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## The Judiciary of Bangladesh

### Its Independence and Accountability

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#### 3.1 Introducing the Judiciary

The justice system of Bangladesh owes its origin to the adjudicative tradition of ancient India, which was decisively influenced by the common law justice system during British rule in India. Following its independence in 1947, Pakistan opted for British common law and established Westminster-type courts. Bangladesh was formerly known as East Pakistan, the eastern province of Pakistan, which seceded to become an independent state in 1971. Bangladesh adopted by executive orders all pre-existing laws and judicial institutions of the defunct East Pakistan.<sup>1</sup> Article 149 of the Constitution of Bangladesh 1972 reiterated the continuation of pre-1971 laws with necessary amendments. Pre-existing courts with new jurisdictions became an integral part of its legal system. The Constitution enacted the structure of the judiciary (Part IV), which has undergone multiple amendments. The judiciary is now composed of three adjudicative bodies: higher judiciary, lower judiciary and specialised tribunals.

The higher judiciary refers to the Supreme Court (SC), which consists of the Appellate Division (AD) and the High Court Division (HCD). The AD is the constitutional court with no original jurisdiction. It hears appeals against (a) HCD orders, judgments, decrees, or sentences involving constitutional interpretation, capital punishment, life imprisonment and sentences for contempt; and (b) judgments/orders of specialised tribunals such as the Administrative Appellate Tribunal and International Crimes

<sup>1</sup> The Laws Continuance and Enforcement Order 1971 and The Bangladesh (Adaptation of Existing Laws) Order 1972, Presidential Order No. 48 of 22 May 1972 provided that all laws which were in force on 25 March 1971 in East Pakistan shall continue to be in force in Bangladesh subject to necessary changes.

Tribunals. It has the authority (a) 'to issue such directions, orders, decrees or writs as may be necessary for doing complete justice in any cause or matter pending before it' (art 104); (b) to render advisory opinion on any question of law and public importance referred to it by the President (art 106); (c) to make rules for regulating the practice and procedure of both SC Divisions and any subordinate courts (art 107); and (d) to act as a court of record with power to order the investigation of or punishment for any contempt of AD or HCD (art 108). Its decisions are final and binding (art 111) unless it exercises its review jurisdiction in response to review petitions and departs from its original decisions (art 105).

The HCD has original and appellate jurisdiction. Its original jurisdiction hears cases relating to contempt of court, company and admiralty, trademarks, patent, matters relating to banking companies, will and probate, and parliamentary elections. It is also a constitutional court with jurisdiction over the interpretation of the Constitution, the determination of constitutionality of parliamentary acts and executive orders, and the judicial enforcement of constitutional guarantees. It exercises civil and criminal appellate and revision jurisdiction over lower court decisions. It has superintendence and control over all subordinate courts and specialised tribunals (art 9). It has the power to withdraw from subordinate courts any case involving constitutional interpretation or matters of public importance and decide the case or determine the question of law and send the case with its determination back to the court wherefrom the case was withdrawn or to any similar subordinate court (art 110).

The lower courts function in their hierarchical order under the District Court and the Magistracy. They have original and appellate jurisdiction over civil and criminal matters (arts 114, 116A). Special courts include: Family Court, Children's Court, Municipal Court, Environment Court, Anti-corruption Court, Money Loans Court and Marine Court. Specialised tribunals are: Administrative Tribunal, Special Power Act Tribunal, Labour Tribunal, Women and Children Torture Tribunal, Suppression of Acid Crimes Tribunal, Speedy Trial Tribunal, Law and Order Disruptive Tribunal, International Crimes Tribunal, Cybercrime Tribunal and Tribunal for Share Market. These courts and tribunals operate within a constitutional and statutory hierarchical order (arts 94 and 114).<sup>2</sup>

<sup>2</sup> Ridwanul Hoque, 'Courts and the Adjudication System in Bangladesh: In Quest of Viable Reforms' in Hunn-Rong Yeh and Wen-Chen Chang (eds.), *Asian Courts in Context* (Cambridge University Press 2014) 456–460; 'Constitutionalism and the Judiciary in

### 3.2 Constitutional Independence of the Judiciary

The principle of separation of powers with appropriate checks and balances between the government organs (executive, legislature and judiciary) is enshrined in the Constitution to ensure good governance. The separation of the judiciary from executive control is an overriding constitutional goal to ensure judicial independence. Judicial independence in the functional sense entails the institutional independence of the judiciary and the individual independence of judges in exercising judicial functions. The Constitution emphasises the independence of individual judges rather than that of the judiciary as an institution. It requires that 'the Chief Justice and the other judges shall be independent in the exercise of their judicial functions' (art 94(4)). For the lower judiciary, 'all persons employed in the judicial service and all magistrates shall be independent in the exercise of their judicial functions' (art 116A). An institutionally independent judiciary is presumed from the constitutionally ingrained separation of powers requiring the state to establish a judiciary separate from its executive and legislative organs (art 22).

In *Anwar Hossain Chowdhury and Others v. Bangladesh*<sup>3</sup> (hereafter referred to as *Anwar Hossain Chowdhury*), a judicial review case on the 8th Constitutional Amendment, the AD held that the institutional independence of the judiciary is so fundamental to the basic structures of the Constitution that it cannot be amended by parliament. In *Secretary, Ministry of Finance v. Md Masdar Hossain and Others*<sup>4</sup> (hereafter referred to as *Masdar Hossain*), the AD recognised that '[j]udicial independence involves both individual and institutional relationships: the individual independence of a judge as reflected in such matters as security of tenure and the institutional independence of the court as reflected in its institutional administrative relationships to the executive and legislative branches of government'. The Constitution is premised on the inseparable and complementary relationship between the individual independence of judges and the institutional independence of the judiciary. In performing judicial functions, judges act and decide mostly individually and in so doing an individual judge can make or mar the

Bangladesh' in Sunil Khilnani et al. (eds.), *Comparative Constitutionalism in South Asia* (Oxford University Press 2013) 303–340.

<sup>3</sup> [1989] 41 DLR 165 (AD).

<sup>4</sup> [2000] 52 DLR 82, [42] (AD); M. R. Islam and S. M. Solaiman, 'The Enforcement of Rulings of the Supreme Court on Judicial Independence in Bangladesh: When Enforcer Becomes Violator' (2002) 4 *Aust J Asian L* 107–126.

institution of judiciary. Judges can develop the judiciary as an institution by individually and collectively resisting external interference to augment the institutional independence of, and public confidence in, the judiciary.

