

**SEPARATION OF POWER AND INDEPENDENCE OF JUDICIARY:
BANGLADESH PERSPECTIVE RESEARCH ON CONTEMPORARY
ANALYSIS OF JUDICIAL INDEPENDENCE: WHETHER
IMPLEMENTED OR NOT?**

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CHAPTER ONE

Foundations of Judicial Separation in Bangladesh

Any democracy is based on a rational system of dispensing authority. The legal system of governance in Bangladesh is predominantly contained in the 1972 Constitution, based upon values of democracy, rule of law, and constitutionalism. One of the fundamental supporting pillars of this framework is the doctrine of separation of powers, necessitating distinct lines drawn between the legislative, executive, and judiciary branches of the state.

Independence of the judiciary is a basic necessity in ensuring checks and balances and rule of law in this setup. The Bangladeshi Constitution itself demands separation between the judiciary and the executive through Article 22. Political opposition, structural inertia, and presidential excess have, however, been aplenty on this path to fulfill this constitutional requirement. The political, legal, and practical aspects of Bangladesh judicial independence are examined in this essay to a considerable extent, specifically with regard to the historic Masdar Hossain Case and its relevance for the legal and constitutional framework of the country. By explaining the objectives, methodology, and scope of the research as well as the inherent limitations of the current intellectual exercise, this chapter provides the background for the whole research project.

1.1 Objectives of the Research

The aim of the essay is to have a comprehensive legal and analytical review of the separation of powers in Bangladesh with a focus on the independence of the judiciary. The following are the main objectives of the study:

- To examine, in the context of Bangladesh, the constitutional and theoretical foundations of judicial independence and the concept of separation of powers.
- To examine the interaction and interdependence of the three branches of the state: the legislative, executive, and judicial branches.
- To examine and demonstrate how crucial judicial independence is to a healthy democracy and rule of law.
- To examine how well the Supreme Court judgment in the case of Secretary, Ministry of Finance v. Masdar Hossain worked and what its effects were.
- To critically evaluate the contemporary position of judicial independence in Bangladesh, more precisely in relation to the ongoing predominance of the executive.

- To make legal and institutional suggestions to strengthen judicial independence in the Bangladeshi context.

1.2 Methodology of Research

The study adopts a qualitative doctrinal method that is dependent largely on primary and secondary law sources.

The primary sources include:

- The Constitution of the People's Republic of Bangladesh,
- Judicial decisions, specifically the Masdar Hossain case,
- Statutory documents such as the Code of Criminal Procedure.

The secondary sources are:

- Commentaries and textbooks written by Bangladeshi jurists (e.g., Mahmudul Islam and Md. Abdul Halim),
- Law reports (e.g., Dhaka Law Reports and Bangladesh Law Chronicles),
- Academic papers and online legal encyclopedias (e.g., Cornell Law, Britannica),
- Lectures and debates in the field of constitutional law.

The research is based on descriptive, analytical, and critical methods. The descriptive elements are used to explain existing constitutional provisions, judicial precepts, and court precedents. Analytical tools are employed to conclude the efficiency of the system, while critical elements are brought in to invalidate inadequacies and loopholes in the institutional setup of judicial independence in Bangladesh.

1.3 Scope of the Research

The study confines itself to the constitutional and institutional infrastructure of the separation of powers with special reference to judicial independence in Bangladesh. While it is not possible to escape theoretical treatises on the doctrine, the practical and jurisdictional thrust is the focus of this paper.

The focus includes:

- Examination of Article 22 and other pertinent constitutional provisions regarding judicial independence.
- Research and critical examination of the Masdar Hossain judgment.

- Reference to the Bangladesh Judicial Service Commission as a post-verdict institutional development.
- Critiques and lacunae in today's criticism about executive intervention into judicial appointments and functioning.
- Cross-references from other constitutional authorities (wherever relevant) to put things into perspective, without deviating from the main theme of Bangladesh.

1.4 Limitations of the Research

No scholarly work is exemption from limitations. Every attempt has been made to be comprehensive in spite of the following limitations:

- **Time Limitation:** Due to the research's strict academic timeline, extensive fieldwork and in-depth empirical engagement were impossible.
- **Accessibility of Resources:** Most recent law reports, judiciary records, and some private government documents pertaining to judicial nominations and discipline process were not readily available.
- **Limited Primary Data:** As a result of practical constraints, the study used court decisions and secondary material rather than interviews or empirical surveys.
- **Dependence on Scholarship:** The study relies on interpretation of conveniently available scholarly and judicial opinion, which will be biased or prone to gaps in the literature.

1.5 Significance of the Study

This study explores a vital phenomenon as much for constitutional law students and scholars as for practitioners, legislators, and reformers. The cornerstone of constitutionalism and of rule of law is an open and impartial judiciary. This study adds to our knowledge of how constitutional aspirations can diverge from politics, and how reforms can close that gap, by challenging both lived experience and legal theory.

Besides, this study re-examines and renews the Masdar Hossain judgment controversy, which is still a constitutional milestone, since Bangladesh's democracy is still condemned for executive supremacy and subordination of the judiciary.

1.6 Research Structure

The paper follows the structure below:

- The theory of government structure is introduced under Chapter 2, where three organs and their constitutional roles are also dealt with.
- Chapter Three discusses the concepts of checks and balances, judicial independence, and separation of powers.
- Masdar Hossain case and its ongoing pertinence are the prime focus of Chapter Four's in-depth discussion on judicial separation's application in Bangladesh.
- Chapter 5 provides the comparative analysis with other states to find out the lessons which can be implemented in Bangladesh.
- The last chapter brings the conclusion and way forward to the future and necessary recommendations.
- A complete bibliography in accordance with the OSCOLA 4th edition citation style can be found at the end.

To provide an uninterrupted and authentic presentation, each chapter provides legal analysis, theological explanation, and critical discussion.

CHAPTER TWO

The Concept of Government Structure in Bangladesh

The framework of any sovereign state is constructed upon the tripartite division of power among the organs of the government. This distribution is not merely structural; it is a safeguard to ensure that the core democratic ideals of accountability, transparency, and constitutional supremacy are maintained. The Constitution of Bangladesh expressly acknowledges this separation and gives the legislature, the executive branch, and the judiciary authority.¹ In order to prevent abuse of power and guarantee justice, each organ is supposed to function within its designated authority while upholding institutional limits and mutual respect. With an emphasis on the unique roles and interactions of the three constitutional organs, the chapter seeks to provide a methodical knowledge of Bangladesh's institutional framework for governance. Later chapters' in-depth examination of the idea of separation of powers is predicated on this framework.

