RESEARCH MONOGRAPH
ON
"SEPARATION OF JUDICIARY AND JUDICIAL INDEPENDENCE: BANGLADESH PERSPECTIVE"

To fulfil The partial requirement to achieve LL.M (1 year) degree

SUBMITTED FOR

Muhammad Ali
Lecturer and Course Coordinator
Department of Law
Sonargaon University

SUBMITTED BY

Asrafun Naher
ID: LLM2401030012
Program: LL.M (1 year)
Department of Law
Sonargaon University

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LETTER OF TRANSMITTAL

7th January 2025

To

Mr. Muhammad Ali

Lecturer and Course Coordinator

Department of Law

Sonargaon University

147/I, Green Road, Panthapath, Dhaka 1215.

Subject: Prayer for approving the Research Monograph Report.

Dear Sir,

With due respect and humility, I beg to state that, I am very happy to present the report of my research monograph. To prepare my report, I have faced many situations and learn different knowledge. It is a great opportunity as best as possible me to learn and observe various cases. This will help me in future. Due to short span of time I faced lot of difficulties for preparing the report even then I tried my best to prepare the report successfully. Finally crossing all the challenges, I able to submit my report on due time.

I shall be grateful if you accept my report.

Sincerely,

Asrafun Naher

ID: LLM2401030012

Department of Law

Sonargaon University

CERTIFICATION

This is to certify that the Research Monograph title "**SEPARATION OF JUDICIARY AND JUDICIAL INDEPENDENCE: BANGLADESH PERSPECTIVE"** is done by **Asrafun Naher (ID: LLM2401030012)** prepared solely by me and which has been submitted Department of Law, Sonargaon University to fulfilment of the requirement for the degree of LL.M. (Master of Laws). The Research Monograph Report has been carried out under my guidance and is a record of bonafide work carried out successfully.

_____

Muhammad Ali
Lecturer & course Coordinator
Department of Law
Sonargaon University

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I am grateful to Almighty Allah, who has been kind to complete publish to the research paper successful. This research has based on the study under taken as the part of the Master of Laws (LL.M) course.

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I perceive as this opportunity as a big milestone in my career development. I will strive to use gained skills and knowledge in the best possible way, and I will continue to work on their improvement, in order to attain desired career objectives. Hope to continue cooperation with all of them in the future.

Sincerely,

Asrafun Naher

ID: LLM2401030012

Department of Law

Sonargaon University

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Abstract

The judiciary is not merely an organ like the executive or the legislative, but it is also an organ more than that. This is the last hope and desire for the restoration of the rights of the people. However, this judicial power cannot act to restore these rights until it is free from the undue influence and interference of other authorities. Therefore, there is a clear need for a true separation of the judiciary in order to perform its independent function, which is its original purpose. And where there is no effective separation of the judiciary powers, there is no independent judiciary, and where there is no independent judiciary, there is no rule of law. However, mere separation alone is not sufficient to effectively perform its functions. This paper will analyse the conditions for the independence of the judiciary and the judiciary and evaluate some of the elements necessary for the separation of the judiciary to ensure proper implementation and independence in Bangladesh. Bangladesh separated the judiciary and the executive in 2007. However, due to some theoretical problems in the judicial system, the practice of administrative intervention in the judiciary still persists in Bangladesh in certain contexts. 'Judicial independence' is the concept that the judiciary should be separate from other governmental institutions. And 'separation of judicial power' is a prerequisite for judicial independence. In order to clarify the concept of the study, we must first clarify some terms. Judicial independence refers to the separation of judicial power and the independence of the judiciary. Since its foundation, Bangladesh has stipulated the separation of the judiciary and the executive in accordance with the Constitution. However, until the 2007 judgment of the Masdar Hossain case, it was limited to mere document recognition, through which the true separation of judicial power and judicial independence were established. However, it is not clear whether judicial independence is adequately implied. The separation of judicial powers is an important issue in creating a proper judicial system.

[1]

[1] Keywords
Separation, Judiciary, Executive, Judicial Independence, Appraisal

Chapter one

Introductory

1.1 Introduction

An independent judiciary is a prerequisite for a democratic government. Among the three organs of a democratic country, the judiciary must decide whether to apply existing laws to individual cases. With the help of a strong judicial system, the social structure is maintained in a strong and organized manner. An independent, impartial, and informed judiciary is the core of the concept of a fair, honest, open, and accountable government. In order for the judiciary to perform its constitutional role of adjudicating cases, it must be independent from the executive. The judiciary is not merely an agency like the executive or the legislature, but is also an agency that goes beyond that. This is the last hope and aspiration of the people to restore their rights. However, this judicial power cannot act to restore these rights until it is free from the undue influence and interference of other authorities. Therefore, in order for the judiciary to perform its primary purpose of independence, there is a clear need for the judiciary to be truly separate. And where there is no effective separation of judiciary powers, there is no independent judiciary, and where there is no independent judiciary powers, there is no rule of law. However, mere separation alone is not enough to perform its functions effectively. This article will analyze the conditions for separation of the judiciary and independence of the judiciary and evaluate their proper implementation along with the important elements of separation of the judiciary for independence of the judiciary in Bangladesh. Bangladesh separated the judiciary and the executive in 2007. However, due to some theoretical problems in the judicial system, the practice of administrative intervention in the functions of the judiciary in certain contexts still persists in Bangladesh. ‘Judicial independence’ is the concept that the judiciary should be separated from other government agencies. And ‘separated judiciary’ is a prerequisite for judicial independence. In order to clarify the concept of the study, several terms must first be clarified. Judicial independence refers to the separation and independence of the judiciary. Therefore, the term ‘judicial system’ is presented first. ‘Judicial system’ refers to the governmental institutions including the courts and judges of a country, and the courts and judges who hold judicial power. Now, ‘judicial independence’ refers to the judicial system that is free from any influence or

