JUDICIARY IN BANGLADESH: ITS INDEPENDENCE AND CHALLENGES, 1991-2014

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DECLARATION

I declare that the thesis entitled **"JUDICIARY IN BANGLADESH: ITS INDEPENDENCE AND CHALLENGES, 1991-2014"** submitted by me for the award of **Doctor of Philosophy** of Jawaharlal Nehru University is my own work. The thesis has not been submitted for any other degree of this university or any other university.

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Dedicated

to

My Parents

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List of Abbreviations

AD	Appellate Division
ADB	Asian Development Bank
ADM	Additional District Magistrate
ADR	Alternative Dispute Resolution
AGOT	Administrator General and Official Trustee
AL	Awami League
AT	Administrative Tribunal
BAKSAL	Bangladesh Krishak Sramik Awami League
BBS	Bangladesh Bureau of Statistic
BCLRH	Bangladesh Company Laws and Regulations Handbook
BDR	Bangladesh Rifles
BEC	Bangladesh Election Commission
BGBCH	Bangladesh Government & Business Contacts Handbook
BHF	Bangladesh Heritage Foundation
BJSC	Bangladesh Judicial Service Commission
BLAST	Bangladesh Legal Aid and Services Trust
BLC	Bangladesh Law Chronicles
BLD	Bangladesh Legal Division
BLT	Bangladesh Law Times
BNP	Bangladesh National Party
BNWLA	Bangladesh National Women Lawyer’s Association
BRAC	Bangladesh Rural Advancement committee
BTI	Bertelsmann Transformation Index
CDI	Criminal

CJ	Chief Justice
CMIS	Court Management Information system
CPC	Civil Procedure Code
Cr. PC	Criminal Procedure Code
DLR	Dhaka Law Reports
DM	District Magistrate
EPO	Emergency Powers Ordinance
EPR	Emergency Powers Rules
FIDH	International Federation for Human Rights
GOB	Government of Bangladesh
HCD	High Court Division
HRW	Human Rights Watch
ICCPR	International Covenant on Civil and Political Rights
ICT	International War Crimes Tribunals
IGS	Institute of Governance Studies
IO	Investigation Officer
IOJ	Islami Okiya Jote
IRO	Industrial Relation Ordinance
JATI	Judicial Administration Training Institute
JI	Jamaat Islami
JNP	Janata Nationalist Party
JSC	Judicial Service Commission
MFLO	Muslim Family Law Ordinances
MP	Members of Parliament
NGO	Non Governmental Organizations
NHRC	National Human Rights commission

NLAO	National Legal Aid Organisation
PC	Privy Council
PIL	Public Interest Litigation
RAB	Rapid Action Battalion
SC	Supreme Court
SCBA	Supreme Court Bar Association
TIB	Transparency International Bangladesh
UK	United Kingdom
UN	United Nations
UNDP	United Nations Development
UP	Union Parishad
VAT	Value Added Tax
VC	Village Courts

CHAPTER – 1

INTRODUCTION

CHAPTER- 1

INTRODUCTION

1.1: Introduction

The pursuit of socio-economic justice in a society is a never ending process. The Preamble of Bangladesh's Constitution ensures discrimination free, inclusive and an egalitarian society. Such an ideal in the society of Bangladesh is supposed to be premised on the bedrock of the principle of the rule of law. The Constitution of Bangladesh attaches supreme importance to the over-arching principles of fundamental rights, freedom, justice and equality. Such an ideal society with its rock-solid commitment towards rule of law can be accomplished only through a vibrant democratic process. The most important thing which may come in mind is, dispenses of justice in a society is the Independence of Judiciary. An efficient and independent judicial system is the core requirement of a healthy society. A society without crime and dispute is unthinkable. Again a society laden by influx of offences and conflicts is not at all a safe abode for humans; so a balance must be retained to live in society. And that very balance is maintained by the Judiciary by administering justice in the society. But if the Judiciary is not independent, then impartial justice can hardly be prevail.

As James Bryce has rightly said:

> "There is no better test of the excellence of a government than the efficiency of its judicial systems, for nothing more nearly touches the welfare and security of the average citizen than his sense that he can rely on the certain and prompt administration of justice, if the law be dishonestly administered, the salt has lost its savour, if it be weakly and fitfully enforced, the guarantees or order fail, for it is more by the certainty than by the severity of punishment that offences are repressed; if the lamp of justice goes out in darkness, how great is that darkness" (Halim 1998: 339-340).

One of the significant problems faced by the modern state is to, "identify the ways to balance the relationship between different organs of the government. Everywhere the Executive has become interventionist assuming responsibilities for functions traditionally considered to be the preserve of other branches. This intrusion is more noticeable in law making than in the judicial process. It is not uncommon to find a legislature, especially in Westminster system, accepting the domination of the Executive government as natural. But the judiciary does not always accept attempts by the executive to intrude into its domain" (Ahmed 2006).

Bangladesh is a liberal secular-democratic country. Although Bangladesh is in a relatively balanced and secure period with respect to security & politics and the Government of Bangladesh has set up a spirited social and economic reform agenda, including strong regional and international cooperation, "the country is still facing challenges in the judiciary system and the rule of law. This is partly due to the confrontational politics practiced by the two main political parties over decades, reflecting longstanding personal enmity between the leaders of Awami League and Bangladesh Nationalist Party (Talukder 1994: 125). This could have significance for countries in Asia, the Middle East and North Africa since Bangladesh have strengthen its stand as a successful secular, democratic and inclusive country with a predominantly Muslim population" (Ministry of Foreign Affairs of Denmark n.d.).

A Judiciary free from the executive control is regarded as the *sin qua non* of any form of democratic Constitution. One of the cardinal objectives of a Constitutional state is to preserve and foster the fundamental rights of its citizens. The Bangladesh's constitution stands as "the most powerful evidence to state, Bangladesh as a unitary, independent and republic, founded on a struggle for national liberation. It lays a strong foundation of nationalism, secularism, democracy and socialism as the ethical that stands for the Republic and declares the quest of a society that gives its citizens- the rule of law, fundamental civil rights and independence as well as fairness"(Akkas 2004).

The Judiciary is bestowed with a cardinal position and it has enhanced its legitimacy through the process of judicial activism. The Courts in Bangladesh can review the

existing judicial rules and orders those are already delivered. Judicial activism in a wayis emblematic of the fact that the Judiciary tries to apply societal goals on its own in light of the prevailing socio-economic conditions. This aspect of the Judiciary is quite important for a poor country like Bangladesh where socio-economic conditions provide ample scope for human rights abuses wherein courts come to play a magnified role as a saviour of the common people.

That the Judiciary and its independence has a cardinal role has been highlighted by Henry Sidgwick in the following words: “in determining a nation’s rank in political civilization, no test is more decisive than the degree in which justice as defined by the law is actually realized in its judicial administration both as between one private citizen and another and as between private citizens and members of the government” (Sidgwick 1897: 481).

In a democratic society rule of law can only be ensured through Independence of Judiciary. The independence of Judiciary is the cornerstone of the constitutional structure. The judicial system is vested with the responsibilities, of gardening the Constitution and fundamental rights of the citizens. The basic rights are robbed of, all values, if the independence of the Judiciary is destroyed. As *Ramakrishna Hedge* has argued that the, “Judiciary stands between the ordinary citizen and the enormous power of the modern state, not only regarding fundamental rights, but also regarding the citizens’ rights, developed through the growth of administrative law in the Leviathan of today”.[1]

The primary objects for which “a state was established in the society, was the creation and protection of individual rights. But an independent organ as a means, through which this object might be accomplished, has been recognized and existed from early times. This independent body is *Judiciary*. An investigating look, from the broader point of view will review the idea that, the existence of a Judiciary does not depend on the existence of a legislature; because the legislature in a sense does not create the rights of

[1]` Hedge, Ramakrishan, Government of Karnataka, *The Judiciary Today- A plea for a collegium*

individuals, it only recognizes the rights" (Alam 2004). Rights originate in the society as ultimate results of mutual interactions between people and other social institutions. That is why even in the absence of legislative organs, the courts can utilise the latitude of application of rules obtained and extracted from extraneous sources like from their own previous decisions or customs and thereby recognize rights of individuals. "A society without a legislative organ is conceivable and indeed fully developed legislative organs did not make their appearance in the life of the state until modern times, but a civilized country without judicial organs is hardly conceivable" (Halim 1998: 339).

There are three separate organs of the government in a democratic set up i.e. the Executive, the Legislature and the Judiciary. The Judiciary includes all courts and tribunals of the land, the principal function of which is to interpret the law, adjudicate disputes and protect rights of the citizens. An independent and efficient judiciary is indispensable for a democratic country to function efficiently and also plays a significantly role in the overall development integrity of a country and judicial corruption undermines the rule-of-law.

In Bangladesh, the Supreme Court stands as the apex of the judicial system. "The Bangladesh's judicial system consists of the High Court Division and the Appellate Division. The Supreme Court serves asthe Guardian of the Constitution and enforces the fundamental rights of the citizens. Subordinate courts consist of Civil and Criminal Courts exist at Districts and Thana's levels as well as special and tribunal courts such as the Administrative Tribunal, Family Courts, Village Courts (VC), Labour Tribunal, Loan Courts, Commercial, Municipal and Marine Courts, etc" (Hossain and Alam 2004: 4).

The Judiciary is the fundamental component of the statehood. It ensures social justice and equality of all citizens of the land. The cornerstone of the duty of the Judiciary is to reflect the cardinal principles of state policies and evokes universal values, uphold the ethics of international human rights regime irrespective of cultural or class differences. A sound judicial system can establish a healthy and prosperous democratic structure (Haque 2003: 29). The citizens go to the Judiciary with a hope that their grievances will be

addressed. If the Judiciary is failed to perform this duty, it erodes the faith and confidence of the people in the basic fabric of the democratic system (Mollah, 2006).
According to Article 22 of the Constitution of Bangladesh (2004), "the Supreme law of the land provides for the Separation of the Judiciary from the Executive while Article 94 (4) grants complete freedom to the Judges in the performance of their functions. One of the essential functions of the judiciary is to interpret the niceties of relations between different branches of the government. What gives the Judiciary the most strength is its power to review the activities of other organs of the state" (The Constitution of Bangladesh 2004). Article 102 (1) of the Constitution confers, "powers on the High Court Division of the Supreme Court to enforce fundamental rights while Article 102 (2) confers the power of judicial review in non-fundamental matters. The Judiciary has the authority to declare ultra vires laws passed by the Parliament and action taken by the executive if these are inconsistent with the Constitution. The Constitution also restricts the jurisdiction of the court in declaring, "void the laws made to give effect to some of the basic principles of state policy even though they may conflict with the fundamental rights guaranteed in it" (The Constitution of Bangladesh 2016).

Independent judicial system is paramount for democratic virtues. "In Bangladesh, demand for judicial independence in practice has been a much-debated issue among policy makers, democratic philosophers and academicians for a long time. Many people raised this issue both at national and international platforms and demanded a positive change to ensure the Independence of Judiciary" (Halim 2006).

The grim situation in Bangladesh is such that the Judiciary is afflicted with problems like financial crunch and the restricted ability to implement its own decision which also raises important questions about the practical state of affairs regarding the separation of the Judiciary from the executive. One scholar has rightly pointed out: "Although the higher Judiciary is still respected and honoured by the people, there are growing allegations of unfair practice in disposing of bail petitions, delay in disposing of cases, politically biased decisions and erosion of moral values in supervising the lower Judiciary. The independence of the lower judiciary remains on paper as neither a separate secretariat has

yet been set up to establish the Supreme Court's control over the lower judiciary nor any legal instrument has been framed for the appointment of judges" (Mollah 2006).

Another problem is the political considerations in judicial appointments in Bangladesh which has witnessed an alarming upswing in recent decades. A part of this problem is related to the qualifications of judges prescribed in the Constitution of Bangladesh. Like Article 95 of the Bangladesh Constitution (2004) does not specify, "the qualifications needed for the appointment of judges in the appellate and high court divisions of the Supreme Court. It only says a person can't be qualified for appointment as a judge unless he or she is a citizen of Bangladesh and has practiced law in the Supreme Court for at least 10 years, has held judicial office in the country for at least 10 years, or has other such qualifications as may be "prescribed by law" for appointment as a judge of the Supreme Court" (The Constitution of Bangladesh 2016).

The above provision underwent an amendment which states that "Parliament shall enact a law for specifying qualifications for judges' appointments. None of the successive regimes have done so. This is ostensible to keep control over the judicial appointments. Interestingly, the Ministry of Law, Justice, and Parliamentary Affairs decides in the name of the President, the number of judges that need to be appointed. Some South Asian countries like India and Pakistan already have given this mandate to their legislative bodies. It is a frequent debate in Bangladesh whether the politically appointed judges actually favour their appointing authorities or political masters when it comes to justice. The primary objective of Judiciary is to interpret the laws, adjudication of legal conflicts, and administration of justice" (Halim 2006).

The Judiciary is that organ of government which is composed of judges and courts. In the modern political system, the judicial system has been kept separate from the legislature. The Constitution is organic and supreme law of the land. However, the legislature carries forward the spirit of the constitution and frame laws according to the demand of the situation. The Judiciary has been given the vital responsibility to interpret and determine whether these laws are in line with constitution. Hence, the judges must be well versed in

the spirit of the law of the land. The Judiciary is now an integral part of any democratic system.

The post-Independence Judiciary in Bangladesh had a concise democratic period within which, it had to consolidate its constitutional jurisprudence. The first Supreme Court was not even granted judicial review that came with the formal adoption of the Constitution. Understandably, therefore, the Court began to abandon, albeit slowly, strict literalism in favour of a legal spirit-based method of interpretation so as to ensure justice by overcoming procedural difficulties and technicalities.

Importantly, the Court broke away from retrogressive judicial decisions of former Pakistan but in some instances, duly drew upon old decisions that were Constitution-compatible, "although, as we shall see below, pro-establishment decisions of the Pakistani Supreme Court did cast some measure of negative influence upon the Bangladeshi judges; In the meantime, we witnessed two extra-constitutional processes. In 1987, initiatives were taken to separate the magistracy by amending Code of Criminal Procedure, 1898. For an unknown reason, the Bill could not be placed before the Parliament. After the fall of the autocratic rule in 1990, the expectation was high to ensure separation of Judiciary. But the next two elected governments of l99l & 1996 did nothing in this regard except spoiling its tenure" (Hoque 2012).

In 1999, "the Supreme Court issued l2-point directives in famous ***Masadar Hossain*** case to ensure separation of Judiciary from the executive. The successive governments have taken lime again and again to delay the process. The Judiciary finally embarked on a historical journey on November1,2007, as it came out of the direct control of the executive organ of the government. The much-demanded implementation of the separation of the Judiciary is now expected to ensure justice without any hindrances as in the past when justice often used to be delayed and the judicial process as controlled by the executive" (Mollah 2005).

The 5th Constitutional Amendment in 1977 brought important changes in the Bangladesh's Constitution. The Judicial independence restored partially which was

ruined by the 4th Amendment. The Supreme Court and High court's jurisdiction are "to enforce fundamental rights and protect them was restored to its original form as was in the original Constitution; the state policy i.e.' *Socialism*' was given a new direction or explanation to give effect to socialism in order to decentralise socio-economic and political justice" (Sukhamaya 2017).

The Judiciary's independence especially in the constitutional status of the Supreme Court was restored in 1970's.The historic judgement in the history of Bangladesh in the case of Anwar *Hussain vs Bangladesh*, which is also known as 8th constitutional amendment, "this is the first judgment whereby the Supreme Court of Bangladesh as striking down an amendment to the Constitution made by the Parliament" (Halim 2008).

Justice *Md. Abdul Wahhab Miah* in his judgement argued that the 13th amendment is intra vires, but not ultra vires. He disagreed with former chief justice ABM Khairul Haque and three other judges who called the 13th amendment unconstitutional and void. Differing with Justice Khairul's views, Justice Wahhab said the 13th amendment had "not impaired democracy, independence of the judiciary and separation of powers are the fundamental structures of the Constitution" (Chowdhary 2014).

After years of fierce debate and delays, as stated by one scholar: "the military-backed caretaker government formally announced the separation of the country's subordinate judiciary from the executive on January16, 2007. The Code of Criminal Procedure (Amendment) Ordinance finally came into effect on November 1, 2007a decision welcomed by civil society organizations and lawyers as the first step toward an independent Judiciary. Under the new law, the Supreme Court appointed all lower court judges and judicial magistrates and held them accountable for their actions, as opposed to appointment by the Ministry of Establishment, headed by the prime minister. Nevertheless, direct and indirect political influence often makes it difficult for judges to make impartial, fair decisions based on the evidence and the law" (Alam 2003). In this context, he further mentions: "The government's decision to send two judges into retirement by Section 9(2) of the Public Servants (Retirement) Act of 1974,on

30July2009 was an example of the political use of existing laws to punish judges, who are unwilling to listen to the executive. Despite the attempt to make the judiciary functionally independent a controversy surrounding the appointment of judges especially the Chief Justice and other judges of the High Court; one of two divisions of the Supreme Court continue polarized the country. Appointment of Supreme Court judges, which is done by the president after extensive consultation with the prime minister, continues to be politicized"(Haque 2006).

The state of emergency in Bangladesh (2007-2008) put "country's Judiciary under certain challenges with a far-reaching bearing on judicial statesmanship, resurfacing the old but difficult question of the proper judicial role in Emergency" (Amin 2005). The Emergency regime of 2007started a slew of reforms in politics and judicial spheres. However, it also restricted the protective authority of the judiciary in Bangladesh. "The proper role of the judiciary in such a context should be defined by reference to its ability to maintain the rule of law. The Bangladeshi judicial decisions show that while the Supreme Court's High Court Division by and large asserted self-confidence vis-à-vis the overweening Emergency government, its Appellate Division either remained silent or paid undue deference to the executive. By examining the new politics of senior Judiciary in Bangladesh and the potential reasons that may have explained this and have been based on the premises that the law is a site of political contestation, while the Judiciary is a political institution continually negotiating the law with politics" (Naimuddin 1998). The purpose of the study is that the Judiciary throughout the Emergency regime suffered a crisis of public confidence imprinted negative impacts on constitutional agency in upholding justice and Constitutionalism.

With the end of year 2010, the Awami League Government's Prime Minister Sheikh Hasina completed its second year in office. Although opinion varies about the performance of the Government, there is agreement that 2010 was a year of judicial activism for Bangladesh. It was the judiciary that paved the way for the reintroduction of the original Constitution of 1972. Again, it owed to the Judiciary to declare all military regimes of the country in the past as illegal. However, the most important one, though

initiated by the Executive, was the setting up of a *War Crimes Tribunal*, to prosecute those that had colluded with the Pakistan Army during the 'Bangladesh Liberation War' of 1971 (Bhattacharjee 2010).

On June 30, 2011, Bangladesh Parliament passed the 15th amendment of the Constitution. The amendment made some dramatic changes in the Constitution that include the abolition of the caretaker government, setting some unchangeable clause in the constitution, dropping off the people's mandate on any national issues and barring the criticism of the Constitution. On January 17, 2015, Justice S. K. Sinha became the first non-Muslim (Hindu) Chief Justice of Bangladesh to hold the highest judicial post who was administered oath of office by President Mohammad Abdul Hamid (Chowdhary 2014).

The difficult and complex political relationship between the army and the two political parties is another factor which strikes at the very root of health of democracy in Bangladesh. One scholar has rightly pointed out:

> "The local government system is considered weak and insufficiently mandated and resourced, and effective decentralization and devolution of decision-making and resource allocation is a slow process. Strengthening of local government is vital for improving public service delivery to the country's vast population, in particular for those living in small towns and rural areas. The bureaucracy is inefficient and highly centralized, making provision of effective services a real challenge. The Government of Bangladesh has a stated policy of, zero tolerance against human rights abuse, but major abuses of human rights including extra judicial killings by law enforcement agencies, custodial deaths and torture with impunity, unwarranted arrests, violence against women, discrimination against indigenous peoples in land and access to justice, child labor and disregard for prisoners' rights, etc., persist. The reasons for this are complex, but the main factor is weak and allegedly corrupt judicial systems and law enforcement agencies in Bangladesh" (Sajid 2012).

1.2: Judicial System

A legal system of a country has its own legal history which comprises "the growth, evolution and development. Bangladesh as an independent state has its own glorious legal history, which ought to be known to the persons interested to and connected with it. Historical background of the legal system means, the past record of law, administration of a country at a given time is not the creation of one man or one day. It represents the cumulative fruit of the Endeavour, experiences, thoughtful planning and patient labour of a vast number of people through generations. The legal system of Bangladesh is primarily in accordance with the English Legal system although since 1947, the legal scenario and the laws of Bangladesh have drifted far from the West Wing to the difference in Socio-cultural values and moral guidelines. In November 2007, Bangladesh has successfully separated the Judiciary from the Executive"(Halim and N.E. Siddiki, 2015).

The primary purpose of the legal system of a country is the administration of the justice which has three aspects. The first is "the institutional aspect which includes civil, criminal and special courts. Second is the procedural and functional aspect which includes the procedure of the judicial or quasi-judicial dispensation of justice, i.e. the procedure of providing remedies through the institutional organs of the legal system. The process of investigation, inquiry, filing a suit, taking evidence, steps in appeal, review, etc., all are within the fold of this procedural aspect" (Rahamn and Shabuddin 2005). The third point relates to all are the conceptual components of the legal system and these include, "*interalia*, the historical development, the rules of judicial precedent, statutory interpretation, legislation, legal reform, legal aid, etc." (Halim 2014)

The best-known definition of a legal system comes from Prof. Hart. He listed five factors which had to be in co-existence to create a healthy legal system. These are as follows:

1. "Rules which either forbade certain conduct or compelled certain conduct at pain of sanctions".
2. "Rules requiring people to compensate those whom they injured".
3. "Rules stating what needs to be done in certain mechanical areas of law such as making a contract or making a will".

4. “A system of courts to determine what the rules are, whether they have been broken and what the appropriate sanctions are and
5. “A body whose responsibility is it to make rules and amend or repeal them as necessary” (Chowdhary 1993)

The five factors enlisted above seem to be the minimum essential requirement for a legal system. Considering these in the context of the legal system of Bangladesh, “the first three types of rule all exist the first one being the criminal law and the second two being part of the civil law in Bangladesh. There are both civil and criminal courts regarding the points in factor four and the parliament is the legislative body as indicated in factor five” (Halim 2010).

1.3: Theories of Judicial System

A thorough investigation into various legal systems results into a theory of legal system. “Such a theory in general in that it claims to be true of all legal systems. If it is successful, it elucidates the concept of a legal system and forms a part of general analytic jurisprudence” (Halim 2004).From an analytical point of view, a complete theory of legal system consists of the solution to the following four problems:

- *“The Problem of Existence*: What are the criteria for the existence of a legal system? We distinguish between existing legal systems and those who have either ceased to exist (Example, the Roman Empire legal system) or never existed at all (Example, Plato’s proposed law for an ideal state). Furthermore, the French legal system exists in France but not in Belgium.”
- *“The Problem of Identity* (and the related problem of membership): “What are the criteria which determine the system, to which a given law belongs? These are the rulesfor membership and from them can be derived the criteria of identity, answering the question which laws from a particular system”.
- *“The Problem of Structure*: “Is there a structure common to all legal systems, or to certain types of legal system? Are there “any patterns of relations among laws belonging to the same system which recurs in all jurisdictions or which mark the difference between important types of system?”

- *"The Problem of Content*: "Are there any laws which in one form or another recur in all legal systems or types of system? Is there any content common to all legal systems or determining important types of systems?" (ibid)

Every theory of legal system must provide a solution to the first two problems, "since existence and identity criteria are a necessary part of any adequate definition of a legal system. It may give a negative answer to the last two questions. It may claim that, there is no structure or shared content common to all legal systems. The examination of structure and content is fundamental also to the theory of types of legal system" (Haque 2006).

Naturally, "every theory of legal system must be compatible with an explanation of three important features of law are that, it is normative, institutionalized and coercive. It is normative in the sense that it serves and is meant to serve as a guide for human behaviour. It is institutionalized in that, its application and modification are to a large extent performed or regulated by institutions. And it is coercive in that obedience to it and its application is internally guaranteed ultimately by the use of force" (Raz 1970).

Austin's theory of legal system divided into three parts, each part providing an answer to one of three main problems: "First, a law is a general command; second issued by some person (Austin's usual expression is set and given) and third who is sovereign i.e.that is habitually obeyed by a certain community and does not render habitual obedience. Austin's *Criteria of identity* defines a legal system contains all and only the laws issued by one person or body of persons. His *criteria of membership* also defines a given law belongs to the legal system containing laws issued by the legislator of that law. That is Austin's answer to the problem of identity. Austin's criterion of existence defines that a legal system exists if the common legislator of its laws is a sovereign. Therefore, a legal system exists if it is efficacious. The shift from one view to other view is ensured by the fact that a person is sovereign only if he is habitually obeyed, and he is usually obeyed if and only if his commands are obeyed" (Haque 2006).

Austin never tackled the problem directly, "but he says enough about the meaning of the term '*general command'* to enable to reconstruct a rudimentary doctrine of the structure

of laws. This doctrine of structure excludes the possibility of any internal relation between laws and constituting a necessary element in a legal system. By internal relation between laws, which means the relation between laws one or more of which refer to or presuppose the existence of the others" (ibid). Thereby Austin excludes a fortiori any specific internal structure which legal systems much necessarily have.

The concept of sovereignty is of cardinal importance in Austin's theory of legal system. According to him, "sovereignty is neither derived from nor explained by reference to morality or moral principles. It is based exclusively on the social fact of the habit of obedience. The concepts of habit and of personal obedience namely obedience to a particular person or group, become the key concepts in the analysis of sovereignty" (Halim 2004).

Kelsen's criterion of the existence of a legal system can be formulated as follows: a legal system exists "if and only if it reaches a certain minimum degree of efficacy. The efficiency of a system is a function of the efficacy of its laws, but Kelsen says nothing about the connection and how the level of efficacy is to be determined. The efficacy of a norm can be manifested in two ways; firstly by the obedience of those, on whom a duty is imposed by that norm and secondly by the application of the sanction permitted by the norm" (Halim 2015).

As far as the efficacy of the legal standard is concerned it "attaches a punishment to a certain behaviour and thus qualifies the behaviour conditioning the sanction as illegal, i.e. as 'delict', two facts may be understood: this norm is applied by the legal organs (the law courts), which means that, the sanction in a concrete case is ordered and executed and this norm is obeyed by the individuals subjected to the legal system, which means that they behave in a way which avoids the sanction. Upon analysis of his viewpoint it is found that Kelsen gives no indication of what the relation between the two types of manifestation of efficacy must be if the norm is to be considered efficacious. Nor is it clears that how the efficacy of a norm can be measured or otherwise determined" (Raz 1983).

1.4: Inter-linkage between Law and Judicial System

The Legal system means “a system of coordination amongst the law making bodies, law applying institutions and law enforcing institution and such system subsists within the territorial extent of a state. There is a deep relation between law and legal system. Law is not isolated from the legal system. The concept of law presupposes legal system because, without the existence of a legal system, a law cannot be applied or enforced. Moreover, a legal system is more than some total of laws or legal material which represents the pattern of the interrelation of this material and differs from them also in its overall purposes and functionary. Hence the legal system is a very wide conception and it is the difficult task to set out the goals of a legal system. The purposes of a legal system are underlying within the purpose of the law” (Halim and N.E. Siddiki 2015).

The purposes are mainly:

- The most important task is to achieve justice in society and justice is integral to the concept of the legal system.
- To provide a framework within which people conduct their affairs. This type of framework is essential for the regulation of our day to day life, like buying, selling, etc.
- To provide education for shaping people’s ideas. This function is conducted by the Bar Council, Universities, colleges and legal aid providing institutions (Patwari 2004).

1.5: Major Judicial Systems of the World

The present major legal systems of the world are:

1. The Common Law System (UK, USA, Bangladesh, etc.)
2. The Civil Law System (Europe except UK)
3. The Philosophical or Religious Law System, which includes
    - Islamic Legal System (Iran, Saudi Arabic etc)
    - Socialist Legal System (Russia, China, Cuba etc)

1.5.1: The Common Law System

As far as the Common law system is concerned it "refers to laws and the corresponding legal system developed through decisions of courts and similar tribunals rather than developed through legislative statutes or executive action". In common law legal system, "the law is created and refined by judges; a decision in the case currently pending depends on decisions in previous cases and affects the law to be applied in future cases. When there is no authoritative statement of the law, common law judges have the authority and duty to make law by creating the precedent. The body of the precedent is called 'Common law' and it binds future decisions. In future cases, when parties disagree on what the law is, an idealized common law court looks to past precedential decisions of relevant courts. If a similar dispute has been resolved in the past, the court is bound to follow the reasoning used in prior decision (this principle is known as *stare decisis*). If however, the court finds that the current dispute is fundamentally distinct from all previous cases, it will decide as a matter of first impression. Thereafter, the new decision becomes precedent and will bind courts under the principle of stare decisis" (Halim 2004).

In practice, common law systems are considerably more complicated than the idealized system. "The decisions of a court are binding only in a particular jurisdiction and even within a given jurisdiction some courts have more power than others. For example in most jurisdictions, decisions by appellate courts are binding on lower courts in the same jurisdiction and on future decisions of the same appellate court, but decisions of non-appellate courts are the only non-binding persuasive authority. However stare decisis, the principle that similar cases should be decided according to same rules, lies at the heart of all common law systems. Common law legal systems are in widespread use, particularly in those nations which trace their legal heritage to Britain, including the United Kingdom, most of the states of USA and Canada and other former colonies of the British Empire" (Halim and N.E. Siddiki 2015).

1.5.2: The Civil Law system

Civil law or Continental law or Romano-Germanic law is the predominant system of law in the world. Civil law as a legal system is often compared with common law. "The main difference that is usually drawn between the two systems is that common law draws abstract rules from specific cases, whereas civil laws start with abstract rules which judges must then apply to the various cases before them. Civil law has its roots in Roman law, Canon law and the Enlightenment, alongside influences from other religious laws such as Islamic law" (Chowdhary 2014). The legal systems in many civil law countries are based around one or several codes of law, "which set out the main principles that guide the law. The most famous example is perhaps the French Civil code, although the German Burgerliches Gesetzbuch and the Swiss civil code are also landmark events in the history of civil law. The civil law systems of Scotland and South Africa are uncodified and the civil law systems of Scandinavian countries remain largely uncodified. The so called Socialist law is considered in post socialist states not as an independent system of law but rather as a particular case of the Romano-Germanic civil law" (Patwari 2004).

1.5.3: The Philosophical or Religious Law System

It is held that "law is not completely a matter of human enactment, it also includes natural law. The best-known version of this view is that '*God's view is supreme'* has had considerable influence in the United States and other western societies" (Khaled 2005). It is also postulated that "the civil rights movements partially inspired by the belief in natural law. Such a belief seems implicit in the view that law should serve to promote human dignity, as for instance by the enforcement of equal rights for all. Muslim societies also embrace a kind of natural law, which is closely linked to Islam. Religious law refers to the notion that the *word of God is law*. For examples the Jewish *Halakha* and Islamic *Sharia,* both of which mean the path to follow" (Halim 2010). In Churches, Christian canon law also survives in contemporary times. "The implication for the law is inalterability, because the word of God cannot be amended or legislated against by judges or government" (Haque 2006).

It is held that “religion never provides a thorough and detailed legal system. For instance, *Quran* has some law, and it acts merely, as a source of further law through interpretation, *Qiyas* (reasoning by analogy), *Ijma* (Consensus) and precedent” (Khaled 2005). This is mainly contained in a “body of law and jurisprudence known as Sharia and *Fiqh* respectively, which had a fairly significant influence on the development of common law as well as some influence on civil law. Another example is the Torah or Old Testament, in the Pentateuch or Five Books of Moses. This contains the basic code of Jewish law, which some Israeli communities choose to use. The Halakha is a code of Jewish law which summarizes some of the Talmud’s interpretations. Nevertheless, Israeli law allows litigants to use religious laws only if they choose”. It is held that “Canon law is only in use by members of the clergy in the Roman Catholic Church, the Eastern Orthodox Church and Anglican Communion” (ibid).

Until the 18th century, “the Sharia law was practiced throughout the Muslims World in a non-codified form, with the Ottoman Empire’s Mecelle code in the 19th century being first attempt at codifying elements of Sharia law. Since the mid-1940s, efforts have been made in country after a country to bring Sharia law more into line with modern conditions and conceptions. In modern times, Sharia is merely an optional supplement to the civil or common law of most countries, though Saudi Arabia and Iran’s whole legal systems source their law on a codified form of Sharia. During the last few decades, one of the fundamental features of the movement of Islamic resurgence has been the call to restore the Sharia, which has generated a vast amount of literature and affected world politics” (Akkas 2004).

1.6: Important Features of Judicial History

Legal History does not mean to study law merely as a body of rules, made by certain organs or neither to study merely a collection of doctrines, dogma and concepts or a static entity. It studies “law as a legal system of a human community organized within the sovereign state as an organic growth, a living and breathing mechanism keeping pace with the common charges. So the legal history contains some important aspects or features mainly:

- Generally, it is concerned with the origin and development of legal institutions, systems, principles and thought about law from the most ancient times.
- It is also concerned with the study of the historical development of particular institutions therein and particular branches of law.
- It deals with all the past, present and future because history has no beginning and end. The present is merely a transitory stage between the past and futures. Whatever happens today becomes history tomorrow and whatever happened yesterday becomes history of today.
- It is not mere mechanical summation of past events, it given an inside into and an intimate knowledge of the past which helps us making a plan and organize a better future.
- The historical perspective throws light on the anomalies that have existed and still exist here and there in the system.
- Law and its history are interdependent and in the absence of any statutory law, let's go through a legal history" (Halim 2004).

1.7: Independence of Judiciary: Meaning and Concept

Independence of Judiciary means a fair and neutral judicial system, where the Judiciary functions without any interference of the executive or legislative organ of the state. Further, in such a system, the courts function as per the Constitutional mechanisms and procedures established by law. "In a Parliamentary democracy, the state has three prominent branches- executive, legislature and Judiciary. Among them the Judiciary comprises of all courts and tribunals which interpret laws to settle disputes, implement legal rights of citizens and impose penalty to the offenders" (Karim 2005). Thus in a democratic state, the power rests on three separate organs, namely the executive, the legislature and the Judiciary.

A smooth functioning of the state lay son non-interference of these three principal organs in each other functional areas along with a proper mechanism for check and balance. On the other hand, a sound judicial system has always helped social structure to remain

coherent and cohesive. Judiciary functions in order to resolve disputes and grievances of the people. As it is reality that rule, law and fundamental human rights cannot be ensured without an effective judicial system, and a judicial system needs to be independent in order to be effective. Once Judiciary is separated from the other organs of the state, the independence of the judiciary is automatically ensured which further safeguards the rights of the people. So, for good governance, the first major step should be the complete independence of Judiciary.

However, the term independence of Judiciary cannot be defined in a specific way. Primarily, it is based on the doctrine of separation of powers. "The doctrine of separation of powers means that there will be no any interference of executive and the legislature in the decision making of the Judiciary. Many other meanings of judicial independence are given by various scholars who have researched on the topic" (Islam 2015). Some scholars also prefer to use the phrase "constituent mechanism" (i.e. what constitutes the judiciary) to define the term. According to these scholars, the independence of the Judiciary is the independence of the exercise of the functions by the judges in an unbiased manner i.e. free from any external interference. So the independence of the Judiciary can be understood as, the independence of the institutions of the Judiciary and also the independence of the judges which forms a part of the Judiciary" (Kumar 2011).The contemporary concept of "judicial independence emphasizes the independence of each and every member of the Judiciary and the Judiciary as an institution or organ of the government. In other words the concept of judicial independence has two essential elements: the individual independence of the judges and the collective or institutional independence of the Judiciary" (Talukder 1994).

The highest judicial organ of the country is the Supreme Court which comprises the Appellate Division and the High Court Division. "There is a Chief Justice in the Supreme Court and there are a number of other judges which are appointed by the President. A judge can hold the office until the age of 67 years. The function of the Appellate Division is to hear and determine appeals from judgments, decrees, orders or sentences of the High Court Division. The High Court Division functions as the Appellate Court and

has superintendence and control over all Subordinate courts. Administrative Tribunals exercise jurisdiction in respect of matters as specified in the Constitution" (The Constitution of Bangladesh 2016).

1.8: Separation of Powers

The principle of judicial independence rests on the idea of separation of power of governmental powers: executive, legislative and Judiciary. "The separation of powers is simply described as the three branches of government, the executive, legislature and the judiciary acting independently of each other. It means at a minimum that no branch of government may arrogate to itself the core functions of a coordinate branch of government and no branch may deprive another branch of the powers and resources necessary to perform its core functions" (Islam 2015). Hence, judicial independence is the cornerstone of the separation of powers doctrine which differentiates the agencies of government that exercise those powers so that they are dispersed.

It is also postulated that the doctrine of separation of powers has its origins in the ancient world, where the theories of government and the concept of governmental functions were initiated" (Vile 1967:3). It is also held that "the concept of governmental functions evolved gradually over many centuries Aristotle (384-322 before Christian era) identifies three elements or powers in a government. The first element is the deliberative element concerned with common affairs including war and peace, enactment of laws, penalty of death, exile and confiscation and appointment of officials. The second element is concerned, with the system of public offices including the number of offices, the subjects with which the offices deal and the tenure of offices. It is also held that the third element is the judicial element or the system of courts including the constitution and the classification of courts and the manner of appointing the judges" (Aristotle 1995: 165-177).

In the last decades of the 17th century, Locke (1632-1704) propounded what may be termed the first modern theory separations of powers. In 1690, in his *Second Treatise of Civil Government* Locke says, "It may be too great a temptation of human frailty, apt to grasp at power, for the same persons who have the power of making laws, to have also in

their hands the power to execute them, whereby they may exempt themselves from obedience to the laws they make, and suit the law, both in its making and executions, to their own private advantage” (Vile 1967: 62).

However Locke’s view of the separation of powers is equivocal. He emphasizes “the need for independent and impartial judges and makes a distinction between pronouncing judgement and enforcement of the judgement, but he does not consider judicial power to be distinct. He emphasis only the separation of executive and legislative power, but he does not formulate a separate judicial power. Locke identifies as a third power, the ‘the federative power’ which contains the ‘Power of War and Peace,’ Leagues and Alliance, all the transactions, with all persons and communities without the commonwealth” (Vile 1967: 59-60).