2.1 Organs of the Government: Constitutional Foundation

The Constitution of the People's Republic of Bangladesh, in its Preamble and substantive provisions, provides for a parliamentary system of governance. The three principal organs of the government under this system are:

- The Legislature – Represented by the Jatiya Sangsad (National Parliament);
- The Executive – Headed by the President as the constitutional head and the Prime Minister as the real executive authority;
- The Judiciary – Empowered to interpret laws, administer justice, and protect constitutional supremacy.

The maintenance of constitutional equilibrium depends on this three-part system. In order to prevent any one institution from controlling the political system, the Constitution not only lists these organs but also distributes their authority. Both explicit constitutional requirements and implicit constitutional norms serve as guidelines for the allocation of power.²

Each of these branches is delineated through specific articles in the Constitution, Parliament under Part V, the Executive under Part IV, and the Judiciary under Part VI. The constitutional philosophy

¹ Md Abdul Halim, *Constitution, Constitutional Law and Politics: Bangladesh Perspective* (6th edn, CCB Foundation 2020) 231.

² Ridwanul Hoque, *Constitutional Theories and the Bangladesh Constitution* (2nd edn, Mullick Brothers 2017) 108.

underpinning this arrangement draws from British parliamentary traditions and modern doctrines of separation of powers.

While the doctrine is not explicitly stated as it is in the U.S. Constitution, Article 22 of the Constitution of Bangladesh affirms:

“The State shall ensure the separation of the judiciary from the executive organs of the State.”³

This provision, though initially part of the Directive Principles of State Policy, was judicially interpreted as binding in the Masdar Hossain case, thereby reinforcing the legal sanctity of the tripartite model.

2.2 Power and Function of the Organs: Role Delineation

A clear understanding of the functions of each organ is essential for analyzing the implications of the doctrine of separation of powers. The following sections provide a detailed account of their respective powers and duties.

2.2.1 Legislative Organ: The Parliament

The only legislative body of Bangladesh is the national assembly, Mostly known as the parliament. Its main responsibility is to enact, alter, and repeal legislation; it is composed of lawmakers who are directly elected. The Constitution's Article 65(1) gives the Parliament the Republic's legislative power. Through a variety of parliamentary processes, it debates policy issues, approves budgets, enacts statutory legislation, and monitors the executive's operations.

Establishing legal norms, particularly for the judiciary to use and interpret, is a critical function of the legislative branch. Although it is solely responsible for enacting laws, it also indirectly controls the judiciary through judge nominations and court procedural legislation.

Although the Parliament has many authorities, it is not all-powerful. According to Article 7B of the Constitution, some of its provisions, especially those pertaining to basic rights, cannot be changed. Judicial examination of Parliament's legislative actions is another way to guarantee constitutional conformity.⁴

Most importantly, legislative supremacy is not unqualified. The judiciary retains the authority to strike down any law that is inconsistent with the Constitution, thereby maintaining constitutional fidelity.

³ Constitution of the People's Republic of Bangladesh, art 22.

⁴ Constitution of the People's Republic of Bangladesh, art 7B.

2.2.2 Executive Organ: Government Administration

The executive power of the Republic is vested in the President, according to Article 48 of the Constitution, but real executive authority lies with the Prime Minister and the Council of Ministers, as provided under Article 55.⁵ The executive organ is responsible for:

- Implementing laws made by the legislature,
- Managing internal administration and governance,
- Ensuring the maintenance of public order,
- Representing the state in international affairs,
- Supervising the civil service, and
- Administering public resources and institutions.

Though the executive should remain distinct from the judiciary, historically it has often sought to exercise influence over the judiciary, particularly in the appointment, promotion, and disciplinary control of judges of subordinate courts.

The dominance of the executive has been a consistent challenge in ensuring an independent judiciary, a theme that is revisited in greater depth in Chapter Four.

The President plays a primarily ceremonial function, with the exception of certain situations, such as emergencies, in which case the Prime Minister and the Council of Ministers wield the executive powers. The Prime Minister has actual executive authority, according to Article 55(2). The executive is tasked with enforcing the law, maintaining public order, managing civil administration, and setting foreign policy. The executive branch's previous intrusion into judicial authority, namely in controlling judge nominations and appointments, served as the impetus for the Masdar Hossain case.⁶

2.2.3 Judicial Organ: The Judiciary

The primary function of Bangladesh's judiciary, the country's third branch of government, is to interpret and enforce the law. Part VI of the Constitution gives it authority.

The following are the main duties of the judiciary:

Ensuring justice through due process, resolving conflicts between people, organisations, and government agencies, interpreting statutes and constitutional provisions, acting as a guardian of

⁵ The Constitution of the People's Republic of Bangladesh, art 55.

⁶ Secretary, Ministry of Finance v Md Masdar Hossain (1999) 52 DLR (AD) 82.

the Constitution by overturning unconstitutional acts, and advising the president under Article 106 in cases of legal ambiguity are all part of this role.

Articles 94–116A grant the judiciary of Bangladesh the authority to interpret the law, make decisions, and preserve the supremacy of the constitution. This organisation, which consists of the Supreme Court and other courts, interprets the Constitution, defends basic rights, and makes decisions in civil and criminal cases. In spite of the constitutional guarantees of judicial independence, Articles 115 and 116 permitted administrative influence over the inferior courts. The Masdar Hossain ruling largely changed these provisions. As the last line of defence against excess by the government or legislature, the judiciary is the last arbitrator of justice. However, its effectiveness is predicated upon its institutional independence, which includes:

- Security of tenure of judges,
- Financial autonomy,
- Independent appointment and disciplinary mechanisms,
- Immunity from arbitrary removal.

The constitutional architecture aspires to maintain judicial independence; however, in practice, executive intrusion has historically impaired this ideal, necessitating constitutional litigation such as the Masdar Hossain case, which will be elaborated in Chapter Four.

2.3 Inter-Relationship Among the Organs: Coexistence and Constitutional Balance

Although the three great State organs, the legislature, the executive, and the judiciary, are theoretically designed to function autonomously, the success of a working constitutional democracy does not solely depend on the separation, but on an ordered system of interdependence as well as institutional cooperation. The interdependence doesn't preclude autonomy but instead supports accountability through checks against one another. It is this necessary balance that maintains any single organ from assuming the roles of authority or acting outside the limits of its constitutional powers.⁷

For instance, while the President of Bangladesh holds the executive power in accordance with Article 48 of the Constitution, the office is not entirely independent of legislative control. The

⁷ Bangladesh Legal Aid and Services Trust (BLAST), 'Judicial Independence in Bangladesh: Barriers and Prospects' (2017) <https://www.blast.org.bd/content/publications/Judicial-Independence-in-Bangladesh.pdf> accessed 25 June 2025.

President is to be chosen by members of Jatiya Sangsad (National Parliament), thereby making the highest ceremonial office of the executive subject to legislative confidence. Similarly, the legislative laws enacted by the legislatures are also open to judicial review, and legislative acts against the provisions of the Constitution can be invalidated by the judiciary through exercising the power of judicial review under Articles 7 and 102. On the contrary, the executive has the responsibility of enforcing and implementing the legislatures' enacted laws, and in the process, must abide by the interpretations and directions given by the judiciary.

