

# Separation of judiciary: Opportunities and challenges

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**N**CESSITY of separation of judiciary is taken for granted in every liberal and democratic society committed to the rule of law and considered sine qua non for ensuring access to justice and protection of human rights. The ability of judicial system to deliver justice depends on to a great extent on how far it is independent and free from influence of executive branch of the government. The notion of separate and independent judiciary is one of the cornerstones of our Constitution. The separation of judiciary from the executive became finally operative from 1st November, 2007 when caretaker government formulated relevant rules and made amendment to the Code of Criminal Procedure (Amendment) Ordinance, 2007 is a response to apex court's twelve directives in the historic Masdar Hossain case. The implementation of separation of judiciary is fulfillment of a constitutional obligation that was a long overdue and is largely seen as outcome of our judiciary's proactive stand as successive political governments failed to realise this much needed constitutional mandate.

Although it is too early to evaluate the success of separation of judiciary, last three month's experience by any indication suggests that it is success story. It is reported that cases have been disposed more expeditiously due to separation of judiciary with resultant reduced cost of litigation and suffering. Previously, heavy workload of executive magistrates resulted in neglect of their judicial function, which caused

long delay in disposing criminal cases. The speedier dispensation of justice as constitutional goal remained dream for thousands of litigants in our country. Protracted delay in our justice system not only constitutes violation of fundamental rights of accused but also causes frustration among victims. Delay also causes substantial public expenses. On the other hand, speedy trial helps build the confidence of the people in the judicial system.

Implementation of separation of judiciary has also created an opportunity for it to combat corruption within judiciary and outside of the judiciary. Within judicial system, an independent judiciary can combat corruption through supervision and monitoring over the administration and budgetary process of the court, the appointment, promotion and removal process of the judges. On the other hand, a separated judiciary can play a significant role in reducing corruption through administering justice with impartiality.

Implementation of separation of judiciary from executive, undoubtedly, facilitates independence of judges so that they can act without external pressure. The requirements of freedom from external and internal interference remain inescapable defining feature of judicial independence. However, separation of judiciary does not mean absence of control on judges. As a note of caution, we should bear in mind that a true separation of judiciary also necessarily presupposes accountability of judges through a system of check and balance. Accountability necessarily implies both personal accountability of individual judges and the accountability of

courts as institutions. At the personal level of accountability, it suggests that their decisions are based on reasoned and impartial considerations. It also implies that judges are not influenced by personal interests, preferences, identity or status of litigants, or external economic or political pressure. At the institutional level, it suggests that lower judiciary has to be accountable to the higher one for their performance. It also implies that judges of both higher and lower judiciary should be accountable to the public through some kind of external mechanisms. Thus, two concepts— independence and accountability are not only consistent and compatible but also complement, supplement and sustain each other.

The success of separation of judiciary also depends on the host of other factors. A related issue to the effective functioning of judiciary is the judicial education and training which should be imparted on continuing basis. Training and performance appraisal and monitoring standards of performance by higher judiciary should be seen as integral part of the process of accountability of judges. Judicial performance appraisal is meant the process to develop reliable information concerning evaluation of individual judges to the end that judges can gain needed insight into their performance and can improve that performance accordingly.

To implement the directives of Masdar Hossain case fully, the constitution should be amended to make the separation more effective and complete. Implementation of separation of judiciary involves three set of legal instruments: amendment of the constitu-

tion, amendment of Code of Criminal Procedure and promulgation of relevant rules. While amendment to the Cr.P.C. and relevant rules have been put in place, constitutional amendment should be made to provide greater degree of sanctity to the rules and laws promulgated for separation of judiciary. Article 115 and 116 of the Constitution which vests the President to appoint and control the offices in the judicial service should be amended to vest these powers completely to the Supreme Court.

Enhancing capacity building of judicial service commission remains a major challenge that should be duly addressed to accomplish the task of appointing, and promotion with efficiency. A separate secretariat for judicial service commission should be established soon to deal with massive task of posting, promotion, grant of leave, discipline, salary and other conditions of service.

In terms of implementation, separation of judiciary creates heavy financial burden. Mobilising financial and human resources is vitally important for effective and independent functioning of judiciary. Currently, the Supreme Court is dependent on financial matters on the executive branch as budget allocation for meeting the expenses of the Supreme Court is made by relevant ministry, which remains a stumbling block in the way of full autonomy of judiciary. A separate pay commission as mandated by Judicial Pay Commission Rule should be established soon to formulate separate salary structure for officials of judicial services to reflect the special nature of their job.

