



## ACADEMIC ARTICLE

# Separation of Judiciary in Bangladesh-Constitutional Mandates and *Masdar Hossain Case's* Directions: A Post Separation Evaluation

Md Milan Hossain\*

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In Bangladesh, the separation of the judiciary and its independence are constitutional mandates repeatedly declared in the judicial pronouncements; but no effective steps were taken by any governments before 2007. In order to fulfill the constitutional mandates and mandatory directions of the judgment of the *Masdar Hossain* case, the judiciary, particularly judicial magistrate courts were formally separated from the executive on 1<sup>st</sup> November 2007. More than 12 years have gone since the formal separation of the judiciary from the executive. Under these circumstances, this paper has been conducted to reveal whether all directions of *Masdar Hossain* case have been implemented and true separation of the judiciary from the executive or the legislature was established. From the analysis of the study, the findings as revealed are negative; therefore, the barriers have also been identified and explored in the paper.

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**Keywords:** separation of judiciary; constitutional mandates; Masdar Hossain Case; Bangladesh; post-separation period

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## Introduction

Separation of the judiciary is an important principle of an effective judiciary, without which the independence of judiciary is not possible to be established in a country and if the judiciary is not independent, then the citizen's rights, it may presume, may be violated; rule of law is impossible to be ensured there. It is observed in *Second Judges' case*<sup>1</sup> (1998) 7 SCC 739 that "so long as the Judiciary remains truly distinct from both, the legislature and the executive, the general power of the people can never be endangered from the any quarters".

State has three important organs- executive, judiciary and legislative. Among them, the judiciary is very important to ensure citizens' constitutional rights, legal rights if their rights are infringed either by the executive or legislature or by any department or institution of the government or even by an individual or a group of individuals. It is rightly said that

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\* Britannia University, BD. Email: [milond97@gmail.com](mailto:milond97@gmail.com)

<sup>1</sup> Cited in *Idrisur Rahman v. Bangladesh* (2009) 61 DLR 523.

“the judiciary stands between the people of the country and the State as a bulwark against Executive pressure, excesses and misuse of power by the Executive”<sup>2</sup>. Therefore, the judiciary of a country must be separate, independent and competent. The concept of separation of the judiciary from other organs of a State refers to a situation in which the judicial branch of government acts as its own body free from intervention and influences from the other branches of government, particularly from the executive and legislature.

In Bangladesh, the separation of the judiciary and its independence are constitutional mandates as they are incorporated in the several articles<sup>3</sup> of the Constitution of the People's Republic of Bangladesh (hereinafter as the Constitution): Article 22 of the Constitution provides that “the State shall ensure the separation of the judiciary<sup>4</sup> from the executive organs of the State” whereas Article 94(4) of the Constitution states that “the chief justice and the other judges of the Supreme Court<sup>5</sup> of Bangladesh shall be independent in the exercise of their judicial functions.” The same view is also reflected in article 116A<sup>6</sup> regarding the judges<sup>7</sup> and judicial magistrates<sup>8</sup> of the subordinate courts. Even, in the case of *Secretary, Ministry of Finance v. Masdar Hossain and others*,<sup>9</sup> (hereinafter as the *Masdar Hossain* case) it was opined upon the provisions of the independence of the judiciary affirmed in Article 94(4) and Article 116A as one of the basic pillars of the Constitution which could not be abridged, curtailed or diminished in any manner.<sup>10</sup> On the contrary, Article 109 provides that the High

<sup>2</sup> *Idrisur Rahman v Bangladesh* (2009) 61 DLR 523, Para. 528.

<sup>3</sup> See the Constitution, arts. 22, 94, 109, 116A, available at: <http://bdlaws.minlaw.gov.bd/act-367.html> (Last visited on September 5, 2018).

<sup>4</sup> The judiciary of a country comprises all courts and tribunals which interpret law, settle legal disputes, enforce rights of citizens and impose penalty to the offenders. The Judiciary of Bangladesh can be drawn broadly by the Supreme Court (higher judiciary) and subordinate courts (lower judiciary). The highest court in Bangladesh is known as the Supreme Court of Bangladesh having two divisions- a) the High Court Division and b) the Appellate Division (Bangladesh Constitution, Art. 94) (hereinafter as the Constitution). Subordinate courts may be civil, criminal, special or tribunal.

<sup>5</sup> The highest court in Bangladesh is known as the Supreme Court of Bangladesh.

<sup>6</sup> Article 116A reads as: “Subject to provisions of the Constitution, all persons employed in the judicial service and all magistrates shall be independent in the exercise of their judicial functions”.

<sup>7</sup> The term judges refer to the District Judges, Additional District Judges, Joint District Judges, Senior Assistant Judges and Assistant Judges; they are presiding officers of the Subordinate Civil Court (Lower Judiciary) at the District Level of Bangladesh.

<sup>8</sup> Judicial magistrate means the presiding officers of subordinate criminal courts (lower judiciary in BD) at the District level; they take cognizance of offences and try criminal matters under the Code of Criminal Procedure (CrPC), 1908.

<sup>9</sup> 52 DLR (AD) 82, Para. 57.

<sup>10</sup> The same view was first established in the case of *Anwar Hossain Chowdhury v. Bangladesh* 1989 BLD (Spl) 1(8<sup>th</sup> Amendment Case); where it was held that the basic features or structures of the Constitution being not altered or changed in any way; of which separation of powers incorporated in Article 22 of the constitution and the independence of the judiciary inserted as in the Articles 94(4) and 116A are two important basic structures; *subsequently*, the same views came in the following cases: *The State v Chief Editor, Manabjamin*, 57 DLR 2005 HCD 359, *Abdul Mannan Khan v. Bangladesh* (2012) 64 DLR 169, *AKM Shafuiddin v. Bangladesh* (2012) 64 DLR 508, 16<sup>th</sup> Amendment case (Civil Appeal No.06 of 2017) available at: [http://www.supremecourt.gov.bd/resources/documents/1082040\\_C.A.6of17.pdf](http://www.supremecourt.gov.bd/resources/documents/1082040_C.A.6of17.pdf) (Last visited on 31 August 2018), Mobile Court Case 2017 (writ no. 8437 & 10482 of 2011, and 4879 of 2012) available at: [www.supremecourt.gov.bd/resources/documents/382548\\_WP8437of2011.pdf](http://www.supremecourt.gov.bd/resources/documents/382548_WP8437of2011.pdf) (Last visited on 25 June 2018). It is apt to state that the doctrine of the basic structure is an Indian judicial principle that the constitution has some basic features that cannot be changed, altered or destroyed by the amendments of the legislature. The principle was first established in 1964 in the case of *Sajjan Singh v. State of Rajasthan*, (1965) AIR 845, SCR (1) 933 cited in Wikipedia, Basic structure doctrine available at: [https://en.wikipedia.org/wiki/Basic\\_structure\\_doctrine](https://en.wikipedia.org/wiki/Basic_structure_doctrine) (Last visited on 4 September 2018). In the different judicial pronouncements of Indian judiciary, constitutional matters are now settled matters that constitutional supremacy, fundamental rights, State directive principles, rule of law, judicial review, separation of powers etc. falling in the category of constitutional basic features. On the contrary, in Bangladesh after several judicial pronouncements, the legislature has incorporated the provisions of basic features of the Constitution

Court Division (hereafter as HCD) of the Supreme Court of Bangladesh (hereinafter as SCB) shall have superintendence and control over all courts and tribunals subordinate to it. If the higher judiciary has control and superintendence exclusively upon the subordinate judiciary, it is possible for the independence of the subordinate judiciary to be established. In the *Masdar Hossain* judgment, the institutional independence of the subordinate judiciary, especially from the legislative and the executive has been treated as third essential condition of judicial independence.<sup>11</sup> Even in the 1972 Constitution, the SCB got priority in controlling and supervising of the subordinate judiciary due to the provisions of original Articles 115 and 116. Article 116 empowered the SCB with control over the subordinate judiciary in the case of postings, promotions, grant of leave and discipline and under Article 115 district judges would be appointed by the President on the Supreme Court's (hereinafter as SC) recommendation, but current articles 115 and 116 empower the President in place of the SC.<sup>12</sup>

It was very unfortunate for the nation in spite of having mandatory provisions regarding the separation of the judiciary in the 1972 Constitution, no effective steps were ever taken by the legislature, executive or any government in order to separate the judiciary from other two branches before 2007. And finally, it was officially separated from the executive on the 1<sup>st</sup> November 2007 by the then caretaker- government in order to meet such constitutional mandates and the directions of the Appellate Division given in the case of *Secretary, Ministry of Finance v. Masdar Hossain and others*<sup>13</sup> 20 BLD (AD) 141; the underlying purpose is to establish the rule of law and uphold the citizens' rights; in the mentioned case the Appellate Division gave twelve directions, of which five were mandatory and seven were optional.

By the separation declaration on 1<sup>st</sup> November 2007, the subordinate judiciary particularly judicial magistrate courts<sup>14</sup> were separated from the executive, but effective separation is yet to be established. Under these circumstances, whether all directions of *Masdar Hossain's* judgment have been implemented; if they have all been implemented, whether true separation of the judiciary has been established here; or what are the reasons behind the non-establishment of true separation of the judiciary in Bangladesh?; these are all the research questions of the current paper. By applying an analytical research methodology, this paper has been conducted.

