same view on the Judicial reviewability of legislative action by the Superior Courts and the view that the Diceyan doctrine of Parliamentary Sovereignty is out of place in the countries with written Constitution, had been echoed by the Appellate Division in 8th Amendment (Anwar Hossain Chowdhury-v-Bangladesh 1989 BLD (spl)-1), by the High Court Division

in 5th Amendment (Italian Marble Works-v-Bangladesh, 62 DLR 70), the 7th Amendment (Siddique Ahmed -v-Bangladesh 63 DLR 565) and 13th Amendment cases, by the Indian Supreme Court in scores of cases , including those of Keshavanada Bharati-v-State of Kerala AIr 1973 SC 128 , Indira Nehru Gandhi-v-Rajnarayan, 1975 SC 2299, Minarva Mills Ltd-v-India AIR 1980 SC 1789 etc and by the Pakistan Supreme Court (both pre and post 1971 cases) in plentitude of cases.

In Secretary of Finance-v-Masdar Hossain (2000 BLD AD 104) the Appellate Division held that the Judiciary is within its Jurisdiction to bring back Parliament and the executive, from Constitutional derailment and give necessary direction to follow the Constitutional course by making amendments to laws or rules.

Prof. Mohan Krishnapuram in his book “Sovereignty of Parliament in India,” states, “In modern democratic states the power of control ever legislative organ to see that the legislative organ shall not enact a statute in contravention of the provision of the Constitution, is vested on the Judiciary...In democratic states sovereignty is vested in the people. Therefore the will of the people is sovereign; the will of the people is embodied in the constitution. Hence Constitution is supreme over statutes.” (page 139).

Justice Hamilton of the United States expressed, “The exercise of the Judicial review only supposes that the power of the people is superior to both (Court and legislature): and that where the will of the legislature, declared in statutes, stands in opposition to that of the people, declared in

Constitution, the Judges ought to be governed by the latter, rather than the former "(Hamilton, the Federalist).

The question is, whether such constitutional functionaries of the Republic, who hold the guardianship of the Constitution, are vested with the exclusive power to interpret the Constitution, occupy such important positions in the national life, who can even efface Acts of Parliament, who, as Mr. Samuel Silkin Q.C., the British Attorney General at the relevant period, said during his submission before the Court of Appeal in Gouriet-V-Union of Post Office Workers, 1978, AC 435, lone runners in their performances, who perform the difficult tasks of balancing, assimilating wisdom , intelligence and intellectual faculties in one pot, are accountable only to their conscience, accept the job in the bench sacrificing more lucrative professional conduits, whose decision are of such enormous and overriding magnitude as has been outlined above, in whose aid all authorities, executive and Judicial are bound to act, and who, according to Gallup Poll, as revealed by the UNDP, hold 3rd position in Asia in enjoying confidence of the 67% of the populace, as against 75% by Malaysian and 69% by Indian Courts, and whose Judgment's are equated with world class ones, can be left with such **meagre** wages?

As Profs Smith and Bailey expounded in their book, “The Modern English Legal System” 3rd Edition, page 240-41, Judges, remuneration is one of the factors that is relevant to the sustenance of Judicial independence. The authors, citing British examples, revealed; “The Judges are paid large salaries, which are a charge on the Consolidated Fund, and so not subject to annual vote in Parliament. The need to secure the independence of the Judiciary was placed in the forefront of the argument that an Act to reduce salaries did not apply to the Judges as a matter of interpretation and in principle. (Page 241). Attracting lawyers with the right qualities and experience as well as the need to insulate the status of the Judges, appeared to be of greater importance to the Senior (formerly top) Salaried Review Board on Judicial Salaries.” (Page 241)

Volume 23, cols 257-261 of the H C debate reveals that in the written answer after the announcement of the 1982 increases, all that was stated was; “in the national interest to ensure an adequate supply of candidates of sufficient caliber for appointment to Judicial office. (HC Debate. Vo/23 cols 257-261, written Answer May 12, 1982).