### 3.3 Erosion of Judicial Independence

The 1972 Constitution vested the authority to appoint the Chief Justice (CJ) of the SC with the President (arts 95, 98), who was required to appoint in accordance with the advice of the Prime Minister (art 48(3)). The President was also empowered to appoint other SC judges on the advice of the Prime Minister and in consultation with the CJ (art 95). The Fourth Constitutional Amendment 1975 (January) established a presidential form of government with the President as the executive head of state and who took precedence over all other persons. It abolished the requirement of consultation with the CJ, which gave the President exclusive power to hire and fire SC judges. The military authority that usurped power in August 1975 restored the requirement of consultation in its Second Proclamation Order 1977 but complied with it selectively. In February 1994, the President appointed nine HCD judges without consultation with the CJ. The CJ objected to the method of these appointments solely by the executive, which continued to be the method of all judicial appointments until 2007. The consultative role of the CJ in appointing SC judges by the President was a major safeguard against politically biased appointments. This consultative process has been followed consistently since British rule in India in the absence of any legal requirement. Consequently, the practice became a constitutional convention in Bangladesh.<sup>5</sup> The underlying rationale was that the selection of highest court judges must be on merit and above politics and that the CJ is the most competent person to express views on the suitability of such appointments.

The Fifth Constitutional Amendment 1979 removed the requirement of parliamentary impeachment for removing SC judges. Instead, a new body, the Supreme Judicial Council (SJC), headed by the CJ and the next two senior judges as members, was set up to advise the President on the matter of removal of judges (art 96). The President retained the power to accept or reject any SJC advice and removed many SC judges upon the

<sup>5</sup> Mahmudul Islam, *Constitutional Law of Bangladesh* (Dhaka: Mollick Brothers 2010) 430–431; Mizanur Rahman, 'Governance and Judiciary' in Hasnat Abdul Hye (ed.), *Governance: South Asian Perspectives* (Dhaka: University Press 2000) 148.

political advice of the government without referring their cases to the SJC for investigation.<sup>6</sup> The SJC was abolished in 2007, and its existence during 1979–2007 contributed almost nothing to improving the removal process of SC judges and judicial independence.

There are specific constitutional provisions for the independence of the lower judiciary. The HCD is mandated to administer, control and supervise all subordinate courts (art 109). The President is empowered to establish subordinate courts and appoint their judges and magistrates in consultation with the SC (arts 115, 116). Constitutionally, all subordinate court judges and magistrates are independent in the exercise of their judicial functions (art 116A). All these explicit provisions purport to create a system of judicial hierarchy in which subordinate courts are responsible to the higher judiciary and not to the executive. But the Fourth Amendment 1975 mandated the President to make all lower court appointments. Since then, the President has been appointing subordinate court judges and magistrates through the Law, Justice and Parliamentary Affairs (Law) Ministry and Home Affairs Ministry. The requirement of consultation with the SC was virtually non-existent. All subordinate courts remained under the total control of the executive. Magistrates performed the dual role of executive officers of the government and judicial officers.

The historic legacy of an all-powerful executive with continuing support from political parties and successive military oligarchies gradually exerted their control and influence on the judiciary. The governments, civil and military alike, have been exercising political authority over all judicial appointments, resulting more often than not in politically expedient appointments. The judiciary has come under the *de facto* full control of the executive, which has continuously been undermining judicial

<sup>6</sup> In 1982, Kemaluddin Hossain CJ and three HCD judges (K.M. Subhan, Abdur Rahman Chowdhury and S.M. Hossain) were removed by executive orders without referring to the SJC, Justice Badrul Haider Chowdhury, *Evolution of the Supreme Court of Bangladesh: Kamini Kumar Memorial Law Lecture* (Dhaka University 1990); Awal Hossain Mollah 'Independence of Judiciary in Bangladesh: An Overview' (2012) 54 *IJ Law & Management* 67. The CJ recommended the confirmation of four ad hoc HCD judges but the President confirmed only one judge upon the advice of the Prime Minister in May 2002: 'CJ's recommendation ignored' *The Daily Star*, Dhaka, 22 May 2002 [www.thedailystar.net/newspaper?date=2002-05-22](http://www.thedailystar.net/newspaper?date=2002-05-22) accessed 23 May 2002; 'Last Outpost of CJ's Authority Demolished' *The Daily Star*, Dhaka, 24 February 2003, editorial reported that 'political motives have been attributed to the non-confirmation of appointments' and eleven new judges 'who were well known as loyal to the ruling party have been appointed in the same court' <http://archive.thedailystar.net/2003/02/24/index.htm> accessed 25 February 2003.

independence. The judiciary appears to serve the political interests of the ruling executive rather than acting as an independent judicial organ of the Republic. This persistent erosion of independence has created an extraordinary public confidence crisis in the judiciary,<sup>7</sup> which led Masdar Hossain, a lower court judge, to lodge a writ petition with the SC, seeking an order for the constitutionally entrenched separation of the lower judiciary from the executive as required under article 22 of the Constitution.

In the landmark *Masdar Hossain*, the HCD in May 1997 issued a directive to the government to separate the judiciary from the executive within eight weeks. This ruling prevailed in the government's appeal in December 1999 and reaffirmed on revision in June 2001 in the AD.<sup>8</sup> In its final judgement, the SC formulated twelve directives to immediately implement the separation that required no constitutional amendment. These SC rulings, which were binding for the government under the Constitution (arts 102, 112), went unheeded. The government procrastinated, sought twenty-six extensions of time to implement the directives, and left the office without implementing them.

The call for the separation of the judiciary enjoyed national consensus. In response, the caretaker government<sup>9</sup> that assumed office in January 2007 implemented the SC directives by promulgating the Judicial Service Commission (JSC) Rules Ordinance to remove the executive authority in appointing judges in a bid to separate the judiciary. These Rules,<sup>10</sup> implemented on 1 July 2007, separated subordinate court judges and magistrates from the executive to be appointed, directed, and controlled by a Judicial Service Commission (JSCoM) with the approval of the General Administrative Committee (GAC) headed by the CJ and three other judges. The government also enacted the Supreme Judicial

<sup>7</sup> M.R. Islam and S.M. Solaiman, 'Public Confidence Crisis in the Judiciary and Judicial Accountability in Bangladesh' (2003) 13 *J Judicial Administration* 29–60.

