The judicial system of Bangladesh: an overview from historical viewpoint

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Abstract

Purpose – The main aim of this paper is to analyze judicial system of Bangladesh, which comprises all courts and tribunals that performs the delicate task of ensuring rule of law in the society. The paper depicts the history and evolution of the judicial system in Bangladesh from ancient period to present day.

Design/methodology/approach – The study is qualitative in nature and based on secondary sources of materials like books, journal articles, government orders, rules, acts, newspaper reports, etc. Relevant literature has also been collected through internet browsing.

Findings – The major findings of this paper are: there is a well-organized court system in Bangladesh which is in fact the replica of the system introduced by British rulers and it is widely accepted in the original Constitution of Bangladesh. The ancient judicial system was not based on rule of law rather on caprice and caste consideration. The executive branch of government always attempts to control the judiciary through different mechanisms, which include the appointment, tenure and discipline of judges from ancient period. Therefore, the independence of judiciary is vulnerable from ancient time to present day and even after separation of the judiciary from the executive (November 2007) the interference of the executive over the judiciary is still continuing.

Practical implications – This paper opens a new window for the policy makers and concerned authorities to take necessary steps for overcoming the existing limitations of judiciary.

Originality/value – The paper will be of interest to legal practitioners, policy makers, members of civil society, and those in the field of judicial system in Bangladesh and some other British colonial common law countries.

Keywords Legal systems, Law, History, Bangladesh

Paper type General review

1. Introduction

The judicial system of Bangladesh has not grown overnight or in any particular period of history (Huda, 1997, p. 740). The present legal and judicial system of Bangladesh owes its origin mainly to 200 years British rule in the Indian subcontinent 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 subcontinent has a known history of over 500 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.

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Bangladesh is a twice-born nation. It achieved independence in 1947 from British domination as a part of Pakistan named as East Pakistan. Over a period of two decades, it suffered from what has been described as internal colonialism. It finally emerged as a sovereign nation in 1971 through protracted mass agitation and a war of liberation, which claimed millions of lives (Khan *et al.*, 1996, p. 1). The Judiciary of Bangladesh consists of a Supreme Court, subordinate courts and tribunals. The Supreme Court of Bangladesh comprises of the Appellate Division (AD) and the High Court Division (HCD). It is the apex court of the country and other courts and tribunals are subordinate to it. In this paper, I have briefly discussed the judicial system of Bangladesh from ancient period to present day under the captions of Hindu, Muslim, British, Pakistan and Bangladesh periods.

2. Hindu period: ancient judicial system

In ancient times, the Hindu kings ruled the Bengal (present Bangladesh) in a period of around 1,500 years before and after the beginning of the Christian era. During this period, India was divided into several independent states and the king was the supreme authority of each state and was considered to be the fountain of justice[1]. There were five major types of court system in ancient Bengal – The King Court, the Chief Justice Court, special tribunals, town or district courts and village courts. The King's Court was both original court as well as the highest court of appeal in the state (Huda, 1997, p. 740). King was assisted by Brahmins, the chief justice and other judges, ministers and learned men for discharging of his judicial functions (Akkas, 2004, p. 55). Under the king, there was the chief justice and other judges who used to receive advice from learned Brahmins (Huda, 1997, p. 740).

In the appointment of the chief justice and other judges, the questions of caste consideration played very important role. The *Brahmins* were first priority to be appointed as a chief justice and other judges. The *Kshatriyas* and *Vaisyas* were of the next preference but a *Sudra* was never considered to be appointed as a judge (Akkas, 2004, p. 56). Apart from this, women were not allowed to hold the office of a judge. Judges were required to take the oath of impartiality when deciding disputes between citizens (Halim, 2008, p. 38).

The judicial trial consisted of four stages like the plaint, the reply, the trial and investigation and finally the verdict or decision of the court. The administration of adjudication was governed by a bench of more than one judges even the king decided cases in his council (Huda, 1997, p. 742; Halim, 2008, p. 38). To reach a fair verdict doctrine of precedent and evidences like documents, witnesses and the possession of incriminating and circumstantial evidence was used. Another important feature of ancient judicial system was trial by ordeal. Major types of ordeal were ordeal by fire, water, poison, rice grains and lot (Halim, 2008, pp. 39-40; Huda, 1997, pp. 741-4). For instance, ordeal by poison is explained here. The ordeal by poison method was based on the view that God protects innocent people. The accused was required to drink poison without vomiting it. If he/she survived, he was declared to be innocent.

There were four methods of punishment – by gentle admonition, by sever reproof, by fine and by corporal punishment (Halim, 2008, p. 40). Caste consideration was a great factor in determining punishment. According to Gautama, a *Brahmin* could flout a *Sudra* with impunity in contempt cases. A *Kshariya* or *Vaisya* abusing a *Brahmin* was to be punished with 100 panas (24 panas = a copper coin) and 150 panas, respectively.

A *Sudra* was punished by corporal punishment, e.g. cutting of the tongue (cited in Huda, 1997, p. 743). Similarly, for committing murder the murderer was to pay 1,000 cows for killing a *Kshariya*, 100 for a *Vaisyo* and 10 for a *Sudra*. On the other hand, if a person of a lower caste killed a *Brahmin*, the murderer would be put to death and his property confiscated. If another *Brahmin* killed a *Brahmin*, he was to be branded and banished. If a *Brahmin* killed a person from lower caste, he was to compound for the offence by fine (Huda, 1997, p. 743; Halim, 2008, p. 41).

From the above brief discussion of ancient judicial system of Hindu period we realized that the judicial system was not based on rule of law rather on caprice and caste consideration. Though judges took oath for fair and impartial judgment, however, the king himself headed the judiciary and he was free to make any changes in the structure of the court, so the independence of was judges were not out of questions.

3. Muslim period: judicial system of sultanate and Mughal Empire

The Muslim period starts with the invasion of the Muslim rulers in the Indian subcontinent in 1100 AD[1]. The period of conquest of India by Muslim in the year 712 when Muhammad bin Qasim, the famous Arab general, defeated King Dahir and conquered Sindh and Multan (Hussain, 1934; cited in Akkas, 2004, pp. 57-8). From 991 successive invasions began with incursions from different Muslim generals. These continued until the permanent conquest of India by Muhammad Ghori in 1206 (Akkas, 2004, p. 58). When the Muslims conquered all the states, they brought with them the theory based on the *Holy Quran*[2]. According to the *Holy Quran*, sovereignty lies in the hand of Almighty Allah and the king is his humble servant to carry out his will on the earth[1]. In Muslim period, everyman was considered as equal before Allah (Creator) overriding distinctions of class, nationality, race or colour and the ruler was Almighty's chosen agent and trustee (Huda, 1997, p. 745).

The whole Muslim period in India may be divided into two separate periods – the Sultanate of Delhi and the Mughal Empire. From 1206 to 1526, India was ruled by Muslim rulers known as the Sultanates of Delhi (Akkas, 2004, p. 58). On the other hand, in 1526 Delhi Sultanate came to an end when Delhi was captured by Zahiruddin Babar who founded the Mughal Empire in India that existed until 1857 (Halim, 2008, p. 42).

3.1 The judicial system under the Sultanate

The Sultan was the prime authority of the administration of justice in his Sultanate. The judicial system under the reign of Sultanate was organized on the basis of administrative units (Huda, 1997, p. 748). A systematic classification and gradation of the courts were available at the seat of the capital, in provinces, districts, Parganahs[3], and villages (M.B. Ahmed, pp. 104-25, cited in Huda, 1997, p. 748). The powers, functions and jurisdictions of each court were clearly defined (Huda, 1997, p. 748).

The courts established at the capital of the Sultanate were as: the King's Courts, Diwan-e-Mazalim, Diwan-e-Risalat[4], Sadre Jehan's Court, Chief Justice's Court and Diwan-e-Siyasat (Halim, 2008, p. 42). The highest court in the capital was the King's Court, which exercised both original and appellate jurisdiction. It was presided over by the Sultan himself, assisted by two legal experts of high reputation known as *Muftis* (Akkas, 2004, p. 59). In addition, there was a separate Court of Chief Justice. The Chief Justice known as Qaziul-ul-Quzat was the highest judicial officer next to the Sultan.