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in the Constitution (Article 7B) by Article 7 of the Constitution (Fifteenth Amendment) Act, 2011 (Act XIV of 2011) where the preamble, all articles of Part I (Provisions regarding the Republic), Part II (Provisions regarding Fundamental Principles of State Policy), Part III (Provisions regarding Fundamental Rights), and Article 150 of the Constitution are clearly declared as basic structures of the Constitution which shall not be amendable by way of insertion, modification, substitution, repeal or by any other means; See the Constitution of the People's Republic of Bangladesh available at: [http://bdlaws.minlaw.gov.bd/print\\_sections\\_all.php?id=367](http://bdlaws.minlaw.gov.bd/print_sections_all.php?id=367) (Last visited on September 5, 2018).

<sup>11</sup> *Secretary, Ministry of Finance v. Masdar Hossain and others*, 52 DLR (AD) 82, Para. 62.

<sup>12</sup> Current Articles 115 and 116 have created a real obstacle to a meaningful and effective separation and independence of the judiciary as these two articles have empowered the President to make appointments of judges and judicial magistrates of the lower judiciary and to deal with posting, promotion, discipline of judicial officers in consultation with the Supreme Court. Actually, these two articles give the executive absolute control over the lower judiciary where original Article 115 was substituted by section 19, the Constitution (Fourth Amendment) Act, 1975 and Article 116 substituted by the Constitution (Fifteenth Amendment) Act, 2011.

<sup>13</sup> Popularly known as the judiciary separation case.

<sup>14</sup> Judicial magistrate courts are now part of the subordinate judiciary, take cognizance of offences and try criminal matters under the Code of Criminal Procedure (CrPC), 1908; Under the CrPC, the magistrate court is now of two types, namely:- (a) Judicial Magistrate; and (b) Executive Magistrate; Before 2007's separation there were only magistrates courts held by the executive; now four types of Judicial Magistrate operates under CrPC: (a) Chief Metropolitan Magistrate in Metropolitan Area and Chief judicial Magistrate to other areas; (b) Magistrate of the first class, who shall in Metropolitan area, be known as Metropolitan Magistrate; (c) Magistrate of the second class; and (d) Magistrate of the third class (CrPC, s. 6).

A great deal of literature has been written on the separation of power and separation of the judiciary. Literature regarding the separation of the judiciary after 2007 will be considered here, as the research is regarding the post separation period of the judiciary. In Bangladesh targeted literature, particularly research based works upon the post separation of the judiciary are hardly available. Justice Latifur Rahman agreed in a judicial pronouncement for financial independence, for effective and meaningful discharge of the constitutional functions of the judiciary, which might ensure its effective separation.<sup>15</sup> Dr. Zahidul (2012) claimed that the judgment of the *Masdar Hossain* case remained largely unimplemented until 2006; he determined many inconsistencies with the independence of judiciary in Bangladesh, particularly, controversial appointments to the HCD, appointment of the Chief Justice (hereinafter as CJ), appointment of public prosecutors, arbitrariness in judicial actions, withdrawal of cases on political grounds, the manner of refusal of bail to political leaders and arbitrary presidential pardon etc., for which questions raised among citizens regarding the separation of the judiciary and its independence.<sup>16</sup> M Rafiqul (2014) argued for the absence of due process of law and justice in the activities of the executive giving opportunity to the executive body, putting the separation of the judiciary at stake.<sup>17</sup> He also identified that the maintenance of a dependable judiciary has created a political expedient for the executive, which is also a bar for ensuring the separation of the judiciary. Huda (2017) claimed for effective separation of the administration of justice from the legislative and executive through the preservation of the public liberty, where the appointment of the judges by the executive is a great restraint for effective separation.<sup>18</sup> Shakhawat (2018) claimed that a meaningful and effective judiciary was not possible in 45 years due to the collective failure of the executive, legislature and the judiciary.<sup>19</sup>

### Separation of Power: Historical Background

Separation of powers, is an idea that became visible at the time of Montesquieu and even before.<sup>20</sup> The concept of separation of powers derived from centuries of political and philosophical development<sup>21</sup> reflected first in Aristotle's book *The Politics*.<sup>22</sup> In this book, the author focused on three elements or powers of a government, where the first element is the deliberative element pertaining to common dealings like war and peace, enactment of laws, penalty of death, appointment, confiscation and deportation.<sup>23</sup> The second element refers to the number of offices and subject matter of its dealings as well as the tenure of offices.<sup>24</sup> And

<sup>15</sup> *Secretary, Ministry of Finance v. Masdar Hossain and others*, 52 DLR (AD) 82, Para. 89.

<sup>16</sup> Dr. Zahidul Islam Biswas, "Do We Have an Independent Judiciary?", 6 (9) *Forum the Daily Star* (Dhaka, September, 2012) available at: <https://works.bepress.com/zahid/8/download/> (Last visited on August 13, 2018).

<sup>17</sup> M Rafiqul Islam, "Independence of the Judiciary-the Masdar Case" *The Daily Star* (Dhaka, 10<sup>th</sup> March 2014) available at: <https://www.thedailystar.net/opinion/straight-line/independent-judiciary-must-democracy-1381690> (Last visited on August 13, 2018).

<sup>18</sup> Muhammad Nurul Huda, "Independent Judiciary a must for democracy" *The Daily Star* (Dhaka, 27 March 2017) available at: <https://www.thedailystar.net/opinion/straight-line/independent-judiciary-must-democracy-1381690> (Last visited on 13 August 2018).

<sup>19</sup> Shakhawat Liton, "A Collective Failure" *The Daily Star* (Dhaka, 9<sup>th</sup> January 2018) available at: <https://www.thedailystar.net/frontpage/collective-failure-1517050> (Last visited on August 13, 2018).

<sup>20</sup> Jr. Laurence J O'Toole, "Doctrines and Developments: Separation of Powers, the Politics-Administration Dichotomy, and the Rise of the Administrative State" 47 (1) *PAR* 17–25(1987) available at: [http://www.jstor.org/stable/975468?seq=1&cid=pdf-reference#references\\_tab\\_contents](http://www.jstor.org/stable/975468?seq=1&cid=pdf-reference#references_tab_contents) (Last visited on May 27, 2018).

<sup>21</sup> Sam J. Ervin, JR., "Separation of Powers: Judicial Independence" 30 *LCP* 108–127(1970) available at: <https://scholarship.law.duke.edu/lcp/vol35/iss1/8> (Last visited on November 25, 2018).

<sup>22</sup> Benjamin Jowett, *Aristotle's Politics* 175–176 (Translated Version), Book IV, Part, XIV (Oxford University Press 1920) available at: [https://ia800503.us.archive.org/7/items/aristotlespolit00aris/aristotlespolit00aris\\_bw.pdf](https://ia800503.us.archive.org/7/items/aristotlespolit00aris/aristotlespolit00aris_bw.pdf) (Last visited on May 31, 2018).

<sup>23</sup> *Id.*

<sup>24</sup> H Reckham, *Aristotle Politics* 385 (English translated version) (Harvard University Press, Cambridge 1959) available at: <https://ryanfb.github.io/loebolus-data/L264.pdf> (Last visited on May 31, 2018).

the third element is the component parts of the judiciary, which denotes the system of court, element of judiciary, appointment procedure of judges and structure of the court.<sup>25</sup> The third element of the government merely touches on the doctrine of separation of powers.

Later on, in 1690, Locke in his *Second Treatise of Civil Government* focused on the independence of judiciary and the theory of separation of powers saying that, 'it is necessary there should be a power always in being which should see to the execution of the laws that are made, and remain in force. And thus the legislative and executive power comes often to be separated'.<sup>26</sup> It is also stated that: 'The executive and federative power of every community be really distinct in themselves, yet they are hardly to be separated and placed at the same time in the hands of distinct persons. The executive and federative power should be placed in persons that might act separately, whereby the force of the public would be under different commands, which would be apt some time or other to cause disorder and ruin.'<sup>27</sup>

In 1748, Great French Philosopher Montesquieu formulated the doctrine of separation of powers in his famous book *The Spirit of the Laws* stating that:

'In every government there are three sorts of power: the legislative; the executive in respect to things dependent on the law of nations; and the executive in regard to matters that depend on the civil law. By virtue of the first, the prince or magistrate enacts temporary or perpetual laws, and amends or abrogates those that have been already enacted. By the second, he makes peace or war, sends or receives embassies, establishes the public security, and provides against invasions. By the third, he punishes criminals, or determines the disputes that arise between individuals. The latter we shall call the judiciary power, and the other, simply, the executive power of the state.'<sup>28</sup>

Montesquieu explicates that each power of the government's three organs should be exercised by each organ itself, so that no apprehensions of interfering can arise. He thus emphasized upon the separation judiciary:

'When legislative power is united with executive power in a single person or in a single body of the magistracy, there is no liberty, because one can fear that the same monarch or senate that makes tyrannical laws will execute them tyrannically. Nor is there liberty if the power of judging is not separate from legislative power and from executive power. If it were joined to legislative power, the power over the life and liberty of the citizens would be arbitrary, for the judge would be legislator. If it were joined to executive power, the judge could have the force of an oppressor.

