

# How far have we ensured judicial independence in Bangladesh?

**November 1 of 2007 was indeed a historic day for the Judiciary. The 71 judges of the full court (Appellate Division and High Court Division) unanimously delivered the judgment in the Masdar Hossain case to bring the Criminal Procedure Act into force on that day. It was officially implemented. The journey of independent and separate judiciary began in the history of Bangladesh.**

MD MASDER HOSSAIN

The judiciary is the last hope for restoring the rights of citizens in a country. However, judiciary cannot act to restore these rights unless and until it is free from any undue influence and interference of any other organ. Then again, mere separation is not enough for the judiciary to perform its functions effectively. Separation of judiciary from the executive has been established by the Constitution of Bangladesh since its origin. But it was limited to mere documentary recognition before the implementation of the Masdar Hossain case on November 1, 2007. Due to some theoretical problems in the justice system, the practice of executive interference over the judiciary is still continuing in Bangladesh in some extent.

## Historical backdrop of separation of the judiciary

The issue of separation of judiciary has been hanging in front of the people of Bangladesh for almost 176 years. While the oppressive and exploitative regimes of the British and Pakistani exploiters ended, the culture of oppressive bureaucratic rule did not.

Secretary to the Government of Bengal, CW Bolton, presented another plan for segregation, but ultimately no action was taken to implement it back in 1900.

abolished the Supreme Court's advisory provision and placed all control in the hands of the executive branch in 1975.

In 1976, The Law Committee headed by former Chief Justice Kamal Uddin Hossain recommended segregation in three phases and followed the 1957 Act in the second phase.

In the course of time, and due to the change in political scenario, Ziaur Rahman in a military decree did not restore the previous status of Article 115-116, but tried to improve the situation. The wording of taking the advice of the Supreme Court on the question of control of subordinate courts was added back in 1978. In 1987, during the regime of HM Ershad, a bill was introduced amending the Code of Criminal Procedure and it was declared that the amendment would come into force from April 1, 1987. According to the statement of the bill, the demand for the complete separation of the judiciary from the executive department of the state is universal and eternal in order to ensure an impartial judiciary and preserve the fundamental rights of the people. But this bill was immediately done away with.

Moving forward, the separation was clearly promised in the Tri-Alliance framework in 1990. Similarly, in the pay structure of 1991, the pay scale of the Additional District Judge was brought down one step below

were already deprived of insurance due to the uncooperative behaviour of administration cadres regarding residence, vehicles, office-courts, etc. Moreover, the suspension order led to all judges of Bangladesh rising up in protest, and under the leadership of the BCS (Judiciary) Association, petitions were presented to the administration and the government. But after receiving no remedy, the judges decided to boycott the court and don a black badge along with the words "kolom biroti" as a show of demonstration.

In 1995, the then Law Minister Mirza Ghulam Hafiz told the fifth Parliament that 46 meetings of the Select Committee have been held so far on the separation of the judiciary and the bill will be presented to the Cabinet soon. This bill was brought by Awami League MP and Minister Mr Salahuddin Yusuf.

On July 10th of the same year, Sheikh Jahangir Hossain, the then Sub-Judge of Madaripur appealed to the president against salary discrimination (he did not receive any salary allowance for 16 months protesting the reduction of salary scale) but after receiving no response, he issued a legal notice to the government. A writ petition was filed in the High Court Division against the scale withdrawal. Finally, 218 judges including Masdar Hossain (later 441) filed the writ case No. 2424/1995 in the High Court Division with the aim of

unanimously delivered the judgment in the Masdar Hossain case to bring the Criminal Procedure Act into force on that day. It was officially implemented. The journey of independent and separate judiciary began in the history of Bangladesh.