Qaziul-ul-Quzat was appointed by the Sultan from amongst the most virtuous of the learned men in his kingdom (Halim, 2008, p. 42).

However, in 1248, Sultan Nasir Uddin created a superior judicial post known as the Sadare Jahan, which became more powerful than the Chief Justice. The Sadare Jahan, was the *de facto* head of the judiciary and he occasionally presided over the King's Court (Akkas, 2004, p. 59). The office of the Sadare Jahan and Chief Justice were amalgamated by Sultan Alauddin Khilji (1296-1316), but Sultan Firoz Shah Tughlau (1351-1388) again separated them (Kulshreshtha, 1989, p. 19; cited in Akkas, 2004, p. 59). The Court of Diwan-e-Siyat was constituted to decide the cases of rebel and high treason, etc. Its main purpose was to deal with criminal prosecutions (Halim, 2008, p. 42). There were some other judicial officers attached to the Court of Chief Justice as: Mufti, Pandit, Mohtasib and Dadbak[5].

In the province, there were four courts namely Adalat Nazim-e-Subah, Adalat Qazi-e-Subha, Governor's Bench (Diwan-e-Subha) and Sadre-e-Subah. At the district level, there were four types of court as: the District Qazi's Court, Faujder Court, Court of Mir Adils and Court of Kotwals. Beside these, there were two separate courts like Parganah's Court for Parganah and Village Court for Village[6].

3.2 Judicial system under Mughal Empire

During the Mughal period (1526-1857) the Mughal Emperor was considered the "fountain of justice". The Emperor created a separate department of justice known as Mahukma-e-Adalat with a view to administering justice properly. Similar to the Sultanate period a systematic classification and gradation of courts existed all over the empire (Halim, 2008, pp. 45-8; Akkas, 2004, pp. 62-5). *Quran*, Sunna (Ideology of Prophet SM), Ijma, Qiyas and Fatwa were the fundamental sources of laws and legal procedures during this period (Huda, 1997, p. 756). The judicial procedure was regulated by two Muslim Codes namely Fiqh-e-Firoz Shahi and Fatwai-I-Alamgiri and crime was classified under three broad categories:

(1) crime against god;

(2) crime against king; and

(3) crime against private individual.

During the Muslim period trail by ordeal was prohibited (Halim, 2008, p. 48).

A qazi was assigned for Parganah to decide civil and criminal cases, a sikdar to maintain law and order, an amin to assess revenue and to decide land and revenue disputes and an amil to collect revenue. Equally, in every district, a district qazi was assigned to hear civil and criminal cases of district town and also to hear appeals as of the decisions of the Pargana Qazis[7].

The Faujdar maintained law and order in the district and malguzar was the head of revenue administration of the district who decided land and revenue disputes. He also empowered to revise decisions of the amins. Qazi-ul-Quzat was the Chief Justice who decided civil and criminal cases of the provincial capital and also heard appeals from decisions of the district qazis[7]. The sikdar of the Pargana and Fauzdar of the district was empowered to punish the offenders for breach of peace only. The nazim (Provincial Governor) was empowered to revise the decision of the chief qazi in criminal offences punishable with death or mutilation[7]. Similarly, the provincial diwan had the power to

revise the decision of the district Malguzar and the village panchayet's was empowered like sultanate period.

There were three types of punishments for three types of crimes (mentioned above) as follows:

(1) *Hadd (fixed penalties)* Hadd meant specific punishment for specific offences according to sharia like theft, robbery, whoredom (rape), apostasy, defamation and drunkenness. For instance, stoning to death was prescribed for adultery or drinking wine, cutting off right hand for theft, etc. It was equally applicable to Muslim and non-Muslim. This type of punishment was prescribed for offence against god or against public justice (Halim, 2008, p. 48).

(2) *Tazir (discretionary punishment)* Tazir was another important form of punishment that prescribed for those crime which were not classified under hadd for instance gambling, causing injury, minor theft, etc. (Halim, 2008, p. 48). Under Tazir the kind and amount of punishment was left entirely with the judge's wish; courts were free to even invent new methods of punishing the criminals, e.g. cutting gout tongue, impalement, etc. (Halim, 2008, p. 48).

(3) *Qisas (retaliation) and Diya (blood money)* Qisas meant, in principle life for life and limb for limb. Qisas was applied for killing and certain types of grave wounding or maiming which were characterized as offences against human body (Halim, 2008, p. 49). On the other hand, Qisas became Diya when the next kin of the victim was satisfied with money as compensation for the price of blood. This also could not be reduced or modified either by the qazi or the emperor (Halim, 2008, p. 49).

Discussion of the Muslim period (both Sultanate and Mughal) reveals that Sultan or Emperor was the supreme authority of administration of justice as state head and equality before law was a common feature. Although qazis were fulltime judges, at every level of administration the executive authority was empowered to exercise judicial functions. Therefore, the judiciary was not independent. The most flawed provision in Muslim criminal law was the provision of Diya. In many cases, the murderer escaped simply by paying money to the dependants of the murdered person. The law of Tazir, which provided for discretionary power of judges, was misused which led to corruption and injustice. The law of evidence under Muslim law was also very defective, unsatisfactory and of primitive in nature. For instance, to convict a man for rape, it was necessary to have four witnesses who had actually seen the accused in the very act of committing the offence (Halim, 2008, p. 51). The nature of punishment of stoning was so cruel and inhuman that no human being could even think of it in a civilized society. However, the judicial system of Muslim is better than ancient Hindu period.

4. British period: modernization of ancient Indian judicial system

The British period in Bengal began with consolidation of power of the East India Company and the British ruler modernized the judicial system of ancient India under a series of Royal Charters (Akkas, 2004, p. 65; Halim, 2008, p. 51). East India Company gradually established control and possession over Bombay, Madras and Calcutta, which were later on known as presidency towns[8]. Till 1726, the administration of justice in three presidency towns was haphazard and ultimately the Company

participated in administration of justice in co-operation with the local Mughal authorities (Halim, 2008, p. 52). Some changes were brought in judicial system with the intervention of some charters issued from time to time by the company in three-presidency towns. The Charter of 1726 issued by King George-I, by way of granting Letters Patent to the Company, was the first gateway to introduce English legal and judicial system in India. Later on, King George-II issued Charter of 1753 with a view to remove the defects of the Charter of 1726[8]. In 1772, the House of Commons appointed a secret committee to improve the judicial system, the secret committee of House of Commons intervened and passed the Regulation Act 1773 (Halim, 2008, p. 57). Under this Act King issued a separate Charter of 1774 with a view to establishing the Supreme Court of judicature at Calcutta to decide civil, criminal, equity, admiralty and ecclesiastical cases arising within Calcutta presidency town except petty civil cases. The Supreme Court had also power to issue writs like the King's Court of England and also power of supervision and control of the subordinate courts[7]. Subsequently, Supreme Courts were established in Madras in 1801 and in Bombay in 1824[8]. In 1829, another change made by appointed a class of officials called "Commissioner" and placed in charge of a division comprising several districts, which effected widely in administrative and judicial machinery. They were authorized to hear appeals from magistrates (Kulshreshtha, 1989, p. 164; cited in Akkas, 2004, p. 76). Thus, the judicial and administrative functions were concentrated in one hand.

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[8].

In the subsequent periods, several kinds of experiments were made on judicial administration. 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 and Madras) replacing the Supreme Court[8]. The judges of High Court were appointed from amongst the practicing barristers, advocate and the district judges[7]. At that time, the Islamic system of law was replaced by the English Common Law system in 1862 with some modifications allowing both Hindus and Muslims to be regulated by the rules of their respective personal laws as enjoined by their respective religion. In 1864, the posts of qazis, muftis, moulavis and pundits were abolished[7].

The most important changes were made by creating a hierarchy of civil and criminal courts by Civil Court Act 1887 and Code of Criminal Procedure 1898[9] (Akkas, 2004, p. 77). Under Section 3 of the Civil Court Act 1887 created the following four classes of civil courts[10]:

(1) The Court of the District Judge.

(2) The Court of the Additional Judge.

(3) The Court of the Subordinate Judge.

(4) The Court of Munsif.

On the other hand under Code of Criminal Procedure 1898, created the following five types of criminal courts:

(1) Courts of Session.
(2) Presidency Magistrates.
(3) Magistrates of the First Class.
(4) Magistrate of the Second Class.
(5) Magistrate of the Third Class.

