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## Independence of Judiciary and its Implication Prospects of Bangladesh

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### ABSTRACT

The aim of this paper is to analyze the status of independence of the judiciary in Bangladesh. It is recognized worldwide that an independent judiciary is the *sin qua non* of democracy and good governance. However, without separation of the judiciary from other organs of the state absolute independence of judiciary is not possible. An attempt has been made in this paper to sketch the brief historical background of judicial system in Bangladesh through analyzing the meaning and basic principles of judicial independence and to what extent these principles exists in Bangladesh. How did the judiciary finally separate from the executive? After separation of the judiciary, what is the status of executive interference over judiciary in Bangladesh has also been evaluated in this paper. The study is qualitative in nature and based on secondary sources of materials like books, journal articles, government rules, newspaper reports, etc. Relevant literature has also been collected through Internet browsing. In this study, it has been found that from time immemorial the judicial system of Bangladesh was not completely independent from the interference of the executive branch of the government. It has also been found that from the beginning of the British colonial rule, the question of separation of the judiciary from the executive had been a continuing debate. Presently, even after separation of the judiciary, the interference of the executive over the judiciary is still continuing. This paper opens a new window for the policy makers and concerned authorities to take necessary steps for overcoming the existing limitations of the status of judicial dependence in Bangladesh. The paper will be of interest to legal practitioners, policy makers, members of civil society, and those in the field of judicial system in Bangladesh and some other British colonial common law countries.

Keywords: *Bangladesh, Colonial rule, Judicial System, Judiciary, Judicial independence*

### INTRODUCTION

The independence of the judiciary is a fundamental feature of the Constitution of Bangladesh. Yet, more than 30 years after the founding of the modern state of Bangladesh, the judiciary remains subservient to an all-powerful executive. Between 1997–2001 the Supreme Court of Bangladesh issued binding judicial directives requiring the government immediately to separate the judiciary from the control of the executive. However, the government has adopted a strategy of procrastination and this has resulted in a public crisis of confidence in the state of the judiciary.

Bangladesh, whose military leaders took over the country last January and threw hundreds of squabbling politicians into jail on corruption charges, has created the mechanism for an independent judiciary, removing it from control of the administration for the first time in the country's short, faction-plagued history.

Barrister Mainul Hosein, the Adviser for Law, Justice and Parliamentary Affairs to the caretaker government, said in a speech, "We (the government) have separated the judiciary from the interference of

the executive not as a favour to the judges, but to assign them with the heavy responsibility of upholding justice and contributing to good governance as contemplated by the Constitution." However, Amnesty International continues to express a broader concern about human rights, most recently over the arrest of Jahangir Alam Akash, the local head of two NGOs, the Task Force against Torture and the Bangladesh Institute of Human Rights and a journalist with the independent TV station CBS News. Akash was arrested on rape charges, but Amnesty International in a press release quoted family members and friends as saying the charges are false, politically motivated and a pretext to detain him for opposing human rights violations.

The Bangladesh military's seizure of power was initially applauded by many relieved citizens who hoped it would end the internecine squabbling between the country's two strong political women, Sheikh Hasina Wajed, and her bitter rival, Begum Khaleda Zia. However, as the interim government appointed by the military has worn on, relief has begun to turn to dismay both inside and outside Bangladesh that the takeover has spawned widespread human rights violations including scores of extrajudicial killings and mass arrests.

Nonetheless, the decision to grant independence to the courts, for instance, stands in dramatic contrast to two other Asian countries. In Pakistan, against which Bangladesh revolted to pave the way for its creation in 1971, President General Pervez Musharraf declared martial law earlier this week and ousted Chief Justice Iftikhar Muhammad Chaudhry. Malaysia is in the grip of a growing standoff between the government of Prime Minister Abdullah Ahmad Badawi and the country's nine sultans over independence of the judiciary. The publication of videotape of a politically connected lawyer discussing judicial appointments of malleable judges with the then chief judge of the Federal Court has contributed to the scandal.

Inaugurating the Dhaka District Judicial Magistracy and Dhaka Metropolitan Magistracy, Fakhruddin Ahmed told the crowd, "The judiciary is fully independent of the executive from today and from now the courts and the judges will establish rule of law without the interference of the executives."

