Research Monograph

on

"Separation of Judiciary and Judicial Independence in Bangladesh Perspective"

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Submitted to:

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Letter of Transmittal

To
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Subject: Submission of Research Paper on "**Separation of Judiciary and Judicial Independence in Bangladesh Perspective**"

Dear Sir

It is a great pleasure to submit my research paper on "**Separation of Judiciary and Judicial Independence in Bangladesh Perspective**". I have given best efforts to finish the thesis with relevant information that I have collected from various sources. I have concentrated my efforts to achieve the objectives of the work and hope that my endeavor will serve the purpose.

I shall be grateful and obliged if you kindly accept my thesis and evaluate it.

Sincerely yours

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Declaration

I hereby do solemnly declare that the work presented in this thesis paper has been carried out by me and has not been previously submitted to any other institution. 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 Supervisor

This is to certify that the research paper on: on "**Separation of Judiciary and Judicial Independence in Bangladesh Perspective**" is done by Farjana Akhter in partial fulfillment of the requirement for the degree of LL.M (1 Year) from Sonargaon University. The research paper has been carried out under my guidance and is a record of the bona fide work carried out successfully.

I wish her every success in his life.

_____

Muhammad Ali
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TABLE OFCONTENTS

Letter of Transmittal…… i

Declaration…… ii

Certificate of Supervisor…… iii

Acknowledgement…… iv

Table of contents …… v

List of Abbreviation…… vii

CHAPTER -1:INTRODUCTORY…… 01-02

1.1Introduction…… 01

1.2 Objective of thestudy…… 01

1.3 Methodologyof the study …… 02

1.4 Limitations of thestudy …… 02

1.5 Abstract of Chapter……..... 02

CHAPTER -2:BACKGROUND OFJUDICIAL SYESTEM…… 03-09

2.1Introduction…… 03

2.2 Philosophybehind theformation of judiciary…… 03

2.3 Historyof separation of thejudiciaryfromtheexecutivein BD…… 04

A.British period…… 04

B.Pakistan period…… 05

C.Bangladesh period…… 05

2.4 Howdid thejudiciaryseparatefinally?..... 08

2.5 Conclusion…… 09

CHAPTER-3:THE SEPARATION OFJUDICIARYFROM EXECUTIVEINBD 10-17

3.1 Introduction…… 10

3.2 TheConceptof Separation of Power…… 10

3.3 Currentsituation: executivecontrolover lowerjudiciary…… 11

3.3.1Denialof Access toJustice…… 11

3.3.2Lack of Judicial Accountability…… 13

3.3.3Lossof ConfidenceintheJudiciary…… 14
3.4 16TH Amendmentand Separation of Judiciary…… 14
3.5 Theproblems of separation of judiciaryfromtheexecutivein BD..... 15
3.6 Implication ofseparation ofjudiciaryintheco-ordinatingroleofexecutive. 16
3.7 Conclusion…… 17

CHAPTER – 4:JUDICIAL INDEPENDENCEIN BANGLADESH…… 18-26

4.1 Introduction…… 18
4.2 Definition of independenceof judiciary…… 18
4.3 Principles of independenceof judiciary…… 19
4.3.1personalindependence;…… 19
4.3.2substantiveindependence;……... 20
4.3.3 Internalindependence;and…… 20
4.3.4collectiveindependence…… 21
4.4 Essentials of independenceof judiciary…… 21
4.4.1Appointment of thejudges. ……. 22
4.4.2Tenure of thejudges;…… 24
4.4.3Adequateremuneration andprivileges…… 25
4.4.4Disciplineof judges;……..... 25
4.5 Conclusion……..... 26

CHAPTER-5: INFORMATIONS AND OBSERVATIONS **27-30**
5.1 Introduction…… 27
5.2 Speech given by some persons in seminar…… 27
5.3 Conclusion……..…….... 28

CHAPTER -6: CONCLUSIONS **31-34**
6.1 Findings ……..……. 31
6.2 Recommendations…… 31
6.2.1 RecommendationsforSeparation ofJudiciaryfromExecutive…… 32
6.2.2 RecommendationsforJudicialIndependence…… 32
6.2.3 Conclusion …… 34
Bibliography **37**

List of Abbreviation

BCS	: Bangladesh Civil Service.
BD	: Bangladesh.
CJS	: Criminal Justice System.
CPC	: Code of Civil Procedure.
CrPC	: Code of Criminal Procedure.
II	: Internal Independence.
IOJ	: Independence of Judiciary.
JA	: Judicial Accountability.
JI	: Judicial Independence.
JPC	: Judicial Pay Commission.
JSC	: Judicial Service Commission.
PI	: Personal Independence.
PSC	: Public Service Commission.
SI	: Substantive Independence.
SOJ	: Separation of Judiciary.
SOP	: Separation of Power.
TOJ	: Tenure of Judges.

CHAPTER -1 INTRODUCTORY

1.1 Introduction

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. Separation of judiciary (SOJ) universally ensures the independence of judiciary and safeguards the rights of the people. Therefore, it is impossible to ensure rule of law, fundamental human rights of freedom, without previously independent courts and tribunals to resolve disputes independently. So the complete independence of judiciary (IOJ) is the first major steps in the process of its developments. In Bangladesh the Judicial norms and practice have been derogating for years. This research is for analyzing this derogating situation and for giving some recommendations so that this situation has been developed in future.. This chapter describes about research objective, research questions, significance, scope and limitation, methodology of the research.

1.2 Objectives of the study

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-

- To review the existing conditions of theory of separation of power (SOP);
- To analyze the existing judicial independence in BD;
- To analyze and assess the existing measures for ensuring judicial independence;
- To analyze how separation of judiciary can be reconciled with judicial independence ;
- To propose improvements of the conditions of judicial independence. [1]

[1] Akter, Sahela.Implication of Separation of judiciary in the Co-ordinating Role of Deputy Commissioner,North South University,2011,p 11

1.3 Methodology of the study

The study is qualitative in nature and based on secondary sources of materials like books, journal articles, government rules, newspaper reports; etc Qualitative data was collected through interview. In order to validate data collected through interview content analysis method was also applied in the study. Relevant literature has also been collected through Internet browsing.

1.4 Limitation of the study

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 i.e. writing, research or reports was available. Therefore researcher found problem in collecting secondary data of academic nature. As judiciary has been separated only 7 years ago, the findings of the study might not reflect in-depth picture. Above all, time was a major constraint in this study.