To achieve the separation of judiciary to its fullest extent, we

should also reflect on appointment process of judges of higher judiciary, which is currently viewed as a flawed one as political considerations play an important role in such process. Effective functioning of lower judiciary depends considerably upon the moral authority and integrity of higher judiciary since it plays supervisory role. Since the higher judiciary will play the supervisory role upon the lower judiciary, therefore it is essential that judges of higher judiciary are appointed only by objective criteria. A guideline should be developed for appointing the judges of higher judiciary to bring greater transparency and accountability in the selection process. While article 94 of the Constitution guarantees the independence of the judges of the Supreme Court, such guarantee becomes questionable by article 95 which says that appointment of chief justice and other judges are vested with the President, who is not legally bound to consult with Chief Justice. The omission of requirement of consultation as envisaged in constitution of 1972 paved the way for political consideration in the appointment process.

It is regrettable that the move for separation of judiciary was vehemently opposed by the civil administration for apprehension of losing their umpire. But ground reality is that separation of judiciary will ultimately increase the efficiency of executive magistrates due to 'division of labour' as they will get more time to devote to their administrative functions. Relieving the executive magistrates from administering criminal justice will result in more focus on maintaining law and order situation and engagement in develop-

ment activities. On the other hand, separation of judiciary presupposes that judges are recruited through independent process and from persons having legal background and training in law, which can ultimately facilitate proper interpretation and application of laws and as a result, better protection of legal rights of litigants. It also meets the expectation of people that judges possess a degree of legal knowledge and judicial skill that is required for administering justice and promotes specialisation of judicial functions.

However, there are many loopholes in the Rules that hinder the full independence of the judiciary: firstly, current composition of the Judicial Service Commission rules, 2007 is based on ad hocism as the members of the Commission will act in addition to their main responsibilities. As a result, As a result, the Judicial Service Commission can lose much of its specialty and importance.

Secondly, the establishment of mobile courts by promulgation of Mobile Court Ordinance in a bid to satisfy some of the demands of administration cadre in which the executive magistrates can retain some judicial powers is incompatible with the notion of separation of judiciary and the directives of Masdar Hossain case.

Thirdly, according to the Rule 7 of the Bangladesh Judicial Service (Posting, Promotion, Leave, Control, Discipline and other Service Conditions), 2007 provides for deputation of judicial magistrates to the Ministry of Law, Justice and Parliamentary Affairs and to the other government offices. This provision creates scope for control of judicial officers by administrative ministries, which runs counter

to the directives of Masdar Hossain case which uphold that the executive and Judicial Service are distinct entities.

Finally, the concept of 'competent authority' envisaged under the Bangladesh Judicial Service (Composition, Recruitment and Suspension, Dismissal and Removal) Rules, 2007 paves the way for executive control over judiciary as the 'competent authority' comprises of the relevant ministry or division responsible under the Rules of Business, will regulate these service matters. These executive controls over the judiciary in matters of composition, recruitment, dismissal, posting, promotion, leave and discipline is also inconsistent with the spirit of separation of judiciary. These problems need to be addressed to ensure that separation of judiciary should be real one and not merely in form.

Separation of judiciary is not an end itself rather it is a means to ensure access of ordinary people to justice system. Viewing from that perspective, it should be observed that success of separation of judiciary will depend on how far it accelerates fair, impartial and speedy justice to common people. Undoubtedly, the separation of judiciary will strengthen and enhance integrity of our judiciary, which in turn, will contribute to establish rule of law and protection of human rights. Given the track record of efficacy of independence of judiciary in different jurisdictions, it is our conviction that implementation of separation of judiciary will bring qualitative change and positive impacts in our justice system in the long-run.

