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Judiciary and the Dilemma of 'Office of profit': A Pandora's Box

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1. Introduction

Though the expression 'Office of Profit' is not defined in the Constitution, it has a pretty sound backing of the doctrine of Separation of Power. The view is that holding executive offices by an MP or a Judge may either be incompatible with his duty or may affect his independence and thus weakens the loyalty to his assigned office. Then instead of ensuring the necessary accountability of the Executive, his office may become subservient to rather than the watchdog of the Executive.

The prohibition against any Member of Parliament taking any 'office of profit' was in the Constitution of Bangladesh, 1972 in sub-clause (f) of Article 66(2). This was however, renumbered as sub-clause (dd) by the Second Proclamation Order IV of 1978. The motive was to prevent any scope of timidity on the part of the Legislature to hold the Executive accountable. However, since the very nature of the Multi-Party Parliamentary Democracy makes the Executive more a part than a counterpart of the Legislature, the Constitution excludes some specific offices from the definition of office of profit in Article 66(2A). The Judiciary, on the other hand, is a completely different arena. Independence of judiciary requires it be secured that judges are so placed that during their term of office they remain above inducement or hope for preferment. A judge must be a recluse, a man apart.[1] Accordingly Articles 147(3) and 99 were included in the Constitution of Bangladesh disqualifying the Supreme Court judges from holding '*any office or post*' whatsoever both during the continuance of their service and after the retirement or removal therefrom. This two tier

prohibition was intended to immune the judges from all sorts of allurement for possible future gains.

Unfortunately Article 99 was amended later on to put a ceiling on the bar limiting it to any '*office of profit*' in the service of the Republic other than '*judicial or quasi-judicial*' offices. This indiscriminate insertion of 'office of profit threshold', widely used around the world in relation to the Members of Parliament, opened a Pandora's box of political favoritism for the Judges. By now we have had many shocking instances of judges holding constitutional, judicial (e.g, Labor Appellate Tribunal, Administrative Tribunal etc), quasi-judicial or even non judicial offices like the Chief Election Commissioner (CEC), Chairman of the Anti-Corruption Commission and Chairman of the Law Commission under the guise of quasi-judicial office. Now-a-days Judges are seen to be rewarded not only after their retirement but also even during their service in the Supreme Court, appointment of Justice M. A. Aziz as CEC being the glaring example.

This write-up aims at surfing through the historical evolution of 'office of profit' to show how a concept essentially used in relation to the Legislature got a firm root in our judicial discourse. It strongly argues that applying the 'office of profit threshold' for the Judges needs a careful perusal and second thought. The later part of the paper explores the different standings of the Supreme Court over the past years to find out the genuine connotation of 'office of profit in the service of the Republic'. Lastly, I come to a conclusion with some concrete what-to-do findings in this regard.

2. The Evolution of 'Office of Profit'

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The concept of 'office of profit', used in relation to the Members of the British Parliament, has a history of more than four centuries in United Kingdom. Initially the English Parliament claimed priority over the services of its Members. This led to the evolution of the idea that holding certain offices would be incompatible with the responsibilities of a Member of Parliament. Later on, there was a protracted conflict between the Crown and the House of Commons. Loyalty to the King and the loyalty to the House of Commons representing the will of the people became growingly irreconcilable and it was thought that if any Member accepted an 'office of profit' under the Crown, there was every chance of his loyalty to the legislature being compromised. At one stage of the show, the King was reduced to the position of a constitutional head and the cabinet, functioning in the name of the Crown became the real executive. The Privy Councilors, who during this phase were invariably considered to be the henchmen of the King and were as such looked upon with suspicion by the House of Commons, had to step aside in favor of the Ministers, who for some time were also disqualified from holding a seat in the House. But in the end of the day it was recognized that application of the disqualification rule to incumbent ministers was too extreme to coordinate between the executive and the legislature.[2] It was felt that the Members of the executive should be represented in the Parliament. This led to the passing of several enactments by the British Parliament excluding some offices from the ambit of 'Office of profit.'

2.1. The Indian Perspective

The concept of 'office of profit' was also adopted with some modifications in India. A clear and precise statement in this regard was made in Section 26(1)(a) of the Government of India Act, 1935 which provided that a person shall be disqualified for being chosen as, and for being, a Member of either Chamber if he held any *office of profit* under the Crown of India, other than an office

declared by Act of the Federal Legislature not to disqualify its holder. When the Constitution of India came into force on 26th January 1950, the provision in Article 102 relating to the disqualification of Members of legislature read:

> A person shall be disqualified for being chosen as, and for being, a member of either House of Parliament - (a) if he holds any office of profit under the government of India or the government of any state, other than an office declared by parliament by law not to disqualify its holder.[3]