Profs Bradley and Ewing stated; “There are also charged on the Consolidated Fund other payments, which, for Constitutional reasons, are considered inappropriate for annual authorization for Parliament. These

include the Civil List, and the salaries of the Judiciary, the Comptroller and Auditor General, the Parliamentary Ombudsman, and the Member of the Electoral Commission. This means that there is no regular annual opportunity of discussing in Parliament the work of these officers. This practice tends purposely to preserve their independence"

Arguing that the failure to adopt the recommendation for substantial pay increase put forward by the Commission on Executive Legislative and Judicial salaries, will lead to an increased brain drain in the Judiciary, Chief Justice Warren Burger of the United States even took the relatively unprecedented step of meeting publicly with President Ford and strongly endorsed the need for such pay increase in his Annual Report on the Judiciary. To support his contention, Chief Justice Burger noted that during the preceding years good number of federal Judges had resigned to return to private practice. ("Judges and Justices" by Prof John R Schmidhauser, 1979, page 189-190).

The above noted author wrote, "The salary issue.....has emerged as one of the most serious in modern times.

With respect to potential solutions to the problem of Court congestion, congress itself is recognized as a major contribution to the contemporary case load crisis. Chief Justice Friendly underscored this dimension of the

complex forces inexorably escalating the case load at every level of the federal Judiciary" (Judges and Justices, supra, page 188).

In illuminating the theme that remuneration of the judges is an immutable adjunct of the independence of the judiciary, Mostafa Kamal J, expressed, " The independence of the judiciary can be measured by the provision in a constitutions in the matter of selection of judges, security of tenure, remuneration and other privileges, **irremovability**, except on proved misbehaviour or misconduct, independence in the exercise of Judicial functions, the assurance with the compliance with the Judges' decisions and the meat and substance of power and jurisdiction that it confers upon the Judiciary.- -- --" (Kamini Kumar Dutta Memorial Lecture, supra, page 28).

Judges of the Court of Appeal and the Supreme Court in the UK (which courts stand at par with our High Court Division and the Appellate Division respectively) are almost invariably admitted into the Privy Council, other incumbents of which Council are some exclusive peers, particularly of the Royal pedigree, the Members of the Cabinet (and, ofcourse, the former Members of the Cabinet, because once a Privy Councilor, is always a Privy Councilor) and some specially inducted people as was Rt. Hon'ble D.F Moola. Privy Council Members are the only people who are entitled to be addressed with the prefix, 'Right Honourable" (Rt Hon'ble).

Britain is not the only country where superior Judges are paid high salaries for the preservation of their independence and status, such trend also pervades in other democracies where superior Judges' salary is deemed **inexonerably** interwoven with Judicial independence. The table below would depict the salary and other benefits the Judges of the Supreme and the High Courts in India, Pakistan and Bangladesh are honoured with, wherefrom comparison can be made.

Post	Nature of Salary & Allowances	Bangladesh	India	Pakistan
Chief Justice	Basic Salary	Tk. 56,000	Rs. 1,00,000	Rs. 1,99,875
	Judicial Allowance	--	--	Rs. 87,500
	Residence Allowance	Govt. Provided Residence	Govt. Provided Residence/ 30% of salary	Govt. Provided Residence/ Rs. 68,000 with Govt. maintenance for his dwelling house
	Medical Allowance	Judge with family Members	Judge with family Members	Judge with family Members
	Car Allowance	Official Car	Official Car	Official Car
	Domestic Aid Allowance/Cost of Living	Tk. 1,625	--	--
	Sumptuary Allowance/Entertainment Allowance	Tk. 7,000	Rs. 20,000	--
	Dearness Allowance	--	--	--

Judge Supreme Court/Appellate Division	Basic Salary	Tk. 53,100	Rs. 90,000	Rs. 1,88,113
	Judicial Allowance	--	--	Rs. 87,500
	Residence Allowance	Govt. Provided Residence/ Tk. 26,600	Govt. Provided Residence/ 30% of salary	Govt. Provided Residence/ Rs. 68,000 with Govt. maintenance for his dwelling house
	Medical Allowance	Judge with family Members	Judge with family Members	Judge with family Members
	Car Allowance	Official Car/ Tk. 15,000	Official Car	Official Car
	Domestic Aid Allowance/Cost of Living	Tk. 1,465	--	--
	Sumptuary Allowance/Entertainment Allowance	Tk. 5000	Rs. 15,000	--
	Dearness Allowance	--	--	--

