



## **JUDICIAL INDEPENDENCE AND THE NEED OF A JUDICIAL SECRETARIATE FOR THE SUPREME COURT OF BANGLADESH**

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The concept of the independence of judiciary is an outcome of the theory of separation of power of Montesquieu. According to Montesquieu the executive, the legislative and the judicial powers of the state should be separate from and dependent upon each other so that the influence of any one power would not be able to exceed that of the other two, either singly or in combination. The above theory was first implemented in the constitution of the United States of America and then incorporated in the constitutions of almost all the emerging nations of the world. Consequently the judicial power of the state has been vested with the judiciary and it has been made independent of other two organs of the state. None can conceive of democracy and rule of law unless there is an independent and competent judiciary. The judiciary and the members of the Bar are the true defenders of rights, liberties and freedoms of the people.

The People's Republic of Bangladesh was born out of a long historic struggle for national liberation at the cost of millions. The fundamental principles of the Constitution of Bangladesh are the high ideals of nationalism, socialism, democracy and secularism. The Constitution has repeatedly emphasized on the Independence of judges and magistrates under Articles 94 (4) and 116A. Besides the Election Commission there is no such constitutional mandate or requirement of independence for any other organ, service or profession of the state. In this regard the Appellate Division of the Supreme Court of Bangladesh in its momentous judgment in the case of Secretary Ministry of Finance vs. Masdar Hossain held as follows:

"The independence of the judiciary as affirmed and declared by Articles 94(4) and 116A, is one of the basic pillars of the Constitution and can not be demolished, whittled down, curtailed or diminished in any manner whatsoever, except under the existing provisions of the constitution. We find no provision in the Constitution which curtails, diminishes or otherwise abridges this independence. Article 115, Article 133 or Article 136 does not give either the Parliament or the President the authority to curtail or diminish the independence of the subordinate judiciary by recourse to subordinate legislation or rules. What can not be done directly, can not be done indirectly".

Pursuant to above historic judgment of the Apex court (20 BLD 2000 AD 141), the government has adopted and passed in Parliament the Code of Criminal Procedure

(Amendment) Act, 2009 providing for separation of the judicial magistracy from the executive branch and incorporating the same in one independent judicial service. This is a great achievement in the way of establishment of an independent, impartial and truly capable judiciary in Bangladesh which is highly appreciated.

As a common law country Bangladesh Judiciary not only adjudicates disputes according to law, it also interprets law and thereby introduces new dimensions of rights and liberties of individuals. To remain truly independent one must not only be free from undue influence and allurements he has also to be capable to perform his statutory and constitutional duty efficiently and promptly. It is, primarily, the responsibility of the state to create an environment conducive to judicial independence.

The growth in the population, mass migration to urban areas and increase in the price of real estate coupled with the rising of literacy level have resulted in increasing the number of cases in the subordinate judiciary as well as in the Supreme Court of Bangladesh. Sincere efforts are being made by all concerned at all levels to enhance the output, but the enhanced output is unable to cope with the ever increasing number of new cases. As such despite the disposal of nine lacs forty eight thousand nine hundred eighty nine (948989) cases in 2011; there was a backlog of twenty one lacs thirty two thousand forty six cases (2132046) cases on 1 January 2012 in all courts and tribunals including the Supreme Court of Bangladesh. Above backlog of cases is causing delay in the disposal of cases. Delay increases the cost of litigation, discourages people to bring their genuine disputes to the courts and encourages resorting to extra-judicial means of dispute resolution. Above backlog of cases is the single biggest impediment for us in the way of dispensation of quality justice. The nature of cases, time, perspective and peoples expectation from the judiciary are rapidly changing. Now time is of greater value for every litigant. The nature of the cases also demands expeditious decision. People also want reduction in the cost of litigation. It is good to take note that our justice system greatly enjoys the confidence of the people. But there is room for further excellence. In fact every man-made system needs, after passage of time, updating through reforms and revision.