Explanation to Article 102 explicitly excluded union/state ministers from the definition of holders of offices of profit. Later on, the Parliament (Prevention of Disqualification) Act, 1950 was enacted. Section 2 of the Act included a Deputy Minister, or a Parliamentary Secretary or a Parliamentary Undersecretary within the list of exemption. This was followed by the Parliament (Prevention of Disqualification) Act, 1951 which further extended the list of exemption. In 1959 the Parliament (Prevention of Disqualification) Act, 1959 was passed. This Act widened the exemption list once again. Further, in light of the recent case of *Ms. Jaya Bachan* v. *Union of India*,[4] a Bill titled the Parliament (Prevention of Disqualification) Amendment Bill, 2006 with retrospective effect was introduced and passed in the Lok Sabha. Even the President APJ Abdul Kalam himself sending the Bill back, a hue and cry arose all over India claiming the law to be destructive of the spirit of democratic constitutionalism.[5] Section 3 of the Amendment Act, however, inserted a Table in the Parliament (Prevention of Disqualification) Act, 1959 listing 55 statutory and non-statutory bodies offices in which were declared not to be 'offices of profit.'

In relation to the Judiciary, however, the Indian Constitution refrained from using the term 'office of profit' at all.

The MPs are ultimately party men having keen interest in running the Executive in line with their political philosophy, while the Judges are a completely different set of personality secluded from all sorts of politics and policy set up. Hence the framers of the constitution considered bothering with 'office of profit' discourse absolutely unnecessary. Accordingly, Article 124(7) of the Indian Constitution totally bars the judges from '*any post, office or service whatever*'. It holds:

> 'No person who has held office as a Judge of the Supreme Court shall plead or act in any court or before any authority within the territory of India.'

2.2. The Lessons from Pakistan

In the Constitution of 1956, the first three grounds of disqualifications of a legislator were unsoundness of mind, insolvency and holding 'any office of profit' in the service of Pakistan.[6] The Constitution of 1962 retained the bar on the holders of offices of profit. The Constitution of 1973 also maintained the disqualification of holding 'any office of profit in the service of Pakistan other than an office exempted by law.[7]

Regarding the Judges of the Supreme Court or High Courts, the 1956 Constitution provided that a person who has been a Judge of the Supreme Court or a High Court shall not, after his retirement or removal therefrom, plead or act before any court or authority or *'be eligible for any appointment'* in the service of the Republic.[8] Field Martial Ayub Khan scrapped it by the Presidential Order No 21 of 1962[9] and ultimately his Constitution of 1962 did not repeat the provision rather it introduced the '*office of profit threshold*' for the Judges for the first time:

> A person who has held office as a Judge of the Supreme Court or of a High court shall not hold any 'office of

> profit' in the service of Pakistan before expiration of two years after he ceased to hold that office.[10]

The substitution of '*office of profit*' in place of '*any appointment*' paved the ways of horse trading, as there was no hard and fast rule to decide whether a particular office is 'office of profit' or not. Since then this unfortunate development bolstered its position in Pakistan finding ultimate legitimacy through article 207 of the Constitution of 1973. Article 207 provides:

> (1) A Judge of the Supreme Court or of a High Court shall not,
>
> > (a) hold any other office of profit in the service of Pakistan if his remuneration is thereby increased; or
> > (b) occupy any other position carrying the right to remuneration for the rendering of services.
>
> (2) A person who has held office as a Judge of the Supreme Court or of a High Court shall not hold any office of profit in the service of Pakistan, not being a judicial or quasi-judicial office or the office of Chief Election Commissioner or of Chairman or member of a Law Commission or of Chairman or member of the Council of Islamic Ideology, before the expiration of two years after he has ceased to hold that office.

Sub-clause (b) of clause (1) may be seen as a progressive inclusion. This prohibits any salaried post or office for the acting Judges. But sub-clause (a) has mitigated the good in sub-clause (b) by opening the slightly open door further. Clause 2 took things to the extreme. Now the Judges can hold any office of profit (if his salary is not increased thereby), 'judicial or quasi judicial office' or offices in Election Commission, Law Commission and Council of Islamic Ideology. The democratic forces of Pakistan did in 1973 what even Ayub Khan didn't do in 1962. Added to Ayub's 'office of profit threshold' was the 'Judicial or quasi-judicial office

threshold' – a new and wider one, later to be followed by the Bangladeshi Military establishment. Though the cooling period of two years in Clause 2 of Article 207 may provide a safety valve, it has exposed a judge to the political and financial lobbies.[11] The Judges became a prey in the hands of the Civil Military establishment. One of the major reasons behind the continued survival of this *ex facie* illiberal provision in the Constitution of Pakistan is perhaps the unholy consensus among the successive military and civilian rulers to keep the judiciary under control. Democratic forces of Pakistan have always admonished of the danger of such a practice and there is a demand for amendment in Article 207.[12] The drastic implication of Article 207(2) shall be discussed in detail in the next part dealing with Bangladesh.

2.3. 'Office of Profit' experiments in Bangladesh

In the Constitution of Bangladesh, 1972 the prohibition against any Member of Parliament taking any 'office of profit' was in Article 66(2)(f). Article 66(3) contained an explanation excluding certain offices from the operation of Article 66(2)(f). However, Articles 66(2)(f) and 66(3) were omitted by Section 5 of the Constitution (Fourth Amendment) Act of 1975. Then the contents of erstwhile Article 66(2)(f) and 66(3) were again inserted in the Constitution by the Second Proclamation (Fifteenth Amendment) Order, 1978 (The Second Proclamation Order IV of 1978) as Articles 66(2)(dd) and 66(2A) respectively. It provides:

A person shall be disqualified for election as, or for being, a Member of Parliament who-

……

(dd) holds any Office of Profit in in the service of the Republic other than an office which is declared by law not to disqualify its holder.