It is also held that “the theory of separation of powers was further developed in the 18th century by the French philosopher Montesquieu (1689-1755) who contributed new ideas to it. He emphasized certain elements in it, particularly about the judiciary. He is commonly recognized as the founder of the modern theory of the separation of powers” (Akkas 2014: 12).

In 1748, Montesquieu wrote “When legislative power is united with executive power in a such single person or in a single body of the magistracy, there is no liberty, because one can fear that the same monarch or senate that makes tyrannical laws will executive them tyrannically. Nor is there liberty if the power of judging is not separate from legislative and executive power. If it were joined to legislative power, the power covers the life and liberty of the citizens would be arbitrary, for the judge would be the legislator. If it were joined to executive power, the judge could have the force of an oppressor All would be lost if the same man or the same body of principal men, either of nobles or of the people, exercised these three powers that of making the laws, that of executing public resolutions ad that of judging the crimes or the disputes of individuals” (Montesquieu 1989: 157).

Montesquieu emphasized “a rigid separation of governmental powers. However, complete separation of powers is impossible either in theory or in practice and the doctrine of separation of powers has not been strictly applied in any single society. “In

different democratic systems of government in the world, the separations of powers have been maintained in varying degrees of adherence" (Shetreet and Dechenes 1985: 595).

There has never been a strict implementation of separation of powers in England. "The most important example of this situation is the position of the Lord Chancellor who is the head of the judiciary, a cabinet member and the speaker of the House of Lords. The doctrine of separation of powers has been implemented largely in the USA in its Written Constitution. The United States' Constitution vests all legislative power to the Congress, executive powers to the President and the judicial powers to the Supreme Court and such other inferior courts as might be established by the Congress" (The Constitution of USA 1789). All these powers are exercised by the respective branches of government under a system of checks and balances provided by the Constitution.

At the end of the 20th century most modern western democracies claimed a system of government based on a functional separation of powers of some kind. Actually "the real separation of powers between the executive and the legislature branches does not work under the Westminster system of government, which is the norm in numerous countries including Australia, Bangladesh, England and India. In a Westminster system the ministers, the heads of the executive, are members of the legislature and are directly responsible to it. However, separation of judicial powers from the executive and legislature is recognized as practicable in different democratic countries by securing the independence of the judiciary from the Control of the executive government" (Philips and Jacson 1987: 14). In fact, separation of powers is a necessary ingredient that ensures institutional independence of the Judiciary.

1.9: Review of Literature

In order to have a clear understanding of the topic, it is highly essential to make an in depth analysis of the available literature. Some of the existing literature has been reviewed here for making the concepts clear. Here the review of literature can be categorized into following themes.

1.9.1: Separation of Power

Sengupta argues that, "The Supreme Court of Bangladesh has again turned down the government 'plea for further extension of time to implement the Supreme Court's directives on separation of judiciary from the executive. The Supreme Court directed the government in a landmark decision in 1999 to separate Judiciary from the executive. Since then, they have asked for 23 times as extension to implement these decisions. The Supreme Court seems to be annoyed with the officials for delay in implementing its directives and a contempt charge is likely to be framed against the officials who are responsible for carrying out the job. It is not clearly understood why the government has been asking for extension of time so many times. The Law Minister said time and again that the whole process would take time. He said that, the judicial officers are to be appointed at the lower level and they should be trained which is a lengthy process. If it is so why the government lawyers could not convince the highest court of the country?"(Sengupta 2006).

According to Hadley, "Separation of the Judiciary has been argued both as a cause and a guardian of formal judicial independence. The concept of separation of the judiciary from the executive refers to a situation in which the judicial branch of government acts as its own body frees from intervention and influences from the other branches of government particularly the executive. Influence may originate in the structure of the government system where parts or all of the judiciary are integrated into another body" (in the case of Bangladesh: the executive) (Hadley 2004).

Hossain explains that, "the concept of separation of the judiciary through the idea of double standards. An executive officer follows plans, which are of a vertical nature, with the higher offices guiding the decisions of the lower officers, who look for the best possible ways to further the plans established by those higher in the packing order. Executive decisions are made in lines of policy; law is not a policy. Judges or magistrates performing judicial functions must examine what evidence is given and find a way to best apply it to the law; there is less room for an individual's perceptions in judicial decisions" (Hossain 2004).

He also explained that “the judicial independence of all judicial officers is unconditional according to the constitution of Bangladesh. This ideal is protected primarily through the concept of separation of Judiciary from the other organs of government”. *Article 22* states that, “the state shall ensure the separation of the judiciary from the executive organs of state. *Article 95(1)* addressed the method of appointment for the Supreme Court: the president shall appoint the chief justice and other judges.” The appointment and control of judges in the subordinate Judiciary (judicial service) are described in *Articles 115* and *116* stating respectively: “Appointment of persons to offices in the judicial service or as magistrates exercising judicial power be made by the president with the rules made by him in that behalf. The control and discipline of persons employed in the judicial service and magistrates exercising judicial functions shall vest in the president and shall be exercised by him in consultation with the Supreme Court” (Hossain 2004).

Hossain and Alam explained that, “in the case of *Masdar Hossain judgement*, the Appellate Division addressed head on certain concerns regarding executive control over the judiciary. It reaffirmed the principle of independence of the judiciary and elaborated on the constitutional position and practice regarding separation of the judiciary from the executive. Most importantly, it laid down twelve declarations and directions for implementation by the government in this regard. This decision originated in a constitutional challenge brought before the High court by 218 persons in judicial service, including Masdar Hossain. They argued that the subordinate courts were part of the judiciary and therefore persons in judicial service could not be included within the Bangladesh Civil Service Order 1980, nor could they be controlled as though they were a part of the Bangladesh Civil Service as defined by the Bangladesh civil service Rules 1981. The High Court Division held in favour of Hossain and after the government appealed this decision and lost the Appellate Division affirmed the High Court’s judgment” (Hossain and Alam 2006).

Thakuria said that “the civil society, media and the political parties of Bangladesh welcome the development. Haroon Habib, a Dhaka based freedom fighter turned journalist said, The separation of judiciary was an epoch-making step, and should be

considered a major milestone in Bangladesh's judicial history despite the fact that it was done when there is no political government. Appreciations came from its development partner countries like the US, UK and Germany saying that was as an important step towards strengthening democracy in Bangladesh. The Supreme Court in Bangladesh ruled in favour of separation of the judiciary from the executive eight years back, but it was implemented by neither the government of Sheikh Hasina (1996-2001) nor that of Begum Khaleda Zia" (2001-2006).The Awami League government of Ms Hasina had reportedly initiated a few positive steps "to honour the directives of the apex court but the Bangladesh Nationalist party led government of Begum Khaleda Zia did nothing in this direction" (Thakuria 2008).

1.9.2: Judicial Independence: A theoretical Framework

As Russell explained that in today's world, "there is a general trend towards liberal democracy. Judicial independence is viewed as an essential feature of liberal democracy. And yet there is little agreement on what this conditions of judicial independence is or on what kind or how much judicial independence is required for a liberal democratic regime or on the societal conditions on which judicial independence depends. According to him the first requirement of a general theory of judicial independence is analytical clarity about the kind of phenomenon being referred to when we talk about judicial independence. Is judicial independence essentially about the relationships judicial institutions or individual judges should or should not have with other institutions, groups or individuals?

Shetreet and Deschenes explained that the judicial independence is critical for the proper functioning of the civil society. Without impartial and independent dispute resolution, there is no substantive protection of human rights, no true economic security or free market or no good governance or civil order" (Akkas 2004). The rule of law requires judicial independence as a precondition.

Again he explained that "the Judiciary must be independent and impartial because both requirements are necessary for fair adjudication. Both conditions are necessary in order to avoid the opposing risks of infirmity and tyranny. The risk of infirmity exists when the

Judiciary is independent on other branches of government or exposed to outside pressures. The risk of tyranny is associated with a biased judicial and lack of judicial accountability" (Shetreet and Deschenes 2012).

Schwarzschild analyses that "judicial independence is surely good and even crucial to the morality of law and but another sense might actually imply judicial over-reaching and abuse of authority an indefensible sort of independence. That sort of independence is liable in the long run to determine or to destroy judicial independence in good sense. This is true both theoretically and practically as is seen in the attitudes of developed countries which is polarized towards a dubious sort of judicial independence. The norms and standards of judicial independence in each spheres affects norms and standards of others. The impacts of these spheres have one upon the other" (Schwarzschild 2012).

Crawford and McIntyre explained that "the independence and impartiality of the international judiciary focuses on the standards of judicial independence as applied to the international judiciary. International law now has its own institutions, increasingly interacting with the domestic laws of states. Their emergence calls for an examination o f the standards and principles that govern and constrain their operation. In particular the question arises as to the extent to which standards international law set for other legal systems apply to its own institutions" (Crawford and Mclntyre 2012).

Ramakrishna Hedge has argued "the Judiciary stands between the ordinary citizen and the enormous power of the modern state not only in regard to fundamental rights but also in regard to the citizens rights developed through the growth of administrative law in the Leviathan of today" (Hedge n.d). Referring to the importance of the independence of Judiciary, an eminent authority namely Henry Sidgwick, has gone so far as to say that, "in determining a nation's rank in political civilization, no test is more decisive than the degree in which justice as defined by the law is actually realized in its judicial administration both as between one private citizen and another and as between private citizens and members of the government" (Mollah 2006).

1.9.3: Independence of Judiciary in the Context of Bangladesh

As Islam describes that, "an independent Judiciary is imperative in establishing rule-based governance in the country. It can restrain and hold the executive accountable together with other state institutions. A functioning and an independent judiciary could be established by bringing in changes in various institutional and operational aspects of the judiciary" (Islam 2010). In this context, "the Institute of Governance Studies (IGS) of BRAC University has recently produced a policy note entitled 'The Judiciary: Policy Note'. The policy note has provided a number of policy recommendations under four themes, i.e. independence, accountability, efficiency, and effectiveness. These policy recommendations, if fully implemented, would assist both the higher and subordinate judiciary to perform collectively as an institution of accountability by resolving disputes in an impartial manner."

A journalist Thakuria also viewed that, "inaugurating the Dhaka district Judicial Magistracy and Dhaka Metropolitan Magistracy, the chief of the government flagged off the journey of an independent judiciary in Bangladesh. "It is a great day for the nation," said Dr Ahmed, a former World Bank official, turned the head of the interim government, adding, The judiciary is fully independent of the executive from today and from now the courts and the judges will establish rule of law without the interference of the executives" (Thakuria 2008).

Ahmed draws parallels between judicial activism and independence in Bangladesh. He said that "Bangladesh has time and again been failed by the legislature and the executive branches of subsequent governments, regardless of whether they came to power through free and fair election, ballot-manipulation, or bullet-mayhem. Time and again, Bangladesh has rested its hope on these two branches in its pursuit of democracy. The judiciary in contrast remained relatively less talked about. Well, that was until the Supreme Court's Fifth Amendment verdict was delivered. And this time, our political discourse is even risking 'contempt of court' debating the pros and cons of its consequences". (Ahmed 2010).

Mollah said that, "the term governance and good governance are increasingly being used in development literature. Intellectuals, bureaucrats and civil society members alike are accepting the spirit of the concept and are conceiving it in the context of their own experience and environment. The Bangladeshi government has recently been under constant pressure from various donor agencies for ensuring good governance. The implementation and achievement of good governance depends upon the transparency, honesty and efficiency of the legislature, executive and judiciary, along with the cooperation of civil society and the private sector. Although it is clear that the Judiciary's role in governance is very effective and urgent, it must also be noted that for doing its job properly, the Judiciary needs to be sufficiently autonomous and the government needs to respect the decisions of the courts adequately" (Mollah 2008).

Nazrul also viewed that, "the higher judiciary of Bangladesh that comprises the Appellate and High court divisions hears appeals from orders, decrees and judgments of sub-ordinate courts and tribunals, disposes of allegation of human rights violation and enjoys the power of superintendence and control over all courts and tribunals sub-ordinate to it. Like many other comparable institutions of developing democracies, it often confronts with an additional challenge of strengthening constitutional order that often are threatened by lack of democracy, autocracy of the executive organ and disregard to or derogation from constitutional norms. A number of measures have been taken following the famous Masdar Hossain case to beef up the independence of the lower Judiciary. Given the supervisory role of the higher Judiciary on the lower tiers and also on state functionaries, it is essential to strengthen the effective independence and efficiency of the Higher Judiciary" (Nazrul 2010).

Hadley and Rahman explained that, "Independence of judiciary means a fair and neutral judicial system of a country, which can afford to take its decisions without any interference of executive or legislative branch of government. Taking into consideration some of the recent discussions made in the Beijing Statement of Independence of the Judiciary (a statement resulting from the cumulated views of thirty-two Asian and Pacific Chief Justices). Judicial independence is defined, in this report as a Judiciary uninhibited

by outside influences which may jeopardize the neutrality of jurisdiction, which may include, but is not limited to, influence from another organ of the government (functional and collective independence), from the media (personal independence), or from the superior officers"(internal independence) (Hadley 2004 and Rahman 2000).

Halim said that, "Independence of Judiciary truly means that the judges are in a position to render justice in accordance with their oath of office and only in accordance with their own sense of justice without submitting to any kind of pressure or influence be it from executive or legislative or from the parties themselves or from the superiors and colleagues" (Halim 1998). Rahman also pointed out that, "Independence of judiciary depends on certain conditions like mode of appointment of the judges, security of their tenure in the office and adequate remuneration and privileges. Satisfactory implementation of these conditions enables the judiciary to perform its due role in the society thus inviting public confidence in it.' Robson (1951), viewed that "Independence of Judiciary", it is maintained, "Lends prestige to the office of a judge and inspires confidence in the general public" (Rahman 2000).

1.10: Definition, Rationale and Scope of the Study

The creation of a culture of judicial independence is of central significance both for National legal system as well as for the international courts and tribunals. This study aims to understand the present status of the Independence of Judiciary in Bangladesh. It aims to find out the major problems to separate the Judiciary from the Executive and Legislature. Bangladesh has a long history of political instability and military interventions in political affairs of the country. In such a scenario, the Judiciary offers less scope for judicial activism and constitutional remedies. The importance of judicial independence lies in creating an efficient and reliable judiciary and issues regarding the securing of judicial independence in Bangladesh.

At the global level, "Judicial independence is of central importance not just in regard to human rights, constitutionality and the rule of law but also in regard to globalization and free and efficient economic activity and international trade and investment. Judicial

independence is one of the fundamental values which lie at the foundations of most judicial systems. These values include procedural fairness, efficiency, accessibility, public confidence in the courts and the values of constitutionality in the sense of the constitutional protection of the judiciary". Each of these values allows the court to fulfil their main function which is the resolution of disputes.

The core issue of this study is the Independence of judiciary in Bangladesh, which are the fundamental values of the administration of justice in a democratic society. It also examines the issues of judicial independence and accountability and their links with the public confidence in the judiciary. Its main purpose is to evaluate the existing conditions of judicial independence and accountability in Bangladesh. Judicial Independence and Accountability are important features of a contemporary democratic country. The main themes to be addressed in the study are the clash between the older concept of controlling the working of judges and the modern concept of ensuring the independence of judges from any kind of interference or influence.

The scope of the study includes the relationship between executive and Judiciary, independence of Judiciary, major cases, and Constitutional Amendments and court hearings and also the need for judicial reforms. Improvements in court administration must be made at both the national and the district levels. Administrative reorganization is vital in order to put in place the structures and processes necessary to administer an independent Judiciary. Rule of law and access to justice are key elements of governance and are essential for ensuring human rights. Without good governance, "corruption flourishes and the benefits of public programmes do not reach to their target recipients. Good governance based on accountability, participation, transparency and responsiveness is a pre-requisite for development and ensuring the provision of services to the people."

1.11: Research Questions

- What is the state of Judiciary in Bangladesh?
- Is it independent or there is an interference of executive over Judiciary matters in Bangladesh?

- What are the functions and structure of the Judiciary in Bangladesh?
- What are the issues that are creating problems in the making of the court structure of the judicial system in Bangladesh?
- What are the challenges that Judiciary in Bangladesh faces?
- How the Supreme Court of Bangladesh has construed and enforced the Constitution as a fundamental charter of social and political values?
- How the Judiciary in Bangladesh is playing an important role in promoting and enforcing principles of Constitutionalism

1.12: Hypotheses

- Party politics of Bangladesh has failed to institutionalize the judiciary in Bangladesh.
- Excessive bureaucratic processes in the judicial system have contributed to non-transparency and delay in the legal processes in Bangladesh.
- Instead of significant legal Constitutional provisions, Judiciary in Bangladesh is still subjected to political interference.

1.13: Research Methodology

The proposed study is descriptive and exploratory in nature. The research will be based on historical and analytical methods. The study proposes to refer both primary and secondary sources of information and data by using deductive method. The primary sources will include various reports of the Governments of Bangladesh, official documents, hearings, decisions, amendments and the reports of the Multilateral Agencies. The secondary sources include books, journal articles, newspapers, internet materials, unpublished research documents and other relevant materials published in Media from time to time, which will be used in the proposed study.

For the completion of study, field trip has been done wherein original documents have also been seen. Interviews of several scholars, policymakers, academicians, researchers, Lawyers and Professors have taken during my field work in Bangladesh in October 2016.

1.14: Outline of the Thesis

Chapter One: Introduction

The first and present chapter gives an overview of the proposed study which includes the background of the study and the review of available literature on the subject. It also provides a rationale of the study and the objectives and methodology to be followed in the study. It also deals with the historical emergence of the judicial system in Bangladesh.

Chapter Two: Structure of Judiciary in Bangladesh: Origin and Evolution

The second chapter deals with the structure of Judiciary and how the country learned lessons from the Constitution and Judiciary of other countries. And also it outlines the necessary elements of the culture of judicial independence and defines the culture of judicial independence in Bangladesh.

Chapter Three: Judiciary in Legal-Constitutional Framework: An Assessment

The third chapter focused on the institution of democracy in Bangladesh. It will also deal with the constitutional provisions because Bangladesh Judiciary is organized and governed according to the constitutional and legal provisions. At a glance the Judiciary of Bangladesh consists of two divisions, the Supreme Court and the Subordinate courts. The highest court in Bangladesh, the Supreme Court, is actually composed of two divisions; the Appellate Divisions and the High Court Division.

Chapter Four: Functioning of Judiciary (1991-2014)

The fourth chapter gives a brief analysis of the functions performed by the judiciary in Bangladesh. The principal theme of the chapter is the institutional functions and role of the Judiciary in Bangladesh, mainly in the context of an underdeveloped socio-economic structure and political stability. The main function of the Judiciary is to interpret the laws and provide justice to the people. Besides this the chapter discusses at length the

functions of the informal and formal institutions of Judiciary in Bangladesh such as Supreme Court, High Court, and Appellate Division etc.

Chapter Five: Challenges to Its Judicial Independence

The fifth chapter discusses the challenges faces by the judiciary in Bangladesh and the relationship between executive and judiciary in Bangladesh and also the separation of the executive branch from the Judiciary because the culture of judicial independence can only exist in a system which is based on the principle of separation of powers. Even once achieved the continuation of judicial independence is not a matter of course. It is constantly subject to challenges sometimes by other branches of government and at the other times as the result of different government.

Chapter Six: Conclusion

Finally the last chapter deals with the overall assessment of the various issues relating to the Independence of Judiciary in Bangladesh and also focus on the present situation of the Judiciary in Bangladesh.

CHAPTER – 2

STRUCTURE OF THE JUDICIARY IN BANGLADESH: ORIGIN AND EVOLUTION

CHAPTER- 2

STRUCTURE OF THE JUDICIARY IN BANGLADESH: ORIGIN AND EVOLUTION

The modern nation-state operates through am institutional mechanism such as judiciary, executive, parliament, bureaucracy, police and the formal structural relations between union and state. In addition to it, the factor of an electoral system is also significant in it as those all are "constituted by the idea of constitutionalism". It is also held that "their arrangements and dependencies are shaped by the" constitution from which the legal system draws its authority. It is inextricably inter-connected with the political system. The judiciary substantiates "the theory of separation of power" and the legislature and executive stand different from it. The system of "parliamentary democracy based on the principle of the fusion of power and in the formation of law there is a direct participation of the executive and legislature" (Taj 2017).

It is the judiciary that remains independent and strong safeguarding the interests of the citizens by not allowing the other organs to go beyond the Constitution. It acts, therefore, "as a check on the arbitrariness and unconstitutionality of the legislature and the executive. Judiciary is the final arbiter in interpreting constitutional arrangements. It is in fact the guardian and conscience keeper of the normative values that are 'authoritatively allocated by the state.' The nature of the democracy and development depends much on how the legal system conducts itself to sustain the overall socio-economic and political environment (Halim 2015).

This chapter explores the present structure of the judicial system in Bangladesh. The structure of the administration is not only important for the judicial system but also for every system. Structure is needed to function the administration efficiently in the. Structure gives solidarity and stability to the system and again proper hierarchy is maintained. It functions following a well-organized physical setup and principles.

The Constitution of Bangladesh is primarily based on the theory of Separation of power. Part IV of the Constitution has laid down the provisions regarding the executive branch of the Government headed by the Prime Minister. Part V has laid down the previous regarding the legislature. It is followed by Part VI laying down provisions regarding the Judiciary headed by the Supreme Court.

Executive power vested in the Prime Minister and his Cabinet and legislative power in the Parliament. Though there is no express mention of it in the Constitution, the Appellate Division held in "Mujibur Rahman v. Bangladesh 44 DLR (AD) 111"that the judicial power vests in the Judiciary. Referring to the Fourth schedule of the Constitution Mustafa Kamal J. Held:"Although the Constitution itself omitted to confer judicial power on the Supreme Court and the Subordinate Courts by any express provision, there can be no doubt whatsoever that the Supreme Court and the Subordinate Courts are the repository of judicial power of the state " (Chowdhury 2014).

2.1: Judicial History of Bangladesh

Since a very long time capital punishment has been used in the Indian subcontinent. However, it was discontinued during the time of Emperor Ashoka it was stayed. The emperor Ashok was a strong votary of peace and non-violence. He had banned the capital punishment in his empire. But this was discontinued after his reign. By the end of the 15th century BC the capital punishment was extremely prevalent. In the early 16th century, during the Mughul era, capital punishment was the highest form of punishment. It was also associated with class and caste. It was mentioned in a travelogue of a Chinese visitor to India in the 5th century BC. The visitor observed that,"a Sudra who insulted a Bhramin faced death whereas a Bhramin who killed a Sudra was given a light penalty, such as a fine the same penalty he might have incurred if he had killed a dog" (Johnson and Zimrig, 2009).

As far as the current legal and judicial system of Bangladesh is concerned it has strong reflections of British rule over the Indian sub-continent "although some elements of it are remnants of Pre-British period tracing back to Hindu and Muslims administration. It passed through various stages and has been gradually developed as a continuous

historical process. The process of evolution 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 mixed systems which have 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 is preceded by the British period and each of these early periods had a distinctive legal system of its own" (The Government of Bangladesh 2004).

The Hindu period extend for nearly, "1500 years before and after the beginning of the Christian era. The ancient India was divided into several independent states and the king was the Supreme authority of each state. So far as the administration of justice was concerned, the king was considered to be the fountain of justice and was entrusted with the Supreme authority of administration of justice in his kingdom" (Halim 2010).

The Muslim period starts with the invasion of the Muslim rulers in the Indian Sub-continent in 1100 A.D. The Hindu kingdoms began to, "disintegrate gradually with the invasion of Muslim rulers at the end of eleventh and at the beginning of 12th century. When the Muslims conquered all the states, they brought with them the theory based on the Holy Quran, their religious book. 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. The ruler was Almighty's chosen agent and trustee" (Patwari 2004).

It is also postulated that "the modernization of ancient Indian legal and judicial system took place in the hand of the British people who came here as being trading company under a series of Royal Charters" (Talukder 1994). It is also held that "East India Company gradually established control and possession over Bombay, Madras and Calcutta which were later on known as Presidency Towns. Ultimately the company participated in the administration of justice in cooperation with local authorities. The charter of 1726 issued by King George I, by way of granting letters patent to the company, was the first gateway to introduce the English legal and judicial system in India. Later on, Charter of 1753 was issued by King George II with a view to remove the

defects of the Charter of 1726. To improve the system, the secret committee of House of Commons intervened and passed the Regulation Act, 1773 under which the King issued a separate Charter of 1774 establishing the Supreme Court of Judicature at Calcutta. Subsequently, Supreme Courts were established in Madras in 1801 and in Bombay in 1824" (International Federation for Human Rights Report 2010: 5).

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 Court, Penal Code, Evidence Act, etc. were enacted and with this common legal fabric, the British Parliament in 1861enacted 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 and Pakistan as independent dominions on 15th August, 1947 by the Indian Independence Act, 1947" (Akkas 2004). It is also held that "this Act also provide that until the new Constitutions were framed for independent India and 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 1947" (Haque 2003).

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 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" (Ahamuduzzaman 2010).

In Pakistan, the Constitution of 1956 was abrogated in 1958 and another one was established in 1962, but the whole judicial structure remained all the same. During the Period of 1947 to 1971, the following important enactments were made:

1. Non-Agricultural Tenancy Act 1949
2. The State Acquisition and Tenancy act-1950
3. The Factories Act. 1965
4. The Employment of Labour Act-1965
5. The Road Transport Workers ordinance 1961
6. The Bank Company Ordinance 1962.
7. The Foreign Regulation Act. 1947
8. The Citizenship Act. 1951
9. The Copyright Act 1962
10. The Customs Act, 1969 include
    - The Waqf Ordinance 1963
    - The Sea Custom Act 1963
    - The Nave Ordinance 1961
    - The Salt Tax Act 198
    - The Muslim Family Laws Ordinance 1961 and others.

Besides these laws, the acts of the British were also in operation for the actual functioning of the legal system of Pakistan. However the above mentioned acts as well as ordinances are operation in Bangladesh having made some required amendments thereon. "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 labour court, juvenile court, family court, Administrative Tribunal etc" (Halim and N.E. Siddiki 2015).

Legal History at a glance

<table>
<tr><td colspan="2">Hindu Period</td><td>(1500 BC- 1206 AD)</td></tr>
<tr><td colspan="2" rowspan="2">Muslim Period
(1206-1757)</td><td>Sultanate Period (1206-1526)</td></tr>
<tr><td>Mughal Period (1526-1757)</td></tr>
<tr><td>Colonial Period or British Period (1600-1947)</td><td colspan="2">Major Judicial Reforms during British Period
1. Warren Hastings Plan of 1772
2. New Plan of warren Hastings 1774
3. Judicial Reforms of Lord Cornwallis 1787-1793
4. Reforms of Sri John Shore 1793-1797
5. Reforms of Lord Wellesley 1798
6. Reforms of Lord Cornwallis 1805, 2nd time
7. Reforms of Lord Minto 1807
8. Reforms of lord Warren Hastings 1813, 2nd time
9. Reforms of Lord Amherst 1823
10. Reforms of Lord Bentick 1828, 2nd time
11. Dual System of Courts 1834-1861
12. Judicial Reform between 1861 and 1935
13. Judicial Reform by the government of India Act, 1935</td></tr>
<tr><td colspan="3">Pakistan Period (!947-1971)</td></tr>
<tr><td colspan="3">Bangladesh Period or Modern Period (1971- till now).</td></tr>
</table>

Source: (Halim, Abdul and N.E. Siddiki 2015: 36)

2.2: Structure of the Judiciary

In pursuance of the *Article149* of the Constitution of Bangladesh 1972, a substantial proportion of its laws have been incorporated into the legal framework of the country. The origin of the existing court system in Bangladesh also lies with the common law, legislation, judicial decisions, the divine laws (for example, Muslim personal laws) and customs are the basic sources of law. It is a unitary state and a uniform law is applied across the country.

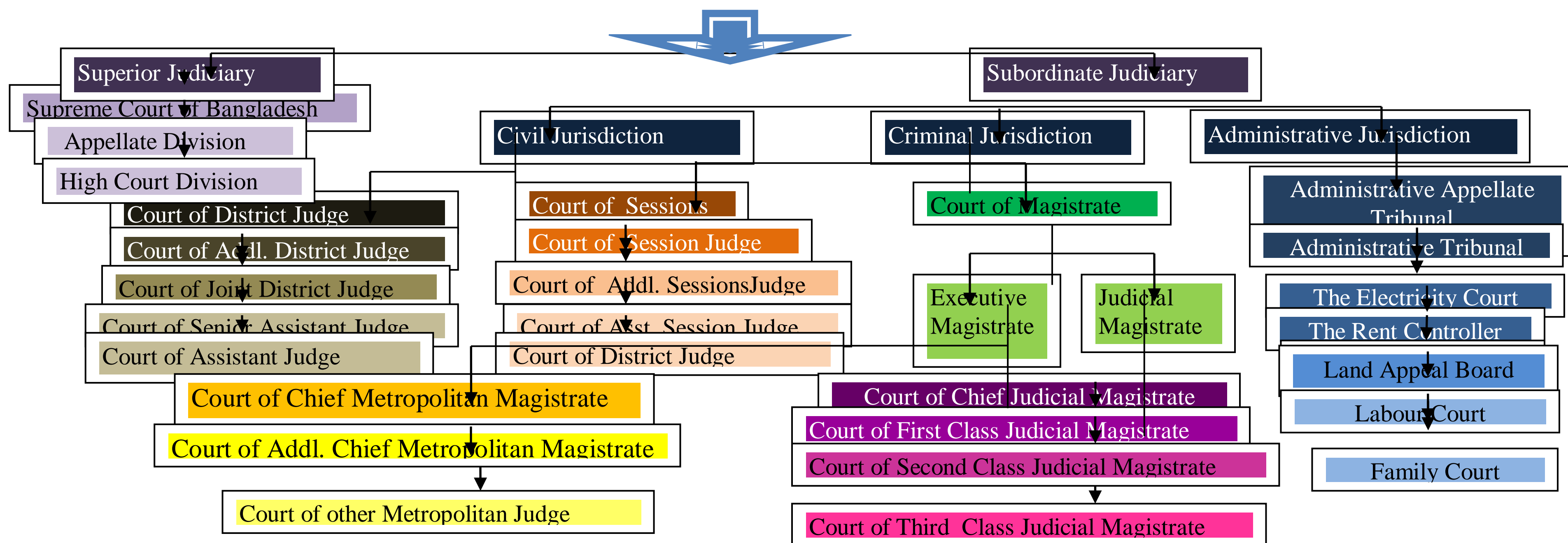
It is held that "the first highest Court in Bangladesh after independence was the High Court recognised under section 2 of the High Court of Bangladesh Order 1972 promulgated pursuant to the declaration of independence 1971 and the provisional Constitution of Bangladesh Order 1972. Further it is also postulated that the High Court of Bangladesh consisted of Chief Justice and other judges. They are appointed by the president on the condition that the president may resolve by the High Court of Bangladesh Order 1972. As far as the structure is concerned The Appellate division of the High Court consisted of a Chief Justice and two other judges of High Court appointed by the President in consultation with the Chief Justice.The High court existed in Bangladesh till the establishment of a Supreme Court"(High Court of Bangladesh Order 1972 Section 2, 3, 9.).

Bangladesh not being a federal state, the judicial structure was also to be rationalized. The idea of having a Federal or Supreme Court (SC) is primarily linked up with a "Federal form of government" where the major function of such court besides the interpretation of law and constitution was to resolve the rights, obligations and "disputes between the centre and the states and between the states themselves" (Ahmed 1983: 135). Regarding the importance of the courts it is held that "the Courts are one of the most essential institutions where power is contested in a Constitutional democracy. A functioning and an Independent Judiciary can restrain and hold the executive accountable together with other state institutions, as well as political and economic elites. A robust Judiciary is imperative in establishing rule based governance" (Chowdhary 1993).

In Bangladesh the Judiciary is organized and function according to the constitutional and legal provisions. The Judiciary consists of both Formal and Informal Judiciary. The formal Judiciary consists of the Supreme Court (SC) and other Sub-ordinate Courts. "After liberation in 1971, Bangladesh adopted its Constitution in 1972, which provides the structure and functioning of the Supreme Court (SC)" (The Constitution of Bangladesh 2004) stands on the top of the hierarchy of courts comprising with the High Court Division (HCD) and Appellate Division (AD). The Sub-ordinate Judiciary consists of Civil, Criminal and Administrative jurisdiction 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 tribunals etc.

The "formal judicial system of Bangladesh is very expensive and follows a lengthy procedure. Poor people living in rural area are rarely able to use this formal legal system to get justice remedies. The costs of engaging a lawyer, the time and the related cost spent in court, the level of skill, education and expertise required to litigate serves as barriers in access to justice. Poor people therefore prefer or rather have no choice but to use the traditional justice mechanisms like *Shalish"* (Banglapedia 2013). Regarding this informal arrangement it is held that "The *Shalish* is an informal, unofficial community based practice of dispute resolution which is very much influenced by the people who belong to the power structure in rural society. With the passage of time people with vested interest, even in some cases musclemen dominate in the village level informal justice system" (Islam 2009). Village Courts (VC) had emerged in mid-seventies with a vision to civilizing the condition of "Village *Shalish*". Hossain stated that "Village Court works under the aegis of a Union Parishad (UP), the lowest level of elected administrative body for rural administrative unit called Union. This state-led rural justice system like village court is playing an important role in resolving rural litigation of petty nature for the last thirty-five years but in a slow pace and informal manner" (Hossain 2012).In the changing scenario of rural political power structure this age old Court is facing challenges in dispensing justice to the rural people (Ibid).

Diagram.2.1:Hierarchical Structure of the Judiciary in Bangladesh



2.3: Features of the Judicial Structure

The features of the Judicial structure of Bangladesh can be discussed as follows:

***2.3.1: OperationalEfficiency**:-* For formal adjudication operational efficiency involves the capacity of adjudication system to try case and deliver judgements timely. It regards the problems such as "efficient court room management, case management, service process, efficient prosecution investigation process, efficient rule and procedures for analysis and interpretation of fact, law and evidence and decision-making"(Karim 2005). It also involves various resources like human resources such as adequate number of judges, staffs, prosecutors and financial resources like sufficient budget, standard and satisfactory salary and also material resources like offices, furniture, stationary etc.

***2.3.2: Human Resource**:-* An effective judicial system requires well-trained and educated human resources. It concerns different legal, Judicial, technical and operational trainings "for the judges and Magistrates, lawyers and Prosecutors, judicial support and case managements, staffs, investigation bodies". Along with trainings, it requires arrangements for other awareness sharing programmes like meetings, seminars and workshops to build them aware and updated on new laws, measures and practices, new values, attitudes and behaviours and building a common agenda within the justice sector and beyond.

***2.3.3: Integrity and Accountability**:* - A just outcome from judicial system is very much dependent on the integrity and accountability of the people with the system. While it depends to a vast extent on the individual honesty of the judges and prosecutors as well as on the other supporting agencies. It largely depends on the overall mechanism for accountability in the system. "Integrity and Accountability involves various issues like judicial independence, political will, judicial corruption, monitoring and performance evaluation, level of salary for the people in the system and level of legal knowledge and expertise of the judges and prosecutors"(Arifur 2016).

***2.3.4: Independence**:-*At the heart of a well functioning judicial system lies the independence of both the judiciary and the prosecution. This autonomy demands that the

Judiciary and the Prosecution as institutions as well as the judges and prosecutors as individuals are free from interference from other institutions and individuals. Islam argued that "there are various issues associated with the independence of judicial system for example the constitutional and legal framework for judicial independence, budget allocation to judiciary and control over expenditure"."Mechanisms of appointment, promotion and transfer of judges, security of tenure of judges and clarity of disciplinary mechanisms, the legal framework of the prosecution, political governments control over the prosecution, safety and security of the person and family of judges and prosecutors are the other issues" (Islam 2009: 54).

2.3.5: Accessibility*:*-It is a pre-requisite of justice from any judicial system. It refers to the rights of every person to access an independent and impartial judicial forum, formal or informal, supportive prosecution and the opportunity to receive a fair and just treatment with a view to providing all effective remedy to a grievance. For informal and traditional system, it might also involve some social, cultural and religious barriers as well as gender bias.

2.4: Structure of Formal Judiciary

It is held that "Part-VI of the Constitution relates to jurisdiction of the Courts. It contains 3 Chapters. Chapter-I provides power and authority of the Supreme Court, Chapter-2 relates to the Sub-ordinate Courts and Chapter-3 deals with the Administrative Tribunal" (Report on Judicial service cadre and Judicial System in Bangladesh 2012.)The Judicial system in Bangladesh is operated by two-tier system of Judiciary one is "Superior Judiciary having Appellate, Revisional and Original jurisdiction and the other is Sub-ordinate Judiciary having Original jurisdiction. The Superior judiciary consists of the Supreme Court (SC) having two wings the High Court Division (HCD) and Appellate Division (AD). The Sub-ordinate Judiciary of Bangladesh is divided into three types-: Civil Jurisdiction, Criminal Jurisdiction and Administrative Jurisdiction" (Begum 2004).

2.5: Superior Judiciary

The superior judiciary is higher in status, quality and degree. The Bangladesh Supreme Court is the highest superior judiciary in the country. "It is the apex Court of the Country and other courts and tribunal are subordinate to it".

The Supreme Court of Bangladesh

Source: http://www.supremecourt.gov.bd/web/

2.5.1: The Supreme Court of Bangladesh

The Supreme Court of Bangladesh was established "under the Constitution of the People's Republic of Bangladesh in" accordance with the provisions inserted in Article 94. Before independence it was known as the Dhaka High Court, East Pakistan. It was first established under the British Rulers. It is comprised of an auditorium, Bar Associations offices, Canteen, Mosque, Shrines, Parking lot and wide open space which is now decorated in lightening. A new building known as Annex building was set up in 2006. In 2010, the Government appointed 17 judges to the High Court Divisions but the Chief Justice denied swearing in two of them i.e. Rahul Kuddus Kajol and Khasruzzaman. The allegation against them is that one is an accused person in a murder

case while the other kicked the Chief Justices chamber during the Non Party Care Taker Rule in 2017 (Ahamuduzzaman 2010).

