Research Monograph
On
"Separation of Judiciary and Judicial Independence: Bangladesh Perspective"

This research paper is submitted in partial fulfillment of the requirements of the degree of LLM (1 Year) under Sonargaon University.

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Letter of Transmittal

January 10, 2025

To,
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Subject: Submission of research monograph.

Dear Sir,

It is a great pleasure to submit my research paper on **"Separation of Judiciary and Judicial Independence: Bangladesh Perspective".**

I have given my best efforts to finish the research with relevant information that I have collected from various source.

I have concentrated my best effort to achieve the objectives of the work and hope that my endeavor will serve the purpose. I shall be highly grateful and obliged if you kindly accept my research and evaluate it with your sagacious judgment.

Sincerely yours,

……

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Acknowledgement

I am deeply gratitude to Almighty Allah for providing me everything that required for completing my research work.

I would like to acknowledge everyone who played a role in my academic accomplishments. First of all, my parents, who supported me with love and understanding. Without you, I could never have reached this current level of success.

Secondly, I am thankful to my supervisor Mr. Muhammad Ali to allow me and support to prepare this research.

……

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Declaration

I do hereby declare that the research monograph entitled **"Separation of Judiciary and Judicial Independence: Bangladesh Perspective"** submitted to the Department of Law in Sonargaon University in the fulfillment of the requirements for the decree of LLM (1 Year), is carried out by me under the guidance and supervision of Mr. Muhammad Ali, Department of Law. Research method and approaches strictly have been followed during undertaking the work. The work I have presented does not breach any copyright. I further undertake to indemnify the University against any loss or damage arising from breach of the foregoing obligations.

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Certificate of the supervisor

The undersigned certify that the research paper entitled **"Separation of Judiciary and Judicial Independence: Bangladesh Perspective",** a study has been carried out by Md. Asiqul Islam (Student ID No. LLM2401030006), under my constant supervision as per the rules and regulations stipulated by the Sonargaon University in the partial fulfillment of the requirements for the degree of LLM (1 Year).

Signature of supervisor:

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Abbreviations

AD- Appellate Division

AL- Bangladesh Awami League

BCE- Before the Common Era

BNP- Bangladesh National Party

BLD- Bangladesh Legal Decisions

CJ- Chief Justice

DLR- Dhaka Law Reports

HCD- High Court Division

JCS- Judicial Service Commission

MP- Member of Parliament

SC- Supreme Court

SJC- Supreme Judicial Council

List of Cases

1. Secretary, Ministry of Finance, Government of Bangladesh vs. Mr. Md. Masdar Hossain & others [52 DLR (AD) 82].
2. Anwar Hossain Chowdhury vs. Bangladesh [1989 BLD (SPL) 1, 41 DLR (AD) 165].
3. Bangladesh vs. Idrisur Rahman (2010) 15 Bangladesh Law Chronicles (AD), p. 49.
4. Judgement (1993) Bangladesh vs. Aftabuddin, 48 DLR.
5. Kesavananda Bharati vs. State of Kerala [(1973) 4 SCC 225].
6. Hussainara Khatoon vs. State of Bihar [(1979) Cr LJ. 1045].
7. Sushma Suri vs. Govt. of National Capital Territory of Delhi [(1999) 1 SCC 330]
8. High Court of Rajasthan vs. Ramesh Chand Paliwal [AIR 1998 SC 1079].

Abstract

In Bangladesh, the separation of the judiciary and its independence are constitutional mandates repeatedly declared in the judicial pronouncements; but no effective steps were taken by any governments before 2007. In order to fulfill the constitutional mandates and mandatory directions of the judgment of the Masdar Hossain case, the judiciary, particularly judicial magistrate courts were formally separated from the executive on 1st November 2007. More than 12 years have gone since the formal separation of the judiciary from the executive. Independent judiciary is a condition sine qua non of a democratic government. In a democratic state, state power rests on three separate organs, namely the executive, the legislature and the judiciary. The Constitution of the People's Republic of Bangladesh vests executive power in the executive and legislative power in the parliament. Judicial power is vested in the judiciary both by tradition as well as by various provisions of the Constitution. The judiciary comprises all courts and tribunals, which performs the delicate task of ensuring rule of law in society. A social structure remains logical and solid with the aid of a sound judicial system. The judiciary redresses grievances of the people and resolves disputes. The dysfunction of judiciary impacts more severely than that of any other institution as it removes from the mind of people the sense of attachment to society. Although the judiciary was independent for sometimes at the colonial period, the colonial administration did not want to separate the judiciary permanently for their colonial interest. From the analysis of the study, the findings as revealed are negative; therefore, the barriers have also been identified and explored in the paper.

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Chapter I

INTRODUCTION

1.1 Introduction

In a democratic state, the power rests on three separate organs, namely the executive, the legislature and the judiciary. The constitution of Bangladesh vests the executive power in the executive and the legislative power in parliament. Though there is no specific vesting of judicial power, it is vested in the judiciary, the judiciary comprises all courts and tribunals, which performs the delicate task of ensuring rule of law in the society. A social structure remains coherent and cohesive with the aid of a sound judicial system. Judiciary redresses the grievances of the people and resolves disputes. The dysfunction of judiciary impacts more severely than that of any other institution as it removes from the mind of people the sense of attachment with the society. In Bangladesh the Judicial norms and practice have been derogating for years. Recently a number of allegations have mounted surrounding judiciary.