Undergoing various amendments time to time to suit the necessity of different rulers[13] the explanation stands today as follows:

> (2A) For the purposes of this article a person shall not be deemed to hold an office of profit in the service of the Republic by reason only that he is a President, Prime Minister, Minister, Minister of State or Deputy Minister.

As regards the acting Judges of the Supreme Court, Article 147(3)&(4) provides:

> (3) No person appointed to or acting in any office to which this article applies shall hold any post or position of profit or emolument or take any part whatsoever in the management or conduct of any company, association or body having profit or gain as its object:
>
> Provided that such person shall not for the purposes of this clause be deemed to hold any such office, post or position by reason only that he holds or is acting in the office first above-mentioned.
>
> (4) This article applies to the offices of -
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> (a) President;
> (b) Prime Minister and Chief Advisor;
> (c) Speaker or Deputy Speaker;
> (d) Minister, Advisor, Minister of State or Deputy Minister;
> (e) Judge of the Supreme Court;
> (f) Comptroller and Auditor-General;
> (g) Election Commissioner; and
> (h) Member of a Public Service Commission.

An acting Judge of the Supreme Court is prohibited from taking any post or position of profit or emolument or taking any part whatsoever in the management or conduct of any company, association or body having profit or gain as its object. But the proviso added to clause 3 makes the Article complicated. Constitutional law expert Mahmudul Islam offered some clarification in this regard while rendering his opinion as *amicus curie* before the High Court Division in a recent case.[14] He claims that Article 147(3) makes all the office mentioned in Article 147(4)

offices of profit though these are not considered as such in case of first appointment due to the proviso appended thereto. But for the purpose of a second appointment, the proviso shall not be applied for the second time.[15] That means that though the Office of President is not an office of profit as such, it shall be so if a Judge of the Supreme Court is proposed for the Presidency. For an Acting Judge of the Supreme Court, all other Offices mentioned in clause (4) are offices of profit. So a Judge cannot be appointed the Chief Election Commissioner and *vice versa*. The Court endorsed the view.[16] This may again be corroborated by the retrospective validation of Justice Shahabuddin Ahmed's accession to the Presidency in 1991 while he was the incumbent Chief Justice of Bangladesh. The Legislature considered the office of President to be an office of profit for a sitting Chief Justice and that's why it went for a constitutional amendment to validate the extra ordinary incident of Justice Shahabuddin Ahmed.[17] So it becomes clear that a sitting Judge of the Supreme Court is prohibited from holding any other office of profit including the constitutional posts mentioned in Article 147(4) during the continuance of his service in the Supreme Court.

As regards the retired Judges, the original Constitution of 1972 jealously safeguarded the identity and status of the Supreme Court as an independent organ of the State. Original Article 99, like Article 142(7) of the Indian Constitution, provided:

> A person who has held an office as a Judge otherwise than as an additional Judge shall not, after his retirement or removal therefrom, plead or act before any court or authority or be eligible for any appointment in the service of the Republic.

Misfortunately, it was re-tailored by Justice ASM Sayem,[18] the then Chief Martial Law Administrator, to lift the embargo partially by making a retired judge eligible for appointment in 'judicial or quasi-judicial offices.' At the same time, 'office of profit

threshold' found its recognition. We accomplished by a single stroke what Pakistan did in two shots (1962 and 1973). Original Article 99 was rephrased as:

> A person who has held office as a Judge otherwise than as an Additional Judge shall not, after his retirement or removal therefrom, plead or act before any court or authority or hold any office of profit in the service of the Republic not being a judicial or quasi-judicial office.

It was again restructured as Article 99(1) and Clause (2) was added newly. Presently the Article stands as follows:

> (1) Except as provided in clause (2), a person who has held office as a Judge otherwise than as an Additional Judge shall not, after his retirement or removal therefrom, plead or act before any court or authority or hold any office of profit in the service of the Republic not being a judicial or quasi-judicial office or the office of Chief Adviser or Adviser.
>
> (2) A person who has held office as a Judge of the High Court Division may, after his retirement or removal therefrom, plead or act before the Appellate Division.

This new Article 99(1) is almost a copy paste of the Article 207(2) of the Pakistan Constitution. The amendment was disingenuous. On the one hand, rallying support of the Judiciary was important to acquire a semblance of legitimacy to an otherwise illegitimate regime.[19] On the other hand, it was not possible to be so blatant to inject something like article 207(1) of the Pakistani Constitution. Article 99(1) embodied a tactful compromise between both ends. Though the offices in Election Commission or Law Commission were not expressly mentioned, 'quasi-judicial offices' were there to fill the vacuum up.