This intricate system of mutual monitoring and inter-institutional interaction is the basis of the doctrine of checks and balances, a crucial principle validating the classical theory of separation of powers advocated by Montesquieu.⁸ The doctrine not only secures democratic governance but also sustains institutional trust and constitutional accountability. Each organ is simultaneously a guardian of its powers and a watchdog over others. But this kind of regulation has to operate within constitutional limits lest it intrude and paralyze institutions.

The Bangladesh Constitution separates the functions and domains of the three branches with exemplary clarity. Articles 65-93 describe in general terms the limits of the legislature; Articles 48-55 the executive; and Articles 94-116A the judiciary. With this normative precision, the actual operation of such constitutional principles has in most cases been fraught with problems. One of the most pressing among these is the notion of judicial independence, constitutionally provided for yet elusive in application.

One of the key causes of this disconnection is the enduring influence of the colonial traditions of administration, which had centralized power in the executive and marginalized other organs, particularly the judiciary.⁹ It has been strengthened by post-independence Bangladesh's political history, as successive governments have preferred to attempt to centralize instead of decentralize power. As a result, judicial postings, promotions, and administrative independence remain vulnerable to executive intervention, despite the landmark decision in *Secretary, Ministry of Finance v. Masdar Hossain* that mandated the separation of the judiciary from the executive.¹⁰

Thus, while the Bangladeshi state theoretically and in practice preserves in formal terms a tripartite constitution, actualization of genuine institutional independence, especially of the judiciary, is still more fantasy than fact. Fulfillment of this ideal requires something more than pieces of paper

⁸ Vile MJC, *Constitutionalism and the Separation of Powers* (2nd edn, Liberty Fund 1998) 13.

⁹ Mahmudul Islam, *Constitutional Law of Bangladesh* (3rd edn, Mullick Brothers 2012) 249.

¹⁰ Sarkar Ali Akkash, *Law of Criminal Procedure* (Bijoy Law Book House 2021) 17.

called the Constitution; it demands a mature political culture, unwavering institutional commitment, and structural changes underpinning both perception and reality of the independence of the judiciary.

An appreciation of the theoretical foundations and functional constraints of the three organs is requisite for any scholarly examination of judicial independence. It provides for a conceptual lens through which to examine the systemic concerns, doctrinal development, and real-world circumstances that typify the evolving connection among the judiciary and the other organs of the state in Bangladesh. The later chapters will take these aspects further by comparative examination, case law, and constitutional interpretation.

CHAPTER THREE

Theoretical Framework: Doctrines of Separation, Balance, and Judicial Independence

The concept of separation of powers remains one of the cornerstones of modern constitutionalism and democratic governance. At its core, the doctrine is intended to prevent the concentration of power in a single authority, thereby reducing the potential for tyranny or abuse. In theory, the three branches of government, legislative, executive, and judiciary, must function independently and autonomously within their own domains, while simultaneously engaging in institutional accountability through checks and balances.

This chapter explores three foundational principles:

- The Doctrine of Separation of Powers,
- The Doctrine of Checks and Balances, and
- The Concept of Judicial Independence.

These ideas are essential to comprehending both the legal framework that was used to resolve the Masdar Hossain case and the constitutional meaning of Articles 22 and 94–116A of the Constitution of Bangladesh.

3.1 The Doctrine of Separation of Powers

In his own foundational treatise *The Spirit of the Laws* (1748), French political philosopher Montesquieu most extensively formulated the theory of separation of powers, opining that "there is no liberty, if the judiciary power be not separated from the legislative and executive."¹¹ By insulating the powers of the government to enact, enforce, and interpret the law from falling in one set of hands, the theory hoped to maintain liberty and justice.

Three reasons are the foundation of separation of powers theory in constitutional law according to A V Dicey¹² are as follows:

- Functional separation: Each arm of government is meant to carry out a different and distinct function.

¹¹ Baron de Montesquieu, *The Spirit of the Laws* (Anne M Cohler, Basia C Miller and Harold S Stone trs, Cambridge University Press 1989) bk XI, ch 6.

¹² A V Dicey, *Introduction to the Study of the Law of the Constitution* (10th edn, Macmillan 1959) 144.

- Separation of personnel: Employees must not be employed in many branches at a time.
- Mutual independence: Each arm must be independent institutionally from the others.

In Bangladesh, the constitutional base of the doctrine lies primarily in Article 22, which states: "The State shall ensure the separation of the judiciary from the executive organs of the State."¹³

Theory of separation of powers divides the government institutions into three: legislative, executive, and judicial. Each has independent powers and functions to prevent absolutism or corruption. The theory can be extended to protect the rule of law and shield individual rights.

In the Westminster System, which Australia has, this one is not fully dominant. In Australia, however, the three of them are there: legislature (parliament), executive (the government departments and the ministers), and judiciary (the judges and the courts). The judiciary is more distinct.

To prevent power over-concentration in one arm of government, there are safeguarding mechanisms against power over-concentration in various forms such as constitutions, conventions, the bicameral system, the existence of more than a single political party, elections, media, courts and tribunals, the federal system, and participatory citizenry. These serve to prevent power over-concentration and ensure the rule of law.¹⁴

However, while the textual realization continued to exist, institutional realization remained an ever-elusive goal. The Masdar Hossain case created legal certainty by interpreting Article 22 as a constitutional directive principle having binding force, thus initiating judicial reforms.

According to the doctrine, the judiciary is not supposed to exercise powers of legislation or administration, and vice versa. In practical governance in South Asian jurisdictions like Bangladesh, however, a strict demarcation has proved impossible, thus making balance and check institutions necessary.

3.2 The Doctrine of Checks and Balances

While separation of powers fosters functional distinction, checks and balances ensure that no arm of the government is omnipotent or unaccountable. Checks and balances introduce a system of mutual monitoring and restraint to ensure that one arm can check the other's excesses.

¹³ The Constitution of the People's Republic of Bangladesh, Art 22.

¹⁴ "Separation of Powers" <

Checks and balances are crucial in upholding separation of powers in parliamentary systems, which are primarily well-documented in states like the British Parliament, France, and Germany. The British Parliament is supreme and not accountable to courts on the matter of constitutionality of the legislation enacted by it. France's Fifth Republic (1958) has a Constitutional Council of nine members nominated by the president, the Senate, and the National Assembly. The Federal Republic of Germany has features of parliamentary systems and federal systems like that of the United States, with the Federal Constitutional Court.