The terms separation and independence are not synonymous. This becomes more visible and audible when we would like to talk about the role of a judiciary for ensuring justice and good governance in a democratic country. It has been our long-cherished dream to separate our judiciary from the influence and control of the executive organ of the state. It has become a matter of great pride and honour for us that the separation of judiciary is no longer a dream for us but has become a thing of reality and we all hope that this historic evolution would usher in a new era of greater judicial independence. Let us again aspire that this greater independence would enable our lower judiciary to satisfy the justice-seekers.[1]

It is almost trite to mention that no other criminal court of the lower judiciary in Bangladesh enjoys direct connection with the larger portion of our litigants so extensively like the magistrate courts. Nor have magistrates of other countries die many special jurisdictions and extrajudicial functions conferred on the magistrates of Bangladesh by statutory enactment.[2]

[1] Rahman, Shah Md. Mushfiqur, 'Separation of Judiciary and its Potential Impact', The Daily Star, (Dhaka, 1 July 2010), p 23.
[2] Bhuian, Mohammad Nazmuzzaman, "Separation of Magistracy: A Need for the Independent Judicial System in Bangladesh", *The Dhaka University Studies, Part F, Vol. XVI* (1), June 2005, p 81.

As regards criminal cases in Bangladesh, magistrates' courts are the courts of first instance. It would be evident from the number of criminal cases filed in a year in these courts, which is far greater than the number of cases in civil courts. So, these criminal courts should have played a vital role in shaping the thoroughgoing nature of our legal system. But unfortunately, due to some legal shortcomings, these courts are playing controversial role frustrating the very purpose of the independent judicial system. Public perception of the magistracy is very low and the reasons are plain to see. In order for law enforcement to be fair, the judicial system must be concerned only with the application of law. There is only one way in order to make this happen: assurance of independence from any sort of influence from the administrative branch of the government. Achieving judicial independence is the crucial phase in regaining public confidence in the legal system of Bangladesh. The future independence of the judiciary of Bangladesh depends upon the minimization of the executive interference in the lower judiciary, and more importantly, upon the removal of the executive control over the magistracy.[3]

1.2 Objectives of the Research

The main objective of the research is to evaluate the existing conditions of judicial independence in Bangladesh after separation of judiciary from executive. In view of the required inquiries this aim is reformulated into some specific objectives. To review the existing conditions of theory of the main aim of the research is to evaluate the existing conditions of judicial independence in Bangladesh after separation of judiciary from executive. In view of the required inquiries this aim is reformulated into some specific objectives. They are:

1) To review the existing conditions of judicial independence and judicial accountability in Bangladesh;
2) To analyze the existing judicial independence in Bangladesh;
3) To analyze and assess the existing measures for ensuring Judicial Independence;
4) To analysis how judicial independence can be reconciled with judicial accountability in Bangladesh.

[3] Ibid.

1.3 Limitation of the Research

The research intends to find out the effect of Separation of Judiciary from the executive in case of ensuring judicial independence. As it has been noted earlier, the executive has diversified functions of maintenance of law and order, after separation what is the present situation about function of executive and judiciary, this study analyzes this situation describing theory of separation with judicial independence. However, this study focuses only on the point whether separation ensure judicial independence. This study has been done to see the implication of judiciary separation in case of law-and-order coordination. After considering separation of power theory and elements for ensuring judicial independence this study evaluates how far judicial independence exists in Bangladesh. The field of study is specific because it covers only the Bangladesh perspective of the evaluation of Implication of the judicial independence. All the major issues regarding the concept, background, statutory value, implication, present scenario and also some measures to ensure judicial independence have been discussed within this article. The main focus is on the situation how far it is implemented in Bangladesh. The problems and drawbacks behinds the situation which hinders the independence of judiciary have also been identified through the Article. Specific measures that should have been taken to resolve those problems are also the subject matter of the Article.

1.4 Problem Statement

After independence of judiciary in 2007 there is no such separation in practice. Now 16th amendment makes this situation visible by giving parliament power to dismiss Supreme Court Judges. In many stages executive exercises control over judiciary and judicial independence is a rule only without any implementation. After 47 years of independence in Bangladesh this system remain unchanged as it was in 1972 in spite of different changes in our laws. It was included in Fundamental Principal of State Policy in our Constitution which is not enforceable. This situation raises the question of analyzing and evaluating the separation of judiciary from the executive and judicial independence in Bangladesh. This research will try to clarify present situation of Bangladesh in case of judicial independence.

Appointing the Judges of the Higher Judiciary there has not any fixed criteria settled by any law. The Constitution of Bangladesh is not properly saying about the criteria of appointing as

a Judge of Supreme Court. It is big negligence of the govt. to appoint the eligible persons as the Judges of the Supreme Court. A law should be fixed as soon regarding the appointment of the Judges of the Supreme Court, there is not any custom in promoting a judge from the High Court Division to Appellate Division of the Supreme Court. Doctrine of Seniority is not practiced always in this regard. Even Appointing the Chief Justice of Bangladesh seniority is not practiced at all There has a lot of examples in our judiciary in this regard.

1.5 Literature Review

The main idea of this study is to know the consequence of the judiciary separation. It is expected that this study will give some insights as to whether the separation has had any impact on judicial independence. It will also be helpful for future researchers to conduct study in this area. 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.

1.6 Research Methodology

The whole article has been conducted on the basis a theoretical discussion by qualitative method. This research has been made on the basis of studying important books, case laws, journals published by different institutions, using legal dictionary, available research works, visiting several websites and newspaper analysis. The portion that has been quoted from these sources has been mentioned in the Article.