At present, as of June 2017, there are 7 Justices in Appellate Division and 85 Judges in High Court Division.

2.5.2: Composition

To administer justice there was to be one establishment for the entire country and there would be one "Chief Justice of the Supreme Court as a whole and to be known as the Chief Justice of Bangladesh and a number of other judges as the President may deem it necessary to appoint to each division. The Chief Justice and the judges appointed to the Appellate Division would sit only in that division and the other judges shall sit only in the High Court Division. The Chief Justice is appointed by the President and the other judges are appointed by the President" (Halim 2008) on the recommendations of the Prime Minister and in consultation with Chief Justice.

2.5.3: Qualification to be Judges

The qualifications which are necessary to become a judge of Supreme Court are given by the Article 95 of the Constitution. They are as follows:

1. "The first and foremost condition to become a judge of the Supreme Court of Bangladesh is that he / she must be a citizen of Bangladesh.
2. He / she must have been an advocate of the Supreme Court for not less than ten years.
3. He / she must have held judicial office in the region of Bangladesh for not less than ten years.
4. He / she should have such other qualifications as may be approved by law for appointment as a judge of the Supreme Court" (Ahmed 1998: 126).

2.5.4: Tenure of Office of Judges

It is provided that "A judge of the Supreme Court shall hold office until he or she attains the age of 67 (sixty-seven) years as extended by the provision of the Constitution of Bangladesh. A judge cannot be removed from office except under the circumstances given by provisions of the Constitution" (The Constitution of Bangladesh 2016).

However, he / she may resign the office by writing in which the judge will address to the President. The constitution stipulates that "There shall be a Supreme Judicial Council which shall consist of the Chief Justice of Bangladesh and the two next senior judges: provided that if, at any time the Council is inquiring into the capacity or conduct of a judge who is a member of the Council or a member of the Council is absent or is unable to act due to illness or other cause, the judge who is next in seniority to those who are members of the Council shall act as such member"(ibid). Also, there are some specified functions of the council.

On 29January 2008, "the Advisory Council of the Bangladesh Government approved the Supreme Judicial Council Commission Ordinance 2008, which specifies procedures for the appointment of judges to both the Appellate Division and the High Court Division of the Supreme Court. The Supreme Judicial Commission is a nine-member body headed by the Chief Justice that will select and recommend candidates as judges of the High Court and Appellate Division of the Supreme Court" (Sierd 2004).

According to this Ordinance, "the Chief Justice will be the Chairman of the Supreme Judicial Commission. Other members of the commission will include the Law Minister, two senior-most judges of the Appellate Division, the Attorney General, a member of the Parliament each from the government and the opposition, the President of the Supreme Court Bar Association, and the Secretary of the Law Ministry. The ordinance also discusses about the other qualifications to be selected as a member of the Supreme Judicial Commission, such as academic qualifications, professional skills, seniority, honesty and reputation. The ordinance requires the Commission to hold meetings every six months. The Commission will recommend two candidates for each vacant post, and the President may appoint one of the two recommended candidates, or send back the recommendation to the Commission for a revision" (Rahman 2008).

2.5.5: Temporary Appointment of Chief Justice

The Constitution of Bangladesh says that "If the office of the Chief Justice becomes vacant, or if the President is satisfied that the Chief Justice is, on account of absence, illness, or any other cause, unable to perform the functions of his office, those functions

will be carried out by the next most senior Judge of the Appellate Division (The Constitution of Bangladesh 2017: Art.97), until some other person has entered upon that office, or until the Chief Justice has resumed his duties"(The Constitution of Bangladesh: Art.97).

2.5.6: Additional Supreme Court Judges

Even so the provisions of Article 94, "if the President is satisfied that the number of the judge of a division of the Supreme Court should be for the time being increased, the President may appoint one or more duly qualified person to be Additional judges of that division for such period not exceeding two years as he may specify or if he thinks fit, may require a judge of the High Court Division to sit in the Appellate Division for any temporary period as an ad hoc Judge and such Judge while so sitting shall exercise the same jurisdiction, powers and functions as a judge of the Appellate Division. Provided that nothing shall prevent a person appointed as an Additional Judge from being appointed as a Judge under Article 95 or as an Additional Judge for a further period" (Ahmed 1998: 127).

2.5.7: Disabilities of Judges

Except as provided in clause 2, "a person who has held office as a Judge otherwise than as an Additional Judge shall not, after his retirement or removal there from, plead or act before any court or authority or any hold office or profit in the service of the Republic not being a judicial or quasi-judicial office or the office of the Chief Adviser. A person who has held office as a judge of the High Court Division may, after his retirement or removal there from, pleads or acts before the Appellate Division" (Halim 2004).

2.5.8: Salary and Allowances

It is held that "The present Salary structure of judges is significantly low compared to other South Asian countries. Such a poor salary and other benefits fail to attract competent lawyers in joining the higher Judiciary. In the Subordinates Courts the situation is even worse. Due to low level pay scale (Tk. 6800 until 2009) as many as 49 entry level judges left the service" (Islam 2010). He further mentions: "Therefore a massive increase in the salary of Supreme Court judges is necessary. A raise in the level of salary of Judges, commensurate to the decent living standards, is believed to attract a

different and hopefully a better category of lawyers and meritorious law graduates in the Judiciary. The Supreme Judicial Pay Commission could be referred to recommend appropriate salary and other benefits for judges and the government should implement such recommendations with immediate effect" (Islam 2010).

Table.2.1: Salaries of the Supreme Court Judges of Bangladesh, India and Pakistan

Position	Pay in Pakistan (Rs)*	Pay in India (Rs)*	Pay in Bangladesh (Tk)*
Chief Justice	2,59,838	1,00,000	56,000
Justice (Appellate Division)	2,45,457	90,000	53,100
Justice, High Court	2,31,563	80,000	49,000

Source- *The Daily Star*, 2010 *Per month as at April 2010

2.5.9: Seat of the Supreme Court

The permanent seat of the Supreme Court shall be in the capital. As of September 2012, there are 100 (76 are permanent and 24 are additional) seats in the Supreme Court and 7 judges in the Appellate division. "The High Court Division and the judges there of shall sit at the permanent seat of the Supreme Court and at the seats of its permanent benches. The High Court Division shall have a permanent Bench each at Barisal, Chittagong, Comilla, Jessore, Rangpur and Sylhet and each permanent bench shall have such benches as the Chief Justice may determine from time to time. The Chief Justice of Bangladesh in the Supreme Court decides where the judges shall sit and they heard different type of cases. The Chief Justice makes rules to provide for all incidentals, supplemental or consequential matters relating to the permanent benches". The appointment of the staff of the Supreme Court is made by the Chief Justice. The Chief Justice can, also direct other judge or any other officer for the appointment of the staff," in accordance with the rules made with the approval of the President" (Chowdhary 1990).

2.5.10: The High Court Division

Hossain stated that "The High Court Division is a creature of both the Code of Criminal Procedure of 1898 and the Constitution of Bangladesh. The High Court Division enjoys habeas corpus writ jurisdiction under which it can examine the legality of the detention of persons, and can pass the necessary order to set the person free in appropriate cases. Every death sentence, before execution, has to be approved by the High Court Division"(Hossain 2012:31)." The High Court Division shall have such original, appellate and other jurisdictions, powers and functions as are or may be conferred on it by this Constitution or any other law. The High Court Division has superintendence and control over all sub- ordinate courts to make judicial review of the decision of the public body" (The Constitution of Bangladesh Art. 101 & 102).

It is held that "In the High Court Division the Chief Justice constitutes Benches with one or two judges known as Single Bench or Division Bench respectively". In a special case, "Chief Justice may constitute Special Bench with three judges, called Full Bench or Larger Bench with five judges to hear and dispose off a referred case by him. The Chief Justice may withdraw any case from the bench of any judge without an assigned reason and transfer it to any other bench. The Chief Justice reshuffles the benches of the High Court Division regularly (Chowdhary 2014).

2.5.11: The Appellate Division

The highest court of the country, "the Appellate Division of the Supreme Court of Bangladesh, enjoys appellate, revisional and review jurisdiction of orders passed by all other courts and by itself" (Hossain 2012: 31). Article 103 of the Bangladesh Constitution conferred, "jurisdiction upon the Appellate Division of the Supreme Court. The Appellate Division shall have jurisdiction to hear and determine appeals from judgements, decrees, orders or sentences of the High Court Division. An appeal to the Appellate Division from a judgment, decree, order or sentence of the High Court Division shall lie as of right where the High Court Division Certifies that the case involves a substantial question of law as to the interpretation of this constitution or has sentenced a person to death or to 62 imprisonment for life or has imposed punishment on a person for contempt of that

division; and in such other cases as may be provided for by Act of Parliament (Halim 2015).

An appeal to the Appellate Division for, "a judgment, decree, order or sentence of the High Court Division in a case to which clause (2) does not apply shall lie only if the Appellate Division grants leave to appeal. Parliament may by law declare that the provisions of this article shall apply in relation to any other court or tribunal as they apply in relation to the High Court Division (The Bangladesh Constitution 2004 Art. 103). In the Appellate Division he normally constitutes the bench with three Appellate division judges or with five judges including him" (ibid).

2.6: Sub-Ordinate Judiciary

It is postulated that "the Sub-ordinate Judiciary is under the control of High Court Division of Bangladesh Supreme Court as per the provision of the Article 109 of the Constitution". According to Article 114 of the constitution there should be establishment of the Sub-ordinate Courts in addition to the law. Article 115 of the constitution stipulates that "the judicial officers in the Sub-ordinate Judiciary shall be appointed by the President of Bangladesh which is as follows appointments of persons to offices in the judicial service or as magistrates exercising judicial functions shall be made by the President in accordance with rules made by him in that behalf". According to Article 116 of the Constitution the control including the power of posting, promoting, granting leave and maintaining discipline of persons employed as Judges and magistrates is vested in the President and this power is to be exercised in "consultation with the Supreme Court". It is held that"All judges and magistrates exercising judicial powers and functions shall be Independent declared the Constitution as mentioned in the Article 116A of the Bangladesh Constitution" (The Constitution of Bangladesh 2016).

The Sub-ordinates Courts are classified into three broad categories, namely: the Civil, the Criminal and the Administrative Jurisdiction. Beyond these ordinary Courts, there are some Courts and tribunals special jurisdiction functioning under particular Acts to deal with specific wrongs and crimes like the Family Court and the Labour Court. The

territorial jurisdictions of ordinary courts are determined on the basis of administrative units such as Division, District, sub-districts, union and villages.

Gonoprajantri Bangla Government Judge Court (Republic of Bangladesh)

Source: http://www.supremecourt.gov.bd/web/

2.6.1: Civil Jurisdictional Courts

The Civil Courts are created under the Civil Courts Act of 1887. “With some exceptions Civil courts have jurisdiction to try all suits of a civil nature The Act provides for five tiers of civil courts in a district, namely”:

- Court of District Judge
- Court of Additional district Judge
- Court of Joint District Judge
- Court of Senior Assistant Judge and
- Court of Assistant Judge

The Court of District Judge was created under the section 18 of the Civil Courts Act 1887. The District and Sessions Judge head the district court and they are “assisted by

Additional District Judges, Subordinate Judges and Assistant Judges. Major offences like murder, armed robbery, rape etc. are tried by Courts of Sessions which are superior to all courts of Magistrates" (Hossain 2012: 31). According to section 18 of the Civil Courts Act 1887, "the jurisdiction of a District Judge or Joint District Judge extends subject to the provisions of section 15 of the 1908 to all original suits for the time being cognizable by Civil Courts. The Court of District Judge admits, hears and disposes civil appeals from subordinate courts, civil revision and suits under HBFC Act, Trademarks, Patent and Design Act, Motor Vehicle Act. And the Court of Joint District Judge admits, hears and disposes of civil suits of original jurisdiction valued more than Tk 4, 00, 000, 00" (Abid n.d).

It is held that "The Court of Additional District Judge was created under the section 8(1) of the Civil Courts Act 1887. When the business pending before any District Judge requires the aid of Additional District judges for its speedy disposal, the Government may having consulted the High Court Division, appoint such Additional District Judges as may be requisite as mentioned in the Section 8(1) of the Civil Courts Act 1887 and according to Section 8 (2), the Additional District Judges so appointed shall discharge any of the functions of a District Judge which the District Judge may assign to them and in the discharge of those functions, they shall exercise the same powers as the District Judge" (Haque 2006).

Further "Section 19 of the Civil Courts Act 1887 conferred jurisdiction upon the Senior Assistant Judge and Assistant Judge and also mentioned that the jurisdiction of a Senior Assistant Judge and an Assistant Judge shall extend to all suits of which the value does not exceed four lac Taka and two lac taka respectively" (The Government of Bangladesh). An Assistant judge is selected by the Public service Commission and appointed by the Ministry of Law, Justice and Parliamentary Affairs. He rises through promotion up to the post of District Judge and in some cases to that of the judge of the Supreme Court. These judges of the subordinate courts belong to Bangladesh Civil Service and perform the judicial functions independently (Ahmed 1998: 137).

2.6.2: Criminal Jurisdiction Courts

It is held that "the criminal courts are created under the Criminal Procedure Code, 1898. The Criminal courts are divided into two tiers, namely: the Court of Session and the Magistracy" (Khaled 2015).The Court of Session consists of:

- The Court of Session Judge
- The Court of Additional Session judge and
- The Court of Assistant Session Judge

The Court of Session Judge and Additional Session Judge "hears, on transfer from Magistracy criminal cases having sentence of death and imprisonment more than 10 years and the Assistant Session Judge hears criminal cases having sentence of Imprisonment up to 10 years (The Government of Bangladesh). The Courts of Session enjoy appellate and revisional jurisdictions against orders of Magistrates. Some Courts of Sessions function as tribunals for the speedy trial of certain grave offences under some special statutes" (Halim 2010). These courts dispose of cases relating to, "offences of gruesome murder, offences against women and children, offences under the Arms Act 1878, the Narcotics Control Act 1990, the Control of Acid Act 2002, and the Acid Offences Act 2002.Court of Sessions can pass death sentences, sentences of imprisonment up to any duration, including imprisonment for life, and also impose a fine" (Hossain 2012: 31).

The Magistracy of Bangladesh is divided into two classes namely:

- The Judicial Magistrate
- The Executive Magistrate

The Court of Judicial Magistrate are four in class, namely:

- Court of Chief Judicial Magistrate
- Court of 1st Class Judicial Magistrate
- Court of 2nd Class Judicial Magistrate and
- Court of 3rd Class Judicial Magistrate

The Judicial Magistrate of 1st Class "takes cognizance of criminal cases and transfer them to appropriate session court and tries offense having sentence up to 5 years The

Magistrates of the subordinate courts are Assistant Commissioners, Additional Deputy Commissioners and Deputy Commissioner. An Assistant Commissioner is also selected by the Public Service Commission and appointed by the Establishment division. He rises through promotion to the post of Deputy and Divisional Commissioner and in some cases to that of the Secretary of a Ministry. They perform dual functions executive as well as judicial (Ahmed, 1998: 137). Ahmed stated that “the Magistrates are controlled not by the judicial branch, but by the Ministry of Establishment and by the government. Magistrate judges are typically transferred to their magisterial posts for 3-10 years during the course of their employment with the government, thereafter are reverted back to their old administrative positions” (Halim and Siddiqui 2015).

Chief Metropolitan Magistrate Court

Source: http://www.supremecourt.gov.bd/web/

Magistrate is Responsible for , “80 percent of criminal cases, and usually he decides if the accused is to be granted bail or prosecuted and typically has the power to send an individual for up to seven years. The most notable executive interferences in the lower judiciary come through the appointment of judges and more importantly executive control over the magistrates, these bonds between the executive and the judiciary are an important constitutional discrepancy that results in the deterioration of the concepts of

judicial independence and rule of law" (Amin 2005). Further it is held that "In metropolitan cities of the country, there is a special type of Magistracy in which Metropolitan Magistrates perform judicial works assigned to them by the Code of Criminal Procedure 1898. Courts of Judicial Magistratesof the First Class and Metropolitan Magistrates can ordinarily pass sentences of imprisonment up to five years and a fine. Magistrates can try offences which are relatively minor. The Metropolitan Magistracy functioning in six divisional metropolitan cities of the country and also deals with criminal cases" (Karim 2005).

Hossain stated that "an Executive Magistrate is mainly an administrative Magistrate, holding the limited trial power only in mobile court. Executive magistrates also conduct summary trial trough mobile courts under the supervision of District Magistrate. Earlier with the introduction of Upazila system, courts of magistrates and Munsifs were established in each Upazila. In early nineties Upazila court system has been abolished" (Hossain, 2012:32).

Mahanagar Daira Judge Court

Source: http://www.supremecourt.gov.bd/web/

2.6.3: The Administrative Jurisdictional Courts

According to Article 117 of the Bangladesh Constitution Parliament may, "by law, establish one or more administrative tribunals to exercise jurisdiction in respect of matter relating to or arising out of the terms and conditions of persons in the service of the Republic, including the matters provided for in Part IX and the award of penalties or punishment; or the acquisition, administration, management and disposal of any property vested in or managed by the Government by or under any law, including the operation and management of, and service in any nationalized enterprise or statutory public authority; or any law to which clause (3) of article 102 applies. Where any administrative tribunal is established under this article, no court shall entertain any proceedings or make any order in respect of any matter falling within the jurisdiction of such tribunal: Provided that Parliament may, by law, provide for appeals from, or the review of, decisions of any such tribunal" (The Bangladesh Constitution 2017: Art 117).

The Administrative Jurisdictional Tribunalsconsists of:

- Administrative Tribunal
- Administrative Appellate Tribunal
- Customs Appellate Tribunal
- Tax Appellate Tribunal
    - The Commissioner of Taxes (Inspecting Joint Commissioner Of taxes)
    - Deputy Commissioner of Taxes
    - The Appellate Joint Commissioner of Taxes
- Labour Appellate Tribunal
- Labour Courts
- EPZ Labour Court
- Special Tribunal
- Family Courts
- Village Courts

- Small Causes Courts
- The Conciliation Board
- The ArthaRinAdalat
- The Bankruptcy Court (DaowliaAdalat)
- The Acid Violation Prevention Tribunal (Acid Apordha Damon Tribunal)
- The Women and Child Repression Prevention Tribunal (Nari-o-Shishu-nirjatan-damon-tribunal).
- Money Laundering Court
- The Juvenile Court
- The Speedy Trial Tribunal (Durto-Bichar-Tribunal).
- The Settlement Court
- The Environment Court
- The Environment Appellate Tribunal
- Court of Special Judge or Special Court of Session
- The Bangladesh Bar Council Tribunal
- The Arbitration Tribunal
- Electricity Court
- Election Tribunal
- Mobile Court
    - Cyber Tribunal
    - Cyber Appellate Tribunal
    - Claims Tribunal

- Marine Court
- Special Judge
- The Food (Special Court)
- Drug Court

2.6.3.1: Administrative Appellate Tribunal

It was established under "section 5 of the Act, 1980 consisting of three members, one Chairman and two other members. Chairman is from judges of the Supreme Court and of two members one from among the Joint Secretaries and other from District judges" (Halim 2015).

2.6.3.2: Custom Appellate Tribunal

Akkas stated that "section 196 of the Customs Act 1969 provides for an Appellate Tribunal to be called the Customs, Excise and Vat Appellate Tribunal which shall consist of as many technical (Member of the Board or Commissioners of Customs and Excise or any equivalent post holding for more than two years) and judicial members (District judge or an advocate practicing for more than 10 years or a member of BCS holding a judicial post for 3 years having earned pay in the selection grade of the scale of pay)" (Akkas 2004).

2.6.3.3: Tax Appellate Tribunals

It is held that "Section 11 of the Income Tax Ordinance, 1984 establishes the Tax Appellate Tribunals consisting of a President and such other judicial and accountant officers as the government may from time to time appoints". Further it is the position that "The lowest three dispute settlement bodies created under the Income Tax Ordinance are the Commissioner of Taxes, Deputy Commissioner of Taxes and the Appellate Joint Commissioner Taxes. The Tax Appellate Tribunal is a quasi-judicial body as like as Customs Appellate Tribunal from the view point of its formation" (Ahamuduzzaman 2010).

2.6.3.4: Labour Appellate Tribunal

The Labour Appellate Tribunal was established under the IRO (Industrial Relations Ordinance, 1969 Section 38) consisting of one member "who is or has been a judge or an

Additional Judge to" (Halim2008). The High Court Division Except the IRO there was a Rule Known as Industrial Relation Rules, 1977 which provided that the Labour Appellate Tribunal will follow the procedure of CPC.

2.6.3.5: Labour Courts

It is also held that "The decisions of the Labour Courts is final and it was established under section 35 of the IRO consisting of a chairman (A Judge or an Additional Judge of the High Court Divisions or District Judge or Additional District Judge) and two members (one will represent the workmen and another the employer). The Labour Court has the power to give award under section 32 or decision and also to impose sentence under section 37" (Halim and Siddiki 2015).

2.6.3.6: Special Tribunal

It is also postulated that "The Special Tribunal was established under the Special Powers Act, 1974 as mentioned in section 26 of the Act. The Special Tribunal deals with the offences as specified in the schedule of the Act and also for offences punishable under the Special Powers Act, 1974, The Arms Act. 1878, the Explosive Substances Act. 1908, Rule made under the Emergency Powers Act, 1975, The Cruelty to Women Ordinance, 1983, the Penal Code Section 376 etc" (Halim 2010).

2.6.3.7: Family Court

It was established under the Family Courts Ordinances, 1985. Section 5 of the Ordinances provides that subject to the provisions of MFLO (Muslim Family Law Ordinances 1961) a Family Court (Assistant/Senior Assistant Judge) will have jurisdiction over the following matter

- Marriage and Dissolution of Marriage.
- Restitution of Conjugal life (a decree passed in this suit cannot be executed)
- Dowry
- Maintenance

- Guardianship and custody of Children

2.6.3.8: Village Courts

The Village Courts have been established under the village Courts Ordinance, 1976 as per the provisions of Section 5 and "composed of 5 members including chairman of the concerning Ups" and two members nominated by each party of which one must be member of the local UP. The Unanimous decision is final but if it is taken by a majority of three to two than a revision application will lie to the District Magistrate in respect of Criminal matters and to the Assistant Judge in respect of Civil Matters (Islam 2003).

2.6.3.9: Small Causes Courts

The Civil Courts Act, 1887 inserts provisions in section 25 for the establishment of Small Causes Courts conferred power to try cases by the Joint District Judges (Suit value not exceeding 20,000 taka), Senior Assistant Judge (Suit Value not exceeding 10,000 tk) and Assistant Judges (suit value not exceeding taka 6000 tk only). Appeal will lie to the District Judges Court (Halim 2008).

2.6.3.10: The Conciliation Court

It is also held that "The Conciliation of disputes (Municipality Area) Board Act, 2004 enumerated in its" provisions for the establishment of a conciliation board comprising of 5 members of which one will be "the Chairman of the concerning Municipality" Corporations who will be the Chairman of the Board and other four members will be appointed as two from each disputant parties where one from each parties nominated as members of the Board will be the commissioners of that Municipality Corporations. So the Conciliation Board is a temporary one and not similar for all cases as the formation of the Board depends upon the parties of the case/suit (Halim 2004).

2.6.3.11: The Artha RinAdalat

Further "the Artha RinAdalat was established under Section 04 of the Artha Rin Adalat Ain Act, 2003 which repealed the previous law of 1990. Every financial institution as listed in section 2 will file suits (mamla) for recovery of Money against a loan defaulter under this Act. The Adalat (Court) will follow its own proceedings as well as the

proceedings of CPC and every application will be filed to the Court through affidavit" (Chowdhary 2014).

2.6.3.12: The Bankruptcy Court (DaowliaAdalat)

There will be a Court to be known as "Bankruptcy Court" as mentioned in Section 4 of the Bankruptcy Act, 1997 presiding over by the District Judge or by the Additional District Judge as the District judge decides. "All questions relating to insolvency will be decided by this court and the creditors may apply to declare a person insolvent under section 10 of the Act" (Islam 1995).

2.6.3.13: The Acid Violation Prevention Tribunal

There are two special laws Acid in Bangladesh one is The Acid Control Act, 2002 and another is The Acid Violation Prevention Act, 2002. In section 23 of the later laws was an inserted provision for the establishment of an Acid Violation Prevention Tribunal. The government will appoint judges to the Acid Tribunal among the judges of the district and session Judges including Additional district and session judge and one or more tribunal may be established.

2.6.3.14: The Women and Child Repression Prevention Tribunal

In every district there must be a Tribunal known as Nari-o-Shishu-Nirjatna-damon-tribunal as mentioned in section 26 of the Act, 2002. A district and Session Judge or an additional District Sessions Judge will preside over the Court either permanently or in excess of his duty as the government decides. This court is mainly takes into cognizance of offences relating to Ransom, Kidnapping, trafficking, abduction, corrosive substances, dowry etc (Halim 2004).

2.6.3.15: Electricity Court

There is no Court known as electricity Court but a 1st class Magistrate in exercising his jurisdiction for theft of electricity and sabotage under the electricity Act, 1910 (1993) for which the highest punishment is 5 years imprisonment and 10 thousand taka fine (Akkas 2004).

2.6.3.16: Mobile Court

Section 352 of the Criminal Procedure Code states that the Criminal Court shall be deemed as an open Court "for the purpose of inquiring into or trying any matter". Thus a Magistrate Court sitting on mobile is contemplated in the Cr PC. Apart from the Provisions of the Cr PC some special laws like the Bangladesh Pure Food Ordinance, 1959 provides for Mobile Court. Section 41B of the Ordinance as amended by the Bangladesh Pure Food Amendment act 2005 provides that an offence under this ordinance may be tried summarily at any place within the local jurisdiction of the Pure Food Court (Ahamuduzzaman 2010).

It is held that "Village court was established with the objective of enabling rural people to settle their disputes and to offer them justice within a relatively short period of time with a minimum cost. At the grass-roots level, "the judicial system begins with village courts. An aggrieved party may make an official petition, which requires a fee, to the chairman of the union council, who may call a session of the village court with himself as chairman and two other judges nominated by each of the parties to the dispute. The parties have the right to question the impartiality of the chairman and have him replaced. Most of the cases are solved at the village court level, which is inexpensive and its judgments reflect local opinion and power alignments (Banglapedia 2013). Further "there are occasions, however, when the union council chairman may reject an official petition to constitute a village court or when one party desires a higher opinion. In these cases, the dispute goes to a government court at the sub district level. Cases may wind their way up from district courts to permanent benches of the High Court Division. Once cases leave the village courts, they become expensive affairs that may last for years, and few citizens only, are financially capable to fight a lengthy court battle". Biswas stated that:

> "The connection of the state-led rural justice systems with the local government administrative body is called Union Parishad (UP). Both the Village Court and the Arbitration Council function under the aegis of a Union Parishad. A Union Parishad has, clearly specified, 38 multifaceted functions laid down in the Local Government (Union Parishads) Ordinance, 1983. Along with these functions, it has been entrusted with the responsibilities to run the Village Court and the

Arbitration Council by the Village Courts Act 2006 and the Muslim Family Laws Ordinance, 1961 respectively" (Biswas 2009: 8).

With the objective of quick, effective and amicable disposal of some of the family matters, "Family Courts were established by the Family Courts Ordinance 1985" (Biswas 2006: 4). Further "Establishment of Family Courts was on the one hand an expression of the sophisticated legal thought, on the other hand, an acknowledgement that the traditional civil courts had failed to successfully deal with the suits relating to family affairs" (Khaled 2015).

2.7: The Ministry of Law, Justice and Parliamentary Affairs

The Ministry of Law, Justice and Parliamentary Affairs has been play in an important role for the establishment and functioning of the legal system of Bangladesh. It is one of the most important legal institutions in Bangladesh for better functioning Ministry of law, Justice and Parliamentary Affairs divides its administration body by the following organizational work faces.

However, "the Law Ministry has two wings namely, the Law and Justice Wingand the Legislative Drafting Wing. Each Wing is headed by an Additional Secretary. Ministry of Law is the administrative ministry for the Sub-ordinate Judiciary, Administrative Tribunals, various other special Courts and tribunals, Department of Registration, Office of the Attorney-General, the Bar Council, Law Commission, Judicial Administration Training Institute (JATI), Office of the Administrator General and Official Trustee (AGOT), Marriage Registration, Govt. Pleaders, Public Prosecutors, Notary Public etc. Apart from this, all legislative, be it principal or subordinate legislation are dealt with by the Ministry of Law. In inter-governmental relations the Ministry of Law, Justice and Parliamentary Affairs shall be consulted" (Halim 2015) -:

- "On all proposals for Legislation;
- On all legal questions arising out of any case;

- Preparation off important contracts, international agreements, international conventions pronouncing and modifying international law;

- On the interpretation of any law;

- Before the issue of or authorization of the issue of a rule, regulation or bye law etc. In exercise of statutory power;

- Before tendering advice on a mercy petition against an order of death sentence and pardon, reprieve, respite, remission, suspension or commutation of any sentence.

- Before involving the government in a Criminal or Civil Proceeding instituted in a Court of Law and when ever criminal or civil proceedings are insulted against the Government."

Halim stated that "no ministry shall consult the Attorney-General except through Ministry of Law, Justice and Parliamentary Affairs. If there is disagreement between the Attorney-General and Ministry of Law, Justice and Parliamentary Affairs, the case shall be submitted to the Ministry of Law, Justice and Parliamentary Affairs" (Halim 2015: 169).

2.7.1: A. Law and Justice Wing

It is held that "The Law and Justice Wing of the Ministry of Law, Justice and Parliamentary Affairs is entrusted with the duty of providing legal advisory services to other ministries, divisions, departments and organizations of the government". More specially,this wing has following responsibilities:-

- "Advice to all the ministries, divisions and offices of all and constitutional questions arising out of any case and on the interpretation of the Constitution and any law including international law".

- Administration of justice

- Legal- proceeding and advice thereon.

- "Conduct of cases on behalf of the Government in all courts and tribunals".

- Conventions with other countries in judicial matters

- "Jurisdiction and power of all courts except Revenue courts and tribunals"; contempt of Court.

- Fees taken in courts and judicial stamps.

- "Posting, transfer etc. Of all judicial officers".

- "Administration and control of subordinate offices and organisations under this ministry".

- "Appointment and resignation of the Judges of Supreme Court" and Additional Judges of Supreme court, Appointment and Assignment of duties to the Attorney-General.

- "Holding of Sessions of the High Court Division and obtaining opinion of the Supreme Court on a Question of law".

- "Appointments and terms and conditions of service of chairman and members of courts and judicial tribunals" (ibid).

2.7.2: B. Legislative Drafting Wing

"The major functions of the Legislative Drafting Wing of the Ministry of Law, Justice and Parliamentary Affairs" are: - Legislation, Legislative management, Legislative opinion and legislative translation.

- *"Legislation*- Legislative Drafting Wing prepares, examines and scrutinizes all draft legislative bills to be introduced in the Parliament on behalf of the Government. Sometimes it prepares preliminary draft bills sent to it itself.

- *Legislative Management*- Codification, consolidation, adaptation and technical amendment of laws are essential part of legislative management.

- *Legislative Opinion*-it gives opinion for other ministries, divisions, departments of the government on laws, rules, regulations by laws, agreements, international contracts, treaties etc.

- *Legislative Translation*- Previously all laws in Bangladesh were made in English. Since 1987 laws are being made in Bangla. Many of the laws, through original texts are in Bangla, requiremaking of a translated versions in English" (Chowdhary 2015).

2.8: Judicial Service Commission (JSC)

There was a direction in the Judgement pronounced by the Appellate Division of the Supreme Court against the appeal (Civil) no- 79/1999 regarding establishment of a Judicial Service Commission under Article 115 of the Constitution. So according to such direction, to establish the Judicial Service Commission, the President has made a rule "named" Judicial Service Commission 2007, on the dated 16th January 2007.

Rule 3(1), of the said Rules states that "there shall be a commission named Judicial Service Commission". Such commission shall contain the following members stated in Rule 3 (2)-

- In according with the advice of the Chief Justice, a judge of Appellate Division of the Supreme Court, selected by the President. He will be also the Chairman of the Commission.
- In accordance with the advice of the Chief Justice, selected by the President, two judges of the High Court Division of the Supreme Court
- Attorney General (ex-officio)
- A member of Law Commission selected by the President
- Secretary, the Ministry of Establishment (ex-officio)
- Secretary, the Ministry of Finance (ex-officio)
- Secretary, the Ministry of Law, Justice and Parliament (ex-officio)
- A Dean of the Law Department from Dhaka or Rajshahi or Chittagong University, selected by the President.
- Register, Bangladesh Supreme Court, (Ex-officio)

- District Judge of Dhaka (ex-officio)

The main responsibilities of the Commission are-:

1. To select the eligible persons for appointment in the service's entry posts, administer the examination and recommend to the President the names of the applicants.

2. Advice the President about any asking regarding the appointment in the services post or any other related matters or any matter send to the commission regarding its responsibilities.

3. Performing other duties conferred by Law or Article 115 or 113 of the Constitution of Bangladesh. (Rule-5 of Bangladesh Judicial Service Commission Rules 2007).

2.9: Supreme Judicial Council

Article 96 (3) of the Bangladesh Constitution states that, "shall be a Supreme Judicial Council which consists of the Chief Justice and two next senior judges. The Council shall prescribe a code of conduct to be observed by the judges and shall inquire into the capacity or conduct of the judges. If upon information received from the council or from any other source, the President has reason to apprehend the judge is incapable of performing his functions because of physical or mental incapacity or has guilty of gross misconduct, the President may direct the Council to inquiry into the apprehended incapacity or misconduct. If the council upon inquiry makes a report that in its opinion the judge is so incapacitated or has been guilty of gross misconduct, the President shall remove the Judge from office. If the judge in respect of whom an enquiry is to be made is a member of the council on a member of the council is absent or is unable to act due to illness or any other cause, the judge who is next in seniority" (Article 96 (3)- 96 (5) of Bangladesh Constitution).

2.10: Law officers of the Government

Law officers of the government meant for conduction cases on behalf of the Government of Bangladesh before superior Court of the country. They are "appointed by the

President. The term of their appointment", duties and other conditions of service are governed by special status named Bangladesh Law Officers (Amendment) Ordinance (ordinance xi of 1977), and other statutory Rules. The law officers of the Government are-

2.10.1: Attorney General

Attorney General of Bangladesh is the Principal legal officer of the Constitution, "who is qualified to be appointed as a judge of the Supreme Court. He shall perform such duties as may be assigned to him by the President. In the performance of his duties, the Attorney General shall have the right of audience in all courts of Bangladesh. He shall hold office during the pleasure of the President and shall receive such remuneration as the President may determine. Attorney General is the ex-officio chairman of the Bangladesh Bar Council and accordingly he performs the duties assigned to that post. He is also empowered to participate in any referenceto Supreme Court made by the President under Article 106 of the Constitution and can express his own opinion. The office of the Attorney General deals with legal matters and is entrusted with the responsibility of giving legal advice to the Government and to plead Government cases before the Court" (Halim and Siddiki 2015).

2.10.2: Government Pleaders and Public Prosecutors (GP/PP)

Government Pleaders and Public Prosecutors are the two other categories of officers who work as lawyers on behalf of the State and the Government in Courts respectively subordinate to the Supreme Court of Bangladesh. PP "look after to the Criminal cases for and against the government on the other hand GP look after to the Civil Cases for and against the government". The lawyers of the government are selected from Advocates or repute who practice as members of Local Bar Associations. No person shall be deemed to be qualified for appointment as a public prosecutor until he has practiced for five years as a Pleader, Advocate or Barrister.

Public Prosecutors are appointed by the government i.e., "Ministry of Law in each district and Metropolitan Sessions Court and for a term determined by the government. They are also Addl. PP's and Asst. PP's. Their main function is to look after the criminal cases for

and against the government" (ibid). A public Prosecutor represents the state in conducting the prosecution. He plays a vital role in dispensation of Criminal Justice in the District. The public Prosecutor should be fair in the discharge of his duties. It is his/her duty to assist the court in doing justice between the state and a citizen.

Government Pleaders are appointed by the government i.e., Ministry of Law in each district for a term determined by the government. They are also Associate GP and Asst GP's to assist the Government Pleaders. Their main function is to look after the Civil Cases for and against the government. The Government Pleaders play vital role in the Districts Courts in instituting/defending and conducting of suits on behalf of the Government. They also represent the government in all revenue and Civil cases.

2.10.3: Registrar of the Supreme Court or other Courts

The Supreme Court has a registrar who exercises his powers as a Judicial Officer and Administrative officer also. Likewise there is a registrar for each Court in the districts level.

2.11: Law Commission

It is held that "Law Commission is established by the Law Commission act, 1996.As per section 5 of the Law Commission Act, 1996, the Commission consists of a chairman and two members. Under the law, the Government is empowered to increase the number of its members. The Chairman and members of the commission hold their respective offices for a term of three years from the date of their appointment. The chairman or a member may be reappointed by the government for the prescribed term after the expiry of the said term. The commission is supported by a Secretary and three Senior Research Officers, one Assistant Secretary and two translation officers" (Ahmed 2014). The main functions of the Commission are as follows:

- "To recommend training and other measures for the improvement of the efficiency of the persons involved with the judicial system such as judicial officers, staff law officers and Lawyers.

- To recommend necessary reforms in order to modernize the judicial system.
- To recommend amendment of laws concerned or enactment of new laws in appropriate cases after examination.
- To recommend modernization of different aspects of court management, such as distribution of works among judges, supply of copies, transmission and preservation of records, service of notices and other relevant matters.
- To recommend necessary measures for the improvement of the entire judicial system and specially to prevent the abuse of the application of the laws concerned.
- To recommend an acceptable measure regarding the feasibility of introducing a more efficient and accountable system in place of the present system for conducting the various government cases properly and establishing a separate investigating agency for the investigation of the criminal cases" (Halim 2004).

2.12: Judicial Administration Training Institute (JATI)

In order to increase professional knowledge, skill and attitude of those persons connected with the judicial system, which is one of the important sub-systems of the legal system of Bangladesh. The institute has established by Act xv of 1995 and has been playing on important role in the arena of judicial system for the establishment of rule of law on the Country. It came into being on the 23rd March 1995. It has a 14 member management board and the Chief Justice; ex-officio is its chairman.