All would be lost if the same man or the same body of principal men, either of nobles, or of the people, exercised these three powers: that of making the laws, that of executing public resolutions, and that of judging the crimes or the disputes of individuals.'<sup>29</sup>

<sup>25</sup> *Id.*

<sup>26</sup> John Locke, *Two Treatises of Government* 168 (New edn, Vol. 5, 1823, Para. 144 available at: <https://www.yorku.ca/comminel/courses/3025pdf/Locke.pdf> (Last visited on May 31, 2018).

<sup>27</sup> *Secretary, Ministry of Finance v. Masdar Hossain and others*, 52 DLR (AD) 82, Para. 148.

<sup>28</sup> Baron De Montesquieu, *The Spirit of Laws* (translated into English by Thomas Nugent) (The Colonial Press, New York, vol. 1, 1899); cited also in George W. Carey, "Separation of Powers and the Madisonian Model: A Reply to the Critics" 72 *APSA* 154(1978) available at: <http://www.jstor.org/stable/1953605> (Last visited on May 27, 2018).

<sup>29</sup> Montesquieu, *The Spirit of the Laws* 157 (Cambridge University Press, Cambridge, 1989), cited also in Sarkar Ali Akkas, *Independence and Accountability of Judiciary-A Critical Review* 17 (Center for Rights and Governance, Dhaka-1000, 2004).

In 1824, William Paley who is a famous English philosopher and theologian, made observations about the doctrine of separation of powers in his *Moral and Political Philosophy* as under: The judges of the land become not infrequently the arbitrators between the king and the people, on which account they ought to be independent of either; or, what is the same thing, equally dependent upon both; that is, if they be appointed by one, they should be removable only by the other.<sup>30</sup>

However, there are lots of criticisms against the doctrine of separation of powers. Absolute separation of power of each branch is never possible and also not desirable; therefore, the subsequent doctrine of checks and balances was introduced among the three organs. The US is a vivid example for following the principle of checks and balances most rigidly among the three organs, whereas in Bangladesh the principle is not ensured constitutionally and not followed in practice; As a result, in spite of declaring the constitution as the supreme law of the country and ensuring constitutional supremacy, the executive and legislative are working as supreme organs in practice, against which true separation and effective independence are quite impossible.

### **Steps for the Separation of Judiciary in Bangladesh: Pre-2007 Regime**

The separation of the judiciary is a precondition for the independence of the judiciary, which is a basic feature of the Constitution. If the judiciary can perform independently, the citizens' rights can never be endangered from any quarters and the judiciary will be respected as protector of citizens' constitutional rights. But in order to implement the constitutional mandates regarding the separation of judiciary, particularly the subordinate judiciary from the executive, the nation had to wait about 36 years from its independence.

In Bangladesh history, it is found that the first attempt was taken in 1976 by a Law Committee of Justice Kamluddin Hossain, who made a recommendation for the separation of the subordinate judiciary on the criminal side in three stages. In 1990 the separation of the judiciary was one of the commitments in the manifesto of the three-party alliance but no steps were taken by the governments of 1991 and 1996 except spoiling their tenure. It was Masdar Hossain, a district judge along with another 441 judicial officers who brought a writ petition in 1995 to the HCD, which is known as the *Masdar Hossain* case. In this case the petitioners claimed inter alia: i. inclusion of judicial service in the name of BCS (Judicial) under the Bangladesh Civil Services (Re-organization) Order, 1980 is ultra vires the Constitution; ii. Chapter II of Part VI of the constitution has already separated the lower judiciary from executive where necessary amendments of article 115 may be required for full separation; iii. judges of the subordinate courts being presiding officers cannot be subject to the jurisdiction of the administrative tribunal of the executive. The court gave a landmark judgment in 1997 declaring 12 historical directions, with a view to giving implementation of the separation of judiciary from the executive. The AD of the SCB reversed the decision of the HCD upholding the 12 directions of the HCD in 1999 in a reply to the appeal of the government:

‘The Appellate Division directed the Government to implement its 12 point directives, including for formation of separate Judicial Service Commission (JSC) to serve the appointment, promotion and transfer of members of the judiciary in consultation with the SC. A further 12-point directive called for a separate Judicial Service Pay Com-

<sup>30</sup> W Paley, “Moral and Political Philosophy” 345 (1824) cited in SAM J Ervin, “Separation of Power: Judicial Independence” (1970) 35 Law and Contemporary Problems 108–127, available at: <https://scholarship.law.duke.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=3279&context=lcp> (Last visited on May 27, 2018).

mission, amendment of the criminal procedure and the new rules for the selection and discipline of members of the Judiciary.<sup>31</sup>

In the mentioned case, the AD of the SCB declared and directed the government to implement the 12 directions where they are as under:

- I. The judicial service is a service of the Republic within the meaning of Article 152(1) of the Constitution, but it is a functionally and structurally distinct and separate service from the executive and administrative services of the Republic.<sup>32</sup>
- II. The word “appointment” in Article 115 means that it is the President who under Article 115 can create and establish a judicial service and also a magistracy exercising judicial functions, make recruitment rules and all pre appointment rules etc., but Article 115 does not contain any rulemaking authority with regard to other terms and conditions of service and Article 133 and Article 136 of the constitution and the Services (Reorganization and Conditions) Act 1975 have no application to the above matters in respect of judicial functions.<sup>33</sup>
- III. The creation of BCS (Judicial) Cadre along with other BCS executive and administrative cadres by Bangladesh Civil Service (Re-organisation) Order 1980 with amendment of 1986 is ultra vires the Constitution, whereas Bangladesh Civil Service Recruitment Rules 1981 are applicable to the judicial service.<sup>34</sup>
- IV. The nomenclature of the judicial service shall follow the language of the Constitution and shall be designated as the Judicial Service of Bangladesh or Bangladesh Judicial Service. A Judicial Services Commission shall be established forthwith with majority of members from the senior judiciary of the Supreme Court and the subordinate courts for recruitment to the Judicial service on merit, with the objective of achieving equality between men and women in the recruitment.<sup>35</sup>
- V. Under Article 133 law or rules relating to posting promotion, grant of leave, discipline (except suspension and removal), pay, allowances, pension (as a matter of right not favour) and other terms and conditions of service, consistent with Articles 116 and 116A shall be enacted separately for the judicial service.<sup>36</sup>
- VI. It is also directed to establish a separate Judicial Pay Commission forthwith as a part of the Rules to be framed under Article 115 to review the pay, allowances and other privileges of the judicial service. The pay etc. of the judicial service shall follow the recommendations of the Commission.<sup>37</sup>
- VII. It is declared that in exercising control and discipline of persons employed in the judicial service and magistrates exercising judicial functions under Article 116, the views and opinion of the SC shall have primacy over those of the Executive.<sup>38</sup>
- VIII. The conditions of judicial independence in Article 116A, elaborated in the judgment, namely (1) security of tenure, (2) security of salary, pension and other benefits and (3) institutional independence from the parliament and the executive shall be

<sup>31</sup> See Bangladesh Supreme Court Bar Association: Masdar Hossain Case available at: [www.bangladeshsupremecourtbar.com/Masdar\\_Hossain\\_Case.php](http://www.bangladeshsupremecourtbar.com/Masdar_Hossain_Case.php) (Last visited on July 23, 2018).

<sup>32</sup> *Secretary, Ministry of Finance v. Md. Masdar Hossain and others* (1999) 52 DLR AD 82, para 76(1).

<sup>33</sup> *Id.* Para. 76 (2).

<sup>34</sup> *Id.* Para. 76 (3).

<sup>35</sup> *Id.* Para. 76 (4).

<sup>36</sup> *Id.* Para. 76 (5).

<sup>37</sup> *Id.* Para. 76 (6).

<sup>38</sup> *Id.* Para. 76 (7).

secured in the law or rules made under Article 133 or in the executive orders having the force of rules.<sup>39</sup>

- IX. The executive Government shall not require the SCB as to seek their approval to incur any expenditure on any item from the funds allocated to the Supreme Court in the annual budgets.<sup>40</sup>
- X. It is declared that the members of the judicial service are within the jurisdiction of the administrative tribunal.<sup>41</sup>
- XI. For the separation of the subordinate judiciary from the executive, parliament can amend the constitution if necessary to make the separation more meaningful, pronounced, effective and complete.<sup>42</sup>
- XII. It is declared that until the Judicial Pay Commission gives its first recommendation the salary of Judges in the judicial service will continue to be governed by status quo ante.<sup>43</sup>

Despite the necessary directions being given by the Appellate Division in the *Masdar Hossain* case to the Government for the separation of the judiciary from the executive and legislature, the 1996 and 2001 governments also made excuses many times and dissipated their tenure.<sup>44</sup>

### Steps for the Implementation of the Directions of the *Masdar Hossain Case* and Post-2007 Regime

Finally, it was formally possible from 1<sup>st</sup> November 2007 for the separation of the judiciary to be established by the then caretaker government, with a view to fulfilling the mandatory directions of the *Masdar Hossain* judgment which is popularly known as the separation of powers case.

