

Judiciary in Bangladesh: Developments and Challenges

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ABSTRACT

The present legal and judicial system of Bangladesh owes its origin back to two hundred years of British rule in the Indian Sub-Continent and Pre-British period tracing back to Hindu and Muslim administration. It passed through various stages and has been gradually developed as a continuous historical process. Bangladesh judiciary is organized and governed according to the constitutional and legal provisions. The judiciary acts through superior judiciary having Appellate, Revisional and original jurisdiction, and Subordinate judiciary. In this study, it has been found that several constitutional provisions are very crucial and favorable for independence of judiciary in Bangladesh. It has also been found that from British period the judiciary was not separated and independent from the interference of executive. As a result the judiciary was not strong enough to control and hold government officials accountable to the legal system of Bangladesh. One of the important findings of this study, despite separation of judiciary, the interference of executive is still continuing.

Key Words : Judiciary, Constitution, Amendments

INTRODUCTION

Judiciary forms the basic element of the statehood shaped by deliberate policies to establish social justice and equality for all citizens. In a modern society it must, therefore, reflect the fundamental principle of state policy as well as universal value and ethics of international human rights regime, which are not fundamentally altered by cultural or class differences. The Judiciary comprises all courts and tribunals which performs the delicate task of ensuring rule of law in the society. A society structure remains coherent and cohesive with the aid of a sound judicial system. Judiciary redresses the grievances of the people and resolves disputes. A sound and independent Judiciary is the *sine qua non* and pre-requisite of a healthy society. "A society without crime and dispute is unthinkable; and society laden with the influx of crimes and disputes is not at all safe for human habitation. So a balanced human existence can be maintained by a Judiciary system of administration meant for justice. But if the judiciary is not independent, it can hardly be expected to render impartial justice"¹.

Bangladesh is a parliamentary democracy and a secular country. Though Bangladesh is in a relatively stable period in terms of politics and security; the Government of Bangladesh has established an ambitious economic and social reform agenda including stronger international and regional cooperation. The country is still facing challenges in the judiciary system and the rule of law. This is

partly due to the confrontational politics practiced by the two main political parties over decades, reflecting longstanding personal enmity between the leaders of *Awami* League and Bangladesh Nationalist Party. Due to this confrontational politics the domestic situations have been very much unfavorable for the development of democratic culture. This could have significance for countries in Asia, the Middle East and North Africa, since Bangladesh would then strengthen its standing as a successful, secular and civilian democracy in a country with a predominantly Muslim population.²

A thorough analysis of the evolution of the ancient judicial system reveals that the rule of law was not the guiding force rather it was based deeply influence by caprice and caste. The executive and Judiciary was not separate and the former influenced and controlled the later through different mechanisms. It includes the considerations like appointment, tenure and discipline of judges. Hence, from the ancient period, there is interference from the executive upon the functioning of the Judiciary in different manner. In the present era also the trend is continued though probably in a lesser degree.³ The appointments of judges and other functions of judiciary have been dominated by the influential political powers. That is why there always have been some chances of impartiality in the decisions of judiciary.

One of the primary objects for which a state was established in the society was the creation and protection of individual rights. But an independent organ as the means through which this object might be accomplished has been recognised and existed from early times. This independent organ is Judiciary. An investigating look from broader point of view will review the idea that the existence of a Judiciary does not depend on the existence of a legislature. Because the legislature in a sense does not create the rights of individuals, it only recognises the rights. Rights originate in the society as ultimate results of mutual interactions among individuals and other social organizations. A society without a legislative organ is conceivable and indeed fully developed legislative organs did not make their appearance in the life of the state until modern times, but a civilized state without judicial organs is hardly conceivable.⁴ This is why even in the absence of legislative organs the courts might apply rules derived from other sources like from their own previous decisions or from customs and thereby recognise rights of individuals.

