SEPARATION OF JUDICIARY

Judiciary is not only confined to be an organ like executive and legislature but also something more. It is the last hope and aspiration to restore the rights of citizen in a country. But this judiciary cannot act to restore these rights unless and until it is free from any undue influence and interference of any other organ. Therefore, it is an obvious need that the judiciary should be separated in true sense to perform its functions independently which is the main object of the judiciary. And where there is no effective separation of judiciary, there is no independent judiciary and where there is no independent judiciary, there is no rule of law. But mere separation is not enough to perform its function effectively. This paper will analyze the terms separation of judiciary and judicial independence and evaluate their proper implementation in Bangladesh and also some other factors which are essential with the separation of the judiciary to ensure independence.

Separation of the judiciary from the executive is established by the constitution of Bangladesh from its origin. But it was limited to mere documentary recognition before the decision of Masdar Hossain case in 2007 through which the separation of judiciary as well judicial independence was established in true sense. But it is not clear whether the judicial independence is actually implicated in proper way. To establish the proper judicial system the separation of judiciary is a vital issue.

Bangladesh Judicial systems are often compared to that of other developed countries in few instants. But most of the time she is abused due to existing administrative corruption prevalent in all departments of the states. To remove this problem one of the most effective ways is, to confirm the balanced power of the organs. This paper has sought to focus on this point. The objectives of the paper are to analyze the term “separation of judiciary” and “judicial independence” and to seek the present scenario of the implication of the terms. It also aims to find out the barriers and give a recommending perception.

**2. Separation of Judiciary in Bangladesh**

During the British colonial there was a demand for the separation of the judiciary from the executive. Many steps also have been taken by the governing authority of the state from that ancient period to the new era of independent Bangladesh to make the demand fulfilled. As well as Article 22 of the Constitution of the Republic of Bangladesh meets the demand. But it also took a long time to implement this article. In accordance with the guidelines given by the Appellate Division of the Bangladesh Supreme Court in Masdar Hossain case [2] the article was implementing by separation of judiciary from the executive. Now, this Article presents the way of journey towards separation of judiciary and also the present scenario of the goal “judicial independence” in Bangladesh.

**2.1. Separation of the Judiciary in the Constitution**

The judicial independence of all judicial officers is unconditional according to the Constitution of Bangladesh . This ideal is protected primarily through the concept of separation of the judiciary from the other organs of government. **Article 22 of the Constitution** states directly and unquestionably, “The state shall ensure the separation of the judiciary from the executive organs of the State.” **Article 95(1)** of the Constitution addressed the method of appointment for the Supreme Court, “the President shall appoint the Chief Justice and other Judges.”

**But Article 113** empowers the Chief Justice to appoint the staff of the Supreme Court, to determine the conditions of service of the staff, and to make rules relating appointment of the staff are subject to previous approval and clearance. These restrictions on the power of appointment of its staff are results of the administrative freedom of the Supreme Court.

**Article 115 and 116** of the Constitution states that appointment of persons to offices in the judicial service or of magistrates exercising judicial functions, shall be made by the President.

Though **the control** including the power of posting, promotion and grant of leave and discipline of persons employed in the judicial service and magistrates exercising judicial functions shall vest in the President, but it shall be exercised by him in consultation with the Supreme Court.

Though the Constitution is the safeguard of the separation of judiciary, through some of the above mentioned provisions, the executive branch practices to influence the functions the judiciary in Bangladesh So, what the constitution has been done can be described as a distribution of the powers of the republic to the three organs of the government and it provides for separation of powers in the sense that no organ can transgress the limit set by the constitution

2.2. Steps to Separation of Judiciary

As regards independence and separation of judiciary, the Constitution of 1972 is fairly developed. **Art 22 states** that “*the state shall ensure the separation of the judiciary from the executive organs of the state*” as one of the fundamental principles of state policy. It is not readily judicially enforceable.

But the **Fourth Amendment** undermined the *constitutionalism itself, which* ***obviously destroyed*** *the independence of judiciary*.

* In 1976 an initiative was taken to separate the judiciary from executive. A Law Committee headed by Justice Kemaluddin Hossain recommended that subordinate judiciary on the criminal side should be separated from the executive in some stages.
* In 1987, second initiative was taken to separate the magistracy by a Bill for amending Code of Criminal Procedure, 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 branch. 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.
* Next attempt was taken regarding separation of judiciary from the executive in 1995 when the renowned ***Masdar Hossain case*** was filed. The landmark decision of Masdar Hossain case was determined on the issue that to what extent the Constitution of the Republic of Bangladesh has actually ensured the separation of judiciary from the executive organs of the State.

2.3**. Masdar Hossain Case and Separation of Judiciary**

Masdar Hossain along with 441 judicial officers who were judges in different civil courts filed a Writ Petition No. 2424. Ultimately, hearing of the case was held on 1 April 1997. After a long hiring with valuable comments arid 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 1999. The Appellate Division directed the Government to implement these 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 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 withthe civil executive and administrative services.”*

2.4**. Implementation of the Judgment: Finally Separation of Judiciary from Executive**

Since the judgment was pronounced by the Appellate Division in 1999, the successive governments took 23 adjournments to implement the judgment on various pleas up to February, 2006. During these 7 years, the government took very slow steps towards the way of separation of judiciary.

The last Caretaker Government (of 2006-2008) from the very beginning adopted a positive and firm outlook with a determination to separate the judiciary from the executive based on the constitutional directive principles and Appellate Division’s judgment in the Masdar Hossain’s Case. Accordingly 4 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 and Suspension, Removal & 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 have been enacted and changes were bought in the existing Code of Criminal Procedure 1898 by Ordinance No II and No. IV of 2007.

This is considered to be a major change paving the way for dispensation of Criminal Justice at the level of magistracy by the officers belonging to Bangladesh Judicial Service and thereby removing all impediments in the separation of Judiciary from the executive control. Finally the historic journey of the judiciary separated from the executive started functioning from 01, November 2007.

From the above, it is convincing that after a long period of implementing article 22 as a fundamental principle of state policy, it was ultimately the Supreme Court which gave directions in the Masdar Hossain judgment for effecting separation and the process of implementation finally done in 2007. As a result Bangladesh got independent judiciary from other organs of the government. But in what extent this implementation has been succeeded is a question of fact.