<sup>8</sup> Masdar Hossain (n 4), [1998] 18 BLD 558 (HCD), Revision Order of 18 June 2001.

<sup>9</sup> The 13th Constitutional Amendment 1996 introduced a non-political caretaker government after the tenure of an elected government to hold free and fair parliamentary elections within ninety days and leave office for the newly elected government; M.R. Islam, 'Free and Fair General Elections in Bangladesh under the Thirteenth Amendment: A Politico-Legal Post-Mortem' (1996) 26 *Politics Administration and Change* 18–31. The caretaker government system was abolished by the 15th Amendment (Act XIV) 2011.

<sup>10</sup> These are: Judicial Service Commission Rules; Judicial Service (Pay-Commission) Rules; Judicial Service (Formation of Service, Appointment, Promotion in the Service and Temporary Suspension and Removal) Rules; and Judicial Service (Determination of Service Place, Granting Leave, Maintaining Discipline and other Conditions of Employment) Rules, *Government Gazette* (additional), 16 January 2007.

Commission (SJCom) Ordinance 2008 and established a nine-member SJCom headed by the CJ to select competent persons and recommend to the President the appointment of SC judges, but its recommendations were not binding. The President was empowered to reject the SJCom recommendation at will, which compromised its very purpose and continued to inhibit judicial independence through political appointments.<sup>11</sup> The HCD, in response to a writ, held the SJCom unconstitutional as it undermined constitutionally entrenched judicial independence by constituting it with majority members from outside the judiciary.<sup>12</sup>

However, some executive acts of the caretaker government revealed its lacklustre commitment to the functional separation of the judiciary. Its Judicial Service Secretariat Ordinance 2008 for the establishment of an independent judicial secretariat headed by the CJ sought to retain the control of the Law Ministry over the new secretariat. It required the CJ to go through the Law Ministry to contact the President and the Prime Minister concerning the operational matters of the secretariat. This prevented the CJ from communicating directly with the President and the Prime Minister pertaining to matters falling squarely within the constitutional role of the SC of superintendence, discipline and control over the lower judiciary (arts 109, 116), which was so fundamental to the independence of the judiciary. The Election Commission (EC) decided on 27 November 2008 to deploy executive magistrates<sup>13</sup> to try punishable electoral offences during the general election of 29 December 2008 and sought the SC's opinion on the matter. The SC disapproved the EC plan on 18 December 2008 because executive magistrates had no such power under the JSC Rules 2007. But the Home Affairs and Establishment Ministries ignored the SC opinion and decided on 22 December 2008 to implement the EC plan to engage executive magistrates.<sup>14</sup>

The caretaker government had full army support and operated within its self-proclaimed emergency from coming to power in 2007 until 2009,

<sup>11</sup> Ehteshamul Bari, 'The Natural Death of the Supreme Judicial Commission of Bangladesh and the Consequent Patronage Appointments to the Bench: Advocating the Establishment of an Independent Judicial Commission' (2014) 1 *Int'l Rev L* <http://dx.doi.org/10.5339/irl.2014.1> accessed 20 November 2015.

<sup>12</sup> *Idrisur Rahman v. Bangladesh*, Writ Petition No. 3228 of 2008.

<sup>13</sup> Executive magistrates come from administrative cadre, not all with legal qualifications and function under the executive; judicial magistrates come from judicial cadre with legal qualifications and function under the SC.

<sup>14</sup> 'SC directive ignored' *The Daily Star*, Dhaka, 23 December 2008 <http://archive.thedailystar.net/newDesign/news-details.php?nid=68350> accessed 10 February 2016.

which resulted in its extraordinary empowerment beyond the Constitution. This unfettered power had an encroaching and marginalising effect on substantive judicial independence in the functional sense as the SC sided more often than not with the executive.<sup>15</sup> This consistent pattern of synergy between SC decisions and unqualified executive powers in the post-separation period went beyond sheer coincidence and leaned towards traditional judicial loyalty to the executive that prevailed in the pre-separation period. The abdication of judicial impartiality in preference to restraint and a pliant role in the post-separation period did not serve the best interest of judicial independence and integrity required under the Constitution.

### 3.4 Current Position

All JSC Ordinances (2007–2008) separating the judiciary became ineffective after 24 February 2009 for want of the parliamentary approval that was required by the Constitution. Being proclaimed as emergency Ordinances, they required parliamentary approval within 120 days of enactment or 30 days from the date on which a new or reconstituted Parliament first meets (art 141A2c). But these Ordinances were not placed for approval before Parliament constituted after the 2008 election, which led to their natural death. On 11 March 2009, the HCD issued a *suo moto* rule asking the government to explain why the JSC Ordinances were not ratified in Parliament within the constitutional timeframe and under which legal authority judicial magistrates were functioning after the expiry of the Ordinances.<sup>16</sup> In response, the government validated the continuation of the separation of the judiciary by enacting a new Act<sup>17</sup> to comply with the constitutional requirement for the appointment of subordinate court judges through the SC. This Act removed impediments to the separation of the lower judiciary, but the government took no practical initiative to separate it. No separate secretariat or administrative arrangement has yet been established. The appointment, promotion,

<sup>15</sup> M.R. Islam, 'Judicial Independence Amid Powerful Executive in Bangladesh: A Constitutional Paradox?' (2009) 18 *J Judicial Administration* 237–252.

<sup>16</sup> By ABM Khairul Hoque and Md Abdul Hye JJ on a writ filed by Naboti Ranjan Chakma, *The Daily Star*, Dhaka, 12 March 2009 <http://archive.thedailystar.net/newDesign/news-details.php?nid=79338> accessed 10 February 2016.

<sup>17</sup> The Code of Criminal Procedure 1898 was amended by Act No. XXXII of 2009.



transfer and service conditions of lower court judges continue to be administered by the Law Ministry, not by the office of the CJ.