Chapter II

ORIGIN AND DEVELOPMENT OF SEPARATION OF JUDICIARY AND JUDICIAL INDEPENDENCE

2.1 Historical Background and Developments

The idea of independence of the judiciary was first worked out by a French philosopher Montesquieu, who articulated the famous "Theory of Separation of Power" in the sixteenth century. Separation of the judiciary from the executive refers to a position in which the judicial branch of government can act without any interference from other branches of government, particularly the executive.

The Constitution of Bangladesh provides for an impartial and independent judiciary as one of its cornerstones. In reality, though the judiciary has been subservient to the all-powerful executive government since independence in 1971, various governments made rhetorical promises to separate the judiciary from the executive only to appease popular demand for an independent judiciary. The domineering culture of executive autocracy over the constitutional imperative of the separation of power militated against the creation of an independent judiciary. This situation led Masdar Hossain, a lower court judge, to lodge a writ petition with the Supreme Court seeking an order for the separation of the judiciary from the executive as required in Article 22 of the Constitution.

The High Court Division in May 1999 issued a directive to the government to separate the judiciary, both higher and lower, from the executive within eight weeks. This ruling prevailed on appeal in November 2000 and reaffirmed in the revision case in June 2001 in the Appellate Division. The SC ruling worked out 12 directives for the government to implement the separation without any constitutional amendments, which went unheeded. Despite Articles 102 and 112 of the Constitution making all SC rulings binding for all citizens and authorities, the then government sought 26 extensions of time to implement the ruling and eventually left the office in October 2006 without separating the judiciary. The interim caretaker government that assumed office after October 2006 declared the separation in January 2007 and enacted four sets of rules to effect this separation. These rules, implemented by 1st July 2007, rendered the SC independent and brought the magistrates

exercising judicial functions under the control of the SC, free of executive influence. This reform is yet to be implemented in the lower judiciary, which remains largely under the control of the executive.[4]

2.2 Doctrine of Separation and Elements of the Independence of Judiciary

The Judiciary is an important organ of the government, which primarily administers the law by expounding and defining its true meaning. In a free society, the necessity of the judiciary is keenly felt to ascertain and decide both public and private rights, to administer justice, to punish crimes and to protect the innocent from injury and usurpation.[5] At modern times, it is contended that the independence of the judiciary is principally a result of the doctrine of separation of powers, the doctrine which means the distribution of powers among different organs of the government. In earlier history, however, the doctrine had nothing to do with the independence of judges, but now it is said to have received its application in democratic countries by securing the independence of courts from the control of the executive.[6]

The most central and traditional meaning of the independence of the judiciary is that the judges are in a position to arrive at their decisions free from interference of the political branches, especially the executive, and apprehension for suffering personally as a result of exercising their judicial powers. But the concept of judicial independence has broadened over the years. Now it has many facets. Recent international efforts have particularly led four meanings of judicial independence:

a) Substantive independence;
b) Personal independence;
c) Collective independence;
d) Internal independence.

It is to be noted that the concept of substantive and personal independence is something that was always universally recognized in the legal world. But the latter two was first recognized by the International Bar Association's Minimum Standards of Judicial Independence, 1982 and following them by the Montreal Universal Declaration on the Independence of Justice,

[4] International Journal of Law and Management; Vol. 54 No. 1, 2012, pp. 61-77.
[5] Dr. M. Ershadul Bari, Importance of an independent Judiciary in a Democratic State.
[6] Philips, O. Hood (& Jackson, Paul) Constitutional & Administrative Law, 15 (1978).

1983. This recognition is considered one of the most significant contributions of the international standards to judicial independence.

2.3 Importance of an Independent Judiciary

Judicial independence is a sine qua non (an essential condition; a thing that is absolutely necessary) in a democratic society proclaiming the rule of law. For, it is the judiciary charged with the ultimate decision over life, liberty, freedom, rights, duties and property of citizens. The Judiciary is an important organ of the government, which primarily administers the law by expounding and defining its true meaning. In a free society, the necessity of the judiciary is keenly felt to ascertain and decide both public and private rights, to administer justice, to punish crimes and to protect the innocent from injury and usurpation. Since its modern beginnings, the international human rights law has incorporated the principle of judicial independence within its jurisprudence. The *1948 Universal Declaration of Human Rights* enshrines the principle of the independence of the judiciary.[7] Similarly, the *European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950* provides that everyone is entitled to a fair public hearing within a reasonable time by an independent and impartial tribunal established by law.[8] Later, the *International Covenant on Civil and Political Rights, 1966* imposed upon governments the duty to preserve the judicial independence in the administration of criminal justice.[9] Referring to the importance of the independence of the judiciary, an eminent authority, namely, Henry Sidgwick, has gone so far as to say that "*in determining a nation's rank in political civilization, no test is more decisive than the degree in which justice as defined by the law is actually realized in its judicial administration…..".*[10]

2.4 Historical Background of the Separation of Judiciary in Bangladesh and the relevant provisions of the Constitution of Bangladesh

The separation of magistracy has been debated almost since the arrival of the British, it is since the emergence of Bangladesh and the formation of its own Constitution that the need

[7] Article 10 of the Universal Declaration of Human Rights 1948.
[8] Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedom.
[9] Article 14 of the International Covenant on Civil and Political Rights, 1966.
[10] Sidgwick Henry, The Elements of Politics, 481 (1897).

