

The Independence of Judiciary in Bangladesh A New Milestone and Its Challenges

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Abstract: Independent judiciary is the sine qua non of a democratic government for ensuring rule of law. Since the beginning of the British colonial rule, the question of separation of judiciary from the executive has been a continuing debate. Even after thirty-six years of independence, Bangladesh experiences the separation of the judiciary from the executive since November 1, 2007. This paper attempts to explore to what extent the initiatives have been taken and what the challenges are ahead to implement these initiatives in this regard. It also discusses briefly the conceptual issue, theory relating to the study and finally concludes with some recommendations so that policy of separation of judiciary from the executive would be effective and helpful for the policy makers. The paper is prepared based on secondary sources of information.

1.0 Introduction

In common parlance, the government in a state comprises of three main organs: the legislature, the executive and the judiciary exercising **power of rule making, rule application** and rule adjudication respectively. These organs of the state should remain separate from each other and be independent in a free democracy. The issue of an independent judiciary has been discussed over time in our country to ensure good governance in the country as well as citizens' liberty and right. Although different political parties have pledged from time to time to give such independence of judiciary in their election manifesto, they could not establish in their regimes. This is because of lack of political will and low political culture in Bangladesh. However, the Caretaker Government¹ of 2001 had taken a step towards this, but the successive political government has prayed for

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extension of time again and again. Consequently, the concept of an independent judiciary has not seen the light of implementation at that period. Finally, the last Caretaker Government took the initiative and separated the judiciary from the executive on November 1, 2007. It is a landmark in the history of Bangladesh to launch the journey of the independent judiciary. This study discusses the conceptual issues, relevant theories, background, constitutional provisions and present situation of independence of judiciary in Bangladesh as well as challenges ahead and potential way out.

Concept of Judiciary

The judiciary, besides being one of the organs of the state, is also the custodian of the constitution. It is the third and a separate organ of a democratic state which includes those officers of government whose function is to adjudicate the existing law to individual cases. "Judiciary means the body of those public officials who interpret and enforce the law of the state". "The judiciary of the state may be defined as that body of officials whose work consists in the resolution of complaint, whether between subject and subject, or between state and subject". Judiciary is that body of the state which functions to establish rule of law through enforcing the law of the state. It is an inevitable part of a state without which modern civilization could never be imagined. It helps to ensure good governance and rule of law in the country. It is also called the safeguard of constitution.

Theory of Separation of Powers

According to the theory of separation of powers, the three organs of the government must be kept separate in a free democracy. Thus the legislature cannot exercise executive or judicial power; the executive cannot exercise legislative or judicial power and the judiciary cannot exercise executive or legislative power of the government. The writings of Locke and Montesquieu gave the theory of separation of powers a base on which distinction between legislative, executive and judicial power is grounded. Locke distinguished between them based on some criteria, what he called:

- a. Discontinuous legislative power;
- b. Continuous executive power;
- c. Federative power.

He included within 'discontinuous legislative power' the general rule-making power called into action from time to time and continuously. 'Continuous executive power' included all those power which we now call executive and judicial. By 'federative power' he meant the power of conducting foreign affairs. Here indicates separation of powers of government and these issues are highly relevant to our study. Because independence of judiciary means that any organs of government cannot influence over the judiciary. Judiciary branch is supposed to work according to their own rules and regulation.

Locke pleads for, but does not fully develop, the doctrine of separation of powers. He suggests the principle of separation. The legislature and the executive must be separated in functions, powers and personnel, for otherwise the legislators "may exempt themselves from obedience to the laws they make, and suit the law, both in its making and its execution, to their own private wish, and thereby come to have a distinct interest from rest of the community, contrary to end of society and government"⁴.

Writing in 1748, Montesquieu said:

"When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty, because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in tyrannical manner. Again, there is no liberty if the judicial power be not separated from the legislative and the executive. Where it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would then be the legislator. Where it joined with the executive power, the judge might behave with violence and oppression.

Miserable indeed would be case, were the same man or

the same body, whether of the nobles or of the people, to exercise those threepowers, that of enacting laws, that of executing the public resolution and that of judging the crimes or differences of individuals" ⁵.

This concept is highly related to the study of independence of judiciary of Bangladesh.