In *Idrisur Rahman and Others v. Secretary, Ministry of Law, Justice and Parliamentary Affairs*, the HCD in 2008 directed the government to reappoint with seniority ten HCD judges, who were not confirmed by the caretaker government despite the CJ's affirmative recommendations. It held that the requirement of consultation between the President and the CJ in appointing judges other than the CJ constituted a constitutional convention and imperative, which was inherent in the basic constitutional structure and ingrained in the principle of judicial independence, and hence the opinions of the CJ on judicial appointments would have primacy and be binding on the President.<sup>18</sup> In affirming the HCD decision, the AD in *Bangladesh v. Idrisur Rahman and Others* held:

In the matter of selection of judges, the opinion of the Chief Justice should be dominant in the area of legal acumen and suitability for the appointment, and in the area of antecedents the opinion of the executive should be dominant. Together, the two should function to find out the most suitable candidates available for appointment through a transparent process of consultation . . . There are some universal principles and one of such principles is that in the appointment of judges, the Judiciary must have the last say and that say can be articulated most efficiently only by the Chief Justice who is most competent and well equipped and well posted with facts to give his considered opinion.<sup>19</sup>

The qualifications for the appointment of SC judges are specified in article 95 of the Constitution requiring 'at least ten years' experience as a SC lawyer or judicial officer appears too broad. These open-ended qualifications and guidelines led the HCD and the AD in *Idrisur Rahman* to underscore the need for a legislation containing detailed guidelines and specific qualifications for the appointment of SC judges and recommended for the enactment of such legislation.<sup>20</sup> On 6 June 2010, the HCD issued a show cause order to the government to explain why a law providing precise qualifications and guidelines should not be enacted and published in a gazette notification for the appointment of SC judges to ensure transparency and competition in the selection

<sup>18</sup> [2009] 61 DLR 523, 531 (HCD); The HCD issued on 9 March 2009 a similar rule on Secretary, Law Ministry in response to a writ by Abdul Wahab filed on 5 February 2009, *The Daily Star*, Dhaka, 9 March 2009 <http://archive.thedailystar.net/newDesign/news-details.php?nid=79114> accessed 10 February 2016.

<sup>19</sup> [2010] 7 LG (Law Guardian) 137, 143 (AD). <sup>20</sup> *Idrisur Rahman* (n 18–19).

process.<sup>21</sup> The government reintroduced the process of consultation with the CJ in appointing other SC judges by amending article 95(1) of the Constitution in the 15th Amendment in July 2011 which reads: 'the other [SC] judges shall be appointed by the President after consultation with the Chief justice'. But no legislation containing the precise qualifications and guidelines for the appointment of judges has been enacted yet. Given the broad ambit of the constitutional provision and the absence of legislation for the qualifications of SC judges, there exists ample scope for politically expedient appointments and indeed allegations of frequent appointments of SC judges marked by political manoeuvring and bias abound.<sup>22</sup>

The new separation of the Judiciary Act 2009 has produced some positive results. In *BNWLA v. Bangladesh*, the National Women Lawyers' Association sought the court's intervention to protect a child domestic worker who suffered brutal physical and mental torture by her employer. The HCD issued a number of specific directives to the executive and legislature requiring the amendment of existing statutory laws or even drafting new laws (a) to stop maltreatment and violence inflicted upon child and female domestic workers, and (b) to monitor their employment conditions for the protection of their rights under the Constitution and other laws of the land.<sup>23</sup> The HCD on 26 September 2013 held certain provisions of the Contempt of Court Act 2013 enacted on 22 February 2013 exempting government officials from any contempt of court action unconstitutional and invalid.<sup>24</sup> In response to a public interest writ, the HCD on 30 January 2014 also held unconstitutional and without the force of law an amendment to the Anti-Corruption Commission (ACC) Act 2004 (s32A) of 10 November 2013 curbing the independent authority of the ACC to initiate investigations and judicial proceedings against

<sup>21</sup> Issued in response to a public interest writ, *The Daily Star*, Dhaka, 7 June 2010, <http://archive.thedailystar.net/newDesign/news-details.php?nid=141667> accessed 10 February 2016.

<sup>22</sup> Abdul Latif Mondal, 'Enact a Comprehensive Law to Regulate the Higher Judicial Appointments' (2010) 62 *J Dhaka L Rep* 21–22; Zahidul Islam Biswas, 'Do We have an Independent Judiciary?' *The Daily Star Forum*, Dhaka, September 2012, vol. 6, Issue 9, <http://archive.thedailystar.net/forum/2012/September/do.htm> accessed 10 February 2016.

<sup>23</sup> [2012] 17 *Mainstream LR* 121 (HCD).

<sup>24</sup> Moneruzzaman, 'Voiding Contempt of Court Act 2013' *NEWAGE*, 23 August 2015 <http://newagebd.net/150544/voiding-contempt-of-court-act-2013-detailed-hc-verdict-not-delivered-in-2-years/> accessed 9 February 2016; *Dhaka Tribune*, 27 September 2013, [www.dhakatribune.com/law-amp-rights/2013/sep/26/hc-annuls-contempt-court-act-2013](http://www.dhakatribune.com/law-amp-rights/2013/sep/26/hc-annuls-contempt-court-act-2013) accessed 9 February 2016.

public officials for corruption.<sup>25</sup> These amendments were found to be discriminatory, inconsistent with the constitutional guarantees and undermining the independence of the ACC. These apex judicial decisions tend to indicate that the judiciary has started to gradually drift apart from its previous pliable role to assume its role as the guardian of the Constitution. Nonetheless, there are recent instances of executive attempts to reclaim and regain control over the judiciary.

### 3.5 New Law for the Impeachment of SC Judges

Parliament had the impeachment power to remove SC judges on the ground of physical or mental incapacity under the 1972 Constitution but this power was removed by the Fourth Amendment 1975. The 16th Constitutional Amendment 2014 has restored this power. Parliament can impeach SC judges, who may be removed by a Presidential Order passed pursuant to a parliamentary resolution supported by two-thirds majority on the ground of proved misbehaviour or incapacity. Parliament would by law regulate the procedure for investigation of alleged misbehaviour or incapacity of judges and adopt impeachment resolution.<sup>26</sup>

Controversies surround the popular representative identity of the current Parliament. The election of 5 January 2014 was marked by low voter turnouts amid rampant violence and boycotts by the opposition alliance, resulting in 154 MPs elected unopposed. The remaining 146 seats were won with a low turnout. There are doubters at home and abroad as to whether incumbent MPs are democratically elected and capable of overseeing the public accountability of SC judges in the best interest of the Republic. Parliament has an opposition tailored by the government, which has appointed opposition MPs as ministers. The chairs of all parliamentary committees are from the ruling party. In such an opposition-free Parliament, the executive gains ample opportunity to dictate legislative

<sup>25</sup> 'Prior Permission for Filing Contempt Cases against Government Officials is Unconstitutional: Bangladesh High Court' *Law and Practice*, Bangladesh Bar Council, <http://lawandpractice.com/index/legal-news-and-information/prior-permission-filing-corruption-cases-govt-officials-unconstitutional-bangladesh-high-court/> accessed 2 February 2016; M.R. Islam, 'Curtailment of ACC Power to Sue Public Officials: A Law to Legalise Corruption?' *The Daily Star*, Dhaka, 4 February 2014 [www.thedailystar.net/curtailment-of-acc-power-to-sue-public-officials-a-law-to-legalise-corruption-9753](http://www.thedailystar.net/curtailment-of-acc-power-to-sue-public-officials-a-law-to-legalise-corruption-9753) accessed 10 February 2016.