It was also said earlier that the famous case *Masdar Hossain v Secretary, Ministry of Finance*, plays a vital role for establishing the independence of the judiciary in Bangladesh.<sup>45</sup> The case also reflects the separation of powers among the three organs of the government.<sup>46</sup> The theory of separation of powers was clearly reflected through the 12 directives in the *Masdar Hossain* case.

In order to meet the constitutional mandate under Article 22 of the Constitution and implement the directions of *Masdar Hossain's* judgment, the then caretaker government took the necessary steps to execute the directives of the *Masdar* case and ensure separation of the judiciary, enacting four sets of rules and finally on paper the judiciary was separated from the executive on 1<sup>st</sup> November 2007:

- i. Bangladesh Judicial Service Commission Rules 2007
- ii. Bangladesh Judicial Service Pay Commission Rules 2007

<sup>39</sup> *Id.* Para. 76 (8).

<sup>40</sup> *Id.* Para. 76 (9).

<sup>41</sup> *Id.* Para. 76 (10).

<sup>42</sup> *Id.* Para. 76 (11).

<sup>43</sup> *Id.* Para. 76 (12).

<sup>44</sup> Tania Lipi, 'Separation of Judiciary from the executive: an Evaluation and Analysis', available at: [https://www.researchgate.net/.../238114298\\_Separation\\_of\\_Judiciary\\_and\\_Judicial\\_In...](https://www.researchgate.net/.../238114298_Separation_of_Judiciary_and_Judicial_In...) (Last visited on June 23, 2018).

<sup>45</sup> M Rafiqul Islam, "Independence of Judiciary-The Masdar Case" *The Daily Star* (Dhaka, 10 March 2014) available at: <https://www.thedailystar.net/independence-of-the-judiciary-the-masdar-case-14760> (Last visited on September 8, 2018).

<sup>46</sup> The World Bank, 'Legal and Judicial Capacity Building Project, Finance and Private Sector Department: South Asia Region' available at: <http://documents.worldbank.org/curated/en/223531468007223731/pdf/ICR-120001Public0Disclosed0July0121.pdf> (Last visited on September 8, 2018).



- iii. Bangladesh Judicial Service Commission (Constitution of service, appointment on the service and suspension, removal and dismissal from the service) Rules 2007
- iv. Bangladesh Judicial Service (posting, promotion, grant of leave, control discipline and other condition of service) Rules 2007

Then Mr. Fakruddin Admed's caretaker government passed four sets of rules to implement the directions of the judgment, but all four sets are not currently operating in practice; only the Bangladesh Judicial Service Commission Rules 2007 are actively working, by which candidates are primarily selected by the Bangladesh Judicial Service Commission through preliminary examination, written examination and viva voce for appointing judges of the subordinate judiciary.

Bangladesh Judicial Service Commission (hereinafter as the Commission) is composed of 11 (eleven) members who are appointed under section 3 of the Bangladesh Judicial Service Commission Rules 2007, by the President in consultation with the Chief Justice of the SCB.<sup>47</sup> The Commission is constituted with a judge of the AD as its chairman, two judges of the HCD, Attorney General, one member of the Law Commission, the Secretary of the Ministry of Establishment, the Secretary of the Ministry of Finance, the Secretary of the Ministry of Law and Justice, one of the Deans of the Faculty of Law of Dhaka University, Rajshahi University or Chittagong University, Registrar of the Bangladesh Supreme Court and the district judge of Dhaka as members of the Commission. In addition to its regular responsibilities of selecting of candidates for appointment, the Commission is also responsible for giving legal advice on any legal question regarding such appointment or duties of the Commission; the Commission have to perform the duties imposed upon it by the any other rules made under article 115 or 133 of the Constitution of Bangladesh;<sup>48</sup> and the Commission has to submit annual reports of its annual activities to the President by 31<sup>st</sup> March of each year.<sup>49</sup> It also has power to enact any rules, which is not inconsistent with the Bangladesh Judicial Service Commission Rules 2007, by official gazette notification in consultation with the President.<sup>50</sup>

It is apt to state that the appointment, posting and removal system for judges of the subordinate judiciary are not being fulfilled in pursuance of Bangladesh Judicial Service Commission [Constitution of service, appointment of 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 conditions of service] Rules 2007 consecutively. Rather the removal, promotion, posting and transfer of the judges of subordinate courts are preceded by the executive through the Ministry of Law and Justice in consultation with the SCB, which is deemed as the main bar to establishing true separation of the judiciary.<sup>51</sup> Recently, Judicial Service Disciplinary Rules 2017 have been passed, but they also have some loopholes which are contradictory, with the doctrine of separation of power discussed in the barriers section of the paper. On the other hand, the judges of the SC are also appointed by the executive on political consideration in consultation with the SC, for which there is no detailed written rules in spite of directions<sup>52</sup> being issued from the SC on the matter.

<sup>47</sup> Bangladesh Judicial Service Commission Rule 2007, s. 3.

<sup>48</sup> *Id.* s. 5(3).

<sup>49</sup> *Id.* s. 7.

<sup>50</sup> *Id.* s. 8.

<sup>51</sup> Md. Milan Hossain, "Effective Judiciary and Citizens' Rights- A study: Bangladesh Perspective" 3(1), *AJLEG* (2017) available at: [www.ajleg.net.au/index.php/AJLEG/article/view/28](http://www.ajleg.net.au/index.php/AJLEG/article/view/28) (Last visited on August 28, 2018).

<sup>52</sup> In the case of *Idrisur Rahman v. Bangladesh* (2009) 61 DLR 523 the Supreme court gave twelve directions but they have not seen the light of implication:

It is apposite to mention here that the traditional judgment reflects the judicial independence of Bangladesh where the Justice Latifur Rahman draws the reference of article 94 (4) of the Constitution which mandates, “Subject to the provisions of this constitution the chief justice and other judges shall be independent in the exercise of their judicial function”. He also comments, “An independent judiciary is the conscience – keeper of the State.”<sup>53</sup> The leading case also mostly emphasizes articles 115, 116, 116A, 152 (1), 133, 136, 109 and 117, which are directly and indirectly related to the independence of the judiciary. In this perspective, the court declared that article 94(4) and 116A of the Constitution as the basic pillars of the Constitution that cannot be demolished, whittled down, curtailed or diminished in any manner.<sup>54</sup> The said case plays a significant role in making rules for the appointment of judges of the subordinate judiciary by the Judicial Service Commission under Bangladesh Judicial Service Commission Rules 2007. Actually, the fact is that the Judicial Service Commission can only make selection and recommendations of suitable candidates for appointing judges of the subordinate judiciary, where the executive exclusively exercises the power of appointment to the service and suspension, removal and dismissal from the service in pursuance of Article 115 of the Constitution.

From the study on the directives of the *Masdar Hossain* judgment, it is revealed that first four directions, viz., Direction No. 1 (Judicial Service – distinct and separate service from the executive and administrative service), Direction No. 2 (Creating and Establishing Judicial Service including judicial magistracy), Direction No. 3 (Creation of BCS (Judicial) Cadre along with other BCS executive and administrative cadre Ultra Vires the Constitution)

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- (i) The proposal and process for the appointment of judges in both branches of the Supreme Court should emanate from the Chief Justice of Bangladesh.
  - (ii) The opinion of the Chief Justice in case of the appointment of judges in the higher judiciary is entitled to have the primacy.
  - (iii) The Chief Justice shall consult with two most senior judges of both, AD & HCD to form his opinion in case of appointment of judges to the High Court Division and with three most senior judges of Appellate Division for the appointment of judges in the AD.
  - (iv) The President or the government shall not have right to initiate for the appointment of judges in the Supreme Court of Bangladesh bypassing the Chief Justice but shall have right to suggest the name of judges.
  - (v) The reasons of non-appointment of judges recommended shall be disclosed and communicated to the Chief Justice for his opinion. And if he gets nothing by consulting such judges, he shall again recommend and the President must adhere such recommendation.
  - (vi) The President shall as a rule accept the recommendation of the Chief Justice for appointment of judges. If the recommendation of the Chief Justice could not be accepted by the President, it cannot be directly rejected and new judges cannot be appointed on the government choice rather the recommendation shall send back to the Chief Justice for reconsideration of it.
  - (vii) After reconsideration if the Chief Justice may withdraw the recommendation but if he again recommends consult with the aforesaid senior most judges of the Appellate Division for appointment, the government shall be obliged to complete the process of appointment.
  - (viii) If the recommendation of the Chief Justice for appointment or non-appointment of an additional judge as judge under Article 95 of the constitution is disregarded by the Executive, violates the Constitution.
  - (ix) If the recommendation of chief justice is refused by the executive, the reason is to be recorded and is to send back for reconsideration on the materials and information conveyed.
  - (x) After such reconsideration if he again recommends for the appointment or non-appointment, the executive shall accept it without raising any question.
  - (xi) After successful completion of the period under Article 98, an additional judge shall be entitled to legitimate expectation to be appointed as permanent judge under Article 95.
  - (xii) Non-appointment of petitioners under the circumstances as stated under Article 95 violates the constitution and conventions and is accordingly declared to be arbitrary, malafide, without any lawful authority and as such, of no legal effect.