Chief Justice of High Court	Basic Salary	--	Rs. 90,000	Rs. 1,85,250
	Judicial Allowance	--	--	Rs. 70,000
	Residence Allowance	--	Govt. Provided Residence/ 30% of salary	Govt. Provided Residence/ Rs. 28,750 with maintenance of Govt. for his dwelling house
	Medical Allowance	--	Judge with family Members	Judge with family Members
	Car Allowance	--	Official Car	Official Car
	Domestic Aid Allowance/Cost of Living	--	--	--
	Sumptuary Allowance/	--	Rs. 15,000	--

Judge High Court/High Court Division	Basic Salary	Tk. 49,000	Rs. 80,000	Rs. 1,78,125
	Judicial Allowance	--	--	Rs. 70,000
	Residence Allowance	Govt. Provided Residence/ Tk. 26,600	Govt. Provided Residence/ 30% of salary	Govt. Provided Residence/ Rs. 28,750 with maintenance of Govt. for his dwelling house
	Medical Allowance	Judge with family Members	Judge with family Members	Judge with family Members
	Car Allowance	Official Car/Tk. 15,000	Official Car	Official Car
	Domestic Aid Allowance	Tk. 1,300	--	--
	Sumptuary Allowance	Tk. 3,000	Rs. 12,000	--
	Dearness Allowance	--	--	--

The comparison divulged in the above table depicts an appallingly sorry state so far as the salaries of our Supreme Judges are concerned, which needs immediate overhauling, and, indeed re-vamping, otherwise the welcome information revealed by UNDP, supra, may wane in no distant future.

It is encouraging and indeed laudable, that the pathetic scenario did not escape the attention of the Parliamentary Sub-Committee on Law, Justice and Parliamentary Affairs. With their commendable wisdom, the members theirin, were unanimous in addressing the issue affirmatively, and emerged with a reasonable recommendation on the Supreme Court Judges' salary which had been reproduced above.

We shall, now, examine the question of reasonableness of the respondents decision in the backdrop of what have been narrated above.

Reasonableness has a distinctive connotation in the legal vocabulary, and it is the observation of none other than Lord Green MR, whence this connotation in its present form first stemmed.

Lord Green MR. alluded to the many grounds of attack which could be made against a decision, citing, unreasonableness, bad faith, dishonesty, paying attention to irrelevant circumstances, disregard of proper decision making procedure and held that each of these could be encompassed with in the umbrella term “Unreasonableness.”

According to Lord Green’s evergreen pronouncement, the test is whether the authority had acted or reached a decision, in a manner so unreasonable that no reasonable authority could ever have come to it.

He expressed; “..... a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. If he does not obey these rules, he may truly be said, and often is said, to be acting unreasonably. Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority. .....The Court is entitled to investigate the action of the local authority with a view to see whether they have taken into account matters which they ought not to take into account, or, conversely, have refused to take into account, and, once that question is answered in favour of the local authority, it may still be possible to say that, although the local authority have kept within the four corners of the matters, which they ought to consider, they have, nevertheless come to a

conclusion so unreasonable that no reasonable authority could ever have come to it. In such a case, again, I think, the Court can interfere." (Associated Provincial Picture Houses Ltd.-V-Wednessbury Corporation (1948, 1KB 223).

To give a modern, and slightly revamped version, without however, undoing Lord Green's **propoundment**, Lord Diplock in the celebrated case of Council of Civil Service Association-V-Minister for Civil Service, Popularly Known as GCHQ Case (1985 AC 374), used the phrase "irrational" and regarded unreasonableness as entailing a decision " so outrageous in its defiance of logic or of accepted moral standards that no sensible person, who had applied his mind to the question to be decided could have arrived at it".