In fact, the aim of the doctrine is to guard against tyrannical and arbitrary powers of the state. The rationale underlying the doctrine has been that if all power is concentrated in one and the same organ, there would arise danger that it may enact tyrannical laws, execute them in a despotic manner, and interpret them in an arbitrary fashion without any external control.

The capability of judicial system to deliver justice depends on to a great extent on how far it is independent and free from influence of executive branch of the government. The notion of separate and independent judiciary is one of the cornerstones of our constitution. Article 22 of the Constitution of People's Republic of Bangladesh emphasizes on the independent judiciary by way of separating the same from the executive organ of the state. The article provides that the state shall ensure the separation of the judiciary from executive organ of the state.

The separation of judiciary from the executive became finally effective from November 1, 2007 after the caretaker government had formulated relevant rules and made amendment to the Code of Criminal Procedure (Amendment) Ordinance, 2007 as a response to the apex court's twelve-point directives in the historic Masdar Hossain case.

Independence of Judiciary: A Conceptual Issue

if the judges can act within the bounds of law without interference from any quarters that constitutes independence of judiciary. Independence of judiciary means a fair and neutral judicial system of a country, which can afford to take its decisions without any interference of executive or legislative branch of government. Taking into consideration some of the recent discussions made in the Beijing Statement of Independence of the Judiciary (a statement resulting

from the cumulated views of thirty-two Asian and Pacific Chief Justices) Judicial independence is defined, in this report as a Judiciary uninhibited by outside influences which may jeopardize the neutrality of jurisdiction, which may include, but is not limited to, influence from another organ of the government (functional and collective independence), from the media (personal independence), or from the superior officers (internal independence)⁶.

Independence of judiciary truly means that the judges are in a position to render justice in accordance with their oath of office and only in accordance with their own sense of justice without submitting to any kind of pressure or influence be it from executive or legislative or from the parties themselves or from the superiors and colleagues⁷.

The concept of judicial independence as recent international efforts to this field suggests, comprises following four meaning of judicial independence⁸:

- i. *Substantive Independence of the Judges: It referred to as functional or decisional independence meaning the independence of judges to arrive at their decisions without submitting to any inside or outside pressure;*
- ii. *Personal independence: That means the judges are not dependent on government in any way which might influence them in reaching at decisions in particular cases;*
- iii. *Collective Independence: That means institutional administrative and financial independence of the judiciary as a whole vis-h-vis other branches of the government namely the executive and the legislative; and*
- iv. *Internal Independence: That 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.*

Independence of judiciary depends on certain conditions like mode of appointment of the judges, security of their tenure in the office and adequate remuneration and privileges. Satisfactory implementation of these conditions enables the judiciary to perform its due role in the society thus inviting public confidence in it ⁹.

The Judicial System of Bangladesh: The Constitutional Basis

At a glance, the judiciary of Bangladesh consists of the Supreme Court and the subordinate courts. The highest court in Bangladesh, the Supreme Court, is actually composed of two divisions; the Appellate Division and the High Court Division. The functions of the two are distinct, and separate appointments of judges are made to each. The Chief Justice of the Supreme Court sits in the Appellate Division. The President appoints the judges of the Supreme Court in consultation with the Chief Justice. While some Chief Justices in the past have insisted on being consulted on these appointments, others were not so exacting, leading to "Political" appointments by the party in power ¹⁰.

The lower judiciary in Bangladesh also consists of two parts: first, there are District courts and Sessions Courts", with 10-30 judges sitting in each of the country's districts. There are also the courts of Judicial Magistrates, the Judges of the District Courts are under the jurisdiction of the Supreme Court and belong to the Bangladesh Judicial service.

Administrative tribunals exercise jurisdiction in respect of matters to, or arising out of the republic, or of any statutory public authority as specified in the constitution.

Bangladesh's Constitution came into force on December 16, 1972, at the first anniversary of the country's independence. It contains fairly strict safeguards for the independence of the judiciary. Part VI of the constitution deals with the judiciary. Article 7 of the constitution provides that all powers in the Republic shall be effective only under and by authority of the constitution. Article 35(3) of the constitution provides "Every person accused of a criminal offence shall have right to a speedy and public trial by an independent and impartial court or

tribunal established by the law". Article 116A provides for independence in the subordinate judiciary while Article 94(4) demands independence of the Supreme Court Judges.

