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Research Monograph

On

**“The Separation of Power and the Independence of Judiciary:
Bangladesh Perspective”**

**This Research Submitted for the Partial Fulfillment of the award of the degree in LL.B
(Hon’s) Department of Law, Sonargaon University (SU), Dhaka.**

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Dedication

*This Research is dedicated to my
Father & Mother*

LETTER OF TRANSMITTAL

To

Muhammad Ali

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Subject: Submission of research paper on **“The Separation of Power and the Independence of Judiciary: Bangladesh Perspective”**

Dear Sir,

It is a great pleasure for me to submit the thesis on **“The Separation of Power and the Independence of Judiciary: Bangladesh Perspective”** While I doing this thesis, I have tried my level best to make this project paper to the latest standard. I think that thesis paper will fulfill your requirement and pleased you. I, therefore, hope that you would be kind enough to go through this thesis paper for evaluation.

I am always be ready for clearance of any part of my thesis.

Thanking you

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CERTIFICATION

This is to certify that the thesis on “**The Separation of Power and the Independence of Judiciary: Bangladesh Perspective**” is done by Rabbi Hossain in partial fulfillment of the requirements for the degree of LL.B. (Honours) from Sonargaon University, Dhaka. The thesis has been carried out under my guidance and is a record of the bonafide work carried out successfully.

.....
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DECLARATION

I do hereby that this Research Monograph on the **The Separation of Power and the Independence of Judiciary: Bangladesh Perspective** have been done by me and this Research is free from all plagiarism and without help of other. I further declare that this monograph is prepared with my own effort and it was not and never submit to any institute for any academic reason.

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Abstract:

Independence of judiciary is the backbone of a nation for ensuring justice towards the people. Bangladesh judiciary is independence according to our constitution. In 2007, judiciary separated from the executive from a dynamic and land marking decisions of the Supreme Court of Bangladesh. Judiciary can play a vital role in maintaining law and order. The Supreme Court of Bangladesh pronounced some tremendous judgment which becomes a land mark not only for Bangladesh but also for the many other states. But still now we have a doubt regarding the independence of judiciary in practice though the constitution ensured its independence. My proposed study aims to show that how for the judiciary independent in Bangladesh. If the judiciary is independent and do not face any pressure or influence from any other organs then it may work honestly may provide justice to the parties. So my study will provide a clear conception at its concluding part that is the judiciary independent truly in practice and what are the weakness and so recommendation regarding the proposed study. But at present the judges and magistrates are being pressurized by the Executive organs of the state. The transfer of the judges and magistrates are highly dependent upon the will of the executive organ. State needs to take proper steps regarding the independence of judiciary.

Abbreviations

DLR - Dhaka Law Reports

BLD - Bangladesh Legal Decisions

AIR - All Indian Reports

SC - Supreme Court

LAWASIA – THE LAW ASSOCIATION FOR ASIA AND THE PACIFIC

HCD - High Court Division

BCS – Bangladesh Civil Service

PSC – Public Service Commission

MLJPA – Ministry of Law, Justice and Parliamentary Affairs

ME - Ministry of Establishment

WP – Writ Petition

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Chapter -1: Introduction

1.1 Statement of the problem:

Judiciary is one of the organs of the state. Judges and Magistrate are appointed for ensuring justice. But in Bangladesh we can see that judiciary is independent literally not practically. The transfer, promotion, removal of the Judges and Magistrates depend upon the executive organ will. In many cases the Magistrates got call from the various Ministry of Bangladesh to do some favour which is not right at all. If the courts did not please them they transfer the Judges or Magistrate for a remote area. For that reason many judges and Magistrates do what they want. The promotion list of the Judges and Magistrate prepared by the law Ministry and they send to the Supreme Court for approval. The person who is loyal to the Government got promotion in most of the cases and the rest deprived from the promotion. By the 16th amendment of the Constitution of Bangladesh the parliament takes the removal power of the Judges in their hand. This is a real threat to the judicial system of Bangladesh. The Supreme Court of Bangladesh declared the amendment unconstitutional and said some country has given the removal power to the parliament but that system is not applicable in Bangladesh. We have to understand the nature of the people before giving such power to parliament. In reaction many Member of Parliament boycott the parliament while pass a bill the relating the enhancement of the salary of the Judiciary. The law Minister trying to say the judiciary did not perform their duty properly and the Member of Parliament is not like them. Which mean the legislature and Executive are great in performing their duties and the judiciary is not. This kind of attitude is a great threat to the Judiciary. In political matters every Government of Bangladesh uses the Judiciary for their benefit. I must say the many Magistrates and Judges of the sub-ordinate court are not morally strong. They always think about their transfer. Why they do not think that they will the Judge even after the transfer. The executive organ implements the laws and also by putting fear in the mind of the Courts enforces the law in such a way by which they may be benefited. As the judiciary is not fully independent, the common people deprived from the justice.

Research question:

How far is the Judiciary independent in Bangladesh?

1.2 Objectives of Research:

As the subject matter of the thesis is judicial independence in Bangladesh, it is necessary to understand how far the judiciary is independent in performing their legal duties provided by various statute of the state. In order to know about the independence of judiciary it is evident to understand how far the separation of power has been insured in Bangladesh. Executive implement the laws and they always try to legalize they illegal work by pressuring the judges and magistrates. Now it is needed to realize their mechanism by which they dominate the judiciary.

1.3 Methodology or Analytical framework:

In this research there are three criteria which are as follows:

a. The role of the constitution:

Article 94(4) of the constitution that the chief justice and the other judges shall independent in the exercise of their judicial functions subject to the provisions of this constitution. From article-94 of the constitution we can see that the president appoints the chief justice and president is the head of the state which basically hold the office as the ruling party want him to do the task. In Bangladesh practice that president is selected from the party who holds the majority seat in the parliament while article-98 stated that the president may appoint one or more duly qualified persons to be additional judges of that division for such period not exceeding two years. Again from Article-116A of our constitution, we know that all persons employ in the judicial service and all magistrates shall be independent in our exercise of their judicial functions subject to the provisions of the constitution.

b. Separation of power:

From the independent of judiciary, the separation of power is prerequisite. Article-22 of the constitution stated that the judiciary shall be separated from the executive. After the decisions of the MasdarHossain Case, the judiciary was separated from the executive but there are some

reasons for which the judiciary cannot functions their duty independently even after the separation.

c. Executive control over judiciary

Before 2007 the judicial judges were appointed from the BCS examination and under the control of the executive but now there is a separate commission but till how executive organ try to acquire benefit from the judiciary by showing threat of transfer and removal.

1.4 Literature review: Mr. Awal stated that independence of judiciary is highly dependent on the separation of power without the separation of power the independence of judiciary cannot be ensured. Execution organ always keep presume upon the judiciary and try to bound them to do what they want. Now the sepearaion of judiciary has been ensured in Bangladesh.¹

I agree with the view of the author and the author does not prescribe the present situation. How the judicial independence is how in danger even after the separation the author does not pay enough attention regarding the matter.

For the independence of judiciary, the separation of judiciary is the prerequisite. Since British colonial rule the separation of judiciary has been a continuing debate. Independence of judiciary has not been properly ensured because of political will lack of strong civil society. Executive dominative mind is over the judiciary, corrupted law makers.²

The author mentioned the reasons for which the judiciary is not capable to perform their duties properly. In his articles he can also add that how the court being pressurized by giving threat of transfer by the executive.

GaziSaidurRahman, is the justice of Supreme Court, stated that magistrate court is not dependent on law, actually it's depends on the amount of bribe. For changing anything, political will is mandatory because political parties deal democratic policies. Executive is impossible if political parties have no internet to separation of judiciary. Every parties talk about separation of judiciary but when they come to power and formed government, they technically avoid the matters. On the

¹MdAwalHossainMollah, Independence of judiciary in Bangladesh: an overview (2012) 54 (1) *International Journal of Law and Management* 61-77

²ZamanMoniruz, *Independence of Judiciary in Bangladesh* (4th October, 2012) <<https://moniruzzamanjuror.wordpress.com/2012/10/04/independence-of-judiciary-in-bangladesh/>> (Last accessed on 15th june, 2016)

other hand, Advocate Gazi Shah Alam, who is the Former Secretary of Dhaka Bar Association told that Some of judges want the interference of home ministry and others satisfy the present condition of separation. Maximum law makers and judges are corrupted so they diverted their cases after taking bribe. It is the alarming condition for us. They have no tension whether public will get justice or not.³

In this article, it can be said that politics must be banned if we want to separation of judiciary.

Shariful Islam analyzed that Judiciary separation comes into force from 1st November, 2007. But it is not separation in the true sense because our judiciary is still dependent on the executive. Judges are still appointed by the executive. On the other hand, government gives executive magistrates some judicial power which makes conflict with the spirit of separation of judiciary from executive. The magistracy also needs to be brought under a separate secretariat under Supreme Court but it is not possible to make. Judiciary has been brought under the ministry of Law (MoL).⁴

Separation of judiciary is now vague concept for us. In true sense, judiciary is never separated. Because Government in its own interest, does not want to separate judiciary from the administration. Government is controlled opposition parties for using the power of judiciary. This is a way for the government to use the power of wrong doing. Our government is changed every five years. When the opposition party comes into the power, they also control over the criminal justice system. The governments don't want to lose the power of judiciary.⁵

1.5 Limitation of the Research: This study covers how far the judiciary in Bangladesh is independent and not others. Due to the lack of time many things left behind. I was not able to do the field work.

³ Assignment point, '[Report on Judiciary System of Bangladesh](http://www.assignmentpoint.com/arts/law/report-on-judiciary-system-of-bangladesh.html)' (2016) <<http://www.assignmentpoint.com/arts/law/report-on-judiciary-system-of-bangladesh.html>> (Last Accessed on 20th June, 2016)

⁴Shafiqul Islam Mohammad ,NashirUddin and Chowdhury Abdullah Al-Hossienie, 'The Independence of Judiciary in Bangladesh; A new Milestone and its challenges'(2008) 17 *Bangladesh Journal of Public Administration*,38

⁵ Tania Lipi, Separation of judiciary from the executive; an evaluation and Analysis (November, 2013) *Journal of Research Gate*, 14

1.6 Structure of the thesis:

Chapter two introduces the conceptual issues of judicial independence which are the main aspects of this thesis. It discusses the links between the separation of powers and the concept of judicial independence and the meaning of judicial independence and its elements. This chapter also analyses the importance of judicial independence and the accountability of judges to protect the rights of the parties.