The judicial officers of the subordinate courts were appointed from amongst the law graduates, practicing lawyers and administrative officers who were members of the Indian Civil Service. The courts of district judges, additional district judges and subordinate judges were assigned for deciding in civil matters, and the courts of the district and additional district magistrates, the sessions judges, additional session judges and assistant session judges was empowered for deciding in criminal matters in the district headquarters[7]. The lowest level civil court was presided over by the Munsif and criminal court by the magistrate in the subdivisional headquarters and there were three classes of magistrates having first, second and third classes who were empowered for imposing sentences[7]. The session courts were presided over by the same officer who decided civil cases also as district, additional and subordinate judges. Apart from this, appeal lay with the high court from the decision of the district court and with the Privy Council in England from the decision of the high court[7].

Later, the Indian High Court Act 1911 made some amendment to the Indian High Court Act 1861. It increased the number of judges in each High Court from 16 to 20 incorporating the Chief Justice and provided for the appointment of additional judges to the High Court by the Governor-General-in-Council for a maximum period of two years (Akkas, 2004, p. 79). In 1915 with a view to consolidate and re-enact existing status, relating to Government of India and the Indian High Courts the Government of India Act 1915 was passed by the British Parliament which re-enacted all the provisions of the Indian High Court Act 1861 (Akkas, 2004, p. 79).

However, 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[8]. The Government of India Act 1935 made some important changes to composition, constitution and working of the high court (Akkas, 2004, p. 79). It therefore, distributed powers between the centre and the constituent units. The structural shape of legal system was as like as unitary system of government except including federal court under Privy Council. The structural shape of legal system under the Government of India Act 1935 was given below (Figure 1).

In the discussion of British period, I have just sketched the efforts were made to establish a new pattern of judicial administration in British India. Numerous measures were taken to improve the judiciary but all the steps taken were not free from imperfections. There was always a tendency of executive government to control the judiciary. The government issued directions to the courts and closely scrutinized the judges and even sometimes asked for explanations of verdicts (Mootham, 1983, p. 162; cited in Akkas, 2004, p. 82). However, by establishing the High Court in 1862, the judiciary was placed in a position to provide real justice and to maintain its independence. All courts were brought under a unified system of control by High Court.

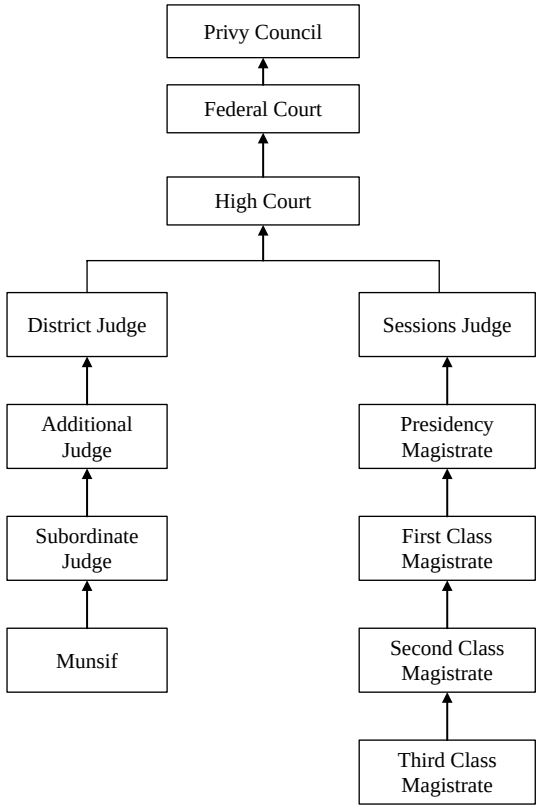

Figure 1.
The structural shape of legal system under The Government of India Act 1935

However, the subordinate criminal judiciary was not separated from the executive and magistrates who belong to executive branch continued to exercise judicial power in criminal cases (Akkas, 2004, p. 82). Therefore, the independence of judiciary was not ensured this period. If we compare with previous two periods of Hindu and Muslim, we found a radical change and difference in judicial system especially in procedure of hearing, evidence, witness and punishment. The cruel punishing system like as trial by ordeal and stoning was removed in this period. The British rulers introduced and practiced British legal system in place of previous Hindu customary provisions and Muslim Sariah laws. Today, we the people of Indian subcontinent live under the legal system, which is basically inherited from this period.

5. Pakistan period

The Pakistan period of Bangladesh began in 1947 when the Indian subcontinent was divided into two independent states, India and Pakistan. Bangladesh was fall under Pakistan as a province namely East Pakistan. In 1949, the Indian Constituent Assembly passed the abolition of the Privy Council Jurisdiction Act 1949 which abolished the system of appeal to the Privy Council from India (Halim, 2008, p. 66). Similarly, 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[8].

In 1947 as an independent state immediately by an order of the Governor General of Pakistan a new Federal Court was established at Karachi according to the provisions of the Government of India Act 1935. By another order of the High Courts (Bengal) order 1947 a High Court was established out of constitutional necessity in Dhaka (Halim, 2008, p. 66). The Federal Court appeared as the highest court in Pakistan till 1956. The high courts in the provinces and the Supreme Court of Pakistan in the centre were established under the new constitution of 1956. Although, the constitution of 1956 was abrogated in 1958 and another one was introduced in 1962, but the whole judicial structure remained all the same[8].

In 1969, the Proclamation of Martial Law abrogated the constitution of 1962. The Martial Law Government issued the Provincial Constitution Order 1969, which provided that all courts should be exercised the same powers and jurisdiction as they had exercised immediately before the Proclamation of Martial Law (Akkas, 2004, p. 86). However, the courts were prevented from entertaining any application or petition against the Martial Law Authority or any person exercising power or jurisdiction derived from it (Akkas, 2004, p. 86). This martial law was ended on 16 December 1971 with the appearance of Bangladesh as a sovereign and independent state in the map of world.

In the Pakistan period, the state of the judiciary was significantly changed. The higher judiciary was separated from the executive branch of government, however, lower courts specially the criminal courts were under executive control and public servant of executive branch exercised judicial functions which was the violation of rule of law or due process of law. Basically, the judicial system of Pakistan period was opposite side of the same coin of later British period.

6. Bangladesh period: current judicial system in Bangladesh

After the emergence of Bangladesh in 1971, initially, there was no change of laws and the judicial system. As an independent nation of the world, Bangladesh adopted its constitution in 1972, which provides the structure and functions of the Supreme Court, which comprises the HCD and the AD. The HCD has empowered to hear appeals and revisions from subordinate courts, and also to issue orders and directives in the nature of writs to enforce fundamental rights and to grant other relieves available under the writ jurisdiction. The AD is vested with power to hear appeals from the decisions of the HCD or from any other body under any statute. The HCD has also powers of supervision and control of the subordinate courts and tribunals and also has jurisdictions to declare any law inconsistent with the fundamental rights as null and void.

It is pointless to say that in Bangladesh the subordinate judiciary both in civil and criminal side originated from Civil Court Act 1887 and Criminal Procedure Code 1898 as amended up to 2007 (Halim, 2008, p. 75). Beside this, in Bangladesh, there are some other special laws, which provide the basis of some special courts, like as Labour Court, Juvenile Court, Administrative Tribunal, etc.

The basic source of law in Bangladesh is the Constitution of the People's Republic of Bangladesh 1972 as amended from time to time. Though the legal system of Bangladesh is founded on the English common law, most of the laws of Bangladesh are

statutory laws enacted by the parliament and interpreted by the Supreme Court. Rule of Law is one of the basic features of Bangladesh legal system. Every one is equal before the law and entitled to equal protection of law, and there cannot be any discrimination on the ground of religion, race, sex, etc. and no one can be detrimentally affected in life, liberty, body, reputation or property except in accordance with law in Bangladesh. The present judicial system of Bangladesh is discussed below.