## Judgment of the Appellate Division

Masdar Hossain, along with 441 judicial officers who were judges in different civil courts, filed the writ petition No. 2424. Ultimately, hearing of the case was held on April 1, 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 May 7, 1997. Then the government filed 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 December 2, 1999. The Appellate Division directed the government to implement the 12 points directives including formation of separate JSC and Judicial Service Pay Commission to separate the judiciary from the control of the executive. On an extensive examination of constitutional provisions relating to subordinate courts (Articles 114-116A) and services of Bangladesh (Articles 133-136), the Appellate Division held that: "Judicial service is fundamentally and structurally distinct and separate

without submitting to any inside or outside pressure. Another one is internal independence, which means independence of judges from their judicial superiors and colleagues. 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. The next one is collective independence, which means institutional independence, which is connected with responsibility for the effective operation of the judiciary as an organ of government. In its easiest form, judiciary as an institute must be free from interference by the executive or the legislature. Financial autonomy of the judiciary is also related to this concept of collective or institutional independence.

The true identity of this independence of judges can be found in a decision of the Indian Supreme Court which said: "The independence of Judiciary is not limited only to the independence from the executive pressure or influence, it is a wider concept which takes within its sweep independence from any other pressure and prejudice. It has many dimensions, viz fearlessness of other power centres, economic or political, and freedom from prejudices acquired and nourished by the class to which the judges belong [C Ravichandran Iyer v Justice AM Bahattacharjee (1995) 6 JT (SC) 339 at 352, 1995 SCC (Cr) 953].

## Present scenario of the separation of judiciary

Our Constitution is a safeguard of judicial independence in our country, as Article 22 of the Constitution says that, "The state shall ensure the separation of the judiciary from the executive organs of the State." Despite such provision, it is a matter of concern that judicial independence has been threatened by certain actions. One such threat is the 16th Amendment of the constitution, which has conferred the power to remove judges of the Supreme Court (SC) to the members of parliament through the amendment of Article 96.

Many jurists and opposition political parties fear that the independence of the judiciary has been put in jeopardy following the latest amendment, and said that: "The government has brought the amendment to undermine the independence of the judiciary. People will not accept the bill and the government will have to face public ire in future."

The judiciary is independent, and it cannot be controlled by any organ of the state. Moreover, to become a parliamentarian, no specific academic qualification is determined in the constitution, but a lawyer or a lower court judge needs at least 10 years of job experience to become a SC judge. Therefore, a lawmaker should not be empowered to determine the fate of a SC judge, who is academically more qualified than him.

By ensuring judicial independence from the executive organ of the government, we are, no doubt, in a position of installing a better democratic system in our society, but there still remains a grey area as to how efficient this system would work if the various stakeholders are not motivated enough to make it work.

Even though on November 1, 2007, the judiciary was finally separated and on April 10 of the same year, the Code of Criminal Procedure was amended as well, the intended separation did not in reality took place since immediately after the separation, in the disguise of the Mobile Court, more than 36 kinds of judicial powers were vested upon the administration. Starting from prosecutors, including the judges of the trial itself, all the relevant official personnel are from there even at this point of time. This violates not only Article 22 of the Constitution of the People's Republic of Bangladesh but also Articles 33(1), 33(3), 35 and 116A. A number of judgments passed by the High Court Division are still pending as for the hearing of the Appellate Division of the Supreme Court of Bangladesh regarding the draconian effect of mobile courts. As such, the actual purpose of the separation of judiciary has not been achieved in its fullest form.

*Md Masder Hossain was a Sr. District and Sessions Judge (Retd) and former General Secretary, BCS (Judicial) Association.*



In 1908, Sir Harvey Adamson, Home Member of the Government of India, prepared a draft agreement on partition and announced that it will be introduced in some districts on an experimental basis. In other words, this plan could not be implemented in practice.

Legislative Council of Bengal passed a unanimous resolution for separation on April 4, 1921. A committee was formed for the examination. The committee headed by Justice Sir Edwards Greaves of the Calcutta High Court opined that there is no real difficulty in segregation. However, no action was taken on this report.