There are three separate organs of the government in a democratic set up *i.e.* the Executive, the Legislature and the Judiciary. The Judiciary includes all courts and tribunals of the land, the principal function of which is to interpret law, adjudicate disputes and protect rights of the citizens. An independent and effective judiciary is vital requirement of a democratic country to function effectively and also plays a key role in the overall integrity system of a country and judicial corruption undermines the rule-of-law. Judiciary is the fundamental component of the statehood. It ensures social justice and equality of all citizens of the land. Thus, the principal duty of Judiciary is to reflect the fundamental principle of state policy and evoke universal value and upholds ethics of international human rights regime irrespective of cultural or class different. A sound judicial system can establish a healthy and prosperous democratic structure. The citizens go to the Judiciary with a hope that their grievances will be addressed. If the Judiciary is failed to perform this duty, it erodes the faith and confidence of the people in basic fabric of the democratic system.⁵

In Bangladesh the Supreme Court stands as the apex of the judicial system. It consists of the High Court Division and the Appellate Division. The Supreme Court serves as the Guardian of the Constitution and enforces the fundamental rights of the citizens. Subordinate courts consists of Civil and Criminal Courts exists at Districts and Thana levels as well as special and tribunal courts such as the Administrative Tribunal, Family Courts, Village Court (VC), Labour Tribunal, Loan Court, Commercial, Municipal and Marine Courts etc.⁶

Development and Challenges:

The Constitution of Bangladesh has mentioned about the three vital organs of the State and

Judiciary is one among them, originated in 1971. Since then the country has experienced different systems of government. It includes socialist democracy, parliamentary and presidential forms of democracy, military rule, non-party caretaker government, etc. However, the judiciary has been treated differently by these different forms of government.⁷ Bangladesh political system has been characterized by military intervention. Besides this the history of Bangladesh has also seen one-party dominance, military bureaucratic alliance, political conflict and instability. In December 1971, Bangladesh got independence. It was happened only after a nine-month long liberation war of East Pakistan with the government of Pakistan and of course with the military intervention of India.⁸

The parliamentary form of government and a command economy was adopted between 1972 and 1975 by Prime Minister Sheikh Mujibur Rahman and the ruling *Awami* League (AL). Domestically, Bangladesh was heavily relied on a strong public sector. It undertook a policy of nationalization. It was done to rebuild itself after the war. The AL was the main advocate of independence. It became the dominant party after the independence. The party also adopted an authoritarian style of governance. Sheikh Mujib Rahman replaced the parliamentary government with a one-party presidential system called the Bangladesh Krishak Sramik Awami League (BAKSAL). Sheikh Mujibur Rahman went on to become the President of the country.⁹ Sheikh Mujibur Rahman was the first Prime Minister of Bangladesh. He enacted the International War Crimes (Tribunals) Act 1973. Thousands of people were investigated under this Act. It also includes the Pakistani Army officers. As many as 195 Pakistani Army officers were convicted with war crimes after the investigation. It is interesting to note that no Bangladeshi citizen was identified as war criminals. However, convicted army officer were granted amnesty after the establishment of a tripartite agreement between the Bangladesh-India-Pakistan in 1974.¹⁰

The Fourth Constitutional Amendment Act prepared foremost changes into the Constitution. It was done under the regime of Sheikh Mujibur Rahman. He adopted the presidential system of government instead of the parliamentary system. He also adopted a one-party system instead of a multi-party system. The authority of the Parliament was curtailed. The vital change was Judiciary lost much of its importance in terms of Liberty. The power of the Supreme Court was weakened in terms of its command over the protection and enforcement of basic rights. The Articles 95, 98, 109, 116 and 117 were also amended.¹¹ The two incidents brought a major shift at both domestic and international levels for Bangladesh. That were military coup of August 1975 and the assassination of Mujibur Rahman resulted. The military government under General Ziaur Rahman (1975 – 1981) initiated vital changes in relationship with some major countries of the world. It promoted Bangladesh's relations with the industrialized nations of the West. It also promoted relations with People's Republic of China. It tries to foster relations with the oil-rich Gulf countries also. The new regime undertook economic liberalization. It advocated foreign investment. It also announced an export-oriented policy in the 1980s.

The Bangladesh Nationalist Party (BNP) was founded by General Ziaur Rahman in 1978; it provided the challenge to the AL in every respect. The BNP gave importance to a separate Bangladeshi identity. It also promoted a religious concept of nationalism. The party highlighted the differences with the Bengali speaking community in India. The major changes brought in the Constitution were in 1977. Religious-political parties like The Jamaat-i-Islami, which opposed the Bengali nationalist movement and actively collaborated with the Pakistani Army during the independence war were being revived.¹² In the area of Judiciary Ziaur Rahman restored its independence by removing the restrictive clauses and provisions imposed under the Constitution Fourth Amendment Act introduced by Sheikh Mujibur Rahman in January 1975.¹³ The military government was given legitimacy by the Fifth Amendment. The amendment provided a Constitutional blanket cover to the government. It all happened after the 1975 assassination of the then President Sheikh Mujibur Rahman in a military coup. The Constitution was not fully restored when the Constitution (Fifth Amendment) Act was passed. The