Chapter three provides some perspectives of judiciary in Bangladesh. This chapter identifies the links between the history of judicial system and the concept of judicial independence in Bangladesh and it gives an outline of current judicial system and identifies the major themes of the study. This chapter also highlights the judicial system in British and Pakistan period. Additionally it also discuss the MasderHossain case which is considered as a cornerstone of judicial independence.

Chapter four analyses the issues relating to the appointment of judges in the Supreme Court of Bangladesh; discusses the issues relating to appointment of judges in subordinate court. This chapter says about the tenure of judges and also deals with the conditions for independence of judiciary. This chapter also deals with the most important part of this thesis which aims to find out the influence of politics in appointing the judges. Because, in 46 DLR (1994) it was held that the appointment of higher judiciary by the president is considered of putting an influence in the appointment of judges because president is the head of executive body of the government.⁶

Chapter five finally presents a general conclusion to the thesis based on the summaries of findings and recommendations in each chapter. It provides a synopsis of the background including the strengths and weakness of the judiciary in Bangladesh and identifies the specific problems addressed in the thesis. It also summaries the main arguments of the thesis and recommends ways of preserving and building on the values of judicial independence. The main theme of conclusion is to give opinion whether the judiciary is truly independent in practice.

⁶46 DLR (1994)

Chapter Two

Judicial Independence: Meaning and Elements

Introduction

Chapter two introduces the conceptual issues of judicial independence which are the main aspects of this thesis. It discusses the links between the separation of powers and the concept of judicial independence and the meaning of judicial independence and its elements. This chapter also analyses the importance of judicial independence and the accountability of judges to protect the rights of the parties.

Section 2.1 of this chapter presents issues relating to the meaning of independent judiciary; section 2.2 highlights issues relating to individual independence of judges; section 2.3 deals with the issues of collective independence of judiciary; and finally section 2.4 talks about the importance of judicial independence.

2.1 Meaning of Judicial Independence

Judicial independence is an important topic of discussion among judges, lawyers, academics, commentators, and researchers in different countries. In any discussion of the topic of judicial independence one essential question needs to be asked : what is meant by the concept of judicial independence ?

Generally judicial independence means the freedom of judges to exercise judicial powers without any interference or influence. The most central and traditional meaning of judicial independence is the collective and individual independence of judges from the political branches of the government particularly from the executive.⁷

It requires that judges should not be subject to control by the political branches of the government and they should enjoy protection from any threat, interference, or manipulation

⁷Islam Mahmudul, *Constitutional Law of Bangladesh*, (Mullick Brothers, 1st edition 1995)p.584

which may either force them to act unjustly in favor of the government or subject themselves to punishment for not doing so (Philip Larkin).⁸

However the concept of judicial independence has been enumerated in many international instruments which state that judges should be free to decide cases impartially without any restrictions, influence, inducement, pressure, threats or interference from any quarter or for any reasons.⁹

The concept of judicial independence carries two opposite senses: negative and positive senses¹⁰. In the sense the concept of judicial independence seeks to avoid any dependence, interference or influence in administering justice ; in the positive sense judicial independence means the freedom of judges to exercise judicial functions impartially in accordance with law and concerned facts.¹¹ Therefore the contemporary or modern concept of judicial independence emphasizes the independence of each and every member of the judiciary and the independence of the judiciary as an institution or organ of the government.¹² In other words, it has two important elements: one is the individual independence of judges and another is the collective or institutional independence of judges.

2.2 Individual Independence of Judges

Individual independence of judges means that a judge is free to exercise judicial functions without any fear or anticipation of retaliation or reward. It requires that a judge should decide a case in accordance with an impartial assessment of the facts and understanding of the law without any direct or indirect improper influence or interference from any source or for any reasons.¹³ In fact first essential of an independent judiciary is that the individual judge should enjoy complete freedom in discharging his or her judicial functions and other official duties. The

⁸ *State vs. Chief Editor, Manabjain(2005), 57 DLR 395*

⁹ *Article 2 of UN Basic Principles 1985; Article 3(a) of Beijing Statement 1995*

¹⁰ Md. Abdul Halim, *A Comparative Study of Problems of Constitutionalism in Bangladesh*, (CCB Foundation, 1st Edition, 1998) p348.

¹¹ *Ibid*

¹² M. Chowdhury Jashim Ali, *The Constitutional Law of Bangladesh*, (NUB, 1st edition 2010) p.444

¹³ Article 2.02 of Montreal Declaration 1983 ; Article 2 of UN Basic Principles 1985

complete freedom of an individual judge has three freedoms: personal, substantive and internal independence.¹⁴

Personal Independence

Personal independence means that judges are not dependent on government in any way in which it might influence them in reaching decisions in particular cases. Personal independence signifies that the tenure of judges and the terms and conditions of their service are “adequately secured, so as to ensure that individual judges are not subject to executive control”¹⁵.

Substantive Independence of Judges

Substantive independence refers to the functional or decisional independence of judges to arrive at their decisions without submitting to any inside or outside pressure. It is connected with the determination of the finding of fact and the application of the relevant legal norms to the facts of the case¹⁶. The substantive independence of judges requires that in performing all the administrative, procedural and substantive duties a judge should be free from any direct or indirect interference, improper influence or pressure.

Internal Independence of Judges

Internal independence means independence of judges from their judicial superiors and colleagues¹⁷. It refers to, in other words, independence of a judge or a judicial officer from any kind of order, indication or pressure from his judicial superiors and colleagues in deciding cases. In this regard, the Montreal Declaration 1983 provides: In the decision making process, judge shall be independent vis-a-vis their judicial colleagues and superiors¹⁸. Any hierarchical organization of the judiciary and any difference in grade or rank shall in no way interfere with the right of the judge to pronounce his/her judgment freely.

¹⁴Md.Abdul H, “A Comparative Study of Problems of Constitutionalism in Bangladesh, (CCB Foundation, 1st Edition, 1998)p363

¹⁵ Supra See Note 15

¹⁶ Ibid

¹⁷ Ibid

¹⁸ Ibid

In the course of hearing appeals, the superior judge may give directions to judges of the lower courts and such directions are not considered prejudicial to the independence of an individual judge.¹⁹

2.3 Collective Independence of the Judiciary

The concept of collective or institutional independence is concerned with the responsibility for the effective operation of judicial branch of govt. This aspect of judicial independence has a great impact on the individual independence of judges. If the judiciary as an institution depends on the executive, the legislature or the other institution for its operation, this may affect the performance of judicial duties by individual judges.²⁰

A judge may not be able to exercise judicial functions independently unless he or she is part of institution with authority over those human and physical resources incidental to perform judicial functions. Therefore, collective institutional judicial independence is necessary to ensure the individual independence of judges. It creates an environment in which judges may exercise their judicial functions without fear or favor.

Collective or individual independence is associated with court administration which includes assignment of cases, control over administrative personnel, maintenance of court buildings and preparation of judicial budgets and allocation of resources. The Montreal Declaration 1983 and the Beijing Statement 1995 emphasize that the main responsibility for court administration should be vested in the judiciary.²¹

In fact the principal of collective judicial independence requires that in different aspect of court administration, the involvement and control of the executive or legislature should be removed²².

¹⁹, Section 107, Order 41, Rule 23 of the Code of Civil Procedure 1908; *Chakroborty vs. Biswas* (1991) 43 DLR 276 ; *Molla vs. Mohammad* (1998) 50 DLR 613

²⁰ Md. Halim Abdul, "A comparative Study of problems of constitutionalism in Bangladesh, (CCB Foundation, 1st Edition, 1998) p. 363

²¹ Article 2.40 of Montreal Declaration 1983; Article 36 of Beijing Statement 1995

²² Article 2.42 of Montreal Declaration 1983,

In South Australia, control of the administration of the courts is vested in a judicial council established under the Courts Administration Act 1993. The Council known as the State Courts Administration Council which is independent from the control of executive government.²³

Thus we see that the provision of collective judicial independence have been enumerated in many national and international instruments as stated above. So if the judiciary acts as an institution or organization (the institutionalism or organization refers to the collectivism) , no one can influence it to act dishonestly ; if it acts as an individual ,no one can enforce individual person to act dishonestly.

2.4 Importance of Judicial Independence

Judicial independence has an important value in any democratic system of government. As Larkin says an independent judiciary is the essential –indeed indispensable – component of a free and democratic society²⁴. In every society, the judiciary is primarily entrusted with the functions to resolve disputes between citizens or between citizens and the government. In performing these functions judiciary needs to be independent from the executive, the legislature or any other sources of influence or interference.

In the past twenty years various international organizations including the International Bar Association, International Commission of Jurists and LAWASIA have been working to devise a set of standards of judicial independence. From 1981 to 1982, the International Bar Association, International Commission of Jurists and LAWASIA adopted different codes, standards, and declarations on the topic of judicial independence .After considerations of these codes, standards, and declarations, the Universal Declarations on the Independence of Justice (Montreal Declaration) was adopted at the first World Conference on the Independence of Justice held at Montreal on 10 June 1983²⁵. In 1985 the seventh UN Congress on the Prevention of Crime and

²³ Section 3(a) of Courts Administration Act 1993

²⁴ChowdhuryDilara, *Constitutional Development in Bangladesh*,(Dhaka:UPL,1995)P.345

²⁵<<http://www.assignmentpoint.com/arts/law/report-on-judiciary-system-of-bangladesh.html> > 19 Aug 2016

the Treatment of Offenders adopted the Basic Principles on the Independence of the Judiciary (UN Basic Principles).²⁶

Judicial independence is also an important issue of public discussion at the national level around the world. The question which needs to be asked is why is judicial independent so important? A modern state is governed by three branches of government, the executive, the judiciary, and the legislature and each organ has some special responsibilities. Among the three branches of the government the judiciary is considered the weakest branch²⁷. In fact, the power of the judiciary is limited only to pronouncing judgment; it has no additional power to enforce its decisions. The enforcement of judicial decisions is the functions of the executive and therefore the power of the executive is ultimately dependent on the executive government. Despite this weakness, the judiciary being an essential organ of government critically contributes to maintaining the peace and order of a society by resolving legal disputes.

The judiciary has a responsibility for ensuring that individual rights and liberties are secured and this responsibility cannot be effectively discharged without judicial independence²⁸. This is because without the independence of the judiciary the power over life and liberty of the citizens would be arbitrary. Judicial independence helps to protect the rights and liberty of citizens of a country.