The ceremony coincided with celebrations in 64 district judicial magistracies and three metropolitan magistracies of Bangladesh. The government has created nearly 4,300 new judicial magistracy posts, Ahmed said, to facilitate an independent judiciary.

The change can't come too soon for a desperately overburdened system. There are 4.85 million cases pending in magistrates' courts across Bangladesh, which has a population of 140 million people. The real test, though, for an independent judiciary will lie in how it deals with the trials of some very senior political leaders, including the two former prime ministers, Begum Khaleda and Sheikh Hasina, who are presently serving jail terms for corruption and misuse of power during their respective reigns.

"The separation of the judiciary should be considered a major milestone in Bangladesh's judicial history despite the fact that it was done when there is no political (elected) government," said Haroon Habib, a Dhaka-based journalist and former independence activist.

In fact, the two previous democratically elected governments didn't try. Although the Supreme Court of Bangladesh ruled to separate neither the judiciary from the executive branch in 1999, neither Sheikh Hasina's Awami League government (1996-2001) nor Begum Khaleda Zia's Bangladesh Nationalist Party which followed it (2001-2006) complied.

The immediate past government, led by the Awami League, openly interfered with the judiciary, says a Dhaka-based social activist who told Asia Sentinel that executive magistrates were pressured into granting

bail and passing other orders for the ruling party. The magistracy, he said, was almost synonymous with corruption.

Bangladesh has two sets of magistrates, judicial and executive. According to the amended Code of Criminal Procedure, the judicial magistrates will run the courts. They will be appointed and supervised by the Supreme Court.

Executive magistrates, including the previously powerful deputy commissioners, have been stripped of judicial powers and will exercise only executive power, which removes a burden from the system. Most of the executive magistrates lacked credible knowledge of the law despite their power to deliver justice.

As Bangladesh has no provinces (and thus no provincial chief ministers demanding a share of power), the deputy commissioners locally wielded the most clout after the prime minister. Often overburdened, they had to perform their duties in a complex structure in which their primary responsibilities were administration and revenue collection, both of which provide ample opportunity for graft.

Indeed, some officials are unhappy with the separation of powers, with one magistrate declaring in a public meeting that the government had humiliated him by scrapping his judicial power and calling vainly on his colleagues to strike.

## PRINCIPLES OF INDEPENDENCE OF JUDICIARY

The concept of judicial independence includes four basic principles, which have been suggested and recognized through international efforts in this field (Bari, 1993, p. 2). These principles are:

- i. personal independence;
- ii. substantive independence;
- iii. internal independence; and
- iv. collective independence.

The followings are the elaborated version of these four meanings of judicial independence.

### **i. Personal independence**

Personal independence means that judges are not dependent on government in any way in which it might influence them in reaching decisions in particular cases. Personal independence signifies that the tenure of judges and the terms and conditions of their service are “adequately secured, so as to ensure that individual judges are not subject to executive control”[1] (cited in Akkas, 2004, p. 22). In the words of Shetreet and Deschenes (1985), the terms of judicial service including transfer, remuneration and pension entitlements should not be under the control of the executive government and the tenure of judges should be granted until a mandatory retirement age. Basically, these are the essential conditions to ensure that an individual judge may exercise judicial role without fear or favor, friendliness or ill will (Malleon, 1999).

Therefore, to keep the administration of justice in a fair and impartial platform, a judge should be “placed in a position where he/she has nothing to be defeated by doing what is right and little to gain by doing what is wrong” (Dawson, 1954). This position can be guaranteed by ensuring the individual independence of a judge.

## ii. Substantive independence of the judges

Substantive independence refers to the functional or decisional independence of judges to arrive at their decisions without submitting to any inside or outside pressure. The substantive aspect of the duties of a judge is the actual decision-making role. It is connected with the determination of the finding of fact and the application of the relevant legal norms to the facts of the case. The substantive independence of judges requires that in performing all the administrative, procedural and substantive duties a judge should be free from any direct or indirect interference, improper influence or pressure (Shetreet and Deschenes, 1985, p. 630). Therefore, it ensures the impartiality of judges and their capacity to make judicial decisions on the merit of cases, without any fear or favor (Geyh and Tassel, 1998). In determining the minimum standards of judicial independence the International Bar Association suggested in 1982 that in the discharge of his judicial function a judge is subject to nothing but the law and the commands of his ethics (Akkas, 2004, p. 22).