1.5 Abstract of all Chapters

The research has been divided into six chapters. The first chapter highlights, the introduction, the research objectives, methodology , scope and limitation, and the abstract of the study. Historical development of the study has been discussed in the second chapter. It discusses how separation of judiciary at last comes into existence after 36 years of independence. Separation of power of judiciary from executive is described in chapter 3 with positive and negative impact. General principles of judicial independence in BD and how far judicial independence exist in BD is described in chapter 4 with special analysis of Higher and lower judiciary. Observations and recommendations are described in chapter 5. By considering all the conclusions of the above chapters a general conclusions chapter is framed in chapter

CHAPTER -2 BACKGROUND OF JUDICIAL SEPARATION

2.1 Introduction

History has time and again shown that unlimited power in the hands of one person or group in most cases means that others are suppressed or their powers curtailed. The separation of powers in a democracy is to prevent abuse of power and to safeguard freedom for all. There is a long history before this system. Our long cherished 'separation of judiciary' is a thing of reality at last on November 1, 2007 after 36 years of independence which has been ignored by political and military government over the last 36 years.8 This chapter will examine how judiciary developed from British period to Bangladesh period.

2.2 Philosophy behind the Formation of Judiciary

One of the basic objects for which a state was established in the society was the creation and protection of individual's rights. But an independent organ as the means through which this object might be accomplished has been recognized and existed from early times.[2] This independent organ is judiciary. An investigating look from broader point of view will reveal the idea that the existence of judiciary does not depend on the existence of the legislature. The system of separation of powers divides the tasks of the state into three branches: legislative, executive and judicial. These tasks are assigned to different institutions in such a way that each of them can check the others. As a result, no one institution can become as powerful in a democracy as to destroy this system. Checks and balances (rights of mutual control and influence) make sure that The Three Powers: Legislature, Executive, and Judiciary interact in an equitable and balanced way. [3]The separation of powers is an essential element of the Rule of Law, and is enshrined in the Constitution.

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[2]M.AHalim,-Constitution,Constitutional Law and Politics:Bangladesh Perspective.4TH edition-2009,p-339. 10 The Separation of Powers – Why is it necessary?REPUBLIC OSTERREICH PARLAMENT.http://www.parlament.gv.at/ENGL/index.shtml.

[3]Halim,A. &Siddiki N.E.-The Legal System of Bangladesh after Separation,1st Published -2008,p-98. 9

2.3 History of Separation of the Judiciary from the Executive in BD

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. Here an attempt has been made to analyze the major initiatives and impacts of those initiatives regarding separation of judiciary from British period.

A. British Period

During the reign of British ruler, there was a demand for separation of judiciary from the executive.[4]However, the British administration did not take any concrete steps until 1919 to separate the judiciary from the executive. In 1919, the issue of separation of judiciary was raised in the House of Commons but it was not discussed on the contention that it was a matter within the jurisdiction of provincial government. Furthermore, in 1921, a resolution was passed in the Bengal Legislative Assembly regarding separation of judiciary, which was followed by formation of a committee. The committee inaugurated its sitting in the beginning of November 1921, completed and submitted its report in January of the following year. Though, the committee reported that there was no practical problem in separation of judiciary from the executive. However, nothing more was done during the British period. Thus, the judiciary remained dependent on executive branch of government. Therefore, it can be assumed that this dependency of judiciary made the judiciary fragile to ensure legal accountability of government officials. Eventually, this situation encouraged the government officials to be corrupt and corruption ruined the socio-economic and human development..

[4]Dr.M.HTalukdar,., Independence of Judiciary in Bangladesh: Law and Practice, Book Syndicate, Dhaka, p. 17

B. Pakistan Period

Though in 1947 Pakistan and India emerged, as independent states however, unfortunately Bangladesh was remained just like as a province of Pakistan. The first Constitution of independent Pakistan that was adopted in 1956 provided for separating the judiciary from the executive.It has been made mandatory for the President to make appointments of judges of the Supreme Court in consultation with the Chief Justice. However, the Constitution of Pakistan like the Government of India Act 1935 (Sections 253, 254, 255 and 256) and the Constitution of India (Articles 233-237) did not include any provision regarding "subordinate courts" or "magistracy" and these were regulated by the Code of Civil Procedure and the Code of Criminal Procedure. As a result the judiciary remained under substantial executive control. However, in 1957, the East Pakistan Provincial Assembly passed the Code of Criminal Procedure with a view to separating the judicial and executive functions of the magistrate Furthermore, in 1958 the Pakistan Law Commission recommended to bring the judicial magistrates under the control of the High court. Consecutively, in 1967 the Law Commission again recommended to give effect to the CrPC Amendment Act 1957. However, it was never given effect during the whole of Pakistan period and the judiciary was remained the abdomen of executive. And the situation of legal accountability of government officials remained like their ancestor.

C. Bangladesh Period

As a sovereign state Bangladesh adopted it's Constitution on 16 December 1972 and the spirit of separation of judiciary from the executive was inserted in Article 22. Article 22 enumerates that, "the State shall ensure the separation of the Judiciary from the executive organs of the State". Article 95(1) addressed the method of appointment for the Supreme Court: the President shall appoint the Chief Justice and other judges. In addition Article 116 A provides for independence in the subordinate judiciary while Article 94(4) demands independence of the Supreme Court judges. Article 116 A, enumerates that the judicial officers including the magistrates have been declared to be independent in the exercise of their judicial functions. Beside this, under the Articles 115 and 116 of the Bangladesh Constitution, the President makes the appointment and control of judges in the judicial service or as

magistrates exercising judicial duties. During Bangladesh period, following initiatives were taken for separating judiciary from the executive.

The first attempt was taken in 1976 under a Law Committee headed by Justice KamaluddinHossain recommended that subordinate judiciary on the criminal side should be separated from the executive in three stages. In 1990, the issue of separation of judiciary was put into the manifesto of the Three-Party Alliance movement against the regime of that time. However, the next two governments of 1991 and 1996 did nothing in this regard except spoiling its tenure. After 1990s, all major political parties had showed their commitment in their manifesto to separate judiciary from the executive but did not do anything for separating judiciary from the executive. For instance (third initiative), in 1991, a private member's Bill namely the Constitution (14th Amendment) Bill was introduced for further amendment the Articles 95, 98, 115 and 116 of the Constitution, for ensuring separation of the subordinate judiciary from the executive branch. The Bill was sent to a select committee, which had carried out about 13 meetings to consider the proposal. However, no further steps were taken to pass the Bill.Next attempt was taken regarding separation of judiciary from the executive in 1995. MasderHossain along with 441 judicial officers who were judges in different civil courts filed a Writ Petition No. 2424.Finally The Supreme Court gave 12 –point directions to the Government to ensure the independence or separation of judiciary. The operative part of the judgment came to be known as 12-point directions which are as follows:

i. Judicial service is a service of the Republic within the meaning of Article 152(1) of the Constitution, but it is functionally and structurally distinct and separate service Republic.
ii. The word ‘appointment’ in Article 15 means that it is the President who under Article 115 can create and establish a judicial service and a magistracy exercising judicial functions make rules etc; Article 115 does not contain any rule-making authority with regard to other terms and conditions of service; Article 133, 136 of the Constitution and Services (Reorganization and Conditions) Act 1975 have no app1ication in respect of the judicial functions.
iii. Creation of BCS (Judicial) cadre along with other BCS executive and administrative cadres by Bangladesh Civil Service (Reorganization) Order, 1980.
iv. Government is directed to take necessary forthwith for the President to make Rules. Nomenclature of the judicial service shall design as the Judicial Service of Bangladesh either

by legislation or rules or order a judicial Service. Commission is to be established forthwith with the majority or members for the Senior Judiciary of the Supreme Court and the subordinate courts for recruitment to the judicial service.