interference from other organs of the country. Therefore, the independence of the judiciary can be understood as the independence of the judicial system and the independence of the judges who constitute the judicial system. Judicial independence is essential to the idea of relief. Separation of powers means the balanced distribution of administrative power among the three organs of the country, namely the legislative, executive, and judicial branches. In particular, in this review, the separation of the judiciary and the executive means a situation in which the judiciary operates as an independent body free from the undue influence of the executive. The separation of the judiciary and the executive has been stipulated in the Constitution of Bangladesh since its enactment. However, until the 2007 judgment in the Masdar Hossain case, it was limited to a mere document recognition, through which the true separation of judicial power and independence of the judiciary were established. However, it is unclear whether judicial independence is actually appropriately implied. The separation of judicial power is an important issue in creating a proper judicial system. The judicial system of Bangladesh is often compared to the judicial system of other developed countries in a matter of minutes. However, in most cases, it is prone to abuse due to the existing administrative corruption that is rampant in all state departments. One of the most effective ways to address this problem is to ensure balanced powers of the authorities. This article attempts to focus on this point. The purpose of this article is to analyse the terms “separation of judicial powers” and “independence of the judiciary” and find out the current scenario of what these terms mean. It also aims to identify barriers and provide advisory awareness. The scope of this study is specific as it deals only with the Bangladesh perspective in assessing the meaning of judicial independence. The article discusses all the major issues regarding the concept, background, legislative value, implications, current scenario and some measures to ensure judicial independence. The focus is on the situation as it is implemented in Bangladesh. The underlying issues and loopholes that hinder the independence of the judiciary are also revealed in the article. Specific measures to be taken to address these issues are also the subject of the article. The entire paper was conducted through theoretical discussion using qualitative methods. The study was conducted by studying major books, case law, and academic journals published by various institutions, utilizing legal dictionaries and available research papers, visiting various websites, and analysing newspapers. The quotes from these sources were mentioned in the article.

1.2 Objectives of the study

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 analyse the existing judicial independence in BD;
3. To analyse and assess the existing measures for ensuring Judicial Independence;
4. To analysis how judicial independence can be reconciled with judicial accountability in Bangladesh
5. To propose improvements of the conditions of judicial independence;
6. To give some suggestions regarding independence of judiciary in Bangladesh e.g-

(a)It is to be taken into consideration that the Judicial Accountability is different from the Accountability of the Judicial System

(b) The principles and standards are to be laid down for ascertainment of Judicial Accountability.

(c) For enforcement of Judicial Accountability it is fealty that they should be a code of conduct covering both Higher Judiciary and the Subordinate Judiciary.

1.3 Methodology of the report

This research paper is not a basic one; it can be treated as a library based experiment. To make the research paper, the instructions given by the Research Supervisor have been followed. 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. Firstly the necessary chapters have been selected. Then every possible effort was made to collect information required for each chapter. The methodology followed throughout the research paper has been pointed out below:

- Planning the whole research paper.
- Dividing the research paper into chapters.
- Taking advice from honourable Research Supervisor regarding the collection of necessary information and study materials.
- Study and discussion with the concern Supervisor.
- Screening the gathered information.
- Selecting the effective information that can be added in the paper.

1.4 Scope and Limitations of the report

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 major limitation of the study is word limitation. Another problem faced by the researcher was lack of secondary sources. Being a very recent issue, hardly any literature ie. writing, research or reports was available. Therefore researcher found problem in collecting secondary data of academic nature. As judiciary has been separated 17 years ago, the findings of the study might not reflect in-depth picture. Above all, time was a major constraint in this study.

Chapter two

Background the independence of Judiciary

The doctrine of the separation of powers is often assumed to be one of the cornerstones of fair government. 15 It apparently evolved from the desire to limit the concentration of power within any one branch of government, a problem most famously articulated by Lord Acton: 16

"Power tends to corrupt and absolute power corrupts absolutely. Great men are almost always bad men."

The principles of separation of power have existed as philosophical constructs since the times of Aristotle, 17 and later expounded upon and articulated by John Locke and Barron Montesquieu during the 17th and 18th Centuries. Ironically it was Montesquieu's idealistic regard for the British parliamentary system that was used by the writers of the American Constitution to justify the concept of the separation of powers in their revolutionary fight against the British. Within the British schools of legal philosophy, the concept was further evolved by Blackstone, who particularly advocated the separation of the judiciary from the state, 18.

The idea of independence of judiciary was first worked out by a French philosopher Montesquieu who articulated the famous "Theory of Separation of Power" in sixteenth century. Though, Montesquieu's theory was criticized primarily but the spirit of this theory has been taken for granted in modern debates of the good governance and accepted in many Constitutions throughout the world. This spirit is also inserted in the Constitution of Bangladesh. Separation of the judiciary from the executive refers to a position in which the judicial branch of government can acts from out of any interference and influence of other branches of government particularly from the executive. The demand and efforts for separating the judiciary from the executive also were noticed since the late eighteenth century and continues even now.

Chapter three

Separation of Judiciary in Bangladesh

During the British colonial era, there was a requirement for separation of the judiciary and the executive. From ancient times to the new era of independent Bangladesh, the state administration took many steps to meet this requirement. Article 22 of the Constitution of the Republic of Bangladesh also meets this requirement. However, it took a long time to implement this article. In the Masdar Hossain case, the Appellate Division of the Supreme Court of Bangladesh directed that this article be implemented by separating the judiciary and the executive. This article now presents the current scenario of the path towards separation of powers and the goal of "judicial independence" in Bangladesh.