The United States Constitution's framers, including Montesquieu and William Blackstone, viewed checks and balances as essential to the security of liberty. Judicial review, the power of courts to decide if legislative, executive, and administrative decisions are constitutional, became a part of the United States government. Checks and balances also include presidential vetoing of legislation, congressional impeachment of the executive and judiciary, and the Senate's role in the approval of treaties.¹⁵ Checks and balances evolved out of tradition and Constitutional practices are congressional committee, investigatory powers, role of political parties, and presidential initiative in initiating legislation. Inherent or even illegal checks and balances may operate in one-party political regimes when aspects of an authoritarian or totalitarian state struggle for dominance.

According to this principle:

- The executive is able to veto legislations passed by the legislature
- Executive and laws disallowed by courts can be impeached and changed by the legislature;
- The judiciary can disallow and examine actions of the executive and legislature which are *ultra vires* or unconstitutional.

The US constitutional model is the gold standard of checks and balances, and Article I–III of the US Constitution formalized the powers and restraints of each branch. Bangladesh adheres to a hybrid model where some elements of British parliamentary dominance are blended with judicial review powers with traceability to American jurisprudence. In Bangladesh the Supreme Court may declare laws to be unconstitutional on the basis of violating fundamental rights under Article 102, while the President must act in accordance with the advice of the Prime Minister (Article 48(3)), indicating executive responsibility to the parliament. Despite the constitutional constraint on the Parliament, it still maintains legislative supremacy. Legal scholars opine that in order to give the

¹⁵ C L Montesquieu, *De l'esprit des lois* (1748) in Vile MJC, *Constitutionalism and the Separation of Powers* (Liberty Fund 1998) 76.

separation of powers a practical effect, there must be checks and balances and not against it. Legal scholars agree that checks and balances are not contrary to the separation of powers but are essential to give it a practical effect.¹⁶

3.3 The Doctrine of Judicial Independence

A part of the larger separation of powers theory is the judiciary's independence. It guarantees that the judiciary is not subject to direct or indirect influence, especially from the state's executive branch. The competence of the judge to make decisions free from fear, favour, attachment, or malice is the fundamental component of judicial independence.

There are two categories of judicial independence:

- Individual independence: When carrying out their judicial duties, judges must be unaffected by other forces.
- Institutional independence: As an institution, the judiciary cannot be financially or administratively subservient to the administration.

The Constitution of Bangladesh recognizes and attempts to secure judicial independence in several ways:

- Article 94(4) guarantees that “subject to the provisions of this Constitution, the Chief Justice and the other Judges shall be independent in the exercise of their judicial functions.”
- Articles 115 and 116 deal with the appointments, discipline, and control of subordinate judiciary, areas where executive interference was long prevalent and only partially removed post-*Masdar Hossain*.

The Supreme Court ruled in the famous *Masdar Hossain* case (1999) that judicial independence is a constitutional need rather than just a policy guideline. In its 12-point order, the Court mandated that:

- A distinct Judicial Service Commission be established;
- Judicial control over its own appointments and discipline;
- An independent judicial pay commission be established;
- Executive and judicial magistrates be distinguished.

¹⁶ Richard A Posner, *The Federal Judiciary: Strengths and Weaknesses* (Harvard University Press 1999).

- The decision signalled a paradigm change and sparked a number of legislative and administrative changes that eventually led to the separation of the judiciary's adoption in 2007.

Critics contend that despite these improvements, informal executive influence still exists, particularly in the nomination, advancement, and posting of judges, eroding the very independence that the courts and the Constitution aimed to protect.

3.4 The Relevance of the Doctrines to the Bangladeshi Context

In Bangladesh, these ideas have only been partially and selectively applied in practice. Historically, the judiciary has been disproportionately controlled by the executive branch, particularly at the subordinate court level. The promise of separation of powers in the constitution stands in stark contrast to this reality.

Although the Masdar Hossain case gave the judiciary legal authority, institutional and political constraints have prevented it from reaching its full potential. In principle, the concept of judicial independence is still constitutional, but in reality, it is political.¹⁷

For instance:

- The government still has a substantial amount of budgetary influence over the judiciary; the President, acting in concert with the Prime Minister, still has the last say in who is appointed Chief Justice.
- Professional development in the judiciary is frequently influenced by personal relationships and political affiliations, especially in the High Court Division.

As a result, although Bangladesh has embraced the separation and independence theoretical framework, complete institutional autonomy is still unattainable. The principles of separation of powers, checks and balances, and judicial independence are not merely theoretical ideals but are functional necessities in any constitutional democracy. These doctrines collectively ensure that power is not abused, laws are justly interpreted, and citizens' rights are protected. Significant court interventions, most notably the Masdar Hossain ruling, have characterised Bangladesh's constitutional journey towards achieving these goals. But there is still a long way to go.

¹⁷ Ridwanul Hoque, 'Judicial Activism in Bangladesh: A Golden Mean Approach' (2011) 13(2) *Bangladesh Journal of Law* 151.

CHAPTER FOUR

Separation of Judiciary in Bangladesh: Constitutional Mandate, Judicial Directive, and Contemporary Realities

The Constitution of Bangladesh solemnly declares the judiciary to be an independent organ of the State, free from undue influence or interference. However, achieving this independence, particularly from executive control, has not been straightforward. Over the years, institutional inertia and political reluctance have frustrated meaningful reform. The Masdar Hossain case, decided by the Supreme Court of Bangladesh in 1999, represents a watershed moment in the country's constitutional jurisprudence, giving justiciable force to the textual promise of judicial separation enshrined in Article 22.

This chapter addresses four essential aspects of judicial separation in Bangladesh:

- The constitutional provisions ensuring separation,
- The Masdar Hossain case,
- The implementation of the Court's directives, and
- A critical assessment of the present-day situation.

4.1 Constitutional Provision: Article 22 and Beyond

Article 22 of the Bangladeshi Constitution, which states "The State shall ensure the separation of the judiciary from the executive organs of the State," is the main source of the constitutional foundation for judicial separation. Although this clause was first included in the Directive Principles of State Policy, the Supreme Court understood it to have binding force in the Masdar Hossain case, turning a constitutional goal into a legally obligatory order. Furthermore, Article 94(4) states that "the Chief Justice and the other Judges shall be independent in the exercise of their judicial functions, subject to the provisions of this Constitution."

According to this constitutional phrase, judicial independence is legally enforceable as long as there is administrative cooperation and political will, rather than only being an ideal. However, the separation between judicial and executive magistracy had historically remained blurred, largely due to colonial legacies and post-independence executive consolidation.