6.1 Organizational structure of judiciary

Part VI of the Bangladesh Constitution deals with the provisions of Bangladesh Judiciary. Chapter I under Part VI deals with the detailed provisions of the Supreme Court (which includes Article 94-113), Chapter II deals the detail provisions of Subordinate Court (which includes Articles 114-116A) and Chapter III deals with Administrative Tribunal (Article 117). After independence, the first highest court in Bangladesh was the High Court established under Section 2 of the High Court of Bangladesh Order 1972 promulgated pursuant to the Proclamation of Independence 1971 and the Provisional Constitution of Bangladesh Order 1972 (Akkas, 2004, p. 87). The High Court consisted of a chief justice and so many other judges as may be appointed from time to time. They would be appointed by the President and held office "on such terms and conditions as the President may determine"[11].

Later, by the High Court of Bangladesh (Amendment) Order 1972 an AD of the High Court of Bangladesh was established and it consisted of the chief justice and two other judges of the High Court appointed by the President after consultation with the Chief Justice[12].

The High Court of Bangladesh existed until the Supreme Court established under the Constitution of Bangladesh[13] (Cited in Akkas, 2004, p. 87). The hierarchical structure of the present judiciary of Bangladesh is shown in Figure 2.

The diagram of present judiciary's hierarchical structure indicates that at the top of the hierarchy is the Supreme Court of Bangladesh. Supreme Court has two divisions – HCD and AD. And there is a network of subordinate courts and tribunals under the HCD. Besides, the above-mentioned courts there are some tribunals and special courts like Juvenile Court, Labour Court, Family Court, Administrative Tribunal, etc. The following section deals with the details of judiciary in Bangladesh.

6.2 The Supreme Court of Bangladesh

The Supreme Court is the highest court of Bangladesh. Article 94(1) of the constitution provides that there shall be a Supreme Court for Bangladesh (to be known as the Supreme Court of Bangladesh) comprising two division – the AD and the HCD. The Supreme Court shall consists of the Chief Justice, to be known as the Chief Justice of Bangladesh and such number of other Judges as the President may deem to necessary to appoint to each division (Article 94(2) of COB). The Chief Justice and the Judges appointed to the AD shall sit only in the division, and the other Judges shall sit only in the HCD (Article 94(3) of COB). The number of judges in the AD was five until early 2002. Later, Government had recruited two more judges in the AD through a gazette notification on 17 January 2002 (Akkas, 2004, p. 89). According to the provision of Article 94(4) of the Constitution, the Chief Justice and the other Judges shall be independent in the exercise of their judicial functions. The AD has jurisdiction to "hear and determine appeals" against "judgments" decrees, orders or sentences' passed by the

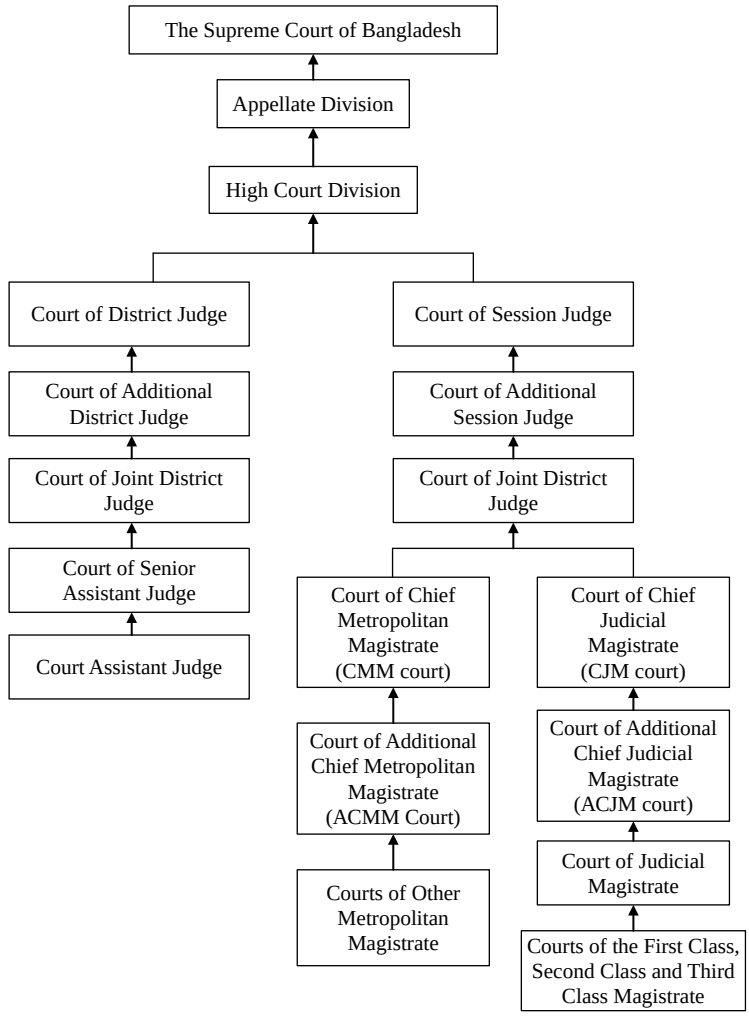

Figure 2.
Hierarchical structure of the ordinary courts

HCD (Article 103(1)). It has also an advisory jurisdiction. As to the advisory jurisdiction, Article 106 of the Constitution lay down:

> If at any time it appears to the President that a question of law has arisen, or is likely to arise, which is of such a nature and of such public importance that it is expedient to obtain the opinion of the Supreme Court upon it, he may refer the question to the Appellate Division for consideration and the division may, after such hearing as it thinks fit, report its opinion thereon to the President.

The HCD has "original, appellate and other jurisdictions and powers as are conferred on it" by the constitution or any other law (Article 101 of COB). It has also a special original jurisdiction. Under this jurisdiction, it is authorized to enforce fundamental rights of

the citizens and to issue certain orders and directions in the nature of writs of prohibition, mandamus, certiorari, habeas corpus and quowarranto (Article 102 of COB). In addition, the HCD exercises special and statutory original, appellate, revisional, admiralty and miscellaneous jurisdictions under numerous laws (Akkas, 2004).

6.2.1 Jurisdictions and power of Supreme Court. The Supreme Court of Bangladesh is divided into two divisions namely the AD and HCD. Jurisdiction of HCD and AD is as follows.

6.2.2 Jurisdiction of HCD. According to Article 101, there are two sources of power and jurisdiction of HCD – the constitution and ordinary law. The main sources of ordinary law jurisdiction of the HCD are the Codes of Civil and Criminal Procedure, which provide appellate and revisional jurisdictions. There are a number of other laws which confer on the HCD jurisdiction to adjudicate disputes (Islam, 2003). Hence, the jurisdiction of the HCD may be divided into two types (Halim, 2008, p. 77):

(A) Ordinary or general jurisdiction.

(B) Constitutional jurisdiction.

6.2.2. A. Ordinary jurisdiction. Ordinary jurisdictions of HCD's are:

- original jurisdiction;
- appellate jurisdiction;
- revisional jurisdiction; and
- reference jurisdiction.

Original jurisdiction means that jurisdiction whereby HCD can take a case or suit as a court of first instance. It is for the ordinary laws (laws passed by the parliament) to prescribe what particular subject matter will come under the ordinary jurisdiction of the HCD. For example, the Company Act 1913, the Admiralty Act 1861 and the Banking Company's Ordinance 1962, etc., have conferred on the HCD the ordinary jurisdiction (Halim, 1998; Islam, 2003).

Any law may confer on the HCD appellate jurisdiction on any matter. For example, the Cr. PC and the CPC have conferred on the HCD appellate jurisdiction. Revisional jurisdiction of HCD means the power whereby it check the decisions of its inferior courts; for example, Section 115 of the CPC has given on the HCD the revision power. Reference jurisdiction means the power whereby the HCD can give opinion and order on a case referred to it by any subordinate court. For example, Section 113 of the CPC gives the HCD reference jurisdiction (Halim, 1998; Islam, 2003).

6.2.2 B. Constitutional jurisdiction of the HCD. The constitution itself has conferred on the HCD the following three types of jurisdictions:

(1) writ jurisdiction;

(2) jurisdictional as to superintendence and control over courts; and

(3) jurisdiction as to transfer of cases.

The constitution has enumerated original jurisdiction of the HCD only in the field of writ matters. The basis of writ jurisdiction is Article 102 of the constitution. Writ jurisdiction means the power of jurisdiction of the HCD under the provisions of the constitution whereby it can enforce fundamental rights as guaranteed in

Part III of the constitution and can also exercise its power of judicial review (Halim, 2008, p. 78).