v. Under Article 133 law or rules relating to posting, promotion, grant of leave, discipline, pay, allowance and other -terms and conditions of service consistent with Article 116 shall be enacted separately for the judicial service.

vi. Government is directed to establish a separate Judicial Pay' Commission forthwith as part of the Rules to be framed, under Article 115.

vii. In increasing control and disciplines of persons employed in the judicial service and magistrates exercising Judicial functions under Article 116 the views and opinion of the Supreme Court shall have primacy over those of the Executive.

viii. The conditions of judicial independence in 116A namely,(i) Security of tenure (ii) security- of salary and- other benefits and pension and (iii) Constitutional independence from the parliament and the executive shall be secured in the law or Rules made under Article 113 or in the executive orders having the force of Rules.

ix. The executive government shall not require the Supreme Court of Bangladesh to seek their approval to incur any expenditure on any items from the fund, allocated to the Supreme Court.

x. The members of the judicial service are within the jurisdiction of the administrative tribunal. xi. Amendment of the Constitution for separation of judiciary form the executive may be made by the Parliament.

xi. Until the Judicial Pay Commission (JPC) gives its first recommendation the salary of judges in the judicial service wi1l continues to be governed by status quo ante.

However, directive pints points of the operative part require the government to frame Rules that are to deal' with establishment of 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 JPC 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.

2.4 How Did The Judiciary Separate Finally?

Since the Appellate Division pronounced the judgment in 1999, the successive governments took 23 adjournments to implement the judgment on various pleas up to February 2006. During these seven years time, the government took very slow steps towards the way of separation of judiciary. Then the interim caretaker government (2006-2008) headed by Mr. Fakruddin Ahmed from the very beginning of his office adopted a positive and firm outlook with a determination to separate the judiciary from the executive. In fact the government took initiatives based on the constitutional principles and 12 point directives of Appellate Division of MasdarHossain's case[5]. As a result four service rules namely:

• Bangladesh Judicial Service Commission Rules, 2007;

• Bangladesh Judicial Service (Pay Commission) Rules, 2007;

• Bangladesh Judicial Service Commission (Construction of Service, Appointments in the Service and Suspension, Removal and Dismissal from the Service) Rules, 2007; and

• Bangladesh Judicial Service (Posting, Promotion, Grant of Leave, Control, Discipline and other Condition of Service) Rules, 2007 were enacted and changes were brought in the existing Code of Criminal Procedure 1898 through Ordinance No's II and IV of 2007.

Finally the historic journey of the judiciary separated from the executive started functioning from 1 November 2007. The initiative of Mr. Fakruddin Ahmed should be considered as a milestone in the history of judiciary for dispensation of criminal justice at the level of magistracy by the judicial officers and thereby removing all impediments in the separation of judiciary from the executive control. Though, it was considered that separation of judiciary from the executive is a vital factor for complete judicial independence however in principles the judicial system has not been able to function without interference from executive. For instance, on 30 July 2009 the Government of Bangladesh issued a notification, which discloses the fact that President of Bangladesh forced two judges into retirement. However, on 3 August 2009 the government, in a separate notification, cancelled its

[5] Secretary Ministry of Finance Vs. Masdar Hossain.52 DLR (2000) AD 86

previous decision of forced retirement of the said two judges. The notification disclosed that there was a procedural mistake concerning the previous decision.

2.5 Conclusion

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. [6]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.

[6]http://www.dw.de/separation-of-powers-in-bangladesh-under-threat/a-17933328

CHAPTER-3 SEPARATION OF JUDICIARY FROM EXECUTIVE IN BANGLADESH

3.1Introduction

In 1999, Bangladesh's apex court, the Appellate Division of the Supreme Court, gave a landmark judgment in Secretary, Ministry of Finance v MasdarHossain. This judgment re-affirmed the constitutional mandate for independence of the judiciary and laid out a roadmap to achieving separation of the judiciary from the executive with respect to the lower courts, both civil and criminal. The judgment was a fitting response to the long standing demand articulated by lawyers and judges to ensure speedy and effective separation of the judiciary. Despite this broad-based consensus, the judgment today remains largely unimplemented. This chapter aims to provide an outline of the current situation regarding the lack of separation between the lower judiciary and the executive, and its implications for access to justice

3.2 The Concept of Separation of Power (SOP)

The powers of the state are generally classified as the legislative power of making rules, the executive power of enforcing those rules and judicial power of enforcing those rules and the judicial power of adjudicating disputes by applying those rules.[7]The Constitution vests the executive power of the Republic in the executive and legislative power in parliament. Though there is no specific vesting of the judicial power of the Republic, it is vested in the judiciary.19The concept of separation of powers assumes that there are three categories of public power, legislative, executive and judicial, that are vested in three distinct groups of institutions Separation of the judiciary has been argued both as a cause and a guardian of formal judicial independence. 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 executive20. 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).

[7]MahmudulIslam,,CONSTITUTIONAL LAW OF BANGLADESH,2nd edition,p-64 19 MujiburRhaman v. Bangladesh,44 DLR(AD)111;M. Khamal J –Bangladesh Constitution:Trends and Issues,p-16 20 Mollah. Md. AwalHossain- Separation of Judiciary and Judicial Independence in Bangladesh.

3.3Current Situation: Executive Control over Lower Judiciary

The flagrant violation of the theory of separation of powers still continues in BD in the alarming concentration of the executive and judicial powers in the hands of the Executive Magistrates.The blurred lines between judicial and executive roles and functions of the lower judiciary, and a situation in which they are under the control of the executive, inhibit the transparent and accountable administration of justice, in particular criminal justice. The impact of lack of separation is felt directly in terms of denial of access to justice, as well as flagrant violations of the most fundamental human rights to life, liberty and personal security. It also impacts more widely on governance in general. As Dieter Conrad notes,

'The subordinate judiciary has become or is at least widely believed to have become subservient to the executive and amenable to pressures and influences from politically influential people ... Telephones were supposedly installed in judges' chambers in order to receive ominous calls from influential quarters. …the existence of executive control is in itself a standing invitation to abuse'. Examples of the consequences of lack of separation are discussed below, first with respect to denial of access to justice, then the lack of accountability of the lower judiciary and finally with regard to the increasing erosion of confidence in the judiciary and the consequent rise in the use of violence to resolve conflicts at various levels.