4.2 The Masdar Hossain Case: Legal Catalyst for Judicial Independence

Background and Legal Issues

Case Name: *Secretary, Ministry of Finance v Md Masdar Hossain* (1999) 52 DLR (AD) 82

Type: Writ Petition

Court: Appellate Division, Supreme Court of Bangladesh

Bench: Chief Justice Mustafa Kamal, Justice Latifur Rahman, Justice Bimalendu Bikash Roy Chowdhury, Justice Mahmudul Amin Chowdhury

Fact:

A writ petition was submitted in 1995 by district judge Masdar Hossain on behalf of 441 other judges of civil courts. The petition made the following arguments: It was extra vires to include the judicial system in the executive branch's directives. Lower courts were separated from the executive by Chapter II of Part VI of the constitution. Lower court judges could not be held accountable by an executive administrative tribunal. In 1997, the Dhaka High Court issued a 12-point ruling in favor of the petition. The Supreme Court's Appellate Division heard an appeal from the government.

Judgement:

The High Court's decision was partially overturned by the Supreme Court in 1999, but the 12-point plan was preserved. Another 12-point directive was given by it. The Supreme Court demanded the creation of a separate judicial body with the authority to choose judges, handle issues related to judicial pay, and enforce rules. The constitution offered a framework for judicial independence, the Supreme Court ruled.

In the landmark case of *Secretary, Ministry of Finance v. Masdar Hossain and others* [(1999) 52 DLR (AD) 82], the Appellate Division of the Supreme Court of Bangladesh issued a set of **twelve binding directives** aimed at ensuring the institutional separation and independence of the judiciary from the executive branch, thereby reinforcing the constitutional mandate under Article 22.

The first declaration emphasized that the judicial service, although recognized as a “service of the Republic” under Article 152(1), is constitutionally and functionally distinct from the civil executive and administrative services. As such, it cannot be merged, abolished, substituted, or treated on equal footing with those services in any context.¹⁸

¹⁸ Bd Law Post, “Separation of Power and Independence of Judiciary in Bangladesh” *BD Law Post* (July 3, 2023) <<https://www.bdlawpost.com/2023/01/separation-of-power-and-independence-of.html>>.

Second, the Court clarified that Article 115 grants the President the authority to create and structure the judicial service, including formulating recruitment rules and rules relating to suspension and removal. However, it does not confer powers concerning other conditions of service. In this regard, Articles 133 and 136 and the Services (Reorganisation and Conditions) Act, 1975 were held inapplicable.

Third, the establishment of the BCS (Judicial) cadre under the Bangladesh Civil Service (Reorganisation) Order, 1980, and subsequent amendments, was declared unconstitutional. Similarly, the Bangladesh Civil Service Recruitment Rules, 1981, were held inapplicable to the judicial service.

Fourth, the government was directed to initiate appropriate measures for the President to formulate rules under Article 115, recognizing it as a constitutional obligation. The judiciary should be formally named as the “Judicial Service of Bangladesh” or “Bangladesh Judicial Service.” Moreover, a Judicial Service Commission was to be established promptly, primarily composed of senior judges from both the Supreme Court and subordinate courts, to recruit on the basis of merit and with due consideration to gender equality.

Fifth, it was directed that laws, rules, or executive orders regarding matters like promotion, posting, leave, pension, and other service terms must be framed independently for the judicial service, in line with Articles 116 and 116A, while maintaining the judiciary’s constitutional standing.

Sixth, two impugned government orders dated 28 February 1994 and 2 November 1995 were declared unconstitutional. The Court also ordered the formation of an independent Judicial Pay Commission, as part of the rules under Article 115, to periodically review judicial remuneration and benefits, and ensure implementation of its recommendations.

Seventh, the Court asserted that in disciplinary matters concerning judicial officers, the opinion of the Supreme Court must prevail over that of the executive, thereby upholding the principle of judicial independence under Article 116.

Eighth, the essential elements of judicial independence, as detailed in Article 116A, namely, (1) secure tenure, (2) protection of salaries, benefits, and pensions, and (3) institutional autonomy from both Parliament and the Executive, must be preserved in the rules or laws framed under Article 133 or equivalent executive orders.

Ninth, the Court stressed that the executive should not impose any prior approval requirements on the Supreme Court for expenditures within its allocated budget. All concerned authorities were instructed to issue necessary financial and administrative directives by 31 May 2000 to ensure this autonomy.

Tenth, it was clarified that members of the judicial service do fall within the jurisdiction of administrative tribunals, thereby overturning the High Court Division's declaration to the contrary.

Eleventh, the High Court Division's observation that no constitutional amendment is necessary for implementing judicial separation was set aside. The Appellate Division observed that while separation is constitutionally possible without further amendments, Parliament may introduce amendments to reinforce, clarify, or perfect the process.

Twelfth, the Court held that until the first recommendation of the Judicial Pay Commission is implemented, judicial salaries would continue under the status quo as of 8 January 1994. If other public service sectors receive pay revisions prior to this, the judicial service shall also receive proportionate adjustments consistent with their constitutional status.

Ultimately, the full implementation of the *Masdar Hossain* directives culminated on **1 November 2007**, when the **caretaker government** formally executed the separation of the judiciary from the executive. This historic milestone followed the enactment of four sets of rules, including the *Bangladesh Judicial Service Commission Rules 2007*, aligning with Article 22 of the Constitution. Through these reforms, the caretaker government fulfilled the long-standing constitutional mandate and brought the judiciary into its rightful position as an autonomous and independent organ of the state.¹⁹

Key Findings and Judicial Reasoning

The Appellate Division partly reversed the High Court's decision but affirmed the core directive, thereby issuing a new set of 12 directives to implement judicial separation.

The Court held that:

- The judiciary was a distinct and independent organ under the Constitution;
- Article 22, although under directive principles, had enforceable value when read with other substantive provisions;

¹⁹ Asif Nazrul, 'The Separation of Judiciary in Bangladesh: Problems and Prospects' (2004) 9 *Bangladesh Journal of Law* 77.

- Judicial officers could not be treated as civil servants under Part IX of the Constitution;
- The government must establish a separate Judicial Service Commission, a Judicial Pay Commission, and draft legislation reflecting the distinct status of the judiciary.

Most importantly, the Court interpreted Article 115 and 116 in a way that mandated the judiciary, not the executive, to exercise control over judicial officers. The judgment effectively overruled longstanding practices that had subordinated the judiciary to the executive, a legacy of colonial bureaucracy.

4.3 Implementation: From Verdict to Institutional Reform

Despite the judgment in 1999, successive governments delayed the implementation of the Court's directives. Political interests, bureaucratic resistance, and executive inertia stalled reforms for nearly a decade. It was only under the non-party caretaker government led by Chief Advisor Dr. Fakhruddin Ahmed in 2007 that meaningful steps were taken:

- The Bangladesh Judicial Service Commission (BJSC) was formally established;
- A separate Judicial Pay Commission was formed;
- Judicial magistrates were placed under the administrative control of the Supreme Court;
- The Code of Criminal Procedure (CrPC) was amended to reflect the division of executive and judicial magistracy.