military coup was happened on 15th August 1975. It was by any account was not a simple assassination but a victorious one as argued by its proponents. The Amendment was enacted by the parliament in 1979 in the constitutional manner. So, it was not arbitrary. The regimes from August 15, 1975 headed by Khandaker Mushtaque Ahmed, Abu Sadat Mohammad Sayem and Ziaur Rahman were declared illegal on 29 August. However, the Appellate Division on 1 September 2005 stayed the Judgment.¹⁴

In 30 May 1981 is another black day for Bangladesh when President Ziaur Rahman was killed in Chittagong by some disgruntled. The effort to establish a civilian rule was failed. General Mohammad Ershad took over the government in March 1982. The Jatiya Party (JP) in was created in January 1986, A party was also created by Ershad with an aim to materialize his political ambitions. The Eighth Constitutional Amendment was made in 1988. It proclaimed Islam as the state religion in Bangladesh. Ershad was able to play the BNP and the AL off each other. He was benefited from the personal rivalries between Sheikh Hasina (AL) and Begum Khaleda Zia (BNP). The role of the military in Bangladesh political system was strengthened during his rule.¹⁵ In June 1982, Ershad came to head on collision with the lawyers when he introduced a decentralization plan for the Judiciary. On 10 October 1984 lawyers brought out demonstrations against the transfer of the permanent benches of the High Court from the Capital of Dhaka to six other district towns. When the matter was brought before the court, the Appellate Division of the Supreme Court declared the Eighth Constitutional Amendment Act relating to the transfer of the permanent benches of the High Court ultra vires.¹⁶

The Constitution (Eighth Amendment) Act 1988 was also become controversial. It was passed amending Article 100 of the Constitution. It set up permanent Benches of the High Court Division outside the capital city Dhaka. It was challenged by two writ petitions on the ground that High Court division of the Supreme Court with judicial power over the republic is a basic structure of the Constitution and hence cannot be altered or damaged. Thus, the said amendment is not legal. However, the said two writ petitions were dismissed by a division Bench of the High Court Division.¹⁷ The amendment power conferred on the Constitution of the Republic of Bangladesh under Article 142 is not an unlimited power. This power conflicts with the concept of supremacy of the Constitution which is provided by Article 7 of the Constitution. The said Article has put restriction on the power of amendment. Therefore the said Article 7 is fundamental and unalterable. There is also counter argument to this notion. It says independence of Judiciary and separations of powers are basic features of the Constitution. According to this view the impugned amendment has not affected either of the aforesaid concepts. Under article 142, the power of amendment is a constituent power. Hence, it is not any ordinary legislative power.¹⁸

Thanks to a popular uprising, the era of military and military-ruled governance ended in December 1990. The BNP was back to power in the elections of February 1991 under the leadership of Khaleda Zia. The parliament unanimously amended the constitution and reintroduced the parliamentary form of government in 1991 which saw the consensus among between the AL and the BNP. All actions taken by the caretaker government headed by Justice Shahabiuddin Ahmed was approved during the regime of BNP. It was done by enacting the Eleventh Constitutional Amendment Act 1991. It also gave seal to the appointment of Chief Justice Shahabuddin Ahmed as the Vice President.¹⁹ Later on he became Acting President when Ershad had resigned. Besides this, the Act also enabled the return of Acting President Shahabuddin Ahmed to his preceding place as the Chief Justice of Bangladesh. The Fourteenth Constitutional Act 1994 provided for reservation of 45 spaces for women on a comparative demonstration basis for the next 10 years. It also provided for the increase in the retirement time of Supreme Court Judges from 65 to 67 years. It also put on view of portrayal of the President and the Prime Minister in all government, semi-government and autonomous offices and diplomatic missions out of the country.

In elections held between 1991 and 2006 Power alternated between the BNP and the AL. However, the rigged election of spring 1996 was an exception. The AL came to power in June 1996. The BNP and

its coalition partners, including religious-political parties like the Jamaat-e-Islami (JI) came to power in the election of October 2001. So trend was after 1978 parties which favour an admixture of religion and politics gained strength and influence. In the late 1990s and the early 2000s Islamist militant groups were spread across. The country was marred by chaos as the outgoing government and the opposition parties were unable to reach an agreement on various fronts including the question on who should be leading the interim government prior to the election in 2006.²⁰ In January 2007, Street agitation, violence and months of uncertainty led to the appointment of a military-backed technocratic caretaker regime under a constitutional provision which was enacted in 1996. The government tried to alter the institutions and bring out reform on a political culture which had established a history of uncertainty, corruption and acrimony during the fifteen years of democratic experience.