3.1 Constitutional Separation of Powers

Judicial independence of all judges is unconditional under the Constitution of Bangladesh[3]. This ideal is mainly defended through the concept of separation of the judiciary from other branches of government. Article 22 of the Constitution directly and explicitly states that "the State shall separate the judiciary from the executive organs of the State." Article 95(1) of the Constitution provides for the appointment of the Supreme Court, stating that "the Chief Justice and the judges shall be appointed by the President." However, Article 113 grants the Chief Justice the power to appoint the staff of the Supreme Court, determine the terms of service of the staff, and make rules for the appointment of the staff, subject to his prior approval and authorization. These limitations on the appointment powers are a consequence of the executive discretion of the Supreme Court. Articles 115 and 116 of the Constitution provide that the appointment of the judiciary and the magistrates performing the judicial function shall be made by the President. The President shall exercise control over the appointment, promotion, leave and disciplinary action of the persons performing the judicial function and the magistrates performing the judicial function, but shall exercise such control in consultation with the Supreme Court.

2

[2] Green, G. "The rationale and some aspects of judicial independence" (1985), Australian Law Journal, Vol. 59. P.

In Bangladesh, despite the separation of the judiciary, the executive has exercised influence over the functioning of the judiciary through some of the provisions mentioned above.

Therefore, what the Constitution has done can be explained as the division of the powers of the republic among the three branches of government, and it provides for the separation of powers in the sense that no authority can exceed the limits set by the Constitution.

3.2. Steps towards the separation of the judiciary

The 1972 Constitution is considerably developed in terms of the independence and separation of the judiciary. Article 22 stipulates as one of the basic principles of national policy that "the State shall ensure the separation of the judiciary and the executive organs of the State." Enforcement by the courts is not easy. However, the Fourth Amendment undermined the very fabric of constitutionalism, and it clearly destroyed the independence of the judiciary. In 1976, a proposal was made to separate the judiciary from the executive. A judicial commission headed by Justice Kemal Uddin Hossain recommended that the lower criminal judiciary be separated from the executive judiciary at certain stages. [5] In 1987, a second proposal was adopted to separate the Magistrates

through the Criminal Procedure Amendment Bill. In 1991, a private member's bill was introduced to further amend Articles 95, 98, 115 and 116 of the Constitution to ensure the separation of the lower judiciary from the executive. The bill was sent to a special committee, which met about 13 times to consider the proposals. However, no further action was taken to pass the bill. The next attempt to separate the judiciary and the executive came in 1995 with the famous Masdar Hossain case. The landmark decision in the Masdar Hossain case [2] was to determine the extent to which the Constitution of the Republic of Bangladesh effectively secured the separation of the judiciary and the executive in the country.

3

[3] http://www.preservearticles.com/201106258647/what-is-meant-by-the-term-independence-of-judiciary.html
Article 22, 95,98 115,116. The constitution of the people's republic of Bangladesh

3.3. Masdar Hossain case and the separation of the judiciary

Masdar Hossain along with 441 judges who were judges of various civil courts filed Writ Petition No. 2424. The case was finally heard on 1 April 1997. After a lengthy engagement with valuable submissions and quotations by Dr. Kamal Hossain, Syed Istiaq Ahmed and Mr. Amir-ul-Islam, the Court delivered its landmark judgment on 7 May 1997. The government then supported the appeal in the Appellate Division, which partially overturned the High Court's decision and issued its landmark 12-point directive decision on 2 December 1999. The Appellate Division directed the government to implement the 12-point directive, including the establishment of a separate public limited company and a Judicial Pay Commission to separate the judiciary from executive control. After comprehensively examining the constitutional provisions relating to the lower courts (Articles 114 to 116A) and Bangladesh Service (Articles 133 to 136), the Appellate Division held that: "Judicial affairs are fundamentally and structurally distinct and separate from the administrative and executive affairs of the Republic, and in no case can they be placed on the same level, integrated, abolished or replaced, and mixed or connected with the administrative and executive services." Implementation of the Decision: Final Separation of Judicial and Executive Powers Since the 1999 Appellate Division's decision, successive governments have postponed the implementation of the decision 23 times, until February 2006, on various petitions. During these seven years, the government took very slow steps towards separation of powers.

[4]

[4] Articles 114-116 of the Bangladesh constitution
33-136 of the constitution of Bangladesh
Judgement 1999 secretary, ministry of finance vs. Masder Hossain 52 DLR

The last interim government (2006-2008) took a positive and firm stance from the beginning, determined to separate the judiciary and the executive, based on the principles of the Constitutional Directive and the decision of the Appellate Division in the Masdar Hossain case. Accordingly, the four service rules were established, namely:

1) Bangladesh Judicial Service Commission Rules, 2007,
2) Bangladesh Judicial Service (Pay Commission) Rules 2007,
3) Bangladesh Judicial Service Commission (Construction of Service, Appointments in and Suspension, Removal & Dismissal from the Service) Rules, 2007; and
4) Bangladesh Judicial Service (Posting, Promotion, Grant of Leave, Control, Discipline and other Condition of Service) Rules, 2007 have been enacted and changes were bought in the existing Code of Criminal Procedure 1898 by Ordinance No II and No. IV of 2007.

This is considered a significant change that removes all obstacles that hinder the separation of the judiciary and the executive by opening the way for officials belonging to the Bangladeshi judiciary to administer criminal justice at the level of magistrates. The historic path of separation of the judiciary and the executive finally began on 1 November 2007. After a long period of implementation of Article 22, the basic principle of public policy from above, it was ultimately the Supreme Court that gave instructions in the Masdar Hossain judgment on the implementation of separation, and the implementation process was finally completed in 2019. 2007. As a result, Bangladesh gained an independent judiciary from other parts of the government.