An independent judiciary can protect the rights of citizens by the fair administration of justice. It may ensure that powerful individuals or institutions must conform to the law and no one is above the law. In the absence of an independent judiciary the fair administration of justice or protection of rights of citizens can not be secured. Therefore, the importance of judicial independence in a democratic society would be unequivocal or unambiguous to ensure the fair administration of justice and to gain public confidence in the justice system, if the judicial independence is not ensured properly.²⁹

²⁶ The text of the UN Basic Principles 1985 is available on the web site:

<http://www.transparency.de/documents/source-book/c/cvL/II.html>> 19 Aug 2016

²⁷ M.ChowduryJashim Ali, *The Constitutional Law of Bangladesh*, (NUB, 1st edition 2010)p.449

²⁸ Ibid

²⁹ *AIR 1965 SC 745*

Conclusion

The foregoing discussion gives a clear definition of judicial independence. Without ensuring the judicial independence, proper justice cannot be ensured to the people. Though the meaning is very clear in theoretical term, but we have a doubt that how far the meaning is practically applied.

Chapter Three

History of Judiciary in Bangladesh

3.1 Introduction

This chapter provides some perspectives of judiciary in Bangladesh. This chapter identifies the links between the history of judicial system and the concept of judicial independence in Bangladesh and it gives an outline of current judicial system and identifies the major themes of the study. The first part deals with the history of judiciary in British period; after that section 3.3 highlights history of Pakistan period; again section 3.4 presents the issues of history in Bangladesh period and finally section 3.5 says about the current judicial system in Bangladesh. In addition to, I also discuss here the MasderHossain Case in brief because it bears most vital concern in the history of separation of power.

3.2 Judiciary in British period

The British judiciary is one of the most renowned judicial systems in the world. Britain has an impartial, well organized and independent judiciary and the British judiciary. It has been working as a guardian of the rights and liberties of the people. The origins of the American Revolution can be traced to many and varied grievances and complaints on the part of the colonists.³⁰ It has its unique organizational pattern along with some exceptional features not to be found anywhere in the world. During the British role there was a demand for separation of judiciary from the executive. The British administration did not make this separation thinking that separation might go against their colonial interest. In 1919 the matter of separation of judiciary was raised in the House of Commons but it was not discussed of contention that it was a matter within the jurisdiction of provincial government³¹. In 1921 a resolution regarding separation of judiciary was passed in the Bengal Legislative Assemble which was followed by formation of a committee³². The committee reported that there was no practical problem in

³⁰ supra

³¹ Md. Halim Abdul , *A Comperative Study of Problems of Constitutionalism in Bangladesh*, (CCB Foundation, 1st Edition 1998)372

³² The available information relating to history of judiciary in British Period are found in the following address < http://www.kkhsou.in/main/polscience/judicial_system.html > 6th January 2015

separation. However nothing more was done in that regard. The origins of the American Revolution can be traced to many and varied grievances and complaints on the part of the colonists.³³

Magna Carta is one of the most mentionable steps which is nothing but the shadow of the will of the common people. The original agreement may not have protected rights and freedoms in the detailed way which modern-day myth occasionally suggests, but it undoubtedly set Britain on a road towards non-autocratic government. Magna Carta achieved acceptance for two key principles. The first was that regal authority should be limited by – and separated from – the will of the people. In the immediate context of the early 1200s, that meant that taxes could not be raised without the “general consent of the realm” – and for realm read barons and the church. Even so, as a guiding principle, it was crucial. The second fundamental doctrine was that individuals were entitled to be treated in accordance with the laws of the land and would, when accused of wrongdoing, be judged by their equals. However, it confirmed the notion of the rule of law and the applicability of trial by jury.

3.3 Judiciary in Pakistan Period

After separation and independence in 1947 no step was taken in East Pakistan. The United front Party included the idea of separation in its 21 points formula in 1954³⁴. The first constitution in independent Pakistan was adopted in 1956. Unlike the Government of India Act, 1935(Ss 253,255and 256) and the constitution of India (art. 233 to 237 in chapter VI) thus Pakistan Constitution of 1956 did not provide for any provision regarding subordinate court or magistracy; these were to be regulated by the code of civil procedure and the Code of Criminal Procedure³⁵. In 1957 the East Pakistan Provincial Assembly passed the Code of Criminal Procedure (East Pakistan Amendment) Act, 1957 which deals with separation³⁶. However, this Act was never given effective. In 1958 the Pakistan Law commission recommended to bring the

³³ George Welwood Murray Professor of Legal History, Columbia University. A.B. 1935, Yale University; LL.B. 1938, Columbia University

³⁴ Barrister Syed Istiaq Ahmed, *Workshop of Independence of the Judiciary*, (2003), volume 4, Number 55
Available information may be found on the following web site
<http://archive.thedailystar.net/judicial_system.htm>21st July 2003

³⁵ Md. Halim Abdul , *A Comparative Study of Problems of Constitutionalism in Bangladesh*, (CCB Foundation, 1st Edition 1998)372

³⁶ Ibid

judicial magistrate under the control of High Court³⁷. In 1967 the Law Commission again recommended to give effect to the Code of Criminal Procedure Act, 1957 though nothing was done until 1972³⁸. In the code of Code of Criminal Procedure (East Pakistan Amendment) Act, 1957 an overhauling amendment was made in the Code of Criminal Procedure with a view to separating the judicial and executive functions of the magistrates³⁹.

3.4 Judiciary in Bangladesh Period

In 1972 after the independence of Bangladesh the Constitution of the People's Republic of Bangladesh was adopted. Provision was made in Article 22 in the Fundamental Principles of State Policy that the state shall ensure the separation of judiciary from the executive organ of the state⁴⁰. Supreme Court of Bangladesh is the highest of Bangladesh for administering justice.

The supreme court of Bangladesh:

The supreme court of Bangladesh was established in accordance with the provision of the Article 94 of the constitution of Bangladesh which provide that there shall be a supreme court of Bangladesh comprising the appellate division and the high court division. It is the highest court of Bangladesh which provides relief the aggrieved person. Supreme Court is divided into appellate division and high court division:

1. The High court division:

Article 101 of the constitution provides that the HCD shall have original and appellate jurisdiction and such other jurisdiction as may be authorized by law. The jurisdiction of the high court division may be divided in to two:

1. Ordinary or general jurisdiction
2. Constitutional jurisdiction

2. The appellate Division:

The appellate division of Supreme Court had no original jurisdiction but it had appellate. Jurisdiction only the jurisdiction the appellate court classify below:

1. Ordinary or General Jurisdiction.

³⁷ Ibid

³⁸ Ibid

³⁹ Supra See Note 2

⁴⁰ Article 22 of the Constitution

2. Constitutional jurisdiction.

The various civil and criminal courts of Bangladesh may be mentioned in the following ways.

Sub-ordinate courts shall be consisted with the district & magistrate courts. It has power to observe both civil and criminal matters and situated in different district and metropolitan area.

From Civil Courts Act⁴¹ we can find five types of civil courts namely:

The court of the district judge⁴²

The court of Additional district judge⁴³

The Court of Joint district judge⁴⁴

The Court of Senior assistant judge⁴⁵

The Court of assistant judge⁴⁶

The court of district judge:

District judge is the head of civil judiciary in each district. It has administrative control over all civil courts situated in local limits. They are appointed through promotion form the amongst additional district judge. Its pecuniary jurisdiction is unlimited.

Jurisdiction of District court:

1. Pecuniary jurisdiction
2. Appellate jurisdiction
3. Administration and transfer jurisdiction.
4. Revisional jurisdiction
5. Double capacity

Courts of additional district judge:

The courts of additional district are comprised with the additional district judge who is appointed through promotion amongst the joint distinct judge. His pecuniary jurisdiction is unlimited. Usually he tries those cases which are transfer to his court from the court of the district judge. Sometimes he is appointed as additional session judge⁴⁷.

⁴¹Section 3 to the Civil Courts Act 1887

⁴² Ibid

⁴³ Ibid

⁴⁴ Ibid

⁴⁵ Ibid

⁴⁶ Ibid

⁴⁷ Supra 46

The court of the joint district judge:

They are appointed through the promotion from the senior assistant judge. Its pecuniary jurisdiction states with taka above 25 lacks sometimes it acts as a small cases court and assistant session judge⁴⁸.

The courts of senior assistant judge:

This court is consisted with a senior assistant judge they are appointed through promotion of amongst assistant judge. It's a pecuniary jurisdiction does not exceed 25 lack taka⁴⁹.

The court of assistant judge:

This court shall be consisted with an assistant judge. Its pecuniary jurisdiction does not exceed 15 lacks taka. It has small revisional power in all petty civil cases coming from village courts⁵⁰.

Special tribunal in civil courts:

Special tribunal established in a legal system in two ways.

1. Established by constitution
2. Established by statute

The formation and function of the administrative tribunal deals with the constitution.

Administrative tribunal:

Administrative tribunal deals such dispute which are relating to employment between the government and its employers. Each administrative Tribunal Consist of one member who is appointed by the government from person who is or has been district judge. It has exclusive jurisdiction to have and determine application made by any persons in the service of the people republic of a statutory public authority in respect of the terms and conditions of his service.

Labour Court

The Government may by notification in the official gazette establish labour court as it necessary. A labour court shall be consisted a chairman and two members but in respect of any matter under chapter ten and twelve it shall be consisted by a chairman alone.

⁴⁸ Ibid

⁴⁹ Ibid

⁵⁰ Ibid

The chairman may be appointed from the District judges or additional district judge. From Labour Court Act⁵¹ we know that a Labour Court shall have exclusive jurisdiction on the following matters namely:

- To adjudicate and determine industries dispute on to try any offence under this code.
- To examine and adjudicate any implementation on violations of a settlement which is refried by the government.
- To exercise any rower referred by this code.

And provision contain in chapter 35 of the CRPC shall apply to labour court.

Labour Court Act 2006⁵² says this court shall follow as namely as parable summary procedure for CRPC to try any offence⁵³e. It has the same power as like the first class magistrate under the CRPC to trying any offence and for the purpose of punishment it has the same power as like Court of Session⁵⁴. Labour Court Act 2006 says except the adjudicating and determining any criminal cases this court shall be deemed as a civil court.

Labour appellate tribunal:

From Bangladesh Labour Law 2006⁵⁵ we know that labour appellate tribunal shall be consisted by chairman and such number of members. And such chairman shall be appointed from among person who is one has been a judge or an a additional judge of the supreme court labour tribunal shall followed as namely as possible the provision of civil code procedure to hear appeal. This tribunal has power to modification awarded decision, judgment or section given by the labour court. If any person aggrieved on the decision of the labour appellate tribunal than the aggrieved person may appeal to the high court decision.