<sup>26</sup> The Constitution (Sixteenth Amendment) Act (No XIII) of 2014 passed on 17–18 September 2014.

policies on critical public interest issues without adequate parliamentary inputs. The government claim that the 16th Amendment is all about the restoration of the 1972 Constitution for the independence of the judiciary is not borne out by facts. The 1972 Constitution mandated Parliament to impeach SC judges (art 96) and kept the lower judiciary under the SC (art 116). The 16th Amendment restores only original article 96, not original article 116. This restoration of article 96 allows the executive to bring under its control the higher judiciary that has been separated from its control since 2007. The non-restoration of article 116 means the lower judiciary will continue to remain under the executive. Thus the 16th Amendment has the potential of resuscitating full executive control over the entire judiciary, higher and lower alike.

There is no provision for voluntary leadership retirement and there are no constitutionally fixed parliamentary terms for the party leader, who is also the head of the executive government. MPs pursuing their conscience contrary to their leader will do so at their own peril. According to article 70 of the Constitution, any MP voting against his/her parliamentary party or abstaining from voting along the party-line will lose his/her seat. With so much power and absolute majority in Parliament, if the ruling party leader decides to impeach an SC judge, an affirmative resolution would be likely to pass. Given the thriving polarised political culture in Bangladesh, any ruling party with the requisite parliamentary majority can move a motion to impeach SC judges whose judgments are not favoured by the ruling party. Should this eventuate, it would compromise the security of judges' tenure, an indispensable element of judicial independence. However, a writ petition was filed in November 2014 challenging the constitutional validity of the Sixteenth Amendment, which the HCD has recently held as unconstitutional and invalid in a judgment on 5 May 2016.<sup>27</sup> The Attorney-General declared that the government would appeal against this judgment to the AD. On 3 July 2017, the full bench of the AD, headed by the CJ, unanimously rejected the appeal, ending parliamentary powers to impeach apex court judges. Instead, the apex court restored the Supreme Judicial Council with recommendatory power to the President to impeach judges and a thirty-nine point code of conduct for judges to follow.<sup>28</sup>

<sup>27</sup> Ashutosh Sarkar and Shakhawat Liton, 'Bangladesh High Court scraps 16th amendment to constitution' *The Daily Star*, Dhaka, 6 May 2016, [www.thedailystar.net/frontpage/hc-scraps-16th-amendment-1219480](http://www.thedailystar.net/frontpage/hc-scraps-16th-amendment-1219480) accessed 10 June 2016.

<sup>28</sup> *Government of Bangladesh and Others v. Advocate Asaduzzaman Siddiqui and Others*, Civil Appeal No. 06 of 2017, judgment of 3 July 2017, [www.supremecourt.gov.bd/resources/documents/1082040\\_C.A.6of17.pdf](http://www.supremecourt.gov.bd/resources/documents/1082040_C.A.6of17.pdf) accessed 2 August 2017.

### 3.6 Judicial Review Power

The Constitution is the supreme law of Bangladesh and any other law inconsistent with it shall be void to the extent of inconsistency (art 7). The HCD has the authority to determine this constitutional consistency of any other law (HCD Rules 1–9). Article 7 warns all law-making authorities not to make any laws, regulations, ordinances, or amendments inconsistent with, or repugnant to, the Constitution. A failure would render those enactments invalid to the extent of their inconsistency or repugnancy. The SC's power to review the constitutionality of all subordinate laws is premised on, and entrenched in, the very structure of constitutional supremacy and not amenable to subordinate laws. It is exercisable over all executive and legislative acts, including constitutional amendments.

The SC partially lost its review power over the decisions of military courts set up by the martial law authorities. The Fifth (1979) and Seventh (1986) Constitutional Amendments placed all martial law proclamations and judgments beyond the reach of judicial review.<sup>29</sup> Two successive military regimes in 1975 and 1982 introduced martial law and committed many unconstitutional and illegal acts, from which they secured exoneration by inserting immunity clauses in these two amendments. These indemnity clauses placed their executive actions above the law and beyond the jurisdiction of courts. The second martial law regime amended article 100 of the Constitution by the 8th Amendment to decentralise the HCD into seven permanent benches in regional cities. This Amendment was challenged in *Anwar Hossain Chowdhury* on the ground that the plenary jurisdiction of the HCD is over the entire Republic and an integral part of the basic structure of the Constitution. The division and decentralisation of this plenary jurisdiction into seven regional jurisdictions was inconsistent with the basic structure of the Constitution and as such unconstitutional. The AD held that the 8th Amendment was incompatible with the Constitution as it was inconsistent with its basic structure pertaining to the SC. It reasoned that the amending power of Parliament is not original or inherent but 'derivative', that is, derived from the Constitution, and it cannot be exercised beyond the Constitution to change its basic structure.<sup>30</sup>

This decision supporting the constitutional rule of law opened the door for judicial review of executive actions and inactions. In a judicial

<sup>29</sup> M. R. Islam, 'The Seventh Amendment to the Constitution of Bangladesh: A Constitutional Appraisal' (1987) 58 *Pol Q* 312–329.