5

[5] Judgement 1999 secretary, ministry of finance vs. Masder Hossain 52 DLR
Article 22 of the Constitution of the people's republic of Bangladesh

Chapter four

Independence of the Judiciary and the legal system of Bangladesh

The separation of powers and independence of the judiciary in Bangladesh were practically implemented through the judgment of the Masdar Hossain case discussed in the previous chapter. Now, questions are raised as to how much independence of the judiciary is guaranteed in our country and what the procedures are. In order to find an answer to this, it is necessary to clarify several matters related to the independence of the judiciary, such as the inevitable principles, several conditions, and current status of the independence of the judiciary in our country. In order to focus on these issues.

4.1 Principles of Judicial Independence

The concept of judicial independence includes four basic principles that were proposed and recognized as a result of international efforts in this field. The following is an extension of the four principles of judicial independence: Personal Independence Personal independence means that judges are not dependent on the government in any way that could influence their decisions in a particular case. Personal independence means that the tenure and terms of service of judges are "adequately protected from being subject to administrative control by the individual judge". Therefore, in order to maintain the administration of justice on a fair and equitable basis, judges must be in a position where they "have nothing to lose by doing the right thing and little to gain by doing the wrong thing".

This provision can be secured by ensuring the independence of judges as individuals. Substantial independence Substantial independence refers to the functional and decisive independence of a judge to make decisions without being subject to internal or external pressures. The essential aspect of a judge's job is the actual decision-making role. This involves the determination of facts and the application of relevant legal rules to the facts of a case. It therefore ensures the judge's impartiality and the ability to make judicial decisions on the merits of a case without fear or favour. In 1982, the International Bar Association defined the minimum standards of judicial independence, suggesting that judges are subject to nothing other than the law and ethical imperatives when performing their judicial functions. Internal Independence Internal independence means that a judge is independent from his or her judicial superiors and colleagues. In other

words, it means that a judge or judge is independent from any orders, instructions, or pressure from his or her judicial superiors or colleagues when deciding a case. The independence of an individual judge can be undermined not only by external interference factors but also by the exercise of administrative power and control by fellow judges, especially senior judges. This means that threats to internal independence can come from high courts or judges. Internal independence also includes the actual decision-making process, the adjudication process. Collective Independence Collective independence refers to institutional independence, which is related to the responsibility of the judiciary to function effectively as an authority. In its simplest form, the judiciary as an institution must be free from interference from the executive or legislative branches. The financial autonomy of the judiciary is also related to this concept of collective or institutional independence. Judges cannot perform their judicial functions independently unless they belong to an institution that has the authority over the human and material resources involved in performing judicial functions. Therefore, collective and institutional judicial independence is necessary to ensure the independence of individual judges. Of these four types of independence, the most important is substantive independence, because it is the internal capacity of the judges that provides the leadership to maintain fairness in the performance of their judicial functions.

4.2 Conditions for Judicial Independence

The judiciary cannot perform its solemn duties unless its independence is guaranteed and protected. It can be said that “the independence of the judiciary gives honour to the position of judge and gives confidence to the general public”. Appointment of judges the basic principle of judicial independence requires that judges be free from any kind of direct or indirect interference or influence in the administration of justice. However, fair decisions are impossible without the election and appointment of fair and impartial judges. Therefore, the appointment of judges is one of the basic requirements for the independence of the judiciary. In the case of Bangladesh, the qualification criteria for appointment are set out in the constitutional provisions for the appointment of judges of both the Supreme Court and lower courts. Article 95, Section 1 of the constitution stipulates that “the Supreme Court judges are appointed by the President, and other judges are appointed by the President after consultation with the Chief Justice.”

Term of office of judge's Secure tenure of judges is also an important element for the independence of the judiciary. In Walter Valente v Her Majesty the Queen it was stated that: "Secure tenure is a traditional and essential condition of judicial independence. The basis of this security is that judges may only be removed for just cause, and that such cause must be independently reviewed and decided in a process in which the affected judge is given a full opportunity to be heard." The tenure of judges is another fundamental aspect of judicial independence, and is closely linked to the appointment of judges. When a person is appointed to a judicial office, the next important question is whether the person's term of office or office is sufficiently secure. If the term of office of a judge is dependent on the will of the executive, then the judge cannot be free from the fear of arbitrary dismissal. In this case, the judge may exercise judicial power to satisfy the power to terminate the office.

Disciplinary action against judge's Judicial independence is based on "good faith" decision-making. It was never intended to include "bad faith" decision-making in which a judge deliberately and wilfully disregards the facts and law of the case. This is inherently subject to disciplinary review, regardless of whether it can be corrected on appeal. And a clear error is also an offence because its nature and/or extent suggests that the judge acted intentionally or that he was incompetent [16]. In Bangladesh, the Constitution provides for the disciplinary action of Supreme Court judges. According to Article 96 of the Constitution, judges may be removed from office for misconduct and mental or physical incapacity, but there is no provision in the Constitution for corruption or crime.

Appropriate Compensation and Benefits In order to ensure the independence and impartiality of the judiciary, it is important to provide adequate compensation and privileges to judges beyond their tenure. First, the salary, housing allowance and other benefits should be such that they can easily maintain a reasonable standard of living without drinking alcohol or giving bribes. Also, if the salary of judges is low, competent people will not be attracted to the profession of judges because they will not have a reputation in society. Institutional Independence Institutional independence is known as collective judicial independence. It actually means the independence of the judicial system.