These steps marked a formal recognition of judicial independence, at least in structure. However, substantive autonomy, in terms of budgetary control, appointment process, and career advancement, remains influenced by executive discretion.²⁰

The Supreme Court justices can be removed on the Supreme Judicial Council's recommendation, according to the ruling in the writ suit *Aasaduzzaman v. Bangladesh*, which declared the change to Article 96 of the Constitution to be invalid. This choice was made as a result of the Constitution's 15th Amendment, which reinstated the 1972 clause by adding Article 7B in 2011. Because they provide the President the authority to nominate judges and judicial magistrates, Articles 115 and 116 of the Constitution are in conflict with Bangladesh's notion of judicial independence.

²⁰ UNDP Bangladesh, 'Justice Sector Facility: Annual Report' (2007) <https://www.undp.org/sites/g/files/zskgke326/files/migration/bd/UNDP-Justice-Annual-2007.pdf> accessed 25 June 2025.

4.4 Present Situation: Challenges and Criticism

Despite formal separation, several chronic issues continue to plague judicial independence in Bangladesh.

Criticism of an impactful judiciary by other organs, such as the executive or legislative branches, is not uncommon and has been a topic of debate in many countries. The following are some typical complaints made about a judiciary that has a big influence:

- **Judicial Activism:** A common critique of an influential court is that it participates in judicial activism, which is when it decides on policies rather than just reading the law as it is supposed to. Critics contend that this infringes upon the legislative branch's duties and threatens the separation of powers.
- **Absence of Accountability:** Because judges are not answerable to the public directly, some contend that an influential court may be undemocratic. Judges are usually appointed or have lengthy tenure, which can make it challenging for the public to hold them responsible or influence their choices, in contrast to elected members in the legislative or executive branches.
- **Policy Overreach:** According to critics, a court with a big influence frequently renders rulings that go beyond the particular case at hand and result in substantial policy changes. Since judges are not elected to make broad policy choices that have an impact on society as a whole, this might be viewed as an abuse of judicial power.
- **Legislative Supremacy:** Critics may contend that an influential judiciary compromises the idea of legislative supremacy. They argue that rather than enforcing their own interpretations or rulings that could be at odds with the legislative intent, judges need to show deference to the elected officials who draft legislation.
- **Lack of Expertise:** Another complaint is that judges might not have the requisite knowledge or experience to decide on complicated policy issues, even though they are well qualified in the law. According to critics, judges are not chosen or appointed on the basis of their particular competence in different disciplines, therefore their rulings could not be well-informed or sufficiently take the practical ramifications into account.
- **Slow-Making Choices:** Due to the possibility of drawn-out court disputes and appeals, some contend that an influential judiciary might cause delays in decision-making. This critique implies that the judiciary's influence may obstruct prompt resolutions and the

effective operation of the legal system.

4.4.1 Appointment of Judges

Although the Constitution vests judicial appointment in the President (Art. 95), this is done in consultation with the Prime Minister, making the process vulnerable to political influence. The lack of a transparent judicial appointment mechanism is a serious obstacle to true independence.²¹

4.4.2 Budgetary Subordination

The judiciary continues to rely on the executive for budget allocation. Unlike many jurisdictions where the judiciary has financial autonomy, in Bangladesh, this dependency undermines administrative independence.

4.4.3 Lack of Institutional Oversight

There is no independent Judicial Appointments Commission or Judicial Conduct Council that can ensure merit-based recruitment and disciplinary control, free from executive interference.

4.4.4 Political Polarization and Judicial Activism

While judicial activism has sometimes been a tool of progressive reform, it has also been used selectively, drawing criticism. The judiciary is occasionally accused of issuing politically favourable judgments, undermining public trust.

The difficulties facing in judicial independence

The independence of the judiciary is called into doubt by executive magistrates' mobile court proceedings, which impact citizens' rights to fair trials. Although the executive and judicial branches have been split apart, no distinct ministry or secretariat has yet been created. Self-reliance is hampered by the lack of an independent prosecution service and investigation cell. Another obstacle to successful separation and independence is financial freedom. Administrative and political constraints impede the judiciary's ability to operate efficiently. For judicial independence to be meaningful and effective, these restrictions must be removed.

4.5 Critical Perspectives: Debating Judicial Impact

The role of the judiciary in constitutional democracies is both critical and contentious. Its fundamental role is to interpret and apply the law, but its authority has insidiously encroached upon adjudication to regulate public policy, limit government excesses, and reinterpret

²¹ International Commission of Jurists (ICJ), *Judicial Accountability in the Domestic Context: Bangladesh Report* (ICJ 2022) 24 <https://www.icj.org/wp-content/uploads/2022/02/Bangladesh-Judicial-Accountability-Report-2022.pdf> accessed 25 June 2025.

fundamental rights. The topics of judicial activism, accountability, institutional competence, and separation of powers continue to be fluid as the judiciary comes forth to address social injustices and loopholes in the law left by the legislature and the executive.

One of the strongest arguments made against a powerful judiciary is judicial activism, where the courts are seen to extend their adjudicative function beyond boundaries and encroach into policy-making domains. It is argued by the critics that in such situations, the judiciary transgresses its constitutional bounds by issuing directives or verdicts that are more legislative in nature than interpretive. This has been a topic of contention in Bangladesh as the Supreme Court has issued Suo-motu orders, framed guidelines in the face of non-existent legislations, or ventured into those fields that have hitherto been the work of the executive. While such actions can be constitutional in the interest of constitutional compulsions or public good, its critics point out that this process jeopardizes the democratic legitimacy of representative institutions and upsets the balance of power that is necessary under the doctrine of separation of powers.

Intimately connected to judicial activism is the issue of accountability. Judges are not elected, as are Parliamentarians or members of the executive, and are thus protected from direct popular oversight. They are constitutionally secured in their service, and disciplinary measures are limited and cumbersome, which lends itself to an impression of unaccountable judicial authority. Although this independence is required to defend the judiciary against political interference, such unrestrained independence without effective institutional accountability can encourage arbitrariness or discrimination in the dispensation of justice.²² Those judgments with significant effects on public policy, but less transparent in rationale or delivered without reasonable interface with stakeholders, erode public trust. In the Bangladeshi context, the lack of a strong system for evaluating judicial performance or publicizing judicial behavior remains a top priority issue. Moreover, internal accountability by the Supreme Judicial Council or administrative measures has rarely been pursued with tangible repercussions and thus reinforced conceptions of judicial immunity from criticism.

