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[THE JUDICIARY OF BANGLADESH]

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THE JUDICIARY OF BANGLADESH

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Background

The present legal and judicial system of Bangladesh owes its origin mainly to two hundred years British rule in the Indian Sub-Continent although some elements of it are remnants of Pre-British period tracing back to Hindu and Muslim administration. It passed through various stages and has been gradually developed as a continuous historical process. The process of evolution has been partly indigenous and partly foreign and the legal system of the present day emanates from a mixed system which has structure, legal principles and concepts modeled on both Indo-Mughal and English law. The Indian sub-continent has a known history of over five hundred years with Hindu and Muslim periods which preceded the British period, and each of these early periods had a distinctive legal system of its own.

In 1853, the first Law Commission was established in India and an all India legislature was created whose laws were to be binding on all Courts. East India Company was dissolved and the Government of India was taken over by the British Crown in 1858, following the event of mutiny in 1857. The Civil Procedure Code, Criminal Procedure Code, Penal Code, Evidence Act, etc. were enacted and with this common legal fabric, the British Parliament in 1861 enacted Indian High Courts Act which provided for the establishment of High Courts in three Presidency Towns (Calcutta, Bombay & Madras) replacing the Supreme Court. After the establishment of High Courts a regular hierarchy of Civil and Criminal Courts were established by Civil Courts Act, 1887 and Criminal Procedure Code, 1898 respectively. The present system of Civil and Criminal Court, in Indian sub-Continent has their legal basis by virtue of these Civil Courts Act, 1887 and Criminal Procedure Code, 1898 respectively. The British Parliament declared India & Pakistan as independent dominions on 15 August, 1947 by the Indian Independence Act, 1947. This Act also provide that until the new Constitutions were framed for independent India & Pakistan, the Government of these two countries were to run by the Government of India Act, 1935. Judicial structure mostly remained the same as it was before 1947.

The Government of India Act.1935 changed the structure of the Government from unitary to that of federal type. Accordingly, in both India and Pakistan Federal Court was retained to function until new constitutions were framed. Pakistan constituent Assembly passed the privy council (Abolition of Jurisdiction) Act, 1950 which abolished the system of appeal to the Privy Council from the Federal Court of Pakistan. The Federal Court appeared as the highest Court in Pakistan till 1956, when the High courts in the provinces and the Supreme Court of Pakistan in the centre were established under the new Constitution. In Pakistan, the constitution of 1956 was abrogated in 1958 and another one was introduced in

1962, but the whole judicial structure remained all the same. After liberation in 1971, Bangladesh adopted its Constitution in 1972, which provides the structure and functioning of the Supreme Court comprising with the High Court Division and the Appellate Division. Needless to say that in Bangladesh the sub-ordinate judiciary both in Civil and Criminal side originated from Civil Court Act, 1887 and Criminal Procedure Code, 1898. Apart from this, in Bangladesh there are some other special laws providing for the basis of some special courts, such as labor court, Juvenile Court, Administrative tribunal etc.

How the Bangladesh judiciary functions?

The Bangladesh Judiciary acts through the Superior Judiciary and Sub-Ordinate Judiciary. The Superior Judiciary includes Appellate, Revisional and Original Jurisdiction and The Sub-Ordinate Judiciary possesses the Original Jurisdiction.

The Superior Judiciary

Bangladesh Supreme Court is the Highest court of Bangladesh, having two wings namely;

1.Appellate Division

2.High Court Division

Bangladesh Supreme Court is the creation of article 94 of the Bangladesh Constitution which provides:

	Establishment of Supreme Court	
	<p>(1) There shall be a Supreme Court for Bangladesh (to be Known as the Supreme Court of Bangladesh) comprising the Appellate Division and the High Court Division.</p> <p>(2) The Supreme Court shall consist of the Chief Justice, to be known as the Chief Justice of Bangladesh, and such number of other Judges as the President may deem it necessary to appoint to each division.</p> <p>(3) The Chief Justice, and the Judges appointed to the Appellate Division, shall sit only in that division and the other Judges shall sit only in the High Court Division.</p> <p>(4) Subject to the provisions of this Constitution the Chief Justice and the other Judges shall be independent in the exercise of their judicial functions.</p>	

The subordinate judiciary is under the control of High Court Division of the Bangladesh Supreme Court as per the provision of article 109 of the constitution.

	Superintendence and control over courts	
	The High Court shall have superintendence and control over all courts [and tribunals] subordinate to it.	