<sup>30</sup> DLR (n 3), [161, 381, 594, 598].

review decision of 29 August 2005, the HCD declared the Fifth Amendment containing the immunity clauses promulgated under martial law and all martial law regimes that unconstitutionally captured governmental power by military coups between 15 August 1975 and 9 April 1979 illegal. This decision was upheld on appeal.<sup>31</sup> The presidential ordinance-making power that often erodes constitutionalism with impunity was challenged in *Kudrat-E-Elahi Panir v. Bangladesh*, where the AD held that the circumstances satisfying and justifying the President to promulgate ordinances was within the purview of judicial review.<sup>32</sup> In *Pirjada Shariatullah v. Bangladesh*, the HCD invalidated an ordinance for being inconsistent with the Constitution and without justifying circumstances.<sup>33</sup> In *Mohammad Badiuzzaman v. Bangladesh*, the establishment of a local government council was found to be inconsistent with the Constitution.<sup>34</sup> The most recent exercise of judicial review power has determined the constitutionality of the Sixteenth Amendment 2014. The HCD, in May 2016, held that the Sixteenth Amendment is unconstitutional because it violates the constitutional principle of separation of powers among state organs and the independence of the judiciary guaranteed by the Constitution's two basic structures, articles 94(4) and 147(2), which was upheld on appeal by the AD on 3 July 2017.<sup>35</sup>

Judicial activism to sustain constitutional supremacy came to a halt when the President of the caretaker government promulgated the Emergency Power Rules (EPR) in 2007 in exercise of his power under article 141A of the Constitution. The EPR excluded the jurisdiction of any courts over all rules, orders, or actions taken under the EPR (s6). This indemnity removed the HCD jurisdiction to review matters encompassing citizens' fundamental rights embodied in the Constitution (Part III). Such exclusion of judicial review by the President, whose law-making power is subject to its constitutional validity, was inconsistent with the basic structure and invalid under article 7, of the Constitution. The President made the Constitution subservient to the EPR, a subordinate law, which the President proclaimed by deriving authority from the

<sup>31</sup> *Bangladesh Italian Marble Works v Bangladesh* [2010] 62 DLR 70 (HCD); *Khondkar Delwar Hossain and another v. Bangladesh Italian Marble Works* [2010] 62 DLR 298 (AD).

<sup>32</sup> [1992] 44 DLR 319 (AD). <sup>33</sup> [2009] 61 DLR 647 (HCD).

<sup>34</sup> [2010] 7 LG 208 (HCD); also *Abdul Gafur v. Secretary, Ministry of Foreign Affairs* [1997] 17 BLD 453 (HCD); *Shah Mohammad Hannan v. Bangladesh*, Writ No. 2052/1998, Interim Order of 5 December 2001.

<sup>35</sup> See n 27–28 and accompanying texts.

Constitution. The constitutional role of an independent judiciary to ensure that the exercise of emergency powers remained within their constitutional bounds was compromised. The SC rulings under this emergency rule showed a pervasive pattern of endorsing executive acts despite their unconstitutionality.<sup>36</sup> The frequency and consistency of such judicial validation of executive acts gave rise to a morbid feeling that justice was dictated or gagged and that the SC toed the executive line by shedding off its constitutional function of judicial review. This malleability of the higher judiciary resulted in a general abdication of judicial independence and impartiality in favour of a predominantly pliant role during the Emergency that lasted until the end of 2008.

### 3.7 Judicial Enforcement of Constitutional Guarantees

Citizens' fundamental rights provided in the Constitution form an integral part of the basic structure of the Constitution and cannot be abrogated, suspended, or undermined by any subsequent law or order, which would be rendered invalid to the extent of their inconsistency with the fundamental rights provisions (art 26). The Constitution empowered the HCD with writ jurisdiction to enforce fundamental rights (arts 44, 102). The Fourth Amendment 1975 restricted this HCD jurisdiction, which was removed altogether by martial law in 1982. The end of military rule and the restoration of democratic government in 1991 restored the HCD jurisdiction to enforce constitutional guarantees but this was eclipsed again in 2007 under the emergency. The EPR excluded the jurisdiction of all courts over any individual arrested, detained, tried and convicted under the EPR (ss11, 19), and empowered all law-enforcing agencies to arrest anyone without warrant and detain without charge indefinitely (s16).

This indemnity had far-reaching implications for the judicial enforcement of constitutional guarantees. The precedence of EPR over the Constitution engendered a situation where the law-enforcing apparatus violated human rights with impunity under the emergency powers, which predefined the legal effect of such abuses to exonerate them from legal challenges. It violated 'the inalienable right of every citizen' to

<sup>36</sup> The AD on 23 April 2008 held that no court or tribunal, including the HCD, had jurisdiction to entertain, adjudicate, or grant bail to anyone arrested or detained under the EPR: *The State v. Moyezuddin Sikder and other* [2008] 28 BLD 135 (AD); *Chairman, RAJUK v. A Rouf Chowdhury and Others* [2009] 61 DLR 28 (AD).



‘equality before law’, ‘equal protection of law’ and ‘to be treated . . . *only* in accordance with law . . . wherever he[/she] may be’ (Constitution arts 27, 31). The emergency power of the President under article 141A of the Constitution not only lacks any mandate to derogate from, or suspend, any constitutional fundamental rights, but also article 141B expressly excludes from the scope of suspension during a state of emergency articles 27 and 31 to preserve the right of every citizen to the protection of law. It undermined the constitutional objective of achieving ‘a society in which the rule of law, fundamental human rights and freedom, equality and justice . . . will be secured for all citizens’ (preamble) and the constitutionally entrenched principle of state policy that ‘human rights and freedoms and respect for the dignity and worth of the human person shall be guaranteed’ (art 11). In a writ, the HCD issued a ruling on 24 November 2008 requiring the government to explain why the suspension of fundamental rights during the emergency should not be declared unconstitutional,<sup>37</sup> which went unheeded. This removal of court jurisdiction over the constitutional guarantees resulted in the apex court relinquishing its role as the enforcer of the citizen’s guarantees.

### 3.8 Judicial Accountability

Judges entrusted with the administration of justice are given considerable power, the exercise of which affects those appearing before them. This power is not unfettered but entails precise obligations to exercise it judiciously and fairly for the public good within the bounds of law. Every society wishes judicial power to be exercised with integrity, honesty and ‘without fear or favour, affection or ill-will’.<sup>38</sup> Judges must be responsive to this expectation for maintaining public confidence in the judiciary, the promotion of which warrants certain minimum standards of judicial conduct to be observed in and out of courts. There is growing public interest in judicial standards and public scrutiny of judicial conduct, the consequence of which is an increased accountability for judges. Judicial accountability is considered a self-evident good and a means of fostering

<sup>37</sup> By Syed Mahmud Hossain and Quamrul Islam Siddiqui JJ, *The Daily Star*, Dhaka, 25 November 2008, <http://archive.thedailystar.net/newDesign/news-details.php?nid=64836> accessed 10 February 2016.