3.3.1 Denial of Access to Justice

- **Criminal Justice System (CJS)**

"The Government in its own interest does not want to separate the judiciary from the administration. If this happened, it would be difficult for the party -in-power to lodge political cases against the opposition. The same is true when the Opposition goes to power. The Government, whichever party is in power, does not want to let go of its control over the criminal justice process because cases against the Opposition need to be manipulated. This is true for all governments, even the democratic ones. Democratic governments are only held accountable to the people once every five years. They are at the receiving end when in Opposition but don't want to implement the separation of the judiciary when in

power.[8]There are many reported instances in which Magistrates have used their executive powers at the instance of the executive to issue warrants of arrest, to sanction arrest without warrant (under section 54 of the Code of Criminal Procedure) and consequent remands to police custody (under section 167 CrPC), to control and impose restrictions on public gatherings (under section 144 of the CrPC) and to control police firing and use of civil and military force (Sections 128 and 129 of the CrPC).Overt abuse of executive powers, allegedly at the dictate of government authorities, whether central or local, has been common place under various different regimes. Another common cause of complaint (and a corollary to the Magistrate's arbitrary exercise of powers to initiate prosecution) arises with regard to the Magistrate's alleged obstruction of investigation or prosecution of incidents involving powerful members of the executive, particularly where the complainant is from a vulnerable or disadvantaged group. Perhaps the most widespread perception of abuse of power relates to the grant or denial of bail. This occurs in both 'politically sensitive' cases and in more routine matters. Higher up within the CJS, the impact of lack of separation is also palpable in the workings of the Sessions Court. There appears to be a common pattern for the government of the day to influence the lower judiciary to manipulate the outcome of cases. As political tensions between the two leading parties usually run high, this sometimes leads to efforts to control and use the magistracy and CJS to harass political opponents and, conversely, to absolve whichever party is in power of wrongdoing. Too often, changes in government result in the dismissal of criminal and corruption cases against members of the newly instated ruling party. [9]

- **Civil Justice System**

The threat of unfavorable posting or of blocking promotion gives an opportunity for the executive to influence the decision making capacity of lower judiciary over decisions, and in particular over interim orders. Such threats, together with the endemic nature of corruption in the lower courts, mean that more often than not justice may be purchased by the highest bidder, whether a private party or the Government, bidding in the currency of commerce or of power.[10]In addition, the deputation of judicial officers to executive posts in different ministries allegedly contributes to creating an 'executive' mindset in many judges, given that they may spend significant parts of their career engaged in working

[8]http://www.blogger.com/profile/15565726607907719
[9] Law and Policy Reform, ADB, 2003, at 55.
[10]http://www.blogger.com/profile/15565726607907719

within a Ministry or Department, with a resulting (or at least with a resulting perception) of loss of impartiality.

3.3.2 Lack of Judicial Accountability(JA)

In 2006, a judicial officer known to have given a number of orders discharging ruling party persons from pending prosecutions, publicly stated his intention to contest in the next Parliamentary Election as a candidate from the then ruling political party. Despite severe criticism in the media, and demands raised by the Bar for his removal, no action was taken by any of the concerned authorities to even investigate these statements. Ultimately, following a public interest writ petition filed by a lawyer as petitioner, the High Court Division issued a direction restraining the concerned officer from discharging any judicial functions. The judicial officer concerned sought permission to appeal before the Appellate Division, but his application was rejected. This case perhaps best demonstrates how even a glaring instance of judicial misconduct does not result in any form of inquiry let alone accountability within the current structures of judicial control and administration. Perceptions of lack of JA at all levels of the judiciary appear to be increasingly widespread among users of judicial services and also the public at large. The issue of judicial accountability has two dimensions, involving judicial recourse on the one hand, and administrative recourse on the other. Of course there is a process of accountability through the judicial process, with errors in decision making by magistrates and judges of the lower courts subject to questioning by higher courts. However, accountability through the administrative process, by exercise of powers of discipline and control, is difficult to achieve in the current situation, given that these lie with the Executive. Given the lack of control of the judiciary over the lower courts, there is no process of scrutiny by the higher judiciary over magistracy and no scope for any action being taken by higher judiciary in respect of allegations of abuse of power or corruption by magistrates. (It is also notable that where the Judiciary has acted – as for example in the case above – against corrupt or incompetent judicial officers – it has generally done so at the initiative of lawyers or others seeking its intervention through public interest petitions or mobilization, rather than as a matter of course.

3.3.3 Loss of Confidence in Judiciary

As a consequence of such executive control of the judiciary having become the norm, and the lack of effective control being exercised by the Supreme Court, the lower judiciary itself is widely perceived to have moved more and more away from the basic principles of independence and impartiality. Once exposed to and implicated in corruption and nepotism at the behest of the executive, arguably the lower courts have become more open to other sources of influence and pressure for example through monetary inducements from private parties. Thus the lack of separation has become part of the context and cause of the endemic rise of corruption. With these twin incentives, the lower courts have been reportedly responsible for the arbitrary exercise of powers resulting in the denial of liberty and fair trial rights on a day to day basis. This situation has contributed to a serious public lack of confidence in the courts, and appears to be catalyzing increasing resort to self-help as a form of conflict resolution, thus contributing to the increase of violence. The only solution to prevent executive interference and establish accountability is therefore to separate the judiciary from the executive control. If this is accompanied by enabling more transparent discussion of judicial processes and outcomes, for example in the media, that would in itself reduce the threat of judicial actions being taken or perceived to be taken whimsically and capriciously.

3.4 16th Amendment and Separation of Judiciary

Bangladesh MPs passed a controversial amendment to the country's constitution that grants the parliament authority to investigate and sack judges of the nation's Supreme Court. [11] Critics say the amendment grants the government influence over the country's judiciary. They fear it could be exploited by the administration to influence the rulings of senior judges, to put them under pressure and control them. "The amendment represents a major threat to the independence of the judiciary," says Sara Hossain, Opposition parties have also criticized the constitutional amendment, suspecting a government plan behind the move to establish a one-party rule and to abolish the separation of powers between various branches of the state. "By making such changes to the law, the Awami League wants to make sure that it remains in power," says MirzaFakhrul Islam Alamgir, the BNP's acting secretary general. This view is also shared by Christian Wagner of the German Institute for International and

[11] http://www.dw.de/separation-of-powers-in-bangladesh-under-threat/a-17933328 Parliament. In the

Security Affairs. "The judicial system in Bangladesh has so far been formally independent. Even the appointment of the Chief Justice of the country's top court was made by the judiciary itself," Wagner told. The recent law change severely undermines the judicial independence. However, SuranjitSengupta, a ruling AL party politician and chairman of the Parliamentary Standing Committee on the Ministry of Law, Justice and Parliament Affairs, rejects all criticism. He explains that the term "impeachment" of judges is misleading and is specifically used by opponents to confuse the public. Despite all the reassurances from both sides, KhandokarMahhubHossain, president of the bar association of the Supreme Court, is pessimistic about the future. He believes the recent developments will have drastic consequences on the day-to-day work of the country's top judges. Those persons who accept the amendment said that "removal of a judge for misbehavior and incapacity on the recommendation of the Parliament will be more democratic. A misconception has arisen that the amendment enables the parliament to remove a judge. Actually, Parliament will recommend to the president; actual authority to remove a judge remains in the hands of the president as it was before. Only the process of investigation and recommendation has been placed in the hands of the earlier system, investigation was started upon the order of the president and was conducted by a committee called "Supreme Judicial Council."[12]The amendment restores parliamentary supremacy upheld by the 1972 Constitution, which provided for impeachment of Supreme Court judges by a two-thirds majority.27 Former Election Commissioner SakhawatHossainagrees."If the 16th Amendment is passed, it will empower Parliament to impeach Election Commissioners just as it would enable them to impeach Supreme Court judges. Minister AnisulHuq says the provisions of Article 96 will only apply to Supreme Court judges -- not to others holding constitutional positions like the Election Commissioners or the PSC officials.