## iii. Internal independence

Internal independence means independence of judges from their judicial superiors and colleagues. It refers to, in other words, independence of a judge or a judicial officer from any kind of order, indication or pressure from his judicial superiors and colleagues in deciding cases. In this regard, the Montreal Declaration 1983 provides:

In the decision making process, judge shall be independent vis-a-vis their judicial colleagues and superiors. Any hierarchical organization of the judiciary and any difference in grade or rank shall in no way interfere with the right of the judge to pronounce his/her judgment freely.

The independence of individual judges may be undermined not only by the outside sources of interference but also by fellow judges, particularly by senior judges using their administrative power and control (Russell, 2001). This means that threat to internal independence may come from the superior courts or judges. In addition, internal independence covers the process of pronouncing judgment that is the actual decision-making process. Hence, the internal independence of a judge is relevant to both the procedural and substantive aspects of judicial duties. The procedural duties include the examination of witnesses, recording of evidence and disposal of interlocutory matters that are integral parts of the decision-making process (Akkas, 2004, p. 24).

## iv. Collective independence

Collective independence means institutional independence, which is connected with responsibility for the effective operation of the judiciary as an organ of government. In its easiest form, judiciary as an institute must be free from interferences of the executive or the legislature. Financial autonomy of the judiciary is also related to this concept of collective or institutional independence. If the judiciary as an institution depends on the executive, the legislature or other institutions for its operation, this may affect the performance of judicial duties by individual judges (Shetreet and Deschenes, 1985). This facet of judicial independence has a great impact on the individual independence of judges. A judge may not be able to exercise judicial function independently unless he or she is a part of an institution with authority over those human and physical resources incidental to (necessary for) performing judicial functions (Millar and Baar, 1981). So, collective or institutional judicial independence is necessary to ensure the individual independence of judges (Winterton, 1995, p. 15). In addition, collective or institutional independence is linked with court management, which includes assignment of cases, control over administrative personnel, maintenance of court buildings and preparation of judicial budgets and allocation of resources. The Montreal Declaration 1983 and the Beijing Statement 1995 emphasize that the main responsibility for court

administration should be attached to the judiciary (Akkas, 2004). Therefore, collective independence is indispensable for judicial independence.

## OBJECTIVES OF THE STUDY

1. To know about the Present Judicial system in Bangladesh
2. To know about the Judicial Independence in the Constitution
3. To know about the Judicial Independence of Bangladesh
4. To know about the Present Judicial Implication prospects of Bangladesh
5. To know about the Judicial Independence and Accountability

## METHODOLOGY

I have used secondary sources of data for my study. I have collected data from secondary source, different books, publications, annual reports, journals and periodic, in addition relevant previous research reports, seminars, meetings and conference papers etc.

## RESEARCH FINDINGS

To ensure absolute independence of the Judiciary England had to fight a long and sustained battle and it was not until 1701 that she was able to achieve that object. On March, 23,195 Sir Winston Churchill said to the judges, “there is nothing likes them at all in our England. They are appointed for life. They cannot be dismissed by the executive government. They have to interpret the law according to their learning and consciences.”

About the salary of judges it is recognized in England that it should be such that they should be able to maintain a way of life befitting the gravity of the duties they have to discharge. They are at present the highest paid officials in England except the prime minister and a few others. Lord Denning Said, “such is the price which England readily pays so is to ensure that the bench shall command the finest character and the best brains that we can produce.”

In the words of Sydney smith, “nations fall when the judges are unjust because there is nothing which the multitude thinks worth defending but nations do not fall which are treated.” If we cherish the independence, efficiency and impartiality of our judiciary as the people do in England, we should see to it that the judges are better paid, that they are able to work so long as they are fit, that their salary and pension are increased and that they have nothing to look forward to at the hand of the government either in the course of their service or after their retirement. The service, promotion and appointment of the judges should be made immune from the action of the government and their service, promotion, salary etc. should not be in the hand of the executive and the government so that the government or any other quarters cannot exert any influence upon the judges.