Now you can appoint a Judge of the Supreme Court in any post provided first, it is a 'judicial or quasi-judicial' office and second, it is not an 'office of profit' in the service of the Republic.

Introduction of the '*office of profit*' criteria in place of '*any office or post whatsoever*' for the judges has made Article 66(2A), which is surely intended for the MPs, applicable for the Judges. A partisan Member of Parliament and a Judge of the Supreme Court is made subject to same disqualification which actually means attracting many other qualifications. So now the Executive can favor an 'acceptable' judge of the Supreme Court in the same degree it can favor a Member of Parliament, a party man. What you need is simply to prove that a particular post is not an 'office of profit'. Now-a-days even lucrative and executive sponsored constitutional posts are claimed not to be office of profit on some technical grounds like mode of appointment, job security, functional independence etc.[20] Again, 'judicial or quasi-judicial' test has made the hurdle more flexible. In *Anwar Hussain Chowdhury* v. *Bangladesh*[21] Justice Shahabuddin Ahmed contemplated that, 'Under the color of quasi judicial office judges may be appointed to executive office also.'[22] The later events have proved this observation. You shall see purely administrative offices (e.g., Election Commission) being claimed to be quasi-judicial office simply on the ground that these have some incidental adjudicative functions apart from their basic administrative functions.[23]

3. Judicial Response to the Office of Profit Issue in Bangladesh

Judicial challenges to the appointments of various Judges of the Supreme Court both during their continuance of service and retirement therefrom are not uncommon in Bangladesh. Frequently questions were raised by the enlightened sections of the society about these controversial appointments in different administrative offices having political implications as well as financial gain. While disposing the challenges on different occasions, the central questions the Supreme Court faced was: What do the 'office of profit in the service of the Republic' and 'quasi-judicial office'

mean? Most interesting part of the literature is the inconsistency in arguments of the lawyers. The same lawyer, who argued in one tune in one case, was seen arguing in a complete opposite tune in the next case. Accordingly the Courts' judgments varied over times. Discussed below are some of those intensely debated instances to show how the Supreme Court has reached, after traveling through variety of directions, the destination to acknowledge that there is no post or office in the Republic which may not be called an 'office of profit' to make to a judge entitled to hold it.

3.1. Justice Shahabuddin Ahmed: A *bona fide* mistake

The first glance over the concept was made in *Abu Bakar Siddique* v. *Justice Shahabuddin Ahmed*.[24] Justice Shahabuddin Ahmed, a retired Chief Justice of Bangladesh, was nominated to the office of President in 1996. His nomination was challenged in the High Court Division by Advocate Abu Bakar Siddique. The question asked there was whether the Office of President, a constitutional post was an 'office of profit' and whether he was in the 'service of the Republic' or not.

As to the meaning of *'office of profit in service of the Republic'*, Mr. Asrarul Hussein appearing on behalf of the petitioner challenged the nomination on the ground that the office of President being an office of profit in the service of the Republic, Justice Shahabuddin Ahmed was barred by Article 99(1) from being the President. Since right from the President down to a peon of a Government office everybody is getting remunerations from the exchequer of Bangladesh, these are 'office of profit' and as all of them are rendering services to the Republic, they are holding posts in the service of the Republic, Asrarul Hussein argued.[25] To him, all the civil servants gazetted, non gazetted or constitutional post holders are discharging their duties towards the state and so all are to be treated as persons holding offices in the service of the

Republic.[26] Hence a Judge of the Supreme Court is barred by Article 99(1) from appointment to any civil or constitutional post.

Dr. Kamal Hossain, Barrister Rafiqul Huq and Barrister Mainul Hussein appeared before the Court as *amicus curie*. They along with K S Nabi, the then Attorney General, dwelt on the hypothesis that a person in the service of the Republic is necessarily governed by Part IX of the Constitution.[27] In this sense, only government officers and employees hold office of profit in service of the Republic.[28] They, in a textual approach, summed up the technical differences between the positions of holders of constitutional posts and persons in the cadre services.

- ❖ Persons in the cadre services serve during pleasure of the President.[29]
- ❖ They are entitled to seek relief in the administrative tribunal constituted under Article 117.[30]
- ❖ They may not be removed or reduced in rank until given a reasonable opportunity of showing cause.[31]
- ❖ Their appointment is regulated by the Public Service Commission and other government rules and regulations.[32]

As none of these are definitely intended for the holders of constitutional posts, it is absurd to think that persons holding constitutional posts are holding office of profit in the service of the Republic, they emphasized.[33] Accordingly a Judge of the Supreme Court may be appointed to any constitutional post after their retirement.

As to the *specific exclusion of some offices from the ambit of office of profit occurring in Article 66(2A),* Mr. Asrarul Hussein claimed that those offices were not to be office of profit specifically for the purpose determining disqualification of a MP. For all other purposes excepting the election of Members of Parliament, these offices must be treated as office of profit in the service of the Republic in all other matters.[34] But Mr. Rafiqul Huq,

the learned *amicus curie* argued that exclusion of President in clause (2A) will not mean his automatic inclusion in other provision of the Constitution.[35] Attorney General KS Nabi and Barrister Mainul Hussein without substantiating any further simply supported Mr. Rafiqul Huq.[36] As we shall see later on, theirs' was a seriously flawed submission.