3.5 The Problems of Separation of Judiciary from the Executive in BD

The question of separation of the judiciary from the executive organ of the state is not new for our judicial system. There have some common problems regarding the separation of judiciary, which is given below: 1. Lack of Consciousness

2. Lack of Political Will

[12]16th Amendment of the constitution: Another view by AnisurRahman

3. Lack of Interaction with Other Courts

4. Lack of Strong Civil Society

5. Lack of Democratic Culture

6. Executive Dominated Judiciary

7. Lack of Popular Access to Justice

8. Overlapping Competencies

9. Corrupted lawmakers

10. Government Negligence

3.6 Implication of Separation of Judiciary in the Coordinating Role of Executive

Before separation of judiciary, among subordinate criminal courts, in magistrate courts judicial function was conducted by the District Magistrate and his subordinate Executive Magistrates. This functioning has been practiced by him from 1787. He was worked as court of first instance and appeals were heard by Court of Sessions. He had power to hear appeals in some cases (Section 144,145 of CRPC). Before separation of Judiciary, there were three types of magistrate courts. Those were First Class Magistrate, Second Class Magistrate, and Third Class Magistrate. These magistrates were appointed from executive organ of the state. District Magistrate was the First Class Magistrates. Executive Magistrate had power to take cognizance of offence, issue warrant of arrest, power to grant bail, try cases, to pass sentence of imprisonment maximum up to five years and also power to impose fine, to record confession, to order for detention, etc. Now a District magistrate has lost these powers and a result drastic change has been brought in the power structure of Deputy Commissioner after separation of judiciary. [13]For effectively playing the role of coordinator in law and order mentioned

[13]SahelaAkter,.-Implication of Separation of judiciary in the Co-ordinating Role of Deputy Commissioner,North South University,2011,p-13

above, the Deputy Commissioner needs the active cooperation of law enforcing agency i.e. police, Border Guard Bangladesh, Ansar and also cooperation from the other departments. As before separation, police was functionally under the control of District Magistrate, mutual cooperation scenario between police and executive Magistrates was also good. Before separation police force was connected with District Magistracy for functioning of the judicial process. Now police are not functionally connected with District Magistracy through court proceeding. Therefore District Magistrate has lost actual control over police. Moreover after separation of judiciary, Police Magistracy meeting which was held at Office of the Deputy Commissioner is now being held at Office of the Chief Judicial Magistrate in Sessions Judges court. Therefore there may be some coordination gap between police and Executive Magistrate. Moreover, scope of informal communication between police and Executive Magistrate seems to be narrow after separation of judiciary.

3.7 Conclusion

The broader theory of 'separation of powers', from which the concept of 'separation of judiciary' emerged, the powers of a given state to be allocated among three separate organs i.e. executive, legislature judiciary, so that neither of them gets arbitrary and a check ca imposed upon one organ if it tends to become autocratic. However, we keep theories aside for a while and rely more on our empirical observations, it would transpire that the roar of the executive so most vis-à-vis the other organs. . We have come across a long way in shaping our legal and institutional structure towards ensuring justice and now we must focus on inculcating the democratic values and spirits, both in optical and legal spheres, in such a way that these may be felt integral to our national life. Mere separation was not enough to ensure justice; it has to be complemented by reforms in the police, courts and the legal profession. In this connection we would like to point out that independent judiciary has now to shoulder more responsibility than before. It will have to ensure that the process of appointment of judges has no flaws and the appointed judge's work with greater integrity. Common people must have easy access to the legal system and get legal help timely and at minimum cost, as said by the chief justice. Judiciary is the last resort of the suffering people; therefore, it must live up to its newly acquired status. We wish the independent judiciary make its presence felt and meet the expectations of the people that are, amply reflected in the jubilant mood they have greeted the separation of judiciary.

CHAPTER - 4 JUDICIAL INDEPENDENCE IN BANGLADESH

4.1 Introduction

Separation of power has been ensured after long time struggle but it cannot be said that it helps to ensure judicial independence in BD. Only separation is not enough for judicial independence. There are many pre-requisite for judicial independence. To know how far the judiciary in Bangladesh is independence first of all we have to evaluate our system and provisions and to see how far conditions for independence of judiciary have been maintained .This chapter describes about principles, elements of judicial independence in general and evaluate how far Bangladesh judiciary is independent.

4.2 Definition of Independence of Judiciary

In general, independence of judiciary means the freedom of judges to exercise judicial powers without any interference or influence. In other words, 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.[14] It requires that judges should not be subject to control by the government or by any one rather they should enjoy protection from any threats, interference or manipulation which may either force them to unjustly favor the government or subject themselves to punishment for not doing so[15].In this paper, independence of judiciary means 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 their superiors and colleagues .

[14]Dr. ZahidulIslamBiswas. -Do we have an Independent Judiciary?- FORUM- A monthly publication of Daily Star.Volume 6, Issue 09 , September 2012

[15]AkkasAli.Sarkar -Judicial Independence and Accountability:a comparative study of Bangladesh experience,University of Wollongong Thesis Collection,2002,p-55

4.3 Principles of Independence of Judiciary

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

1. personal independence;

2. substantive independence;

3. internal independence; and

4. Collective independence.

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

4.3.1 Personal Independence(PI)

PI means that judges are not dependent on government in any way in which it might influence them in reaching decisions in particular cases. PI signifies that the tenure of judges and the terms and conditions of their service are "adequately secured, so as to ensure that individual judges are not subject to executive control". In the words of Shetreet and Deschenes, the terms of judicial service including transfer, remuneration and pension entitlements should not be under the control of the executive government and the tenure of judges should be granted until a mandatory retirement age. Basically, these are the essential conditions to ensure that an individual judge may exercise judicial role without fear or favor, friendliness or ill will. Therefore, to keep the administration of justice in a fair and impartial platform, a judge should be "placed in a position where he/she has nothing to be defeated by doing what is right and little to gain by doing what is wrong". This position can be guaranteed by ensuring the individual independence of a judge.[16]

[16]Md A. Hossain - Mollah, "Independence of judiciary in Bangladesh: an overview", International Journal of Law and Management, Vol. 54 Iss: 1,pp.61- 77.http://www.emeraldinsight.com/doi/full.