All political parties, especially while in the opposition, shout for rule of law and independence of the judiciary was one of the main slogans in our country and yet the rule of law and complete independence of the judiciary could be achieved. One of the main slogans of the political party in power was “rule of law and for the independence of judiciary” and still the same has not been fully achieved and established even after passing of 37 years of independence.

The parties, in the opposition, in full throat shouted for rule of law and for independence of the judiciary but while they were in power they did exactly the opposite. They did not make judiciary subservient to the Executive and the government and to that end they did not hesitate to amend the constitution from time to time to suit their purpose.

The first major encroachment upon the independence of the judiciary and to make it subservient of the executive was made by the 4<sup>th</sup> Amendment of the Constitution. The power of impeachment of the judges was taken away from parliament, and the president was vested with the sole authority to remove judge of the Supreme Court without any charge, notice or show cause.

That was the first blow upon the “Rule of law and the independence of the judiciary” immediately after independence. Thereafter, from 1982 to 1990, attempts were made to weaken the judiciary further and to make it subservient to the executive by eight Amendment bifurcation of the High Court division of the Supreme Court of Bangladesh.

During the last regime and the government preceding the present one, perhaps the cruelest blow was inflicted upon the judiciary when four senior most eminent Judges of the Supreme Court of Bangladesh were removed arbitrarily.

The aforesaid removal of the senior most Judges including the chief justice shall always remain as the most naked act of encroachment upon the rule of law and the independence of the judiciary.

Even under those unfavorable conditions judges of the Supreme Court made their utmost to uphold the dignity and independence of the judiciary. Subsequently it was the supreme court of Bangladesh which restored back its power, authority, jurisdiction and independence to a great extent by its unparalleled historic Judgment declaring the 8<sup>th</sup> Amendment to the constitution in relation to the bifurcation of the high court division and curtailing of its overall jurisdiction over all the territorial jurisdiction of Bangladesh as illegal, unconstitutional and void.

Till date the reasons for the removal of the affronted senior eminent Judges of the Supreme Court from their office are not known. These eminent Judges were not only removed from service most illegally arbitrarily in flagrant violation of all norms, ethics and principles, they were as well restrained from practicing law for their livelihood and were refused any compensation or pension whatsoever, except chief justice kemaluddin Hossain who was given pension.

One of the four judges, Justice S. M. Hussain, could not absorb the shock of his illegal removal from service and died of cardiac failure, leaving behind his widow and minor children penniless and without any shelter. It is shocking that till today nothing worthwhile has been done to compensate and redress the family of that eminent, dedicated judge and other three judges of the supreme court of Bangladesh.

Justice S M Hussain became a victim of the past regime, along with other three eminent judges, for their uncompromising and unflinching judicial temperament and relentless endeavor and efforts to establish rule of law and safeguard independence of the judiciary. Many years have passed since my respected teacher justice s. m. Hussain has died in agony and helplessness in his tormented mind but we the lawyers and officers of the court will never forget him and the names of justice s m Hussain. Justice Abdur Rahman Chowdhury and Justice K. M. Sobhan will always be remembered.

It is now quite evident that the political parties always shout for “rule of law and independence of the judiciary” not for the sake of the judiciary but to achieve their political objective and to give impetus and momentum to their criticism and movement against the party in power.

Now it is high time that the slogan needs to be raised by all lawyers irrespective of cast creed and political affiliation unanimously (not by politicians) to achieve rule of law and the independence of the judiciary in the country.

As referred to in the historic 8<sup>th</sup> Amendment case judgment that independence of judiciary is not an abstract concept. The reference given there in where judge Vagabati said “if there is one principle which runs through the entire fabric of the constitution it is the principle of the rule of law and under the constitution it is the judiciary which is entrusted with the task of keeping every organ of the state within the limits of the law and thereby making the rule of law meaningful and effective.” He said that the judges must uphold the core principle of the rule of law. Which says “be you ever so high, the law is above you?” This is the principle of independence of the judiciary which is vital for the establishment of real participatory democracy and maintenance of the rule of law as dynamic concept and delivery of social justice to the vulnerable sections of the community. It is this principle of independence of the judiciary which must be kept in mind while interpreting the relevant provisions of the constitution.