The 13th Amendment in March 1996 introduced a novel idea of The Caretaker government (CG) which is a unique feature of Bangladesh's political system. The non-partisan Caretaker Government will be formed within 15 days of the dissolution of the Parliament. The Article 58 C says the President shall appoint as Chief Adviser the person who among the retired Chief Justices of Bangladesh retired last. It goes on to say if this was not possible the Chief Justices of Bangladesh retired next before the last retired Chief Justice, or the retired Judges of the Appellate Division who retired last or the retired Judges of the Appellate Division retired next before the last such retired Judge²¹ could be appointed as head of the Caretaker Government. However, if these conditions cannot be met then the President shall, after consultation, as far as practicable, with the major political parties, appoint the chief advisor from among citizens of India.²¹

Justice KM Hasan, the retired Chief Justice of the Supreme Court was to be the Chief Advisor of the caretaker government according to the Constitution, However, the then opposition parties objected to Hasan's candidature because of his proximity with Bangladesh Nationalist Party (BNP). The retirement age of Chief Justice from 65 to 67 was increased by the Khaleda Zia government. For this, the government amended the Constitution in 2004. It allows Hasan to head the caretaker regime in the event of an election. Hasan quietly withdrew himself and became incommunicado. The opposition parties suggested few other names but BNP refused to accept any of the names. Hence it was left to the Army to move in and occupy the available space.²² Dr. Fakruddin Ahmed, former Bangladesh Bank Governor and a well known economist was appointed as the Chief Advisor of the military-backed Caretaker government on January 12, 2007. It ushered a new sense of relief from the continuing violence among the people. The caretaker government of Fakruddin Ahmed which was backed by Army aims to prepare a new voter list and to severely deal with corruption.

The state of emergency in Bangladesh (2007-2008) put the country's judiciary under certain challenges with a far-reaching bearing on judicial statesmanship, resurfacing the old but difficult question of the proper judicial role in Emergency. The 2007 Emergency regime initiated an array of reforms in politics and legal and judicial spheres, but at the same time clipped the rights of the people and the Judiciary's protective authority. The proper role of the judiciary in such a context should be defined by reference to its ability to maintain the rule of law. The Bangladeshi judicial decisions show that while the Supreme Court High Court Division by and large asserted self-confidence vis-à-vis the overweening Emergency government, its Appellate Division either remained silent or paid undue deference to the executive. By examining the new politics of the senior Judiciary in Bangladesh and the potential reasons that may explain this and having been based on the premises that the law is a site of political contestation while the Judiciary is a political institution constantly negotiating the law with politics. The purpose of the study is that the Judiciary throughout the Emergency regime suffered a crisis of public confidence with negative impacts for its constitutional agency in upholding justice and constitutionalism. While contextualize the need for Judicial Activism during Emergency.

The AL-led alliance emerged victorious in the election held in December 2008. It fetched an unprecedented majority in parliament. In early 2009, the government faced a rebellion of the border

security force, the Bangladesh Rifles (BDR). After that time, government has maintained control of the overall scenario and various institutions have functioned without much hiccup. The government run by *Awami League* was not able to cash on its significant parliamentary mandate in 2011 to initiate policies to provide protections for human rights. The then home Minister did not favour prosecution of members of the Rapid Action Battalion (RAB), who engage in extrajudicial killings. He on the contrary, chose to deny that such violations have happened, even in cases where internal ministry investigations found the trace of violations happened. The violations of human rights continued in different form and there were several new allegations of torture, arbitrary arrest, and enforced disappearances by police.²³

The International Crimes Tribunal established in Bangladesh in March 2010 is nothing but a legacy of the Nuremberg trial held after the World War II. This tribunal established on the basis of the International Crimes Tribunals Act 1973 as amended in 2009 to convict and take action against the perpetrators and their collaborations who committed the crime of genocide, crimes against humanity and war crimes in the territory of Bangladesh in 1971.²⁴ Bangladesh is a key participant as the first nation in South Asia to become a state party to the Rome Statute (for the International Criminal Court) and a signatory to the International Covenant on Civil and Political Rights (ICCPR).²⁵ In the matter of selection of judges, the decision of the chief justice should be paramount in the area of legal skill and suitability for the appointment. However, in the area of antecedents the opinion of the executive should be paramount. The High Court on 6 June, 2010 asked the government to explain in six weeks why specific guidelines should not be framed for appointment of judges to bring transparency and competitiveness. Since then, almost two years have since passed. The government has not been able to pass or even draft or provide for public discussion a law formulating guidelines for appointment of judges to the Supreme Court. Beside it has made several appointments to the SC including the HCD.