The High Court Division was engulfed by arguments of the reputed experts and the enlightened arguments of Mr. Asrarul Hussein were silenced mistakenly. Shahabuddin Ahmed's neutrality and integrity was undoubtedly beyond question. The intention of the then ruling party also could not be termed as *mala fide*. But it produced a weak interpretation of the Constitution and hence a bad precedent to be misused later.[37] That day the Court became oblivious that original Article 99 prohibited all sort of offices not to disadvantage a particular person but for the greatest interest of judicial independence. Now the Court warns us, "One encroachment leads to another. What has been done may be done again in a lesser crisis and less serious circumstances."[38]

3.2. Justice Abdur Rouf: A Judge on deputation

Justice Md Abdur Rouf, then a Judge of the High Court Division, was appointed as the Chief Election Commissioner (CEC) in December 1990.[39] He was appointed a Judge of the Appellate Division in the Supreme Court in 1995 after his politically forced resignation from the post of CEC, seemingly as a reward of his ideological inclination to the then ruling party. His new appointment was challenged in *Shamsul Huq Chowdhury* v. *Justice Md Abdur Rouf*[40] on the ground of being grossly violative of Article 118(3).[41]

In this case also, the High Court Division held that holders of constitutional posts are not persons in the service of the Republic. Therefore holding the office of CEC by a Judge does not

stand as a bar against his appointment as Judge of the Appellate Division.

3.3. Masder Hussein: Service of the Republic redefined

'Service of Republic', the bone of contention in *Abu Bakar Siddique* and *Shamsul Huq Chowdhury* came under consideration of the Appellate Division in *Secretary, Ministry of Finance* v. *Masder Hussain*.[42] This was the case for separation of judiciary. Naturally the respondents'[43] main focus was on establishing the judicial service as a distinct one from other cadre services.

Article 152 of the Constitution defines 'service of the Republic' as 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. Barrister Amirul Islam appearing on behalf of the respondents submitted that Judges are not in the service of the Republic as service 'in respect of Government' indicates the executive or administrative functionary of the State. He, like the *amicus curie* in *Abu Bakar Siddique* underscored the theoretical distinction that judges hold office during the good behavior while persons in the service of the Republic hold office during pleasure of the President under Article 134 i.e., part IX.[44]

But Mahmudul Islam, the then Attorney General echoed the voice of Mr Asrarul Hussein in *Abu Bakar Siddique* arguing that all officers whether judicial, civil or military are in the service of the Republic in respect of the government. Here the Government of Bangladesh 'includes the Parliament, executive and judiciary.'[45] As the 'government' may be sued in the name of Bangladesh,[46] government means the Republic.[47]

The Appellate Division acknowledged that it was not right to claim judicial service not to be a service of the Republic.[48] It is

also not proper to say that existence of rules and regulations different from those in part IX to govern a particular service takes it out of the ambit of service of the Republic. Persons appointed to the Secretariat of the Parliament and the staffs of the Supreme Court, although governed by separate terms and conditions of service, are in the service of the Republic.[49] So the holders of constitutional posts are very well in the service of the Republic. This was a clear negation of the submissions of the *amicus curie* in *Abu Bakar Siddique*.

3.4. Justice M A Aziz: A charade on the Constitution

Justice M A Aziz was appointed CEC while he was a sitting Judge of the Appellate Division. He didn't even resign from his post. His appointment was challenged in *Advocate Ruhul Quddus* v. *Justice M A Aziz*.[50] The petitioner argued that since M A Aziz was holding an office of profit in the service of the Republic (Judge of the Supreme Court), he was barred from appointment to another office of profit (CEC) by operation of Article 147(3). The defence argument sang the old song - offices of a judge of the Supreme Court and Chief Election Commissioner being constitutional posts are not office of profit in the service of the Republic.[51] The questions of law to be answered by the Court were:

- What does the service of the Republic mean?
- Should the exclusion made in Article 66(2A) come to any help in this regard?
- Which offices are to be called 'judicial or quasi judicial offices'?

As to the first question, most curious were the arguments of the learned *amicus curie* Dr. Kamal Hussain and Barrister Amirul Islam. Dr. Kamal Hussain followed a line of interpretation contradictory to his argument in *Abu Bakar Siddque*.[52] He now argues that delimiting service of the Republic only to government offices is nothing but finding technical loopholes for personal interests.[53] Gross and generalized intention of the Constitution is to

keep the judges above temptation by disqualifying them from all sorts of offices of emolument of the Republic[54] – exactly what Mr. Asrarul Hussein pressed and he opposed in *Abu Bakar Siddique*. Mr. Amirul Islam, who offered a restrictive interpretation in *Masder Hussein* this time claims that 'service of the Republic' should be given a broader meaning and even the President is in service of the Republic.[55] If one receives salary from the exchequer, he holds an 'office of profit' and serves of the Republic, Barrister Islam argues.[56]