<sup>53</sup> *Secretary, Ministry of Finance v. Masdar Hossain and others*, 52 DLR (AD) 82, Para. 78.

<sup>54</sup> *Id.* Para. 57.

and Direction No. 4 (Establishment of Judicial Service Commission<sup>55</sup>), Direction No. 6 (Establishment of Separate Judicial Pay Commission<sup>56</sup>) and Direction No. 10 are being merely implemented but the rest of the directives of the case are yet to be implemented or are still inactive. In the case of Direction No. 5 (pay, allowance, pension, terms and condition), Direction No. 7 (priority of Supreme Court over executive), and Direction No. 8 (security of tenure, salary and institutional independence), no effective actions have been taken to implement them for the purpose of ensuring the separation of the judiciary and independence of the judiciary.

In addition, after separation some matters have been raised creating restraint in implementing true separation of the judiciary according to *Masdar Hossain's* Judgment directions, which cannot be ignored and therefore, they are analyzed here as under.

### Contrary Provisions of the Constitution

Article 116A of the Constitution provides that all persons employed in the judicial service and even all magistrates,<sup>57</sup> shall be independent in the exercise of their judicial functions. Again, Article 109 of the Constitution states that the SC shall have superintendence and control over all courts subordinate to it. But the current Articles 115<sup>58</sup> and 116<sup>59</sup> of the Constitution have created a real bar to a meaningful and effective separation and independence of the judiciary. These two articles have empowered the President to make appointments of judges and judicial magistrates of the subordinate judiciary and to deal with the posting, promotion and discipline of judicial officers in consultation with the SC. In fact, under these two articles, the

<sup>55</sup> Judicial Service Commission (hereinafter as JSC) after its constitution in 2007 under the JSC Rules, 2007 recommended names of 165 persons for appointment as assistant judges after their selection on the basis of oral and written examination held earlier by the Public Service Commission (PSC). In 2008, the Commission also arranged and conducted examination for selecting persons for appointment as assistant judges, and on its recommendation about 400 candidates have been appointed as assistant judges. (See Judicial Service Commission – Banglapedia, available at: [en.banglapedia.org/index.php?title=Judicial\\_Service\\_Com](http://en.banglapedia.org/index.php?title=Judicial_Service_Com) (Last visited on 25 November, 2018). Currently the commission is conducting 12<sup>th</sup> BJSC Assistant Judge Recruitment Exam for selecting candidates for appointing judges in subordinate judiciary (See 12<sup>th</sup> BJSC Assistant Judge Recruitment Exam Circular 2018 ... available at: <https://www.bdresultjob.com/2018/03/BJSC.html> (Last visited on 25 June, 2018).

<sup>56</sup> The Judicial Service Pay Commission was established under Judicial Service Pay Commission Rules, 2007 that came into force after a directive by the Supreme Court on December 2, 1999 to separate lower judiciary from the executive branch. In 2015, the Commission recommended the highest basic pay of TK. 84,000 for a senior district judge and the lowest of TK. 35,000 for assistant judge. The Commission also urged for retaining the existing 30% judicial allowance the judicial officers have been enjoying since 2012.

See *New Age – Judicial pay commission recommends pay hike for district ...* available at: [archive.newagebd.net/.../judicial-pay-commission-recommends-pay-hike-for-district-l...](http://archive.newagebd.net/.../judicial-pay-commission-recommends-pay-hike-for-district-l...) (Last visited on August 28, 2018).

<sup>57</sup> Judicial Magistrates; after 2007 magistrates are classified into two types in the Code of Criminal Procedure, 1908, namely:- (a) Judicial Magistrate; and (b) Executive Magistrate whereas Judicial Magistrate is of four types: (a) Chief Metropolitan Magistrate in Metropolitan Area and Chief judicial Magistrate to other areas; (b) Magistrate of the first class, who shall in Metropolitan area, be known as Metropolitan Magistrate; (c) Magistrate of the second class; and (d) Magistrate of the third class (Section 6).

<sup>58</sup> Current Article 115 was substituted by section 19 of the Constitution (Fourth Amendment) Act, 1975 (Act No. II of 1975).

<sup>59</sup> Article 116 was substituted for the former article 116 by section 32 of the Constitution (Fifteenth Amendment) Act, 2011; the Constitution (Fifteenth Amendment) Act, 2011 was the most debatable one in the post democratic era from 1990's public upsurge against autocracy; such amendment was introduced to the constitution by the two third majority of the total members of the Parliament with a view to repealing the caretaker government from the constitution but along with this, many changes were introduced including the power to interfere with the lower judiciary under article 116 of the constitution which frustrated many (see Sanjida Yeasmin and Falgini Sutradhar, '*The 15<sup>th</sup> amendment of the constitution and the confrontational politics*' available at: [https://www.academia.edu/29363795/The\\_15th\\_amendment\\_of\\_the\\_constitution\\_and\\_the\\_confrontational\\_politics](https://www.academia.edu/29363795/The_15th_amendment_of_the_constitution_and_the_confrontational_politics), (Last visited on January 5, 2020).

executive can control and interfere with the lower judiciary regarding the posting, promotion and discipline of judicial officers despite the judiciary being separated from the executive on paper. The President has limitations on the exercise of all his functions, as he has to act according to the directions of the Chief Executive or Prime Minister as per view of Article 48(3),<sup>60</sup> which means that the President can exercise all of his functions at the desire of the Prime Minister of the executive head. Under these circumstances, the provisions of Articles 109, 115 and 116 have created a 'dual rule'<sup>61</sup> in the judiciary, which sometimes makes slow the filing of appointments, transfers, postings and promotion of the judges of lower courts at the district level. Under these contrary constitutional provisions, which give space for the executive to interfere with the judiciary people believe that judges who issue orders or decisions against the interests of the government are transferred from their current job station (place of business) to inconvenient working stations<sup>62</sup> and consequently judges may give orders or judgments in favour of the government, which is not helpful in any way in establishing individual independence or institutional independence of the judiciary.

Despite the separation of the lower judiciary from the executive, the posting, promotion and discipline of judicial officers is still interfered with by the executive due to the existing constitutional provisions. Therefore, effective separation and real independence either institutionally or individually are not possible. But there were no such provisions in the original Constitution of 1972. Article 116 of the 1972 Constitution, empowered the SC with control over the lower judiciary in the case of postings, promotions, grants of leave and discipline. As per Article 115 of the 1972 Constitution, district judges would be appointed by the President on the Supreme Court's recommendation. Under this situation, in order to ensure true separation, the legislature should restore the original articles 115 and 116 in place of current ones.

### Tenure and Removal of Judges: State of Job Security

Article 94(4) of the Constitution provides that the Chief Justice and the other judges of the SC shall be independent in the exercise of their judicial functions. The security of tenure of judges, their promotion, posting and transfer are the core characteristics of the independence of the judiciary, as admitted in the *Masdar Hossain* judgment. In the judgment of the 16<sup>th</sup> Amendment case<sup>63</sup> Dr. Kamal Hossain also opined the security of the judges as one of the essential conditions for ensuring effective independence of the judiciary; the same view was also reflected in the case of *Walter Valente v Majesty The Queen and another*, (1985) 2 R.C.S. 673 and *S.P Gupta and others v President of India and others*, 19823 AIR (SC) 149 cited in the same judgment of the 16<sup>th</sup> Amendment case.<sup>64</sup> As per Article 96(1) a judge of the Supreme court shall hold office until he attains the age of 67 years; he/she cannot hold the office for a life time; he/she may be removed from his/her office due to

<sup>60</sup> As per article 48(3) it provides that "In the exercise of all his functions, save only that of appointing the Prime Minister pursuant to clause (3) of article 56 and the Chief Justice pursuant to clause (1) of article 95, the President shall act in accordance with the advice of the Prime Minister".

<sup>61</sup> The terms 'dual rule' means the control of the executive and the Supreme Court over the lower judiciary regarding posting, promotion, discipline of judicial officers as per present provisions of the constitution under articles 109, 115, 116.

<sup>62</sup> Mizanur Rahman Khan, "An Interview with Mr. Anisul Haque, Honable Minister, Law & Justice, Govt. of Republic of Bangladesh" *The Daily Prothom Alo* (Dhaka, 12 July, 2015) 10.

<sup>63</sup> Writ petition no. 9989 of 2014, available at: [https://www.supremecourt.gov.bd/resources/documents/783957\\_WP9989of2014.pdf](https://www.supremecourt.gov.bd/resources/documents/783957_WP9989of2014.pdf) (Last visited on September 9, 2018).