4.3.2. Substantive Independence (SI)

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

4.3.3 Internal Independence(II)

II 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. In this regard, the Montreal Declaration 1983 provides:

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

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

4.3.4 Collective Independence(CI)

CI means institutional independence, which is connected with responsibility for the effective operation of the judiciary as an organ of government. If the judiciary as an institution depends on the executive, the legislature or other institutions for its operation, this may affect the performance of judicial duties by individual judges. This facet of judicial independence has a great impact on the individual independence of judges. A judge may not be able to exercise judicial function independently unless he or she is a part of an institution with authority over those human and physical resources incidental to (necessary for) performing judicial functions. So, collective or institutional judicial independence is necessary to ensure the individual independence of judges. 33 MdAwalHossainMollah, (2012) "Independence of judiciary in Bangladesh: an overview", International Journal of Law and Management, Vol. 54 Iss: 1, pp.61 - 77 In addition, collective or institutional independence is linked with court management, which includes assignment of cases, control over administrative personnel, maintenance of court buildings and preparation of judicial budgets and allocation of resources.

Of these four types of independence of judges the SI is the most important because it is the inner strength of the judges that provides the steering-force for them to maintain their impartiality in discharging judicial functions. When a judge governs justice, it is presumed and expected that he will administer justice impartially. In spite of having better protection of collective, individual and internal independence, if a judge administers justice in a partial way nothing can abstain him. So, the substantive independence is considered as a cardinal virtue of judges to maintain impartiality in administering justice.

4.4 Essentials of Independence of Judiciary

In the context of Bangladesh I have analyzed independence of the judiciary both individually and collectively under the classification of five categories such as:

4.4.1 Appointment of the judges.

4.4.2 Tenure of the judges;

4.4.3 Adequate remuneration and privileges.

4.4.4 Discipline of judges; and

4.4.5 Institutional independence of the judiciary.

4.4.1 Appointment of Judges

As mention earlier the conditions for appointment of judges should be a healthy one so that men of keen intellect, high legal acumen, integrity and independence of judgment from among the lawyers get opportunity to be judges. If there is any scope of personal favoritism and political bias in appointments, men of integrity and sense of justice will not be appointed as judges and when the judges lake these qualities, they will administer justice in a partial way resulting in low quality if judgment and such a situation will compel the people to withdrew their confidence from the judiciary. So the substantive independence which is the vital element of judicial impartiality depends on the mode of appointment. As professor Garner says "If the judges lack wisdom, probity and freedom of decision, the high purpose for which the judiciary is established cannot be realized. Without impartial and fair selection and appointment of judges fair judgment is impossible. Therefore, appointment of judges is one of the basic requirements of independence of judiciary. In Bangladesh in terms of the eligibility criteria for appointment, judges of both the Supreme Court and subordinate courts can be classified as career judges and non-career judges.

Public Services Commission (PSC) previously recruited career judges but recently after separation of judiciary from the Executive Judicial Service Commission (JSC) is assigned for recruiting career judges. Career judge means those judges who belong to the judicial service in Bangladesh and initially appointed as assistant judges at the subordinate judiciary. On the basis of job experience and seniority assistant judges can be promoted to the posts of senior assistant judges followed by joint district judges, additional district judges and district judges. Furthermore, district judges are eligible to be appointed as Supreme Court judges having at least ten years of experience.

On the other hand, non-career judges in Bangladesh are classified into two categories:

- public servants exercising judicial power; and
- Practicing lawyers appointed as judges.

Public servants of the executive branch (assistant commissioners, additional deputy commissioners and deputy commissioners) are appointed to the subordinate judiciary for trying criminal cases. Judges of criminal cases are of two kinds' session judges and magistrate. Public servants are eligible only for magistrate courts.[17]In Bangladesh, practicing lawyers are commonly known as advocates. Presently, advocates of Supreme Court having professional experience for a period of not less than ten years are eligible to be appointed directly as judges of Supreme Court.

In Bangladesh three basic principles are followed for appointing judges in Supreme Court and subordinate courts that include: seniority, merit and quota. Out of three, the most practicing criteria are seniority. However, the principle of seniority is not always strictly followed in appointing judges. For example, in 2004 Justice Syed J.R. MasdarHosain of the Appellate Division of the Supreme Court was appointed the 14th Chief Justice of Bangladesh bypassing Justices M. Ruhul Amin and Mohammad FazlulKarim, two senior judges of the Appellate Division. Similarly, in 2008 President Prof. Iazuddin Ahmed appointed Justice Mr M.M. Ruhul Amin as the 16th Chief Justice of the Supreme Court of Bangladesh by superseding Justice Mohammad FazlulKarim, who was then the senior most amongst the Appellate Division judges.In addition, generally the most senior judges of the High Court Division are appointed to the Appellate Division but these principles also violated frequently in Bangladesh.

Therefore, from the above discussion it apparently seems to us that there is a culture of supersession in appointing and promoting judges in the Supreme Court, including the appointment of the Chief Justice of Bangladesh. The judges are appointed and promoted by political or executive choices instead of their seniority and merit principles in service. This endorses injustice within the judiciary and makes rooms for further injustice to be melted out against the citizens of BD.

[17]MdAwalHossainMollah, "Independence of judiciary in Bangladesh: an overview", International Journal of Law and Management, Vol. 54 Iss: 1, pp.61 – 77, (2012)

4.4.2 Tenure of Judges(TOJ)

The TOJ is another fundamental aspect of judicial independence that is closely connected with judicial appointment.When a person is appointed as a judicial officer, the next essential question is whether the tenure of his/her office or job is adequately secure or not? If the TOJ is not secure, they may be subject to discipline or removal in an arbitrary manner. So, the principle of independence of judiciary requires that the tenure of judges should be adequately secured. In order to ensure the administration of justice neutrally, fairly and fearlessly judges should have a guarantee that they will not be subject to discipline or removal because of their decisions or the exercise of arbitrary discretion of the appointing authority

In Bangladesh the original Article 96 of the Constitution of Bangladesh provides a guaranteed tenure of office for Supreme Court judges up to their mandatory retirement at the age of 67 years. The TOJ of subordinate courts continues till a mandatory retirement age of 57 fixed by section 4 of Public Servants (Retirement) Act 1974. However, under Article 134 of the Constitution, the tenure of subordinate court judges depends upon the pleasure of the President of Bangladesh. Article 134 provides, "except as otherwise provided by this Constitution every person in the service of the Republic shall hold office during the pleasure of the President". Since judicial service is also public service or service of the Republic of Bangladesh and subordinate judges are initially recruited by Public Service Commission similar to other civil services, the tenure of subordinate judges are also dependents upon the pleasure of the President. Therefore, subordinate judges may be forced to retire before attaining the mandatory retirement age simply by misusing the "public interest" clause, which is not clearly defined in Public Servant (Retirement) Act 1974.

For example, on 30 July 2009 the Government of Bangladesh issued a notification that President of Bangladesh forced two judges into retirement who were the President and General Secretary of the Bangladesh Judicial Service Association. The notification revealed that in order to maintain

discipline in the public service, the government sent two judges into retirement in accordance with the section 9(2) of the Public Servant (Retirement) Act, 1974.