The High Court Division in its turn confirmed the Appellate Division in *Masder Hussain* and focused on the intention of the framers of the Constitution[57] and also emphasized on the Common Sense Approach. Any kind of jugglery of words will be fruitless if it does not make common sense, the Court opined.[58] And common sense tells that the 'service of the Republic' mentioned in Article 99 includes all post or office of the Republic.[59] Republic means the State which is defined to include parliament, government, statutory public authorities[60] as well as the judiciary.[61] Moreover the definition of 'service of the Republic' in Article 152 does not use the word 'in the government' rather it uses 'in respect of government.'[62] So it is service not only in government but also service, post or office in relation to the governance,[63] the governance of the whole Republic.[64] While the civil servants retire at the age of 57, the judges retire at 67. Then is it not absurd, irrational and illogical to think that after 67 years of age judges are prohibited from joining government jobs?'[65]

As to the *specific exclusion of some offices from the ambit of office of profit occurring in Article 66(2A)*, the High Court Division now okays the arguments of Mr. Asrarul Hussein in *Abu Bakar Siddique* which was mistakenly suppressed by that Court. Avoiding the technical jugglery of words the Court makes it

abundantly clear that specific exclusion of anything in one particular instance (here in Article 66(2A)) logically infers the general inclusion of that in all other instances. If that is not so, there would not have been any necessity to exclude anything specifically at all. Specific exclusion in Article 66 (2A) was felt necessary because the office of President and other constitutional offices are otherwise considered to be offices of profit in the service of the Republic.[66]

As to the misty of *Judicial or Quasi Judicial Office*, it was claimed on behalf of the respondent that the office of the Chief Election Commissioner is a quasi judicial office. This argument was based on the fact that Election Commissioners have to sit over the adjudication of election disputes.[67] In fact, this is a common excuse in Bangladesh to claim an office which has some adjudicative power as a corollary to its basic administrative functions. The High Court Division this time boldly asserts that the office of CEC or EC was anything but judicial or quasi judicial, as almost all of their jobs are administrative in nature holding election being the principal one. Nature of a particular office depends on its main responsibilities not ancillary jobs attached to it.[68] That the mere existence of adjudicative power is not enough was also confirmed in *AFM Shah Alam* v. *Mujibul Huq*.[69] The Election Commission has been given power to decide certain matters but such enquiry will not come within the purview of judicial inquiry because the power to decide judicially is different from deciding administratively.[70]

Most interestingly MI Faruqi, a counsel appearing on behalf of the petitioner, argued that since the 'judicial or quasi judicial' threshold has been added by Martial Law Proclamation, this addition being destructive of the independence of judiciary, a basic structure of the Constitution, is void as per *Anwar Hussain*.[71]

The High Court Division responded positively holding that the amendment in original Article 99 is void on two grounds, firstly for the Chief Martial Law Administrator being incompetent to amend the Constitution through Martial Law Proclamation and secondly, for distorting the basic structure of independence of judiciary.[72]

So the conclusion becomes inescapable that as per article 99(1) judges of the Supreme Court are barred from assuming any post whatsoever after their retirement.[73] Even the exception of judicial or quasi-judicial offices in article 99(1) being offensive to the basic structure of independence of judiciary cannot sustain.

4. Concluding Remarks

Judges are more often bribed by their ambition and loyalty than by money.[74] The slightest scope of inducement during their service in the Court is bound to affect the performance of the judiciary. We have so many laws requiring composition of statutory bodies comprising the acting or retired Judges of the Supreme Court.[75] Time and again we have seen the Judges holding political offices like the Election Commissioner,[76] Martial Law Administrator,[77] Member of the Law Commission[78] etc. Most unfortunately we had to bear the agony of street demonstrations against the Honorable Judges of the Supreme Court. Time has come to realize that this is going to help none – the Supreme Court, the Executive and the polity above all. The Supreme Court is still considered to be the last docket of hope for the people. If the image of the Judges in the Supreme Court becomes tarnished so becomes our future as a nation. So best if we seriously and sincerely consider the following options:

- First, the original Article 99 be revived;[79]

- Second, alternatively Article 99(1) be amended to provide a cooling period of at least five years after the retirement of a Judge from the Supreme Court to the following effect:

  'A person who has held an office as a Judge otherwise than as an additional Judge shall not, after his retirement or removal therefrom, plead or act before any court or authority or be eligible for any appointment in the service of the Republic before the expiration of five years after he has ceased to hold that office.'

  This five years' cooling period shall make all the allurements and future calculations too distant to foresee. Moreover, since the term of a political government is five years, it shall be in a very difficult position to offer any persuasive assurance of favor to a particular Judge;
- Third, all the laws providing for judicial or administrative bodies comprising of retired Judges of the Supreme Court be amended to rule out the possibility of the acting or retired Judges getting another chance to hold an office involving financial gain.

A Judge of the Supreme Court must not take any appointment - judicial, quasi judicial or non judicial because he thereby gets some benefits and powers which he may not avail ordinarily after retirement at any cost. Most important is that almost all of these appointments - be the office judicial, quasi judicial or non judicial - are made pursuant to the recommendation of the Executive.[80] Judges being the servant of the Republic serve the Nation not the Executive. That being so, the 'office of profit' for the judges can do no more than re-opening a Pandora's box of dilemma.