The ArthaRin-Adalat:

The ArthaRinAdalat was established under the Artha-Rin-AdalatAin act 2003⁵⁶. Every financial institution as listed in section 2 will file suits for recovery of many against a loan under this act. This Adalat follow its own proceeding as well as the proceeding of CPC and

⁵¹Section 214 of the Labour Court Act 2006

⁵² Section 215 of the Labour Court Act 2006

⁵³ Ibid

⁵⁴ supra

⁵⁵Section 218 of the Bangladesh Labour Law 2006

⁵⁶ Section 104 of the Artha-Rin-AdalatAin act 2003

application will be file to the court through affidavits. A join district judge will be appointed as judge of this court⁵⁷.

Land survey tribunal:

Land survey tribunal has been established under State Acquisition and Tenancy Act (1950)⁵⁸ SAT Act. This chapter has been added in 2004 by an amendment in the Act⁵⁹.

The Arbitration tribunal:

Arbitration Act⁶⁰ provides that the parties shall be free to determine the number of arbitration. And under the provision of this Act the parties are able to consist of arbitration tribunals. Arbitration Tribunal Act⁶¹ says, parties may be appointed arbitrator to follow the requirement of the arbitration under this Act. According to the provision of sec 17 of the Arbitration Act 2001 provided that if the party is disagreed then the tribunal may exercise its own jurisdiction-

1. There is existence of a valid Arbitration agreement.
2. The arbitration tribunal is properly constitute
3. Whether the arbitration agreement against the public policy
4. The arbitration is unable to preformed
5. What matter have been submitted to arbitration is accordance with the arbitration of agreement.

Family court:

Family courts have been established under the ordinance 1985. The assistant judge is the judicial officer of this court.

The court have jurisdiction over the following matters.

1. Desolation of marriage
2. Dower
3. Restitution of conjugal rights
4. Maintenance
5. Guardianship and custody of children.

⁵⁷ Ibid

⁵⁸Section 145 (A) of the State Acquisition and Tenancy Act (1950)

⁵⁹ Ibid

⁶⁰Section 11 of the Arbitration Tribunal Act 2001

⁶¹Section 11 of the Arbitration Tribunal act 2001

Small causes court:

Civil Courts Act 1887 says small cause's court was established for the settlement of small and petty claims matters between parties. There is no separate court for small cause but some regular judges, the Joint District Judge, Senior Assistant Judge and Assistant Judge have jurisdiction to try cases of small cases. Civil Courts Act 1887⁶² provides that all suits of civil nature of which values does not sec 25 thousand taka shall be cognizable by the court of small causes and it is the highest pecuniary jurisdiction of this court..

Civil Courts Act 1887⁶³ provides

1. Small causes suit valued up to taka six thousand is to be field in the court of assistant judge.
2. Suit valuation up to taka 10 thousand to be filed in the senior assistant judge court of the local area.
3. Suit valuation up to taka 20 thousand is to be filed is the joint district judge court of the local area vested with small causes lower.⁶⁴

Different kinds of criminal courts and tribunal excising criminal jurisdiction in Bangladesh:

Code of criminal procedure in 1898⁶⁵ provides that beside the Supreme Court, there shall be five classes of criminal court:-

- Session Courts
- Metropolitan Session Courts
- First class magistrate
- Second class Magistrate
- Third class Magistrate

Courts of Session:-

In every district there is a Court of Session. District judges shall have power to work as a Court of Session it has jurisdiction to give death sentence to confirm by, the High Court Division. When the Court of Session is situated in a metropolitan area is called the court of the metropolitan session.

⁶²section 15 of the Civil Courts Act 1887

⁶³ section 25 of the Civil Courts Act 1887

⁶⁴ Supra note

⁶⁵section 6 of the Code of Criminal Procedure ,1898

In has following types of jurisdiction

- i) Original jurisdiction.
- ii) Appellate jurisdiction
- iii) Revisional jurisdiction
- iv) Jurisdiction as to transfer or with draw a case.

Additional session court:

The court of additional session judge shall exercise same powers like session judge court. When additional session judge situate in Metropolitan area is called additional metropolitan session judge.

Joint session court:

Joint session judge may exercise any power authorize by law except a sentence of death or a term exceeding ten years on of imprisonment when join session judge located in metropolitan area is called joint metropolitan session court.

Magistrate Court:

According to 6.2 to the Criminal Code Procedure 2 types of magistrate courts:

1. Judicial Magistrate
2. Executive Magistrate.

According to section 6.3 there shall be four types of judicial magistrate in district & metropolitan area namely:

- A. Chief Metropolitan Magistrate in metropolitan area & chief judicial magistrate to the other.
- B. Magistrate of the first class, in metropolitan area known to be metropolitan magistrate, may give any sentence up to 5 years and fine up to taka ten thousand.

C. 2nd class magistrate:

According to the section 32 of the CRPC 2nd class Magistrate may pass imprisonment up to 3 years including solitary confinement and give fine up to five thousand taka.

D. 3rd Class Magistrate:

According to the CRPC⁶⁶ 3rd class magistrate give imprisonment up to two thousand taka.

⁶⁶section 32 of the Code of Criminal Procedure, 1898

For the purpose of this sub section the word c and Chief Judicial Magistrate Shall includes Additional Chief Metropolitan Magistrate and Additional Chief Judicial Magistrate respectively⁶⁷.

Executive Magistrate:-

Criminal Code Procedure⁶⁸ deals with the executive magistrate shall have the following functions & powers.

In every metropolitan area & district area, the Government shall appoint any person to be an executive magistrate as if thinks fit. & among them shall appoint District Magistrate

- The Government may appoint any Executive Magistrate to be an Additional District Magistrate and they have the same power as like District Magistrate.
- The Government or D.M define local any time to time within which E.M may exercise its power⁶⁹s.

According to Section .4. 2. b. the executive magistrates shall not exercise any judicial function. This court shall do such wonk as like administrative or executive nature, suds as granting of a license, sanctioning a resection or withdrawing from a prosecution etc.

Special Magistrate:-

The Government may confer upon any person all or any of the powers conferred to executive magistrates, such person is called special executive magistrate. The Government may appoint suds officer to do work for a certain period such magistrate will be appointed outside metropolitan area. Such power will not confer on such person who is in below grade of an assistant superintendent of police.

The Government may with the consultation of the High court Division may confer such power upon any person as like judicial magistrate of the first class, second class & third class magistrate.

District Magistrate:

Ordinary power of the 1st class.

- To hear appeal from orders of magistrate relating to accept or rejecting.
- To hear on refer appeal from magistrate 2nd class and 3rd class.

⁶⁷ ibid

⁶⁸ section 10 of the Criminal Code Procedure,1898

⁶⁹ supra

Nari-o-shisunirjatan Daman Tribunal

Nari-o-shishuNirjatanDomon Tribunal has been established under the provision of the Nari-o-shishuNirjatandomonAin 2000. According to the section 26 every district there must be a tribunal of such cases. If the government thinks necessary may consist more tribunal in each district. The tribunal shall be consisted by one judge who is appointed for amongst the district judge⁷⁰.

The speedy trial tribunal:

According to the section 4th the speedy trial act 2002 the government may be notification in the official gazette, may consist one more tribunal if he think fitsand may notify the local limited of each tribunal the president may appoint as session judge on retired session judge of be the judge or special tribunal.

According to the see 5 of the speedy tribunal act the government may by notification of the official gazette may confer any offence to try this tribunal.

Ain-shirinkhula-bigno-kari-oporad (speedy try) Tribunal :-

Ain- Shirinkhula – Bignokari- oporad (speedy try) Ain-2002. The Govt. may by notification of the official gazette consist one or more speedy trial tribunal. This tribunal is comprised with the first class magistrate. This tribunal shall try any offence under this ordinance.

The Environmental court:

The environment court was established under section 4 of the environment court act 2000 consisting at one judge hold port as joint district judge and it will be situated in every headquarters of the division. The government may appoint special magistrate to try any offence for which the punishment is not exceeding 2 tens imprisonment and 10 thousand taka fine the offence mentioned in section 15 of this act where the highest punishment is up to 10 year imprisonment and 10 lakh fine or both.

The environmental appellate tribunal:

The environmental court act 2000 provided the provision of established on environment appellate tribunal under section 12 comprising of a judge port of district judge.

The government may empowered a district and session judge to worth as a judge to the environment appellate court as an extra change and they will follow the proceeding of CRPC in criminal cases and proceeding toe CPC in civil case suit.

⁷⁰section 26 of the Nari-o-shishuNirjatandomonAin 2000

3.4.1 **First Stage** The Government may by notification, appoint some particular magistrates at each station exclusively for judicial work. This can be given effect forthwith without any additional expenses or administrative⁷¹.

3.4.2 **Second Stage**

This should be the nature of separation of judicial function from executive as envisaged in the Code of Criminal Procedure (East Pakistan Amendment) Act, 1957.

3.4.3 **Third or Final Stage**

The final stage would be not only compelling separation of judicial function from executive but also constitution of separate integrated judicial service under the control of High Court Division(HCD), for civil and criminal work right up to the level of the district and session judge⁷². The Law committee also recommended that for creation of an integrated judicial service, it would be necessary to enact new legislation.

In 1987 by an amendment to the Code of Criminal Procedure, President Ersad prepared a bill for separation of judiciary⁷³. However the bill did not see the light of the day.

In Pakistan, separation was done in 1973 and in India in 1974 by an amendment to the Code of Criminal Procedure. In 1990 the issue of separation of judiciary was put into the manifesto of the three parties Alliances Movement against Ersad regime⁷⁴. In every election after 1990 both BNP and AL had avowed commitment in their manifesto that going to power they would separate judiciary from the executive.

After that 14th amendment has been made in the Articles 95, 98, 115 and 116. But they did not deal with the separation of subordinate judiciary from the executive. ShekhHasina as the prime minister in 7th parliament kept echoing her commitment that she would do all for separation of judiciary. A committee was formed headed by the secretary of Law and Parliamentary Affairs. Abdul MotinKhashru, the law minister stated that a bill for separation of judiciary from the

⁷¹ *Supra* 3

⁷² DilaraChowdhury, *Constitutional Development in Bangladesh*, (Dhaka: UPL, 1995) P. 350

⁷³ *Code of Criminal Procedure (Amendment Act) 1987*

⁷⁴ *Supra* 9

executive was under way but nothing more was done⁷⁵. During Bangladesh period, following initiatives were taken for separating judiciary from the executive.

The first attempt was taken in 1976 under a Law Committee headed by Justice Kemaluddin Hossain recommended that subordinate judiciary on the criminal side should be separated from the executive in three stages⁷⁶.