The judicial independence of all judicial officers is unconditional according to the constitution of Bangladesh. This ideal is protected primarily through the concept of separation of the judiciary from the other organs of government. Article 22 of the constitution provides that the state shall ensure the separation of the judiciary from the executive organ of state. Article 95(1) addressed the method of appointment for the Supreme Court: the president shall appoint the Chief Justice and other Judges. The appointment and control of judges in the subordinate judiciary (judicial service) are described in Articles 115 and 116 as appointment of persons to offices in the judicial service or as magistrates exercising judicial be made by the President with the rules made by him in that behalf. The control (including the power of posting, promotion and grant of leave) and discipline of persons employed in the judicial service and magistrates exercising judicial functions shall vest in the President and shall be exercised by him in consultation with the Supreme Court. Article 96 provides, "A judge shall hold office until he attains the age of sixty-seven years" and Article 99 provides, "A person who has held office as a Judge otherwise than as an additional Judge shall not, after his retirement or removal there from, plead or act before any court or authority or hold any office or profit in the service of the Republic not being a judicial or quasi-judicial office" although the formal separation of powers is not emphatically articulated. Over the years, its safeguards for judicial independence, rather than being strengthened and consolidated, have been diluted through a number of constitutional amendments.

"It is principally through the above articles that the executive branch has been able to gradually intrude upon and influence the judiciary in Bangladesh, creating enormous problems regarding the quality of jurisdiction and the extent of judicial independence. Recently, separation of the judiciary from the executive has been argued as a necessity based on the unconstitutionality of the

present organization and while this may well be true, it appears to be the consequential improved functional independence of the judiciary that is the fundamental reason for separation with unconstitutionality being only an argument to ensure its enactment" ¹²

Separation of Powers in Bangladesh: A Brief History

The first attempt was taken after the division of the sub-continent in 1947, Pakistan government enacted East Pakistan (then Bangladesh was under Pakistan government) Act No. XXIII of 1957, which provided for separation of judiciary from the executive. The law was still hanging for a simple gazette notification. As regards independence and separation of judiciary, our constitution of 1972 is fairly developed. But the framers of Supreme Law of the land made an unfortunate insertion in article 115 and 116 as 'Magistrates exercising judicial functions'. Article 22 in unequivocal term states that 'the state shall ensure the separation of the judiciary from the executive organs of the state' as one of the fundamental principles of state policy. It is not readily judicially enforceable. Nevertheless the state cannot ignore it for long. There was under current of demand of implementation of constitutional obligation from the very inception of Bangladesh. But the Fourth Amendment undermined the constitutionalism itself, which obviously destroyed the independence of judiciary. The subsequent upheavals of politics rather by passed it. In 1976 law commission recommended that subordinate judiciary on the criminal side should be separated from the executive ¹³.

In the mean time, we witnessed two extra-constitutional processes. In 1987, initiatives were taken to separate the magistracy by amending code of Criminal Procedure, 1898. For unknown reason the Bill could not be placed before the Parliament. After the fall of the autocratic rule in 1990, expectation was high to ensure separation of judiciary. But the next two elected governments of 1991 & 1996 did nothing in this regard except spoiling its tenure. In 1999, the Supreme Court issued 12-point directives in famous Mazdar Hossain¹⁴ case to ensure separation of judiciary from the executive. The successive

governments have taken time again and again to delay the process. It may be recalled that the caretaker government (2001) had taken all measures to ensure separation but initiative was stop at the request of major parties of the country. In 2001 BNP formed a coalition" government with **Jamat-e-Islami** Bangladesh. The BNP led coalition government was working very slowly towards separation of judiciary. The demand of separation of the judiciary from the executive is universal to ensure the independence of judiciary and safeguard the rights of the people. It is quite unfortunate that the Government is moving towards at snail's pace ¹⁶.

Unfortunately, the Government has not been able to give life to these provisions even decades after the framing of the Constitution. Thus, the Supreme Court Appellate Division gave specific directions for its implementation when it had the occasion to interpret the constitutional provisions in *Secretary of Finance v. Masdar Hossain* (20BLD [2000] [AD] 141) ("Hossain") ¹⁷. In the form of 12 point directions, the Supreme Court provided a road map to implement the separation of powers from executive to judiciary ¹⁸.