for the separation and the independence of the Judiciary as well as magistracy has become crucial. Specially after the 4th Amendment of the Constitution on 25th January of 1975, which introduced the one-party political system, the country went through the most significant and radical changes in the Constitution.[11] It is told that the Amendment completely curtailed the independence of the judiciary.[12]

Regarding the appointment of the judges in the subordinate courts, it was provided in the original Constitution that the District Judges shall be appointed by the President on the recommendation of the Supreme Court and; in the case of other judicial officers including magistrates shall also be appointed by the President after consulting the Public Service Commission and the Supreme Court.[13] As to the security of tenure, it was provided that the control and discipline of the judges and magistrates would vest in the Supreme Court.[14]

These were healthy provisions regarding the lower judiciary as well as magistracy.[15] But the 4th Amendment amended the appointment provision to the effect that appointments of persons to offices in the judicial service or as magistrates exercising judicial functions shall be made by the President in accordance with the rules made by him in that behalf.[16] The provision regarding control and discipline were amended to the effect that the control (including the power of posting, promotion and grant to leave) and discipline of persons employed in the judicial service and magistrates exercising judicial functions shall vest in the President. Thus, the whole judiciary became subservient to the executive.[17] And after malting such provisions, it was inserted in the Constitution that subject to the other provisions, all persons employed in the judicial service and all magistrates shall be independent in the exercise of their judicial functions.[18] This provision was really illusory. However, the undemocratic provisions regarding the control and discipline introduced by the 4th Amendment were repealed and the healthy provision 'in consultation with the Supreme

[11] Ahmed, Moudud, *Bangladesh. Era of Sheikh Mujibur 'Rahman,* Dhaka, 1984, p 233.
[12] Halim, Md. Abdul, *Constitution, Constitutional Law and Politics, Bangladesh Perspective,* Dhaka, 2003, p 118.
[13] Article 115(1) of the original Constitution of Bangladesh of 1972 but this Article was amended by the Fourth Amendment Act, 1975(Act II of 1975), s 19.
[14] Article 116 of the *Constitution of the People's Republic of Bangladesh*. In this Article die word "President" was substituted for the words "Supreme Court" by the Fourth Amendment Act, 1975(Act II of 1975), s 20.
[15] Supra note 2, p 94.
[16] Article 115 of *The Constitution of the People's Kepublic oj Bangladesh.*
[17] Supra note 2, p 94.
[18] Article 116A *of The Constitution of the People's Republic of Bangladesh.*

Court' as was provided by the original Constitution was revived in 1978 by the Second Proclamation.[19]

In the years following the 1975 Amendment, a few attempts were taken to improve the independence of Judiciary, which revolved around mainly the higher judiciary only (e.g. the creation of Supreme Judicial Council regarding the removal of Supreme Court Judges in 1977 and the increase in the tenure of the office of the Supreme Court Judges several times) but the issue of the separation of lower judiciary remained unheeded until 1997 when the High Court Division demanded the judiciary to be separated from the executive.[20]

2.5 Masdar Hossain Case, a brief look into the Judgement

The issue of separation of judiciary from the executive came to the fore with the judgement of Masdar Hossain Case (Secretary, Ministry of Finance vs. Masdar Hossain)[21] that started as a mere grievance regarding financial benefits evolved to an issue that touched the core of separation of judiciary. The higher judiciary seized the opportunity to its fullest to come up with two of the most acclaimed milestone judgments in the country's legal history at both tiers of the apex court. Interestingly enough, and much to the satisfaction of the lawyers' community, the highest court did not loosen its leash on the implementation of the judgement. Rather, it still holds the full control of the implementation procedure to make sure that everything is on track.[22]

Popularly it is said that Masdar Hossain judgment contains 12-point directives that are vital to separation of judiciary. Indeed, the judgment contains 12 points in its directive part but all of those are not essentially framed in the form of directions that may require the government to undertake some actions of affirmative nature. Rather, most of the points deal with declarations made by the court clarifying its position on different constitutional provisions and these, declarations do have the force of law. Directive points of the operative part require the government to frame Rules that are to deal with establishment o f a Judicial Service of Bangladesh; to enact law regarding posting, promotion, grant of leave, discipline, pay, allowances, pension and other terms and conditions of service; to establish a separate Judicial

[19] Supra note 2, p 95.
[20] Ibid.
[21] 52 *DLK (AD)* p 82.
[22] Supra note 1.

Pay Commission by Rules; to make law ensuring security of tenure of judges, security of their salary and other benefits and pension and institutional independence from the Parliament.[23]

These directions of the highest court are complied with the enactment of the much-talked-about four Rules.[24] Other points of the judgement are also of vital importance. For example, the very first point declares that the judicial service, though a service of the Republic, is a functionally and structurally distinct and separate service from the civil executive and administrative services of the Republic and any amalgamation or mixing up between these two different genera of services cannot be done on any account nor can they be placed on a par.[25]

It was also clarified that the control of the Judicial Service should be guided by Rules framed according to Article 115 and not Rules under Article 133 or 136 of the Constitution. It was also clarified that the Services Act, 1975 and the Civil Service Recruitment Rules, 1981would not apply with regard to the judges.[26]

After the pronouncement of this landmark decision, it has taken nearly ten years but this has finally been achieved. On 1 November 2007, a nonpolitical government was able to complete what political governments of the past had promised but failed to deliver. It was a question of political will and the past political masters were unfortunately found wanting.[27] Reluctance of successive government and bureaucratic tangles had been the main hindrances till now to the implementation of such separation. Political governments, due to partisan interests had also procrastinated in die implementation of the required steps. This course of action on their part had been so despite the provisions of Article 112 of the constitution whereby the government is supposed to act in aid of the Supreme Court.[28]