"Methodological training is a human resource development activity and judicial education and training is a discipline to enhance capacity of the judges, law officers of the Government, Advocates and Court Support staffs for achieving better access to justice for the citizens". The main activities of the institute are as follows:

- "Imparting training in legislative drafting and drafting of other legal documents to trainees from abroad in cooperation with international donor agencies.

- Arranging and imparting training in legislative drafting and drafting of other legal document.

- Imparting training to the persons appointed in the Judicial Service, Law officers entrusted with conducting of government cases, Advocates enlisted with the Bangladesh Bar Council and officers and staff of all courts and tribunals subordinate to the High Court Division of the Supreme Court.

- Conducting research and investigation in respect of court management and publish the same.

- Arranging and conducting national and international conferences, workshops and symposia for improvement of the judicial system and quantity of judicial work.

- Publishing periodicals, reports etc. on the judicial system and Court Management.

- Advising the Government on any matter relating to the judicial system and court management" (Halim 2010).

2.13: National Legal Aid Organisation (NLAO)

It is the main function of the Government to maintain and sustain the equality and liberty of the citizens. Under Article 7 of the Universal Declaration of Human Rights, it is vividly expressed that "all are equal before the law and are entitled without any discrimination to equal protection from the law. Since equality before law is the important right of man. Bangladesh Constitution also explores under Article 11. Equality before law necessarily implies the concept that all the parties to the proceeding must have equal opportunity of access to the court for presenting their cases before the court" and this depends upon three conditions:

a. Payment of Necessary Court Fees

b. Bear other incidental costs

c. Assistance of a Skill lawyer for presenting the case properly in the Court.

In a country like Bangladesh, where above 50% of the people are unable to maintain their livelihood. So it is difficult for them to get redress in a case from the Court affording above mentioned costs. “Therefore, legal aid is essential for these people to protect their fundamental rights which are preserved in the Constitution under Article 11. Legal aid means the assistance in the legal matters both inside and outside the courts to the indigent litigants” (Halim 2004).

2.14: Informal Judiciary

There is dearth of faith in the formal justice system in Bangladesh to a significant level. As an illustration, “a survey conducted by Transparency International Bangladesh found that 96 percent of the households interviewed agreed with the assertion that it was almost impossible to get help from the police without money or influence. 89 percent expressed a similar disillusionment with respect to the Judiciary and 63 percent of the households involved in court cases reported that they had to bribe court official” (Transparency International Bangladesh 1997).

The “access to the formal court is extremely limited for the rural poor people because 8 out of 10 people come from villages and most ofthe formal courts are situated in urban centres”.The rural poor are compelled to bear additional burdens of travel and logistics costs because the lowest formal court is at the district level (Siddiqi 2003). Therefore, “large segments of the population who lack information or means to surmount the significant substantive and procedural barriers seek informal mechanisms like *Shalish* to redress their grievances. About two-thirds of the disputes do not enter the formal court process; instead, they are either settled at the local level through informal process by local leaders or a Village Court or they remain unsettled” (Golub 2003).

“Village level traditional judicial mechanism named *'Shalish'* is active in rural Bangladesh from time immemorial”. An informal justice mechanism, “*Shalish* 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" (Khair 2001).While the above description may suggest that a, "*Shalish* is a 'calm deliberation, with the parties patiently putting forth their perspectives and impartial facilitators soberly sorting through the issues' but actual *Shalish* is of peculiar character." Stephen Gloub describes his impression flowing from the observations of over a dozen *Shalish* sessions during the 1990s as follows:

> The actual *Shalish* is often a loud and passionate event in which disputants, relatives, (shalish panel) members and even uninvited community members congregate to express their thoughts and feelings. Additional observers adults and children alike gather in the room's doorway and outside. More than one exchange of opinions may occur simultaneously. Calm discussions explode into bursts of shouting and even laughter or tears. All of this typically takes place in a crowded school room or other public space, sweltering most of the year, often with the noise of other community activities filtering in from outside. The number of participants and observers may range from a few dozen to well over one hundred (Gloub 2003: 137-138).

However, "*Shalish* mechanism as a justice forum has some specific characteristics. It is a completely informal mechanism which has no specie procedure to follow. The adjudicators (Shalishkar) of a *Shalish* do not have any legal authority, but they get social authority from their seniority, wisdom, economic and religious status or by way of village politics. The judgement or justice given by *Shalish* is not based on any specific law but the notion of justice comes from religious guidance and sense of social wellbeing (Banglapedia 2013).

Gloub opined:

> "A *Shalish* may involve voluntary submission to arbitration (which, in this context, involves the parties agreeing to submit to the judgment of the *Shalish* panel), or mediation (in which the panel helps the disputants to try to devise a settlement themselves) or a blend of the two. *'Shalish* addresses almost all type of disputes- civil, criminal or family. Many of the times, these include gender and family issues, such as violence against women whether within or outside marriage, inheritance, dowry, gpolygamy, divorce, maintenance for a wife and children, or a combination of such issues. Other foci include land conflicts as well as other property disputes"(Gloub 2003).

The objective of *Shalish* is, “to dispose of different type of local disputes locally, speedily and amicably without resorting to formal expensive and lengthy court procedures. While it is undeniable that *Shalish* has been successful 'in some measure at providing acceptable judgments and solutions” (Haq1998). Further,“it is also a bare truth that this objective of the *Shalish* mechanism has been frustrated time and again due to various socio-economic and religious grounds. Due to the absence of any specified law, process and accountability the socially, economically or religiously powerful people, have been using the forum as a vehicle for imposing subjective notion of justice and use this forum as a platform for enforcing their will on villagers”.

As summarized by Khair in a thoughtful review of NGO-modified *Shalish*, in its traditional form the practice:

> …[I]s 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” (Khair 2001: 5).

According to a survey by United Nations Development Programme (UNDP), “60 to 70 percent of local disputes are resolved by the *Shalish”* (UNDP 2002:92). It is held that “The *Shalish* is usually an all-male affair, and is not known for its commitment to social justice or the rule of law. Rather, the *Shalish* has been actively used as a means of social control, including upholding gender and social hierarchies”. In historical records also, the Shalishdars were generally closely connected with the local elite. Following the Independence of Bangladesh in 1971, traditional power structures were disrupted and new actors have emerged.

It is held that “In the case of *Shalish* also, along with wealthy and politically strong members of the community, elected members of local government as well, have come to play a key role in the *Shalish* process”. Despite having no legal authority, the *Shalish* is considered to play “an extremely important role in ensuring acquiescence to prevailing

moral codes of conduct on which rural society is based" and further it "serves to upload and consolidate the prevailing structure of power" (Hashemi and Hayat 1998).

It is held that "while the actors have changed, the *Shalish* remains undemocratic and has little knowledge or interest in promoting the rule of law. *Shalish* seems to have a conservative and discriminatory approach to women". According to recent studies, the integrity and respect for *Shalish* among common people have come to be diminished because money and muscle have become key factors to influence the judgement of present day Shalish rulings (Siddqi, 2004). Despite its weaknesses, "*Shalish* remains the preferred mode of conflict resolution in rural Bangladesh", and it is "an enduring and fundamental feature of rural society, one that has neither been displaced nor endangered by the introduction of a formal justice system" (Siddqi 2003).

2.15: Alternative Dispute Resolution (ADR)

It is held that "Alternative Dispute Resolution includes dispute resolution processes and techniques that fall outside of the Government judicial process". Despite historic resistance to ADR by both parties and their advocates, "ADR has gained widespread acceptance among both the general public and the legal profession in recent years. In fact, some courts now require some parties to resort to ADR of some types, usually mediation, before permitting the parties cases to be tried. The rising popularity of ADR can be explained by the increasing caseload of traditional courts, the perception that ADR imposes fewer costs than litigation, a preference for confidentiality and the desire of some parties to have greater control over the selection of the individuals or individuals who will decide their dispute (Rustom 2009).

However, ADR may be defined as solving the dispute in a non- traditional way. It is a new dimension or a *denovo* in our justice delivery system and a creation of the demand and cry of the aggrieved who are not satisfied with and are unable to access the formal legal system. It is an important vehicle to transform and improve the informal systems of justice and to give common people a means to address their most frequently encountered legal problem (Ahmed 2015).

2.15.1: Meaning of Alternative Dispute Resolution

It is postulated that "Alternative Dispute Resolution is usually considered to be alternative to litigation. It also can be used as a colloquialism for allowing a dispute to drop or as an alternative to violence. ADR is a procedure for settling a dispute by means other than litigation, such as arbitration or mediation" (Ahmed 2015). In another sense, ADR is non-adversarial or the inquisitional system of justice that is used instead of civil litigation. ADR can be defined as encompassing all legally permitted process of dispute resolution other than litigation. ADR proponents may object to it on the ground that it privileges litigation by giving the impression that litigation is the normal or standard process of dispute resolution.

2.15.2: ADR and Civil Legal System

Delay devalues judgement which creates anxiety in the mind of litigants, an "uncertainty for lawyers, results in loss or deterioration of evidence, wastes court resource, needlessly increase the cost of litigations and creates confusion and conflict in allocation of court resources" (ibid). Halim and Siddiki further stated that "in fact, delayed justice is the means of inflicting injustice through process of law. Prolonged delay makes the litigants enormously impatient. As such an implicit model of mechanism must be made to pay to resolve undue delay in the disposal of cases. However, taking this view in mind the ADR system can be introduced and developed in the present society beside the formal judicial system in order to eliminate the endless suffering of the poor litigants of our country" (Halim and N.E. Siddiki 2015).

In the recent past, the ADR system has been developed in the USA, UK and also in Hong Kong, Australia etc. and the rate of success of ADR is significantly high under this system. The system of ADR is easier, time saving and cheap compared to traditional adversary system of litigation. In line with this view, ADR has been introduced in Bangladesh. However, generally ADR mechanism is applied in our civil legal system.
The Bangladesh judiciary is hierarchical organized both consists of both the formal and informal structure. Each of the division of the Judiciary has some special characteristics which make one division different from other.

CHAPTER – 3

JUDICIARY IN LEGAL-CONSTITUTIONAL FRAMEWORK: AN ASSESSMENT

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JUDICIARY IN LEGAL CONSTITUTIONAL FRAMEWORK: AN ASSESSMENT

The Constitution is the supreme law of the republic. The entire legislative, executive an judicial activities of thestate are guided and regulated by the Constitution. In all countries here where Constitutionalism prevails, ordinary men and women are more or less knowledgeable about their country's constitution and are vigilantand vocal to a man to assert and preserve the Constitution and their Constitutional rights. They do not leave their Constitution in the hands of constitutional lawyers judge and academicians. Each citizen is a defender ofthe constitution. So that it becomes almost impossible to make an open breach of it.Article 21 of the constitution says that, "it is the duty of every citizen to observe theconstitution and the laws, to maintain discipline, to perform public duties and to protect public property (The Constitution of Bangladesh 2016).

"The importance of an independent Judiciary is not less but all the greater when judges have to serve under an all-powerful parliament dominated by a party cabinet, and concentrating all the powers and more than all powers of the executive and legislature combined in one coherent complex." -Lord Hailsham (Anzara 2016).

A nation's civilization is ultimately measured from its standard of justice delivery system for protecting the fundamental rights of the citizens. Judiciary has, "the solemn responsibility to uphold the democratic functioning of the institutions and to act as the guardian of human rights and liberties. Democracy depending upon the rule of law and proper dispensation of justice can only be sustained and upgraded by strengthening the independence, impartiality, and knowledge of judges, lawyers and other professionals of the judicial systems." (JATI 2016).

"A Judiciary of undisputed integrity, is the core institution essential for ensuring compliance with democracy and rule of law. Even when all other protections fail, it

provides a safeguard to the public against any encroachments on rights and freedoms under law. Ensuring the independence and integrity of the judiciary are thus inevitable tasks to which much energy, skill, experience and attention should be devoted" (Rahman 2016: 192).

3.1: Judiciary and Its Constitutional Provisions

Bangladesh's Constitution envisages Independence of Judiciary under various articles. As per Article 95 of the Constitution, "Appointment of Judges of the Supreme Court were made by the President in consultation with the Chief Justice (The Constitution of Bangladesh 2016). In the Fourth Amendment some changes have been introduced as to requirement of consultation with the Chief Justice, however, "in practice the Chief Justice is consulted in such appointments. According to the Article 22, separation of the Judiciary from the Executive is ensured by the state. Further, according to the Article 115, it is the President who makes appointments to subordinate courts. However, though the control and discipline of the subordinate courts including Magistrates is vested in the hands of the President, but he/she shall have to exercise the same in consultation with the Supreme Court." (The Constitution of Bangladesh 2016: 36, 6, 42)

Part IV of the Constitution deals with the Judiciary. According to the Constitution, "all powers in the Republic belong to the people, and their exercise on behalf of the people shall be affected only under, and by the authority of this Constitution. So, every legal step of the Republic should be according to the Constitution. Also, as stated by the Constitution, any person accused of a criminal offence has the right to a speedy and public trial by an independent and impartial court or tribunal established by law (Article 359(3)). It demands independence of the Supreme Court Judges and it also provides for independence of the Subordinate Judiciary (HCD Special original Jurisdiction Writ Petition No.8283 2005)" (The Constitution of Bangladesh 2016).

When it comes to the exercise of the judicial function of the judges of the Supreme Court, the Constitution has ensured the independence of the judges of the Supreme Court by making some provisions in the Constitution. "Article 115, Article 133 or Article 136 does

not give either the Parliament or the President to curtail or diminish the independence of the Subordinate Judiciary by recourse to subordinate legislation or rules.Article 135 of the Bangladesh's Constitution deals with the dismissal, removal or reduction in the rank of a person who holds a civil post. The members of judicial service and magistrates exercising judicial functions are no doubt holding civil posts and public offices as they get emolument and render service to the republic" (Islam 2012).

The independency of the judicial officers including the Magistrate in exercise of their judicial functions has been declared under the Article 116A. In this connection, "a landmark judgment by the Supreme Court headed by Justice Mustafa Kamal (the Chief Justice of Bangladesh) came in the case of Secretary, *Ministry of Finance Vs Masdar Hossain and others*. In this decision, after taking into consideration a number of decisions from Indian and Canadian jurisdictions, the Appellate Division held, inter alia, that the independence of the Judiciary as affirmed and decided by Articles 94(4) and 116A is one of the basic pillars of the constitution and cannot be demolished, whittled down, curtailed or diminished in any manner whatsoever, except under the existing provisions of the Constitution" (Akkas 2004).

Further, it is held that "neither the parliament nor the President are given the authority by the Articles 115, 133 or 136, to curtail or diminish the independence of the Subordinate Judiciary by recourse to Subordinate legislation or rules and that what cannot be done directly, cannot also be done indirectly. The decision in the case, popularly known as *Masdar Hossain's* Case, is acclaimed nationally and internationally as milestone in the judicial history of Bangladesh laying foundation towards achieving independence of Judiciary and it must be regarded as a major and bold step in judicial system of Bangladesh" (Talukder 1994). However, the subject matter of the case was with regard to service conditions, salaries etc of the subordinate Judiciary thus affecting financial security. In the case of Bangladesh Vs Md. Abu Bakar, the respondent a Magistrate was imposed a penalty in a departmental proceeding by the government without consultation with the Supreme Court" (Hoque 1998).

Here under some important provisions, especially in relation to independence of the judiciary in Bangladesh has been pointed out with analysis as well as evaluation.

3.2: Appointment of Judges

The provisions relating to appointment of judges are given in Article 95 of the Constitution. This Article Provides:

1. "The Chief Justice and other judges shall be appointed by the President
2. A person shall not be qualified for appointment as a judge unless he is a citizen of Bangladesh and
3. Has not less than ten years, been an advocate of the Supreme Court or
4. Has for not less than ten years, held judicial office in the territory of Bangladesh or has such other qualification as may be prescribed by law for appointments as a judge of the Supreme Court."[1]

From Article 95 aforesaid, "it is seen that unlike the Indian Constitution and the 1962 Constitution of Pakistan, the President has been given exclusive authority to appoint the Chief Justice and other judges of the Supreme Court. But according to the 1962 Constitution of Pakistan, the Chief justice of the Supreme Court was to be appointed by the President and other judges to be appointed by the President after consultation with Chief Justice. On the other hand the Constitution of India, 1950 provides that in the matter of appointment of the Chief Justice of India, the president shall consult such judges of the Supreme Court and of the High court as may deem necessary. And in case of appointment of other judges of the Supreme Court, consultation with the Chief Justice of India, in addition to the above, is obligatory. Article 95 of the Constitution of Bangladesh as originally enacted in 1972, which was amended subsequently. Provided that the Chief justice of Bangladesh and other judges were to be appointed by the President and once the Chief Justice was appointed other judges could only be appointed after consultation with the Chief Justice" (Talukder 1994).

[1] The Constitution of Bangladesh, 2016 Article 95.

3.3: Amendments in the Constitution of Bangladesh

In order to understand the constitutional law of a country we must not only refer to the laws and principles that exist outside the constitution, we must also acquaint ourselves with its historical background. There are usually many provisions in a constitution which can be properly understood and applied only if we know the historical facts which led to the adoption of the scheme and the formation of those provisions of the constitution. Constitutional development is no doubt an evolution of the constitution through judicial decisions, but judicial decisions on the constitution are the outcome of dedicated lawyering backed intensive academic studies (Chowdhary 2014).

Within a short span of 45 years, the Constitution of Bangladesh has undergone 16 amendments. But the **16th Constitutional Amendment** was scrapped by the Constitution on 3rd July 2107 which means, "Parliament no longer has the power to impeach judges of the apex Court. A seven-member bench of the Appellate Division, led by Chief Justice Surendra Kumar Sinha, uphelda High Court judgement that had scrapped the amendment, rejecting an appeal led by the state. From now on, the Supreme Judicial Council will deal with the impeachment matters, not parliament. The 16th Amendment was passed by parliament on September 17, 2014, empowering the member's of Parliament (MPs) to impeach the top court judges for incapability or misconduct via two-thirds majority. Examining the constitutionality of the 16th Amendment, the court found that a peculiar political culture wasprevalent in the country. In public perception, the independence of judiciary had been curbed by the amendment. The High Court said, if the judiciary is not independent in public perception, it cannot be sustained at all. The court observed that,"there was no consensus on pressing national issues between the major politicalparties, the society was sharply polarized and there might not be two-thirds majority of the ruling party at all times" (The Daily Star 2017). The verdict said people would suffer because of the 16th Amendment.The following is a brief account of 15 amendments.

First Amendment Act

In order to put the 195 armed personnel of the Pakistani army guilty of War Crimes on trial, the Constitution First amendment Act 1973 was passed on 15th July 1973. It amended,"Article 47 of the Constitution by inserting an additional clause to it which allowed prosecutions and punishment of any person accused of genocide crimes against humanity or war crimes and other crimes under international law. A new Article 47A specifying inapplicability of certain fundamental rights in those cases was also inserted" (Shuza 2011).

The Second Amendment Act.

The Constitution (Second Amendment) Act 1973 was passed on 22 September 1973. This act resulted in the, "Amendment of Articles 26, 63, 72 and 142 of the constitution; (i) Substitution of Article 33 and(iii) the insertion of a new part i.e. IXA in the constitution. (iii)Provisions were made through this amendment for the suspension of some fundamental rights of citizens in an emergency" (Aziz 2015).

The Third Amendment Act.

The Constitution (Third Amendment) Act 1974 was enacted on 28 November1974 by bringing in changes in, "Article 2 of the constitution with a view to givingeffect to an agreement between Bangladesh and India in respect of exchange ofcertain enclaves and fixation of boundary lines between India and Bangladesh" (The Constitution of Bangladesh 2004).

The Fourth Amendment Act:

The Fourth Constitutional Amendment Act 1975) was passed on 25 January1975. Major changes were brought into the Constitution by this amendment like, "The Presidential form of government was introduced in place of the parliamentary system, a one-party system in place of a multi-party system was introduced; The powers of the Jatiya Sangsad (National Assembly) were curtailed; The Judiciary lost much of its independence and the Supreme Court wasdeprived of its jurisdiction over the protection and enforcement of fundamental rights" (Halim 2008).

The Fifth Amendment Act:

This Amendment Act was passed by the Jatiya Sangsad on 6 April 1979.This Act amended the Fourth Schedule to the constitution by adding a newparagraph 18 thereto, which provided that,"all amendments, additions,modifications, substitutions and omissions made in the constitution during theperiod between 15 August 1975 and 9 April 1979 (both days inclusive) by anyProclamation or Proclamation Order of the Martial Law Authorities had beenvalidly made and would not be called in question in or before any court ortribunal or authority on any ground whatsoever" (ibid).

The Sixth Amendment Act:

The Sixth Amendment Act was enacted by the Jatiya Sangsad with a view toamending Articles 51 and 66 of the 1981 Constitution.

The Seventh Amendment Act:

This Act was passed on 11 November 1986. It amended, "Article 96 of the Constitution; it also amended the Fourth Schedule to the constitution by insertinga new paragraph 19 thereto, providing among others that all proclamations,proclamation orders, Chief Martial Law Administrator's Orders, Martial LawRegulations, Martial Law Orders, Martial Law Instructions, ordinances and otherlaws made during the period between 24 March 1982 and 11 November 1986 (both days inclusive) had been validly made and would not be called in questionin or before any court or tribunal or authority on any ground whatsoever" (Emajuddin 2016).

The Eighth Amendment Act:

This Amendment Act was passed on 7 June 1988. It amended Articles 2, 3, 5,30 and 100 of the constitution.This Amendment Act declared, "Islam as the state religion;Decentralized the judiciary by setting up six permanent benches of the HighCourt Division outside Dhaka;Amended the word 'Bengali' into 'Bangla' and 'Dacca' into 'Dhaka' in Article 5of the constitution;Amended Article 30 of the constitution by prohibiting acceptance of any title,honours, award or decoration from any foreign state by any citizen ofBangladesh without the prior approval of the President" (Shuza 2011).

The Ninth Amendment Act:

The Constitution (Ninth Amendment) Act 1989 was passed in July 1989 which provided for the, “direct election of the Vice-President; it restricted a person in holding the office of the President for two consecutiveterms of five years each; it also provided that a vice-president might beappointed in case of a vacancy, but the appointment must be approved by the Jatiya Sangsad” (Halim 2008).

The Tenth Amendment Act:

The Tenth Amendment Act was enacted on 12 June 1990. It amended, amongothers, “Article 65 of the constitution, providing for reservation of thirty seats forthe next 10 years in the Jatiya Sangsad exclusively for women members, to beelected by the members of the Sangsad” (The Constitution Of Bangladesh 2004).

The Eleventh Amendment Act:

This Act was passed on 6 August 1991.It amended the Fourth Schedule to the constitution by adding a new paragraph21 thereto which legalized the appointment and oath of Shahabuddin Ahmed, Chief Justice of Bangladesh, as the vice-president of the Republic and the resignationtendered to him on 6 December 1990 by the then President Hussain M Ershad, This Act ratified, “confirmed and validated all powers exercised, all laws andordinances promulgated, all orders made and acts and things done, and actionsand proceedings taken by the vice-president as acting president during theperiod between 6 December 1990 and the day (9 October 1991) of taking overthe office of the president by the new President Abdur Rahman Biswas, duly elected under the amended provisions of the constitution.The Act also confirmed and made possible the return of Vice-President Shahabuddin Ahmed to his previous position of the Chief Justice of Bangladesh” (Aziz 2015).

The Twelfth Amendment Act:

This Amendment Act, known as the most important landmark in the history ofconstitutional development in Bangladesh, was passed on 6 August 1991.It amended,“Articles 48, 55, 56, 57, 58, 59, 60, 70, 72, 109, 119, 124, 141A and 142”. Through this amendment, “The parliamentary form of government was re-introduced in Bangladesh; the President became the constitutional head of the state; The PRIME

MINISTER became the executive head; the cabinet headed by the Prime Minister became responsible to the Jatiya Sangsad ;the post of the vice-president was abolished;The President was required to be elected by the members of the Jatiya Sangsad" (The Constitution of Bangladesh 2016).

Thirteenth Amendment Act:

The Constitution (Thirteenth Amendment) Act 1996 was passed on 26 March1996 in the so called Parliament. This parliament was actually elected in a fake (voter-less) election of February 1996, arranged by the BNP-Government.It provided for,"a non-party CARETAKER GOVERNMENT which, acting as an interimgovernment, would give all possible aid and assistance to the ElectionCommission for holding the general election of members of the Jatiya Sangsad peacefully, fairly and impartially. The non-party caretaker government, comprising the Chief Adviser and not more than 10 other advisers, would becollectively responsible to the president and would stand dissolved on the dateon which the prime minister entered upon his office after the constitution of the new Sangsad" (Shuza 2011).

Fourteenth Amendment Act:

The Constitution (Fourteenth Amendment) Act, 2004 was passed on 16th May,2004.This amendment amends the several articles, "Insertion of new Article 4 A after Article 4 for preservation and display of theportraits of the President and the Prime Minister.Amendment of clause (3) of Article 65 in the Constitution regarding reservednumber of seats exclusively for women members in the Parliament; Amendment of Article 96(1), 129 and 139 of the constitution enhancing theretirement age of the Judges of the Supreme Court, Auditor General andChairman and other members of Public Service Commission; Enhancement of retirement age of the supreme Court Judges; Enhancement of retirement age of the Auditor General and Chairman &Member of P.S.C; Amendment of Article 148 of the Constitution making provision foradministering oath of the newly elected members of the Parliament by theChief Election Commissioner is unprecedented" (The Constitution of Bangladesh 2016).

Fifteenth Amendment Act:

It has been passed on 30 June 2011 in the 9th Parliament. This Amendment hasbeen done on the basis of the HC/SC verdicts on 5th, 7th and 13th. The key issues of this amendment follows, "Caretaker system abolished; Elections to be held under incumbent cabinet; Islam as State religion and 'Bismillah-Ar-Rahman-Ar-Rahim' retained above the preamble; Removal of 'Absolute Faith and Trust in Allah' from the constitution; Revival of Article 12 to restore Secularism and freedom of religion; Maintains the provision allowing religion-based politics; Denies recognizing the indigenous people, will be termed as tribal andethnic minorities; The people of Bangladesh shall be known as Bengalese as a nation andcitizens of Bangladesh shall be known as Bangladeshis; Inserted articles 7A and 7B in the Constitution after Article 7 in a bid to endtake-over of power through extra-constitutional means and highest level ofpunishment would be awarded for those power capturers by extra constitutional means; Basic provisions of the constitution are not amendable; The Chief Justice shall be appointed by the President, and the other judgesshall be appointed by the President in consultation with the Chief Justice" (UNB 2011).

3.4: Constitutionally Challenged Sixteenth Amendment and its Effect

The impugned 16th Constitutional Amendment of the Constitution of Bangladesh empowered, "the Parliament to remove a judge from his office. However the Constitution explicitly provides for an impartial and independent judiciary as one of its cornerstone" (Aziz 2015). Looking at the history of the removal of judges in brief, "Article 96 in the original 1972 constitution relating to the removal of judges was materially affected by the 4th Amendment in 1975 which deleted clause (3) of Article 96. Thereafter by the 15th Amendment provisions for removal of judges by the Supreme judicial council was introduced. The 5th Amendment was held to be unconstitutional by theHigh court division in Bangladesh Italian Marble Works Ltd. V. Government of Bangladesh and others, 62 DLR (HCD) (2010) 70, which was also confirmed by the Hon'ble Appellate Division in Khondker DelwarHossain Secretary, BNP and another v. Bangladesh Italian Marble Works and other reported in 62 DLR (AD) (2010) 298. In that case, the Hon'ble Appellate Division had the occasion to examine different provisions of 5th amendment. With regard to the provisions of Article 96 of the Constitution, the Hon'ble Appellate

division made a clear observation favoring to retain the provision for Supreme Judicial Council." (Akkas 2004)

The consequences of 16th amendment is "to render the tenure of the judges insecure and hence, it is submitted that such amendment created an opportunity to undermine the independence of the Judiciary by making the judiciary of the country vulnerable to undue influences and pressure and this jeopardizes the rule of law" (The Daily Star 2017). The Appellate Division in the 5th amendment case also observed that; "the Fifth Amendment ratifying and validating the martial law Proclamations, Regulations and orders not only violated the supremacy of the Constitution but also the rule of law and by preventing judicial review of the legislature and administrative action, also violated two other more basic features of the Constitution, namely, Independence of Judiciary and its power of Judicial review.The impugned 16th Constitutional Amendment clearly is in conflict with, Article 7 B and hence the 16th Amendment should be struck down as it would undermine the independence of Judiciary" (Arifur 2016).

"Anwar Hossain Chowdhury etc. v. Bangladesh and others. BLD 1989 (SPI) I", Badrul Haider Chowdhury, J observed that; "An amending law becomes part of the Constitution but an amending law cannot be valid if it is inconsistent with the Constitution. The Contention of the Attorney general on the non-obstante clause in the article 142 is bereft of any substance because that clause merely confers enabling power for amendment but by interpretative decision cannot be given the status for swallowing up the Constitutional fabric".[2]

It may be also noted that following the impugned 16th Constitutional Amendment, "the Parliament has not yet laid down any rule governing the impeachment procedure of a judge. In an absence of such rules it is impossible to ascertain who will conduct the inquiry on allegations of a judge and whether the judiciary will be able to be represented at a hearing, to make a full defence and to be judged by an independent and impartial

[2]Writ petition no. 9989 of 2014 in the matter of Advocate Asaduzzaman SIddiqui and others vs Bangladesh and others.

tribunal" (The Daily Star 2017). In light of the above, it is submitted that the impugned 16th Amendment severely obstructs the independence of the Judiciary and the separation of power.

3.5: Judiciary and Democracy

Wise politicians and scholarly jurists have repeatedly observed that an independent Judiciary is the very heart of a republic. This is so because "the foundation of a democracy, the source of its perpetual vitality, the conditions of its growth and the hope of its well being, are all found in this great institution, a judicial power independent. In Bangladesh, however, it took a long time to at least formally separate the Judiciary from an authoritarian executive despite the constitutional commitment to do so. The situation on the ground has not changed significantly as a result of the aforementioned separation is frankly confirmed by recent remarks by the Honourable Chief Justice when he says with poignancy that perception, the Judiciary a rival of the Administration is completely wrong. It had to be categorical to say that the judiciary has never been a rival of the administration and the government. The head of our apex court hoped that the government and the administration would realize the current situation between the government and the Judiciary" (Mizan and Humayun 2002).

The Chief Justice, as the guardian of the Constitution, rightly pointed out that, "the limitations of the functions of a political government and a Judiciary is clearly indicated, adding that the Judiciary will interfere whenever the activities of a political government will be unconstitutional. Indeed, the media have expressed their concern about the allegedly uncomfortable relationship between the Judiciary and the executive by observing that alleged tactics such as delay in promotion. The posting and transfer of district judges and the publication of the Gazette on the rules for determining the discipline and conduct of lower judges will subvert the process of separation of the Judiciary. He rightly adds that, the absence of effective separation will surely hamper the proper functioning of the judicial body. At this point we must remember that the independence of the Judiciary is a fundamental element of our constitution and that the

separation of powers, as provided for in Article 22 of the Constitution, is a Sine qua non of this independence.” (The Constitution of Bangladesh 2016).

However, although the constitution required the separation of the judiciary and the executive, no action was taken by the legislative or executive authority of the government and, in such a situation, “Appeal has given instructions to Parliament and the President to promulgate laws and promulgate rules Under articles 115 and 133 of the Constitution to give effect to the policy set forth in article 22 of the Constitution. We must remember that, the judiciary is the branch of the state that deals with conflicts between state institutions, between the state and the individual, And between individuals. The judiciary is independent of Parliament and the executive. In fact, it is this characteristic of judicial independence that is of paramount importance for both the government and the protection of the citizen’s freedom against the executive” (ibid).

In this distinct and distinct existence of the Judiciary rests the chief curator of public freedom. This freedom can not last long in any state unless the administration of justice is effectively separated from the legislature and the executive power. “It may be time to reflect on whether we are unwittingly going down our judicial system. It is also relevant to ask whether, instead of defending our judges against political pressure, instead of insisting on the integrity and impartiality of judicial appointments, we are allowing the executive to enunciate and apply the astounding doctrine that it is free to appoint to the philosophy of the ruling party. It would be appropriate for the appointment system to be particularly relevant to the position of judges and their independence a crucial aspect of the separation of powers” (Abid n.d).

The fact that “the executive appoints judges does not in itself mean a threat to the independence of the Judiciary. Nevertheless, judicial independence may be threatened by a judge's awareness of the power that the executive exercises over his judicial career. It is, fair to acknowledge that at the root of the subject of judicial independence and public confidence in the impartiality of the Judiciary lies the system of appointments and promotions. It cannot be denied that the Judiciary, as a mechanism for resolving conflicts

in a democratic society, must be free and unhindered. There is wisdom and circumspection in the speech of Pandit Jawarharlal Nehru when, on May 24, 1949, he declared in the Constituent Assembly that our judges should be “first-class” men of “the highest integrity” who could “stand up against the executive government and anyone can come in their way.” (BD News 2017).

3.6: A New Judicial Role after Democratic Transition (1991–2006)

“The emergence of a new constitutional environment after the fall of the autocratic regime in 1990 led to the renewal of public faith both in constitutionalism and in the judiciary (Rahman 1988). The post-1990 Court came to be increasingly activated by a growing critical section of the public with a diverse range of causes, most often espoused through the PIL. The judges, too, seemed sensitized about the need for protecting the public interest and enacting constitutional justice, especially for those who continued to remain underprivileged and discriminated against (Shamima Sultana Seemav. Bangladesh 2005) 57 DLR”. (HCD): 201).

During the post-autocratic regime, thus, we see, “a wave of Constitutional judicial activism in Bangladesh, marking a significant paradigm shift which is driven by creative judicial interpretations and inspired by the judges’ self-realization about their past failings during martial law regimes” (Uddin 2013). (Bangladesh Italian Marble Works Ltd 2005).In this period, the Court has built on its rights-protective personal liberty jurisprudence. “In particular, it has sought to constrain the irrational use of the prevention detention law, but with little success in stopping abuses of the detention laws. In *Bilkis Akther Hossain*v. *Bangladesh* (1997), (BLD HCD 1997: 334) for example, the High Court Division held the government liable in damages for arbitrary detention of some political leaders, an appeal against which has remained on the dock of the Appellate Division for the last fifteen years” (Chowdhay 1993).

At the level of protection of fundamental rights, “there have also been many new developments, especially in the field of right to life and good governance. For example, initiatives have begun towards constructing a theory of constitutional tort to check abuses

of public power (Mohammed Ali v. Bangladesh 23 BLD HCD 2003: 389) alongside the development of what is now a mature trend of self-initiated (*suomotu*) judicial interventions often directed towards removing illegality from the country's criminal justice system" (Hoque 2003).

The post-1990 judiciary became persistently critical of wanton misuses of arresting power by the police and other forms of police brutalities and excesses (Saifuzzamanv. State 56 DLR HCD 2004: 304)although little could be achieved in terms of effecting a change in the government's behavior[3]. In the most prominent case in this field, "the Court in *BLAST & Others* v. *Bangladesh* (BLD HCD 2003: 115) handed down a ground-breaking judgment issuing directions and guidelines with a view to stopping largely unchecked police brutalities and custodial deaths. The Court was activated by a public interest group that had long been seeking to combat unconstitutional police practices. In this case, the Court forcefully underlined the need to bring existing legal inconsistencies into conformity with the constitutional safeguards against torture and unlawful arrest, and formulated certain strategies and polices to regulate the arresting power of the police under widely-framed Section 54 of the Criminal Procedure Code as well as to condition the magistrates' power to remand an accused person to the police. Unfortunately, however, an appeal against this rights-enhancive decision has since remained pending before the Appellate Division." (BLD HCD 2003: 115)

Notably, "the new-found judicial assertiveness has by and large preserved the institutional balance, by strategically engaging with other branches of government, particularly on issues of wider political ramifications" (*Najmul Huda, MP* v. *Secretary, Cabinet Division* BLC HCD 1997: 414). Unlike its past role the Court now seemed prepared to enter a democratic dialogue with the representative organ of the State, while at times remaining essentially passive on complex political issues such as the legality of *Hartal* (political strikes) (Khondaker Modarresh Elahi v. Bangladesh 21 BLD HCD: 352).

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[3] Both lack of further strong judicial vigilance and the Executive's defiance of court decisions are responsible for this.

In the first-ever constitutional reference by the President, "the Appellate Division refused to relinquish its advisory jurisdiction regarding the issue of the legality of long-drawn boycotting of Parliament, an exercise of which was argued by the opponents to have the effect of dragging the Court to politics. The Court advised the President that boycotting of Parliament by opposition members for a consecutive period of ninety days rendered their seats vacant.[4] By this, the Court clearly refused to uncritically accept the so-called American doctrine of political question, thereby showing its readiness for intervention for the cause of Constitutionalism" (M.A. Mannan v. Bangladesh HCD 2008).

The strategy of cautious or what can be called passive judicial activism was perhaps most strikingly exercised in, "a 1992 decision in *Kudrat-E-ElahiPanir*v. *Bangladesh* (44 DLR AD 1992: 319) which concerned the local level governance. In this case, the petitioner challenged a law which abolished a local government unit, arguing that the law breached the Constitutional mandate (Articles 9, 11, 59 and 60) for elected local government bodies at every administrative unit. The petitioner's argument was also built around a few fundamental constitutional principles of State policy that sought to entrench democracy in the polity" (The Constitution of Bangladesh 2016).

The Appellate Division refused to strike down the law reasoning that "the legislature could pass such a law abolishing any particular tier of local government, and observed that it lacked an authority to enforce the principles of state policy. In a trend-setting judgment, however, the Court set out to further the constitutional mandate for participatory local-level democracy. It articulated that, the government had an obligation to make all existing local government laws Constitution-compatible, and ordered elections to the existing local bodies within six months keeping in mind the principle of special representation of women" as enshrined in Article 9 of the Constitution. This type of technical enforcement of non-justiciable fundamental principles of State policy signifies strategic judicial activism, launching a creative dialogue with the Executive and

[4] Article 67 (1) (b) of the Bangladesh Constitution provides that if any member of the Parliament remains 'absent' from Parliament for such a period his or her seat would become vacant.

the Legislature. In a mixed response to this decision,"the Legislature thereafter enacted laws providing for election to city corporations with the provision of special representation of women. Although the Court has not been articulate enough in making this clear, it has sought to craft a public law model of judicial review underpinned by 'pragmatic policy judgments' (Driesen 2004: 890). This expansion has taken place both within and beyond the sphere of public interest jurisprudence. In some decisions, the Court resorted to the common law doctrine of public trust in order to remind the duty-bearers of the state that the powers they exercise are a trust reposed by the general public on them" (BLAST v Bangladesh 60 DLR HCD 2008).