Article 109 of the constitution conferred that the HCD shall have superintendence and control over all courts and tribunals subordinate to it[14]. This power is also called the supervisory power of the HCD. Therefore, the position for supervisory power is that the court or tribunal must be subordinate to the HCD. The supervisory power of the HCD as conferred by Article 109 is a constitutional power. The power of superintendence is in addition to the power conferred upon the HCD under Section 115 of the CPC and Cr. PC is only statutory supervisory powers whereas power under Article 109 of the constitution is a constitutional supervisory power (Halim, 2008, p. 78). Statutory supervisory power extends to judicial but not to administrative matters, while the constitutional supervisory power extends to both judicial and administrative matters[15]. The statutory supervisory power covers only courts but Article 109 covers court as well as tribunals subordinate to the HCD. Under this supervisory power, HCD can interfere in the functioning of subordinate courts or tribunal in the following circumstances (Halim, 1998, p. 325):

- want or excess of jurisdiction;
- failure to exercise jurisdiction;
- violation of procedure or disregard of principles of natural justice; and
- findings based or no materials, or order resulting in manifest injustice.

Under Article 110 of the constitution the HCD may transfer a case form subordinate court to itself (Halim, 1998, p. 328). But condition is that the HCD is to be satisfied that:

- A substantial question of law as to interpretation of the constitution is involved in the case. Or
- A point of general public importance is involved in the case. If the HCD, on being so satisfied, with draws a case from a subordinate court, it will take following three alternatives; it may dispose of the case itself; or it may determine the question of law and return the case to the court from which it has been withdraw together with a copy of the judgment of the division on such question, and the court to which the case is so returned, on receipt thereof proceed to dispose of the case in conformity with such judgments. Or
- It may determine the question of law and transfer it to another subordinate court together with a copy of the judgment of the division on such question and the court to which the case is so transferred shall, on receipt thereof, proceed to dispose of the case in conformity with such judgment.

The power of transfer under Article 110 is a discretionary power and so no litigant can invoke this power as of right. This power can be exercised *Suo Motu* by the HCD or it may be exercised on an application by party (Halim, 2008, p. 88).

6.3 Jurisdiction of the AD

The AD of the Supreme Court has no original jurisdiction. The source of jurisdiction of the AD is also two like as the HCD:

(1) the constitution; and
(2) ordinary law.

But an ordinary law can give the AD only appellate jurisdiction as stated in Article 103(4) of the constitution[16]. There are four types of jurisdiction have conferred by the constitution itself on the AD as follows:

A. appellate jurisdiction;
B. jurisdiction as to issue and execution of process;
C. jurisdiction as to review; and
D. advisory jurisdiction.

6.3.A. Appellate jurisdiction. The appellate jurisdiction of the AD applies only against the judgment, decree, order or sentence of the HCD as enumerated in Article 103 of the constitution. This constitutional appellate jurisdiction has two magnitudes (Halim, 2008, p. 89):

(1) cases where appeal lies as of right; and
(2) cases where appeal can be made if the AD grants leave to appeal.

According to Article 103(2) one can appeal to the AD from the judgment, decree, order or sentence of the HCD lies as of right in the following three cases[17]:

(1) where the HCD certifies that the cases involves a substantial questions of law as to the interpretation of the constitution;
(2) where the HCD sentences a person to death or imprisonment for life; and
(3) where the HCD punishes a person for its contempt.

It has also enumerated in Article 103(2) that parliament may by law add to this list other cases in which appeal as of right may be filed[17]. Beside these, all other cases except the above-mentioned three cases appeal shall be laid from the judgment, decree, order or sentence of the HCD only if the AD Grants leave to appeal[18] (also cited in Halim, 2008, p. 89).

6.3.B. Jurisdiction as to issue and execution of process. The issue and execution of process of the AD is also called power to do complete justice. Article 104 of the constitution provides that the AD shall have power to issue such orders or directions as may be necessary for doing complete justice in any case or matter pending before it[19]. This power is a discretionary and extraordinary one of the AD. The AD may use this power *suo motu* or on the application of any party (Halim, 2008, p. 89).

6.3.C. Jurisdiction as to review. The AD shall have power, subject to the provisions of any Act of Parliament and of any rules made by that division to review any judgment pronounced or order made by it[20]. Accordingly, the Supreme Court of Bangladesh (AD) Rules were framed by the AD in 1988 (Halim, 2008, p. 90). According to these Rules:

> The Appellate Division may either of its own motion or on the application of a party to a preceding, review its, own judgment or order in a civil proceeding on grounds similar to those mentioned in Order XLVII Rule 1 of the Code Of Civil Procedure and in a criminal proceeding on the ground of error apparent on the face of the record (Rule 1 of Order XXVI) (Halim, 1998, p. 342).

6.3.D. Advisory jurisdiction. In Bangladesh, Article 106 of the constitution provides that the President may seek the opinion of the AD of the Supreme Court on a question of law which has arisen or is likely to arise and which is of such nature and of such public importance it is expedient to obtain the opinions. The AD may, after such hearing as it thinks fit, report its opinion thereon to the President[21]. In this context, it is to be noted that in the constitutional history of Bangladesh, one reference has been made to the AD seeking its advisory opinion in 1995 regarding boycotting of parliament by opposition MPS for consecutive sitting days of more than 90 days (Akkas, 2004). Recently (in 2009), the president has been made another reference to the AD for seeking its advisory opinion regarding the adjudication process of Pill Khana Killing case under which law army law or common law the would be decided? After hearings of ten eminent law experts as Amicus Curiae of Bangladesh the AD gave its opinion that this case would be appropriate to adjudicate under common law not army law.

Although this is not obligatory upon the court to give an opinion, however, it will be unwilling to decline a reference except for good reasons. By giving this advisory opinion the Supreme Court significantly contributes to the Democratic Governance of Bangladesh. Therefore, the judiciary may play a crucial role in good governance by exercise its advisory jurisdiction.

7. Subordinate court

Under the HCD of the Supreme Court, there is a set of subordinate courts and tribunals having civil, criminal or special jurisdiction. The huge portion of the population is directly linked with the litigation in the courts of the subordinate judiciary. This lower judiciary is the base and foundation of the judiciary and also the creatures of statutes. The respective statutes also determine their powers, functions and jurisdictions. The major bulk of the cases, both civil and criminal, are tried and heard in such courts and tribunals. Some tribunals are termed as administrative tribunals. The subordinate courts in Bangladesh can be divided in two broad categories namely, civil and criminal courts. The subordinate judiciary is separated from the executive by the historical and heroic verdict of Masder Hossain Case through amending the Criminal Procedure Code 1898 in November 2007. However, it is to be noted that the Mobile Court Ordinance 2007 has given some judicial powers to the executive magistrates[22]. After November 1, 2007 with the enactment and enforcement of Code of Criminal Procedure 1898 (Amendment) Ordinance 2007 and other four rules[23] (Halim, 2008, p. 93) relating with separation of judiciary the nature and structure of the subordinate court system in Bangladesh are discussed below.

7.1 Ordinary courts of civil jurisdiction

The civil court system is more popularly known as the subordinate judiciary. The civil courts are created under the Civil Courts Act of 1887. The act provides for five tiers of civil courts in a district, which are:

(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.

The first two are generally courts of appeal in civil matters, and rest three are courts of first instances with powers, functions and jurisdictions in respect of subject matter, territory and pecuniary value determined by or under statutes[24].

7.1.1 Court of the District Judge. The Court of the District Judge is the principal court at the district level. It is mainly an appellate court with very limited original jurisdiction and deals only cases relating to probate and letters of administration[25]. In the appellate jurisdiction, a District Judge hears and determines some appeals against Joint District Judges' judgments, decree or orders (Akkas, 2004, p. 90). The District Judge's pecuniary jurisdiction is unlimited and under Sections 8,11,22, 23, etc. of the Civil Court Act 1887, he has power to delegate his function or transfer appeal to the Additional District Judge or any other civil court under his administrative control (Halim, 2008, p. 98). Moreover, District Judge is authorized to hear and determine appeals against all judgments or orders of Senior Assistant Judges (Akkas, 2004, p. 90).