In the case of Bangladesh, there is a strong provision in Article 22 of the Constitution that the state should separate the judiciary and the executive. However, it was not separated from the executive until November 1, 2007. The following section examines the status of the judiciary and the separation of executive and judicial independence in Bangladesh.

Judicial independence under the Constitution The independence of the judiciary can be measured by the provisions contained in the Constitution on matters such as the election and appointment of judges, security of tenure, remuneration and other privileges, irrevocability except in cases of proven misconduct or illegality, independence in the performance of judicial functions, guarantee of compliance with judges' decisions, and essential powers and jurisdiction granted to the judiciary. There are several provisions in the current Constitution that guarantee the independence of the judiciary.

Article 7 stipulates that all powers of the Republic shall be exercised only in accordance with the Constitution. The duty to ensure that public officials do not exceed their authority is essential for the judiciary. Article 22 of the Constitution states that the government has a duty to ensure the independence of the judiciary.

6

[6] Article 95 of the Constitution of the People's Republic of Bangladesh
Article 7 of the Constitution of the People's Republic of Bangladesh
Article 22 of the Constitution of the People's Republic of Bangladesh
Akkas.A. (2004), Independence and Accountability of Judiciary A Critical Review, Centre for Rights and Governance (CRIG), Dhaka.204

Article 35, of the Constitution states that "Everyone accused of a crime shall have the right to a speedy and public trial by an independent and impartial court or tribunal established by law." In other words, the provision guarantees the fundamental right of every person (whether a citizen or not) accused of a crime in Bangladesh to a "speedy and public trial" by "an independent and impartial judiciary." Judiciary." Article 94, Section 4 states that "The Chief Justice and other judges shall be independent in the exercise of their judicial functions, subject to the provisions of this Constitution." Financial independence is an essential part of the concept of judicial independence. These provisions contain provisions guaranteeing the independence of the judiciary, but this was truly implemented through the judgment in the Masdar Hossain case.

Structure of the Judicial System The separation of the judiciary and the executive, and the independence of the judiciary, seem to be a never-ending process. The debate began in the late 18th century and continues to this day. However, in order to understand where the administrative intervention in the judiciary now comes from and how it affects the independence of individual judges, it is important to understand the current judicial structure. At first glance, the judicial system in Bangladesh is made up of two branches: The Supreme Court and the lower courts. The Supreme Court, the highest court in Bangladesh, is actually made up of two branches: Appellate Division and High Court Division.

[7]

[7] Article 35 of the Constitution of the People's Republic of Bangladesh
Article 94 of the Constitution of people's Republic of Bangladesh

The functions of the two branches are different, and the judges are appointed separately. The Chief Justice of the Supreme Court is part of the Appellate Division and is the Chief Justice of Bangladesh. There is no separate High Court Chief Justice. The President sometimes appoints Supreme Court judges in consultation with the Chief Justice. While some Chief Justices have in the past insisted on consultation for such appointments, others have not, leading to "political" appointments by the ruling party.

Lower Courts The lower judicial system in Bangladesh also consists of two parts. First, there are the district courts and the higher courts. In the light of the landmark decision in the Masder Hossain case in 1999, the government led by Dr. Fakhruddin Arned amended the Code of Criminal Procedure, 1898, in November 2007, and this change separated the lower judiciary from the control of the executive. The term "executive" still exists in the Code of Criminal Procedure, but it is no longer given judicial functions. Their functions are essentially administrative. Figure 1. Court hierarchy in Bangladesh. However, it should be noted that the Mobile Courts Act 2009 has given some judicial powers to the Executive Magistrate. The major laws relating to the division of judicial powers and the newly created Judicial Council since 1 November 2007 are as follows: Following the adoption and implementation of the Code of Criminal Procedure, 1898 (Amendment) Ordinance, 2007 and the other four rules mentioned above, the structure of the lower courts in Bangladesh is as follows:

Civil Courts

- District Judges,
- Additional District Judges,
- Joint District Judges,
- Senior Assistant Judges and
- Assistant Judges.

Criminal Courts

Courts of Sessions;

- Session Judges
- Additional Session Judges
- Joint Session Judges

Magistrates

1) In metropolitan areas:

- Chief Metropolitan magistrates
- Additional Chief Metropolitan magistrates
- Other Metropolitan magistrates

2) In other areas:

- Chief Judicial Magistrates
- Additional Chief Judicial Magistrates
- Judicial Magistrates
- Magistrates of

3) first class,

4) second class and

5) third class.

There are some special laws providing for the basis of some special courts or tribunals namely:

In relation to civil matters:

- the Administrative Tribunal,
- the Environment Court,
- the Family Court,
- the Juvenile Court,
- the Labour Court and the Labour Appellate Tribunal,
- the Money Loans Court,
- the Court of Settlement and the Taxes Appellate Tribunal.

In relation to criminal cases:

- the Special Tribunal on Violence against Women and Children
- the Special Tribunal for Speedy Trials etc.

Chapter Five

Judicial Independence in Bangladesh: How Far Ensured

The Constitution of the People's Republic of Bangladesh came into effect on December 16, 1972, the first anniversary of independence. Although the formal separation of powers was guaranteed in 2007, it included a fairly strict guarantee of the independence of the judiciary. Despite the passage of time, due to various contradictions such as the balance of power, socio-political conditions, and lack of government will, the guarantee of the independence of the judiciary is still vulnerable, rather than being strengthened or solidified. To what extent is the independence of the judiciary guaranteed in Bangladesh? The independence of the judiciary is the basic foundation of the Constitution. On 7 August 2008, Justice Abdur Rashid, Justice Najmun Ara Sultan and Md. Ashtakula Islam delivered a decision in Idrisur Rahman v. Bangladesh. Justice Abdur Rashid stated: "The Appellate Division, through the 12 Directive Principles in Masdar Hossain, confirmed the complete separation of powers. The separation of the judiciary from the executive and legislature came into effect on 1 November 2007." However, the appointment of judges can be seen as being regulated by the Prime Minister's Council. In this context, the conflict with judicial independence was not clearly evident. The 16th Amendment to the Constitution also grants the National Assembly the power to impeach Supreme Court Justices. Moreover, the influence and interference of the executive branch in the judicial system continues to this day.