In 1987, second initiative was taken to separate the magistracy by a Bill for amending Code of Criminal Procedure, 1898. However, for unknown reason the Bill could not place before the Parliament⁷⁷. Third initiative, in 1991, a private member's bill was introduced for further amendment the Articles 95, 98, 115 and 116 of the Constitution, for ensuring separation of the subordinate judiciary from the executive branch⁷⁸. The Bill was sent to a select committee, which had carried out about 13 meetings to consider the proposal. However, no further steps were taken to pass the Bill.

3.5 Current Judicial System

As a sovereign state Bangladesh adopted its Constitution on 16 December 1972 and the spirit of separation of judiciary from the executive was inserted in Article 22. Article 22 enumerates that, “the State shall ensure the separation of the Judiciary from the executive organs of the State”⁷⁹. Article 95(1) addressed the method of appointment for the Supreme Court: the President shall appoint the Chief Justice and other judges⁸⁰. In addition Article 116 A provides for independence in the subordinate judiciary while Article 94(4) demands independence of the Supreme Court judges. Article 116 A, enumerates that the judicial officers including the magistrates have been declared to be independent in the exercise of their judicial functions⁸¹. Beside this, under the Articles 115 and 116 of the Bangladesh Constitution, the President makes the appointment and control of judges in the judicial service or as magistrates exercising judicial duties.

⁷⁵ Supra See Note 9

⁷⁶ Md. Halim Abdul, *A Comparative Study of Problems of Constitutionalism in Bangladesh*, (CCB Foundation, 1st Edition 1998)374

⁷⁷ Ibid

⁷⁸ Ibid

⁷⁹ *Article 22 of the Constitution*

⁸⁰ *Article 95(1) of the Constitution*

⁸¹ *Article 116A of the Constitution*

The 16th amendment which has taken place in 2015 creates a criticism all over the country⁸². Because through this amendment, the impeachment power of the judges go to the hands of parliament. So the 16th amendment bears a major concern and it may consider a threat to the independence judiciary. In such situation the judges must be in fear and thus they act dishonestly or act in favor of the parliament⁸³.

So we see theoretically the judiciary is enriched. But problems lie on the deep. In every sphere of appointment of judges both in Supreme Court or subordinate courts, each appointment may accelerate through the interference of executive government. Thus there is a chance of dishonesty in such appointment

3.6 Conclusion

The foregoing discussion makes it clear that though the judiciary is independent in theoretical term but in practice it is not independent. Though the statutory laws ensure its independence but it cannot act properly in practice. This is why it is considered one of the reasons of being disappointed of the parties in going to or in regard to court or court system or proper justice. On the other side here we see that there are so many policy and politics in the judicial system. Even Political party, after coming in the power, promises to act in doing the judiciary independence. But actually they use that power and may establish their privileges. So actually our personal responsibility, after having authority, must be ensured. Then we may ensure the independence of judiciary.

⁸² Islam Mahmudul , *Constitutional Law of Bangladesh*,(Mullic Brothers, 1st Edition 1995)P.584

⁸³ Ibid

Chapter Four

Appointment of Judges in the Judiciary

4.1 Introduction

Section 4.2 of this chapter analyses the issues relating to the appointment of judges in the Supreme Court of Bangladesh. After that section 4.3 discusses the issues relating to appointment of judges in subordinate court. Again section 4.4 of this chapter says about the tenure of judges. Further section 4.5 of this chapter deals with the conditions for independence of judiciary. Section 4.6 deals with the most important part which aims to find out the influence of politics in appointing the judges. Because, in 46 DLR (1994) it was held that the appointment of higher judiciary by the president is considered of putting an influence in the appointment of judges because president is the head of executive body of the government.⁸⁴

4.2 Appointment of Judges in the Supreme Court

The conditions for appointment of judges in higher judiciary should be a healthy one so that man of keen intellect, high legal acumen, integrity and independent of judgment from among the lawyers can be taken as judges⁸⁵. While the provisions for appointment of judges of the Supreme Court in the present Constitution is not healthy enough to satisfy this requirement⁸⁶. Article 95(1) of the constitution states that the chief justice and other judges of the Supreme Court shall be appointed by the president⁸⁷. Thus the appointment depends on the sole wishes of the executive which may create personal favoritism and political bias in the appointments. Unchecked nomination by the executive is not accepted in a democratic country; an objective assessment from the chief justice or consultation with the judiciary is essential to ensure independence of judiciary as has been suggested in the International Congress of Jurist held in New Delhi in 1959⁸⁸.

It is mentionable that though there are no constitutional requirements of consultation with the

⁸⁴46 DLR (1994)

⁸⁵Md. Halim Abdul ,*A Comperative Study of Problems of Constitutionalism in Bangladesh*,(CCB Foundation,1st Edition 1998)348

⁸⁶ Supra

⁸⁷ Article 95(1) of the Constitution

⁸⁸ Supra See Note 2

Chief Justice, a practice of such consultation before appointing judges of the supreme court has been followed by the president. However we will see that this practice of consultation has been violated by the government in recent history of judicial appointments.

Under Article 98 of the constitution, the President is empowered to appoint one or more qualified persons as additional judges for 2 years⁸⁹. But here the objectionable point is the "proviso" of the Article where it is said that the President may appoint such an additional judge as a regular judge or for a further period. This is objectionable in the sense that the power which has given to such judges may greatly hamper in discharging impartial justice.

Under Article 99, a retired or removed judge may be appointment by the President in judicial or quasi-judicial offices and Article 62(2) states that they may also be appointed as a Minister, Deputy Minister, or President which are not regarded as profitable posts⁹⁰. This provision is a great hindrance to the independence of judiciary in Bangladesh. Chowdhuri Badrul Haider in his article "Evolution of the Supreme Court of Bangladesh" states that opening up of opportunities for appointment after retirement will serve as a temptation and temper with his independence during the concluding period of his service⁹¹.

The International Law Commission Report also holds the same view that where there is any chance for the judges to be appointed in honorable posts after their retirement or removal, impartial judgment may not be expected from them especially where the government itself is a party to a suit⁹².

The ultimate consequences of Articles 95, 98 and 99 is that only those lawyers would be appointed as judges who are the members of the ruling party or who are likely to favor the government. So here no independence of judges is required since they are the persons in favor of the ruling party. Thus if they act impartially they may be in fear of being sacked.

In 2001 before the Awami League Government ended its term, it appointed some additional Judges in the High Court Division on two occasions⁹³. In the first instance in February 2001 the

⁸⁹ Article 98 of the Constitution

⁹⁰ Articles 99 and 62(2) of the Constitution

⁹¹ Badrul Haider Chowdhury, *Evaluation of the Supreme Court of Bangladesh*, (Dhaka: Dhaka University, 1990) p. 168

⁹² M. Jashim Ali Chowdhury, *The Constitutional Law of Bangladesh*, (NUB 1st Edition 2010) p. 441

⁹³ Supra See Note 41

government appointed 9 Additional High Court Judges under Article 98 of the Constitution. After two years in February 2003 the confirmation of these appointments as regular judges came to be considered by the BNP led coalition government⁹⁴. However, the government did not confirm the services of 7 additional judges out of 9. It is alleged that the Chief Justice recommended for confirmation in favor of at least 5 of them, but the government ignored the suggestions breaking the constitutional convention⁹⁵.

4.3 Appointment of Subordinate Court Judges

Subordinate Court judges are of two kinds: persons employed in the judicial service and magistrates exercising judicial functions⁹⁶. The President of Bangladesh appoints them under Art 115 of the Constitution. The original Article 115(1) provided:

Appointments of persons to offices in the judicial service or as magistrates exercising judicial functions shall be made by the President-

- (a) in the case of district judges, on the recommendation of the Supreme Court, and
- (b) in the case of any other person, in accordance with rules made by the President in that behalf consulting the appropriate public service commission and the Supreme Court⁹⁷.

Thus we see that president being head of the executive make rules for appointing the persons in lower judiciary. So this is the interference of executive in the functions of judiciary. So there must be favoritism in appointing judges and the judges appointed must be in fear and may act in favor of the appointer. So here the matter of independence of judiciary must be in question.

Art 115 was amended by s. 19 of the *Constitution (Fourth Amendment) Act 1975*. It now provides, “appointments of persons to offices in the judicial service or as magistrates exercising judicial functions shall be made by the President in accordance with rules made by him in that behalf”⁹⁸. To date (2002), no rules have been made under Article 115 for appointment of

⁹⁴ Ibid

⁹⁵ Ibid

⁹⁶ Ibid

⁹⁷ *Article 115(1) of the Constitution*

⁹⁸ *Article 115 of the Constitution, s.19 (Fourth Amendment) Act 1975*

subordinate court judges⁹⁹. They are appointed in accordance with the *Bangladesh Civil Service (Judicial) Composition and Cadre Rules 1980* and *Civil Service Recruitment Rules 1981* made under Art 133 of the Constitution¹⁰⁰.

In fact, subordinate court judges are members of the civil service known as the ‘Bangladesh Civil Service’ (BCS). Regarding the services of Bangladesh, there are elaborate provisions in the Constitution in Part IX, which contains two chapters. The first chapter (Articles 132-136) deals with the services of the Republic and the second chapter (Articles 137-141) deals with the Public Service Commission. In respect of appointment and conditions of services, Article 133 of the Constitution provides:

“Parliament may by law regulate the appointment and conditions of service of persons in the service of the Republic: Provided that it shall be competent for the President to make rules regulating the appointment and conditions service of such persons until provision in that behalf is made by or under any law, and rules so made shall have effect subject to the provisions of any such law”¹⁰¹.

In addition, Article 136 provides that ‘provision may be made by law for the reorganization of the service of the Republic by the creation, amalgamation or unification of services and such law may vary or revoke any condition of service of a person employed in the service of the Republic’¹⁰².

Under Article 136 of the Constitution, Parliament enacted the *Services (Reorganization and Conditions) Act 1975*, which empowered the government to reorganize the services of the Republic and to prescribe grades, scales of pay and other terms and conditions of services¹⁰³. In the exercise of this power the government created 16 cadres and 22 sub-cadres of different services under the *Bangladesh Civil Service (Reorganization) Order 1980*. In 1986, by

⁹⁹LatifurRahman, *Judicial Independence and Accountability of Judges and the Constitution of Bangladesh*, 20 BLD (2000), Journal 85

¹⁰⁰ M.chowduryJashim Ali, *The Constitutional Law of Bangladesh*, (NUB, 1st edition 2010)p.452

¹⁰¹ Article 133 of the Constitution

¹⁰² Article 136 of the Constitution

¹⁰³ Md.HalimAbdul, *A Comperative Study of Problems of Constitutionalism in Bangladesh*, (CCB Foundation, 1st Edition, 1998)p345

abolishing all sub-cadres, 30 cadres have been created¹⁰⁴. Moreover, according to the proviso of Article 133 of the Constitution, the government made the *Bangladesh Civil Service Recruitment Rules* 1981 for recruitment of persons in the service of the Republic¹⁰⁵.