7.1.2 Court of Additional District Judge. The judicial jurisdiction of Additional District Judges is similar to the District Judges' except that they cannot receive appeals from any inferior courts (Halim, 2008, p. 99). An Additional District Judge may discharge any of the functions of a district judge, as assigned by a District Judge (Akkas, 2004, p. 91). In administering those functions, the Additional District Judge exercises the same power as the District Judge[26].

7.1.3 Court of Joint District Judge. The Court of Joint District Judge exercises both original and appellate jurisdiction. All cases, which exceed the pecuniary jurisdiction of Senior Assistant Judge, are filed in the Court of the Joint District Judge (Akkas, 2004, p. 91). The jurisdiction of the Court of Joint District Judge extends to all original suits without any pecuniary limit[27]. This court has jurisdiction to try those cases the value of which exceeds taka 4 lac (Halim, 2008, p. 100). In addition, Joint District Judge can hear and determine appeals against judgments, decrees or orders of Senior Assistant Judges when such appeals are transferred to them by District Judges under Section 21(4) of the Civil Court Act 1887 (Akkas, 2004, p. 91). Moreover, under Section 25 of the Civil Courts Act 1887, this court is also empowered to act as Small Causes Court.

7.1.4 Court of Senior Assistant Judge. The Court of Senior Assistant Judge has original jurisdiction of a claim the value of which does not exceed taka 4 lac and appeal from this court lies to the Court of the District Judge (Halim, 2008, p. 101). However, the District Judge may withdraw any proceeding under Section 23 of the Civil Court Act from a court below and may either dispose of them or transfer them to the Assistant Judge's Court or any other court under its administrative control. This court is also empowered to act Small Causes Court under Section 25 of the Civil Courts Act (Halim, 2008, p. 101). Moreover, the Court of Senior Assistant Judge acts as the Family Court under the Family Courts Ordinance 1985 and also acts as the Election Tribunal under the Local Government (Upazilla Parishad) Ordinance 1983.

7.1.5 Court of Assistant Judge. The Court of Assistant Judge is the base of hierarchy of subordinate civil judiciary. All civil servants are filed in the Court of Assistant Judge unless barred by the pecuniary jurisdiction of the Court of Assistant Judge is limited to TK 200,000 (equivalent approximately) (Akkas, 2004, p. 92). Appeal from this court lies to the Court of District Judge. However, the District Judge may withdraw any proceeding under Section 23 of the Civil Court Act from a court below and may either dispose of them or transfer them to the Assistant Judge's Court or any other court under

its administrative control. This court is also empowered to act Small Causes Court and in petty civil matters coming from Village Court under the Village Court Ordinance 1976 under Section 4(2) (Halim, 2008, p. 101).

7.2 Ordinary courts of criminal jurisdiction

The legal basis of the ordinary criminal courts is the Code of Criminal Procedure 1898. The subordinate courts of criminal jurisdiction are classified as:

- Courts of Session Judge.
- Court of Additional Session Judge.
- Court of Joint Session Judge.
- Court of Chief Metropolitan Magistrates (CMM).
- Court of Additional CMM.
- Court of Magistrates of the First Class.
- Court of Magistrates of the Second Class.
- Court of Magistrate of the Third Class[28].

In broadly, it can be divided into two categories of courts like as – Courts of Session and Courts of Magistrate.

7.2.1 Courts of Session. For the purpose of administration of criminal justice in the territory of Bangladesh has been divided into some sessions divisions each containing a Court of Sessions (Halim, 2008, p. 102). In the structure of Courts of Session, there are three tiers of judges, namely, Sessions Judge, Additional Sessions Judge and Joint Sessions Judge. Judges of Sessions Courts try grave criminal offences[24]. As per rules of Section 9 of the CrPC, the Government is bound to appoint a judge in each Session Court. Under Section 9(3) Session Judge, Additional Sessions Judge and Joint Sessions Judge Shall be appointed from among the members of the Bangladesh Judicial Service (Halim, 2008, p. 103). Sessions Judge and Additional Sessions Judge hold same powers, while Joint Sessions Judge enjoy lesser powers. A Sessions Judge and an Additional Sessions Judge may impose any penalty including the death penalty prescribed by law, however, any sentence of death passed by any such Judge shall be subject to confirmation by the HCD (Akkas, 2004, p. 93; Halim, 2008, p. 106). A Joint Sessions Judge may pass any sentence authorized by law, except a sentence of death or of transportation for a term exceeding ten years or of imprisonment for a term exceeding ten years (Halim, 2008, p. 106).

The Court of Session for a metropolitan area is known as the Metropolitan Court of Session and in practice, judges from the civil jurisdiction, District Judges, Additional District Judges and Joint District Judges are appointed to these positions (Akkas, 2004, p. 92). Judges appointed to such courts do not hear or try any civil matter, unlike judges of session courts in districts. These are a kind of relatively fast track criminal courts. All Joint Session Judge shall be subordinate to the Sessions Judge in whose Court they exercise jurisdiction (Section 17A) and all Judicial Magistrates including to the Chief Judicial Magistrates shall be subordinate to the Metropolitan Session Judge under Section 17A(92) (Halim, 2008, p. 103).

7.2.2 Court of Magistrates. Under Subsection 6(2) of the CrPC provides that there will be two types of magistrate court: Judicial and Executive Magistrates

(Halim, 2008, p. 106). There are four types of Magistrates, namely, Chief Metropolitan or Chief Judicial Magistrate, Magistrates of the first class, Magistrates of the second class and Magistrates of the third class. Such classification of magistrates is made on the basis of powers and functions assigned to each class[24]. Apart from these types of magistracy, two other forms of Special Magistracy and Justice of Peace have been existed in Bangladesh[29].

7.2.3 Judicial Magistrates. Subsection 6(3) provides that there shall be four types of Judicial Magistrate like as follows:

(1) CMM in metropolitan areas and Chief Judicial Magistrate in other areas.

(2) First-Class Magistrate, who is known as metropolitan areas and Chief Judicial Magistrate in other areas.

(3) Second-Class Magistrate.

(4) Third-Class Magistrate (Halim, 2008, p. 106).

However, Section 6 of CrPC specifies that the word "CMM" and "Chief Judicial Magistrate" shall include "Additional CMM" and Additional Chief Judicial Magistrate", respectively[30]. Therefore, these Additional CMM or Additional Chief Judicial Magistrate are not any separate courts; they are part of the CMM and Chief Judicial Magistrate. However, the Additional CMM or Additional Chief Judicial Magistrate may exercise the same power of sentence as that of the CMM and Chief Judicial Magistrate (Halim, 2008, p. 107).

Moreover, under Section 12(1) of the Code of Criminal Procedure 1898 the government "may appoint as many persons as it thinks fit" as a Magistrate of the first, second or third class in any district: all of them subordinate to the District Magistrates[31]. Section 29C of the Code of Criminal Procedure 1898 empowers the government to invest a District Magistrate or any Additional Magistrate "with power to try as a Magistrate all offences not punishable with death" (Akkas, 2004, p. 96). In addition, the government may invest any magistrate of the first class with power to try as a magistrate all offences not punishable with death or with imprisonment for a term exceeding ten years'[32].

A magistrate of the first class may impose the sentences of imprisonment for a term not exceeding five years, fine not exceeding TK 10,000 and whipping[33]. A magistrate of the second class may impose imprisonment for a term not exceeding three years and fine not exceeding TK 5,000[34]. A magistrate of the third class may impose imprisonment for a term not exceeding two years and fine not exceeding TK 2,000[35].

7.2.4 Executive Magistrate. Under Section 10 of the Code of Criminal Procedure 1898 in every district and in every metropolitan area, the government shall appoint as many persons as it thinks fit to be Executive Magistrates and shall appoint one of them to be the District Magistrate (Halim, 2008, p. 107).

The government may also appoint any Executive Magistrate to be an Additional District Magistrate, and such Additional District Magistrate shall have all or any of the powers of a District Magistrate[36]. The government may, or the District Magistrate may from time to time, by order define local area within which the Executive Magistrate may exercise all or any of the powers of a District Magistrate (Halim, 2008, p. 107). All persons appointed as Assistant Commissioners, Additional Deputy Commissioners or Upazila Nirbahi Officer in any district or Upazila shall be Executive

Magistrate within their existing respective local areas[36]. The Executive Magistrates shall not exercise any judicial function. He or she will do the work, which are administrative or executive in nature, such as the granting of a licence, sanctioning a prosecution or withdrawing from a prosecution, etc.[37] (Halim, 2008, p. 108).