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## Contempt of court: An evolving law

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**J**USTICE concerns the proper ordering of things and persons within a society. As a concept it has been subject to philosophical, legal, and theological reflection and debate throughout history. According to most theories of justice, it is overwhelmingly important: John Rawls, for instance, claims that "Justice is the first virtue of social institutions, as truth is of systems of thought." Justice can be thought of as distinct from and more fundamental than benevolence, charity, mercy, generosity or compassion. Contempt of Court: Contempt of court remains a problematic area for many people including lawyers. In Johnson v Grant (1923 SC at 790) Lord President Clyde described contempt of court as follows: "The phrase 'contempt of court' does not in the least describe the true nature of the class of offence with which we are here concerned. The offence consists in interfering with the admin-

istration of law; in impeding and perverting the course of justice... It is not the dignity of the Court which is offended -- a petty and misleading view of the issues involved -- it is the fundamental supremacy of the law which is challenged." Origin: It has been said that the law of contempt is of ancient origin yet of fundamental contemporary importance (Miller: Contempt of Court: 1976). Contempt of court certainly has a long history -- contempt us curiae is said to have been recognized phrase in English law since the 12th century (Fox: The History of Contempt: 1927). It is said to have its origins in the medieval devolution of royal powers to the courts from a monarch who was believed to be divinely appointed and accountable only to God. Be that as it may, it seems clear from the earliest legal history that common law courts in England have assumed the power to coerce those who obstruct the administration of justice. Criminal and civil

contempt of court: One result of this continuing development and concern to protect the many facets of the administration of justice is that there are many forms of contempt. One commentator (Joseph Moskovitz: Contempt of Injunctions: 1943) has described contempt as "The Proteus of the legal world assuming an almost infinite diversity of forms", but equally it can be said that contempt of court is as diverse as are the means of interfering with the due course of justice. One clear distinction is between criminal and civil contempt of court. The distinction between the two is that civil contempt involves disobedience to a court order or breach of an undertaking in civil proceedings, whereas a criminal contempt of court is committed either when there is contempt in the face of the court or there is interference in the course of justice. Criminal contempt of court brings with it intention or mens rea. Criminal contempt

of court is generally committed in following ways: (a) contempt by publication, (b) contempt in the face of the court and (c) contempt of court in disobedience to judgments and orders of the court including undertakings given by a party to the court. As Lord Diplock said in AG v Leveller Magazine Ltd (1979 AC 440 at 449): "They all share a common characteristic: they involve an interference with the due administration of justice either in a particular case or more generally as a continuing process."

Purpose of the law of contempt: One of the basic principles of justice is that a person is entitled to a fair trial free from prejudice. No system of justice can be effective unless a trial fair to both sides is ensured and there are many rules of law and practice intended to support this principle. Among them are the rules of natural justice, for example, that no man shall be a judge in his own cause. The fairness of trials can be adversely affected by all kinds

of conduct and publications. A more subtle but no less important aspect of law of contempt is scandalising a court. Public faith in the proper administration of justice and in the authority of the law, which is essential for an ordered society, is of course promoted and supported in many ways. The law of contempt gives one kind of support by providing a sanction against scurrilous abuse of judges or allegations that a judge or court is biased. Both scandalizing the court and the type of criminal contempt involved in prejudicing one particular trial are sometimes referred to as constructive contempt. Contempt of court and freedom of discussion: One aspect of contempt that deserves special mention is to protect and maintain the authority and integrity of the courts. Although there is a public interest in doing this, the rules thereby imposed also may impede and ultimately conflict with another public interest or fundamental right, namely, freedom of

discussion which is a part of freedom of speech and freedom of the press (Article 39 of the Bangladesh Constitution). Freedom of discussion is an important public interest for as Lord Simon said in AG v Times Newspapers Ltd (1974: AC at 315): "People cannot adequately influence decisions which affect their lives unless they can be adequately informed on facts and arguments relevant to the decisions." It is not easy to reconcile these two public interests. On the one hand, with the advent of newspapers with large circulations, radio and television, there is arguably a greater need of vigilance to maintain the authority of the courts, on the other hand freedom of speech is part and parcel of democracy. It is abundantly clear that democracy cannot flourish where one group is able to suppress the voices of another. The democratic environment to which people of Bangladesh aspire is a complex system of checks

and balances with various components including the legal system and the media, performing vital functions. Another function of the media is arguably to pursue truth through investigative journalism. Conclusion: The law of contempt of court continues to play a key role in protecting the administration of justice. The law continues to be developed and adapted to meet the changing challenges to the supremacy of law. (The Law of Contempt: Arlidge and Eady: 1982 and 1999). The law of contempt is an evolving law so that the two vital public interests, i.e. authority and integrity of courts and freedom of discussion reconciled. In recent days, the Bangladesh Supreme Court (High Court Division) in their decisions in cases of contempt of court appeared to have balanced both the principle of public interests.

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