Effective case management practices and scientific monitoring and evaluation of performances of every person employed in the judiciary can help to ensure quick dispensation of quality justice, equal treatment to all litigants and timely conclusion of cases and maintain public confidence in the Court as an institution. In our justice system the case management is a judicial work and the overall responsibility of efficient case management lies with the judge. The judges are of course provided with invaluable support by the court staffs of various grades in this regard. The Registry of the Supreme Court of Bangladesh provides logistics and other necessary support to the judges of the apex court in case management and court administration. In this regard, the number of judges as well as the cases of the apex court has increased significantly from 1972 to 2012. In 1972 there were in total 13 judges (3 judges in the Appellate Division and 10 judges in the High Court Division) in the apex court while the total number of cases was 24623 (4056 cases in the Appellate Division and 20567 cases in the High Court Division). On the other hand in 2011 there were 10 judges in the Appellate Division and 98 judges in the High court Division. As far as the cases are concerned there were 12441 cases in the Appellate Division and 279436 cases in the High Court Division.

The Registry of the Supreme Court in addition to its above duty also provides secretarial support to the High Court Division of the Supreme Court of Bangladesh in the performance of its constitutional duty of exercising control and superintendence and consultative role, respectively, of the subordinate judiciary. In view of significant increase in the volume of works it is now next to impossible for the Registry to provide effective and quality support to the Supreme Court for control, superintendence and administration of the subordinate judiciary and judicial magistracy.

In this regard, the scenario in the subordinate judiciary has also changed. Due to separation of the judicial magistracy and ever increasing number of cases the number of judges, judicial magistrates and court staffs have increased manifold in the subordinate judiciary. At present the total strength of the subordinate judiciary is about 1500 judges and magistrates of different grades. In addition there is a supporting court staffs of several thousands.

Public confidence in the moral authority and integrity of the judges and the judiciary is of utmost importance in a modern society. In fact public confidence is the source of all strength of the judiciary. Public perception of a judge and his competence depends on the conduct of a judge both inside and outside of the court room. It is important that every judge strives to ensure that his or her conduct, both in and out of court, maintains and enhances the confidence of the public, the legal profession and litigants, in the impartiality, integrity and competence of the judge and of the judiciary.

It is now urgently necessary to establish a mechanism which will ensure effective and continuous monitoring and evaluation of performances of the judges, judicial magistrates and court staffs of the subordinate judiciary and reflect the outcome of the exercise in their service record.

The independence of the judiciary will be meaningless and the separation of the judicial magistracy a nightmare if the High Court Divisions' effective control and superintendence over the subordinate judiciary and judicial magistracy as provided under Article 109 of the Constitution can not be established and made functional.

In addition the judicial secretariat will also provide necessary support for research and development as well as reforms of cases management and court administration processes of the subordinate judiciary. The challenges which the Bangladesh judiciary is encountering now had been faced and successfully over come by other common law judiciaries of developed economy and we may be benefited from their experience and accordingly select and adopt the best practices for our judiciary. We are in need of open and receptive mind and innovative ideas so that substantial reduction in case processing time is possible without compromising the quality of justice. It may be surprising to many of us to know that the statutory trial courts in USA and Canada dispose of about 80% of cases without resorting to trial processes. The right to advance arguments in cases is also time bound; either party will have to complete arguments hearing within the fixed hours. The culture of lengthy hearing of arguments for days or weeks is no more available in those judiciaries.

Since the Supreme Court Registry is over burdened with its mandatory primary duties, we are in need of a judicial secretariat for above purposes. In this context it is pertinent to mention that in my reply to the felicitation given to me by the Supreme Court Bar Association after my taking oath as the chief Justice of Bangladesh I made it clear that for securing the independence of Judiciary and proper superintendence and control of

subordinate judiciary, effective steps and measures would be taken to establish a judicial secretariat of the Supreme Court of Bangladesh.

It is the sacred constitutional obligation of the government to build necessary infrastructures, institutions and offices so that the Supreme Court gets necessary logistics and secretarial support to satisfactorily perform its consultative role and the High Court can perform its controlling and supervisory role with regard to the subordinate judiciary and judicial magistracy. It is good to note that the Supreme Court received very positive response from the Government of Bangladesh in this regard. On the basis of positive assurance from the Government the Supreme Court has taken all necessary preparations and effective measures including the finalization of an organogram, for the establishment of a judicial secretariat.

The establishment of a judicial secretariat for the Supreme Court is a crying need of the day for making the separation and independence of judiciary really meaningful and functional and we all are optimistic that with the support and cooperation of the Government it will come into being very soon.

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