The civil society, media and the political parties of Bangladesh welcomed the development. Haroon Habib, a Dhaka based freedom fighter turned journalist said, “The separation of

[23] Ibid.
[24] The Bangladesh Judicial Service Commission Rules, 2007; The Bangladesh Judicial Service (Pay Commission) Rules, 2007; The Bangladesh Judicial Service (formation of the service, appointment in the service and temporary dismissal, dismissal and removal) Rules, 2007; The Bangladesh Judicial Service (determination of posting, promotion, grant of leave, regulation, discipline and other conditions of service) Rules, 2007.
[25] Ibid.
[26] Zamir, Muhammad, ‘Make the Separation of Judiciary work”, *The Daily Star, 17-11-2007.*
[27] Ibid.
[28] Ibid.

judiciary was an epoch-making step, and should be considered a major milestone in Bangladesh's judicial history despite the fact that it was done when there is no political government." Appreciations came from its development partners, with countries like the United States, Britain and Germany saying that it was an important step towards strengthening democracy in Bangladesh.[29] Barrister Mainul Hossain, the adviser for Law, Justice and Parliamentary affairs to the caretaker government described, "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."[30]

The government has also brought amendments to the Code of Criminal Procedure, 1898[31] reflecting the basis of the separation of judiciary as contained in Article 22 of our Constitution, which states that the State shall ensure separation of the judiciary from the executive.

[29] Merinews,: "Bangladesh's Big Leap Towards a Stronger Democracy," available at http.•ww^v.merinews.com/catFull.jsp? article ID = 127957& cat ID=1& category^ World < accessed on 29-ll-2007>.
[30] Ibid.
[31] *The Code of Criminal Procedure (Amendment) Act*, 2007 Ordinance no 2, 2007, Bangladesh Gazette, Extraordinary Issue.

Chapter III

CONCEPTUAL ANALYSIS

3.1 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)[32] [33].

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 colleagues[34]. The concept of judicial independence as recent international efforts to this field suggests, comprises following four meaning of judicial independence[35] [36] :

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 in which might influence them in reaching at decisions in particular cases;

[32] Rahman, Mizanur. 2000. Governance and Judiciary. Governance: South Asian Perspective (Eds. Hye, Hasnat Abdul). Dhaka: University Press Ltd.
[33] Hadley, Sierd. 2004. Separation of Judiciary and Judicial Independence in Bangladesh. www.ais-dhaka.net/School_Library/senior%20Projects/04_Hadley_judiciary.pdf
[34] Halim, M.A. 1998. Constitution, Constitutional Law and Politics: Bangladesh Perspective. Dhaka: Rico printers, p 299.
[35] Bari, M. Ershadul. 1993. The Dhaka University Studies. Part. F, IV; 1: 2.
[36] Supra note 32.

iii. ***Collective Independence:*** That means institutional administrative and financial independence of the judiciary as a whole vis-à-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 judges 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 some 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[37]. "Independence of the judiciary", it is maintained, "lends prestige to the office of a judge and inspires confidence in the general public"[38].

3.2 Separation of the Judiciary

Separation of the judiciary has been argued both as a cause and a guardian of formal judicial independence[39]. The concept of separation of the judiciary from the executive refers to a situation in which the judicial branch of government acts as its own body frees from intervention and influences from the other branches of government particularly the executive. Influence may originate in the structure of the government system where parts or all of the judiciary are integrated into another body (in the case of Bangladesh: the executive). For example, in Bangladesh the president in consultation with the Supreme Court according to the constitution, appoints judicial officers other circumstances include functional aspects of the judicial system when the administration of justice is in some way, affected by executive orders or actions. Executive abuse of this constitutional order result in biased appointment of judges, and other officers of the judicial cadre, favoring individuals who support the governing political party. An executive officer follows plans, which are of a vertical nature, with the higher offices guiding the decisions of the lower officers, who look for the best possible ways to further the plans established by those higher in the pecking order. Executive

[37] Supra note 32, p 147.
[38] Robson, W.A. 1951. Justice and Administrative Law.
[39] Supra note 33.

decisions are made in lines of policy; law is not a policy. Judges or magistrates performing judicial functions must examine what evidence is given and find a way to best apply it to the law; there is less room for an individual's perceptions in judicial decisions.[40]

Complete separation is relatively unheard or outside of theory, meaning no judiciary is completely severed from the administrative and legislative bodies because this reduces the potency of checks and balances and creates inefficient communication between organs of the state[41]. A high degree of separation, however, can be a strong guardian of judicial independence, as this paper will attempt to prove.

The constitution of Bangladesh is the first defense of judicial independence, presiding over all the "Republic's affairs and framing the organization and administration of the government. While constitutional flows exist, regarding separation of the judiciary, there are adequate provisions for formal judicial independence.

3.3 Judicial Independence in the Constitution

Part VI of the constitution deals with the judiciary. Artical 7 provide that all powers in the Republic shall be effective only under and by authority of the constitution. The responsibility of seeing that no functionary of the state oversteps the limit of his power is, a necessity, on the judiciary. Artical 35(3) of the constitution provide "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. Article 116A, while requiring judicial independence, was part of the detrimental changes to the constitution made in 1974 and 1975 discussed later in the paper: Subject to the provisions of the constitution, all persons employed in the judicial service and all magistrates shall be independent in the exercise of their judicial functions.