The Sub-ordinate judiciary is the creation of Act of parliament. Article 114 of the constitution provides thus:

	There shall be in addition to the Supreme Court such courts subordinate there to as may be established by law.	
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The Sub-Ordinate Judiciary

The Sub-ordinate Judiciary of Bangladesh is divided into

1. Civil Jurisdiction
2. Criminal Jurisdiction
3. Administrative Jurisdiction

Civil Jurisdictional Courts

1. Court of District Judge
2. Court of Additional District Judge
3. Court of Joint District Judge
4. Court of Senior Assistant Judge
5. Court of Assistant Judge

Every Administrative District of Bangladesh has these courts functioning to adjudicate civil disputes among the citizens.

The Criminal Jurisdictional Courts

The criminal judiciary is divided into the followings:

1.The Court of Session

2.The Magistracy

The Court of Session

1. Court of Session Judge

2. Court of Additional Session Judge

3. Court of Assistant Session Judge

The Magistracy

The Magistracy of Bangladesh is divided into two classes,

1.The Judicial Magistrate

2.The Executive Magistrate

The Court of Judicial Magistrate

1. Court of Chief Judicial Magistrate
2. Court of 1st Class Judicial Magistrate
3. Court of 2nd Class Judicial Magistrate
4. Court of 3rd Class Judicial Magistrate

An executive Magistrate

An executive Magistrate is mainly an administrative Magistrate, holding the limited trial power only in mobile court. These Courts are functioning in every Administrative District.

Administrative Jurisdictional Tribunals

1. Administrative Appellate Tribunal.
(Situated in the capital only)
2. Administrative Tribunal.
(Situated in the capital only)
3. The Electricity court.
(Administrative Magistrate of every District acts as such)

4. House Rent Controller.

(Every District has this court)

5. The settlement Court

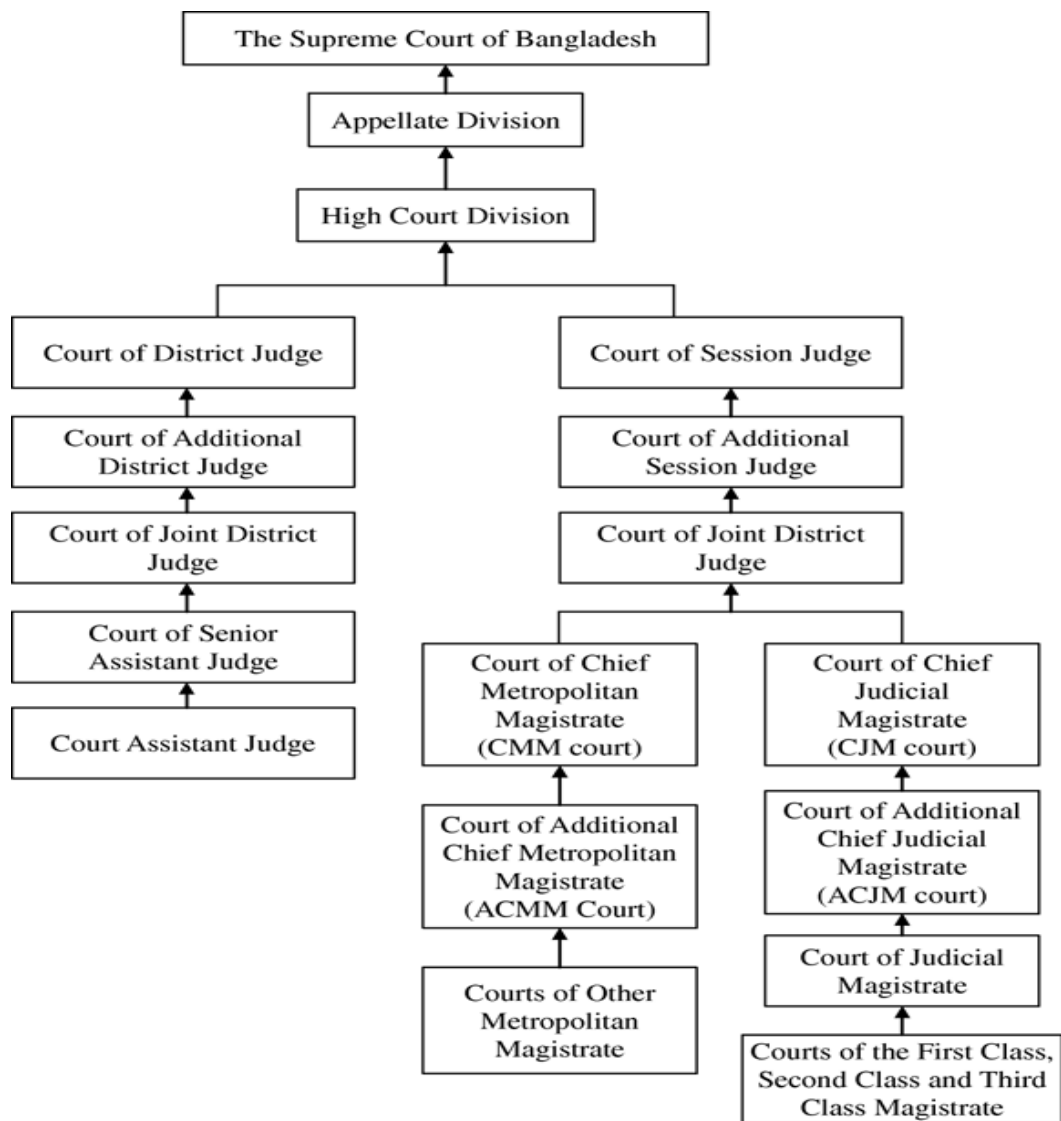
(Situated only in the capital)