Even, though, the Judiciary of Bangladesh has been officially separated on 1 November 2007 but the executive interference is still continuing like past which undermine the judicial independence and fair

justice in Bangladesh. So, the tenure of judges both in higher and lower judiciary in Bangladesh is not adequately secured. But such security is very essential for judicial independence.

4.4.3 Adequate Remuneration and Privileges.

The salaries, housing facilities, allowances and other privileges are to be such that they can easily maintain a standard life and they do not have to think of corruption or bribery. Again, if judges are ill-paid able persons may not be attracted to this profession. The conditions of salaries and other privileges must be such that they cannot be varied to their disadvantages during the tenure of their office. This is why in democratic countries judges are paid their salaries and allowances from the consolidated fund and there is no need for the approval of the parliament for these payments every year. After retirement a judge should receive pension so that during his tenure he need not indulge in corrupt practices and he can lead a peaceful retired life.[18]

4.4.4 Discipline of Judges

Judicial independence is predicated on "good faith" decision-making. It was never intended to include "bad-faith" decision-making, where a judge knowingly and deliberately disregards the facts and law of a case. This is properly the subject of disciplinary review, irrespective of whether it is correctable on appeal Discipline of judges is closely related to judicial accountability and there is a relationship between judicial accountability and judicial independence. Without proper control or accountability judiciary may be arbitrary. On the other hand in the name of accountability or control if the assigned authority interferes or intervenes unnecessarily it would be a threat for judicial independence. Therefore, setting up of appropriate mechanisms for the judges is essential to ensure their accountability.

Judicial discipline is a proceeding against judges that is carried out in accordance with the Constitution and statutory law of a country. Discipline of judges involves performance appraisal and other actions

[18]MdAwalHossainMollah, "Independence of judiciary in Bangladesh: an overview", International Journal of Law and Management, Vol. 54 Iss: 1, pp.61 – 77, (2012)

necessary to ensure proper conduct and performance of judges, which may include censure, reduction to a lower rank and salary, forced transfer, compulsory retirement and

removal. These disciplinary actions or penalties have a direct impact on the conditions and tenure of judicial office, which are closely associated with the independence of judiciary. The main aim of judicial discipline is to wonder why discipline is necessary and how it can be ensured. The general causes of discipline are: incapacity, misconduct, corruption and criminal offence and the available mechanisms for discipline are: parliament, judiciary and independent commission.

4.5 Conclusion

Judicial independence in BD is a dream today. 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.

CHAPTER-5 INFORMATIONS AND OBSERVATIONS

5.1 Introduction

This chapter discusses field level observation of the present situation of judicial independence and some recommendation to fill the present loopholes of independence of judiciary in Bangladesh. This research has been conducted to analyze the impact of separation of judiciary from the executive for ensuring judicial independence in BD and to evaluate how far judicial independence exist in BD.In this regard the study focuses on two question:1. Does separation of judiciary has any impact on the functions of executive? 2. Whether separation of judiciary can ensure judicial independence? With a view to answering the above mentioned questions in 1st November of 2014 a seminar was held in Nawab Ali Chowdhary Senate Vhabon where some special persons attentended on that seminar and gave their valuable speech related to independence of judiciary and the most honorable person Ex-Justice ABM KhairulHaque who was the pioneer of separation of the judiciary also and delivered judgment in MasdarHossain case. This chapter describes the speech given by some executive and judicial officers. By observing those speech I co-ordinate this with some literature review and at last I recommend some necessary steps for judicial independence from that seminar

5.2 Speech Given By Some Persons in Seminar

A B M KhairulHaque

"Independent judiciary is a must for ensuring the rights of the people. Experience, integrity, boldness and mental strength of the judges can ensure an independent judiciary in the country.[19] He emphasized on the merit of law students and addressed them to be as GOD GENUS with two sided head. He described about the history of law that started 2500 years ago. Accountability of Khalifa OMAR(R:) is given as example of judicial boldness. He said that in the past no one can think about the influence in case of judgement.TATBIR was Harem in that period and people obey it but in present people forgotten about haram rather they cannot think anything without TADBIR.He said “The officials of the judiciary in the past went to Secretariat for their promotion Law 37Commission Chairman and former

[19] 'Independent judiciary must to ensure rights of people' published in newspaper The New Nation ,5th November 2014.

Chief Justice and transfer. Sometimes, the officials offered bribe. But now check and balance has been established. The judges face some problems. But they have to tackle it with talent."

Professor MizanurRahman

Honesty would be the key ingredient for independence of judiciary, he said. Judiciary is an organ of a state and no law can change this organ. Independence of judiciary is not possible by imposing any law. An organ cannot be changed without changing its whole body that means by changing a state we can change our judicial system. Justice should be the motto of the independent judiciary for the well being of the people. It has to think about the rights of the people, he said.

Senior Jurist Barrister M. Amirul Islam

He said our state is like a three leg table where there is absent of another leg which is the most important organ that can be acquired by experience. For judicial independence we should go back in the history where someone cannot think about bias judgement.He emphasized that proper method of appointment in case of judges is essential for judicial independence. He said that we should take our preamble as oath in every sector of our employment.

Advocate Abdullah Mohammad Hasan

After separation of judiciary from executive there is a change in the dress up system "he said. Before that one advocate can go to court without proper dress but now it has been changed by separation. Really it is shameful for us. Proceedings in the court have not been changed. Money is the main element to get justice.

Mollah Abu Kawser

He said that substantive independence of judges is important for judicial independence. No separation theory can ensure judicial independence. After separation there exists executive control everywhere in judicial activities

DrShahjahanSaju

He said that 1/11 is the special situation that brings judicial separation. But this remains only in the judgment no enforcement in practical situation. In the name of Mobile Court Executive violates the very theory of Separation. In the past there were 25 laws in case of Mobile court for imposing fine .But at present there are about 150 laws for imposing fine and also for imprisonment which is totally against human rights. So there is no separation from executive as executive act as judicial majistrate.He also described about the remuneration facilities of executive and judicial branch where executive get 3 or 4 times salary than judicial branch.

AKM Afzal-ul-Munir41

In practical life in cases of judicial activities he faced many influence by executive, he said. For his own sufferings he arranged such like a seminar to realize the law student about the present situation of judicial independence in Bangladesh.