7.2.5 Courts and tribunals of special jurisdiction. Beside the aforesaid mainstream ordinary civil and criminal courts within the structure of the subordinate judiciary, there are a good number of special courts and tribunals, both civil and criminal, established by different laws and constitutional provisions to deal with specific matters or offences (Akkas, 2004, p. 97; Halim, 2008, p. 111)[38]. For instances, in the civil area there are Labour Courts to deal with disputes under different labour-related laws, Family Courts to deal with matrimonial matters, Money Loan Courts, Bankruptcy Courts, Income Tax Tribunals, Administrative Tribunals, Election Tribunals, etc. to deal with relevant matters[38]. Similarly in the criminal area, there are Special Tribunals, Public Safety Tribunals, Courts Against Repression of Women and Children, etc. to deal with certain specified offences[38]. All such courts and tribunals are also under the general superintendence and control of the Supreme Court[39]. The discussion of some of the special courts or tribunals is follows.

(A) Family Court. Family Courts were established under Section 4 of the Family Courts Ordinance 1985 where all courts of Assistant Judge are invested with the power of the Family Courts and all Assistant Judges act as judges of theses courts (Akkas, 2004, p. 97). The jurisdiction of Family Court is to "entertain, try, and dispose of any suit relating to, or arising out of" dissolution of marriage, restitution of conjugal rights, dower, maintenance and guardianship and custody of children[40].

(B) Village Courts. The Village Court has been established under the Village Courts Act 2006 (Gram Adalat Ain, 2006) with a view to adjudicating petty civil and criminal matters in rural areas (Halim, 2008, p. 135). There is a list of criminal cases and civil matters have been outlined in the schedule of the act, which provides the court's jurisdiction. Under Section 5 of the Act a Village Court consists of a Chairman and two members nominated by each party to the dispute totaling five members including its Chairman[41].

(C) Financial Loan Court. In Bangladesh, the Financial Loan Courts were established in accordance with Section 4 of the Financial Loan Court Act 1990, which was enacted to make special provisions for recovery of loans given by financial institutions[42]. Judges of the Financial Loan Courts are appointed from among the Joint District Judges (Akkas, 2004, p. 97).

(D) Special Tribunal. Special Tribunals were established under Section 26 of the Special Powers Act 1974. These tribunals are authorized exclusively to try the offences under different statutes including the arms Act 1878 and the Explosive Substances Act 1908 (Akkas, 2004, p. 99). This court is applicable for the offences of unlicensed manufacture, conversion, sale, importation, exportation, and possession of any arms, ammunition or military stores, and causing explosion by explosive substances likely to endanger life, person or private property or with intent to commit offence[43].

All Session Judges, Additional Session Judges or Assistant Session Judges act as judges of the Special Tribunals for the areas with their session's division. The judges may impose "any sentence authorized by law for the punishment of the offence of which a person is convicted"[44].

The government is empowered to constitute additional Special Tribunals consisting of Metropolitan Magistrates or Magistrates of the first class under Section 26(2) of the Special Power Act 1974.The Magistrates may impose "any sentence authorized by law except death, imprisonment for life or imprisonment for a term exceeding seven years and fine exceeding ten thousand taka"[45].

(E) Court of Special Judge. In accordance with the Criminal Law Amendment Act 1958, the Courts of Special Judge were established to try and punish special kind of offences including corruption (Akkas, 2004, p. 98). The Special Judges may be appointed from among Sessions Judges, Metropolitan Magistrates or Magistrates of the first class[46].

(F) Administrative Tribunal/Administrative Appellate Tribunal. Administrative Tribunals in Bangladesh were established by the Administrative Tribunals Act 1980. This Tribunal consists of one member appointed from "among persons who are or have been District Judges"[47]. It has exclusively empowered to hear and determine disputes relating to the service matters of person employed in the service of the republic or any statutory public authority[48].

In order to hear and determine appeals from any order or decision of an Administrative Tribunal, Administrative Appellate Tribunals are established comprising one chairman and two other members (Akkas, 2004, p. 99). The chairman shall be a person who is, or has been, or is qualified to be a Judge of the Supreme Court, and of the two other members, one shall be a person who is or has been an officer in the service of the republic not below the rank of joint to the government and the other a person who is or has been a District Judge (Akkas, 2004, p. 99)[49].

Beside the judicial structure of Bangladesh, some other important issues are very closely related to the legal system of Bangladesh, which I have given follows.

8. Executive control over the judiciary

The executive branch of the government exercises control over the judiciary especially subordinate criminal judiciary. In order to try criminal cases magistrates exercising judicial functions are appointed from among public servants employed in executive positions. They are entrusted with a large number of functions including those of implementing the policies of the government (Akkas, 2004, p. 101). In fact, they are petty administrators-cum-judges. The Deputy Commissioner will also hold the position of District Magistrate, who is in turn the boss of the Additional District Magistrate (Ashrafuzzaman, 2006).

In discharging their duties as public servants, magistrates are always in close contact with the political executive who are responsible for their posting, promotion and prospects. Therefore, it is likely that in deciding criminal cases they are dictated and influenced by the political executive (Halim, 1998; Akkas, 2004, p. 102). Control over the magistracy is seen vital for harassing political opponents by the criminal justice system and conversely, absolving members of the ruling party and bureaucrats from alleged criminal wrongdoings (Ashrafuzzaman, 2006).

9. Delay in the disposal of cases

Delay in the disposal of cases is another important issue of the judiciary in Bangladesh. According to the report of the Ministry of the Law, Justice and Parliamentary Affairs, there are more than 968,000 pending cases in Bangladesh (Akkas, 2004). Among these

cases 5,000 (approximately) are pending in the AD; 127,244 are in the HCD; 344,518 are in the subordinate civil judiciary; 95,689 are in the Courts of Session, and 296,862 are in the Magistrate Courts (*The Daily Janakantha*, 3 February 2002). This figure indicates the scale of power of the courts rather than a measure of delay.

In fact, when a case is filed with a court, nobody knows when it will end. Even a small case, which should be disposed of within one year, may take ten to 15 years to dispose of through all stages (Akkas, 2004).

10. Corruption

Corruption is a great problem in Bangladesh and the judiciary is not free from it. It is generally believed that the judiciary is extensively involved in corruption (Akkas, 2004, p. 105). Transparency International in its Global Corruption Report 2007 disclosed that Bangladesh failed to ensure full independence of the judiciary and the politicization of the judiciary is one of the major reasons behind judicial corruption. According to this report, "Two thirds of the people who used a court in 2004 paid bribes, with the typical bribe amounting to 25 percent of average annual income." Former Chief Justice Mahmudul Amin Chowdhury said corruption has taken a turn into "blood cancer" and it would not be eradicated if nepotism, favouritism are not stopped (*The Daily Star*, 2007 25 May). In fact, corrupt practices of the people involved in the justice system seriously undermine the image of the judiciary.

11. The politics of prosecutors

In Bangladesh, prosecutors are also thrown out during a government's tenure if they displease the whims of a local member of parliament, a minister or some other political extreme. Their appointment and job security are not determined by their ability or professionalism but by the extent to which they have served the pecuniary and political benefit of the appointing party, its leaders and workers (Ashrafuzzaman, 2006).

In addition, prosecutors simply make the most of the time that they have in their positions to benefit themselves and their patrons. The prosecutor feels answerable only to his party bosses (Ashrafuzzaman, 2006).

12. Concluding remarks

The foregoing discussion reveals that there is a well-organized court system in Bangladesh and it is in fact the culmination of a long historical tradition. In the historical period, the courts were mostly presided over by more than one individual, but under the current system the bench of judges exist only in the Supreme Court. Subordinate courts in Bangladesh are presided over by a single judge (Akkas, 2004, p. 99). Under Subsections 15 and 19 of the Code of Criminal Procedure 1898, benches of two or more magistrates may be constituted to try criminal cases, but in practice no such bench is constituted[50].

The ancient judicial system was not based on rule of law rather on caprice and caste consideration. Justice was administered in accordance with the religious law. Therefore, in Hindu period, learned *Brahmins* assisted the King in the administration of justice by expounding the Hindu law. Though judges took oath for fair and impartial judgment, however, the King himself lead the judiciary and he was free to make any changes in the structure of the court, so the independence of judiciary was not ensured.