[40] Dr. Kamal, Hossain. 2004 5th March, Interview by Sierd Hadely with Dr. Kamal Hossain, senior most lawyer of the Supreme Court Bar Association and joint-writer of the Constitution of Bangladesh.
[41] Supra note 33.

3.4 Separation of the Judiciary in the Constitution

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 state directly and unquestionably: The state shall ensure the separation of the judiciary from the executive organs 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 stating respectively: 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.

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 he consequential improved functional independence of the judiciary that is the fundamental reason for separation with unconstitutionality being only an argument to ensure its enactment[42].

3.5 Independence Judiciary in Bangladesh

Separation of judiciary from the executive and judicial independence appears to have become an endless process. The debate started in the late 18th century and continues even now[43]. However now it is important to understand the present structure of the judiciary to be able to understand where executive intrusions into the judiciary originate and how these affect the independence of individual judges.

[42] Supra note 40.

[43] Ali, S.A.M.M. 2004. Wither separation of the judiciary. The Daily Star. Retrieved from http://www.thedailysatar.net/2004/01/07/d401070 20330.htm

3.6 Structure of the Judiciary

Bangladesh's Constitution came into force on December 16, 1972, the first anniversary of the country's independence. It contains fairly stringent safeguards for the independence of the judiciary in Article 95 (Appointment of Judges), Article 96 (Removal of Judges), and Article 99 (Prohibition on Further Employment of Judges), 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.

At a glance the judiciary of Bangladesh consists of two divisions, the Supreme Court and the subordinate courts. The highest court in Bangladesh, the Supreme Court, is actually composed of two divisions; the Appellate Divisions 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 and is the Chief Justice of Bangladesh; there is no separate Chief Justice of the High Court Division. The president, sometimes-in consultation with the Chief Justice appoints the judges of the Supreme Court. While some Chief Justice 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[44].

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 61 districts. Then there are also the courts of Magistrates, the Judges of the District Courts are under the jurisdiction of the Supreme Court and belong to the Bangladesh civil service, while judges in the courts of Magistrates are members of the country's, administrative cadre, which is responsible for the general administration of its territories. Magistrates are controlled not by the judicial branch, but by the Ministry of Establishment and by the government. Magistrate judges are typically transferred to their magisterial posts for 3-10 years during the course of their employment with the government, thereafter are reverted back to their old administrative positions[45]. There are four different types of magistrates: magistrate of the first class, second class third class and honorary magistrates[46]. Responsible for 80 percent of criminal cases, it is the magistrates who usually decide if the accused is to be granted bail or prosecuted and

[44] ADB. 2003. Judicial Independence Overview and Country-level Summaries. Asian Development Bank. Retrieved January 10, 2005, Retrieved from http://www.adb.org/Documents /Events/2003/RETA5987/ Final_overview_Report_pdf

[45] Ibid.

[46] Hoque, K.E. 2003. Judiciary. In Banglapedia. 6, Dhaka: Asiatic Society of Bangladesh.

typically have the power jail and individual for up to seven years. The most notable executive interferences in the lower judiciary come through the appointment of judges and more importantly executive control over the magistrates, these bonds between the executive and the judiciary are an important constitutional discrepancy that results in the deterioration of the concepts of judicial independence and rule of law.

3.7 Steps for Separation of Judiciary

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', which still remain unattended. Artical 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[47].

In the meantime, we witnessed two extra-constitutional processes. In 1987, initiatives were taken to separate the magistracy by amending The Code of Criminal Procedure, 1898. For unknown reason the Bill could not placed before the Parliament. After the fall of autocratic rule in 1990, exception was high to ensure separation of judiciary. But the next two governments of 1991 & 1996 did nothing in this regard except spoiling its tenure. In 1999, the Supreme Court issued 12 points directives in famous Mazdar Hossain 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)

[47] Hussain, M.M. 2003. Reporting on bail requires thinking. The Daily Star. Retrieved from http://www.the dailystar.net/law/200306/04/corridor.htm

has all measures to ensure separation but stop at the request of AL and BNP two major parties of the country. The BNP leaded coalition government is working very slowly towards separation of judiciary. It is a pleasure that Judicial Service Commission and Judicial Pay Commission have been created various rules and amendment in the relevant sections of code of Criminal Procedures 1898 are under consideration of parliament of late the law. Just and Parliamentary Affairs Minister announced that it would take additional six years (!) to ensure separation of judiciary the Daily Star 20.6.2004 this statement is reflective of how indifferent the Government is about separation of judiciary. The demand 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 a snail's pace[48].

It may be noted that Pakistan and India have taken necessary steps for free the judiciary from the executive at all levels in 1973 and 1974 (in West Bengal in 1970) respectively. Ensuring justice and independence of judiciary will remain a far very until lower judiciary is separated from the executive. It is mandatory and constitutional obligation of the Government to ensure separation of the judiciary from the executive. Five years have been clasped since the Supreme Court gives it directives in Masdar Hossain case. Law Minister is seeking for additional six years in this regard we can fairly questions how long will it take to ensure separation of judiciary from the executive?

We may mention here some draft procedure to separation of judiciary by the government at a glance:

i) The formation of Bangladesh Judicial Service, establishment of pay commission, appointment in service and the procedures of temporary dismiss and remove, 2001.
ii) Bangladesh judicial service (ascertainment of field of service, giving promotion, system of control and discipline including grant of vacation and the term of service) procedures, 2001.
iii) Judicial Service Commission Procedures, 2001.
iv) The Code of Criminal Procedures, 1898 (Amendment) Ordinance, 2001.