<sup>64</sup> See the Judgment of the HCD upon the 16<sup>th</sup> Amendment case, 41, available at: [http://www.supremecourt.gov.bd/resources/documents/783957\\_WP9989of2014.pdf](http://www.supremecourt.gov.bd/resources/documents/783957_WP9989of2014.pdf) (Last visited on September 9, 2018).

physical or mental incapacity, gross misconduct or moral turpitude if the Supreme Judicial Council<sup>65</sup> makes recommendation to the President. But such power of the Council has been taken away by the 16<sup>th</sup> Amendment of the Constitution and vested in the hands of the parliament members.<sup>66</sup> Under these circumstances, Article 96 of the Constitution containing the provisions for removal of the judges of the Supreme Court by the recommendation of the Supreme Judicial Council,<sup>67</sup> is held in the 16<sup>th</sup> Amendment Case<sup>68</sup> as an integral part of the independence of the judiciary as incorporated in the Constitution, which is not amendable due to the provision of Article 7B inserted by the 15<sup>th</sup> Amendment of the Constitution. But the independence of judiciary has been affected by the 16<sup>th</sup> Amendment of the Constitution<sup>69</sup> as it empowers the Parliament to remove the judges of the Supreme Court of Bangladesh, which is direct interference of the legislature with the judiciary and contravention of constitutional provisions. Therefore, the independence of the judiciary has been affected and subsequently such amendment was declared as void (illegal) in recent judicial pronouncements<sup>70</sup> of the HCD and AD in the 16<sup>th</sup> Amendment Case; now this case is pending before the AD for review. Due to harsh observations<sup>71</sup> in the judgment the relationship among the judiciary, executive, and legislature emerged as the worst in the history of the country and there was high tensions among the judiciary and the government. Consequently, the former chief justice S K Sinha was compelled to resign; Justice Wahab Miah had to act as chief justice- in- charge and later he also resigned, due to appointing another justice as chief justice of the SCB in transgression of the seniority rule.<sup>72</sup> Under these circumstances, it is harsh and challenging for the judges to exercise their judicial functions independently.

<sup>65</sup> Supreme Judicial Council consists of 3 members from the judges of the Supreme Court incorporated in the constitution of which one member is chief justice and next two senior judges of the Supreme Court.

<sup>66</sup> As per 16<sup>th</sup> Amendment of the constitution, Article 96(2) provides "A Judge shall not be removed from his office except by an order of the President passed pursuant to a resolution of Parliament supported by a majority of not less than two-thirds of the total number of members of Parliament, on the ground of proved misbehaviour or incapacity."

<sup>67</sup> A council of three members inserted in the Constitution under Article 96 by the 5<sup>th</sup> Amendment of the Constitution; of which one member is chief justice and next two senior judges of the Supreme Court where Article 96(2) of the Constitution provides that a Judge of the Supreme Court shall not be removed from his office except upon a report submitted to the President by the Supreme Judicial Council on the basis of an inquiry proceeded by it due to the allegation of physical or mental incapacity, gross misconduct or moral turpitude regarding a judge of the Supreme Court.

<sup>68</sup> Civil Appeal No.06 of 2017, available at: [http://www.supremecourt.gov.bd/resources/documents/1082040\\_C.A.6of17.pdf](http://www.supremecourt.gov.bd/resources/documents/1082040_C.A.6of17.pdf) (Last visited on August 31, 2018).

<sup>69</sup> By the 16<sup>th</sup> Amendment of the Constitution the provision of the Supreme Judicial Council was repealed and the Parliament (legislature) has been empowered to remove the judges of the Supreme Court where the new provision is: "A Judge shall not be removed from his office except by an order of the President passed pursuant to a resolution of Parliament supported by a majority of not less than two-thirds of the total number of members of Parliament, on the ground of proved misbehaviour or incapacity."

<sup>70</sup> Supra Note 63 & 68.

<sup>71</sup> The Appellate Division of the Supreme Court of Bangladesh made several observations: (i) Executive becomes arrogant, uncontrolled; (ii) Having no checks and balances; (iii) Parliament is dysfunctional; (iv) Corruption is rampant; (v) Human rights are at stake; (vi) Mismanagement in the administration is acute; (vii) Politics as an institution is completely destroyed; (viii) Instead of strengthening the Judiciary, the executive is now trying to cripple it and if it happens, there could be disastrous consequences and so on.

<sup>72</sup> Principle of seniority is deemed as an important factor in the case of appointment of judges from High Court Division to the Appellate Division; such principle by practice has created but there no recognition in the Constitution or in the Statutes; See Sarkar Ali Akkas, *Independence and Accountability of Judiciary-A Critical Review* (Center for Rights and Governance, Dhaka-1000, 2004) 17.

## Mobile Court

The trial by mobile courts held by the executive magistrates raised questions among the citizens regarding the independence of the judiciary in the country and such trials often infringe upon the rights of citizens.<sup>73,74</sup> It is a direct interference by the executive with the functions of the judiciary, which is also conflicting with citizen's rights regarding fair trial by the open court, enshrined in Article 35 of the Constitution. Conviction by mobile court on the basis of testimony of witnesses and circumstantial evidence without giving any opportunity for the accused to consult with a lawyer and without his confession is a clear violation of citizens' fundamental rights enshrined in the Constitution, which is also contrary to the separation of the judiciary and to the judgment of *Masdar Hossain*.<sup>75</sup> "Trial of mobile court by executive magistrate creates double judiciary system in the country as they are not under the control and supervision of the Supreme court of Bangladesh as it having upon other subordinate courts; why it is running in this way"- asked by the then chief Justice Surendra Kumar Sinha in the seminar held at Dhaka University (DU) Senate Bhavan.<sup>76</sup> Even this peculiar trial by executive is not found in India and Pakistan.<sup>77</sup> In the case of the trial of mobile courts by executive magistrates, "check and balance should be ensured while executive magistrates try through mobile courts, they should come under the supervision of the SC" –admitted by the present law minister- Mr Anisul Haque in an interview taken by Prothom Alo.<sup>78</sup> Even the HCD declared the mobile court as unconstitutional in the year (2017) in the judgment of the *Mobile Court* case, 2017.<sup>79</sup> The court also opined that empowering the executive magistrates with judicial powers as "a frontal attack on the independence of the judiciary and overstepping of the theory of the separation of powers". After such judgment from the HCD, the govt. made three appeal petitions to the AD against the verdict and got permission to run the activities of such courts until the disposal of three leave to appeal petitions.<sup>80</sup>

## Separate Secretariat for Judiciary

Despite the judiciary has been separated from the executive, a distinct or separate ministry or secretariat is yet to be established. The current 'ministry of law and justice' is working as secretariat for law and judiciary, the main tasks of 'the ministry of law and justice' are exercising administrative control, management and dealings with the sub-ordinate/attached departments or offices, namely, the sub-ordinate judiciary, Administrative tribunals, various other

<sup>73</sup> Mobile Courts are special courts moving one place to another held by the executive for summary trial of particular offences with a view to maintaining law and order of the country and preventing the commission of the particular offences (See The Mobile Court Act, 2009, available at: [http://www.gaibandha.gov.bd/sites/default/files/files/www.gaibandha.gov.bd/page/6f577055\\_18fd\\_11e7\\_9461\\_286ed488c766/Mobile%20court%20act%202009.pdf](http://www.gaibandha.gov.bd/sites/default/files/files/www.gaibandha.gov.bd/page/6f577055_18fd_11e7_9461_286ed488c766/Mobile%20court%20act%202009.pdf), and see also GD Hosen and SR Ferdous, 'The Role of Mobile Court in the Enforcement of Laws in Bangladesh' NUJL (2010) 1, available at: <file:///C:/Users/HP/Downloads/18527-Article%20Text-66678-1-10-20140407.pdf>, (Last visited on January 5, 2020).

<sup>74</sup> Shakhawat Liton and Ahuthosh Sarkar, "Mobile Court Trials often violate rights" *The Daily Star* (Dhaka, 6 August 2015) 1.

<sup>75</sup> Staff Correspondent, 'Conviction may be drawn without confession' *The Prothom Alo* (Dhaka, 23 June 2015) 20.

<sup>76</sup> Staff Correspondent, "Fair Justice Not Possible for Murder of Tanu under old laws" *The Prothom Alo* (Dhaka, 3 April, 2016) 1, 4.

<sup>77</sup> *Supra* note 61.

<sup>78</sup> Mizanur Rahman Khan, "An Interview with Mr. Anisul Haque, Honable Minister, Law & Justice, Govt. of Republic of Bangladesh" *The Daily Prothom Alo* (Dhaka, 27 January 2016) 1, 11.

<sup>79</sup> Writ no. 8437 & 10482 of 2011, and 4879 of 2012, available at: [www.supremecourt.gov.bd/resources/documents/382548\\_WP8437of2011.pdf](http://www.supremecourt.gov.bd/resources/documents/382548_WP8437of2011.pdf), (Last visited on June 25, 2018).