MijanurRahman Khan

He emphasized that supreme power of the prime minister is against the judicial independence in spite of separation of judiciary from the executive. President has power to appoint prime minister and chief justice but in our country there is no such implementation of this rule. Prime Minister takes post hierarchy and in case of appointing chief justice file is sent to the prime minister. So every activity is done by the advice of Prime Minister. Without amending Article 116 our present government tries to go back in 1972 constitution. He said that under Article 190 of CrPC cognizance taking power is given to the executive magistrate and bail is given under consideration of executive branch. He also said about mobile court which is against the separation theory. Most of the judges give judgment on political considerations. After 16th amendment the fate of Supreme Court judges is determined by parliament and for this judges are bound to take the decision of political party. He said that there are about 28 lack cases in pending situation that is impossible to dispose by our small judicial branch. The number of judges should be increased for disposing this pending suit. With heavy burden of work a judge cannot work properly. For judicial independence we should ensure proper environment for administration of justice. For judicial independence he recommended in the following way –

1. For judicial independence power of prime minister should be decreased.

2. For the appointment of judges in higher and lower judiciary there should be a special judicial service commission and pay commission.
3. There should be a special law for judicial development.
4. The decision of senior judges in the Supreme Court should be given preferences in cases of dismissal of any judges.
5. Supreme Court Bar Association should act properly for implementation of MasdarHossain case judgement.
6. Article 116 and 99 of 1972 constitution should be restored.
7. Appointment of judges for two years under article 98 should be stopped.
8. The president should pass rule for appointment of chief justice.
9. There should be a separate secretariat in the Supreme Court for separation of judiciary.
10. A National Judicial Data Greed should be established.
11. National Mission for Justice Delivery and Legal Reforms that exist in INDIA can be established in

5.3 Conclusion

After 48 years of independence separation of judiciary remains in rule only without implementation. 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.

CHAPTER -6 CONCLUSIONS

6.1 Findings

From the above commentary of different persons in different branch it can be said that there is no separation of judiciary from the executive and no judicial independence in BD. In this research, it has been found that from time immemorial the judicial system of Bangladesh was not completely independent from the interference of the executive branch of the government. It has also been found that from the beginning of the British colonial rule, the question of separation of the judiciary from the executive had been a continuing debate. Presently, even after separation of the judiciary, the interference of the executive over the judiciary is still continuing. All the activities of judiciary including appointment of judges, their promotion, and transfer are conducted by the influence of executive. After 16th amendment now judges of the higher court can be dismissed by parliament which is an executive organ. The very element which is necessary for judicial independence is absent among the judges because our society deprive our judges from many facilities that is the obstacle of substantive independence of judges.

6.2 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 MasdarHossain 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.

6.2.1 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. Determination of the cadre strength of the Judicial Service and the various grades thereof.
10. Preparation of a realistic annual budget and placing it before the Government on time.
11. Planning for phased selection of stations and locations of civil/criminal courts and of tribunals to facilitate access to inexpensive justice

6.2.2 Recommendations for Judicial Independence

a) 1. A change in the system of selecting and appointing judges is an aspect requiring special attention.

b) Appointment of judges should be made on the basis of merit excluding all quota system.

c) A psychologist may take part in viva exam to justify the mental condition of a candidate to act as a judge.

d) 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.

e) Police verification should be done at the first stage very carefully.

f) Periodic increase in remuneration of the judges and other judicial staff. Permanency in office for judges of good behavior, physical and mental capability.

g) Training and continuing education for all judicial officers should be systematic, and could be carried out through the Judicial Administration Training Institute.

h) 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.

i) High Court Judges must conduct full periodical inspections of all courts in the District, in order to obtain a firsthand understanding of their problems, working conditions and environment.

j) As part of the process of performance review, targets could be established for judicial performance, and regular reviews of targets held. This would assist in establishing an alternative and objective set of criteria for assessing the performance of judicial officers for purposes of advancement, and assist in insulating them from executive interference.

k) Establishing a performance based incentive system, and ensuring that this is managed by the Supreme Court, in place of the current system in which advance is largely dependent on political patronage, would help to change the work culture for the subordinate judiciary.

l) Greater commitment and more proactive role of the High Court Division.

m) Problems, difficulties and needs regarding the proper functioning of the judicial system can be highlighted and brought to public attention through Annual Conferences of various levels of the judiciary, and by publication of relevant data in Annual Reports.

n) Political interference is a major impediment to the proper justice. For judicial independence judges have to stay away from any political influence.

o) The citizen and government must have more respect for judicial decisions. 16. The administrative officer and other staff, on whom the judge relies in administrative matters, would be upgraded, in part by developing career path for them.

p) 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 (CMS), would be supplied by the government.

q) The establishment and enforcement of a procedural calendar for the life of a case.

r) The enforcement of time limits for processing cases, backed by a regime of costs and/or other sanctions to discourage non-compliance.

s) The elimination of unnecessary procedural steps for, and other hurdles to, the enforcement of judgment.

t) Improved courtroom facilities, as well as technology support, with automated case tracking systems, as part of the CMIS to be installed in the Supreme Court and the District Courts.

A more standardized and stringent process for judicial impeachment of tainted judges.
Inducting 'rule of law' values for transparency, effectiveness and openness of judges.

6.2.3 CONCLUSIONS

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 favorable 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. It has also been found that from

British period the judiciary was not separated and independent from the interference of executive as a result the judiciary was not strong enough to control and hold government officials accountable to the legal system of Bangladesh. In the Pakistan period an executive could arrest and prosecute a person. The individual liberty was in danger as executive was acted as a judge and tried criminal cases. Although the courts had a general reputation of fairness and incorruptibility but we are proud of a number of cases decided by the Pakistan Supreme court namely- Malik GhulamJilani,Mir Abdul BakiBaluch and Begum ShorishKashmiri.After independence in 1971 independence of judiciary in BD remain unimplemented in spite of separation of power in 2007.Masdar Hossain judgement is a great milestone for separation of power but remain unimplemented because of various roadblocks like Government negligence. One of the important findings from history is that despite separation of judiciary still the interferences of executive are continuing. The broader theory of 'separation of powers', from which the concept of 'separation of judiciary' emerged, the powers of a given state to be allocated among three separate organs i.e. executive, legislature and judiciary, so that neither of them gets arbitrary and a check can be imposed upon one organ if it tends to become autocratic. Indeed, there are countries where this separation theory applies but not because of the vitality of the theory itself rather because those countries had developed national sense of respect to words their democratic institutions amounting to inviolability, breach of which is regarded and impossibility. So, it is more of political culture then of mere implementation of theory. We have come across a long way in shaping our legal and institutional structure towards ensuring justice and now we must focus on inculcating the democratic values and spirits, both in optical and legal spheres, in such a way that these may be felt integral to our national life. Mere separation was not enough to ensure justice; it has to be complemented by reforms in the police, courts and the legal profession. In this connection we would like to point out that independent judiciary has now to shoulder more responsibility than before. It will have to ensure that the process of appointment of judges has no flaws and the appointed judge's work with greater integrity. Common people must have easy access to the legal system and get legal help timely and at minimum cost, as said by the chief justice. Judiciary is the last resort of the suffering people; therefore, it must live up to its newly acquired status. We wish the independent judiciary make its presence felt and meet the expectations of the people that are, amply reflected in the jubilant mood they have greeted the separation of judiciary. 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. [20]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.

[20]http://www.dw.de/separation-of-powers-in-bangladesh-under-threat/a-17933328

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