In 1947, After the partition of the country, some experimental steps were taken regarding segregation in West Pakistan, but no attempt was made for the same in East Pakistan.

The Criminal Procedure (East Pakistan Amendment) Act (EP Act No. 36 of 1957) was unanimously passed in the then East Pakistan Provincial Council back in 1957. The notification which was required to be issued to enforce this law was never allotted.

After Bangladesh's independence, dating back to 1972, Article 22 of the original constitution talked about segregation. A former chief justice said that bureaucrats still obstructed the process. Hence, article 22 was added to address their concern. But the then Law Minister Dr Kamal Hossain could not issue any rules in this regard.

Later on, the Fourth Amendment

that of the equivalent officers of the administration cadre and again in the pay structure of 1985. In this way, officers of all levels of the judiciary were subjected to extreme pay disparity compared to their counterparts in the administration cadre.

After presenting these issues of salary discrimination to the secretary of the ministry of establishment and making repeated requests to the policy-making authorities, a committee was formed under the leadership of the secretary of establishment to resolve the salary discrimination. Consequentially, the committee examined the salary discrimination and submitted a recommendation.

In view of that recommendation, the Ministry of Finance in 1994 revised the pay scale of some posts by one step and increased the pay scale of the then sub-judges from Tk 4,800 to Tk 6,300 and increased the pay scale of additional district judges from Tk 6,300 to Tk 7,100 effectively resolving the pay gap.

Thereafter, judges started earning as per the new scale. However, they started facing illegal pressure and influence from members of the administrative cadre via a memorandum dated February 28, 1994, where only the portion of the order of re-fixation of the new pay scale affecting the judges was suspended, leaving the salary re-fixation order of other cadres untouched and in force. Judges from all over the country were outraged with this discrimination. Judges

separating the judiciary.

In 1996, a committee was formed with the secretaries and senior officers of the ministry of law. The then State Minister for Law, Advocate Abdul Matin Khosru, said that a bill for the separation of the judiciary is being prepared.

On January 30, 1997, the committee led by the then Law Secretary Amin Ullah proposed a large-scale constitutional reform in the name of segregation. On July 7th, the Honourable Justice of the High Court Division Mr Mozammel Haque and Hon'ble Justice Mr Hasan Amin's double bench judgment gave the ruling to separate the judiciary from the executive department in light of Article 22 of the Constitution along with 9 points instructions.

On December 2, 1999, the Appellate Division in the Masdar Hossain case reached a unanimous verdict [52 DLR (AD) (2000) 82] that it is possible to achieve a lot of segregation without amending the Constitution. For this, a 12 points guideline was announced.

The government again filed a review petition against the judgment of the Appellate Division (December 2, 1999) in 2001. After a lengthy hearing, the Appellate Division rejected the review petition on June 18, 2001 and ordered the government to implement the Supreme Court's 12-point directive. November 1 of 2007 was indeed a historic day for the Judiciary. The 71 judges of the full court (Appellate Division and High Court Division)

service from the civil executive and administrative services of the Republic with which the judicial service cannot be placed on par on any account and that it cannot be amalgamated, abolished, replaced, mixed up and tied together with the civil executive and administrative services."

## Judgment of the High Court Division in the writ case

After hearing the writ case for two and a half years, on May 7, 1997, the double bench judgment of Hon'ble Justice Md Mozammel Haque and Hon'ble Justice Hasan Amin of the High Court Division passed the judgment in light of Article 22 of the Constitution with 9 points instructions. Justice Hasan Amin added three more paragraphs separately in that judgment.

## Remedy sought in Masdar Hossain case

Separation of judiciary as well as judicial independence in Bangladesh has come into force in a practical sense through the decision of the Masdar Hossain case. Now the question is, how far has judicial independence been ensured in our country. To find the answer, it is indispensable to clarify some points about judicial independence, such as personal independence for the judges – meaning that judges are not dependent on the government in any way. Then there is substantive independence, which refers to the functional or decisional independence of judges to arrive at their decisions