<sup>80</sup> Staff Correspondent, "Mobile Court can operate until disposal of petitions" *The Daily Star* (Dhaka, 10 January 2018) 1, available at: <https://www.thedailystar.net/backpage/bangladesh-mobile-court-operation-can-operate-until-disposal-petitions-1517548> (Last visited on March 6, 2019).

special Courts and Tribunals, Department of Registration, Office of the Attorney-General, Judicial Administration Training Institute, Office of the Administrator General and official Trustee (AGOT), Judicial Service Commission Secretariat, Marriage Registration, Government Pleaders, Public Prosecutors, Notary Public, etc. More specifically the ministry gives advice to all ministers regarding the questions arising on legal and constitutional matters, deals with other countries in judicial matters, takes steps for the administration of justice including appointing, posting, transfer, etc. of all judicial officers, takes fees in courts and tribunals, judicial stamps, court-fees and stamp duties etc. appointing attorney general, deputy attorney general, assistant attorney general and assigning their functions etc.<sup>81</sup>

Due to the nature of the functions of 'the ministry of law and justice', there is often interference from the law ministry or government with the affairs and functions of the judiciary for which a 'dual rule' is created in the judiciary, which may make the necessary actions slow in the case of appointment, transfer, promotion or posting of the judges of the lower judiciary which hinders the functions of the judiciary.<sup>82</sup> People believe that this ministry works for government more than the judiciary and interferes for the sake of the executive bodies or for the legislature. In several cases, the news came in daily newspapers regarding the dubious role of this ministry: SC says the President 'misinformed' on rules for the judges of the lower court (subordinate courts) –this news came in *The Daily Star*, 13<sup>th</sup> December 2016, where the SC asked the law ministry to issue a gazette notification on the rules determining the discipline and conduct of subordinate courts' judges. In a survey conducted by the researcher, 71.82% of respondents among 30 judicial officers agreed on the condition of not disclosing their name for the sake of their job security, that there should have a separate and independent secretariat for the judiciary for ensuring the true independence of judiciary. Even the Supreme Court Bar Association (SCBA) demanded a separate secretariat for the judiciary in the light of the *Masdar Hossain* case verdict, which will help to ensure judicial independence.<sup>83</sup> In reply to the SCBA demand's the law minister Mr. Anisul Haq remarked that it is unrealistic as there is no separate secretariat for the judiciary for any democratic or undemocratic countries in the world.<sup>84</sup> But in an inquiry into these matters revealed that there is the ministry of justice headed by the Secretary of the State for justice in UK,<sup>85</sup> or the minister of justice in Canada<sup>86</sup> who is the minister of the Crown in the Canadian Cabinet, responsible for the Department of Justice, who also serves as chief federal legal advisor and Attorney General of Canada. If here there is a separate ministry for the judiciary rather than a combined ministry (ministry of law and justice), it will work only for the judiciary; the consequences of which include that the independence of the judiciary will be ensured, judicial functions will run more smoothly and justice will be speedier.

<sup>81</sup> See Government of the People's Republic of Bangladesh, Law and Justice Division, available at: [http://old.lawjusticediv.gov.bd/static/about\\_us.php](http://old.lawjusticediv.gov.bd/static/about_us.php), (last visited on 10 January 2020).

<sup>82</sup> MN Huda, 'Independent Judiciary a must for democracy', *The Daily Star* (Dhaka, 27 March 2017), available at: <https://www.thedailystar.net/opinion/straight-line/independent-judiciary-must-democracy-1381690>, (last visited on 12 January 2020).

<sup>83</sup> 'SCAB demands separate secretariat for judiciary' *Dhaka Tribune* (Dhaka, 5 January 2018) available at: <https://www.dhakatribune.com/bangladesh/court/2018/01/05/scba-demands-separate-secretariat-judiciary> (Last visited on September 10, 2018).

<sup>84</sup> 'SCAB demand of separate secretariat for judiciary unrealistic: Law Minister' *The Daily Star* (Dhaka, 7 January 2018) available at: <https://www.thedailystar.net/politics/demand-separate-secretariat-judiciary-unrealistic-bangladesh-law-minister-supreme-court-bar-gazette-1516231> (Last visited on September 10, 2018).

<sup>85</sup> Ministry of Justice (United Kingdom), 2018, available at: <https://www.gov.uk/government/organisations/ministry-of-justice> (Last visited on September 11, 2018).

<sup>86</sup> Minister of Justice (Canada) 2018, available at: <http://www.justice.gc.ca/eng/> (Last visited on September 11, 2018).

### Absence of Separate Investigation Cell and Independent Prosecution Service

In the Bangladesh subordinate judiciary particularly judicial magistrate courts have no separate investigation cell. There are no judicial investigation officers under the supervision and control of the judiciary and therefore, the judiciary has to depend on the police personnel, who are under the control of State Ministry, maintaining law and order of the country. However, they are engaged in a myriad of issues showing a dillydally approach and have a casual manner of investigation. In many cases, they are alleged to be inefficient, negligent and biased in discharging their duties.<sup>87</sup> These police officers are not so skilled and are not experts in preparing reports and therefore, the accused get discharged due to weak investigation reports and citizens are deprived of justice. Besides, the police are so interested in arresting the criminals and yet are so reluctant to present the witnesses before the courts, the consequence of which is very frustrating and results in the disposal of cases.<sup>88</sup>

Again, here there is no independent public prosecution service like many other countries of the world. Public prosecutors are appointed here mostly on the basis of political consideration. The ruling party appoints those lawyers who are loyal to them therefore, inexperienced and unskilled lawyers are getting appointment who cannot ensure justice due to their limitations and they are often also engaged in corruption.<sup>89</sup> But a prompt and quality investigation and independent prosecution service are required as the basis of a criminal case for ensuring quick and effective criminal justice. In India in 2012 separate investigation and prosecution cadre were proposed for a speedy criminal trial system.<sup>90</sup> In Pakistan for the purpose of prosecution, a separate police sub cadre was created where law graduates are being appointed to whom the judiciary has control and supervision.<sup>91</sup> In Bangladesh if such a cadre is established, a speedy criminal trial system and effective separation of judiciary will be ensured. Under these circumstances, there is no alternative to a separate investigation cell under the control of the judiciary and independent public prosecutor service.

### Absence of Financial Independence

Financial independence is very essential for the effective separation and independence of the judiciary. According to Justice Browne-Wilkinson, the lack of financial support by the government is a threat to the independence of the judiciary. Justice Malcolm stated that 'the preparation of judicial estimates by anyone not acting under the direction of the judiciary and the exercise of control by the Government over the way in which the courts expend the funds granted to them necessarily poses a potential threat to judicial independence'.<sup>92</sup>

The financial independence needed for an effective independent judiciary and smooth judicial functions are also recognized by international instruments: Principle 7 of UN Basic

<sup>87</sup> Hussain MFB, 'An Appraisal of Criminal Investigation in Bangladesh' (2015) 60(2) Journal of Asiatic Society (Humanities) available at: [www.asiaticsociety.org.bd/journal/H\\_December\\_2015/1%20H\\_885\\_D2015.pdf](http://www.asiaticsociety.org.bd/journal/H_December_2015/1%20H_885_D2015.pdf) (Last visited on September 15, 2018).

<sup>88</sup> Surendra Kumar Sinha, "The Contribution of the Judiciary" *The Ittefaq* (Dhaka, 25 December, 2016) 8 available at: [http://epaper.ittefaq.com.bd/?archiev=yes&arch\\_date=25-12-2016#](http://epaper.ittefaq.com.bd/?archiev=yes&arch_date=25-12-2016#) (Last visited on 29 August 2018).

<sup>89</sup> MSI Tipu and Al Shaon, "Why we need an independent public prosecution service" *DhakaTribune*, available at: <https://www.dhakatribune.com/bangladesh/2017/07/06/need-independent-public-prosecution-service> (Last visited on 10 January 2020).

<sup>90</sup> Press Information Bureau, Govt. of India, Separate Investigation and Prosecution Cadre Proposed for Speedy Criminal Justice, 2012, available at: <http://pib.nic.in/newsite/PrintRelease.aspx?relid=80575> (Last visited on September 15, 2018).

<sup>91</sup> Tofail Ahmed, "*Britto O Brithantho: Bikendrikan, Shathania Shasan, Rajnithi O Unnayan Bhabna*" 184 (in Bangla) (Dhaka, Agamee Prokashani, 2011).

<sup>92</sup> Cited in a consultation paper on the Financial Autonomy of Indian Judiciary (Chap:V, 5.19) available at: <http://legallaffairs.gov.in/sites/default/files/Financial%20Autonomy%20of%20the%20Indian%20Judiciary.pdf> (Last visited on February 2, 2019).



Principles on the Independence of the judiciary provides that it is the duty of a State to provide adequate resources to the judiciary to ensure its proper judicial functions;<sup>93</sup> again Article 34 of the Draft Universal Declaration on the Independence of Justice states that for ensuring the independence of the judiciary the budget for the judiciary shall be prepared by the proper authority in collaboration with the judiciary regarding the needs and requirements of the judiciary.<sup>94</sup> Even in the judgment of the *Masdar Hossain* case, it is opined that the higher judiciary should get financial independence for the effective and meaningful discharge of judicial functions, especially for constitutional functions.<sup>95</sup> Officially the judiciary was separated from the executive in 2007, but the judiciary has no financial independence still today due to having no self-fund. The revenue coming from the court fees are deposited to the govt. fund. The judiciary has to depend on the government and the amount the govt. allocates each year for the judiciary is very inadequate; actually the judiciary gets less than 1% of the total budget of the country.<sup>96</sup> In the financial year 2016, only 112 cores were allocated for the judiciary which was very poor for the infrastructure development of the judiciary, but the govt. earns more from court fees. Even the then chief justice also urged for financial independence of the judiciary.<sup>97</sup> The current state of financial independence and budget for the judiciary are not improving as in the financial year 2019–2020 only 195 cores are being proposed for the Supreme Court of Bangladesh, where for whole judiciary it is 1650 cores which is only 0.352 percent of the total budget in spite of being one of the three organs of the State, whereas the allocated budget for BTV or Fishing Department is far more.<sup>98</sup> Under this poor budget it is quite impossible to work as an effective independent organ to upgrade the rule of law in the country.