Persons employed in the judicial service are members of the BSC (Judicial) cadre and they are designated as Assistant Judge, Senior Assistant Judge, Joint District Judge, Additional District Judge and District Judge.

Under the existing system, appointments to the rank of Assistant Judge are made by direct recruitment on the basis of competitive examinations conducted by the Public Service Commission (PSC). Appointment to any post higher than that of Assistant Judge are made by promotion of officers at the stage immediately below that stage.

In order to fill the vacant posts of Assistant Judge, the Ministry of Law, Justice and Parliamentary Affairs (MLJPA) refers the matter to the Ministry of Establishment (ME) and the ME sends it to the PSC for selection of candidates¹⁰⁶. The PSC conducts tests and examinations for selection of suitable persons for appointment to the posts of Assistant Judges and recommends the list of successful candidates to the Ministry of Establishment (ME). The ME submits the list of selected candidates to the Prime Minister for approval and then the formal appointments are made by the President or an officer authorized by him. After making the formal appointments, the ME sends the list of appointees to the Ministry of Law, Justice and Parliamentary Affairs for their posting¹⁰⁷.

So we see that the appointment of lower judiciary are regulated by several ministry of the government which are the part of executive government. On the other hand, in case of promotion of the judges, the functions also regulated by the executive government. Now the question is that if the appointment procedure is regulated by the executive authority then how it could act impartially. But major change has been placed in the judiciary after the MasderHossain Case. In 2007 separate commission was made namely Bangladesh Judicial

¹⁰⁴ Ibid

¹⁰⁵ Ibid

¹⁰⁶ Md. Halim Abdul, Making the Constitution of Bangladesh, (CCB Foundation, 1st Edition 2010) p.333

¹⁰⁷ Ibid

Service Commission and now this commission regulates the appointments along with other functions of the judiciary.

4.4 The appointment process of a Judge

The appointment process of a judge is one of my research criteria. In this chapter we see that there are so many provisions to appoint Supreme Court judges or subordinate court judges. In each appointment there is intervention of executive government. Here we see many anomaly, non-transparency and favoritism in appointing judges which may undermine the judicial independence. So the appointment process both in higher or lower judiciary must be transparent and the intervention of the executive government in appointing judges should be reduced.

Tenure of Judges

As per Article 96(1) of the Constitution, subject to the other provisions of this Article, a judge shall hold office until he attains the age of sixty seven years¹⁰⁸; Article 96(2) states that a judge shall not be removed from his office except in accordance with the following provisions of this article¹⁰⁹; Article 96(3) states that there shall be a supreme judicial council, in this article referred to as the council, which shall consist of the Chief Justice of Bangladesh, and the two next senior judges: provided that if at any time the Council is inquiring into the capacity or conduct of judge who is a member the Council, or a member of the council is absent or is unable to act due to illness or other cause, the judge who is next in seniority to those who are members of the council shall act as such members¹¹⁰.

Article 96(4) states that the function of the council shall be (a) to prescribe a code of conduct to be observed by the judges; and (b) to inquire into the capacity or conduct of a judge or of any other functionary who is not removable from office except in like manner as a Judge¹¹¹. Article 96(5) states that where, upon any information received from the council or from any other source, the president has reason to apprehend that a judge (a) may have ceased to be capable of properly performing the functions of his office by reason of physical or mental incapacity, or (b) may have been guilty of gross misconduct, the president may direct the council to inquire into

¹⁰⁸ Article 96(1) of the Constitution

¹⁰⁹ Article 96(2) of the constitution

¹¹⁰ Article 96(3) of the Constitution

¹¹¹ Article 96 (4) of the Constitution

the matter and report its finding¹¹². In February 1994 the then BNP Government issued a Gazette Notification with a list of 9 judges to be appointed as Additional Judges in the High Court Division¹¹³. The arrangement of these appointments was made without consulting the Chief Justice. It was revealed on the same day when the Chief Justice in inaugurating the lawyers conference of Bangladesh Bar Council stated that he was 'Mr. Nobody'¹¹⁴. This obviously meant that the appointments were made without consulting him. The following day the Supreme Court Bar Association unanimously condemned the action of the President and demanded the cancellation of the notification. In another resolution the Bar requested the Chief Justice not to administer oath to newly appointed judges. The Bar also decided not to accord any regards to any of the newly appointed judges. This decision of the Bar was communicated to the Attorney-General. In view of this strong protest from the Bar, the Government had to cancel the notification and a fresh appointment was made after consultation with the Chief Justice

So if the report goes against the judges then president may remove them from their post under article 96(6) of the Constitution¹¹⁵. Under this article a judge may also resign of his post in writing addressed to the president. So to ensure the independence of judiciary we should ensure the tenure of judges. But still we have a doubt that how far the tenure of the judges are secured.

Conditions for Independence of Judiciary

The independence of judiciary depends on some conditions which are as follows:

4.4.1 Mode of Appointment

4.4.2 Security of Tenure

4.4.3 Adequate Remunerations and Privileges

¹¹² Article 96 (5) of the Constitution

¹¹³ Badrul Haider Chowdhury, *Evaluation of the Supreme Court of Bangladesh*, (1990), Vol. IV, Dhaka University Law Journal p.175

¹¹⁴ Ibid

¹¹⁵ Article 96(6) of the Constitution

4.4.1 Mode of Appointment

As mentioned earlier the conditions for appointment of judges should be a healthy one so that man of keen intellect, high legal acumen, integrity and independence of judgement from among the lawyers gets opportunity to act as judges¹¹⁶. If there is any scope of personal favoritism and political bias in the appointment, men of integrity and sense of justice will not be appointed as judges and when the judges lack these qualities, they will administer justice in a partial way resulting in low quality of judgement and such a situation will convert the people to withdraw their confidence from the judiciary.

So the substantive independence which is the cornerstone of judicial impartiality depends on the method of appointment. As professor Gerner says “If the judges lack wisdom, probity and freedom of decision, the high purpose for which the judiciary is established cannot be realized. The existence of these necessary qualities depends in large measure upon the method by which the judges are selected”¹¹⁷.

The existing methods by which judges are chosen in different countries of the world as follows:

1. Election by the people
2. Election by the legislative and
3. Appointment by the executive¹¹⁸.

Election by the People

This popular system of electing of judges was first introduced in France in 1790. But this system was not a successful, because the masses of voters do not always possess enough knowledge or understanding which is necessary to appreciate the soundness of judicial opinion. It was the result of the elections which took place in 1793 that most of those who were elected were engravers, stone-cutters, clerks, gardeners and common laborers who had no quality to administer justice¹¹⁹. This is why with the advent of Napoleon, this popular system of election was abolished.

¹¹⁶ M. Ershadul Bari, *The Imposition of Martial Law in Bangladesh: A Legal Study*(Dhaka : Dhaka University ,1975) P.168

¹¹⁷ Games Wilford Garner, *Political Science and Government*(American Book Company,1st Edition 1928)P.722

¹¹⁸ R.C Agarwal, *Principles of Political Science*,(S.Chand and Company Ltd. 1st Edition 1976)P.383

¹¹⁹ Supra See Note 28

This method, of course, is now in vogue in some of the States of the American Federal Union. The chief disadvantage of this method is that different political parties nominate their candidates and people being influenced by the parties elect a candidate though that particular candidate has no quality to administer impartial justice¹²⁰. Judges, therefore, elected by this method become subject to popular passion and prejudice. It tends to lower the character of judiciary. Again, it is impossible for a judge to put for the electorate either a programme or a personal success concerning his judicial conduct¹²¹. This is why Laski says that “of all the methods of appointment that of election by the people at large is without exception the worst”¹²².

Election by the Legislature

This method exists in Switzerland and in two States of American Federal Union¹²³. This system is not considered well because in this system judges are nominated by political parties in the parliament and the majority is sure that his candidate must be elected whatever be his quality to administer justice. It is contended that when a judge is elected with the support of majority party, he will have to appease that party and it will be quite impossible for him to administer impartial justice.

4.5 The role of parliament

The role of parliament is one of my research criteria which I use it in defining analytical framework. In this chapter section 4.5.1.2 deals with the electing system of judges by the legislature. This system is not available in our country. But the 16th amendment in the constitution gives the impeachment power of the judges to the hands of parliament which is totally against the independence of judiciary. Because at that time the judiciary must be in fear of being sacked and they must act in favor of the parliamentarian.

¹²⁰ Ibid

¹²¹ Ibid

¹²² Md. Halim Abdul, *A Comparative Study of Problems of Constitutionalism in Bangladesh*, (CCB Foundation) P.344

¹²³ Supra See Note 32, P.345

Appointment by the Executive

The appointment of judges by the executive is the most common and available method of choice and this system is in vogue in nearly all countries. Appointment by the executive may be of two types

- i. By the executive; or
- ii. By the executive after consultation with the court or from a list of nominees presented by the court or with the consent of legislature¹²⁴.

The first method is sometimes contended to be objectionable in the sense that personal favoritism or political consideration may determine the appointments which may lead the judges not to pass impartial judgment. Mr. Briand, when minister of justice of France in 1912 himself declared that the judges had become the prey of the politicians¹²⁵.

The second method is most democratic and objective. Because when the court prepares a list or the Chief Justice consults then he, who is closely associated with the performance of Bar, will select the name of those lawyers who are men of high legal acumen, integrity, independence of justice etc.¹²⁶. Such a method of appointing judges is conducive or helpful to the development of the standard of judicial decisions on the one hand and on the other hand, it is best able to ensure impartial justice in the country.

4.6 Executive control

It is also one of my research criteria. In this chapter section 4.5.1.3 deals with the electing process of judges by the executive. This system is commonly available in our country. Because in all appointment we see the interference of the executive government. Being the head of the executive government, president may appoint Chief Justice or Additional judges or any other judges as expressly stated in the Constitution. So here, there are so many chances to make favoritism in appointing judges. Thus the involvement of the executive government in appointing

¹²⁴ A.V Dicey, *Introduction to the Study of the Law of the Constitution*(London: ELBS and Macmillian, 10th Edition 1973)P.198

¹²⁵ Ibid

¹²⁶ M. Ershadul Bari, *The Dhaka University Studies Part.F* ,(1990),*The Imposition of Martial Law in Bangladesh: A Legal Study*, Vol. IV, P.13

judges should be more transparent and personal responsibility also be ensured to ensure the independence of judiciary in practice.