Executive Interference in the Lower Judiciary In a hierarchical judicial system, the higher courts generally monitor the lower courts to prevent them from deviating from the higher standards of judicial conduct, thereby preventing the public's confidence in the judicial system from being undermined. The HCD has the power to supervise, supervise, and control all lower courts.

All of these constitutional provisions aim to establish an orderly judicial system in which the lower courts are accountable to the Supreme Court, not the executive. The lower judiciary has a clear mandate for independence under Articles 109, 115, 116 and 116A of the Constitution. However, the President has appointed judges and judges of the lower courts through laws or the Ministry of

the Interior without respecting the constitutional guarantee of consultation with the Supreme Court. The executive asserts absolute control over the lower judiciary, especially the Magistrates, who have little independence in the performance of their judicial functions. Magistrates are an integral part of the executive and are subordinate to it. They perform their duties at the discretion of the executive and have no other option than to carry out the executive's instructions. Government intervention in lower court proceedings for political reasons is frequent, and the government is often used as a political weapon through undue favours such as promotions, transfers, postponements of trials, releases of defendants, and withdrawals of cases for political reasons. The National Commission for the Review and Recommendation of Withdrawals of Politically Motivated Cases has recommended withdrawals of 7,177 politically motivated cases since 2009. It selected 170 cases, including 30 murder cases, for review without following the mandatory referral procedure of the local committee chaired by the deputy chief justice. Only the competent court, not the executive, should have the authority to order the postponement of pending cases and the release of defendants. Such interference by the executive undermines justice and tarnishes the public image of the lower judiciary by undermining the provision of "public trials by independent and fair trials" in Article 35, Paragraph 3 of the Constitution. Appointment of prosecutors Bangladesh has a long-standing practice of appointing lawyers from the ruling party as prosecutors. The current government is suspected of continuing the past practice by replacing all prosecutors general with ruling party members or true supporters, and of appointing politically motivated officials to the Attorney General's Office.

8

[8] Article 109
Article 115
Article 116
Article 116A of the Constitution of people's Republic of Bangladesh

Executive intervention in the higher judiciary Not only the lower judiciary, but also the higher judiciary, namely the Supreme Court (appellate division, high court division), is still under the control of the executive. The executive has exercised such control in various ways, such as appointing judges and controlling the Bar Council. The Bar Association is one example. It is often said that the higher judiciary is currently highly politicized and is not yet fully independent. Suppression of Appointment Procedures We know that the person who appoints judges (including Supreme Court judges) is the executive, that is, the President, and that the President does what the Prime Minister tells him to do, so the executive has played a sufficient role. Although the President is not obliged to consult with the Prime Minister on the appointment of the Chief Justice, such a practice is rare. Therefore, there are many cases where the seniority is not followed when appointing judges, and there are many cases related to this. Furthermore, the absence of clear guidelines on the appointment of judges has opened the way for open interference in the functioning of the higher judiciary. There has also been controversy over the appointment of the Chief Justice of Bangladesh. In the appointment of the Chief Justice, Articles 96 and 97 of the Constitution and Bangladesh v. Md. Idrisur Rahman [24] have been largely accepted. However, this principle has been repeatedly violated in recent years, with four of the last six appointments replacing the Chief Justice of the Appellate Division. In September 2010, the appointment of Chief Justice A. B. M.-Khairul Haque by the President reportedly replaced two more Chief Justices of the Appellate Division. A similar controversy arose during the appointment of the current Chief Justice of Bangladesh, Justice Muzammel Hossain, on 18 May 2011. This appointment replaces Justice Shah Abu Naeem Momikhur Rahman (who resigned).

Lack of Instructions for Use: The High Court Judges are appointed under Article 95, Section 2, Clause 6f of the Constitution. In other words, under Article 90, the President has the power to appoint one or more qualified persons as additional judges for a period of two years. However, the objectionable point here is the provision that the President can appoint additional judges as permanent judges or extend their tenure. This can be objected to as the power to expect such additional

judges to obtain permanent posts can greatly hamper the ability to administer fair justice.

Appointment after retirement Under Article 99, retired or suspended judges can be appointed by the President to judicial or quasi-judicial posts and can also be appointed as ministers, vice ministers or presidents, which are not considered lucrative posts under Article 66(2). This situation poses a major obstacle to the independence of the judiciary in Bangladesh. Ahmed J. He observed that "opening up the possibility of appointment after retirement would tempt and weaken his independence during the last period of his term."

Judicial Independence and Article 16 of the Constitution Judicial independence means that the judiciary is an independent branch of government from interference by other branches such as the executive and the legislature. Our Constitution guarantees the independence of the judiciary in our country by stipulating in Article 22 that "the State shall separate the judiciary from the executive." However, despite this situation, there are concerns that the independence of the judiciary is under threat due to certain acts. One such threat is the 16th Amendment to the Constitution. This provision gave the National Assembly the power to remove Supreme Court (SC) judges through an amendment to Article 96.

On August 18, 2014, the Cabinet approved a proposal to amend the Constitution to pave the way for the restoration of the power of the National Assembly to remove Supreme Court judges for misconduct or incompetence.