<sup>38</sup> *Guide to Judicial Conduct* (Australian Judicial Administration Institute and CJ Council of Australia, 2002) 1.



public trust in dispensing justice.<sup>39</sup> Judicial independence and judicial accountability are mutually complementary in that the former endures if the latter strengthens.

Bangladesh judges are appointed by the executive. Apart from the constitutional checks and balances requiring all government organs to be mutually accountable and interdependent, the Constitution contains no explicit provision for judicial accountability to the people. This lack however does not necessarily mean that the judiciary and judges are immune from accountability, for which compelling constitutional enumerations exist. It is the Constitution's supremacy, not the judicial supremacy, which governs Bangladesh. All powers of the Republic are vested in the people and all state organs exercise these powers on behalf of the people and under the authority of the Constitution, which is the 'solemn expression of the will of the people' (art 7). Being an organ of the Republic, the judiciary derives its power from the people through the Constitution. The judicial power is not unfettered but is exercisable within the constitutional limits, which judges are bound by their oath to respect and uphold (Constitution art 148). The exercise of judicial power beyond the constitutional limits may trigger public concern and a confidence crisis, the avoidance of which requires the judiciary and judges to be responsible to the people.

This is not to suggest that the legitimacy of exercise of judicial power stems from the popular approval of judgments. Judges are accountable to the law, not to popularity, in rendering justice. The special nature of judicial functioning and decision-making may not always be publicly intelligible. Judicial activism may be essential to administer justice in diverse circumstances, but judges must take due care so that judicial activism does not turn into judicial dictatorship.<sup>40</sup> Judicial independence is necessary to exercise judicial power rationally and justly. The irrational and unjust exercise of judicial power compromises the credibility of the justice system, destabilises the reserved domains of legislature and executive, and undermines the constitutional separation of powers. Since judges are in positions of power to provide justice, pressure for accountability has increasingly been brought to bear on them. In exercising their constitutional power, judges are accountable to the people in providing a

<sup>39</sup> Shimon Shetreet, 'Judicial Accountability: A Comparative Analysis of the Models and the Recent Trends' (1986) 11 *International Legal Practitioner* 39.

<sup>40</sup> William Quirk 'Judicial Dictatorship' (1994) 31 *Society* 34–35; Ranganath Misra 'Governance and Judiciary' in Hye (n 5) 104–105.

justice system in which the people can be confident. Judges must be able to defend and explain the ways in which they exercise judicial powers in order to dispel doubts as to their fairness and legitimacy. The judiciary and judges cannot be immune from public accountability, which acts as a balancing factor between the independence of judges and their constitutional obligations in the adjudication process. Judicial accountability in a functional sense is indeed a safeguard against judicial autocracy.

There is a tradition of judicial isolation in Bangladesh that keeps judges apart from the community of ordinary people seemingly to preserve their integrity. It is the remoteness of judges from the community they serve and the unintelligibility of their decision-making that is fraught with the danger of eroding public confidence in the judiciary. Judges should be understanding and responsive to the prevailing social circumstances and community expectations. They 'increasingly have to deal with broad issues of social values and human rights, and to decide controversial moral issues that legislators cannot resolve'.<sup>41</sup> In Bangladesh, many aspects of the judiciary and administration of justice have become the subject matter of public debates and media. The revolutionary progression of information technology has led to a wider base of informed thinking on various judicial issues affecting civil society. This process has rendered these issues mass-oriented and created collective public interest in them, with increasing demand for inclusive social justice. There is a proliferation of public interest litigation. The worldwide concern over the plight of women, children, minorities and tribal peoples has resulted in an ever-increasing body of national and international legal measures to protect their rights and status. The judiciary is expected to be more sensitive to interest, well-being and human rights of vulnerable and underprivileged groups in the community. Judges must not apply law mechanically and exercise discretion arbitrarily. The application of law and judicious minds must manifestly be seen to be engaged in ensuring justice. They must consciously make public outreach efforts as fully as their office permits to address public misunderstandings of the administration of justice. Judicial awareness of pressing community imperatives and their reflection in judicial decision-making is likely to maximise community confidence in the judiciary of Bangladesh.

The HCD has the supervisory authority over subordinate courts (Constitution art 109). It occasionally takes disciplinary action against judges

<sup>41</sup> David Wood 'Judicial Ethics: A Discussion Paper' (1996) 44 *Australasian Institute Jud Admn* 1.

upon specific complaints. But the extent of irregularities far outpaces disciplinary actions due to the weakness of judicial supervision and the inability of the Law Ministry to proceed on every complaint lodged.<sup>42</sup> The HCD supervisory role in combating misfeasance and minimising delays in adjudication is inadequate to restore and maintain public confidence in the administration of justice. The Law Ministry, with the SC approval, formulated the *Code of Conduct 1988* to prohibit unethical and illegal activities in the lower judiciary. These judges are required (a) to observe a very high standard of personal integrity and the rule of law (code 2); (b) to provide patient hearing to all parties (code 3); (c) to maintain impartiality under all circumstances (code 4); (d) to remain above political pressures and ideological influences (codes 9, 14); and (e) to avoid unnecessary delay (code 10). The end in view is to serve the interest of justice and portray a credible image of the lower judiciary in the community (preamble of the Code). In practice though, the Code is often ignored for want of its strict enforcement. Activities contrary to the Code are rampant in subordinate courts.<sup>43</sup> The higher judiciary is immune from any scrutiny as there is no designated supervisory authority. The role of the SJCom to enhance judicial accountability is yet to be formally operational, a body that remains unfavourable to an all-powerful executive.

The judiciary has been at the centre of controversy over transparency, impartiality and accountability. Its frequent use of contempt of court action appears to be an attempt to keep judicial conduct beyond public scrutiny and accountability.<sup>44</sup> While apex court judges are accused of according priority to extra-legal and political considerations with questionable standards of judicial conduct, lower court judges are involved in rampant corruption and bribery scandals.<sup>45</sup> These accusations portray an

<sup>42</sup> Amir-Ul-Islam, 'Judicial Reform and Independence of the Judiciary', keynote address in a seminar organised by Human Rights and Peace for Bangladesh on 11 August 2007, Supreme Court Bar Association Building, [http://hrpb.org.bd/images/frontImages/Judicial\\_Reforms\\_and\\_Independence\\_of\\_Judiciary-Keynote\\_pap.pdf](http://hrpb.org.bd/images/frontImages/Judicial_Reforms_and_Independence_of_Judiciary-Keynote_pap.pdf) accessed 7 February 2016.