## CONCLUSION

The broader theory of 'separation of powers', from which the concept of 'separation of judiciary emerged requires the powers of a given state to be allocated among three separate organs i.e. executive, legislature and judiciary, so that neither of them gets arbitrary and a check can be imposed upon one organ if it tends till 'become autocratic. However, if we keep theories aside for a while and rely more on our empirical observations, it would transpire that the roar of the executive sounds most vis-à-vis the other organs. Even in the USA, the epitome of the separation of powers theory, Mr. Bush still can drag his war-dominated foreign policy on despite the fact that Democrats form the majority in both houses of the Parliament. This observation helps us to realize that it is hard, if not impossible, for other two organs to do or to abstain from doing something which run counter to the will or interest of the executive. This is evident in the course of implementation of Masdar Hossain case itself. Despite being 'supposed' representatives of people, two consecutive political governments afforded to abstain from executing the judgment and got away with that. Indeed, there are countries where this separation theory applies well, but not because of the vitality of the theory itself rather because those countries have developed national sense of respect towards their democratic institutions amounting to inviolability, breach of which is regarded an impossibility. So, it is more of political culture than of mere implementation of theory. We have come across a long way in shaping our legal and institutional structure towards ensuring justice and now we must focus on inculcating the democratic values and spirits, both in political and legal spheres, in such a way that these may be felt integral to our national life. Mere separation was not enough to ensure justice; it has to be complemented by reforms in the police, courts and the legal profession. In this connection we would like to point out that independent judiciary has now to shoulder more responsibility than before. It will have to ensure that the process of appointment of judges has no flaws and the appointed judge's work with greater integrity. Common people must have easy access to the legal system and get legal help timely and at minimum cost, as said by the chief justice.

Judiciary is the last resort of the suffering people; therefore, it must live up to its newly acquired status. We wish the independent judiciary to make its presence felt and meet the expectations of the people that are amply reflected in the jubilant mood they have greeted the separation of judiciary.

## RECOMMENDATION

Given the above solutions this thesis recommends that proper measures should be taken to strengthen judicial independence and to ensure judicial accountability in Bangladesh. In summary, it is recommended that:

- The criteria for appointment of judges should be made explicit and publicly known and in this regard the criteria for appointment of judges in Canada and England can be followed.
- The mechanisms for judicial appointment should be made transparent and open to public scrutiny. In this respect the working procedure employed by the Judicial Service Commission of South Africa can be followed.
- For the appointment, promotion, transfer and discipline of judges at all levels an independent commission should be established with members from the executive, legislature, judiciary, legal profession and lay persons. In this respect, the models of the Judicial Service Commission of South Africa and the Commission on Judicial Performance of California can be followed.
- Judicial vacancies should be advertised and all appointments should be made by open competition as in South Africa.
- Appointment of additional judges of the Supreme Court should not be made as a regular practice. Additional judges may be appointed to meet urgent necessity, particularly to reduce backlogs of cases or to solve temporary shortages of judges.
- The judiciary, particularly the subordinate criminal judiciary should be separated from the executive branch of the government. For the sake of security of tenure of magistrates of the subordinate criminal judiciary, full-time judicial magistrates should be appointed to exercise judicial functions instead of investing magisterial powers in public servants.
- Provision should be made to ensure that until the attainment of the mandatory retirement age subordinate judges should hold office during good behaviors and competence instead of the pleasure of the President and without being subject to forced retirement.
- Media liaison officers should be appointed to provide adequate information about the judiciary to the media. In this respect, the models of Australia or United States can be followed.
- The law of contempt of court should be amended to specify clearly the liability for contempt.
- A fully independent judicial system as a separate branch of government which (a) governs itself and (b) controls its own budget.
- Judicial system with independence in judicial decision-making but administrative and budgetary dependence on an executive department, generally the ministry of justice or its equivalent.

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