9

[9] Article 99
Article 66(2)
Article 16
Article 22
Article 96 of the Constitution of Bangladesh

Accordingly, on September 17, the National Assembly unanimously passed the Constitution (16th Amendment) Bill, 2014, without any opposition. According to the existing constitutional provision, a Supreme Court Justice Commission consisting of the Chief Justice and two Chief Justices of the Appellate Division shall investigate allegations of misconduct by Supreme Court Justices and make recommendations to the President. The President shall then take action on the recommendations. He may also impeach a Justice for physical or mental incapacity that renders him unable to properly perform his duties. However, the provision now states: "Judges shall not be removed from office except by order of the President pursuant to a resolution of the National Assembly supported by a majority of not less than two-thirds of the total number of Members of the National Assembly, on the ground of proven misconduct or incapacity. However, the method of investigation and evidence of moral disqualification or incapacity shall be governed by the National Assembly Act.

In Idrisur Rahman v. Bangladesh , Justice Abdur Rashid cites three "fundamental aspects" to confirm the independence of the judiciary: This But this is truly a fateful moment in the history of the nation, because the principles of separation of powers and checks and balances between the three branches of state, which are the foundation of the entire democratic system of government, have been nullified in one fell swoop. And with the passage of this bill, the government has effectively tied up the judiciary and placed it in the hands of the ruling party, which can use its majority in parliament to remove judges.

Many lawyers and the opposition are concerned that the independence of the judiciary will be threatened by this amendment. The President of the Supreme Court Bar Association (SCBA), Advocate Khandker Mahbub Hossain, said in a press conference held at the Supreme Court Hall on September 18, 2014, organized by the SCBA: "The government has brought in amendments to undermine the independence of the judiciary. People will not accept the bill and the government will have to face the wrath of the public in the future."

[10]

[10] 16th amendment of the Constitution of Bangladesh
Bangladesh v. Idrisur Rahman (2010) 15 Bangladesh Law Chronicles (AD), p. 49.

The judiciary is independent and cannot be controlled by any government agency. Also, while there is no specific educational requirement in the Constitution to become a member of the National Assembly, a lawyer or a lower court judge must have at least 10 years of practical experience to become a judge of the Supreme Court. Therefore, a member of the National Assembly should not have the power to decide the fate of a judge who is more educated than him. In his defense, the government cited existing provisions on impeachment of high court judges in some democratic countries such as India, Canada, Australia and the United States, where the parliament has the power to impeach a judge. However, the government has been clear about the mechanism for appointing judges in these countries. Let's take a look at the scenario in other countries.

Recently, the Indian Parliament amended the Constitution to provide a mechanism for better appointment of judges. The amendment provided for the creation of the National Judicial Appointments Commission (NJAC), which would appoint judges and assign them to the Supreme Court and 24 high courts. The Chief Justice of India would head the NJAC. In addition to the Chief Justice, two other Chief Justices would represent the judiciary[30]. In order to maintain and strengthen the independence of the judiciary, the British Parliament established the Judicial Appointments Commission in 2006, which was charged with the responsibility of selecting candidates for judicial posts through a transparent and accountable process. Therefore, Article 16 of the Constitutional Amendment is the basis of the theory of separation of powers. It grants the National Assembly exclusive authority over the Supreme Court judges. In other words, it threatens the establishment of judicial independence. Moreover, the ruling party can use it for political gain. 5. Securing judicial independence The main conversation about judicial independence is based on the principle of separation of powers. As far as this theory is concerned, the judiciary should remain separate and independent from the executive and legislative branches of government. In November 2007, the lower judiciary in Bangladesh was formally separated from the executive, with the main findings of the Masdar Hossain case coming into effect. However, it should be noted that even if the judiciary is separated from other institutions, only the separation of powers can ensure judicial independence if proper independence is to be confirmed in our country. This chapter will be devoted to answering this question.

Does the separation of the judiciary alone ensure judicial independence? There is no doubt that by ensuring judicial independence from the executive branch of government, we are in a position to build a better democratic system in our society. There is not enough incentive for the system to work. Therefore, if the 'separation of the executive and the judiciary' is the first step, securing a 'fair judiciary' should be the next step to ensure the de facto independence of the judiciary. There are other factors that play an important role in the independence of the judiciary. Moreover, the independence of the judiciary is undoubtedly a fundamental condition for ensuring a free and fair society under the rule of law. The judiciary as an institution must be financially and administratively independent, but judges must be independent from all external factors in order to fairly perform the functions of the judiciary.

In Which Way Judicial Independence Can Be Ensured

In modern constitutional states, the principle of the independence of the judiciary is rooted in the theory of separation of powers. This constitutes a system of mutual checks and balances designed to prevent abuses of power that would harm a free society. In this context, the Institute for Government Studies (IGS) plans to provide a series of policy recommendations to further strengthen the independence of the judiciary through a policy brief.