Security of Tenure

Security of tenure for the judges is most important in securing their independence and impartiality. Security of tenure means that-

- i) Either judges are to be appointed for the whole life i.e. during good behavior or for a definite period extending up to e. g. 65 years or 70 years.
- ii) During this tenure the conditions of service must be such that they can fearlessly administer justice¹²⁷.

In other words, the power of transfer and removal of a judge must be a strict and difficult one to avoid the abuse of power and its capricious or casual operation by the executive¹²⁸. If the transfer or removal of a judge is to depend upon the pleasure of a particular person or the executive, neither independence nor impartiality can be ensured. Because in such a situation judges will be under a constant fear of being removed or transferred from office, if they give decisions against the executive.

Adequate Remuneration and Privileges

In order to ensure the independence and impartiality of the judiciary it is essential to provide judges with adequate remuneration and privileges. Adequate remuneration and privileges include the following three things:

Firstly, the salaries, housing facilities, allowances and other privileges are to be such that they can easily maintain a reasonable standard of life and they do not have to think for corruption or bribery.

Secondly, the conditions of salaries and other privileges must be such that they cannot be varied to their disadvantages during the tenure of their office. This is why in democratic countries

¹²⁷ Islam Mahmudul , *Constitutional Law of Bangladesh* ,(Mullik Brothers, 3rd Edition 2007)P.555

¹²⁸ Ibid

judges are paid their salaries and allowances from the consolidated fund and there is no need for the approval of the parliament for these payments every year¹²⁹.

Thirdly, after retirement, a judge should receive pension so that during his tenure he need not involve in corrupt practices and he can lead a peaceful retired life.

4.7 Consultation with the Chief Justice

The Higher Judiciary of a country is seen by ordinary people not as a necessary part of the government but as a forum of justice; a forum of last hope to get redress against the governmental actions; an image and prestige built on time-honoured undisturbed organization independence with the judiciary is the build of this aspiration by the people¹³⁰. However, in the very recent history of our higher judiciary, people have seen much inconsistency in the appointment or in regard to ensuring the independence of judiciary. Evidence of this dismal or inconsistent scenario is clear from the three spheres of appointment of judges in the higher judiciary. First, appointment of additional judges in the High Court Division under Article 98 of the Constitution; second, confirmation of additional judges as regular judges after the expiry of two years under Article 95 of the Constitution; and third, appointment of the Chief Justice under Article 95 of the Constitution.

MasdarHossain Case¹³¹

After the MasdarHossain Case (1999) the judiciary was finally separated from the executive. Fourth attempt was taken regarding separation of judiciary from the executive in 1995¹³². MasdarHossain along with 441 judicial officers who were judges in different civil courts filed a Writ Petition No. 2424¹³³. The petitioners alleged inter alia that:

- Inclusion of judicial service in the name of BCS (judicial) under the Bangladesh Civil Services (re-organization) Order 1980 is ultra vires the Constitution;

¹²⁹M.Jashim Ali Chowdhuri, *The Constitutional Law of Bangladesh*, (NUB, 1st edition 2010)p.465

¹³⁰ Md. Abdul Halim, *A Comparative Study of Problems of Constitutionalism in Bangladesh*, (CCB Foundation)P.344

¹³⁰Supra See Note 32, P.350

¹³¹*Secretary, Ministry of Finance vs. Md. MasdarHossain and Others* 52 DLR (AD) 82

¹³² Supra See Note 13

¹³³DilaraChowdhury, *Constitutional Development in Bangladesh*, (Dhaka: UPL, 1995) P. 350

- Subordinate judiciary forms chapter II of the part VI (the judiciary) of Constitution and thereby the subordinate judiciary has already been separated by the Constitution. Only the rules under Article 115 of the Constitution and/or enactments, if necessary, are required to be made for giving full effect to this separation of judiciary¹³⁴;
- Judges of the subordinate judiciary being the presiding judges of the courts cannot be subordinate to any tribunal and as such the judicial officers are not subject to the jurisdiction of the Administrative Tribunal¹³⁵.

Ultimately, hearing of the case was held on 1 April 1997. After a long hearing with valuable comments and citations by Dr. Kamal Hossain, Syed Istiaq Ahmed and Mr Amir-Ul Islam, the court delivered its historic judgment on 7 May 1997. Then the government favored an appeal to the Appellate Division but the Appellate Division partly reversed the decision of the High Court Division and gave its landmark decision with 12 points directives on 2 December 1999¹³⁶. The Appellate Division directed the Government to implement these 12 points directives including formation of separate Judicial Service Commission and Judicial Service Pay Commission to separate the judiciary from the control of the executive. However, the successive governments have taken time again and again to delay the process¹³⁷.

Thus a common question arise that how did the judiciary become separated finally? Since the Appellate Division pronounced the judgment in 1999, the successive governments took 23 adjournments to implement the judgment on various pleas up to February 2006¹³⁸. During these seven years' time, the government took very slow steps towards the way of separation of judiciary.

Then the interim caretaker government (2006-2008) headed by Mr. Fakruddin Ahmed from the very beginning of his office adopted a positive and firm outlook with a determination to separate

¹³⁴Article 115 of the Constitution

¹³⁵ Supra See Note 16

¹³⁶Secretary, Ministry of Finance vs. Md. MasderHossain and Others 52 DLR (AD) 82

¹³⁷ Ibid

¹³⁸Md.Halim Abdul , A Comperative Study of Problems of Constitutionalism in Bangladesh,(CCB Foundation,1st Edition 1998)375

the judiciary from the executive¹³⁹. In fact the government took initiatives based on the constitutional principles and 12 point-directives of Appellate Division of MasdarHossain's case.

As a result four service rules namely:

1. Bangladesh Judicial Service Commission Rules, 2007;
2. Bangladesh Judicial Service (Pay Commission) Rules, 2007;
3. Bangladesh Judicial Service Commission (Construction of Service, Appointments in the Service and Suspension, Removal and Dismissal from the Service) Rules, 2007; and
4. Bangladesh Judicial Service (Posting, Promotion, Grant of Leave, Control, Discipline and other Condition of Service) Rules, 2007 were enacted and changes were brought in the existing Code of Criminal Procedure 1898 through Ordinance No II and IV of 2007¹⁴⁰.

Finally the historic journey of the judiciary separated from the executive started functioning from 1 November 2007.

It is very clear to us that despite separation of judiciary, until and unless the government has adequate respect and willingness to implement the verdict of judiciary and all the rules and regulations related to the separation of judiciary, complete independence of judiciary is not possible¹⁴¹.

4.8 Conclusion

This chapter bears a major concern of this dissertation. Because it describes the issues relating to appointment procedure and other important issues which influence the judicial system very swiftly. Here we see that political influence in appointing the judges destroy the pillar of independence of judiciary. Most of the cases the President do not consult with the chief justice in appointing judges. Appointment of judges by one political party is totally or partially cancelled by other party. Besides these in the existing law we have some lacuna which we have to be improved. In every appointment we see the interference of executive government in judicial functions. So here there is a chance of biasness or favoritism in appointing judges. On the other hand during the course of discharging their functions they may act in favor of his or her appointer or they may be in fear of being sacked from their post if they do not act in favor of ruling party.

¹³⁹ Ibid

¹⁴⁰ Supra

¹⁴¹ Ibid

Chapter Five

Findings, Recommendations & Conclusion

5.1 Findings:

- The Constitution of Bangladesh explicitly guarantees the separation of powers and judicial independence. Article 22 states that "the State shall ensure the separation of the judiciary from the executive organs of the State"¹⁴². However, these constitutional directives remain only partially implemented in practice.
- The landmark judgment in *Secretary, Ministry of Finance v. Masdar Hossain* (1999)¹⁴³ directed the establishment of a separate judicial service and laid down 12 directives to ensure independence of the lower judiciary. Although significant progress followed, full institutional independence is still lacking.
- Judicial appointments—particularly in the Supreme Court—are still largely controlled by the executive, especially through the President, as per Articles 95 and 98 of the Constitution¹⁴⁴. This weakens the principle of separation of powers.
- Unlike other democracies, Bangladesh does not have a Judicial Appointments Commission or similar independent body. This leaves space for political influence, favoritism, and lack of accountability¹⁴⁵.
- The judiciary does not have full control over its own budget and depends on the Ministry of Finance and Ministry of Law for administrative decisions¹⁴⁶. This compromises institutional autonomy.
- Despite formal separation, the lower judiciary is still administratively supervised by the Ministry of Law, Justice, and Parliamentary Affairs, making judges susceptible to external pressure, particularly in politically sensitive cases¹⁴⁷.
- Due to insufficient manpower, infrastructure, and case management systems, the judiciary struggles with huge backlogs⁷. This hampers timely justice and weakens public confidence.

¹⁴² The Constitution of the People's Republic of Bangladesh, Article 22.

¹⁴³ *Secretary, Ministry of Finance v. Masdar Hossain*, 52 DLR (AD) (2000) 82.

¹⁴⁴ The Constitution of Bangladesh, Articles 95 and 98.

¹⁴⁵ Ain o Salish Kendra (ASK), *Judicial Independence in Bangladesh*, 2018.

¹⁴⁶ Transparency International Bangladesh, *Judiciary in Bangladesh: A Diagnostic Study*, 2015.

¹⁴⁷ Law Commission of Bangladesh, *Separation of Judiciary Report*, 2007.

- Due to perceived partisanship, lack of accountability, and delayed justice, citizens increasingly question the judiciary's ability to function independently and fairly.
- Countries like India (Collegium System) and the UK (Judicial Appointments Commission) show relatively better institutional structures for maintaining independence and transparency in the judicial process.
- Without legal and institutional reforms, including the establishment of an independent appointments body, financial autonomy, and full implementation of the Masdar Hossain directives, true judicial independence will remain unachieved in Bangladesh¹⁴⁸.

¹⁴⁸ UNDP Bangladesh, *Strengthening Rule of Law in Bangladesh Programme (ROLBD)*, 2021.