But these drafts have some flaws, which are mentioned below:

- **Constitutional Amendment:** First of all, constitutional amendment is essential if the judiciary is to be separated from the executive. In the proposed process, the judges are

[48] Bari, H.M. Fazlul. 2004. Separation of Judiciary How long will it take? Retrieved from: http://www.thedailystar.net/law/2004/08/04/vision.htm.

supposed to be indirect control of the president. But in the Article No. 48 of the constitution President is bound to take suggestion for appointing chief justice and Prime Minister. Moreover, in the Article No. 55, it is clearly mentioned that the executive power of the republic will be vested upon the Prime Minister. So the article 48, and 55 must be amended.

- **Future of Working Magistrate:** How the promotion and other facilities will be given to the magistrates, it is not clear in the draft. If the working magistrates do not go under judiciary, there will be great problem because of shortage of judges.
- **Mobile Court**: In order to sustain the law and order of the country, mobile court plays a vital role. Executive controls it though it is the work of judiciary. According to the Criminal Procedure, Claluse-190 magistrate cannot direct the mobile court. So, it is a confusing matter that who will control mobile court.
- **Pay Commission and Finance**: Who will provide money/salary to the Judges or Magistrate, if Judiciary is separated, it is not mentioned in the draft. So before separation, pay commission and finance must be fixed.

Chapter IV

CONCLUDING CHAPTER

4.1 The Problems and Obstruction of Separation of Judiciary in Bangladesh

The question of separation of the judiciary from the executive organ of the state is not new for our judicial system. There were of course commitments of the political parties every time before the elections were held[49]. We must seek the reasons why this very important organ of the state has so far not been given the shape as enunciated in the sacred constitution where the nation has solemnly affirmed for an independent judicial system. I have point out here some common problems.

1) **Lack of Consciousness**: Of the total people constituting the electorate of our country, many voters do not know what actually is mean by the separation of the judiciary and for that matter what is the bright side of the proposed separated judicial system. To address these questions, we should have at least an average knowledge of our present judicial system. Lack of consciousness peoples have no strong movement for this reasonable and demandful wants.
2) **Lack of Political Will**: Any kind of meaningful changed, political will is mandatory because our democratic polity deals by various political parties and Government formed by citizen's mandate with their representatives. So, if the political parties (both government and opposition) have no interest to separate the judiciary from the executive it would be impossible. Though most of the political parties have commitment to separation of judiciary but after formation of government they technically avoid the matters. That's why the process of separation of judiciary is going on endlessly.
3) **Lack of Interaction with Other Courts**: Lack of interaction of the judges in Bangladesh with their counterparts in other countries is a possible factor for their insular understanding of law. The courts' scarce resources limit the opportunities for such interaction. And, the very limited judicial interaction with foreign courts, when it

[49] Rahman, S.M. Matiur. 2004. The Problems of Separation of Judiciary from the Executive. Retrieved from http://www.thedailystar.net. /law/2004/09/04/.

does occur is arranged in hierarchical order. This means that older judges, who are usually less amenable to fresh ideas and have less time left on the bench, undertake such interactions most often, receiving the most limited results possible[50].

4) **Lack of Strong Civil Society**: Civil society now days play a very important role for any positive change or form of a country. The civil society of Bangladesh is not so strong that's why they also failed to compel the government to separate the judiciary from the executive.
5) **Lack of Democratic Culture**: We have reached upon 34th years of our independence from the dictatorial and autocratic rule of Pakistan. In 1991 we claim to have set up a democratic government. But we have so far made little progress in practicing parliamentary culture. Our leadership instead of guiding the nation toward setting up a strong parliamentary democracy has so long been engaged in the politics of mutual hatred and vengeance. Tolerance and respect for opposition party is now foreign in our politics. Such intolerance and enmity between political parties have adversely affected the nation as a whole and virtually has divided the nation into some group antagonistic to each other. This inimical attitude of our political parties has not only polluted the politics of our nation but has created groupings among public servants in general and bureaucrats in particular. Of late the highest judiciary has reportedly been politicized[51].
6) **Executive Dominated Judiciary**: Article 115 of the constitution: Appointments of persons in the judicial service or as magistrates exercising judicial functions shall be made by the President in accordance with rules made by him in that behalf. It is noticeable in this article that the President with exercising this power is not required to consult the Chief Justice of Bangladesh. We know that the President cannot exercise his powers whatever, without the advice of the Prime Minister, except of course his power to appoint the Prime Minister. This is how the executive organ of our state is controlling the judiciary. Their appointments, postings, transfers, promotions, punishments etc. are at the hands of the President or for that matter, the government.
7) **Lack of Popular Access to Justice**: Unlike neighboring India, where legal aid, access to justice and alternative dispute resolution were largely judge-pioneered initiatives, the situation is completely different in Bangladesh. The very wide powers of the

[50] Supra note 44.
[51] Supra note 49.

highest court to deliver justice have been under-utilized. Less than a dozen-suomoto case during the last ten years have succeeded, perhaps reflecting judicial conservatism.