Another area of controversy in the area of judicial impact is that of policy overreach. The judiciary, particularly supreme courts, sometimes take on the responsibility of resolving disputes with very enormous policy ramifications, such as environmental protection and electoral reform or control

²² Khandker Mahub Hossain, 'Separation of Judiciary in Bangladesh: A Functional Reality or a Formal Declaration?' (2010) 7 *Northern University Journal of Law* 33.

of media and schools. When such courts strayed into these domains through blanket orders without an implementation plan or burdening the administration with work too excessive to perform, they stepped over the line into judicial overreach. The legislative supremacy doctrine is put under strain where the courts' judgments are construed to be against the legislature's will. Secondly, the criticism was towards judicial delay and systemic inefficiency. A powerful normative power judiciary with reduced functional legitimacy based on delay and backlog is compromised by institutional failure. Critics broadly argue that instead of handing out abstract declarations of rights or intruding into policy domains, courts should worry more about delivering timely and accessible justice. In Bangladesh, where lower courts suffer from endemic delay and are under-equipped, the Supreme Court's involvement in prominent constitutional or political cases normally attracts more attention than necessary improvement in procedural efficiency or legal aid. This diversion of judicial resources, it is argued by some commentators, is contributing to inequality in access to justice and isolating marginal groups from the formal system of law.²³

Final Observations on Judicial Separation in Bangladesh

The seminal ruling of *Secretary, Ministry of Finance v. Masdar Hossain* (1999) is a constitutional milestone in the constitutional evolution of Bangladesh, and for that matter, in the development of the doctrine of separation of powers. Article 22 of the Bangladesh Constitution mandates that the state ensure the separation of the judiciary from the executive. However, the road to complete judicial independence remains plagued with structural, administrative, and political barriers that persist in obstructing constitutional realization.

One of the longest-running challenges to substantive judicial independence in Bangladesh is with the appointment and elevation of judges, particularly at senior ranks of the judiciary. Although Article 95 of the Constitution decrees that the President shall appoint judges to the Supreme Court, it has been the practice to do so in consultation with the Prime Minister, thus opening the door to the executive preference scenario. Not only is judicial impartiality undermined by such practice, but there are also grave risks of politicization of the bench involved. Also, the absence of an open and consultative process, like a Judicial Appointment Commission or Parliamentary Hearing system, has created a vacuum in public accountability. This issue is further aggravated when promotions in the subordinate judiciary are not based on meritocratic principles and instead

²³ Md Abdul Halim, *Constitutional Law and Politics: Bangladesh Perspective* (CCB Foundation 2010).

succumb to political or bureaucratic pressures. Such systemic uncertainty in appointments and promotions discourages the evolution of an absolutely independent judiciary which not only is structurally independent but also in spirit.

The other pressing issue is the lack of fiscal independence and adequate infrastructure, which does not ensure functional independence of the judiciary. Whereas the Masdar Hossain verdict firmly held that the Supreme Court should have complete authority over its allocated budget free from executive interference, that is still only half-way applied. Practically, the judiciary still depends on the Ministry of Finance and other executive departments for the approval of budgets, infrastructure development, hiring staff, and technology advancement. This dependence compromises the autonomy of the judiciary to manage its affairs and imposes obstacles in efficient court administration. Besides, huge numbers of lower courts continue to function under seriously dilapidated infrastructure, lack of exposure to computerized case management systems, poor record-keeping facilities, and sub-par personnel, all of which result in systemic backlogs and deny justice to ordinary litigants.

Another area of the debate surrounding judicial separation is in the vagueness between structural independence and functional independence. The Masdar Hossain orders specifically covered structural reforms, such as the establishment of the Judicial Service Commission, an independent pay commission, and rule-making power separate from the executive under Article 115. These were good beginnings but have not yet considerably resulted in working independence, i.e., the ability of judges to function in their roles without being subject to outside, political pressure, or institutional hesitation.

In short, while the Masdar Hossain judgment established the legal foundation for judicial independence in Bangladesh, it did not complete the process. Judicial independence is a legally solitary path, the journey is institutionally, politically, and culturally profound. To solidify constitutionalism and democracy, Bangladesh must transcend piecemeal reforms and embark on a long-term commitment to transforming the judiciary. It is only when the judiciary is not merely separate but autonomous, merit-based, and answerable that the promise of Article 22 and the legacy of Masdar Hossain can be fully realized. Judicial independence must become the structural cornerstone of justice in Bangladesh.

The Masdar Hossain ruling is a constitutional milestone compelling the executive to opt for the long-pending independence of the judiciary. The exercise, however, remains incomplete and the judiciary is still plagued with political and structural problems.

For the judiciary to finally be able to play its constitutional role, further reforms are needed in:

- Judicial appointment and promotion process,
- Financial and infrastructural autonomy,
- Transparency and internal accountability procedure.

The spirit of Article 22 and the rules of the Supreme Court demand not physical distancing but also functional, procedural, and institutional independence. Then only can the dream of an completely independent judiciary, as envisioned in the Constitution and reaffirmed in Masdar Hossain, be fully realized.

Chapter Five

Judicial Independence in Comparative Jurisdictions

The principle of judicial independence is a constitutional constant across democratic jurisdictions, yet its implementation varies in scope, structure, and resilience. While Bangladesh has made notable progress, particularly following the Masdar Hossain judgment, it continues to lag behind jurisdictions with more robust institutional safeguards. This chapter draws a comparative analysis of how judicial independence is structured and maintained in India, the United Kingdom, and Canada, and identifies key lessons applicable to Bangladesh's evolving legal landscape.

5.1 India: Constitutional Mandate and Judicial Assertion

India, with traditions of colonial and common law following Bangladesh, has long established the independence of the judiciary as a foundational element of the basic structure of the Constitution.²⁴ Article 50 of the Indian Constitution, like Article 22 of Bangladesh, mandates separation of judiciary from the executive.

Appointments to India's higher judiciary are made possible by the Collegium system under which judges appoint and promote themselves, thereby keeping the process shielded from executive intervention. While the system has been faulted as being transparent, it has ensured judicial autonomy from political interference.²⁵ While the system has faced criticism for lack of transparency, it has reinforced judicial autonomy from political influences.

Moreover, in *Supreme Court Advocates-on-Record Association v Union of India*, the Indian Supreme Court ruled that judicial independence is an essential feature of the Constitution that cannot be amended by executive or legislative action.²⁶

Lessons for Bangladesh:

- Judicial appointments must be insulated from the executive.
- Internal reforms to render the judiciary transparent can balance independence with accountability.

²⁴ *Supreme Court Advocates-on-Record Association v Union of India* (1993) 4 SCC 441.

²⁵ *S.P. Gupta v Union of India* (1982) AIR 149.

²⁶ *Supreme Court Advocates-on-Record Association v Union of India* (1993) 4 SCC 441.

5.2 United Kingdom: Statutory Safeguards and Institutional Separation

As opposed to Bangladesh, the UK does not have a codified constitution. The independence of the judiciary is nevertheless enshrined by statute and conventions, though. The Constitutional Reform Act 2005 instituted a Judicial Appointments Commission to differentiate judicial appointments from political authority.²⁷

Judges are appointed on merit, and security of tenure is protected by the Act of Settlement 1701 and reinforced by subsequent legislation. Judicial salaries are charged on the Consolidated Fund and cannot be reduced arbitrarily, ensuring financial independence.