This Policy Note focuses on four issues:

1) Independence

2) Accountability

3) Efficiency

4) Effectiveness

However, judicial independence means that judges should be able to exercise their judicial power freely without interference from powerful individuals or groups such as litigants, the state, the media, and large corporations. Judges should also act fairly, impartially, and with dignity. In this regard, we can identify several elements that should be preserved in lieu of separation of judicial powers. Fairness of the Courts It is not enough for the judiciary to be independent as an institution. Individual judges should be regarded as objective and impartial. They should respect lawyers, clients, and witnesses, and they should refrain from making statements that imply that they have made a decision in advance. Outside of the courtroom, judges do not interact or interact with lawyers or other people

involved in the case, or they may be accused of favouritism. Judges generally declare conflicts and recuse themselves from cases involving relatives or friends. The same applies if the case involves a former client, a member of the judge's former law firm, a legal partner, or a former business partner, until at least one or two years after the judge's appointment and until such relationship is severed. Walter Valente believed that the "concept of independence" and "impartiality" are distinct, but related, values or requirements. However, both are important for the independence of a judges. Proposal and Conclusion The basic condition of judicial independence is based on the principle of separation of powers, which states that the judiciary must be separate and independent from the executive and legislative branches. The concept of judicial independence also includes various aspects such as appointment, assignment, promotion, tenure, discipline, and other informal matters of judges. This article attempts to determine how this term is evaluated in the context of our country. The judiciary is a fundamental element of a state formed by a deliberate policy to establish social justice and equality for all citizens. She protects the weak from the strong; the few from the many; the rich from the poor; the citizens from the excesses of the government. Separation of judiciary is a prerequisite for ensuring judicial independence. Bangladesh established separation of judiciary in 2007, but it has not lived up to the expectations of the people due to other theoretical issues. The executive’s encroachment on judicial independence in relation to the routine decision-making of judges is widespread and is a growing public concern. Accordingly, judicial rules and practices in Bangladesh have deviated from this provision over the years. In addition to separation of judiciary, several measures can be taken to ensure proper independence of the judiciary.

Conclusion

The forgoing discussion reveals an evaluation of the present state of independence of judiciary in Bangladesh. The concept of independence of judiciary includes numerous aspects like appointment, posting, promotion, tenure, discipline and other forms of informal scrutiny of judges. In this study, it has been found that several constitutional provisions are very crucial and favourable for independence of judiciary in Bangladesh. However, there are some provisions, which contradict to the concept of judicial independence such as Art 48, 96, 98, 116 of our constitution. Therefore, it is very clear to us that despite separation of judiciary, until and unless the government has adequate respect and willingness to implement the verdict of judiciary and all the rules and regulations related to the separation of judiciary, complete independence of judiciary is not possible. 43 Beside this, the provision of Constitution should be amended especially in case of appointment, tenure and discipline or the provisions (original Articles 115, 116) of consultation with Supreme Court should be re-established. Essential elements for ensuring judicial independence are absent here because proper procedure has not been followed in case of appointment. Without proper person we cannot expect a proper system. Men of keen intellect, high legal acumen, integrity should be appointed for substantive independence which is the most essential pre- requisite for judicial independence. From the commentary of different officer in judicial service I can conclude that there is no separation from executive. Everywhere executive control is prevailed in the activities of judiciary Judicial independence cannot be ensured because of political influence, quota system in appointment of judges. Many people are appointed only because of quota without having qualification and substantive independence is unexpected from them. Separation of judiciary is possible by strong judicial authority and judicial independence is possible by making appointment procedure fair.

Recommendations

This paper has sought to identify some of the key impediments for implementing separation and to suggest ways and means for overcoming such obstacles. It is hoped that the discussion above will contribute to the evaluation of the various options currently under consideration for implementing the Masdar Hossain judgment. Through a combination of law reform, administrative changes and other practical management measures, as suggested below, separation of the lower judiciary from the executive is a practicable and realizable goal, and one that is essential to ensure the rule of law and enforcement of basic rights to access to justice, and safety and security. In my opinion separation of judiciary and judicial independence is different from each other. When separation depends on institutional perspective judicial independence depends on mental integrity of the person in duty. What is the position is not a matter of fact the very thing we should consider is the quality to perform. Separation of judiciary from executive cannot ensure judicial independence but it can be said that it has a little impact to perform the activity in a sound environment. Here I want to recommend some changes differently for separation of judiciary from executive and judicial independence.

Recommendations for Separation of Judiciary from Executive

1. The Government may consider amendment of the Constitution so as to restore the original Articles 115 and 116 of the Constitution providing for full control and discipline of the subordinate courts in the Supreme Court.
2. Enacting and enforcing necessary legislation.
3. Establishing a Secretariat for the Judicial Service Commission.
4. Secretariat would be under the control of the Supreme Court and could be met from the charged amount as allocated by Parliament.
5. Making resource allocations for the Appropriate Authority.
6. Establishing a Secretariat for the Judicial Pay Commission.
7. Making appointments to the posts of Judicial Magistrates.
8. Ensuring Availability of Support Staff

9. Preparation of a realistic annual budget and placing it before the Government on time.
10. Determination of the cadre strength of the Judicial Service and the various grades thereof.

Recommendations for Judicial Independence

1. A change in the system of selecting and appointing judges is an aspect requiring special attention.
2. Appointment of judges should be made on the basis of merit excluding all quota system.
3. A psychologist may take part in viva exam to justify the mental condition of a candidate to act as a judge.
4. To know about the personality of the candidate the authority can access to the social network like face book of the examiner. Here they can get overall information of the candidate.
5. Police verification should be done at the first stage very carefully.
6. Periodic increase in remuneration of the judges and other judicial staff. Permanency in office for judges of good behaviour, physical and mental capability.
7. Training and continuing education for all judicial officers should be systematic, and could be carried out through the Judicial Administration Training Institute.
8. The practice could be reintroduced, as prescribed first in the colonial period of a District Judge and Subordinate Judge setting aside certain days from the judicial calendar only for the purpose of reviewing orders made and identifying whether any delay has occurred, and submitting an inspection note based on his or her findings. This would enable regular and critical review of the Court's own work as well as that of its staff.
9. High Court Judges must conduct full periodical inspections of all courts in the District, in order to obtain a first-hand understanding of their problems, working conditions and environment.
10. Dependent on political patronage, would help to change the work culture for the subordinate judiciary.

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