Notes and References

[1] Mahmood, Shaukat and Shaukat, Nadeem, 'Constitution of the Islamic Republic of Pakistan 1973', 3rd Edition, 1996, Legal Research Centre, Lahore, pp. 1287 at p. 1062

[2] Consumer Education & Research Society v. Union of India & Ors; W/P (Civil) No. 448 of 2006 at Para 2; See the full text of the judgment online: http://www.indiankanoon.org/doc/1025791/ (Accessed on: September 6, 2009)

[3] Article 102(1)(a) of the Constitution of India, 1950

[4] (2006) 5 SCC 266; Ms Jaya Bachachan, a Member of the Rajya Sabha was declared disqualified to continue in her parliamentary office, since she was holding the office of the Chairperson of Rajasthan Film Development Corporation, an office of profit. The Ms Bachchan incident suddenly opened the eye of the Indians to see that many of the Congress led UPA MPs including the Congress Chairperson Ms. Sonia Gandhi were holding office of profit disqualifying them from continuing as a Member of the Loko Sabha. To tackle the situation the Parliament (Prevention of Disqualification) Amendment Act, 2006 was passed. The Indian Supreme Court has confirmed the validity of the Act in *Consumer Education & Research Society* v. *Union of India & Or*, W/P (Civil) No. 448 of 2006

[5] Sridhar, Dr. Madabhushi, 'A case against amending office of profit', JANASAMACHAR.NET, an online newspaper of India, Visit: http://www.jansamachar.net/display.php3?id=&num=4718&lang=English, (Accessed on: September 1, 2009).

[6] Article 45 of the 1956 Constitution of Pakistan

[7] Article 63(d) of the 1962 Constitution of Pakistan

[8] Article 166(3) of the 1956 Constitution of Pakistan

[9] *Haider Automobiles Ltd* v. *Pakistan* 22 DLR (SC) (1970) 65 at Para 7

[10] Article 126(2) of 1962 Constitution of Pakistan

[11] *Ibid*

[12] *Supra Note* 1 at p. 1062

[13] On the death of Ziaur Rahman, Justice Abdus Sattar, the then Vice President, became the Acting President and put his candidature in the upcoming Presidential Election. Doubt arose whether he could contest at all, the office of the Vice President being an office of profit. The Constitution was amended accordingly to provide that office of Vice President was not an office of profit. In Article 66(2A) the words 'he is a President, Vice president, Prime Minister' were substituted for the words 'he is a President' by Section 3 of the Constitution (6th Amendment) Act, 1981. People should know the result of an

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election well in advance, if the Constitution itself is amended to ensure the candidature of a particular candidate. Again, the words 'Vice president' and 'Deputy Prime Minister' were omitted by Section 4 of the Constitution (12th Amendment) Act, 1991 (Act No XXVIII of 1991).

[14] *Advocate Ruhul Quddus* v. *Justice M.A. Aziz* 60 DLR 2008 (HCD) 511

[15] *Ibid* Para 48

[16] *Ibid* Para 264

[17] The Constitution (Eleventh Amendment) Act, 1991

[18] This Article was amended by a the Second Proclamation (First Amendment) Order (The Second Proclamation Order No I of 1975) dated 17 December, 1975

[19] Rabbani, Justice Muhammad Gulam, 'Bangladesher Songbidaner Sohojpat' (Bangla) , Samunnoy, Dhaka, 2008 pp 139 at p 101

[20] *Abu Bakar Siddique* v. *Justice Shahabuddin Ahmed* 17 BLD (1997) 31

[21] 1989 BLD (Spl) 1

[22] *Ibid* Para 365; Most interestingly Justice Shahabuddin Ahmed himself came under judicial challenge on the ground of violating Article 99(1).

[23] *Supra Note* 14

[24] *Supra Note* 20

[25] *Ibid* Para 25

[26] *Ibid* Para 26

[27] *Ibid* Para 27

[28] *Ibid* Para 60

[29] Article 134 of the Constitution of the People's Republic of Bangladesh

[30] *Supra Note* 20 Para 51

[31] Article 135(2) of the Constitution of the People's Republic of Bangladesh

[32] Article 140(1)(a) of the Constitution of the People's Republic of Bangladesh

[33] *Supra Note* 20 Para 28

[34] *Ibid* Para 38

[35] *Ibid* Para 41

[36] *Ibid* Para 45

[37] Such was the acclamation of the decision of appointing Justice Shahabuddin Ahmed as the President that even the academic world didn't see any way except accepting that Constitutional Posts were not office of profit in the service of the Republic. See: Ali Akkas, Dr. Sarkar, 'Understanding the Service of the Republic Under the Constitution of Bangladesh, Chittagong University Journal of Law (1999) Vol. IV, pp 101-110 at p. 108

[38] *Supra Note* 14 Para 372

[39] Ahmed, Nizam, '*Non Party Caretaker Government in Bangladesh Experience and Prospect*', UPL, Dhaka, 2004 pp 206 at p. 68. Justice Shahabuddin Ahmed, the incumbent Chief Justice of Bangladesh and the President of 1991 Caretaker

Government appointed two sitting Judges of the Supreme Court as Election Commissioners and Justice Abdur Rouf, another sitting Judge of the High Court Division as the Chief Election Commissioner. *Prima facie* all those appointment could be challenged for being violative of Article 147(3). Probably the extra ordinary political situation prevailing then coupled with the absolute trust and faith on Justice Shahabuddin Ahmed's Government precluded any judicial challenge. While Justice Shahabuddin's accession to the Presidency in 1991 was validated by the Eleventh Amendment of the Constitution, the CEC and other Election Commissioners requiring validation on the same ground escaped notice.