Lessons for Bangladesh:

- Independent Judicial Appointments Commissions help depoliticise judicial recruitment.
- Financial autonomy through direct budgetary allocations to the judiciary enhances independence.

5.3 Canada: Institutional Resilience through Constitutional Architecture

Judicial independence in Canada is enshrined by Section 96 of the Constitution Act 1867. The Supreme Court of Canada is impartial towards Parliament and the executive, enjoying protection for:

- Security of tenure;
- Fixed remuneration;
- Financial management by the Judicial Compensation and Benefits Commission.⁵

The Canadian Supreme Court decided in *Provincial Judges Reference* that cutting judicial remuneration without an independent process violates judicial independence under the Constitution.²⁸

Judicial independence in Canada is entrenched by Section 96 of the Constitution Act 1867. The Canadian Supreme Court is independent of Parliament and the executive and enjoys the following protections:

- Security of tenure;
- Secure remuneration;
- Financial management by the Judicial Compensation and Benefits Commission.

²⁷ Constitutional Reform Act 2005 (UK), ss 61–63.

²⁸ *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island* [1997] 3 SCR 3 (SCC).

The Canadian Supreme Court stated in *Provincial Judges Reference* that a decrease in judicial remuneration without an independent process violates judicial independence in the Constitution. On this constitutional basis, the Supreme Court of Canada has interpreted judicial independence not as a formalistic protection but as a structural necessity in order to sustain public confidence in the rule of law. In the Court's vision, the judiciary must be protected from direct and indirect pressures from the legislative and executive branches. The Court emphasised that there are three basic dimensions of judicial independence: (1) personal independence, ensuring that judges are not exposed to external influence in their rulings; (2) administrative or institutional independence, namely, the judiciary runs its own affairs; and (3) financial independence, i.e., a stable, unbiased system of remuneration which is protected from political influence. These dimensions were integrated specifically under the 1997 *Provincial Judges Reference*, whereby it was held that any monetary decision in relation to judicial salaries must go through an independent commission to ensure that Section 11(d) of the Canadian Charter of Rights and Freedoms is not breached, which provides for a fair tribunal.

Additionally, Canada has also established a Judicial Advisory Committee system to filter applicants for judicial appointments, favouring merit-based selection and minimising political influence. Notwithstanding ongoing debate regarding transparency and accountability, the system has traveled a significant way in limiting executive domination of judicial promotion. In addition, the Canadian Judicial Council is a necessary part of judicial discipline and responsibility without sacrificing adjudicative independence. The Canadian model thus reflects a developing dialogue between constitutional mandate and institutional behaviour. It upholds judicial independence not merely as a principle in theory but as an operating fact by means of mechanisms of financial impartiality, institutional integrity, and appointment transparency. To an emerging democracy like Bangladesh, where executive domination has been a persistent problem, Canada's approach demonstrates that assuring judicial independence is more than just constitutionally proclaimed but also firm institutional guarantees and autonomous checks and balances institutions, which are capable of safeguarding judges against political intrusion while keeping them accountable from the inside.

Lessons for Bangladesh:

- Judges' remuneration and pensions should be set by an independent authority.
- Judges require independence in internal administration and budgeting.

5.4 Comparative Analysis and Contextual Transfer

All of the above jurisdictions yield lessons applicable to the Bangladeshi context.²⁹ Transplantation must, however, be cautious and context-sensitive. Bangladesh cannot adopt the UK's uncodified conventions wholesale or India's Collegium system wholesale, but it can:

- Set up a constitutionally backed Judicial Appointment Commission;
- Secure safe and autonomous judicial budgeting;
- Improve training, transparency, and career advancement through independent oversight.

Final Thoughts on Comparative Lessons

Judicial autonomy is not an isolated desire, it evolves through nested safeguards, legislative designs, and political values. For Bangladesh, comparative constitutionalism holds up a mirror: even though the Masdar Hossain case provided the groundwork, effective independence will require institutional vision and political will. Embracing world best practices, tailored to domestic legal realities, offers a solid path forward.³⁰

²⁹ Peter H Russell, *Towards a General Theory of Judicial Independence* (1998) 3(1) *International Journal of Constitutional Law* 1.

³⁰ International Commission of Jurists (ICJ), *International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors* (ICJ Practitioners Guide No.1, 2004) <https://www.icj.org/wp-content/uploads/2014/10/International-Principles-on-Independence-and-Accountability-PG-no.1-publication-2004-eng.pdf> accessed 25 June 2025.

Chapter Six

Conclusion and Way Forward

Bangladesh's pursuit of judicial independence has been a journey of constitutional promise, judicial activism, and partial institutional transformation. The Masdar Hossain decision remains a landmark in this pursuit, bringing the constitutional mandate of Article 22 to a judicially enforceable one. Yet, structural vulnerabilities, executive control, and political entrenchment are persistent barriers to the full attainment of an independent judiciary in form and substance.

This research has addressed:

- The constitutional structure and functioning of the three branches of government;
- Theoretical grounding of separation of powers and checks and balances;
- The revolutionary impact of the Masdar Hossain judgment;
- The loopholes and deficiencies in current institutional practice; and
- Comparative experiences that offer models of reform.

While the Supreme Court has interpreted the Constitution as providing for the judiciary, political opposition has diluted most of its gains. The executive's influence on appointments, budgeting, and the careers of judges remains deeply intractable. Unless there is a systemic change, the ideal of judicial independence continues to hang in the air in the form of isolated judicial interventions rather than stable institutions.

6.1 Chief Recommendations

To move toward genuine judicial independence, the following reforms are called for:

- **Create a Constitutional Judicial Appointments Commission:** Independent, merit-based, and transparent judicial appointments must be institutionalized.
- **Provide Financial Autonomy of the Judiciary:** Judicial budget must be imposed on the Consolidated Fund and dealt with by the judiciary itself.
- **Reform Article 95 Appointment Process:** The President's authority must be exercised in consultation with a Judicial Commission rather than the Prime Minister.
- **Create a Judicial Conduct Council:** A retired judges' and scholars' panel to oversee discipline and ethics.
- **Upgrade Infrastructure and Case Management:** Digitisation, alternative dispute

resolution, and case monitoring can reduce backlog and increase transparency.

6.2 Concluding Reflection

Judicial independence is not a privilege of judges, it is the strength of a just society. Bangladesh needs to be able to establish the rule of law, uphold human rights, and reach its constitutional aspirations if it is to ensure that the judiciary plays the role it must play. The Masdar Hossain judgment had opened the door; it is now up to the country to enter. Judicial independence must be asserted, it must be guaranteed.

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