Similarly, in the Muslim period, the Sultan or Emperor was the supreme authority of administration of justice as state head and a learned law officer *Mufti* was assigned to explain the Islamic legal provision to assist the *Qazis*. Although, equality before law was a common feature and qazis were fulltime judges at every level of administration, however, the executive authority was empowered to exercise judicial functions. Therefore, the judiciary was not independent. The law of evidence under Muslim law was also very defective, unsatisfactory and of primitive in nature. For instance, to convict a man for rape, it was necessary to have four witnesses who had actually seen the accused in the very act of committing the offence (Halim, 2008, p. 51). The nature of punishment of stoning was so cruel and inhuman that no human being could even think of it in a civilized society. However, the judicial system of Muslim was better than ancient Hindu period.

Under British period, several measures were taken to improve the judicial system but all the steps taken were not free from imperfections. There was always a tendency of executive government to control the judiciary. The government issued directions to the courts and closely scrutinized the judges and even sometimes asked for explanations of verdicts (Orby Mootham, 1983, p. 162; cited in Akkas, 2004, p. 82). At the beginning of this period the rulers adopted the policy of applying the personal laws of the Muslim and Hindus to the administration of justice. However, the books of law were in Arabic and Sanskrit and were not pure law books so the English judges could not understand the laws of Hindu and Muslim. That is why native law officers, qazis and pandits were appointed to assist the British judges. Subsequently, the personal laws of Muslims and Hindus were codified and translated into English.

In the Pakistan period, the state of the judiciary was significantly changed. The higher judiciary was separated from the executive branch of government, however, lower courts especially the criminal courts were under executive control and public servant of executive branch exercised judicial functions, which was the violation of rule of law. Basically, the judicial system of Pakistan period was opposite side of the same coin of later British period.

Bangladesh as an independent state continued with inherited institutions and legacies. The judicial system as outlined above is a replica of the system introduced by British rulers, which were widely accepted in the original Constitution of Bangladesh. Though, the higher judiciary is separated and independent from the executive, however, lower judiciary is under the abdomen of Executive Branch. Similar to the rulers of the early historical periods the government always attempts to control the judiciary through different mechanisms, which include the appointment, tenure and discipline of judges. Though, from the independence of Bangladesh Government under various regimes committed to separate the judiciary from the executive but never be implemented. In 1995, Masder Hossain along with 441 judicial officers who were judges in different civil courts filed a writ (Writ Petition No. 2424) to the HCD regarding separation of judiciary from the executive. However, lack of enthusiasm of political government separation of judiciary from the executive and judicial independence was hampered in Bangladesh. So the issue of separation of judiciary was the most demanded and burning issue of Bangladesh. Finally, the historic journey of the judiciary separated from the executive started functioning from 1 November 2007 through implementing the Masdar Hossain case by the interim caretaker government headed by Fakaruddin Ahmed. Now, the country is governed by the democratic

multiparty parliamentary system of government headed by Sheikh Hasina as a Prime Minister (Chief Executive) of Bangladesh. Now, we the people of Bangladesh are expecting to the latest elected government that they would be so cordial to implement the every rules and regulations regarding separation of judiciary to play its role independently for ensuring rule of law and fair justice in Bangladesh.

Notes

1. Source: www.minlaw.gov.bd/aboutbangladesh.htm
2. *Quran* is the religious book of Muslim/Islam. It is believed that Almighty Allah (God) provides this book to prophet Hazrat Muhammad (SM) to govern the society in correct way like as a constitution of complete code of life.
3. A group of villages constituted a Parganah.
4. Under the King Court, there were two other high courts of civil appeal and criminal appeal, respectively, known as Diwan-e-Risalat and Diwan-e-Mazalim (Akkas, 2004, p. 59).
5. These four types of officers acted as legal experts like Mufti for Muslim law, Pandit for Hindu and non-Muslim law, Mohtasib for cannon law and Dadbak for petty civil cases and as a registrar.
6. For detail of structure, functions and jurisdictions of provincial, district, parganah's and village courts, please see Halim (2008, pp. 43-5) and Akkas (2004, pp. 60-2).
7. Quoted from Bangladepedia: www.banglapedia.org/httpdocs/HT/L_0089.HTM
8. Has been taken from the web site of Ministry of Law, Justice and Parliamentary Affairs: www.minlaw.gov.bd/supremecourt.htm
9. The present system of Civil and Criminal Court, in Indian subcontinent has their legal basis by virtue of these Civil Courts Act 1887 and Criminal Procedure Code 1898, respectively.
10. For details about classification of courts and the structure, functions and jurisdiction, please see Halim (2008, pp. 62-3).
11. High Court of Bangladesh Order 1972, Section 3.
12. High Court of Bangladesh (Amendment) Order 1972, Section 3.
13. The Constitution of the People's Republic of Bangladesh 1972 (hereinafter Constitution of Bangladesh) was adopted by the Constituent Assembly on 4 November 1972, given effect from the 16 December 1972, the first anniversary of the victory day of Bangladesh. There have been 13 amendments to the constitutions to date (2002). The latest amendment was made by the Constitution (13th Amendment) Act 1996.
14. Article 109 of the Constitution of Bangladesh 1972.
15. *A.T. Mirdha* V. *State 25 DLR335* cited in Halim (2008, p. 86).
16. Article 103(4) of the Constitution of Bangladesh 1972.
17. Article 103(2) of the Constitution of Bangladesh 1972.
18. Article 103(3) of the Constitution of Bangladesh 1972.
19. Article 104 of the Constitution of Bangladesh 1972.
20. Article 105 of the Constitution of Bangladesh 1972.
21. Article 106 of the Constitution of Bangladesh 1972.
22. Ordinance 31 November, 2007.

23. These four rules are: (i) Bangladesh Judicial Service Commission Rules, 2007; (ii) Judicial Service Commission Pay Commission Rules, 2007; (iii) Judicial Service (appointment, dismissal, etc.) Rules, 2007; and (iv) Bangladesh Judicial Service Commission (posting, promotion, discipline, etc) Rules, 2007.
24. Ministry of Law, Justice and Parliamentary Affairs: www.minlaw.gov.bd/subcourt.htm (accessed 13 June 2009).
25. In the past, the court of district judge had original jurisdiction to try cases relating to guardianship, insolvency, house building loan, industrial loan, etc. but subsequently the jurisdiction to try the cases has been given to some special courts, as Family Court, Insolvency Court and Financial Loan Court (Akkas, 2004, p. 90).
26. Civil Courts Act 1887, Section 8.
27. Civil Courts Act 1887, Section 18.
28. Code of Criminal Procedure 1898, Section 6 (Akkas, 2004, p. 92).
29. For details about these two types of Magistracy please read Halim (2008, pp. 108-9).
30. Code of Criminal Procedure 1898, Section 6.
31. Code of Criminal Procedure 1898, Section 17(1).
32. For an elaborate discussion, see Akkas (2004, p. 96).
33. Code of Criminal Procedure 1898, Section 32(a).
34. Code of Criminal Procedure 1898, Section 32(b).
35. Code of Criminal Procedure 1898, Section 32(c).
36. Code of Criminal Procedure 1898, Section 10.
37. Code of Criminal Procedure 1898, Section 4(2)(b).
38. And also in: www.minlaw.gov.bd/subcourt.htm (accessed 15 September 2009).
39. Ministry of Law, Justice and Parliamentary Affairs: www.minlaw.gov.bd/subcourt.htm (accessed 15 June 2009).
40. Family Courts Ordinance 1985, Section 5. For detail and elaborate discussion please see Halim (2008, pp. 134-5).
41. Gram Adalat Ain, 2006, section, 5. For detail and elaborate discussion please see Halim (2008, pp. 135-6).
42. Financial Loan Court Act 1990, Section 4.
43. Arms Act 1878, Subsections 5-6, 13; Explosive Substances Act 1908, Subsections 3-3A.
44. Special Powers Act 1974, Section 28(a).
45. Special Powers Act 1974, Section 28(b).
46. Criminal Law Amendment Act 1985, Section 3(2).
47. Administrative Tribunals Act 1980, Section 3.
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49. Also see, Administrative Tribunals Act 1980, Section 5(3).
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