An early expression of this awareness by the Court was in *Kudrat-E-ElahiPanir*v. *Bangladesh* (1992), in which, "the Appellate Division held that the President's satisfaction as to the existence of justifying circumstances warranting promulgation of an Ordinance is not out of the scope of judicial review. This holding was a breakthrough in the history of constitutional jurisprudence in that the president's ordinance-making power in Bangladesh has been a potential source of violence to constitutional democracy" (Rahman 1988: 126.)

Following the above dictum, the High Court Division in the first ever decision of its type in *Pirjada Syed Shariatullah*v. *Bangladesh* (2009), "invalidated an Ordinance for not having been necessitated by circumstances. As the Court reasoned, the president's ordinance making power must closely conform to the Constitution.[5] Judicial review has been extended to new areas such as executive leverage concerning foreign relations and governmental inactions impinging on fundamental rights, and to legal issues implicating policy decisions where the wider concern of constitutionalism has been found to be at stake. For example, when legal issues involving the government's energy policy reached its docket, the Court went as far as barring the government from exporting gas until the disposal of the case(s)" (Writ Petition No. 2052/1998 2001).

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[5]Invalidating the Muslim Marriages and Divorces (Registration) (Amendment) Ordinance 2008 on the ground that its promulgation was not indispensable for the discharge of the Caretakers Government's Duties.

Similarly, in *Abdul Gafur*v. *Secretary, Ministry of ForeignAffairs* (1997), the Court invoked the constitutional legal protection clause (Article 31) and the constitutional right to life (Article 32), "while imposing on the foreign office a positive duty to initiate diplomatic efforts to track and repatriate a female child trafficking victim later found detained in Kolkata" (17 BLD HCD 1997: 453). In another case, "*Ain o Salish Kendra v. Bangladesh* (WP No. 6409/20008), the Court issued a rule asking the government to explain why the falling of the concerned ministries to ensure safe migration of workers should not be considered a breach of legal duty" (Halim 2004).

On a negative note, the Court can be critiqued for not extending the enforcement of fundamental rights horizontally. "The public law style of adjudication demands the piercing of the narrow divide between the private and public activity when the enforcement of public responsibilities and constitutional values are in question. By this standard, the Bangladeshi Court has been failing effectively to enforce constitutional rights and ethos against private individuals or entities. The Court's reluctance to apply fundamental rights horizontally, although there is some measure of indirect horizontality, does not quite match with either the letter or the spirit of Article 102(1) of the Constitution that makes fundamental rights enforceable against 'any person' (*Anwar Hossain v. Mainul Hosein*58"(DLR AD 2006: 229).

Alongside the above-mentioned trend of judicial defence of constitutionalism, "the Bangladeshi Court has sometimes revealed its close attachment to rigid Anglo-American legal notions, un-conducive for justice in the local context. For instance, the Court in a number of cases refused to invalidate laws only because they were harsh and arbitrary." (Bangladesh Krishi Bank v. Meghna Enterprise 50 DLR AD 1998: 194).

A more telling example of judicial indifference with damaging effects on judicial craftsmanship in achieving standards of constitutionalism is probably the case of *State* v. *Sukur Ali* (9 BLC HCD 2004: 238). In this case, "the High Court Division confirmed a death conviction imposed on a minor boy for the offence of rape and murder, reasoning

that despite its will, it could not defy the language of the concerned special statute that provided for the mandatory death penalty for 'any person' guilty of the offence. This is a questionable interpretation of the law which the Appellate Division later endorsed. It is submitted that the decisions of the two Courts fall far behind the norms and spirit of the Constitution." (Hoque 2007)

Ironically, this kind of deplorable judicial escapism lent an impetus to the ongoing legal activism by civil society members. In *BLAST* v. *Bangladesh* (30 BLD HCD 2010: 194), "a legal provision that was relied on for awarding a death sentence to a minor boy was challenged in 2005 by citing its incompatibility with the principle of constitutional supremacy and the fundamental right to life. The High Court Division in its 2010 judgment declared the concerned legal provision unconstitutional for prescribing the mandatory death penalty for the offence of 'rape and murder', but without altering or nullifying the death sentence already awarded to the minor offender. The Court was probably concerned with prospective invalidation of the impugned law and, arguably, followed the legal technicalities, leaving the issue for the Appellate Division. It seems that this cautiousness actually disguises studious avoidance of the issue of unjustness of the death penalty already awarded to the minor convict" (Mithu v. State of Punjab 2 SCC 1983: 277).

3.7: Public Interest Litigation (PIL) and Constitutionalism

Following the hard-earned entrenchment of public interest litigation into the country's legal system in 1996, PIL has since been increasingly used as tool for achieving constitutionalism through litigation. "The opening up of PIL, which has achieved both practical achievements and normative social impacts, was the fruit of a sustained pressure of comparative developments elsewhere, particularly in India, although it was based on, the Court's autochthonous style of constitutional interpretation fed by the dynamics of constitutional values such as 'justice' and the rule of law" (Thiruvengadam 2008).

Starting off with collective rights and environmental justice, "the Court in PIL cases has shown activism vis-à-vis a wide array of issues such as child health, protection of the

homeless (slum dwellers), preservation of public parks or rivers, and public health and hygiene. In some cases of a mixed genre, combining political rights claims and greater constitutional principles, the Court zealously guarded judicial independence; sought to promote electoral political culture and ensure grass root-level participation in democracy; acted to stop police brutalities; attempted to prevent sexual harassment at workplaces and educational institutions; checked corruption by state executives; and protected the rights of vulnerable people. Interestingly, environmental justice seems to have drawn the Court's most intensive attention. In a long series of cases, the Court has proactively indulged in exercises directed towards the protection of the environment, mostly by issuing innovative remedies such as obliging the concerned government agency to make rolling reports of progress or by binding the government with specific positive obligations or by framing 'obligatory' guidelines. For example, a recent court action resulted in a string of government actions towards improving the conditions of four exceedingly polluted rivers surrounding Dhaka" (Human Rights and Peace for Bangladesh v. Bangladesh 14 BLC HCD: 759).

Like the environmental PIL cases, most PILs in their early age focused on the goal of social justice, attempting to enforce what can be called collective or socio-economic rights through, of course, enforcing statutory duties or/and constitutional rights, notably the 'right to life' (1yer 2000). "While judicial social rights activism in Bangladesh remains still rudimentary and lags well behind activist instances particularly of the Indian Court, the volume and catchments of constitutionalism-inspired PIL cases have increased significantly in recent times. The Court in these cases seems to have become attuned to, the need for upholding the supremacy of the constitution and enacting justice vis-à-vis myriad forms of un-constitutionalism. For example, in a famous action, the Court invalidated the governmental permission granted to a foreign private company to construct a container-terminal at the Chittagong Port on the ground of non-transparency in public decision-making" (Engineer Mahmud-ulIsalam v. Govt. of Bangladesh 23 BLD HCD 2003: 80).

In some other notable actions, “the Court invalidated a ‘local government law’ that undermined the principle of representative governance; directed the government to establish special courts in the Chittagong Hill Tracts region for the protection of women and children” (BLAST v. Bangladesh 61 DLR HCD 2009), “a provision of mandatory death penalty (BLAST v. Bangladesh 30 BLD HCD 2010: 194)) and required the police on one occasion to submit to it fortnightly reports of the investigation concerning the 2007 terrorist attacks that killed many including two judges” (Z.I. Khan Panna v. Bangladesh WP No. 8621 2005).

Also notably, the judges in PIL cases have been increasingly undertaking lawmaking or policy-setting exercises with renewed enthusiasm. “This has been a major shift in the Court’s jurisprudence which, although it is often justified in terms of constitutional imperatives, is arguably driven by the post-Emergency (2007–8) democratic changes in the polity”. As briefly covered below, “the post- Emergency judiciary in Bangladesh has engaged itself in regaining public confidence and rebuilding its image, showing ‘new activism’ in both ordinary and PIL cases, which has correspondingly enlivened the hitherto feeble social and legal activism” (Iyer 2000).

A good example of the Court’s new activism is its decision in a PIL against the government’s inactions over the rampant incidents of sexual harassment of women. The Court in *BNWLA* v. *Bangladesh* (14 BLC HCD 2009: 694) found that, “despite constitutional mandates for gender equality and the equal legal protection for all, there was virtually no law to effectively prevent and punish unsocial behaviour known as sexual harassment of women. The Court issued detailed guidelines ‘in the nature of law’, binding the employers and educational institutions to follow them in preventing and suppressing sexual harassment of women until ‘effective legislation’ is made. The formulation of the guidelines looks almost like a legislative statute, and they largely resemble the guidelines against sexual harassment that the Indian Supreme Court issued in *Vishaka*v. *State of Rajasthan (1979)* (AIR SC 3011 1997)” (The Supreme Court of Bangladesh)

The Court rationalized such radical adjudicative legislation by placing "its reasoning on the Bangladeshi Constitution's basic premises such as 'equality' and 'protection' guarantees, although the major impetus and the ground of legitimacy for such action came from comparative foreign judicial decisions and certain international human rights instruments. In *BNWLA* and other leading PIL cases we actually find comparative law in action, in the sense that comparative law worked there really very well. The Court's all-out reliance on *Vishaka* (ibid) although this was not made clear in the judgment, showcases how closely the Indian PIL developments have influenced PIL jurisprudence in Bangladesh" (Halim and Siddiki 2015). This has been what Sujit Choudhry calls them, dialogical' use of comparative public law, although in a peculiarly Bangladeshi fashion, by which the Court has attempted both to sharpen its reasoning and to draw justificatory force from the neighbouring jurisdiction with like legal culture" (Choudhry 1999).

The above does not, however, lead to a conclusion that PIL-based judicial activism is free of imperfections. "The Court's preparedness in PILs to be vigilant against injustices or the violation of citizens' rights does not seem to be sufficiently robust, coherent, and pragmatic. While the Court has shown disproportionately active engagement with cases concerning its independence, it has not, for example, yet authoritatively established the jurisprudence of public law compensation for gross constitutional breaches including misfeasance in public offices. Nor has it adopted an adequately cooperative mode of adjudication in PILs, taking the public officials within implementation processes" (Halim 2008). Despite these limitations, however, the PIL-tool continues to help the willing and perceptive judges achieve goals of justice and constitutionalism.

3.8: The 2007 Emergency, the Post Emergency Democratic Regimes, and the Judiciary

The 2007 Emergency, although it brought about certain judicial and politico-legal reforms, effectively clipped the constitutional rights and the protective role of the courts. In this context, "the role of the Bangladeshi Supreme Court was undoubtedly critical both for the country's constitutional future and for a public sphere in the polity. The Judiciary during the Emergency, however, suffered a severe crisis of public confidence, with

negative impacts on its role as the protector of the Constitution. A quick review of the performance of the Supreme Court will reveal that while its High Court Division largely asserted self-confidence vis-à-vis the overbearing government, the Appellate Division often displayed undue deference to the Executive" (Hoque 2009).

Following the proclamation of Emergency, the President issued in quick time the Emergency Ordinance and the Emergency Power Rules 2007, "which in their combined operation suspended the enforcement of constitutional fundamental rights, created certain special offences, authorized the trial of certain offences under the new Emergency rules, and postponed the accused people's right to seek bail and challenge proceedings in a court of law" (Emajuddin 2016).

In the context of these sweeping actions, I now turn to the role the higher judiciary played in protecting the norms of Constitutionalism. In a significant, early Emergency-period decision, the High Court Division in *Moyezuddin Sikder*v. *State* (59 DLR HCD 2007: 287) held that, "its inherent and wider constitutional authority to grant bail to the accused cannot be foreclosed by law even during the state of a national emergency. A provision in the Emergency Powers Rules (EPR) 2007 provided that no person accused of an offence subjected to the EPR would be entitled to petition 'any court or tribunal' for bail. Based on a dynamic interpretation of the text, the Court held that the term 'any court' in the concerned rule was not intended to include the Supreme Court, in as much as no law can oust its constitutional supervisory jurisdiction. In this decision, the principle of rule of law was thus upheld against the prerogatives of an all-powerful Emergency-government" (Chowdhary 2014).

Unfortunately, however, the Appellate Division in *Moyezuddin Sikder*v. *State* (60 DLR AD 2008: 82) overruled the High Court Division's decision, "on a narrow interpretation of the law, quickly finding a 'manifest' legislative intention to oust the High Court Division's jurisdiction to grant bail in EPR-cases." In the case of *Bangladesh* v. *Sheikh Hasina*(2008), "a case that portrays the judges' often usual dilemma during emergencies,

the Appellate Division held that the trial of certain criminal offences by retrospectively applying procedural rules, if not the substantive law, was not unconstitutional" (ibid).

Earlier, the High Court Division significantly found that the relevant Emergency rules did not clearly authorize such retrospective trials and held that even retrospective operation of criminal procedural law is unconstitutional. "Drawing on rights-based reasoning, it further held that ousting, by the EPR, of its power to grant bail was incompatible with the, constitutional right to life and the guarantee of equal legal protection despite the fact that the 'Emergency law' postponed the right to judicially enforce fundamental rights" (13 BLC HCD 2008: 121).

These arguments which were not surprisingly, overturned by the Appellate Division. "There had been some measure of court-based legal activism during the Emergency. It needs to be noted that the Supreme Court's public interest jurisprudence played a major role in changing the way the people and civil society perceived the judicial role. Although public interest litigations grounded on constitutional rights arguments became stalled due to the operation of Emergency law, public-spirited citizens or 'interested' politicians repeatedly invoked the operative part of the constitutional remedial clause to secure justice vis-à-vis actions of the government.[6] Although the Court took much time in appreciating that its power of judicial review on the ground of breach of legality was not foreclosed, there emerged some significant public interest actions challenging what can be called, un-constitutionalism and seeking to place limitations on Emergency powers." (13 BLC HCD 2008: 144).

In *Advocate Sultana Kamal and Others* v. *Bangladesh* (2008), "three concerned citizens challenged the constitutionality of certain provisions of the Emergency Powers Ordinance (EPO) and Rules (EPR), without challenging the legality of the Emergency itself. In its judgment delivered just a few days before the Emergency was lifted, the High Court Division voided certain provisions of these statutes that precluded judicial review of any

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[6] Although the right to enforce fundamental rights under Article 102 (1) of the Constitution was suspended, judicial review of 'legality' of other issues under Article 102 (2) remained unaffected

Emergency-decisions and curtailed the judicial power of senior courts to grant bails, hear appeals against interim court orders, and suspend sentences. The Court stressed that the provisions under challenge were an affront to the principles of justice and the due process of law. Interestingly, although it stopped short of striking down the Emergency as unconstitutional, the Court observed that, under the Constitution, Emergency cannot continue for an indefinite period. An appeal against the decision in *Advocate Sultana Kamal* has since remained pending in the Appellate Division which in its interim order stayed the judgment's efficacy. Full-fledged constitutionality-challenges to the 2007 Emergency went to the Court only during the waning days of Emergency" (40 BLC HCD 2009: 141, 198, 189-90).

In *M. Asafuddowla and Others* v. *Bangladesh* (2008), "constitutional provisions enabling the President to declare a state of emergency generally and particularly to postpone the enforcement of constitutional rights were challenged.[7] The Court issued a *rule* calling for explanations from the government, but the case was not heard in the context of the withdrawal of Emergency. Alongside the PILs, the 2007 Emergency saw other ordinary constitutional cases with significant implications for constitutionalism and, strategically, for the future exercise of Emergency powers. The Court, however, seemed to be more confident in exercising activism regarding issues that did not directly concern the legality or efficacy of the Emergency regime." In *Md. Idrisrur Rahman* v. *Bangladesh*(WP No. 3228 2008). For example, "the High Court Division adjudged unconstitutional the Supreme Judicial Commission Ordinance 2008 on the ground that the Ordinance breached the constitutional principle of judicial independence by providing for a Commission with majority members from outside of the Judiciary. In another Ordinance, 2008 unconstitutional not only for violating the principle of judicial independence but also for not being within the President's constitutional power to make such a constitutive ordinance during the caretaker government's tenure."

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[7] Indeed the petitioners challenged the Constitution (2nd Amendment) Act 1973 that made provisions for Emergency

The above brings into sharp focus the proper judicial role during an Emergency. "The traditional constitutional-legal theories often refute a role for the Court in helping the troubled nation to restored democracy. The 'Conventional View 'of the Court's role during an Emergency, from across the world, is that the judiciaries lack capacity to prevent executive excesses in times of Emergency and that the judicial protection of rights in such times appears more elusive than real. In an important recent study on Asian Emergency-time judiciaries, Arun Thiruvengadam has argued that, Asian judiciaries have by and large made a remarkable shift in their approach to judicial review of Emergency powers, by adopting a robust rather than a conventional stance" (Thiruvengadamn .n d).

This author has, however, argued that, "despite this marked shift in judicial review approaches, whether a particular judiciary would actively review Emergency powers ultimately depends on mainly internal facilitative or supportive societal factors (Iyer 2000). Seen in light of this important insight, it is clear that, in deciding the cases concerning Emergency the two Divisions of the Supreme Court of Bangladesh took largely differing approaches the High Court Division took a dynamic interpretive role vis-à-vis the Emergency laws while the Appellate Division mostly embraced legal formalism and uncritically deferred to the Executive. Glancing through the above cases one gets the sense that the Appellate Division almost always displayed a policy preference for not interfering with the Executive, although it is unclear whether it maintained strategic silence or abandoned its autonomy to the external political pressure ensuing from the Emergency (Hossain 2004).

Admittedly, "the Emergency regime of the recent past created an atmosphere of fear and humiliation for the top judges who had to work in a situation of virtual non-independence as opposed to supporting factors such as judicial freedom and a rule-of-law based government. Nevertheless, given that the High Court Division tried and followed an intense form of judicial review, the pertinent question is how one should evaluate the legal reasoning that underlies the Appellate Division's excessive deference. It seems that, on the whole, the Bangladeshi Judiciary's role during the Emergency in enforcing constitutionalism was a mixed bag of unconventional stance now and the taking of

traditional, deferential path then" (Arifur 2016). As the interpretive techniques of the Appellate Division show, in addition to the atmosphere of judicial subjugation, "the spill-over impact of past restrictive jurisprudence, and the background factors that often influence the judges' minds, it is the Appellate Division's legal formalism that is in part responsible for their deplorable silence during the Emergency" (Schmidhause 1999).

Following the post-Emergency installation of a new democratic government in 2009, "the Bangladeshi top Court seems to be increasingly acting in order to overcome the crisis of public confidence it incurred during the Emergency. This post-Emergency period can to some extent be likened to that of India that gave birth to the most powerful and activist court in the world and also to Pakistani Supreme Court's post-Emergency (2008 onwards) new activism. As seen above, the Supreme Court in recent times has been issuing activist judgments in the protection of fundamental rights and the principles of constitutionalism, often issuing novel remedies and making policy suggestions" (Halim 2004). For example, it is in this period that, "the Appellate Division has confirmed the High Court Division's invalidation of the 5th Amendment to the Constitution that constitutionalized a martial law regime. Also, unlike earlier *suomotu* interventions solely in the area of criminal injustice, the High Court Division has been increasingly acting on its own in other areas of constitutionalism by issuing *mandamus* and prohibitive orders. Also mentionable is the new Court's emerging attempts in recent PILs towards crafting a cooperative model of judicial review, notably creating therein, a role for experts and government agencies" (Government of Bangladesh v. Ministry of Home Affairs and Others 16 BLT HCD 2008).

The judges in Bangladesh have promoted and protected the cause of constitutionalism through active resolution of constitutional issues based on globally informed but locally grounded interpretations of the Constitution. Although, the Judiciary in Bangladesh has not yet become what is called the "Good Governance Court" has by and large earned some commendable achievements in enforcing constitutional justice.

CHAPTER – 4

FUNCTIONING OF JUDICIARY

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The Country Bangladesh emerged as unitary state in early 1970's and the immediate question was to decide whether the country needs two separate establishments as Supreme Court and High Courts to decide their respective functions in a country with no federal problems or issues. Secondly, even during the Pakistan period, it was widely felt that the seat of the High Court ought to sit in circuit, at least in the major districts towns of East Pakistan, to make justice available to all the litigants, particularly to the poor ones, who did not have financial resources to travel up to Dhaka. Keeping these two major issues in mind, the structure of the superior branch of the Judiciary was to be determined. Bangladesh being a non-federal state, the judicial structure was also to be rationalized. The idea of, having a federal or Supreme Court is primarily linked up with a Federal form of government where the major functions of such courts besides the interpretation of law and the Constitution was to resolve the rights, obligations and disputes between the centre and the states and between the state themselves (Ahmed 1983: 135).

It is believed that rules and regulations within the state are maintained through the administration of justice and the confidence of the people depends on the punctual, well-organized, impartial and independent administration of justice. Moreover, Judiciary acts as the custodian of human rights. The Judiciary consists of magistrates and judges, charged with the function of administration of justice. In early times, it was done by some social associations like churchs, guilds, Panchayats or by dominant landlords etc. Nowadays, the administration of justice is done by the constitutionally established institutions, whose sole purpose is to dispense justice according to *Rule of Law*. The chief function of the Judiciary is to punish criminals, dispense fair justice as per Rule of law and defend the innocents from damage and usurpation. Thus the nature of judicial function demands that the judges ought to acquire great legal intelligence, authenticity to

the Constitution, determination of character and above all sincerity and autonomy (Rohini 2011).

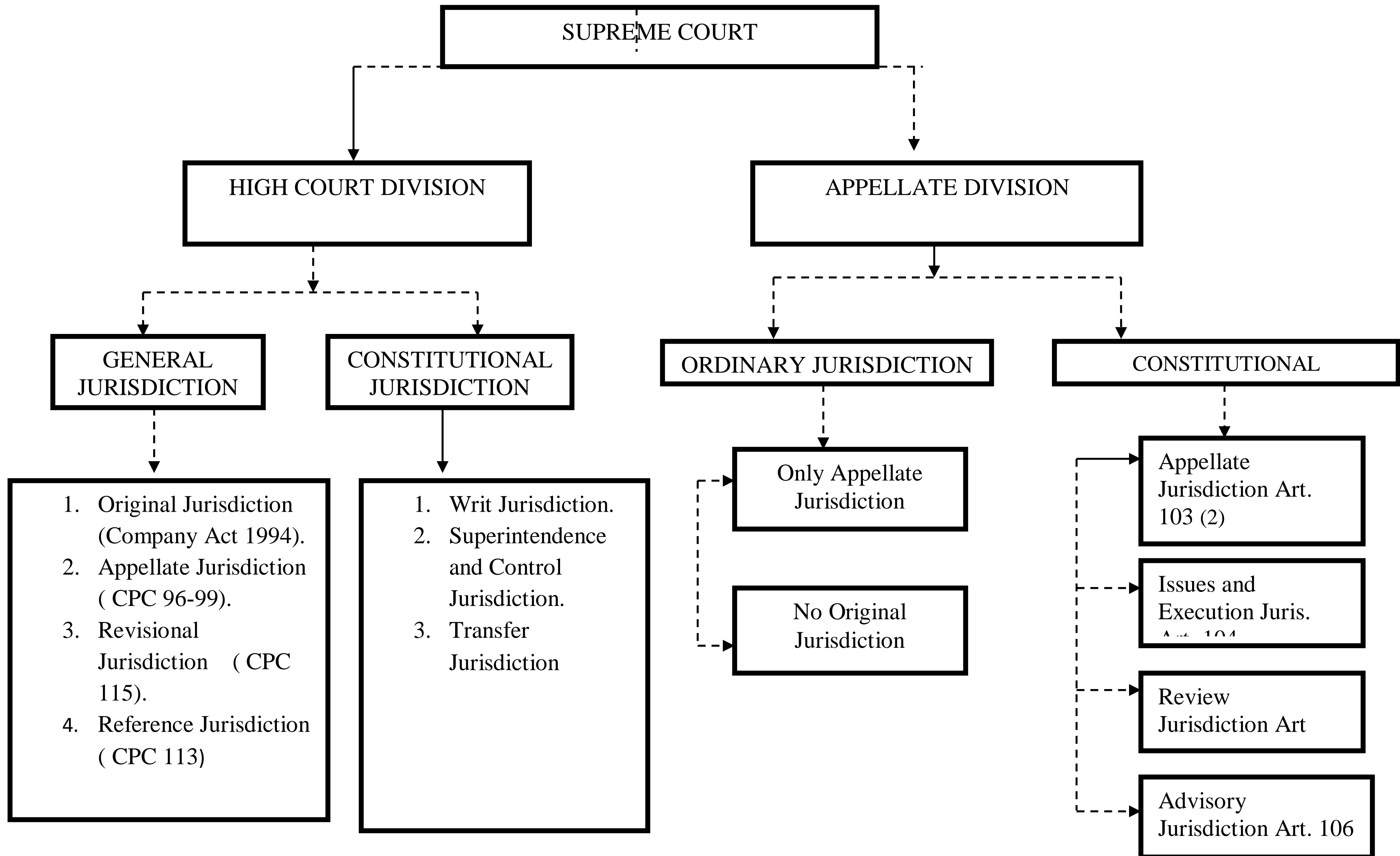
> In pursuance of the High Court of Bangladesh Order, 1972, promulgated on 17th January 1972, the High Court which existed on 26th March 1971 started functioning with almost all powers exercised by the then High Court of judicature at Dacca in East Pakistan. Under the laws continuance Enforcement Order 1972, the Subordinate Judiciary and Magistracy continued to function after taking oath of allegiance to Bangladesh. On 4th November 1972, the Constituent Assembly of Bangladesh framed and passed the Constitution of Bangladesh within a short span of time after independence and it came into force on 16th December 1972 (The High Court of Bangladesh Order 1972).

4.1: Functions of the Formal Judiciary

The Judiciary performs various functions in a modern democratic state. The most important function of the Judiciary is to understand and interpret laws, punishes those who breach them, therefore, by doing this it protects individual's liberties and rights against violation. As we know that the Judiciary of Bangladesh consists of both formal and informal; the former consists of Supreme Court, Sub-ordinates Courts and tribunals and latter consists of *Shalish*.[1] Both the formal and informal Judiciary performs various functions in the state of Bangladesh. According to the available literature, one could know that there are large varieties of Subordinate Courts and tribunals. Such courts and tribunals are formed by some significant statutes. All their powers, functions and jurisdictions are well determined by the relevant statutes.

[1]"In Bangladesh Shalish is usually an all-male affair and a traditional justice system and non-state justice system found in rural areas by which resolves conflicts between individuals, family, lineage, neighbor about land or other things, unlawful activities, ill-feelings, non-cooperation etc. or in other words it is just like Panchayat system" (Hasle 2003: 106).

The Legal System of Bangladesh after Separation:



4.1.1: Function of the Supreme Court

The Supreme Court and the Subordinate Court of Bangladesh perform different kinds of functions to interpret Law of the Land and it has different obligations to the people of the society. The Supreme Court is vitally important for the protection of the basic rights of the citizens. Its judgement has a touch of finality and people repose enormous faith in this credible institution. It is a repository of the collective trust of the people of Bangladesh. It plays a key role in sustaining democracy in Bangladesh. Transparency and accountability are its watchwords and it has played a stellar role in making the executive government accountable. It nudges the government to perform its duties religiously. It takes its neutrality very seriously. It is committed to protection of fundamental rights of people irrespective of their religious faith. The Supreme Court has stood firm as the torch-bearer of secularism even when certain political constituencies have undertaken acerbic criticism of courts' lack of reverence towards Islamic leanings. The right-wing groups periodically launch tirades against progressive and secular judgements of the court. Hence, the Supreme Court turns out to be a very critical institution for the survival of secular liberal democracy in Bangladesh.

4.1.2: Advisory Jurisdiction

In Bangladesh, "Advisory Jurisdiction of the Supreme Court commenced from the Government of India Act 1935, Section 213, of which is almost in the same terms as in Article 106 of the Constitution provided that for reference to the Federal Court by the Governor-General. Similar provision was there both in the Constitution of 1956 (Article 162) and of 1962 (Article 59) of the then Pakistan. Almost all the countries in South Asia have the same provisions. The Supreme Court of Canada also exercises advisory jurisdiction. Under Section 60 of the Canadian Supreme Court Act, 1906 the Governor-General-in-Council may refer essential question of law concerning certain matters to the Supreme Court for its advisory opinion" (Halim 1998: 401).

The Constitution of Bangladesh provides Advisory jurisdiction under Article 106. It states: "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 Constitution of Bangladesh 2004).

The Constitution stipulates that the advice tendered under Article 106 by the Supreme Court to the President will be non-binding in nature (ibid).

On 28 December 1994, "three major opposition parties, Awami League, Jatiya Party and Jamaat-e-Islami submitted resignation letters to the Speaker on identical proof demanded for holding general elections under a neutral non-partisan caretaker government. On 23 February 1995, the Speaker informed the House that in his perspective Article 67(2) of the Constitution provides for a mass resignation. In addition if the opposition members remained absent from parliament for 90 days, according to Article 67 (1) (b), their seats would be declared vacant" (Rehman 2008). However their seats were not declared empty and their resignation letters were also not accepted. The matter was referred by President Abdur Rahman Biswas to the Supreme Court to ascertain its opinion under Article 106 of the Constitution.

The Appellate Division of the apex court gave the opinion that it was not ready to decline the Presidential reference. The Supreme Court observed that "if a member or members of parliament remain absent without leave of Parliament for 90 consecutive sitting days as mentioned in the Article 67 (1) (b) of the Bangladesh Constitution, he/she or they do it on pain of vacating his/her or their seats. Therefore, there must be bye-elections for those seats and new members must be elected to stand for the people. The Supreme Court further observed that the walkout, consequent added that 90 consecutive sitting days must be computed excluding the period between the two sessions and even adjournments in a particular session between sitting days. The Supreme Court further held that the Speaker would compute and determine the period of absence. By giving this advisory jurisdiction, the Supreme Court significantly contributed to democratic governance" (Mollah 2008:259-260).

4.1.3: Rule Making Power

According to Article 107 of the Constitution of Bangladesh

(1) "The Supreme Court may formulate rules for regulating the practice and procedure of each division of the Supreme Court and of any court subordinate to it.
(2) It may delegate any of its functions under clause (1) and Article 113 to a division of that Court or to one or more Judges.
(3) Chief Justice shall decide which Judge is to constitute any Bench of a division of the Supreme Court and which Judges are to sit for any purpose.
(4) He may empower the next most senior-Judge of either Division of the Supreme Court to work out in that division any of the powers conferred by Clause (3) or by rules made under this Article" (The Constitution of Bangladesh, 2004).

"It is evident in the case of *Mahiuddin v Dhaka* University (DLR 1983). The Supreme Court ruled that *audi alterampartem*[2]applies to administrative as well as to judicial bodies such as enquiry committees. Thus, where a petitioner's license was cancelled without being given a fair opportunity to convert the allegation brought against him and the action was condemned as breach of Article 27 of the Constitution which provides for Equality before Law" (Mollah 2008: 254).

4.1.4: Supreme Court as a Court of Record

Generally, the Court of Record means that its decisions and judicial proceedings are recorded for perpetual memory. These records have evidentiary value and are not to be questioned when produced before any court because they operate as precedents to be followed when occasions arise (Ahmed 1998:135). As mentioned in the Article 108 of the Bangladesh's Constitution the Supreme Court shall be "a court of record and shall have all the powers of such a court including the power subject to law to make an order

[2]Audi alterampartem or rule of fair hearing is a basic principle of natural justice, which protects the little man from arbitrary administrative actions whenever his right to person or property is Jeopardised (Mollah 2008).

for the investigation of or punishment for any contempt of itself. The role of the Supreme Court has many facets such as protection of fundamental rights, scrutiny of laws, monitoring discretionary powers, equal justice for all, judicial activism, judicial remedies, exercise of supervisory power, guardian of the constitution in the context of good governance etc"(Hossain 2014).

4.1.5: Protection of Fundamental Rights and Equal Justice for All

The Preamble of the Bangladesh's Constitution (2004) states that "it should be a fundamental aim of the state to realize through the democratic process a socialist society in which the rule of law, fundamental human rights and freedom and political, economic and social equality and justice for all citizens will be ensured. The Constitution incorporates a long list of fundamental rights in Part III, Articles 27-44 with an aim to achieve all these. For the safeguard of these fundamental rights of the citizen, Article 44 (1) of the Constitution guarantees the right to move High Court division of the Supreme Court. Article 102 (1) (2) of the Constitution provides that on the application of any aggrieved person, the HCD may give such directions or orders to any person of the authority. Every effort has been made to preserve the liberty of the people in accordance with the Constitution" (Mollah 2008:247).

4.1.6: Guardian of the Constitution

The Supreme Court has been trying to protest against any action violating the Constitution. "The protest made by the Chief Justice against the appointment of the nine additional judges without consulting him is a striking example of such an action. However, in practice the Supreme Court cannot safeguards the rights of many persons who are illiterate and do not understand the judicial process of it. They are also too poor to hire lawyers to advocate their case of injustice. In fact the judicial process is too cumbersome and costly. So the Supreme Court is beyond the approach of the common people" (Ahmed 1998: 136).

4.1.7: Power and Jurisdiction of the High Court Division

The High Court Division is an independent Court with its powers, functions and jurisdictions are well cleared under the Constitution and others different laws. The High Court Division shall have such original, Appellate and other jurisdictions, powers and functions as are or may be conferred on it by this Constitution or any other laws.

4.1.8: *Original Jurisdiction*- It means that, “jurisdiction whereby it can take a case or suit as a Court of first instance. It is for the ordinary laws to prescribe what particular subject matter will come under the ordinary jurisdiction of the HCD. For example, the Companies Act, 1913, the Admiralty Act, 1861 and the Banking Company's Ordinance, 1962 etc. have conferred on the High Court Division of the ordinary jurisdiction” (Alam 2010).

4.1.9: *Appellate Jurisdiction*- “It is which may confer on the HCD Appellate Jurisdiction on any matter. For example the Criminal Procedure Code and others(CPC) have conferred on the HCD appellate jurisdiction.

4.1.10: *Revision Jurisdiction*- It means “the Power whereby it examines the decisions of its Subordinate Courts' for example Section 115 of the CPC has conferred on the HCD the revision power” (Halim 2010).

4.1.11: *Reference Jurisdiction*- It “means the power whereby the High Court Division 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: 380-381).

4.1.12: *Writ Jurisdiction*

The underlying basis of the writ jurisdiction in Bangladesh is provided by the Article 102 of the Constitution. Under this provision, “the court can play a role in the implementation of the fundamental rights of the aggrieved citizens. Moreover, it also encapsulates the power of judicial review of the court. If any order passed by government ministry or government officer in official capacity either central or district level, affecting one’s

property, freedom, right or office, the aggrieved person may proceed against such order in *Writ Petition* proceeding in the High Court Division. Writ petition lies only against government or public body and not against any private individuals as provided in Article 102 of the Constitution of Bangladesh. It is a written document by which one is summoned or required to do or refrain from doing something. Historically writ originated and developed in British legal system" (Pirzada 1966: 417).

4.1.12.1: Class of Writ Petition

4.1.12.2: ***Habius Corpus*****:** It is against illegal detention of any person Article 102 (2) (b) (i) of the Constitution. The word Habeas Corpus means "have his body" to have the body before the court. So "it is a kind of order of the Court that commands the authorities holding an individual in custody to bring that person in court. The authorities must then explain in the court why the person is being held. The court can order the release of the individual if the explanation is unsatisfactory" (Chowdhary 2014). The writ of Habeas Corpus is also vitally important as it provides a "method for securing the personal liberty of the subjects by affording an effective means of immediate release from illegal or unjustifiable detention, whether in prison or in private custody" (Pirzada 1966: 435).

4.1.12.3: ***Certiorari*****:** It is against any Proceeding Article 102(2) (a) (ii) of the Constitution. The term certiorari means to be certified or to be more fully informed of. As mentioned in the Article 102(2) (a) (ii) of the Constitution of Bangladesh "declaring that any act done or proceeding taken by a person performing functions in connection with the affairs of the Republic or of a local authority has been done or taken without lawful authority and is of no legal effect" (The Constitution of Bangladesh 2016).

4.1.12.4: ***Mandamus*****:** to compel to act lawfully under Article 102 (2) (a) (i) of the Constitution. Literally the term Mandamus means 'we command'. According to Article 102 (2) (a) (i) of the Constitution "directing a person performing any functions in connection with the affairs of the Republic or of a local authority to refrain from doing

that which he is not permitted by law to do or to do that which he is required by law to do"(ibid).

4.1.12.5: ***Prohibition***: The function of prohibition was to, "limit the jurisdiction of the lower courts. Prohibition as a writ means one which means prevents a tribunal possessing judicial or quasi-judicial powers from exercising jurisdiction over matters not within it cognizance. Thus prohibition is originally a judicial writ since it can be used against a judicial or quasi-judicial body and not against an administrative body or public corporation" (Halim and Siddiqi 2015).

4.1.12.6: Q*uo-warranto*: It is also very important under writ jurisdiction. It provides that if "any person who occupies or usurps an independent substantive public office or franchise or liberty is asked to show by what authority he claims it, so that the title to the office franchise or liberty may be settled and unauthorized occupants be ousted by judicial order" (Halim 1998:385). It ensures legal sanction and security from such cases.

According to Article 102 (3) of the Bangladesh Constitution, "notwithstanding anything contained in the foregoing clauses, the High Court Division shall have no power under this article to pass any interim or other order in relation to any law to which article 47 applies. And under article102 (4), Whereon an application made under clause (1) or sub-clause (a) of clause (2), an interim order is prayed for and such interim order is likely to have the effect of (a)prejudicing or interfering with any measure designed to implement any development programme, or any development work; or (b)being otherwise harmful to the public interest, the High Court Division shall not make an interim order unless the Attorney-General has been given reasonable notice of the application and he (or an advocate authorized by him in that behalf) has been given an opportunity or being heard, and the High Court Division is satisfied that the interim order would not have the effect referred to in sub-clause (a) or sub-clause (b)" (The Bangladesh Constitution 2004).