8) **Overlapping Competencies**: Often, executive branch ministries to work as their legal officers recruit judges from the subordinate judiciary. Generally, ministries do not have legal officers of their own, and the public prosecution service is an adhoc arrangement. Arguably, judicial independence is compromised when a person acts as both a prosecutor and a judge. Law officers have to defend government positions while judges might rule against the government. A directive of the Masdar Hossain Judgment calls for the roles of judges and prosecutor to be separated. Unfortunately, so far this directive has not been carried out.
9) **Corrupted lawmakers**: The air of separation of judiciary is entering, side by side it has also bad smell. Maximum judges and lawmakers are corrupted. The takes bribe spontaneously and make the case diverted. It is a very common phenomenon in our country. So if the independent judiciary is vested upon the dishonest lawmakers, there must be disorders in law and order situation of Bangladesh.
10) **Government Negligence**: The High Court Division of the Supreme Court of Bangladesh in a judgment directed the government to take steps for separation of judiciary from the executive organ quite a few years back. But the government has so long remained headless and negligent to the High Court Division's directives. When the government itself does not honor the highest court of the country, how can the people in general confide in the judicial system and such underhand practice?

However, the government has sought, and the Appellate Division has granted, a number of extensions in time for the implementation of the Supreme Court's directives. Formally land officially the government is committed to implementing these directives, which would also include some changes in the criminal procedural laws. However, these repeated extensions suggest continuing challenges to the ultimate implementation of University of Rajshahi, Rajshahi the directives[52]. It is strongly felt everywhere that immediate steps are taken for separation of the judiciary from the executive organ of the state[53].

[52] Supra note 44.
[53] Supra note 49.

4.2 Recommendations

From the above discussion I have some recommendations for removing the judicial problems and separating the judiciary from the executive and ensure the judicial independence in Bangladesh.

1) Political interference is a major impediment to the proper justice. If the judiciary is separated, cases can be dealt without political interference. We cannot expect proper justice if judiciary does not work independently. There is hardly a little chance for case to be biased in case of independent judiciary. So, from this point of view separation of judiciary is necessary.
2) The citizenry and government must have more respect for judicial decisions. This would go a long way in centralizing the notions of the rule of law, defining the limits of government, creating parameters of accountability, and ensuring other necessary pre-conditions for an ordered and predictable society.
3) In Bangladesh with immediate technical assistance for carrying out the directives of the Masdar Hossain judgment, particular knowledge of how the functional separation of powers is initiated and implemented in other countries should be seriously considered. The creation of judicial service commission (JSC) implies a drastic expansion of administrative responsibilities for the Supreme Court, a burden that it is currently ill suited and to shoulder. The rudimentary technical competence of the administration of the Supreme Court is an area of concern, and courts in general are in need of more technical assistance.
4) The appointment of Judges of the Supreme Court, currently done by the President, is susceptible to external influences in a selection process that is nontransparent. A change in the system of selecting and appointing judges of High Court Division is another aspect requiring attention. The courts themselves must encourage ordinary citizens to seek justice through their chambers. At present, lower courts are mistrusted and the judiciary in general, if it is to be effective, must encourage and support citizens' access to justice.
5) Improvements in court administration must be made at both the national and the District levels. Administrative reorganization is vital at this time in order to put in place the structures and processes necessary to administer an independent judiciary. At sometime in the future the judiciary may be expected to perform all of those necessary functions, which are now being performed by the Executive. At the national

level, the Registrar's Office in the Supreme Court will be studied and reorganized along functional lines, i.e. case management, planning budgeting and financial management, general administration, human resources, and research. Institutions such as the existing Judicial Council will be studied and other administrative reorganizations may be recommended and implemented.

6) At the district level, to reduce the administrative workload of the District Judges, the administrative officer and other staff, on whom the judge relics in administrative matters, would be upgraded, in part by developing career path for them. The District Court's administrative office would be modernized and would have appropriate and trained staff, e.g., a planning and budgeting officer, a purchasing and accounting officer, and other customary staff, e.g., a court order clerk, a process/decree officer, and process servers. Office manuals would be developed documenting the new procedures and standard forms; office space would be created adequate for staff, records and equipment, and technology, including computers and suitable software, with linkage to the Court Management Information System, would be supplied by the government.

4.3 Conclusion

Judiciary forms the basic element of the statehood shaped by deliberate policies to establish social justice and equality of all citizens. In a modern society it must, therefore, reflect the fundamental principle of state policy as well as universal value and ethics of international human rights regime, which are not fundamentally altered by cultural or class differences. In order to meet the challenge of the next century and to accomplish the constitutional goal, to secure equal justice in economic, political and social life, it is important to extend the judicial mind and the due process in all spheres of administrative dealings with the affairs of men and society. Pressure on the government to implement the 12-point directive continues to mount in the current heat of Bangladeshi politics. The Attorney General has threatened not to ask for a further time extension on behalf of the government and the recent creation of an alternative political base headed by former President Badruddoza Chowdhury and Dr. Kamal Hossain has threatened the political legacies currently dominating politics in Bangladesh. In order to get back the trust of the public upon the Judiciary, it is essential to be separated from the Executive. First of all the government has to take steps to remove all the impediments. Such

as recently the Govt. Has formed the Judicial Service Commission, they will play an important role to make the judiciary independent. But it is also true that all the roads of justice may not be opened even after the separation of judiciary. Civil society should come forward, and the politicians and executive authority should understand that a sound judicial system keeps equilibrium of a society. If the judicial edifice weakens, the democratic system will not function, and social fabric will be broken down. So, here all the people concerned with judiciary have to play active and effective role from honest point of view. Then the independence of judiciary will bring effective fruits in future.

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*******THE END*******