6. The Land Appeal Board.

(Situated only in the capital)

7. The Labour Court.

(Few Administrative Districts have this court)



1 Flow Chart

Court Procedures: (Example of Subordinate Judiciary)

বাংলাদেশের অধঃস্তন আদালত সমূহে প্রধানত দুই ধরনের মামলার বিচার সম্পন্ন হয়। ১. দেওয়ানী ও ২. ফৌজদারী। দেওয়ানী মামলার মধ্যে স্বত্ব মোকদ্দমা, অর্থ লেনদেন সম্পর্কিত মোকদ্দমা, উত্তরাধিকার মোকদ্দমা, পারিবারিক মোকদ্দমা ইত্যাদি অন্তর্ভুক্ত। প্রাথমিক ভাবে এই মামলা সমূহ এর মূল্যমান অনুসারে যুগ্ম জেলা জজ, সিনিয়র সহকারী জজ এবং সহকারী জজের আদালতের যেকোনটিতে দায়ের হতে পারে। সাধারণত হত্যা, রাহাজানী, চুরি-ডাকাতি, ধর্ষণ -এই জাতীয় অপরাধ সমূহ ফৌজদারী অপরাধের অন্তর্ভুক্ত এবং এই সম্পর্কিত মামলাগুলো ফৌজদারী মামলা। এই জাতীয় মামলা প্রাথমিক ভাবে জুডিশিয়াল ম্যাজিস্ট্রেটের আদালতে দায়ের হয় এবং এর কিছু কিছু থানার মাধ্যমে দায়ের হয়। (bdcourts.gov.bd)

আদালতের

গঠন:

জেলা পর্যায়ে আদালত সমূহ সাধারণত একজন জেলা জজ কিংবা অতিরিক্ত জেলা জজের সমপর্যায়ের বিচারকের নেতৃত্বে একাধিক বিচারকবৃন্দের সমন্বয়ে গঠিত হয়। বিচারকবৃন্দের মধ্যে রয়েছেন অতিরিক্ত জেলা জজ, যুগ্ম জেলা জজ, সিনিয়র সহকারী জজ এবং সহকারী জজ কিংবা তাঁদের সমপর্যায়ের বিচারক।

Non-State Justice System

The term “shalish” (or “salish”) refers to a community-based, largely informal Bangladeshi process through which small panels of influential local figures help resolve community members’ disputes and/or impose of sanctions on them. (It also can refer to the panels themselves.) NGOs and the government have drawn on and modified this process in recent years so that shalish now takes three basic, sometimes overlapping forms in Bangladesh: traditional; government-administered “village courts” (though under the relevant laws other terms technically apply for family and urban disputes); and NGO-modified.

Shalish may involve voluntary submission to arbitration (which, in this context, involves the parties agreeing to submit to the judgement of the shalish panel), mediation

(in which the panel helps the disputants to try to devise a settlement themselves) or a blend of the two.

Shalish addresses a wide variety of civil matters, some with criminal implications. These often involve gender and family issues, such as violence against women (whether within or outside marriage), inheritance, dowry, polygamy, divorce, financial maintenance (or lack thereof) for a wife and children, or a combination of such issues. Other foci include land conflicts, such as over the boundaries between neighbors' parcels, as well as other property disputes. It is basically a practice of gathering village elders and concerned parties, exclusively male, for the resolution of local disputes. Sometimes Chairmen and elite members of the Union Parishad are invited to sit through the proceedings. Shalish has no fixed dimension and its size and structure depend entirely on the nature and gravity of the problem at hand.

Separation of the judiciary from the executive in Bangladesh

The idea of independence of judiciary was first worked out by a French philosopher Montesquieu who articulated the famous "Theory of Separation of Power" in sixteenth century. Separation of the judiciary from the executive refers to a position in which the judicial branch of government can act free of any interference and influence of other branches of government particularly from the executive. Earlier part of this chapter depicted that in any aspect of judiciary, like appointment, tenure and discipline of the judiciary is not free from interference of the executive.