4.2: Supervisory Power of the High Court Division

The High Court Division (HCD) has been bestowed the power to administer and control all courts and tribunals which are subordinate to it under the supervisory jurisdiction. The

most important pre-condition for the exercise of this jurisdiction is that "the court or tribunal must be Subordinate to the HCD" (Alam, 2010). This power is constitutional power and is in addition to powers of superintendence given under Article 102.

4.3: Jurisdiction as to Transfer of cases from Subordinate Courts to HCD

Under Article 110 of the Bangladesh Constitution "If the High Court Division is satisfied that a case pending in a court subordinate to it involves a substantial question of law as to the interpretation of the Constitution on a point of general public importance, the determination of which is necessary for the disposal of the case, it withdraws the case from that court and may

- either dispose of the case itself or
- determine question of law and return the case to the Court from which it has been withdrawn together with a copy of the judgement of the division on such question and the Court to which it has been so returned or transferred shall, on receipt thereof, proceed to dispose of the case in conformity with such judgement of the High Court Division.

The number cases pending before the Subordinates Courts are not large at all. Such a situation seems to be rare. The main reason may be that the Subordinate Courts generally deal with cases many of which are related to matters other than Constitutional. These may be solved by the existing laws, rules and regulations" (Ahmed 1998: 132).

4.4: Jurisdictions, Powers and Functions of the Appellate Division

The Appellate Division as the apex organ of the Judiciary "shall have the jurisdiction to hear and determine appeals from judgements, decrees, orders or sentences of the HCD" as mentioned in the Article 103 (1) of the Bangladesh Constitution. And according to Article 103 (2) of the Bangladesh Constitution an appeal to the Appellate Division is admissible under the following conditions-:

(a) ***Interpretation of Court***-The HCD certifies that the case involves a substantial question of law as to the interpretation of this constitution; or

(b) ***Appeal against Death Sentence***-The HCD has sentenced a person to death or to imprisonment for life, or

(c) ***Contempt of HCD***-The HCD has imposed punishment on a person for contempt of that division; and in such other cases as may be provided for by Act of Parliament.

Under Article 103(3) of the Constitution, HCD has the Discretionary power of the Appellate Division. It is supposed to be exercised in exceptional cases and not routinely. The Appellate Division is not expected to "grant leave to appeal unless it can be proved that exceptional and special conditions exist, that substantial and grave injustice has been done and the case in question presents features of sufficient gravity to warrant a review of the decision appealed against" (Ahmed 1998: 132).

4.5: Original Powers of the Appellate Division

The Appellate division has some original powers also

- Under Article 104 of the Constitution, "it has the power to issue such directions, orders, decrees or writs as may be necessary for doing complete justice in any cause or matter pending before it."
- The Appellate Division 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 Appellate Division as mentioned in the Article 105 of the Bangladesh Constitution" (The Constitution of Bangladesh 2004).
- According to Article 106 of the Bangladesh Constitution the Appellate Division plays some advisory role.

The law/judgements of the Appellate division is by nature binding upon the High Court. Moreover, it is compulsory on all subordinates courts. It is also provided that "all authorities both executive and judicial are required by the Constitution to act in aid of the

Supreme Court whenever needed" (Bangladesh Government & Business Contacts Handbook 2007).

In the Constitutional history of Bangladesh, the first case about the advisory rule of the Appellate Division of the Supreme Court may be discussed here that on 1st March 1994, while there was a discussion in parliament to call attention notice of the killing of Herbon, there was uproar over a part of the statement made by the then Information Minister and the Deputy Leader of the House requested the Deputy Speaker to expunge the relevant part of the statement from the proceedings of the house and the Information Minister himself expressed the regret and also sought expunging of the statement. Yet the leader of the opposition along with all members of the opposition except Mr.Surunjit Sen Gupta staged a walked out. The Deputy Speaker announced the expunging of the statement to which the opposition parties had taken exception but the opposition members did not return to the house.

The opposition members while so acting, by-election to Magura constituency was held and the opposition parties made certain allegations to the Election Commission after causing equity and having found the allegations not true declared the final result where upon the opposition parties declared by cancelling the result declared by the Election Commission, they would return to parliament. While the negotiations between the government and the opposition parties were being held for resolving the problem. The opposition parties added a new demand namely the ruling party must launch a bill in parliament amending Constitution to provide for holding at least three future parliamentary elections under caretaker government (Ahmed 1998: 133-134).

The opposition party as their demand was not accepted by the ruling party continued boycott of the sessions of the parliament. So on 28th December 1994, leaders of the opposition parties submitted to the Speaker the resignation letters to their members. From the date of walkout of the date of resignation, members of Parliament remained absent for 90 days and as per 67 (1) (b) of the Provision of the Constitution, their seats would be declared vacant. Because of the controversy between ruling party and opposition party,

thus the question of law has arisen. Pursuant to the power conferred on the President by Article 106 of the Constitution, he referred the matter to the Supreme Court to report its opinion upon the controversies.

4.6: Functions of the Supreme Judicial Council

The functions of the Council as mentioned in the article 96 (4) of the constitution are:

(a) "To prescribe a Code of Conduct to be observed by the Judges; and

(b) To inquire into the capacity or conduct of a Judge or of any other functionary who is not removable from office except in like manner as a Judge.

Under Article 96 (5) of the Constitution, where upon any information received from the Council or from any other source, the President has reason to apprehend that a Judge-

(a) may have ceased to be capable of properly performing the functions of his office by reason of physical or mental incapacity, or

(b) May have been guilty of gross misconduct, the President may direct the Council to inquire into the matter and report its finding" (Halim and Siddiqi 2015).

According to article 96 (6) of the Constitution, "If after making the inquiry, the Council reports to the President that in its opinion, the Judge has ceased to be capable of properly performing the functions of his office or has been guilty of gross misconduct; the President shall, by order, remove the Judge from office. For the purpose of an inquiry this article, the Council shall regulate its procedure and shall have, in respect of issue and execution of processes, the same power as the Supreme Court as mentioned in the Article 96 (7) of the Constitution. And Article 96 (8) deals with that, a Judge may resign his office by writing under his hand addressed to the President".

4.7: Functions of the Subordinate Judiciary in Bangladesh

The main function of a court of law is the administration of justice which means the protection and enforcement of rights and the punishment and prevention of wrong by means of physical force of the state. Civil justice is concerned with the enforcement of rights in civil proceedings, where plaintiff claims a right against defendant who is alleged

to have committed a wrong. The court secures these rights for the plaintiff by compelling the defendant to perform a duty. One scholar has rightly pointed out:

> "On the other hand Criminal justice is concerned with the punishment of the wrong which in Criminal proceedings is called a crime. In a Criminal proceeding the complainant claims no right but makes an allegation against the accused that he or she has committed a wrong or crime. Here the court does not require the accused to perform any duty but punishes him or her if it is satisfied that an offence has been committed by the accused" (Akkas 2006: 1).

All the powers, functions and jurisdictions are well determined by the respective statutes. These are basic courts in the Judiciary of Bangladesh. A substantial number of the cases are tried and heard in such courts and tribunals. Certain tribunals are termed as, "*Administrative Tribunals*, *Nari-o-ShishuNirjato Daman Tribunals*, *Special Tribunals* etc. Such courts and tribunals spread all over the country at district levels."It is also stated that "the Subordinate Courts in Bangladesh can be divided in three broad classes, namely, Civil Courts and Criminal Courts and Administrative courts" (Siddiqui 2010).

4.8: Functions of the Civil Judiciary in Bangladesh

The Civil Courts Act of 1887"Provides for five tiers of Civil Courts in a district, which are as (i) Court of District judge, (ii) Court of Additional District judge, (iii) Court of Joint District judge, (iv) Court of Senior Assistant judge and (v) Court of Assistant judge. The first 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. The rest two are generally courts of appeal in civil matters. District judge is the head of the Judiciary in each of the district. District judge has mainly appellate jurisdiction, but in some matters he has original jurisdiction too. Jurisdiction of the additional judge is co-extensive with that of the district judge. He/she discharges the judicial business assigned to him/her by the district judge. Appeals to the judgements, decrees and orders passed by

the Assistant judges and subordinate judges lie to the district judge" (Halim 2008). It needs to be mentioned:

> "Similarly district judge may transfer the appeals preferred against judgements, decree or orders passed by the Assistant judges to the subordinate judges for disposal. Subordinate judges have mainly unlimited civil original jurisdiction. Civil courts while deciding any question regarding succession, inheritance, marriage or caste or any religious usage or institution apply the Muslim law in cases where the parties are Muslims, Hindu law in cases where the parties are Hindus except so far as such law has been altered or abolished by any enactment made by the legislature" (Banglapedia 2013).

"Civil Courts decide disputes between a subject and the state or between one individual and the other, it is only the suits of civil nature that can be adjudicated in Civil Courts (ibid). The Civil Courts subordinate to the High Court Divisions are established by or under several enactments". Some of them are set up under special and others under general laws having well defined jurisdiction to administer justice in civil matters.

4.8.1: The Court of District and Additional District Judge

"A District Judge exercises administrative control over all civil courts within the local limit of his jurisdiction. The local limit is determined by the government. His administrative control is supervised by the High Court Division. A district Judge has in respect of all suits in his district, original, appellate as well as revisional jurisdiction.
The Judicial function of an Additional district Judge is similar to that of a District Judge. He tries those cases which are transferred to his court from the Court of District Judge or from other Additional District Judges" (Talukder 1994).

4.8.2: The Court of Subordinate Judges

A subordinate judge exercises two types of powers namely, "Appellate and Original. His pecuniary jurisdiction in original suit is unlimited. A district judge may transfer to a subordinate judge, under his administrative control, any pending appeal from the decree or order of an Assistant Judge. The appeals so transferred are disposed by the

Subordinate judge in exercise of his appellate power as a delegate of the district Judge" (Chowdhury 2014).

4.8.3: The Court of Senior Assistant Judge and Assistant Judge

The Court of Assistant Judge, "stands at the base of hierarchy of Civil Courts in Bangladesh. It exercises original and revisional jurisdiction. Normally its pecuniary jurisdiction extends to the suits of which value does not exceed 20 thousands Taka. Some selected senior Assistant judges exercise higher pecuniary jurisdiction, which in no case exceeds 50 thousands Taka. An appeal from a decree and order passed by an Assistant judge lies to the Court of District Judge. Recently, the Court of Assistant Judge has been invested with revisional powers in petty civil matters coming from Village Courts and Conciliation Boards under two special Statutes" (Halim 2004).

4.8.4: Family Court

Under the family Courts Ordinance of 1985, all the Courts of Assistant Judges are to act as the Judge of Family Courts. This Court deals with the cases relating to divorce, maintenance, guardianship and superintendence of Children, etc. except in certain cases, appeal against the decisions of a Family Court lies to the Court of District Judge.

4.9: Administration of Justice in the Civil Court

- *The Assistant Judge*- "when the valuation of the civil suit, valued according to the provisions of Suit valuation Act 1887, is up to 2, 00,000/- Taka the plaint is to be presented in that Court of the local area.
- Senior *Assistant Judge*- "when the valuation is above that amount and up to 4, 00,000 Taka the plaint is to be presented in the Court of Senior Assistant Judge of the local area.
- *Joint District Judge*- "when the valuation is above that amount, the plaint is to be presented in the Court of Joint District Judge of the local area" (Halim 2004).

4.10: Functions of the Criminal Judiciary in Bangladesh

The law of Criminal Procedure in Bangladesh is known as the Code of Criminal Procedure 1898, which was enacted by the legislature of undivided British. For an effective administration of Criminal Justice, it is very important that there be a regular and certain Criminal Procedure. In special terms, the main object of the law of Criminal procedure is to provide the means and lay down the methods by which

(1) The facts concerning an offence committed or supposed to be committed, may be ascertained as speedily and accurately as possible;
(2) Persons reasonably supposed to be guilty may be brought before the courts;
(3) An impartial inquiry before a court may be secured;
(4) The courts are to reach their decisions after full consideration of all the available and admissible evidence which it may be proper to take and
(5) When there is a conviction, the infliction of the penalty properly ordered by the Court is to be secured.

"The Criminal courts are created under the Criminal Procedure Code, 1898. The Criminal Courts are divided into two tiers, namely: the Court of Session and the Magistracy. The Court of Session consists of

- The Court of Session Judge
- The Court of Additional Session judge and
- The Court of Assistant Session Judge" (Haque 2006).

4.10.1: Jurisdiction of the Session Judge

A Session Judge exercises original, appellate and revisional jurisdiction. In the original jurisdiction, a Session judge can try offences under the Penal Code 1860 or under any other law. Schedule II of Criminal Procedure Code shows the offences under the Penal Code 1860 which are triable by Session Judges. The offences include waging or attempting to wage war against Bangladesh, sedition murder, culpable homicide and counterfeiting currency notes or bank notes. Under the appellate jurisdiction, a Session judge can hear and determine appeals from convictions and sentences passed by an Assistant Session Judge, a District Magistrate, an Additional District Magistrate or other

Magistrate of the first class. However, when an Assistant Session Judge passes any sentence of imprisonment for a term exceeding five years or when a Magistrate passes any sentence for sedition charged under Section 124a of the Penal Code 1860, the Session judge cannot exercise appellate jurisdiction. In such cases appeal lies to the High Court Division only. A Session judge can exercise revisional jurisdiction for the sake of law (ibid).

4.10.2: Jurisdiction of Additional Session Judge

The jurisdiction of an Additional Session Judge is similar to that of a Session judge. However, an Additional Session Judge cannot hear cases or receive or admit an appeal or a revision from any inferior court by him/herself. He or she can try such cases or hear appeals or revision of such cases as directed by the Government or as transferred or made over to him or her by the Session judge. For administrative purposes, a Session judge would hold the charge of Session division and from this point of view an Additional Session judge would be subordinate to Sessions judge but in exercising judicial powers, an Additional Session judge is not deemed to be subordinate to Session judge (Ahmed 2014).

4.10.3: Jurisdiction of Assistant Session Judge

"An Assistant Session judge has only one jurisdiction, that is, to say original jurisdiction. Assistant Session judges can try such cases as the Government by general or special order directs them to try or as the session judge by general or special order may make order to them for trial. Unlike an Additional Session judge an Assistant Session judge is subordinate to the Session judge and consequently for the exercise of revisional jurisdiction the Court of an Assistant Session judge is an inferior Criminal court and the Session judge can entertain revisions against the orders of the Assistant Session judge" (Halim 2004)

4.11: The Magistracy of Bangladesh Criminal Court

"The Magistracy of Bangladesh Criminal Court divided into two classes namely:

- The Judicial Magistrate

- The Executive Magistrate

The Court of Judicial Magistrate is four in class, namely:

- Court of Chief Judicial Magistrate
- Court of 1st Class Judicial Magistrate
- Court of 2nd Class Judicial Magistrate and
- Court of 3rd Class Judicial Magistrate" (ibid).

Metropolitan Magistrates and Magistrate of the first Class:

The Courts of Magistrates in the metropolitan areas are organized separately as Courts of Metropolitan Magistrates. "Each Metropolitan Magistracy has one Chief Metropolitan Magistrate as head of the Institution. All magistrates in a Metropolitan Magistracy are First Class Magistrates, unlike magistrates in a District Magistracy. They are exclusively Criminal Courts" (Alam, 2010).

The courts of Metropolitan Magistrates and Magistrate of the first class may impose the following case:

(a) Imprisonment for a term not exceeding five years including such solitary confinement as is authorized by law and

(b) Fine not exceeding seven years.

Magistrate of the Second and Third class- "The courts of Magistrate of the second class may impose imprisonment for a term not exceeding three years, including such solitary confinement as is authorized by law and fine not exceeding 5000 Taka. A Magistrate of the third class may impose imprisonment for a term not exceeding two years and fine not exceeding 2000 Taka" (Akkas 2006: 21).

Jurisdiction of the Chief Metropolitan Magistrates and Metropolitan Magistrates:

A chief Metropolitan Magistrate or Metropolitan magistrates has original jurisdiction. "Under this jurisdiction they can try the offences shown in schedule II Criminal Procedure Code including sedition, assaulting or obstructing public and harbouring an offender who has escaped from custody. They can also try the petty offences including rioting, promoting enmity between classes, committing affray, voluntarily causing hurt and theft which are shown in Schedule II to be triable by any Magistrate".

District Magistrate and other Magistrates-"A District Magistrate and other subordinates Magistrates have original jurisdiction to try offences shown in Schedule II Criminal Procedure Code. Moreover a District Magistrate may hear appeals from sentence passed by a magistrate of the second class or third class but may direct than an Additional District Magistrate hear such an appeal" (Akkas 2006: 27).

An Executive Magistrate is mainly an administrative Magistrate, "holding the limited trial power only in mobile court. Executive magistrates also conduct summary trial trough mobile courts under the supervision of District Magistrate. Earlier with the introduction of *Upazila system*, courts of magistrates and Munsifs were established in each Upazila. In early nineties Upazila court system has been abolished" (Hossain 2012:32)

4.12: Jurisdiction of Administrative Courts and Special Courts

In the Article 117 (2) of the Constitution, says that "where any administrative tribunal is established under this article, no court shall entertain any proceedings or make any order in respect of any matter falling within the jurisdiction of such tribunal: Provided that Parliament may, by law, provide for appeals from, or the review of, decisions of any such tribunal" (The Constitution of Bangladesh, 2004).

Special Tribunals or Courts are established under Section 26 of the Special powers Act 1974. "These tribunals are certified absolutely to try the offences under different statues including the *Arms Act 1878 and the Explosive Substances Act 1908*. The offences include 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" (Halim 2008).

The Administrative Jurisdictional Tribunals consists of Administrative Appellate Tribunal, Administrative Tribunal, the Electricity Court, House Rent Controller, the

Settlement Court, the Land Appeal Board and the Labour court. Besides these courts, there are some other courts created under special laws which are as follows; Nari-O-Shishu Nirjatan Daman Adalat, Special Judge Court, Durto Bichar Tribunal, Special Tribunal, Juvenile court, Administrative tribunal, Artha Rin Adalat, Environment Court, Family Court and the Village Court". Village court was established with the objective of enabling rural people to settle their disputes and to offer them justice within a relatively short period of time with a minimum cost.

4.12.1: Administrative Tribunals

"As per the provision, the Jatiya Sangsad may by law establish one or more Administrative Tribunals to exercise jurisdiction in respect of matters relating to or arising out of terms and conditions of persons in the services of the republic, property vested in or managed by the government by or under any law, etc" (Banglapedia 2013).

4.12.2: Labour Appellate Tribunal

The main function of this tribunal is established to adjudicate disputes regarding employment of commercial or Industrial disputes. "Each Labour Court consists of a chairman and two members, one is appointed in consultation with the employers and the other in consultation with the employees. This Court, adjudicates industrial disputes, execution or violation of settlements complaints made by employers and employees/workers in respect of retrenchment, Lay off, termination and dismissal from service, non-payment of wages, compensation disabled in course of service, offences in respect of unfair labour practices, breach of or failure to implement settlement, illegal strike or lockout and non-compliance of Labour Court's order" (Official website of the Supreme Court of Bangladesh).

4.12.3: Durto Bichar Tribunal

"The Durto Bichar tribunal (speedy trial tribunal) is recently established by the Durto Bichar Tribunal Act in 2004 and its status is similar to the Court of Session judge. This court is responsible for adjudication of certain cases transferred to it by the government.

The judges of the Durto Bichar Tribunals are appointed from among judicial officers who are holding the rank of District judge" (Akkas 2006: 19).

4.12.4: Taxes Appellate Tribunal

"Any person aggrieved by an order of the Deputy Commissioner of Taxes may prefer an appeal to the Appellate Joint Commissioner or an order of the Inspecting Joint Commissioner to the commissioner (Appeal). If an assesses is aggrieved by an order of the Appellate Joint Commissioner or Commissioner (Appeal), he may prefer an appeal to the Taxes Appellate Tribunal

4.12.5: Customs, Excise and Value Added Tax Appellate Tribunal

"Any person aggrieved by a decision or order of any officer of Customs, Excise and VAT may prefer appeal to the commissioner that Any person aggrieved by an order or decision of the commissioner or commissioner) may prefer an appeal to the Customs, Excise and VAT Appellate Tribunal" (Karim 2005).

4.12.6: Election Tribunal

"Election disputes under the Representation of the Peoples Order, 1972 in respect of the election of Members of Parliament are being adjudicated by the High Court Division" (ibid).

4.12.7: The International Crime Tribunal

"This Tribunal was constituted by the Government in exercise of powers under section 6 of the International Crimes (Tribunal) Act, 1973 consisting of a Chairman and two members. This Tribunal was constituted for the purpose of trial of offences mentioned in Section 3, such as (a) Crimes against Humanity, (b) Crimes against peace, (c) Genocide, (d) war crimes, (e) Violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva conventions, 1949, (f) Any other crimes under the International Law" (Rahman and Sangita Farzana 2011: 35-36).

4.12.8: Artha Rin Adalat Ain 2003

"Sections 21 and 22 of the Artha Rin Adalat Ain, 2003 provide for Settlement Conference after the filing of written statement. "The Judge may request the parties and their lawyers to remain present in Court to resolve the dispute. The Judge will convene the meeting and fix up the venue, procedure and function. The conference shall be in camera. If the parties or their representatives agree to resolve the dispute, the parties or their representatives will sign the agreement and the lawyers and others will sign as witnesses" (Halim 2004). Thereafter that the Judge will pass a decree on the basis of the agreement.

4.12.9: Family Court

When the written statement is filed, "the Family Court shall fix a date ordinarily not more than thirty days from the date of filing written statement for a pre-trial hearing of the suit. On the date fixed for pre-trial hearing, the Court shall examine the plaint, the written statement and documents filed by the parties and shall ascertain the points in issue between the parties. If no compromise or reconciliation is possible, the Court shall frame the issues in the suit and fix a date for recording evidence. Family Courts are supposed to retain exclusive jurisdiction to try and determine maintenance cases. The Bangladeshi legislation relating to family courts is quite similar to the legislation applicable in Pakistan however the Pakistani Family Courts have broader jurisdiction extending beyond civil suits" (Haque 2006).

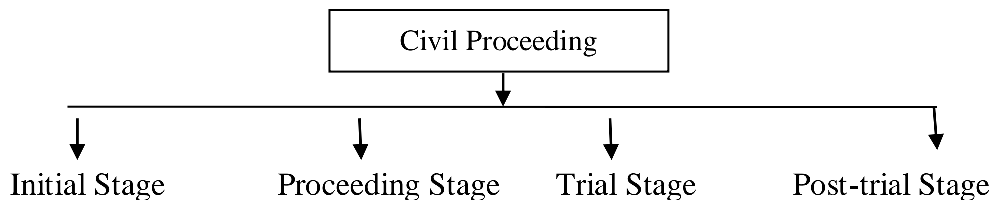
4.12.10: Bank Loan and Bankruptcy Court:

"A suit for recovery of loan of financial institutions including banks is to be filed in the Court of Joint District Judges of the local area vested with the power of Artha Rin Adalat. A bankruptcy suit is to be filed in the Court of the District Judge or Additional District Judge of the local area vested with the power of Deulia Adalat. All such courts and tribunals are also under the general superintendence and control of the Supreme Court" (Akash 2006).

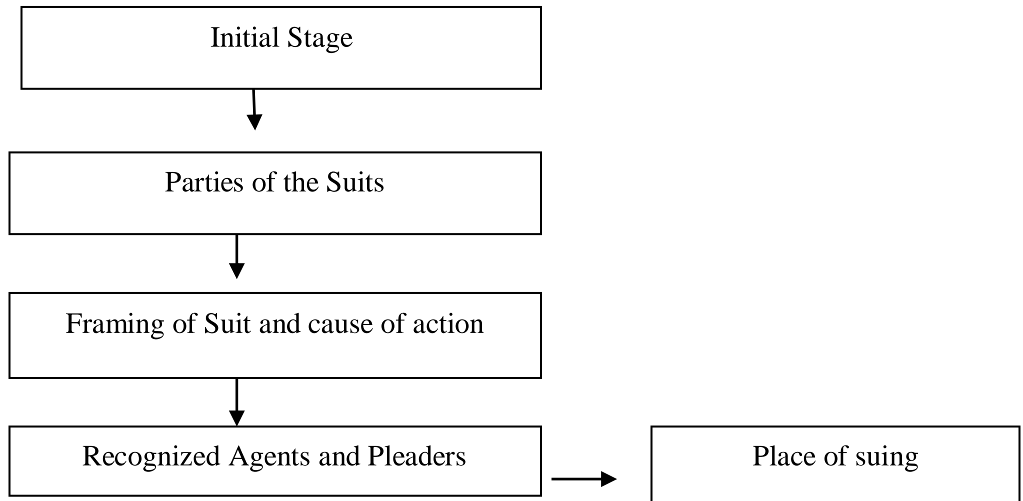
4.13: Civil Proceeding

Civil Procedure is "the body of law that sets out the process that Courts will follow when hearing cases of a civil nature. Civil procedure is one of the mandatory law courses in Bangladesh. These Rules govern how a lawsuit or case may be commenced, what kind of service of process is required, the types of pleadings or statements of case, motions or applications and orders allowed in civil cases, the timing and manner of depositions and discovery or disclosure, the conduct of trials, the process for judgement, various available remedies and how the courts and clerks must function. The Civil Proceeding in Bangladesh is adversarial or accusatorial in nature meaning that the entire process is a contest between two parties, namely the Plaintiff and the Defendant. They may however, be more than one plaintiff and more than one defendant. But there must be at least one plaintiff and one defendant in every suit. In the process court takes a non-partisan rule; court plays no magnificent role in preparation of a case; trial itself is not an inquiry into events but rather a hearing to decide within a complex set of rules, whether the Plaintiff claims for his relief which the defendant denies. However, all civil Proceeding in Bangladesh are regulated under the CPC 1908 unless otherwise excluded" (Halim and Siddiqi 2015). The CRO (Civil Rules and Order) and the Civil Suits Instructions Manual also relate to Civil Proceeding.

4.13.1: Different Stages of Civil Proceeding



1. **Initial Stage**



Parties of the Suits

Every suit shall be contested between the two parties, namely, the plaintiff on the one hand and the defendant on the other. There may, however, be more than one plaintiff or defendant. But there must be at least one plaintiff and one defendant in every suit. Plaintiff is a person who brings a suit or commences an action against a defendant. It is the plaintiff who approaches a court of Law by filing a suit for relief claimed in the plaint. In the HCD and AD the plaintiff is called Appellant. Defendant means a person sued in a court of law by a plaintiff. A defendant is a person against whom a relief is claimed by a plaintiff. In the HCD and AD, the defendant is called as respondent.

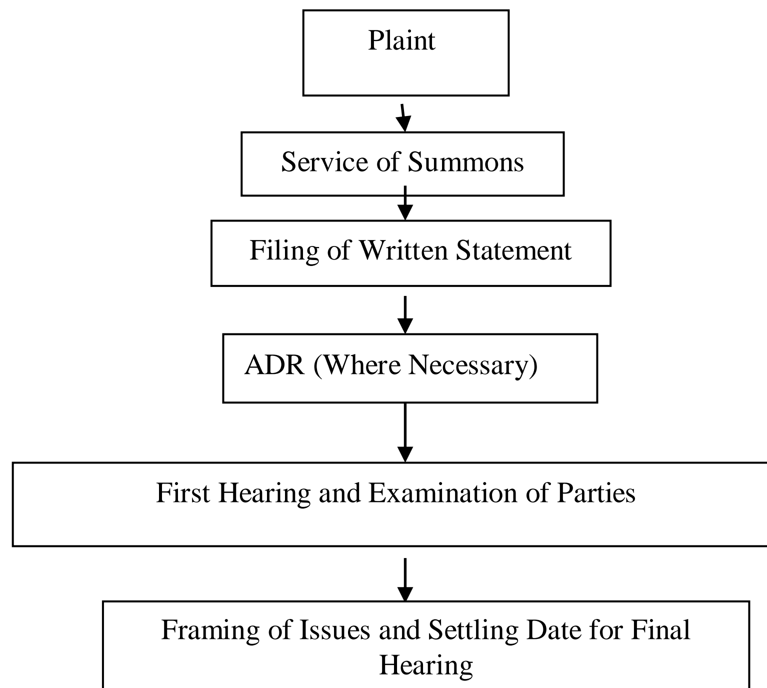
Framing of Suit and Cause of Action*,* "Every suit must include the whole of the plaintiff's claim in respect of the cause of action, and as far as practicable, all matters in dispute between the parties be disposed of finally. A cause of action is the foundation of a suit. It must be antecedent to the institution of a suit and on the basis of it the suit must have been filed. If a plaint does not disclose a cause of action, a court will reject such plaint" (Khaled 2015).

Recognized Agents and Pleaders**,** "Here a party may appear, apply or act in court through his recognized agent. The following persons have been considered as recognized agent: Persons holding the power of authority and persons carrying on trade or business

for parties not residing within the territorial jurisdiction of the Court in matter connected with much trade or business only provided that there is no agent" (Halim 2008).

Place of Suing, "Section 15 of the CPC provides that every suit shall be instituted in the Court of the lowest grade competent to try it. This is a Suit shall be instituted in the proper court which has proper jurisdiction otherwise the suit shall be rejected or returned".

2. Proceeding Stage



Plaint, every suit shall be instituted by the presentation of the plaint (s 26 of CPC). "Plaint is a statement of claim, a document, by presentation of which a suit is instituted. Its object is to state the grounds upon which the assistance of the Court is sought by the plaintiff. It is a pleading of the plaintiff" (Chowdhary 1993).

Service of Summons, "when the suit has been duly instituted and registered, the next step is to issue a summons by the Court. A summons is a document issued from the office of a

court of Justice, calling upon the person to whom it is directed to attend before a judge or officer of the Court for a certain purpose. But when the defendant has appeared at the presentation of the plaint and admitted the plaintiff's claim there is no need to issue summons" (Chowdhury 2014).

Filing of written Statement, "on the date fixed in the summons, the defendant shall appear to the Court intending to contest the claim. On this day, the defendants either submits his written statement or asks from time to time file the same in some future date.

Alternative Dispute Resolution is not only the process in the Civil Proceeding. It may be applied where necessary, basically in certain cases" (Ahmed 2015).

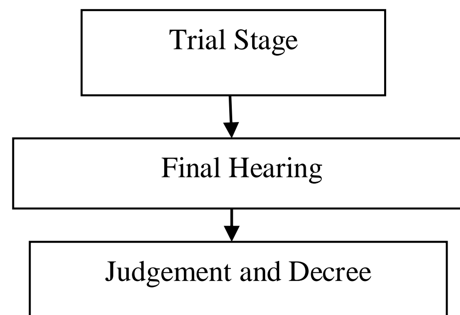
***First Hearing* and *Examination of Parties by court*,**

"if the ADR mechanism is undertaken and it is successful, the dispute will end there. However if ADR fails, the court shall proceed with hearing of the suit from the stage at which the suit stood before the decision to mediate. The first hearing of a suit means the day on which the court goes into the pleadings (either plaint or written statement) of the parties in order to understand their contentions and at the first hearing of the suit the court shall ascertain from each party or his pleader whether he admits or denies such allegations of fact as are made in the plaint or written statement" (Halim 2010).

Framing of issues and settling the date for final hearing

This stage is similar to the framing of charge under CrPC. However, as issue is that which, if decided in favour of the plaintiff, will in itself gave a right to relief and if decided in favour of the defendant, will in itself be a defence. Issues are of two types- issues of facts and issues of law. Issues arise when a material proposition of fact or law is affirmed by one party and denied by the other. Once the issues are framed, the Court will fix a date for settling the date of final or peremptory hearing i.e. the trial.

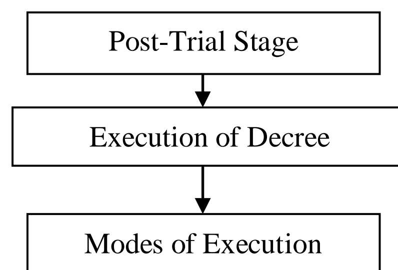
3. Trial Stage



FinalHearing, when the issues are framed, the court is called for final hearing. However final hearing taking evidence i.e. examination, argument, examination in chief, cross examination etc. According to the Evidence Act 1872,it is to be mentioned that at the time of final hearing as well as the trial stage the court may give interim order on the different grounds.

Judgement and Decree, after the completion of final hearing, "the court shall pronounce Judgement in open court, either at once or on some future day after giving due notice to the parties or their pleaders. Once the hearing is over, there should not be a break between the reservation and pronouncement of judgement. Every judgement other than a court of small causes should contain facts, issues, decision and Reasoning" (ibid).

4. Post Trial Stage



Execution of Decree, execution signifies "the process for enforcing or giving effect to the Judgement of the Court. In another sense, execution is the enforcement of a decree holder to realise the fruits of the decree passed by the competent court in his favour.

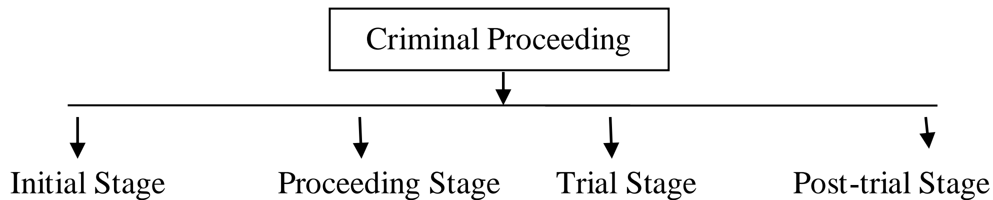
Mode of Execution, the CPC lays down various modes of execution. After the decree holder files an application for execution of a decree, the executing court can enforce execution" (Khaleda 2015).

4.14: Criminal Proceeding

The Criminal Process in "Bangladesh is essentially adversarial or accusatorial in nature, means the whole process is a contest between two parties. As regards crime, these two parties are the state on the one hand and the person accused of the crime concerned on the other hand. In the process court takes a non-partisan role; court plays no significant role in preparation of a case; the trial itself is not an investigation into events or allegations but rather airing to decide within a complex set of rules, whether the accused is proved to be guilty of the particular offences which the prosecution have charged him with. Criminal justice consists in the punishment of wrong while civil justice consists the enforcement of rights. In a criminal proceeding the injured person claims no right but accuse the defendant of wrong. He is thus not a claimant for redress but an accuser and the court makes no attempt to constrain the defendant to perform a duty or to respect a right but penalises him for the duty already disregarded and for any right already violated.

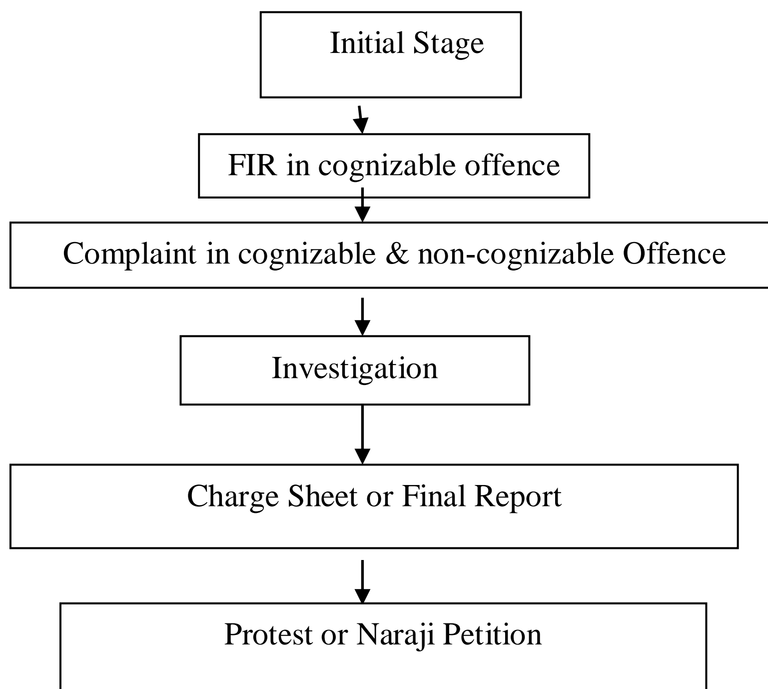
All Criminal Proceeding in Bangladesh are regulated under the Code of Criminal Procedure (CrPC), 1898 unless otherwise excluded. The CRO (Criminal Rules and Orders) also relates to the Criminal Proceeding and the Penal Code 1860, the Special Power Act 1974, the Nari-o-ShishuNirjatana Daman Ain 2000. The Acid throwing Act etc. are related substantive laws with the CrPc" (Halim and Siddiki 2015). Four agencies are involved in a criminal administration of justice: police, Prosecution, Courts, Jail and Probation.

4.14.1: Different Stages of Criminal Proceeding



1. **Initial Stage**

In the initial stage, investigation and preparation of a criminal case will be accomplished and in this stage policy plays the only role from the beginning to the end of this stage. It is noted that in the criminal cases between the two parties, state is one and the other is the person accused. However this stage may be discussed under the followings:



FIR in Cognizable Offence means First Information Report i.e. Information report of the police station regarding any case and cognizable offence means an offence for arrest

without warrant mentioned in the second schedule of CrPC 1989. Under Section 154, "every information relating to the commission of a cognizable offence if given orally to an officer in charge of a police station, shall be reduced writing by him or under his direction and be read over to the information and such information whether given in writing or reduced to writing as aforesaid, shall be signed by the person giving it and the substance thereof shall be entered in a book to be kept by such officer in such form as the government may prescribe in this behalf" (Halim2004).

Complaint in Non-Cognizable and Cognizable offence, According to Section 155 (2) "no police officer shall investigate a non-cognizable case without the order of a Magistrate of the First or Second Class having power to try such case or send the same for trial. Again Section 200 provides that a Magistrate taking cognizance of an offence on complaint shall at once examine upon oath the complainant and such of the witnesses present if any as he may consider necessary and the substances of the Examination shall be reduced to writing and shall be signed by the complainant or witness so examined, and also by the Magistrate" (Halim 2008).