5.2 Recommendations:

The foregoing discussion makes it clear that there are so many obstacles or problems behind the making of judicial body independent in practice. The appointment procedure, the rules of administering judicial body are very complicated. In spite of having honesty sometimes it is seen that judges cannot act impartially in practice because of political or other influence or intervention. In 2001 before the Awami League Government ended its term, it appointed some additional Judges in the High Court Division on two occasions. In the first instance in February 2001 the government appointed 9 Additional High Court Judges under Article 98 of the Constitution. After two years in February 2003 the confirmation of these appointments as regular judges came to be considered by the BNP led coalition government. However, the government did not confirm the services of 7 additional judges out of 9. It is alleged that the Chief Justice recommended for confirmation in favour of at least 5 of them, but the government ignored the suggestions breaking the constitutional convention. In the second instance in July 1, 2001 the Awami League Government appointed 9 Additional High Court Judges. On July 2, 2003 the BNP Government did not confirm the services of 4 of these 9 additional judges. It is contended that the Chief Justice had recommended in favor of all of them¹⁴⁹. It is to be mentioned that following the non-confirmation of 7 judges out of 9 additional judges in February 2003 three Writ Petitions were moved to the High Court Division; a rule issued on May 05, 2003 on the Government asking it to explain why non-appointment of additional judges should not be declared illegal. The Appellate Division has, however, stayed the proceedings of three writs till September 2003 following a Government petition¹⁵⁰.

The Constitution of Bangladesh guarantees that judges shall be independent in the exercise of their functions. In addition there are some other features of the constitutional arrangements and judicial administrations which strengthen judicial independence. But in practice the scenario is much more different than theory. The mode of appointment is not healthy enough to ensure the total independence of judges. Besides these there are some other weaknesses behind these aspects.

¹⁴⁹ Haider Badrul Chowdhury, *Evaluation of the Supreme Court of Bangladesh*, (1990), Vol. IV, Dhaka University Law Journal p.175

¹⁵⁰ Ibid

Although judicial independence is guaranteed by the constitution of Bangladesh, there are numerous important weaknesses which undermine the judicial independence. The criteria for appointment of judges in Bangladesh are not explicitly published. Only some specific eligibility criteria have been stated in the Constitution and in the other statutory instruments in appointing judges. In some cases, principles of seniority and quota are followed, but other criteria or qualities considered in making judicial appointments are not made explicit or publicly known. The executive enjoys almost exclusive power in appointing judges at all levels. In appointing Supreme Court judges, there is a Constitutional convention to consult with the Chief justice but this convention has not been followed at all.

The process of judicial appointments is very secretive and there is no scope for public scrutiny. Furthermore there is no participation of members of the legal profession in making judicial appointments. Although judges have a fixed tenure of office, in some cases their security of tenure is not adequate. Firstly the tenure of Additional Judges of the High Court Division is not secure. They are appointed for a term of two years and after their expiration of term they are appointed as permanent judges. In some cases after the expiration of the terms of two years they are not appointed to permanent judicial offices. Secondly subordinate court judges hold office during the pleasure of the President and after completion of 25 years of their service they may be forced to retire office at any time before attaining the mandatory retirement age simply by reason of public interest. Judicial corruption is a serious problem for the judiciary in Bangladesh. In most cases the court staff are involve in the corruption and they receive bribe directly from the party or through the lawyers. In some cases the judge is involve in corruption but it is very difficult to prove their involvement. This problem seriously undermines public confidence in the judiciary.

Since there are numerous problems in making the judiciary independent in practice, we have also many reliable ways to solve the problems. The criteria for appointment of judges should be made explicit and publicly known. The mechanisms for judicial appointment should be made transparent and open to public scrutiny. For the appointment, promotion, transfer and discipline of judges at all levels an independent commission should be established with member from executive, legislature, judiciary, legal profession and lay persons. Appointment of additional judges of the Supreme Court should not be made as regular practice. Additional judge may be

appointed to meet urgent necessity, particularly to reduce backlogs of cases or to solve temporary shortages of judges. The judiciary, particularly the subordinate criminal judiciary should be separated from the executive branch of the government. For the sake of security of tenure of magistrates of the subordinate criminal judiciary, full-time judicial magistrates should be appointed to exercise judicial functions. Provision should be made to ensure the security of tenure of subordinate court judges and also they may not be retired forcibly from their post.

We know in a democratic country the sovereign power vests on the hands of the people. So when we talk about the personal or individual independence of the judges, we also ensure the vested responsibilities towards the litigants or the country or the countries people that the judges should need to do from his personal way. If a judge is able to ensure his or her personal responsibility in performing his or her official duty then we may expect impartial judgment also; though state should ensure the environment to act the judges impartially in practice.

Here we see that political influence in appointing the judges destroy the pillar of independence of judiciary. Most of the cases the President do not consult with the chief justice in appointing judges. Appointment of judges by one political party is totally or partially cancelled by other party. Besides these in the existing law we have some lacuna which we have to be improved. In every appointment we see the interference of executive government in judicial functions. So here there is a chance of biasness or favoritism in appointing judges. On the other hand during the course of discharging their functions they may act in favor of his or her appointer or they may be in fear of being sacked from their post if they do not act in favor of ruling party.

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The process of judicial appointments is very secretive and there is no scope for public scrutiny. Furthermore there is no participation of members of the legal profession in making judicial appointments. Although judges have a fixed tenure of office, in some cases their security of tenure is not adequate. Firstly the tenure of Additional Judges of the High Court Division is not secure. They are appointed for a term of two years and after their expiration of term they are appointed as permanent judges. In some cases after the expiration of the terms of two years they are not appointed to permanent judicial offices. In February 1994 the then BNP Government issued a Gazette Notification with a list of 9 judges to be appointment as Additional Judges in the High Court Division¹⁵¹. The arrangement of these appointments was made without consulting the Chief Justice. It was revealed on the same day when the Chief Justice in inaugurating the lawyer's conference of Bangladesh Bar Council stated that he was 'Mr. Nobody'¹⁵². This obviously meant that the appointments were made without consulting him. The following day the Supreme Court Bar Association unanimously condemned the action of the President and demanded the cancellation of the notification. In another resolution the Bar requested the Chief Justice not to administer oath to newly appointed judges. The Bar also decided not to accord any regards to any of the newly appointed judges. This decision of the Bar was communicated to the Attorney-General. In view of this strong protest from the Bar, the Government had to cancel the notification and a fresh appointment was made after consultation with the Chief Justice.

Secondly subordinate court judges hold office during the pleasure of the President and after completion of 25 years of their service they may be forced to retire office at any time before attaining the mandatory retirement age simply by reason of public interest. Judicial corruption is a serious problem for the judiciary in Bangladesh. In most cases the court staff are involve in the corruption and they receive bribe directly from the party or through the lawyers. In some cases the judge is involve in corruption but it is very difficult to prove their involvement. This problem seriously undermines public confidence in the judiciary.

¹⁵¹HaiderBadrulChowdhury , *Evaluation of the Supreme Court of Bangladesh*,(1990),Vol. IV, Dhaka University Law Journal p.175

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We know in a democratic country the sovereign power vests on the hands of the people. So when we talk about the personal or individual independence of the judges, we also ensure the vested responsibilities towards the litigants or the country or the countries people that the judges should need to do from his personal way. If a judge is able to ensure his or her personal responsibility in performing his or her official duty then we may expect impartial judgment also; though state should ensure the environment to act the judges impartially in practice. . In organic term judiciary is independent but if we see the above discussion then it shows that judges are not free in discharging their duties.

Bibliography

Books

1. Islam Mahmudul, *Constitutional Law of Bangladesh* ,(Mullick Brothers, 1st edition 1995)
2. Md.AbdulHalim, *A Comperative Study of Problems of Constitutionalism in Bangladesh*,(CCB Foundation, 1st Edition,1998)
3. M.ChowdhuryJashim Ali, *The Constitutional Law of Bangladesh*,(NUB,1st edition 2010)p.444
4. Article 2.02 of Montreal Declaration 1983 ;Article 2 of UN Basic Principles 1985
5. Md.Abdul H, “A Comperative Study of Problems of Constitutionalism in Bangladesh”,(CCB Foundation, 1st Edition,1998)p363
6. Islam Mahmudul , *Constitutional Law of Bangladesh*,(Mullic Brothers, 1st Edition 1995)P
7. R.C Agarwal, *Principles of Political Science*,(S.Chand and Company Ltd. 1st Edition 1976)P
8. Games Wilford Garner, *Political Science and Government*(American Book Company,1st Edition
9. ¹ M. Ershadul Bari, *The Imposition of Martial Law in Bangladesh: A Legal Study*(Dhaka : Dhaka University ,1975)
10. ¹ Games Wilford Garner, *Political Science and Government*(American Book Company,1st Edition 1928)
11. ¹ A.V Dicey, *Introduction to the Study of the Law of the Constitution*(London: ELBS and Macmillian, 10th Edition 1973)

Journals

1. MdAwalHossainMollah, Independence of judiciary in Bangladesh: an overview (2012) 54 (1) *International Journal of Law and Management*
2. Shafiqul Islam Mohammad ,NashirUddin and Chowdhury Abdullah Al-Hossienie, ‘The Independence of Judiciary in Bangladesh; A new Milestone and its challenges’(2008) 17 *Bangladesh Journal of Public Administration*
3. Tania Lipi,Separation of judiciary from the executive; an evaluation and Analysis (November, 2013) *Journal of Research Gate*

Statutes

Code of Criminal Procedure, 1898

Internet material

1. Zaman Moniruz, *Independence of Judiciary in Bangladesh* (4th October, 2012) < <https://moniruzzamanjuror.wordpress.com/2012/10/04/independence-of-judiciary-in-bangladesh/>> (Last accessed on 15th June, 2016)
2. Assignment point, '*Report on Judiciary System of Bangladesh*'(2016) <<http://www.assignmentpoint.com/arts/law/report-on-judiciary-system-of-bangladesh.html>> (Last Accessed on 20th June, 2016)
3. The available information relating to history of judiciary in British Period are found in the following address< http://www.kkhsou.in/main/polscience/judicial_system.html > 6th January 2015
4. Barrister Syed Istiaq Ahmed, *Workshop of Independence of the Judiciary, (2003)*, volume Number 55 Available information may be found on the following web site<http://archive.thedailystar.net/judicial_system.htm>21st July 2003

Legislation:

1. *Montreal Declaration 1983,*
2. *Courts Administration Act 1993*
3. *UN Basic Principles 1985*
4. *Civil Courts Act 1887*
5. *The Labour Court Act 2006*
6. *The Artha-Rin-Adalat Ain act 2003*
7. *The Arbitration Tribunal Act 2001*
8. *The Code of Criminal Procedure ,1898*
9. *The Nari-o-shishu Nirjatandomon Ain 2000*
10. *Code of Criminal Procedure (Amendment Act) 1987*
11. *Beijing Statement 1995*

Cases:

1. 57 DLR 1908, 395
2. *State vs. Chief Editor, Manabjain*(2005)
3. AIR 1965 SC 745