The History of Separation of the Judiciary

01. British period:

During the reign of British ruler, there was a demand for separation of judiciary from the executive. In 1921, a resolution was passed in the Bengal Legislative Assembly regarding separation of judiciary, which was followed by formation of a committee. Though, the committee reported that there was no practical problem in separation of judiciary from the executive. However, nothing more was done during the British period. Thus, the judiciary remained dependent on executive branch of government. Eventually, this situation encouraged the government officials to be corrupt and corruption ruined the socio-economic and human development.

02. Pakistan period

The first Constitution of independent Pakistan that was adopted in 1956 provided for separating the judiciary from the executive. It has been made mandatory for the President to make appointments of judges of the Supreme Court in consultation with the Chief Justice. However, the Constitution of Pakistan did not include any provision regarding “subordinate courts” or “magistracy” and these were regulated by the Code of Civil Procedure and the Code of Criminal Procedure. As a result the judiciary remained under substantial executive control. However, in 1957, the East Pakistan Provincial Assembly passed the Code of Criminal Procedure with a view to separating the judicial and executive functions of the magistrates. Furthermore, in 1958 the Pakistan Law Commission recommended to bring the judicial magistrates under the control of the High court. Consecutively, in 1967 the Law Commission again recommended to give effect to the Cr.P.C Amendment Act 1957. However, it was never given effect during the whole of Pakistan period and the judiciary was remained the abdomen of executive.

03. Bangladesh period

As a sovereign state Bangladesh adopted her Constitution on 16 December 1972 and the spirit of separation of judiciary from the executive was inserted in Article 22. Article 22 enumerates that, “the State shall ensure the separation of the Judiciary from the executive organs of the State”. Article 95(1) addressed the method of appointment for the Supreme Court: the President shall appoint the Chief Justice and other judges. In addition Article 116 A provides for independence in the subordinate judiciary while Article 94(4) demands independence of the Supreme Court judges. Article 116 A, enumerates that the judicial officers including the magistrates have been declared to be independent in the exercise of their judicial functions. Beside this, under the Articles 115 and 116 of the Bangladesh Constitution, the President makes the appointment and control of judges in the judicial service or as magistrates exercising judicial duties. During Bangladesh period, following initiatives were taken for separating judiciary from the executive.

The first attempt was taken in 1976 under a Law Committee headed by Justice Kemaluddin Hossain recommended that subordinate judiciary on the criminal side should be separated from the executive in three stages. In 1987, second initiative was taken to separate the magistracy by a Bill for amending Code of Criminal Procedure, 1898. However, for unknown reason the Bill could not place before the Parliament. Third initiative, 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.

Barrister Sara Hossain says: In many countries separation has been ensured in compliance with a constitutional mandate and has not required the kind of prolonged efforts from the Bar, supported by the Bench, that we have seen. Unfortunately, we still don't have full separation in the sense that we don't have independent-minded judges in all courts. On the one hand, there are still too many reports that someone or the other is breathing down a judge's neck. Earlier it was political leaders, now there are other forces. On the other hand, we also see many judges who do not take decisions according to the law and constitution with its mandate of equality -- but who give full rein to their biases, whether these are politically partisan biases, or gender biases, or racial or religious biases.

The lessons from other countries are many. They include a focus on ensuring that the judiciary is not just independent but accountable also and to the people at large. This means that it must allow more open public criticism and comment on its decisions and actions, it must allow public scrutiny for example by publishing regular information on its activities, case dockets etc -- and it must be ready to act in cases of complaints regarding judicial behavior and actions. To ensure independence and effective of action, judges should not be dependent on the executive for preferment of any kind. In other countries in South Asia and South East Asia, one way has been to improve judges' terms and conditions of work and to enhance their salaries. Another way -- more lateral to ensure independence is to also make judges more effective, to set up systems of judicial education, including social context education, for judges at all levels, to ensure that they can truly deliver justice to all. (in an interview with Daily Star)

Conclusion

It is very clear to us that despite separation of judiciary, until and unless the government has adequate respect and willingness to implement the verdict of judiciary and all the rules and regulations related to the separation of judiciary, complete independence of judiciary is not possible.

The forgoing discussion reveals an evaluation of the present state of independence of judiciary in Bangladesh. The concept of independence of judiciary includes numerous aspects like – appointment, posting, promotion, tenure, discipline and other forms of informal scrutiny of judges, however; attempts were made in appointment, tenure and discipline of judicial independence in Bangladesh. In this study, it has been found that several constitutional provisions are very crucial and favorable for independence of judiciary in Bangladesh. However, there are some provisions, which contradict to the concept of judicial independence. These provisions of Constitution should be amended especially in case of appointment, tenure and discipline or the provisions (original Articles 115, 116) of consultation with Supreme Court should be re-established. On the other hand, it can be conducted by JSC and Supreme Judicial Council in place of by President.

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