The Masdar Directions

1. Judicial Service is different from Civil Service;
2. Only President has authority to create and establish a judicial service and a magistracy;
3. Government Order creating BCS (Judicial) Cadre and other administrative cadre unconstitutional;
4. Government of Bangladesh (**GoB**) to establish "forthwith" Judicial Service Commission with majority members being senior Supreme Court (SC) judges;
5. Government of Bangladesh (**GoB**) to frame Rules for posting, promotion, grant of leave etc. consistent with Art. 116;
6. Government of Bangladesh (**GoB**) to establish Judicial Pay Commission (JPC);
7. Primacy of SC's views over executive in exercising control and discipline of persons in judicial service;

8. Rules under Article 133 to be framed to ensure essential conditions of judicial independence (i) security of tenure, (ii) security of salary and other benefits and (iii) institutional independence from the Parliament and Executive;
9. Budgetary independence of SC;
10. Judicial Service Members subject to Administrative Tribunal;
11. Parliament may amend Constitution to secure independence of judiciary;
12. Pending new Judicial Pay Commission (JPC) recommendation, members of judiciary to receive salaries as before.

It is a positive initiative that the Supreme Court's 12-point directions provide concrete guidance on how to proceed with the separation process.

Separation of Judiciary in Bangladesh: A Milestone

The independence of judiciary was a challenging issue in Bangladesh although it is constitutional obligation. It is a way to ensure human rights and people's demand, needs and aspirations. The political culture is the main reason to implement the process. The present Caretaker Government of Bangladesh created a milestone in the history of Bangladesh by implementing independent judiciary on November 1, 2007. The events of the milestone are presented below-

The Msadar Hossain case is the main initiative in the process of independence of judiciary. Government took following action after 12-point directions.

- Financial Autonomy of Supreme Court (SC) secured;
- Judicial Service Commission (JSC) established;
- 5 Laws-Drafted
 - a. Bangladesh Judicial Service Commission (JSC) Rules, 2002 (notified 2004);
 - b. Draft Bangladesh Judicial Service (Pay Commission) Rules; 2002.

- c. Draft Bangladesh Judicial Service (Service Constitution, Composition, Recruitment and Suspension, Dismissal & Removal) Rules; 2002.
- d. Draft Bangladesh Judicial Service (Posting, Promotion, Leave, Control, Discipline and other Service Conditions) Rules; 2002.
- e. Draft Code of Criminal Procedure (Amendment) Bill.

These drafts were published as gazette on June 12, 2006 and finally through proper amendments on January 16, 2007. The Code of Criminal Procedure on February 11, 2007 which was finally published as revised on April 11, 2007.

The judiciary finally embarked on a historical journey on November 1, 2007 as it came out of the direct control of the executive organ of the government. The much-demanded implementation of the separation of the judiciary is now expected to ensure justice without any hindrance as in the past when justice often used to be delayed and the judicial process was controlled by the executive.

The magistrate courts across the country came out of the executive control and continued operation under the authority of the Supreme Court (SC). The Chief Adviser of the Caretaker Government inaugurated Dhaka District Judicial Magistracy and the Dhaka Metropolitan Magistracy at the Bangladesh-China Friendship Conference Centre. Lawyers across the country observed the day as the Separation of Judiciary Day.

Supreme Court Registrar Ikteder Ahmed on behalf of the lower court judges told, "Appointment of 655 judicial magistrates has been approved and 218 of them have already been appointed. The Supreme Court appointed 202 judicial magistrates from the Session Judge's Courts while the rest joined the judicial service from the administration"¹⁹. A total of 4500 officials and staff have been approved for running the judicial process under the independent

judiciary. Of them 600 judicial and 55 metropolitan magistrates who will work in district and metropolitan areas respectively; others are official staff.

The rule of law and democracy could only be achieved when a government is fully aware of the judiciary's role in governance and the constitution is not enough to protect people's rights and freedoms; it needs to be complemented by an independent, efficient, and functioning judiciary. But in our country it is widely believed that ministers or administrators used to largely influence the judicial processes, particularly granting bail and passing orders, as the executive magistrates worked under their control. In cases of non-compliance with the superiors' directives, the magistrates would mostly be stripped of their magistracy power and transferred to other administrative jobs. Different political governments even used the magistrate courts to get political purposes served or to gain other interest.

Around 600 executive magistrates entrusted by the administration with judicial job returned to their administrative duties. The SC has already appointed 202 judicial magistrates to carry out the duties at the magistrate courts.