With the end of 2010, the *Awami League* Government of Prime Minister Sheikh Hasina completed its second year in office. Although opinion varies about the performance of the Government, there is agreement that 2010 was a year of judicial activism for Bangladesh. It was the judiciary that paved the way for the reintroduction of the original Constitution of 1972. Again, it owed to the judiciary to declare all military regimes of the country in the past as illegal.

However, the most important one, though initiated by the Executive, was the setting up of a War Crimes Tribunal, to prosecute those that had colluded with the Pakistan Army during the 'Bangladesh Liberation War' of 1971. On June 30, 2011 Bangladesh Parliament passed the 15th amendment of the constitution. The amendment made some dramatic changes in the constitution that includes abolition of the caretaker government, setting some unchangeable clause in the constitution, dropping of the people's mandate on any national issues and barring the criticism of the constitution.

Post Fifteenth Constitutional Amendment, several judges have been appointed to the High Court, apparently with the Chief Justice (CJ) assent. However, the nature of those appointments has given rise to various questions in media and among the public. It is contested that as to whether the CJ was really consulted, and if consulted, then how the CJ could select some judges who are allegedly less qualified to be appointed to the higher judiciary. Appointment of the Chief Justices of Bangladesh has also not been free from controversy. The principle of seniority, as reflected in Articles 96 and 97 of the Constitution and in *Bangladesh v Md. Idrisur Rahman* (15 BLC (AD) 49) in the appointment of the CJ was largely recognized. Nevertheless, the principle has not been followed in recent years. There are examples of four of the last six appointments seeing the senior-most judge of the Appellate Division being superseded. The September 2010 appointment of A.B.M. Khairul Haque as the Chief Justice by the President was alleged to have involved the supersession of two more senior judges of the Appellate Division. It was condemned by the Supreme Court Bar Association, headed by members affiliated with opposition parties. The appointment of the ex Chief Justice of Bangladesh, Justice Muzammel Hossain on 18 May, 2011 is also marred by controversy. In this case, the candidature of Justice Shah Abu

Nayeem Mominur Rahman was superseded.²⁶

In 2014 MPs have passed the 16th Amendment to Bangladesh's Constitution mandating Parliament to investigate and sack top judges on the grounds of incapability and misconduct. Now, Parliament will be able to remove judges if allegations of incapability or misconduct against them are proved, a power lawmakers had enjoyed only for four years after independence. In line with the 16th Amendment, a new law will be introduced to guide the investigation and gathering of evidence over the allegations against a judge.²⁷ Recently on January 17 2015, Justice S K Sinha was appointed as the Chief Justice of Bangladesh to become the first Hindu to hold the highest judicial post in the Muslim majority country. President Mohammad Abdul Hamid appointed Sinha, the senior most judge of the apex court, as its Chief Justice who will have a term of a little over three years. He is the first non Muslim to become the country's top judge.²⁸

Conclusion :

The complex political relationship between the army and the two political parties is another factor which to some extent risks undermining democracy in Bangladesh. The local government system is considered weak and insufficiently mandated and resourced, and effective decentralization and devolution of decision-making and resource allocation is a slow process. Strengthening of local government is vital for improving public service delivery to the country's vast population, especially for those living in small towns and rural areas. The bureaucracy is inefficient and highly centralized, making provision of effective services a real challenge.

The Government of Bangladesh has a stated policy of "zero tolerance" against human rights abuses, but major abuses of human rights, including extra judicial killings by law enforcement agents, custodial deaths and torture with impunity, unwarranted arrests, violence against women, discrimination against indigenous peoples in land and access to justice, child labour and disregard for prisoners' rights etc., persist. The reasons for this are complex, but a main factor is weak and allegedly corrupt judicial systems and law enforcement agencies.

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