Given the facts and circumstances analysed above, we have no reason not to be swayed to the irresistible synthesis that the respondents acted unreasonably in the Wednessbury sense and irrationally in the sense canvassed by Lord Diplock, by posing to be indifferent to the recommendation laid down by the said Parliamentary Sub-Committee and Justice Fazlul Karim's Committee. We do, in this respect, also endorse Mr. Murshed's view that it is ludicrous that the payment made to the District Judges, when Judicial allowance is added, at times exceed the amount paid to the Supreme Court Judges.

The first question being resolved in favour of the petitioner it is, now incumbent upon us to decide whether an order of Mandamus should be issued.

Mandus as a prerogative writ stands as number three in the order of birth, ie after Certiorari and Habeas Corpus. Common law judges evolved this writ when they came to realise that Certiorari some times fail to do complete justice. As it stands now, Certiorari and Mandamus can be sought in a single application.(“Principles of Judicial Review” by De Smith , Wolf and Jowell, page 587)

The most glaring British example on the availability of mandamus in a case where a government department has acted unreasonably by being influenced by extraneous consideration, emanates from the House of Lords decision in the Landmark case of Padfield –v- Minister of Agriculture and Fisheries and Food(1968 AC 997). The House held that where a Minister had a duty as well as power, he could not exercise his discretion to frustrate the policy of the legislation. Lord Reid explicitly rejected the proposition of unfettered discretion.

On Padfield decion ,Lord Denning MR, in Breen –v- Amalgamated Engineering Union (1971 2 QB 175) said; “The discretion of a statutory body is never unfettered. It is a discretion which is to be exercised according

to law. That means at least this: the statutory body must be guided by relevant consideration and not by irrelevant. If its decision is influenced by extraneous consideration which it ought not to have taken into account, then the decision can not stand. No matter that the statutory body may have acted in good faith; nevertheless the decision shall be set aside. This is established by Padfield –v- Minister of Agriculture and Fisheries and Food, 1968 AC 997, which is a land mark case".

"It is well settled that Mandamus may properly be invoked to compel a reasonable exercise of official discretion where there is a failure or refusal to perform some duty resulting from an office, an officer may be compelled to act so far it is necessary to an actual exercise of his judgment or discretion in determining whether he ought to do so or refrain from doing that which petitioner desires." ("Writ Remedies" by Justice P N Banerjee, 4th Edition, page 184).

So far as Bangladesh perspective is concerned, power to issue Mandamus stems from Article 102(1) and Article 102(2) (a) (1) because both the sub-Articles empower this Division to pass mandatory orders. And, ofcourse, the Masdar Hussain case, supra, provides best example of a situation when an order of mandamus can be passed to compel the government to act in accordance with the constitutional scheme or the law.

The petitioners have craved for an order of Mandamus essentially against the government of the Peoples Republic of Bangladesh, represented by five Secretaries, basically at whose instance and consent the present salary structure has been fixed, and it is the government who can and should, now come up with a fresh move for the implementation of the said Parliamentary Su-Committee's recommendation.

Having scanned the legal position and the ratio **decidendi** of the decisions of the cases cited above, in juxtaposition with the petition, the prayer and the existing salary level and having been propelled to the invariable equation that the pursuit of reasonableness in the Wednessbury sense can not be attained without directing the respondents to make an endeavour to animate the Parliamentary Sup-Committee's recommendation, we feel bounden to be steered to the irresistible conclusion that this indeed is an apposite case where an order of Mandamus must be issued.

We do, accordingly issue an order of Mandamus, requiring the respondents to take positive steps to pave ways to give effect to the recommendation, the Parliamentary Sub-Committee on Law, Justice and Parliamentary Affairs, made, with retrospective effect, forthwith. In issuing this order of Mandamus we are being guided by the Appellate Division's decision in Masdar Husain case, supra.

In consequence, the Rule is made absolute, without an order on cost.

The respondents are directed to act as per the order figured in the preceding paragraph with retrospective effect, i.e. as from the date on which the said recommendation by the Parliamentary Sub-Committee on Law Justice Parliamentary Sub-Committee was published, without delay.

Gobinda Chandra Tagore, J:

I agree