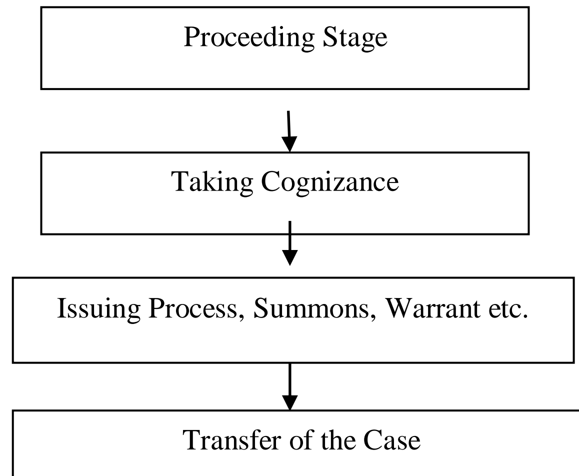
***Investigation*, Section 156 (1)** provides that "any officer in charge of a police station may, without the order of a Magistrate, investigate any cognizable case which a court having jurisdiction over the area within the limits of such station would have power to inquire into or try under the provisions of Chapter XV relating to place of Inquiry or trial" (ibid).

Charge Sheet or Final Report, after investigation the case, "the investigation officer submits a charge sheet to the Magistrate. He can also submit the final report and when he submits the final report, it means that no case of the offence has been made out of the investigation and as such the accused should be released from custody or discharged.

Naraji or Protest Petition, if the Investigation officer (IO) submits the final report against the accused the Magistrate may accept or reject it. After rejecting the final report he may

order for further investigation. But when the Magistrate accepts the final report, the accused can file a naraji or protest petition in the Court" (Halim 2008).

2. Proceeding Stage



Taking Cognizance**,** "it is taken in front of the accused person. If the accused is in custody, he is brought before the court while taking cognizance. Taking cognizance of an offence is the starting point of a case and it plays a very important role in criminal cases. Illegal taking of cognizance vitiates the whole proceedings. When a magistrate or judge applies his mind to the facts of a case and decides to proceeds against the offender with a view to determining the guilt, it is the state where cognizance of the offence is taken" (Halim and Siddiki 2015).

Issuing Process: "A criminal proceeding commences either taking cognizance of the offence or issuing process. If the accused is not arrested, the Magistrate must issue process, either summons or warrant to compel the attendance of the accused. When the accuse dis before the magistrate, he will examine the record of the case and will see if there is any basis for initiating any judicial proceeding. Transfer of Cases, section 191 of CrPc provides that "when a Magistrate cognizance of an offence under sub-section (1), clause (c), of the preceding section, the accused shall, before any evidence is taken, be informed that he is entitled to have the case tried by another court, and if the accused or any of the accused if there be more than one, objects to being tried by such magistrates,

the case shall instead of being tried by such Magistrate be sent to the Court of session or transferred to another magistrate" (ibid).

3. Trial Stage

Basically a Criminal case is tried before the judicial magistrate court and the sessions judge court because of their nature and procedure. But here the gist of the trial procedure has been discussed at a glance though the nature of the trial in the judicial magistrate court and the sessions court are different in some extent.

Trial by Magistrate, the procedure of trial of cases by Magistrate has been described in Sections 241 to 249 of the CrPC 1898 which is, in short as follows:

S.241, Procedure in cases

S.241 A, when accused shall be discharged

S. 242, Charge to be framed

S. 243, Conviction on admission of truth of accusation

S. 244, Procedure when no such admission is made

S. 245, Acquittal, Sentence

S. 247, Non-appearance of Complainant

S.248, Withdrawal of Complaint

S.249, Power to stop proceedings when no complainant.

Trial by Court of Sessions, the procedure of the trial before session courts has been described in sections 265 A to 265L of the CrPc 1989 which is as follows

S. 265A. Trial to be conducted by Public Prosecutor

S.265B. opening case for prosecution

S. 265 C. Discharge

S.265D. Framing Charge

S. 265E. Conviction of plea of guilty

S. 265F Date for Prosecution evidence

S. 265G. Evidence of Prosecution

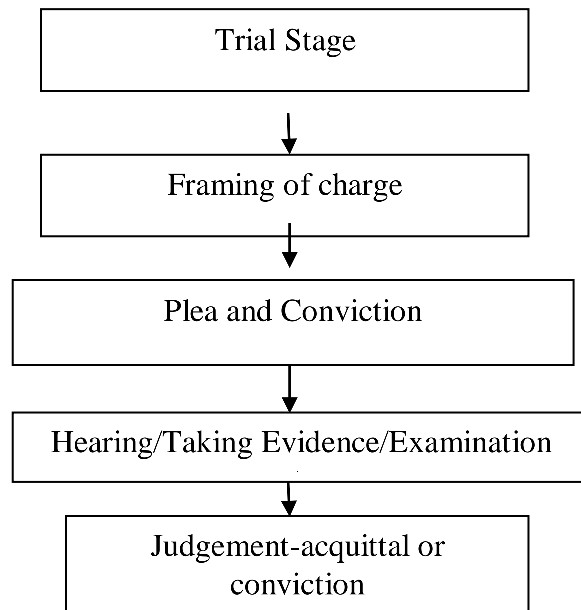
S. 265H. Acquittal.

S. 265-I Entering upon defence

S. 265J. Arguments

S. 265K. Judgement of acquittal or conviction

S. 265L. Previous Conviction



Framing of Charge, "trial commences with the framing of charge. In this stage, the accused is called upon to answer. "charge" means an accusation against a person with respect to the commission of an offence. Chapter XIX of CrPc relates to charge which contains sections 221 to 240. It is said that every charge shall state the section of the law along with the name of the offence, place and the manner of the

occurrence as well as the person against whom or the thing in respect of which the offence has been committed .Plea and Conviction, once the charge is framed the accused will be asked whether he admits that he has committed the offence with which he is charged. If the accused pleads guilty to the charge, i.e. admits his guilt to the charge, the court may convict him accordingly" (Halim 2008: 148).

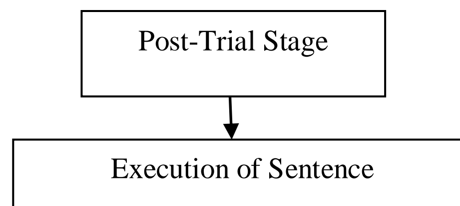
Hearing/Taking Evidence/Examination Etc.

It is mainly the hearing stage of the case that includes various processes like taking evidence, examination, cross-examination, arguments etc. according to the Evidence Act. 1872.

Judgement- Acquittal or conviction

A criminal judgement ends either with acquittal or conviction. If it is an acquittal and the accused is in jail, a copy of the judgement will be passed to the jail authority that will release the acquitted offender as per the Judgement. In the other hand, if is a conviction of imprisonment, the accused will be taken from the court to jail and will be serving the sentence as per the judgement unless his sentence is suspended or remitted by Government.

5. Post-Trial Stage



Execution of Sentence, "When the judgement is pronounced with conviction and sentence, then sentence has to be executed namely, "when the Court of Sessions passes sentence of death, the proceedings shall be submitted to the High Court Division and the sentence shall not be executed unless confirmed by the High Court Division (Section 374), Popularly known as Death Sentence. When a sentence is fully executed, the officer

executing it shall return the warrant to the Court from which it was issued, with an `endorsement under his hand certifying the manner in which the sentence has been executed (Section 400). When a sentence of death passed by a Court of Session is submitted to the High Court Division for confirmation, such Court of Session shall, on receiving the order of the High Court Division thereon, cause such order to be carried into effect by issuing a warrant or taking such other steps as may be necessary". (Section 381)

4.15: Functions of the Informal Judiciary in Bangladesh

"System of informal justice is a reality and sometimes needed in almost all countries of the world. Its extent, character and importance vary greatly depending on a wide range of factors. Among those factors are the nature of the state and its capacity; the diversity of the population in terms of ethnicity and race, religion, ideology, language and income and the type of economy. It is a traditional dispute resolution mechanism that operates at a local level. To be precise, it is a means of resolving conflict between individuals, family, lineage, neighbour about land, unlawful activities, illegitimate relationship, non-cooperation, etc., that take place in the rural society. In Practice the indigenous informal justice system which controls the society had been for quite a long time following the socio-economic and cultural variation" (Alim 2004: 4).

Shalish, is one of such system which referred as a mediation, "is a traditional justice system or non-state justice system found in the rural areas by which resolves conflict between individuals, family, lineage, neighbour about land or other things, unlawful activities, ill-feelings, non-cooperation, etc The village heads being a salient figure always control the power structure of the village and rule the poor as they are economically solvent and linked with political party. The villagers do not have courage to protest the unjust verdict of the heads. Nevertheless, they had to obey the heads, as there is no alternative affordable and effective institution serving the poor" (Alim and Rafi 2003: 3).

> "It's a social system for informal adjudication of petty disputes both civil and criminal, by local notables, such as *matbars* (leaders) or *Shalishkars*

(adjudicators). Two types of adjudication have been in place in rural Bangladesh from the days of antiquity, these were *Shalish* and the extension of the state's judicial arm into the rural areas through specific legislation. Normally, the process of a particular *Shalish* starts with interrogating the disputants to ascertain the facts. Then the *Shalishkars* offer their solutions, and seek the opinions of the disputants before; finally, they come to a decision. But there are local variations depending on local customs and tradition" (Banglapedia 2103).

It may involve voluntary submission to arbitration mediation or a blend of the two. "In a harsh, extreme version of its traditional form, however, it instead constitutes a de facto criminal court that inflicts trial and punishment on individuals who have not consented to its jurisdiction? *Shalish* addresses a wide variety of civil matters, some with criminal implications. These often involve gender and family issues, such as violence against women, inheritance, dowry, polygamy, divorce, financial maintenance for a wife and children, or a combination of such issues. Other things include land conflicts, such as over the boundaries between neighbours' parcels, as well as other property disputes" (Golub 2003).

"It has different purposes and it encages to dispose of different type of local disputes locally, speedily and amicably without resorting to formal expensive and lengthy court procedures. While it is undeniable that *Shalish* has been successful in some measure at providing acceptable judgments and solutions" (Haq 1998)

"It is also a bare truth that this purpose of the *Shalish* mechanism has been frustrated time and again due to various socio-economic and religious grounds. In the absence of specified law, process and accountability, the forum has been a vehicle for imposing subjective notion of justice by the socially, economically or religiously powerful people. While socially and economically powerful people have got much preference and this forum as a platform for enforcing their dominance over disadvantaged portion of the society, the religious leaders have used this forum as an instrument for practicing their religious dogmas and for established interests. These malpractices or biases in the *Shalish*

system, are broadly categorized as class-based and gender-based. One the one hand, the powerful portion of the society have supported their class against disadvantaged group, on the other hand the patriarchal society, sometimes with the assistance of the religious leaders, has uphold their patriarchal notion of justice" (Biswas 2008: 3- 4).

A research was conducted by "Dr. Dalem Chandra Barman, Professor and Founder Chairman of the Department of Peace and Conflict Studies, University of Dhaka; Ms. Kyra A. Buchko, JD, Attorney and Conflict Resolution Specialist, USA and Mr.Buddhadeb Biswas, Sr. Research Fellow of CDIin understanding about traditional community practices in recognizing, identifying and responding to conflicts. Based on the research findings, the Research Team has made the following main recommendations regarding the use of traditional mechanisms to manage and resolve disputes at the community level" (Islam 2009).

- "The *shalish* (arbitration) mechanism should be retained and strengthened at the village level. Despite its drawbacks, there is still widespread confidence in and reliance on the local practice. *Unbiased shalish* is seen by village communities as the very best way to resolve a conflict".
- "Although *shalish* is frequently translated as *mediation*, the mechanism in practice at the village level is actually arbitration, i.e., a third-party gives a decision or judgment. Without a recognized legal basis, such decisions are more difficult to enforce, especially when the decision is a win-lose proposition".
- "Local and national level awareness campaigns on the effective functioning of shalish should be conducted to educate villagers and local leaders on what they should expect from the process, and how to play their roles most effectively".
- "Broad-based training of *shalishkars*, village elders, and other community leaders is essential for the expansion and improvement of conflict resolution mechanisms and processes".
- "The role of women in traditional mechanisms should be expanded. Women should serve as *shalishkars* or *shalish* participants in cases of sensitive matters

involving women. *Shalish* should also be conducted during daytime hours so that women can be present" (ibid).

"In Bangladesh's, anyone interested in the continuation of *Shalish* finds it a real challenge to revive and mould the traditional *Shalish* on the right lines, reflecting the spirit and aspiration of the people. It seems very difficult to bring about equitable resolution between the conflicting parties due to persistent structural functional problems and the lack of peace and amity within the rural social structure. However, one positive development that seems to have been emerging is that some Non Governmental Organizations (NGOs) have in recent years come forward to refashion the traditional *Shalish* system. They are conscious of the prime need to ensure neutrality, non-imposition and attaining a 'win-win situation' in the mediation process. As part of a priority measure, training for the *Shalishkars* on the legal issues and mediation processes has been introduced by them with a vieto overcoming the limitations of the traditional Shalish" (Haq 2006).

4.16: Judicial Review and Judicial Activism in Bangladesh

Judicial review is the most important modern instrument of courts to restore justice. "It is the power of the courts to examine the legality and constitutionality of the officials act and thereby to safeguard the fundamental and other essential rights of citizen; This is the ultimate power of the court to declare any law and official action unconstitutional on the ground of violation constitutional norms" (Abraham 1980: 175). "The Supreme Court is the absolute protector of the freedom and liberty, the authoritative interpretation of the will of the citizens and the ultimate authority to control any exercise of absolute, impulsive and arbitrary power" (Diwan 1996: 18). "In Bangladesh the power of judicial review has been in scripted in Article 7, 26 and 102 (2) of the constitution" (Serajuddin 2010).

Article 7 (2) of the Bangladesh Constitution says "This Constitution is, as the solemn expression of the will of the people, the Supreme law of the Republic and if any other law is inconsistent with this constitution that other law shall to the extent of the inconsistency,

be void" (Halim 1998: 73). As mentioned in the Article 26 of the Bangladesh Constitution "Firstly it says that all existing law inconsistent with the provisions of this part shall, to the extent of such inconsistency, become void on the commencement of this Constitution. It gives a double sanctity on the provision of fundamental rights. Secondly the state shall not make any law inconsistent with any provisions of this part and any law so made shall to the extent of such inconsistency be void. Therefore Article 7 and 26 give the substantive law of judicial review and Article 102 (2) gives the implementing law of it, for it provides for the procedure- how a law which is inconsistent with the provisions of the Constitution can be declared unconstitutional by issuing prohibition, mandamus and certiorari" (Halim 1998: 95)

Part III of the Constitution explains 18 fundamental rights and under Article 102(1) "the HCD of the Supreme Court can issue direction and orders for enforcement of these rights. All rights are ordinary rights which are protected under statutory law and common law not by any Constitutional guarantee like Bangladesh. Administrative actions may be reviewed under constitutional provisions; because under Article 102 (2) of the Constitution of Bangladesh the Supreme Court can examine the validity of actions performed by any public officials or bodies" (Akkas 2004).

"The law courts act on the principle that administrative powers can be validly exercised only within their true limits under doctrine of *ultra vires*. Furthermore public officials are not to be allowed to transgress the limits of their authority conferred by the constitution of statutory laws. The courts can exercise the power of judicial review if the decision is *mala fide* or in violation of the principles of natural justice or an irrelevant consideration or rule against bias. For example, in the *Habibur Rahman v Government of Bangladesh case*, it was held that if a person is arrested by the police on reasonable suspicion or is ordered to be detained as per the satisfaction of the detaining authority, the materials on the basis of which the detaining authority is satisfied about the detent's involvement in any prejudicial act must be placed before the court to justify that the suspicion entertained by the police is reasonable" (Dhaka Law Reports 1974: 201).

In the *Faisal Mahbub v Bangladesh case*, "which challenged the validity of preventive detention, the court held that every citizen has an inalienable right to be treated in accordance with law (Dhaka Law Reports 1992). Similarly in the case of *Nasrin Kader Siddique v Bangladesh,* the court demanded that materials supporting the commitment would have to place before the court for its satisfaction as to whether the irregularities in it, if any could be detected."

"Judicial activism is portrayed as an integrated judicial decision-making process and is very to maintain law and justice that accommodates formal legal principles and sensitivity to social conditions to achieve justice. Judicial activism should be viewed as goal-oriented and creative interpretation of the law, strengthened by application of judicial discretion" (Hoque 2012:279). "It signifies that the judiciary being aware of existing socio-economic realities, voluntarily implements social goals. Nowadays the pronouncements made by the judges from around the world reveal that there is growing enthusiasm to perform judicial functions in a proactive manner within the constitutional limitations of the separation of powers" (Mollah 2008:250). "Judicial activism has emerged as an important instrument of creativity in law-making and policy by judges around the world, increasingly recognized as a tool of redressing injustice when legal formalism fails to secure justice" (Hoque 2011: 279).

In the case of Bangladesh, "Judicial Activism started in 1992 in the case of *State v DC Satkhira* (Dhaka Law Reports, 1994). The HCD issued a *suo motu* ruling on the Deputy Commissioner of Satkhira, directing the release of a child from legal custody on the basis of a newspaper report. On 6 October 1992, a news item under the caption *Sab Mamla Hote Abbahoity, Athocho Baro Batshor JabodJailey* was published in the *Daily Ittefaq*. It was reported that a 12 year old boy had been in prison for 12 years without any case." Based on this news item, "a division bench of the HCD of the Supreme Court issued a *suo* motu rule on the government, the Deputy Commissioner of Satkhira and the concerned jail authority where the boy, Nazrul Islam was in custody. In its judgement the HCD declared the detention of Nazrul Islam as illegal and without jurisdiction. The court directed the government to inquire as to how a 12 year old boy was kept in jail in

connection with 12 criminal cases" (Akkas 2004).This case is a significant example of Judicial Activism by, "the HCD of the Supreme Court of Bangladesh and may help poor juvenile prisoners to seek redressal against the state's dereliction. This proactive role of the Judiciary facilitates the effective enforcement of different rights of the citizens and also ensures citizens access to the judicial system" (Mollah 2008:251).

It was the judiciary that paved the way for the reintroduction of the original Constitution of 1972. Again, it owed to the judiciary to declare all military regimes of the country in the past as illegal. However, the most important one, though initiated by the Executive, was the setting up of a War Crimes Tribunal, to prosecute those that had colluded with the Pakistan Army during the 'Bangladesh Liberation War' of 1971.

"The Judiciary plays the key role between the two other organs of the state. Therefore its role is not only limited to settling disputes between the two disputants within the Courtroom, but also to maintain the executive and administrative action of the system. Therefore Effective implementation of judicial powers and functions has a future reaching impact on governance and supremacy. The Judiciary has a superior role to protect the rights and interests of the marginalized, backward and weak sections of the society in the framework of Bangladesh. Though the Judiciary can be of little help to those sections of society in Bangladesh those are backward and deprived in terms of access of justice. Thus the Judiciary wants to build the people conscious about their rights and duties. It is the duty of the Judiciary to play practical role in meeting of new issues, challenges and developments and to see the poor and helpless groups in the society i.e. the poor, women and marginalized sections are not denied access to justice either because they are not conscious of laws or they are not capable to tolerate the monetary or social costs of justice.

CHAPTER – 5

CHALLENGES TO ITS JUDICIAL INDEPENDENCE

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The concept of judicial independence has cardinal importance for Judiciary. It is of paramount importance for the functioning of any democracy in the world. "The concept of judicial independence is one of the key factors that distinguish our system of government from others around the world. It protects the weak from the powerful, the minority from the majority, the poor from the rich and the citizens from excesses of government" (Leuba 2000). One scholar has pointed out:

> "Independence of Judiciary is essential to the maintenance of public confidence and trust in the Court System. The Judiciary is serving not because Judiciary has police power like the Executive. The Executives enforce the judgements of the judges. The Judiciary has no source of fund. Unless the Parliament sanctions budget the Judiciary does not have any fund, still then the Judiciary functions. The Judiciary survives on the trust and Confidence that it has in the hearts of people. Thus it is essential that the Judiciary must be independent so that the people have confidence on the justice delivery system" (Afzal 2005: 295).

A modern state is governed by "three branches of government, the executive, legislature and the Judiciary". The responsibilities of the executive branch are to determine government policies, their implementation, enforce or administer laws and conduct other business of the government. The legislature is responsible for making the law of the land and the Judiciary applies the laws in resolving dispute between citizens or between citizens and the Government. Among the three branches of the Government, the Judiciary is considered the weakest branch. In this regard, Hamilton Says "The legislation not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated: The Judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; can take no active resolution whatever. It may be truly said to have neither force nor will, but

merely judgement and must ultimately depend upon the aid of the executive arm for the efficacious exercise even of this faculty. The simple view of the matter suggests that the Judiciary is beyond comparison, the weakest of the three departments of power." (Hamilton 1948: 396-397)

In fact, the power of the Judiciary is limited only to the pronouncing judgements; it has no additional power to enforce its decisions. The enforcement of the judicial decisions is "the function of the executive" government and therefore the power of the Judiciary is ultimately dependent on the executive government. Despite this weakness, "the Judiciary being an essential organ of the government critically contributes to maintaining the peace and order of a society by resolving legal disputes" (Bari 1993: 8). In any democratic society, the Judiciary has the authority to resolve legal disputes with the object of playing two important roles: "social service and protection of citizen's rights. The social service role of the Judiciary indicates the day to day functions of the Courts in resolving disputes between individuals. In protecting the rights of the citizens, the Judiciary is authorized to keep the state within the bounds of law by resolving the conflicts between the State and Citizens" (Akkas 2004: 31).

It is held that "this authority of the Judiciary comes from the Public Confidence in the justice System As Frankfurter says, the Court's authority, consisting of neither the purse nor the sword and rests ultimately on substantial public confidence in its moral section, therefore, public confidence in the justice system is the most important element to retain the authority of the Judiciary" (Government of Bangladesh 2012). It is held that "If the Judiciary fails to maintain public confidence, its legitimacy would be endangered" (Esterling 1998: 112). Without the confidence the "effective functioning of the Judicial Branch is quite impossible" (Handsley 2001: 184).

However, public confidence in the justice system is largely dependent on the independence of the Judiciary. In other words, "judicial independence is a precondition to maintaining public confidence in the Judiciary". In reality trust of public can be satisfied when the independence of the Judiciary is adequately ensured (Bari 2001: 49). However,

public confidence does not mean popularly because judges are obliged to make unpopular decisions, if they are required by the law (Zemans 1991: 730). "Judicial independence enables judges to make judicial decisions without fear or favour even when the decisions are unpopular or difficult. Thus it encourages, tranquillity and harmony' in society by ensuring litigants that their claims are determined fairly by the courts" (Fein and Neuborne 2000: 62).

It is held that "Public confidence in the Judiciary rests on a public understanding that the judges are independent to administer justice impartiality and according to law" (Webster 1995: 9). The independence of judges is necessary not only for the judges themselves but also for the benefit of the members in the society. Brennan says: "Judicial independence does not exist to serve the Judiciary or to serve the interests of the other two branches of government. It exists to serve and protect not the governance but the governed." (Brennan 1996) The Judiciary has a responsibility for ensuring that individual rights and liberties are secure (Barr 1999: 223).

This responsibility cannot be effectively discharged without judicial independence. This is because without the independence of the Judiciary the power over life and liberty of the citizens would be arbitrary. Judicial independence helps to protect the right and liberty of citizens of a country. "An independent Judiciary can protect the rights of citizens by the fair administration of justice". Further "It may ensure that powerful individuals or institutions must conform to the law and no one is above the law. In the absence of an independent Judiciary, the fair administration of justice or protection of rights of citizens cannot be secure". Therefore, the importance of judicial independence in a democratic society is unequivocal to ensure the fair administration of justice and to gain public confidence in the justice system (Wallace 2001: 241).

As Judiciary is one of the three organs of the State, is duty bound to administer justice in the society "through establishing and enhancing an effective justice delivery system that is equal, affordable and accessible to all. Judges are the main actors of the organ and play central role in dispensing its charted duties of upholding rule of law, fundamental human

rights, freedom, equality and justice in the society. Thus, judges always seem to have the capacity and capability of understanding, applying and enforcing law in the broader context of fact and circumstances of each case and prescribe for available remedial measures or punitive actions in accordance with law" (Abid n.d). Bearing this in mind, "all the judges and magistrates exercising judicial functions must strive to attain necessary legal knowledge and skill through professional education, experience and training. Besides, a judge should also explore the other disciplines and branches of knowledge for developing his analytical skill, intellect, reasoning and judicial mind that form the bedrock of a proper judicial decision" (JATI 2015).

Elements of Judicial Independence

The contemporary concept of judicial independence emphasizes the independence of each and every member of the Judiciary and the Judiciary as an institution or organ of the government. In other words "the concept of judicial independence has two important elements: the *individual independence of the judges* and *the collective or institutional independence of the Judiciary"* (Talukder 1994).

Individual Independence of Judges

Individual independence of "judges means that a judge is free to exercise judicial functions without any fear or anticipation of retaliation or reward. It requires that a judge should decide cases in accordance with an impartial assessment of the facts and understanding of the law without any direct or indirect influence or interference from any source or for any reasons" (Akkas 2004). In fact the first essential for an independent Judiciary is that the individual judge should enjoy complete freedom in discharging his or her judicial functions and other official duties. The complete freedom of an individual judge has three elements (Halim 2008: 342).

Substantive Independence of the Judges:

It is said that "the independence of judges to give judgment in accordance with their oath of office and without being affected by any inside or outside pressure". The minimum standards of judicial independence determined by, "the International Bar Association in

1982 says that while doing his judicial function a judge is subject to law and the commands of his conscience and nothing else" (ibid).

In "discharging judicial functions, a judge performs three kinds of duties: procedural, administrative and substantive. The administrative duties include the responsibility for managing the cases, fixing the dates for their hearing, organizing the judicial workload and expediting the hearings and resolutions of cases. The procedural duties concern the responsibility for conducting resolution of the trial in accordance with the rules regarding the examination of witnesses, recording of evidence and disposal of other interlocutory matters". Further "The substantive aspect of the duties of a judge is the actual decision making role. It concerns the determination of the finding of fact and the application of the relevant legal norms to the facts of the case" (Faruque 2005).

Personal Independence:

It means that judges are not dependent on government in any way, which might influence their decision making. According to the International Bar Association, "it means that the terms and conditions of judicial service are adequately secured so as to ensure that individual judges are not subject to executive control" (Karim 2005).

"Personal independence signifies that the tenure of judges and the terms and conditions of their service are adequately secured, so as to ensure that individual judges are not subject to executive control". In other words, "the term of judicial service including transfer, remuneration and pension entitlements should not be under the control of the executive government and the tenure of judges should be guaranteed until a mandatory retirement age." Further "These are the prerequisites to ensure that an individual judge may exercise judicial functions without fear or favour, affection or ill-will. This aspect of judicial independence is very significant for an individual judge" (Halim 2008: 342).

Internal Independence:

It means "independence of judges from their judicial superiors and colleagues. In other words, a judges or a judicial officer is not bound to obey any kind of order, indication or pressure from his judicial superiors and colleagues while reaching to a judgement" (Rahman 2000).

"Internal independence covers the process of pronouncing judgement, that is the actual decision making process. Hence internal independence of judges is relevant to both the procedural and substantive aspects of judicial duties. The procedural duty includes the examination of witnesses, recording of evidence and disposal of interlocutory matters that are integral parts of the decision making process" (Akkas 2004). Any attempt to influence or interfere with these functions by fellow judges may represent danger to the independence of individual judges. Similarly, any attempt to influence a fellow judge in substantive duties that are part of their actual decision making functions is of great concern for internal independence.

Collective Independence of the Judiciary

The concept of Collective or institutional independence is concerned with responsibility for the effective operation of the judicial branch of government. This aspect of "judicial independence has a great impact on the individual independence" of judges. "If the Judiciary as an institution depends on the executive, the legislature or other institutions for its operations, this may affect the performance of judicial duties by individual judges. A judge may not be able to exercise judicial functions independently unless he or she is part of an institution with authority over those human and physical resources incidental to performing judicial functions. Therefore collective or institutional judicial independence is necessary to ensure the individual independence of judges. It creates an environment in which judges may exercise their judicial functions without fear or favour" (ibid).

"Collective or institutional independence is associated with court administration which includes assignment of case, control over administrative personnel, maintenance of court buildings and preparation of judicial budgets and allocation of resources. *The Montreal*

Declaration 1983 and the Beijing Statement 1995 emphasizes that the main responsibility for court administration should be vested in the Judiciary" (Halim 2010).

Basic Principles of the Independence of Judiciary

The basic principles of the Independence of Judiciary adopted in the Seventh United Nations Congress on the "Prevention of Crime and the Treatment of Offenders" 1985 were unanimously endorsed by the General Assembly. These principles are:

- "The State will guarantee the independence of the Judiciary and it shall be enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the Judiciary."
- "The matters taken to the Judiciary shall be decided impartially, in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason."
- "The Judiciary shall have jurisdiction over all issues of a judicial nature and shall have exclusive authority to decide whether an issue taken to the Judiciary comes under the competence as defined by law."
- "There shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision. This principle is without prejudice to judicial review or to mitigation or commutation by competent authorities of sentences imposed by the Judiciary, in accordance with the law" (Chowdhury 1993: 15).

  "Everyone shall have the right to approach ordinary courts or tribunals in accordance with legal procedures. Tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals" (ibid 15-16).
- "The principle of the Independence of the Judiciary entitles and requires, the Judiciary to ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected".
- Each Member State has the duty to provide adequate resources to the Judiciary so that it can perform the functions properly (UNCPCTO 1985).

Thus, we see that many "conditions like mode of appointment of the judges, security of their tenure in the office and adequate remuneration and privileges etc .are responsible for the independence of the Judiciary. Satisfactory implementation of these conditions enables the Judiciary to perform its due role in the society, thus, inviting public confidence in it" (Rahman 2000:147).

Need for the Independence of the Judiciary

The essential requirements for the independence of the Judiciary rest upon the following points:

- ***Strike a balance between three organs of the State****:* "Judiciary acts as a watchdog by ensuring that all the organs of the state function within their respective areas and according to the provisions of the Constitution. Judiciary acts as a guardian of the constitution and also aids in securing the doctrine of separation of powers.
- ***Interpreting the provisions of the Constitution*****:** With the passage of time ambiguity arises in the "provisions of the constitution so they ensured that the Judiciary must be independent and self competent to interpret the provision of the constitution". If the Judiciary is not independent, "other organs may pressurize the Judiciary to interpret the provisions of the constitution in their favours. The constitution has given the job to Judiciary to interpret the constitution according to the Constitutional philosophy and the Constitutional norms. (Talukder 1994).
- ***Disputes referred to the Judiciary*****:** "The Judiciary is expected to give judicial justice and not partial or committed justice. Committed justice refers to the situation when the judgment of a judge is made by emphasizes, "On a particular aspect and not considering all the aspects involved in the situation. Judiciary must act in an unbiased manner" (Kumar 2011).

Conditions for Independence of Judiciary

The Independence of Judiciary depends on some conditions which are as follows:

- ***Mode of Appointment-*** "The conditions for the appointment of judges should be, impartial one so that a man of keen intellect, high legal acumen, integrity and independence of judgement from among the lawyers gets opportunity to act as judges. If there is any scope of personal favouritism and political bias in appointments, men of integrity and sense of justice will not be appointed as judges". Further, "When the judges lack these qualities, they will administer justice in a partial way resulting in low quality of judgement. Such a situation will compel the people to lose their confidence over Judiciary. So the substantive independence which is the cornerstone of judicial impartiality depends on the method of appointment" (Halim 2008: 348).

- ***Security of Tenure-***"Security of tenure for the judges is most important in securing their independence and impartiality. It means either judges are to be appointed for the whole life during good behaviour or for a definite period extended up to 65 years or 70 years. During this tenure the conditions of service must be such that they can fearlessly administer justice. In other words, "the power of transfer and removal of a judge must be strict and difficult one to obviate the abuse of power and its capricious operation by the executive. If the transfer or removal of a judge is to depend upon the pleasure of a particular person or the executive, neither independence nor impartiality can be ensured" (ibid).

- ***Adequate Remuneration and Privileges-*** "In order to ensure the independence and impartiality of the Judiciary it is essential next to the permanency of office, to provide judges with adequate remuneration and privileges includes firstly the salaries, housing facilities, allowances and other privileges are to be such that they can easily maintain a reasonable standard of life and they do not have to think for corruption or bribery Secondly, the conditions of salaries and other privileges must be such that they cannot be varied to their disadvantages during their tenure of office. And finally after retirement,

judge should receive pension so that during his tenure he need not indulge in corrupt practices and he can lead a peaceful retired life" (Halim 1998: 342, 347).

Steps for the Separation of Judiciary

There has always been a certain tension between the principle of judicial independence and the idea of representative democracy. An independent Judiciary is an essential element of democratic societies as it "guards against the exercise of arbitrary power, prevents democratically elected majorities from using their power to threaten the basic rights of minorities, and guarantees the individual that human rights will be protected when a citizen stands accused by the state of violating the law. The theory of separation of powers guards against the dangers that arise when too much power is concentrated in too few hands and independent Judiciary is a key component of this theory" (Akkas 2014). And as Montesquieu saw, "it promotes moderation by government leaders and thus protects individual liberty" (Leeuwen 2010: 1).

The Judiciary examines that whether any violation was taken place in making the laws and executing those. The Judiciary plays role as the guardian of the country. It ensure justice for the people, who are deprived of rights, and at the same time passed orders to punish the violators, establishing rule of law and strengthening democracy in the country. If the Judiciary fails to do so, then the rule of law as well as the democracy will fall into threats.

The famous "*Theory of Separation of Power*" was articulated by a French philosopher Montesquieu in sixteenth century who was the first person to work out on the idea of Independence of Judiciary. "The separation of Judiciary from the executive is a situation in which the judicial branch of Government acts as an independent body frees from interventions and influences from the other branches of government particularly the executive" (Islam 2015). However, it is possible that influence will originate in the government structure "where parts or all of the Judiciary are integrated into another body For instance, in Bangladesh, "when the administration of justice is some way affected by

executive orders or actions, the President in consultation with Supreme Court appoints judicial officers" (Sierd 2014).

After the partition of British India, "Pakistan government enacted East Pakistan (then Bangladesh was under Pakistan government) Act 1957, which provided for separation of Judiciary from the executive. However, for a simple gazette notification the law was still hanging. When it comes to the independence and separation of Judiciary, it can be said that Bangladesh's constitution of 1972 is fairly developed. However, there is an unfortunate insertion made by the framers of the Constitution in the Article 115 and 116 as 'Magistrates exercising judicial functions', which still remain unattended" (Mollah 2009).

Article 22 in unequivocal term states that, "the state shall ensure the separation of the Judiciary from the executive organs of the state' as one of the fundamental principles of state policy" (The Constitution of Bangladesh 2016). Further "It is not readily judicially enforceable. Nevertheless the state cannot ignore it for long. There was under current of demand of implementation of Constitutional obligation from the very inception of Bangladesh. But the Fourth Amendment undermined the Constitutionalism itself, which obviously destroyed the independence of Judiciary. The subsequent upheavals of politics rather by passed it. In 1976 law commission recommended that subordinate Judiciary on the criminal side should be separated from the executive" (Hussain 2003).

"In the mean time, Bangladesh witnessed two extra-constitutional developments. In 1987, initiatives were taken to separate the magistracy by amending Code of Criminal Procedure, 1898. For unknown reason the Bill could not placed before the Parliament. After the fall of undemocratic rule in 1990, expectations were high to ensure separation of Judiciary. But the next two governments of 1991 and 1996 did nothing in this regard except spoiling its tenure" (Chowdhary 2014). In 1999, "the Supreme Court issued 12-point directives in famous *Mazdar Hossain* case to ensure separation of Judiciary from the executive. The successive governments have taken time again and again to delay the process. It may be recalled that the caretaker government (2001) has all measures to

ensure separation but stop at the request of AL and BNP two major parties of the country. The BNP leaded coalition government is working very slowly towards separation of Judiciary. It is a pleasure that Judicial Service Commission and Judicial Pay Commission have been created various rules and amendments in the relevant sections of code of Criminal Procedures 1898, are under consideration of Parliament" (Shuza 2011).

Since the Appellate Division pronounced the judgment in 1999, the successive governments took 23 adjournments to implement the judgment on various pleas up to February 2006. During these seven years time, "the government took very slow steps towards the way of separation of Judiciary. Then the interim Caretaker Government (2006-2008) headed by Mr.Fakruddin Ahmed from the very beginning of his office adopted a positive and firm outlook with a determination to separate the Judiciary from the executive. In fact the government took initiatives based on the constitutional principles and 12 point-directives of Appellate Division of Masdar Hossain's case" (Chowdhury 1993). As a result four Service rules namely:

1. Bangladesh Judicial Service Commission Rules, 2007;
2. Bangladesh Judicial Service (Pay Commission) Rules, 2007;
3. Bangladesh Judicial Service Commission (Construction of Service, Appointments in the Service and Suspension, Removal and Dismissal from the Service) Rules, 2007; and
4. Bangladesh Judicial Service (Posting, Promotion, Grant of Leave, Control, Discipline and other Condition of Service) Rules, 2007 were enacted and changes were brought in the existing Code of Criminal Procedure 1898 through Ordinance No II and IV of 2007" (Hossain 2012).

Finally, the Judiciary of Bangladesh embarked on an epoch-making journey on 1 November 2007, separating itself from the executive organ of the state fulfilling a long-cherished dream. Now all Magistrates at subordinate courts have started exercise their judicial functions under the authority of Supreme Court. The separation came after 200 years of colonial rule and 36 years of independence. While successive political

government failed to effect the separation despite persistent pressure from the bench, the bar and the civil society, the Caretaker Government finally did it by implementing 12-point directive of Supreme Court given in 1999" (Haque 2006).

This directive came following a case popularly known as "Masdar Hossain case filled in 1995 by 440 members of the lower tier of Judiciary. The provision for the separation was introduced in the Constitution framed in 1972, a year after the country gained freedom. The demand existed also in the East Pakistan as the 1949 draft constitution of the Awami League had pledged to separate the Judiciary from executive" (Bangladesh News 2007).