Meanwhile, the existing backlog of around five lakh cases pending with the magistrate courts is feared to worsen further due to the insufficient number of judicial magistrates. The overload of cases at the session judge's courts is also feared to deteriorate as the judicial magistrates have been selected from different ranks at the sessions judge's courts.

According to Ikhtedder Ahmed, Registrar of Supreme Court, "The judicial magistrates will be carrying out judicial duties round the clock. So, the cases [at magistrate's courts] will be disposed of quickly." He said more judicial magistrates will be appointed in within three months. The executive magistrates could not spend their full time dealing with cases at their courts as they also had a number of other duties to perform. He also expressed, "The executive magistrates

do not have adequate judicial knowledge as they do not have any degree in law. The separation of the judiciary will be helpful to ensure quick justice. Separation of the judiciary is a constitutional mandate and a demand of the people for the welfare of the people. We hope judicial magistrates will be able to carry out duties independently once the separation is implemented" ²⁰.

Implementation of separation of judiciary has also created an opportunity for it to combat corruption within judiciary and outside of the judiciary. Within the judicial system, an independent judiciary can combat corruption through supervision and monitoring over the administration and budgetary process of the court, the appointment, promotion and removal process of the judges.

Separation of judiciary from executive, undoubtedly, facilitates independences of judges so that they can act without external pressure. A true separation of judiciary also necessarily presupposes accountability of judges through a system of check and balance.

Challenges of Independence of Judiciary

Financial problem: Separation of judiciary creates heavy financial burden. Mobilising financial resources is vitally important for effective and independent functioning of judiciary. Currently the Supreme Court is dependent on financial matters on executive branch as budget allocation for meeting the expenses of the Supreme Court is made by relevant ministry, which remains a stumbling block in the way of full autonomy of judiciary.

Lack of Infrastructure: Judicial department needs some immediate requirements such as new buildings and other logistic supports. But it will take a long time because new infrastructures cannot be constructed at overnight. Otherwise, judicial organ is not yet self-independent in finance to establish new buildings for the maintenance of the department and secure the judges while government has no preparation to fund for these establishments. That's why; accommodation problem has already been arisen after separation of the judiciary.

Conflicting with the main spirit of the separation: Government decision to give the executive magistrates some judicial power conflicts with the spirit of separation of the judiciary from the executive.

Incomplete separation: As the magistracy has been brought under the Ministry of Law (MoL), it is not separation of the judiciary in the real sense. To ensure true separation of the judiciary, the magistracy needs to be brought under a separate secretariat under the Supreme Court.

Skilled Human Resources: Judicial department has already been separated but not yet institutionalized with skilled manpower.

Institutional Capacity: The independence of judiciary is a new chapter in the Judicial system of Bangladesh. It is under process and going to be organized. The administrative and legal framework of present independence of judiciary is not fully established. The lack of institutional capacity is found for financial and managerial reasons.

Conclusion and Recommendations

In fine, we can conclude that ending all conjectures concerning smooth transition; the judiciary has finally been made an independent organ as a true governmental system. This is undoubtedly a milestone that has been achieved to advance and ensure greater judicial independence and thereby establish rule of law in the country. The control and supervisory authority of the Supreme Court over the judicial magistrates would be exercised in full measure with a check and balance system put in place.

Any new step forward may have some initial problems which are to be overcome through the application of some remedial steps:

- In order to implement the directives of Masdar Hossain case fully, the constitution may be amended to make separation more effective and complete. Article 115 and 116 of the Constitution which vests authority to the President to appoint and control the offices of the judicial services may be amended to vest those powers fully to the Supreme Court.

- ◆ A separate pay commission as mandated by Judicial Pay Commission Rule should be established as soon as possible to formulate separate salary structure for officials of judicial services in order that it reflects the special nature of its job.
- A guideline should be designed and implemented for the appointment of the judges of higher judicial process in order to bring greater accountability and transparency in their selection process.
- ◆ A separate secretariat may be established under the authority of the Chief Justice to monitor the whole process.
- There is the need for logistic support and **efficient** human resources in order to make the separation of judiciary meaningful.
- Placing the entire lower judiciary under the control of the Supreme Court from the Ministry of Law.
- For an effective separation of judiciary from the executive it is of pivotal importance that the Supreme Court has to have an independent and self-contained **secretariat**.
- Judges should have authority to justify separation of the judiciary from the executive control through candid dispensation of justice. Only then the separation of judiciary would be meaningful.

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