[40] 49 DLR (1997) 176; Though Justice Abdur Rouf's accession to the office of CEC was not challenged, this time his re-appointment in the Appellate Division didn't go unchallenged.

[41] Under Article 118(3)(a) of the Constitution, a person who has held office as Chief Election Commissioner shall not be eligible for appointment in the Service of the Republic. Interestingly, Article 118(3)(a) did not mention the term 'office of profit'. Accordingly, an Election Commissioner is barred from all sorts of office whether it attracts any financial gain or not.

[42] 52 DR (2000) (AD) 82

[43] Masder Hussain, representing the Judges of the lower judiciary sought the complete separation Judiciary from the Executive.

[44] *Supra Note* 42, Para 28

[45] *Supra Note* 42, Para 10

[46] Article 146 of the Constitution

[47] *Supra Note* 42, Para 26

[48] *Supra Note* 42, Para 27

[49] *Supra Note* 42, Para 27

[50] *Supra Note* 14

[51] *Ibid*, Para 226

[52] *Ibid*, Para 42

[53] *Ibid*, Para 36

[54] *Ibid*, Para 35

[55] *Ibid*, Para 60

[56] *Ibid*, Para 75

[57] *Ibid*, Para 193

[58] *Ibid*, Para 219

[59] *Ibid*, Para 223

[60] *Ibid*, Para 230

[61] *Ibid*, Para 239

[62] *Ibid*, Para 286

[63] *Ibid*, Para 256
[64] *Ibid*, Para 251
[65] *Ibid*, Para 268
[66] *Ibid*, Para 262
[67] *Ibid*, Para 227
[68] *Ibid*, Para 296-301
[69] 41 DLR (AD) 68; Para 48
[70] *Supra Note* 14, Para 361
[71] *Ibid*, Para 11
[72] *Ibid*, Para 321
[73] *Ibid*, Para 277
[74] *Ibid*, Para 376
[75] For instance, The Press Council Act, 1974 (Section 4), The Administrative Tribunal Act, 1980 (Section 5) etc
[76] It seems that except a few exceptions the people of Bangladesh could not even imagine the Election Commission without Judges, sitting or retired, from the Supreme Court. Justice Sultan Hussein Khan, Justice Abdur Rouf, Justice AKM Sadek, and Justice M.A. Aziz – all are known more as CEC than as Judges of the Supreme Court thanks to the attribution 'Justice' attached their respective names. Justice Sultan Hussain Khan is exceptionally lucky. He had the fortune of becoming the Chairman of the Press Council in 1991 and Chairman of the Anti Corruption Commission in 2003 as well.
[77] Bangladesh probably is the only country in the world where the Chief Justice became the Chief Martial Law Administrator (CMLA). Justice ASM Sayem became the CMLA in 1975 and continued till 1976. President Justice Abdus Sattar headed the Military Government of H.M. Ershad for three days (March 24 – March 27, 1982), Justice Ahsan Uddin taking the baton on March 27 soon to be relieved by Ershad himself accessing to the Presidency.
[78] The Law Commission was headed by Justice Mustafa Kamal during the 4-Party Alliance government. It is widely believed that Justice Latifur Rahman was made the Chief Justice of Bangladesh by superseding another Judge in the Appellate Division ultimately to be 'chosen' as the Chief Advisor to the caretaker government, as the Awami League (AL) government couldn't have enough confidence on Justice Mustafa Kamal, who was otherwise in the serial. AL's lack confidence was seen compensated by the 4-Party Alliance government by appointing him the Chairman of the Law Commission. The present Chairman of the Law Commission Justice Abdur Rashid has a judgment in his credit through which he gave judicial recognition to the August 15 as National Mourning Day. I'm not claiming that these appointments surely reflect political nexus between the honorable Judges and the respective political parties.

But I can confidently claim that these are seen as such by many and this, in an over-politicized society like ours, is bound to affect the image of the Supreme Court in the long run.

[79] Being irritated by the discreditable conduct of the Executive, Shahbuddin Ahmed, C.J., as he then was, once recommended such a course of action in *Abdul Bari Sarkar* v. *Bangladesh* 46 DLR (AD) 37, 38 See: Islam, Mahmudul., *Constitutional Law of Bangladesh*, 2nd Edition, Mullick Brothers, 2006 pp 848 at p. 434

[80] *Supra Note* 14, Para 354

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