<sup>43</sup> A TI Bangladesh (TIB) survey found 88 per cent of respondents admitting to having paid bribes in litigations, TIB National Household Survey 2010 and Overview of Corruption and Anti-corruption in Bangladesh, TI Anti-Corruption Resource Centre, No 353, 7 November 2012, [www.u4.no/publications/overview-of-corruption-and-anti-corruption-in-bangladesh/](http://www.u4.no/publications/overview-of-corruption-and-anti-corruption-in-bangladesh/) accessed 15 January 2016.

<sup>44</sup> Examples of decisions sparking criticisms: *State v. Chief Editor, Manabjamine and Others* [2005] 57 DLR (HCD) 359; *Abhimunnya Singha v. Ms Shauli Shumon* [2014] 34 BLD (HCD) 183.

<sup>45</sup> Farzana Nawaz, 'Overview of Corruption within the Justice Sector and Law Enforcement Agencies in Bangladesh', TI Anti-corruption Resource Centre, Paper No 316 (12

ingrained culture of judicial unaccountability, which has steadily been eroding public confidence in the judiciary and judges. The prospect of judicial accountability being compromised further may not be gainsaid should partisan politics fail to relinquish power to dictate the course of the judiciary and justice.

### 3.9 Conclusion

Judicial independence entails the integrity and authority of the judiciary in terms of the freedom of judicial conscience and external interference in the performance of judicial functions. Judicial accountability guards against judicial autocracy. Judicial independence and accountability, however desirable, warrant certain specific measures to promote them. The Constitution explicitly provides for an impartial and independent judiciary as one of its cornerstones. The purpose is to establish rule-based governance and hold government organs/institutions, and political and economic elites accountable. But the measures that Bangladesh adopted since independence have rendered the judiciary subservient to the all-powerful executive. Changes in the form of government from parliamentary to presidential and dictatorial were able to gradually affect, and assert influence on, the judiciary. All governments in power gave priority to political consideration and party affiliation over judicial impartiality to make politically expedient judicial appointments.

Past governments made only rhetorical promises to separate the judiciary from the executive to appease popular demand for an independent judiciary. The maintenance of a dependent judiciary helped the executive to commit illegal and unconstitutional acts with judicially endorsed immunity.<sup>46</sup> The judiciary itself played a restraining pliant role by abdicating its powers and independence at the testing times of constitutional crises and emergencies. Being under the *de facto* control of the executive, the judiciary became an integral part and served the political interests of the ruling executive, rather than an independent judicial organ of the Republic. The reintroduction of parliamentary government in 1991 made

February 2012); M. R. Islam and S. M. Solaiman, 'Torture under Police Remand in Bangladesh: A Culture of Impunity for Gross Violation of Human Rights' (2003) 4 *Asia-Pac JHR* 6 & L 6.

<sup>46</sup> M. R. Islam and S. M. Solaiman 'The New Speedy Trial Law to Maintain Order in Bangladesh: Its Constitutional and Human Rights Implications' (2004) 46 *J Indian L Inst* 79–98.

only cosmetic changes that ensured judicial independence continued under the control of the executive. The public appreciation of judicial independence, impartiality, transparency and accountability in judicial decision-making is almost non-existent. Judicial independence is not meant to be a privilege for judges but, rather, a shield to protect citizens' rights, freedoms and the rule of law. Constructive public criticisms of the judiciary are not necessarily inimical to judicial independence. Greater judicial independence calls for specific measures of judicial accountability through transparency to maintain and enhance public faith in the judiciary. The domineering culture of executive autocracy over the constitutional imperative of the separation of power militated against the creation of an independent and accountable judiciary.

The constitutional requirement of the separation of the judiciary has *formally* been fulfilled in 2007 after 36 years of its subservience to the executive. This is largely attributable to the SC's judicial activism in *Masdar Hossain*. Judicial independence and accountability under the present government seem to be on a rollercoaster ride. There have been developments indicative of the judiciary starting gradually to drift apart from its previous pliable role to assume its role as the guardian of the Constitution. This is not to assert that the clout of the executive over the judiciary has dissipated altogether: rather, it has weakened. There are instances of executive attempts to reclaim and regain control over the judiciary. The functioning of the SJCom, which was hamstrung by the 2009 Act, has been curbed further following the introduction of parliamentary impeachment of SC judges in 2014. The recent declaration by the SC of this parliamentary power as unconstitutional generated considerable resentment and blistering attacks by government MPs in Parliament on 9 July 2017.<sup>47</sup> Thus the permeating executive control and its unwillingness to relinquish influence on the judiciary are still being felt in the post-separation era.<sup>48</sup>

Good and responsible governance calls for a balanced judiciary, which is independent and accountable in exercising judicial powers. Should the

<sup>47</sup> 'Verdict on 16th Amendment: Lawmakers tear into higher courts' *The Daily Star*, Dhaka, 10 July 2017, [www.thedailystar.net/frontpage/verdict-16th-amendment-lawmakers-tear-higher-courts-1430734](http://www.thedailystar.net/frontpage/verdict-16th-amendment-lawmakers-tear-higher-courts-1430734) accessed 31 July 2017.

<sup>48</sup> In early 2016, incumbent CJ SK Sinha remarked that the separation of the judiciary is only in paper and talks; in reality judiciary independence is under attack by the executive: *Daily Observer*, Dhaka, 10 January 2016, [www.observerbd.com/2016/01/10/130356.php](http://www.observerbd.com/2016/01/10/130356.php) accessed 12 January 2016; *The Daily Star*, Dhaka, 12 January 2016 [www.thedailystar.net/frontpage/jurists-ponder-what-do-200653](http://www.thedailystar.net/frontpage/jurists-ponder-what-do-200653) accessed 12 January 2016.

judiciary continue to function under the arm of the executive, the preference of judges to judicial restraint over activism and a pliant role over judicial independence, impartiality and accountability may not be gainsaid in view of their vulnerability under an all-powerful executive. The omnipresence of invisible executive control over the judiciary is likely to continue unabated and judicial independence will remain elusive as long as the vast empire of executive influence remains politically uncontrollable and legally unamenable to the constitutional rule of law in Bangladesh.