### Judicial Service Conduct & Discipline Rules 2017

One of the directions of the *Masdar Hossain* case was to make separate and different rules on the discipline and conduct of judges of the subordinate courts but up until 2017, no gazette notification was issued. On several occasions, the SC expressed dissatisfaction with the government for not finalizing the Conduct Rules. On the 7<sup>th</sup> May 2016 the Law Ministry proposed rules on the discipline and conduct of the judges for lower courts and sent it to the SC for opinion, which was rejected on 28<sup>th</sup> August 2016 at the hearing of the *Masdar Hossain* case by the Supreme Court due to the similarity of the Govt. Employees (Discipline & Appeal) Rules 1985 which were totally contrary to the judgment of the *Masdar Hossain* case. Under these circumstances, the SC showed its dissatisfaction and gave a draft copy on the Rules to the 'Ministry of Law and Justice' to publish it by gazette notification.<sup>99</sup> But an embarrassing and surprising matter arose while law ministry issued a notification on the 11<sup>th</sup> December 2016 stating that the President decided not to issue a separate gazette notification on the conduct

<sup>93</sup> UN Basic Principles on the Independence of the Judiciary, 1985, available at: <https://www.un.org/ruleoflaw/blog/document/basic-principles-on-the-independence-of-the-judiciary/> (Last visited on September 11, 2018).

<sup>94</sup> Draft Universal Declaration on the Independence of Justice, 1989, available at: <https://www.cristidanilet.ro/docs/Shingvi%20Declaration.pdf> (Last visited September 11, 2018).

<sup>95</sup> Supra note 11 Para. 89, available at: <https://shamimsufi.files.wordpress.com/2013/05/secretary-ministry-of-finance-vs-md-masdar-hossain-and-others-52-dlr-ad-82.pdf> (Last visited on September 11, 2018).

<sup>96</sup> Shadin Malik, "*Hatee Gora Gelo Tol*" (Horse Elephant Gone to Under) *The Prothom Alo*, (Dhaka, 29 June 2016) 11.

<sup>97</sup> Supra note 62.

<sup>98</sup> Eqramul Haque Shamim, Backlog in the Judiciary V Disposal, *LawyersClub Bangladesh.com*. (2019, June 20). Retrieved from <http://lawyersclubbangladesh.com/2019/06/20/%e0%a6%ac%e0%a6%bf%e0%a6%9a%e0%a6%be%e0%a6%b0-%e0%a6%ac%e0%a6%bf%e0%a6%ad%e0%a6%be%e0%a6%97%e0%a7%87%e0%a6%b0-%e0%a6%ae%e0%a6%be%e0%a6%ae%e0%a6%b2%e0%a6%be%e0%a6%9c%e0%a6%9f-%e0%a6%ac%e0%a6%a8/>, (accessed on 12 January, 2020).

<sup>99</sup> Staff Correspondent, "Judiciary is independent but preserved in a box locked" –said CJ to the Attorney General' *The Ittefaq* (Dhaka, 7 November, 2016) 1, 19.

rules.<sup>100</sup> Finally, after resignation of the former chief justice, SK Sinha, the govt. issued and published the gazette notification for the Judicial Service Conduct & Discipline Rules 2017, but in the Rules old things are found as new ones regarding the final authority relating to the suspension, removal or temporary suspension of judges of the subordinate courts; here in the case of the suspension, removal or temporary suspension of the judges of the subordinate courts, the President (who has to act according to the advice of the head of the executive or prime minister<sup>101</sup>) is referred to as final authority in the name of appropriate authority and the higher authority refers to the SC and district judge.<sup>102</sup> Therefore, it is evident that ultimate power is still in the hands of the executive by the name of the President as titular head of the state. As a result, the spirit of the original 1972 Constitution and the directions of the *Masdar Hossain* case regarding the separation and independence of the judiciary are not truly reflected and implemented. Interestingly, again, the shadow of the 'dual rule' is also reflected under the 2017 Rules, through the name of appropriate authority regarding removal, suspension, or temporary suspension of judges of the lower courts. More interestingly, it is seen that the SC has welcomed the 2017 Rules without raising any questions; they have accepted them. Under these circumstances, a column in the Daily Star<sup>103</sup> titled "A collective failure" came out on 9<sup>th</sup> January 2018, explaining the reasons behind and the responsibility for not establishing effective separation and independence of the judiciary 19 years after *Masdar Hossain* judgment. However, finally, it can be said that such separate rules for the conduct of judges of the lower judiciary are the old things in the new bottle by the executive, while the executive claims a progressive step though the effective separation of the judiciary it is still today absent in practice.

## Conclusion

In Bangladesh 'the role of each organ of the State is clearly defined and deliberately and carefully kept separate under the constitution to maintain its harmony and integrity and to maximize the effectiveness of the functionality of the organs of the State in their respective spheres'.<sup>104</sup> But the judiciary was formally separated in 2007 by the separation of the judicial magistrate courts from the executive accompanying some drawbacks where the appointment of judicial officers of the lower judiciary, their posting, promotion and removal still today depend on the President under current Articles 115 & 116 of the Constitution and under the 2017 Rules; there is no separate secretariat for the judiciary and detailed specified rules for the appointment of judges for the higher judiciary.

In this paper in response to inquiry it is also revealed that some directions of the *Masdar Hossain* case have been fulfilled and few will not see the light of implementation (see the post-2007 regime section). It is also found that trial by mobile court held by the executive is creating a double judiciary in the country, which is not under the supervision and control of the SC for which the separation of the judiciary is again at stake. In addition to this, the dilemma of the judgment of the 16<sup>th</sup> amendment case and subsequent consequences (implied confinement of former chief justice, then resignation, chief justice in-charge, infringement of the seniority principle and resignation of the aggrieved judges) have raised questions among

<sup>100</sup> Staff Correspondent, 'Rules For Lower Court Judges' *The Daily Star* (Dhaka, 13 December 2016) 1, 10.

<sup>101</sup> See the Article 48(3) of the Constitution, available at: <http://bdlaws.minlaw.gov.bd/act-details-367.html>, (Accessed 12 January, 2020).

<sup>102</sup> Judicial Service Conduct & Discipline Rules 2017, rr. 2, 11, 15.

<sup>103</sup> *Supra* note 18 at p. 6.

<sup>104</sup> Civil Appeal No.06 of 2017, available at: [http://www.supremecourt.gov.bd/resources/documents/1082040\\_C.A.6of17.pdf](http://www.supremecourt.gov.bd/resources/documents/1082040_C.A.6of17.pdf) (Last visited on August 31, 2018).

the people of the country regarding the separation of the judiciary and therefore, the independence of the judiciary has fallen into a huge challenge.

Apart from these, the financial independence of judiciary is yet to be established due to the lack of a separate investigation cell under the judiciary and absence of an independent prosecution service. The people are deprived of a speedy criminal trial system and as a result they are losing their confidence in the judiciary. With a view to implementing the directions of the *Masdar Hossain* judgment, a separate code of conduct or discipline rules for the judges of the lower judiciary was passed in 2017 which was deemed as old things in a new bottle, as the ultimate authority being vested in the hand of the executive via the president regarding the removal of judges of the lower judiciary against which the higher judiciary did not raise any questions which was deemed as collective failure of the judiciary, executive and legislature for not ensuring separation of the judiciary and independence of the judiciary.

In order to ensure the true separation of the judiciary, the 12 directives of the *Masdar Hossain* case need to be implemented and existing barriers in the judiciary identified in this paper are to be removed by the government so far as possible. In this regard, government positive-will should be raised through increasing awareness among the people by judicial authority, mass media and civil society. It is true that a government does not like the true separation of the powers of the three organs of a state due to the excuses of the executive body. But, there is no alternative to the separation of the judiciary from the executive and legislature, as it is the most important component in establishing good governance and enforcing citizens' rights. It is also opined by the High Court Division in the judgment of the *Mobile Court* case 2017<sup>105</sup> that "if the independence of the judiciary remains truly separate and distinct from the legislature and the executive, the people's power will never be endangered."<sup>106</sup>

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The author has no competing interests to declare.

<sup>105</sup> Writ no. 8437 & 10482 of 2011, and 4879 of 2012, available at: [www.supremecourt.gov.bd/resources/documents/382548\\_WP8437of2011.pdf](http://www.supremecourt.gov.bd/resources/documents/382548_WP8437of2011.pdf), (Last visited on June 25, 2018).

<sup>106</sup> The same views came in the case of *The State v. Chief Editor, Manabjamin*, [2005] 57 DLR (HCD) 359, the base of which was found in Montesquieu's book 'Spirit of Laws', Vol.-1, p. 181.

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