Safeguarding Independence of Judiciary and 16th Constitutional Amendment

The High Court (HC) on May 05, 2016 declared the "Sixteenth constitutional Amendment unconstitutional and void and it is against the principles of separation of powers and the independence of the Judiciary too. The HC verdict came following a writ petition filed in November, 2014. The Constitution (Sixteenth Amendment) Act 2014 was passed to amend the Article 96 (2) which had provided for impeachment of the Supreme Court (SC) judges to be done by the Supreme Judicial Council (SJC), comprising the Chief Justice and two next senior judges" (The Daily Star 2017). But the amended provision of "the Constitution provides that a judge shall not be removed from his office except by an order of the President, passed pursuant to a resolution of parliament, supported by a majority of not less than two-thirds of the total number of members of the legislature on the ground of proved misbehaviour or incapacity. The HC rightly observed that independence of the Judiciary" is invaluable to ensure justice (The Financial Express 2016).

Article 22 of the Constitution also asks for "separation of the Judiciary from the executive branch of the country. Further, Article 116A of the Constitution requires that all persons employed in the judicial service shall be independent in the exercise of their judicial functions. Therefore, the Constitution stresses on assurance from all institutions to safeguard the freedom of Judiciary" (The Constitution of Bangladesh 2004). Article 70

of the Constitution provides that, “the elected Member of Parliament shall have to vacate seat if s/he votes in the legislature against the political party, which nominated him/her as a candidate in an election. Therefore, as per Article 70, the MPs cannot exercise their own judgment regarding removal of the SC judges against their respective political parties' decision. As a consequence of this Sixteenth Amendment, “there are risks that impeachment of the SC judges shall be subjected to political views and demands. That parliament can impeach judges with two-thirds majority could render the Judiciary subservient to the legislature” (The Daily Star 2017).

This is clearly a violation of the notion, stipulated under Article 22 of the Constitution. The Sixteenth Amendment has given rise to suspicion among people that parliament might have the intention to have unwarranted and decisive authority over the Judiciary. An independent Judiciary is a key to establishing rule of law in the country. Article 11 of the Constitution provides for, “respect and dignity of human beings to be guaranteed through effective participation of the people through their elected representatives in administration at all levels. However, the Sixteenth Amendment does not serve the purpose of democracy as the rights under Article 11 of SC judges have been perforated by the Sixteenth Amendment. Moreover, as per Article 7B, the provisions relating to the basic structure of the Constitution cannot be amended by any manner. Since the Sixteenth Amendment is related to the notion of independence of Judiciary and separation of power, the two basic foundations of the Constitution, it cannot be justified in any way whatsoever” (ibid).

A judge, who was appointed prior to the Sixteenth Amendment, cannot be impeached by parliament as per Article 147 of the Constitution as this impeachment procedure at the discretion of the political party may prove to be disadvantageous to his interest. Further, the members who constitute the SJC are appointed by the President with prior mandatory consultation with the Prime Minister. On the other hand, “the members of parliament are elected by direct polls in different geographical constituencies. Therefore, it is better not to put this responsibility of removing any SC judge on grounds of incapacity or misconduct on MPs who are bound to adhere to a political party's decision. Bangladesh is

committed to safeguard, protect and defend the Constitution and to maintain its supremacy as the embodiment of the will of the people" (Aziz 2015). Hence, it is very much essential to understand the very basic principles of our Constitution and apply the same in this matter for establishing a society where rule of law, equality and political, economic and social justice shall be ensured and secured for all citizens (Ahmed 2016).

Status of Independence of Judiciary

Independence of the Judiciary is undisputedly said to be the basic requisite for ensuring a free and fair society under the rule of law. To put it simply, independence of the Judiciary means the institutional independence of the Judiciary as well as of the judges who form a part of the Judiciary. While the Judiciary as an institution should be independent in terms of finance and administration, the judges should be independent and free from all external factors in order to exercise the Judiciary's functions in an unbiased manner". The primary talk on the independence of the Judiciary is based on, "the doctrine of separation of powers, which holds that the Judiciary should remain separated and independent from the executive and the legislature branches of the government" (Akkas 2004).

Executive Influence

Despite a constitutional mandate for separation of Judiciary from the executive organs of the state, until 2009, "the Subordinate Courts in Bangladesh remained formally subject to executive control with *magistrates* performing the dual role of executive officer of the government as well as that of a judicial officer. In 1999, the Appellate Division of the Supreme Court gave a landmark judgment in *Secretary, Ministry of Finance v Masdar Hossain*(20 BLD (2000) AD 141) re-affirming the constitutional mandate for independence of the Judiciary and laid out a roadmap to achieve separation of the Judiciary from the executive with respect to the lower courts, both civil and criminal. Until 2006, the judgment remained largely unimplemented" (Rahman 2008).

In 2007, the caretaker government took initiatives to implement the judgment by promulgating two ordinances (No II and IV of 2007), and by making four service which are mentioned in the above. The government in 2009 amended the Code of Criminal

Procedure 1898, by which it formally removed all the impediments in the separation of lower Judiciary from executive control, and also in the appointments of judicial magistrates.

Judicial Appointment

"The Bangladesh Judicial Service Commission since its establishment in 2007 has conducted five judicial service examinations, and accordingly recruited and appointed judges to the lower Judiciary. However, no separate secretariat has been established for the Judiciary, and thus appointment, transfer, promotion of the judges of lower Judiciary are still administered by the executive through the Ministry of Law, Justice and Parliamentary Affairs, instead of the office of the Chief Justice. It is alleged that this results in inhibiting judicial independence, as premature transfers and arbitrary postings, promotions, removals exert political pressure on the Judiciary" (Halim and Siddiki 2015).

Further "Serious controversy has arisen regarding the frequent appointments to the High Court Divisions of the Supreme Court. There are allegations that these appointments are political influenced or political basis. Bangladesh still does not have a legislation prescribing detailed 'qualifications' for the appointment of judges to the Supreme Court. Despite a strong civil society's demand and a recommendation in the landmark judgment in *Idrisur Rahman v Bangladesh* (60 DLR 714) in 2008 for making law specifying appointment guidelines, the government has yet to enact such legislation"(Halim 2008). Moreover, "Article 95 of the Constitution of Bangladesh provides for, the appointment of judges to the Supreme Court. It dictates that a person cannot be qualified for appointment as a judge unless he or she is a citizen of Bangladesh and has practiced law in the Supreme Court for at least ten years, or has held judicial office in the country for at least ten years, or has other such qualifications as may be 'prescribed by law'."In the absence of a legislation prescribing detailed qualification, the 'at least ten years' experience as a lawyer or judicial officer appears as a broad criterion, leaving room for political manoeuvring in selection and appointment of judges to the Supreme Court" (The Constitution of Bangladesh 2016).

Appointments to the Superior Judiciary was not a controversial issue before the restoration of democracy in 1991. There was a convention of consultation with the Chief Justice before making any appointment. Until the Fourth Amendment of the Constitution in 1975, the provision was that, "The Chief Justice shall be appointed by the President, and the other Judges shall be appointed by the President after consultation with the Chief Justice" (Shuza 2011). "The Fourth amendment removed the explicit requirement that the Chief Justice of the Supreme Court of Bangladesh should be consulted as part of the process of appointing judges. Although successive governments have attempted to comply with the convention of consultation with the Chief Justice, political affiliation started playing a significant role in appointments of the judges to the Supreme Court from the 1990s onwards" (Halim 2008).

In "*Idrisur Rahman v Bangladesh* (60 DLR 714) in 2008, the High Court Division of the Supreme Court re-asserted the role of the Chief Justice, and made it clear that the recommendation of the Chief Justice would be binding on the President. The Appellate Division upheld the High Court's judgment in 2009 (15 BLC (AD) 49) and recommended making a law specifying guidelines" (ibid). It clearly suggested that, "in the matter of selection of judges, the opinion of the Chief Justice should be dominant in the area of legal acumen and suitability for the appointment, and in the area of antecedents the opinion of the executive should be dominant. Further, On 6 June 2010 the High Court asked the government to explain in six weeks why specific guidelines should not be framed for appointment of judges to bring transparency and competitiveness in the process. However the government has yet to pass or even draft or provide for public discussion a law formulating guidelines for appointment of judges to the Supreme Court. In the meantime, it has made several appointments to the SC including the HCD. The Fifteenth Amendment of the Constitution in June 2011 brought back the provision of consultation with the Chief Justice" (Aziz 1015). After this Amendment too, "several judges have been appointed to the High Court, apparently with the CJ's assent, but the nature of those appointments has given rise to questions in media and among the public as to whether the CJ was really consulted, and if consulted, then how the CJ could select

some judges who are allegedly less qualified to be appointed to the higher Judiciary (Shuza 2011).

There has been controversy over appointment of the Chief Justices of Bangladesh as well. In the appointment of the CJ, the principle of seniority, as reflected in Articles 96 and 97 of the Constitution and in *Bangladesh v Md. Idrisur Rahman*(15 BLC (AD) 49), was largely recognized. However, the principle has been repeatedly violated in recent years with four of the last six appointments seeing the senior-most judge of the Appellate Division being superseded. The appointment of Chief Justice A.B.M. Khairul Haque by the President in September 2010 was alleged to have involved the supersession of two more senior judges of the Appellate Division. The Supreme Court Bar Association, headed by members affiliated with opposition parties, condemned the selection. Similar controversies arose in the appointment of the present Chief Justice of Bangladesh, Justice Muzammel Hossain on 18 May 2011. In this appointment, Justice Shah Abu Nayeem Mominur Rahman was superseded (and then he resigned)" (Haque 2006).

There is also Criticism regarding the appointment of public prosecutors, who play an important role in aiding the Judiciary to come to a proper decision-making in state-led cases. Bangladesh has a longstanding practice of appointing ruling party-affiliated lawyers as public prosecutors. It is alleged that, following the practices of the past, the current government has replaced the entire group of public prosecutors with members or genuine supporters of the governing party and has also made politically motivated appointments to the Office of the Attorney General. There are also allegations regarding arbitrariness in judicial action. There are frequent reports of High Court Judges refusing to hear matters on the grounds of feeling 'embarrassment'. This practice, in which no reasons are provided, has raised public concern" (The Daily Star 2012). Moreover, "As reported in the Daily Star in May 2012, "some judges of High Court felt "embarrassed" to hear the bail petitions of prominent opposition leaders, while yet another bench passed dissenting orders on a bail petition" (ibid).

Politicization of Judicial Decisions

The manners of refusal of bail to political leaders have raised concerns about whether the courts are functioning freely. In December 2009, "the Dhaka District Court refused bail to opposition BNP leader (Ariful Islam) who was arrested in connection with the 21 August grenade attack case. In June 2010, another opposition leader (Mirza Abbas), an ex-minister and member of the BNP Standing Committee, was arrested. After he was granted bail initially, he was not released and was instead 'shown arrested' in relation to two new cases of burning vehicles during hartal and later was detained in jail" (Rahman 2008). Moreover, "in May 2012, two High Court benches refused to hear the bail petitions filed by senior BNP leaders, who had been implicated in two criminal cases regarding arson attacks and bomb blasts in the capital during a hartal. On 16 May 2012, "Dhaka Chief Metropolitan Magistrate's court rejected bail petitions of 33 top leaders of 18-party opposition alliance in an arson attack case, and sent them to jail" (The Independent 17 May 2012).

Withdrawal of cases on allegedly political considerations was also a factor for the controversy. In 2009, "a committee was set up under the law minister to review applications for withdrawal of cases on the grounds of their being politically motivated. By March 2011, the committee had recommended withdrawal of 4,687 cases, most of which allegedly involved members of the ruling coalition ("Overview of corruption within the justice sector and law enforcement agencies in Bangladesh", Anti-Corruption Resource Centre, 5). These included twelve corruption cases implicating senior ruling party leaders, their supporters, and relatives. At the same time, the committee appeared reluctant to approve similar applications filed against opposition party leaders or by journalists and human rights activists including journalist Jahangir Alam Akash, whom the Caretaker Government had reportedly implicated in false criminal cases in retaliation for his protest against extrajudicial killings" (Ahmed 2014).

Further, "In several sensational murder cases, Presidential pardons to persons affiliated with the ruling party, seriously diminished the integrity of the Judiciary undermining the rule of law. In September 2010, President Zillur Rahman granted Presidential pardons to

20 death row inmates (some allegedly affiliated with the ruling party) who were convicted of the murder of the Jubo Dal (opposition party BNP's youth organisation) leader Sabbir Ahmed Gama, nephew of the former BNP deputy minister Ruhul Quddus Talukdar Dulu", who had been gunned down in 2004 in Natore. In July 2011, "the President granted a pardon to AHM Biplob, son of ruling party leader Abu Taher of Laxmipur, who was convicted and sentenced to death for the murder of Nurul Islam, a leader of the main opposition party, the BNP. Thus, there have been many factors which brought up the questions and doubts as to an independent Judiciary into public discussion time and again." Some of those factors are "controversial appointments to the High Court, arbitrariness in judicial actions, appointments of Chief Justices, withdrawal of cases on political ground and arbitrary Presidential pardons in the last three years even after the formal separation of the Judiciary from the executive" (Biswas, the Daily Star 2012) etc.

"As far as the rule of law is concerned the independence of the Judiciary has a prominent position. However, Judiciary has faced many obstacles in the past especially in relation to the appointment and the transfer of the judges" (Talukder 1994). Judicial independence is one of the most required factors to run the Constitution smoothly and for the realization of a democratic society based on rule of law. The democratic system and social fabric will be broken down if the judicial system gets weakened. So, now it becomes the responsibility of the stake holders of the Judiciary to make this institution independent and impartial by playing an active and effective role.

The Judiciary is yet to be allowed to have the independence, offered by the original constitution 45 years ago, making the idea of nurturing judicial freedom further a hollow promise. There is no move on the government's side to restore the provision of the constitution of 1972 with regard to the independence of the Judiciary. Thus, the aspiration for a fully independent Judiciary will remain unmet for an indefinite period" (The Daily Star 2016). In such a situation, "the government's claim that the Supreme Court's latest verdict scrapping the 16thconstitutional amendment proves that the independent Judiciary does not tell the whole truth. Bangladesh ranked 103 out of 113

countries in the rule of law index of 2016 released by the World Justice Project. The poor ranking is indicative of the deficiency in the independence of Judiciary as well as the sorry state of the rule of law in the country" (Liton 2017).

"An independent Judiciary is regarded as the hallmarks of good governance, rule of law and the sought-after goal of separation of powers of the state organs. The framers of Bangladesh's constitution had envisioned an independent Judiciary free from the executive control. Separation of the Judiciary is one of the fundamental principles of the state policy and independence of the Judiciary is one of the basic tenets of the constitution enacted in 1972" (Akkas 2004) considered a result of the Liberation War, the constitution, in Article 22, clearly says: "The State shall ensure the separation of the Judiciary from the executive organs of the State."The SC had been empowered to have full control over all courts and tribunals subordinate to it. But things went in the opposite direction. Independence of the Judiciary has been undermined on several occasions since 1975 through constitutional amendments. During the two martial law regimes, independence of the Judiciary has been compromised even more" (The Daily Star 2017).

Appointment of the SC Judges

"The process by which judges are appointed in the Judiciary is an important factor to safeguard judicial independence. In establishing rule-based government, an independent Judiciary plays a substantial role. In Bangladesh, following the Masdar Hossain case, the subordinate Judiciary was formally separated from the executive in 2007. However, the process of appointment of judges in the Supreme Court of Bangladesh still rests in the hands of the executive. According to Article 95(1) of the Constitution of Bangladesh, "the President can appoint the Chief Justice. The High Court Division (HCD) and the Appellate Division (AD) judges are appointed by the President in consultation with the Chief Justice" (Mashraf 2016).

Nevertheless, the President, under Article 48(3) of the Constitution, "has to act in accordance with the advice of the Prime Minister except when appointing the Chief Justice." Further, "This ultimately vests a significant portion of the power of appointing

justices in the hands of the cabinet. Hence, to ensure that the process of appointing judges does not rely on the hands of the executive, a Supreme Judicial Council could be formed like the one during the regime of the caretaker government in 2007-09. The Council, like the former one in 2008 would be headed by the Chief Justice and include the Minister of Law, three senior-most Judges of the AD, two senior-most judges of the HCD, the Attorney General and the President of the Supreme Court Bar Association. They would recommend, after selection, two competent names against each vacant post to the President for appointing one of them as a judge" (ibid).

Alternatively, "a Collegium of judges can appoint new judges in the Supreme Court, as it is done in India, where it is formed of the Chief Justice and four senior-most judges from the AD. The Collegium would submit a list of eligible candidates to the President who would ultimately appoint the most suitable candidates as judges" (Sired 2004). Further, "In both the abovementioned methods, proper consultation with the Chief Justice will be done by the President and this will ensure that the executive can in no way influence the whole procedure. After all, a fair procedure of appointment of judges of the Supreme Court is the first step towards ensuring actual and absolute independence of the Judiciary" (The Daily Star 2016).

Recently in July 2017, "the Chief Justice Surendra Kumar Sinha said that in a meeting with the judges of the Supreme Court cautioned them against getting involved in inappropriate activities. According to him, the image of the Judiciary cannot be tarnished by the immoral activities of a few judges, while presiding over the full-court meeting where the judges of the appellate and high court divisions of the SC were present. The meeting was held at the conference lounge of the SC yesterday afternoon in order to discuss some urgent issues, meeting sources said. Quoting the chief justice they said there were allegations that some lawyers, who are members of some judges' families, moved cases before the benches of their friendly judges to get orders in their favour" (Sarkar 2017)

Further, “During the last Supreme Court vacation, some orders of bail were issued in cases that did not deserve bails; a source said citing the chief justice's statement. The judges are accountable for their activities, Justice SK Sinha said show-cause notices would be issued and appropriate action would be taken if allegations were brought against any judge in connection with indulging in anomalies and if the allegations were found to be true, he said, the chief justice issued the warning so that all judges work more honestly, sincerely, punctually and no question could be raised about their activities after the Supreme Judicial Council was restored. The Supreme Judicial Council, led by the chief justice and two senior-most judges of the Appellate Division, has been restored following the SC verdict that upheld a High Court judgement scrapping the 16th amendment of the constitution. The 16th amendment had empowered parliament to remove judges for incapacity or misconduct” (The Daily Star 2017).

An Overview of the Impeachment of Supreme Court Judges in Bangladesh

“The first constitution of Bangladesh, drafted in 1972, gave the Parliament the power to impeach the judges of the Supreme Court (SC). Then, following the fourth amendment, the President of Bangladesh was vested with this power. However, the Fifth Amendment legalized the formation of a Supreme Judicial Council (SJC). And the SJC, consisting of the Chief Justice and two next senior-most judges of the Supreme Court, was empowered to impeach judges on the grounds of proven misbehaviour or incapacity. The higher Judiciary of Bangladesh is not totally free from the reins of the executive while performing its functions. This is evident from the fact that the President after prior consultation with the Chief Justice and on advice from the Prime Minister would appoint judges in the SC, “as per the question arises as to their tenure of office and circumstances of misconduct due to which a justice can be impeached. However, the 16 amendment restored the power of impeachment of SC judges back to the Parliament” (Mashraf 2017).

“In accordance with the newly-inserted article 96(2) of the Constitution has restored the power to the parliament to impeach the judges of the Supreme Court followed by an order of the President. Article 96(3) has empowers, “the Parliament to regulate the

procedure by law. This prompted the debate once again as to whether the Parliament should have such authority over the higher Judiciary or not" (The Constitution of Bangladesh 2004). The Law Minister commented, *"The independence of the Judiciary will not be hampered because of the amendment. The Supreme Court judges will be able to discharge their regular duties independently"(ibid).* Further But there is a possibility that such an amendment would halt the Judiciary from functioning independently

"On 5 May, 2016, a special bench of three High Court (HC) judges declared the 16 amendment illegal, unconstitutional and against the principles of the separation of state powers and the independence of Judiciary. The HC observed that although in the UK, the USA, Canada, Australia, and India etc. the Parliaments preserved such powers, the MPs of those countries had total freedom of performing their duties. But this is not so in Bangladesh". Referring to article 70(b), the HC remarked, *"Our MPs are not able to vote against the party's decision even after the party took the wrong decision. If the 16th amendment is upheld, judges will have to seek mercy from Parliament members"* (The Daily Star 201).

Moreover, the HC noted that the previous instance of the SJC was the best policy to impeach the justices. On February 8, 2017, the SC announced 12 lawyers as amicus curiae or friends of the court, to hear their opinions when it hears the State's appeal against the verdict. Further, "Leaving the power of impeachment of the Supreme Court judges to the hands of the Supreme Judicial Council will not only consolidate the image of the Judiciary but also assure the common people of the independence of the higher Judiciary; which is a much needed step to reinvigorate the rule of law and justice in Bangladesh" (The Daily Star 2017).

According to the Chief Justice SK Sinha Bangladesh's courts are operating without any interference from the government. He was speaking at a discussion arranged by the Bangladesh Law Society, an organization of Bangladeshi American lawyers, in New York City in his honour on Sunday afternoon (local time). "In the past everyone believed the Judiciary was just another organ of the political government. Actually the Judiciary is

an organ of the state and it is working with one hundred percent independence. Chief Justice Sinha said. There has been no interference from any section of the government he continued. All sensitive cases, including those on 1971 war crimes, are proceeding in line with the law" (The Daily Star 2016). Justice Sinha, dwelling on human rights and the role of the Judiciary in Bangladesh, made the comments amidst claims by the BNP that the government exercised an undue degree of influence over the Judiciary. The chief justice had himself also expressed a different opinion earlier, "Beware of the executive branch it is trying to take away all our powers," he said at a programme organized by the Supreme Court Bar Association in January.

On Sunday, Sinha said those making claims about the government's influence over the Judiciary were doing so for 'purely political' reasons. "Many people raise questions about the Judiciary's impartiality to score political points, even when cases go their way," he said. "It has become something of a platitude." The chief justice also had praise for the media on its role in ensuring fair trials. "It has become impossible to suppress anything, he said. According to him, "Because the Judiciary is now independent, it will never be possible to impose martial law on the people again," The chief justice admitted that, as any other government institution, the Judiciary had 'some degree of corruption'. Work was under way to eliminate it, he added. "Like other sectors the Judiciary also has some degree of corruption and there is no denying of it. But we are making a sincere and concerted effort to stamp it out," he said (New Nation 2016).

Independence of the Judiciary- The Masdar Hossain case

"The Constitution of Bangladesh provides for an impartial and independent Judiciary as one of its cornerstones and guardian. In reality though, the Judiciary has been subservient to the all-powerful executive government since independence in 1971. Various governments made rhetorical promises to separate the Judiciary from the executive only to appease popular demand for an independent Judiciary. The domineering culture of executive autocracy over the constitutional imperative of the separation of power militated against the creation of an independent Judiciary" (Islam 2014). This situation led Masdar Hossain, a lower court judge, "to lodge a writ petition with the Supreme

Court (SC) seeking an order for the separation of the Judiciary from the executive as required in Article 22 of the Constitution" (The Constitution of Bangladesh 2016).

"The High Court Division (HCD) in May 1999 issued a directive to the government to separate the Judiciary, both higher and lower, from the executive within eight weeks. This ruling prevailed on appeal in November 2000 and reaffirmed in the revision case in June 2001 in the Appellate Division (AD). The SC ruling worked out 12 directives for the government to implement the separation without any constitutional amendment, which went unheeded. Despite Articles 102 and 112 of the Constitution making all SC rulings binding for all citizens and authorities, the then government sought 26 extensions of time to implement the ruling and eventually left the office in October 2006 without separating the Judiciary. The interim caretaker government that assumed office after October 2006 declared the separation in January 2007 and enacted four sets of rules to effect this separation. These rules, implemented by 1 July 2007, rendered the SC independent and brought the magistrates exercising judicial functions under the control of the SC, free of executive influence. This reform is yet to be implemented in the lower Judiciary, which remains largely under the control of the executive" (The Daily Star 2014).

In a hierarchical Judiciary, "the higher courts usually control subordinate courts to avoid deviations from the higher standard of judicial behaviour thus preventing damage to public confidence in the Judiciary" (Hussainara Khatoon v State of Bihar (1979) Cr L J 1045). The Constitution, "in a number of provisions, warrants the separation of the Judiciary from the executive as an overriding goal to ensure judicial independence in a functional sense." Further, "It contains explicit provisions for the independence of the lower Judiciary. The HCD is authorized to administer, control, and supervise all subordinate courts (Art. 109). Articles 115 and 116 mandate the President to establish subordinate courts and appoint their judges and magistrates in consultation with the SC and pursuant to appropriate rules" (The Constitution of Bangladesh 2016).

Further "Article 116A affords independent competence to all subordinate court judges in the exercise of their judicial functions. All these constitutional provisions purport to

establish an orderly system of judicial hierarchy in which subordinate courts remain accountable to the SC and not to the executive. The lower Judiciary has an unequivocal mandate for its independence under Articles 109, 115, 116 and116A of the Constitution. Yet the President appointed subordinate court judges and magistrates through the Law and/or Home Ministry without adhering to the constitutional safeguard of consultation with the SC. The executive asserts absolute control over the lower Judiciary, especially the magistracy, which enjoys little independence in performing judicial functions. The magistrates are an integral part of, and subordinate to, the executive. They serve only during the pleasure of the executive and have no choice but to carry out executive directives" (Mollah 2012).

The public prosecution department has been highly politicized, "which in collusion with the magistracy kept the rule of law and judicial impartiality at bay for many years. Frequent government interference with lower court proceedings on political grounds and their use as a political weapon through undue favour in promotions and transfers, adjournment of hearings, release of accused persons, and withdrawal of cases on political grounds are rampant." Further, "The national committee for reviewing and recommending the withdrawal of 'politically motivated' cases recommended 7,177 such cases since 2009 for withdrawal. Recently, "it has selected 170, including 30 murder, cases for review without following the mandatory due procedure of referral from district committees headed by deputy commissioners" (The Daily Star 2013). It is held that "Only competent trial courts, not the executive, should have the authority to order the adjournment of pending cases and the release of accused persons. Such executive interference subverts justice by undermining the provision for 'public trial by an independent and impartial court' under Article 35(3) of the Constitution and impairs the public image of the lower Judiciary". By virtue of its authority under Article 109 of the Constitution, "the HCD occasionally takes disciplinary actions against judges upon specific complains. But a great incongruity exists between the extent of actual irregularities and disciplinary actions taken so far" (The Daily Star 2014).

“The reasons for such inaction are attributable to the weakness of the judicial supervisory system and negligence of the Law Ministry to proceed on complaints lodged”. From this viewpoint “the supervisory role of the HCD in combating misfeasance and minimizing delays in the adjudication procedure in the lower Judiciary is not adequate enough to restore and maintain public confidence in the administration of justice. An example of this inadequate supervision is the implementation of the Code of Conduct formulated for the lower Judiciary in 1988 by the Law Ministry with the approval of the SC”. This brief code sets acceptable standards for, “all judicial ethics and morality, personal integrity of judges, impartiality and complete submission to the constitutional rule of law in the judicial decision-making” (Islam 2014).

Further, “the judges are required (a) to observe a very high standard of personal integrity and the constitutional rule of law (code 2); (b) to provide patient hearing to all parties (code 3); (c) to maintain impartiality under all circumstances (code 4); (d) to remain above political pressures and ideological influences (codes 9 and 14); and (e) to avoid unnecessary delay (code 10). The end in view is to serve the interest of justice and portray a credible image of the lower Judiciary in the community (preamble of the Code). In practice though, the code is more often than not ignored for want of its strict enforcement. The basic compliance problem is that the current supervision arrangement, particularly the case of overseeing the activities of the lower Judiciary on a case specific basis, is not working satisfactorily. Activities contrary to the code are rampant in subordinate courts, one of the principal reasons for the erosion of public confidence in the Judiciary. One possible way of monitoring the activities of the lower Judiciary and enforcing its compliance with the code may be the creation of a body of three judges from the HCD with mandate to report all anti-code conducts of the lower court judges and recommend disciplinary action against them. The publication of codes of conducts through public media would help the litigants to demand just behaviour from the persons involved in the adjudication procedure of their litigation”(Iyer 2000).

Further, “The social accountability of judicial conducts may be enhanced through press freedom. The press could be the best watchdog to effectuate judicial accountability to the

public. The degree of public confidence in the Judiciary is contingent upon the public perception of the integrity and transparency of its decision-making process. Judges must be able to defend and explain the ways in which they exercise their judicial powers. Fair and ethical press reporting on the prevalent impropriety of the lower Judiciary would be of much help to warn its judges to be honest and sincere, thereby helping restore public confidence. In Australia, all judicial functions are open to public scrutiny" (ibid).

Lord Denning justified such public accountability, "In every court in England you will find a newspaper reporter. He notes all that goes on and makes a fair and accurate report of it. He is the watchdog of justice. The judges will be careful to see that the trial is fairly and properly conducted if he realises that any unfairness or impropriety on his part will be noted by those in Court and may be reported in the press. He will be more anxious to give a correct decision if he knows that his reasons must justify themselves at the Bar of public opinion" (The Road to Justice 1955: 64).

> "It is imperative that Bangladesh respects the press as an effective means of public scrutiny of lower judicial conducts. Attempts at strict regulation of the press through the contempt proceedings under dubious circumstances have already caused public concern. The Judiciary needs not be obsessed with the contempt actions in an attempt to insulate itself from constructive press criticisms. Continuous practice of judicial immunity from criticisms through contempt proceedings considerably diminishes public confidence in the Judiciary. Good governance calls for a balanced Judiciary, which is both independent and accountable in exercising its judicial powers. Public criticisms are not to be seen inimical to judicial independence. Greater judicial independence calls for specific measures to promote it. Judicial accountability to maintain and enhance public trust in the Judiciary comes foremost among these measures. Judicial independence and accountability are mutually complementary in that the former consolidates and endures when the latter strengthens and enforces" (Mollah 2012).

“The appointments of judges in the lower Judiciary should be made by the Judicial Service Commission (JSC) on the basis of merits and experience. There should be specific criteria for the promotion of judges, not merely on the basis of their seniority. In addition to the length of service, activity reports especially on how many cases he/she disposed of on yearly basis and how many of them were reversed on appeal or revision should be taken into account. Publications in professional journals may also be counted in order to ensure that judges acquire the cutting-edge knowledge by familiarizing themselves with the judgments of other jurisdictions and juristic writings” (Halim 2015).

Further “The time and cost effective management of cases to reduce the chronic delay in the disposal of cases and to render the justice system available to all is especially crucial in the context of the Bangladesh. These inclusive criteria for promotion, if followed routinely, would make the judges self-regulatory and help them remain on the right track. The high cost of litigation, frequent shifting of hearing dates and adjournments, harassment by lawyers, and the complicated process are quite intimidating for the common people generally and vulnerable and marginalized (poor, women, and minorities) particularly in accessing justice in lower courts. Difficulties in accessing National Legal Aid and Services Organization are almost insurmountable. Of the cases brought to trial, conviction rate is extremely low (about 10%) often due to corruption, which remains the leading cause of denial of justice in lower courts” (NHRC Survey in Daily Star 24 December 2011: 27).

“It is imperative for the lower Judiciary to address these problems of access to justice and for its judges to remain above any corrupt conducts. A mandatory system of periodic review of the financial, moveable and immovable assets of a judge from the beginning of his/her tenure may be put in place. Any noticeable disparity between the valid sourced incomes and undue enrichment could be a ground for triggering an inquiry to be conducted by the proposed body of the HCD judges. Disciplinary action has to be initiated based on the finding of the investigation after giving the judge an opportunity for self-defence, if any ex facie irregularity is found, Concurrently, he/she should be tried in the ordinary court of criminal law” (Halim 2008).

Historically, “adherence to the due process of law and justice in the performance of executive functions is almost non-existent in Bangladesh. There is a great deal of executive interest at stake in the separation of the Judiciary. The maintenance of a dependent Judiciary has been politically expedient for the executive. It is therefore unlikely that the initiative would come from any executive government. It is indeed the Judiciary itself that has been instrumental in forcing the executive to formally proclaim the separation of the Judiciary in the aftermath of the Masdar Hossain case. There appears to be no palatable alternative other than further higher judicial tenacity and activism in contriving ways to ensure the constitutionally entrenched separation and independence of the lower Judiciary. Shagging-off this popular expectation and constitutional requirement may fuel a public confidence crisis in the Judiciary and might be paradoxical to its status as the guardian of the Constitution” (Islam 2014).

Role and Vulnerabilities of the Judiciary

Historically, the courts system was different to the present one. Earlier the courts were presided by more than one individual but currently the system of court transformed into the bench of judges which exists only in the Supreme Court. All Subordinates courts are presided over by a single Judge. Under Section 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. In this Context another important deviation from the past needs to be explain briefly. “During the Hindu and Muslim Periods justice was administered in accordance with religious law” (Akkas 2004: 99). Therefore, in the Hindu period learned Brahmans assisted the King in the administration of justice by expounding the Hindu Law. Similarly, in the Muslim Period the Sultan or Emperor and even in some cases Qazis were assisted by a learned law-officer Mufti who explained the Islamic legal provision (ibid: 100).

At the beginning of the British period, the rulers adopted the policy of applying the personal laws of the Muslims and Hindus to them in the administration of justice. However, the Muslim and Hindu laws were mostly in Arabica and Sanskrit languages

which the English judges could not read and understand. Moreover the books containing the personal laws were not pure books of law: Law, Morality and Ethics were all mixed in them. Consequently, the British rulers appointed native law officers, qazis and pundits who were to explain the legal principles before the judges. Subsequently, "the personal laws of Muslims and Hindus were codified and translated into English. Then the practice of appointing the law officers was abounded in 1864 and the obligation to find the principles of personal laws were vested in the judges themselves" (Jain 1997: 581).

This system is now applied in Bangladesh and therefore, "there is no practice of appointing religious law officers in the Courts. Judges are appointed irrespective of their religious background and they can apply any law including the personal laws of different religious communities in respect of disputes relating to family matters, which involve marriage, divorce and guardianship" (Ahmed 2104). A very significant similarity between the colonial and current judicial administration is that the British rulers used judicial power in revenue collection which was an important aspect of legal disputes. This system still exists in Bangladesh: Deputy Commissioner, a public servant, invested with the power of the Chief Executive in each district, exercises the power of a district magistrate and revenue Collector (Akkas 2004: 100).

Article 7 (1) of the Constitution of Bangladesh provides that "all powers of the state belong to the people and their exercise should be effected on behalf of the people.[1] Therefore, the Judiciary is under the indirect control of the people and this control is stimulated by public confidence in the Judiciary which is an important factor to the maintenance of judicial independence and to ensure judicial accountability" (The Constitution of Bangladesh 2016: 3). Despite this, there are some important issues after public confidence in the Judiciary. Some of the major issues are discussed below.

Executive Control over Judiciary

The Executive branch of the government exercises extensive control over the Judiciary. The Constitution of Bangladesh recognizes the principle of "separation of Judiciary from

[1] That is called as the "Supremacy of the Constitution", Article 7 (1) of the Bangladesh Constitution, 2016.

the executive as a fundamental principle of the State policy". Article 22 of the Constitution provides, "the State shall ensure the separation of the Judiciary from the executive organs of the state" (The Constitution of Bangladesh 2016: 6). However, in practice this principle is not completely implemented. The executive enjoys control over many aspects of the Judiciary including "the appointment, tenure and discipline of judges" (Sierd 2004).

Another important issue of the executive control over the Judiciary relates to the working of the subordinate criminal Judiciary. Further "In order to solve the criminal cases magistrates exercising judicial functions which produce the conditions of over burdens in the lower Judiciary? The magistrate are so burdened that they deliver the criminal cases as well as play a key role in implementing the programmes and policies of the government. It has been also mentioned that a public servant is appointed as the Deputy Commissioner who is the chief executive in the district and at the same time, he or she exercises the powers of a District Magistrate" (Akkas 2004: 101). As the Deputy Commissioner, he/she can on the one hand arrest and prosecute a person and on the other hand, as a District Magistrate he/she can act as a judge of the Criminal Court to try criminal cases. Under the control of the Deputy Commissioner-cum-District Magistrate, "a number of public servants are appointed in the executive position to discharge miscellaneous functions including exercising judicial functions as different classes of Magistrates." The Magistrates now try more than 80 percent of Criminal cases, despite they do not have legal background (Malik 2003: iii).

The structures of executive and lower Judiciary are so dependent that Magistrates instead of discharging their duties try to please the political executives. Nevertheless, the Magistrates try criminal cases in which the government is essentially a party. Therefore, it is likely that in deciding criminal cases, they are dictated and influenced by the political executive (Halim 1998: 312). Malik says that, "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" (Malik 2003: iii).

Delay in the Disposal of Cases

Delay in the disposal of cases is an alarming issue of the Judiciary in Bangladesh. There are appalling arrears of cases pending in the lower courts as well as in the Supreme Court. According to the 2002 report of the Ministry of Law, Justice and Parliamentary Affairs, where Barrister Moudud Ahmed mentioned that, “there are more than 968,000 pending cases in Bangladesh. Among these cases approximately 5,000 cases are pending in the Appellate Division, 127,244 are in the High Court division, 344,518 are in the Subordinate Civil Judiciary, 95,689 are in the Courts of Session and 296, 862 are in the Magistrates Courts (Rahman 2016). And also it would take hundred years to dispose of the pending cases even if no new cases were filed (Dainik Janakantha 2003)

On 16 June, 2016, Law minister Anirul Hoque said that, “the number of total pending cases lying with the High Court Division till March 31, 2016were 3, 99,303. Among these pending cases, the numbers of civil cases are 87,964, Criminal cases 2, 41,015, Writ cases 63,250 and old cases 7,074.Anisul said various initiatives have been undertaken to remove the case log. According to him, “The work on filling the vacant posts of the judges is underway, while appointment of more judges and infrastructural development are under active consideration of the government” (Halim 2015). Besides that he also mentioned that, “Supreme Court Legal Aid Office and Supreme Court Legal Aid Committee have been constituted to provide legal aid to the insolvent, poor and helpless people and the digital cause list has already been introduced at Bangladesh Supreme Court for using modern technology and district legal aid office has been set up in 64 districts.” Anisul also said that steps also “have been taken to reduce the case log through Alternative Dispute Resolution (ADR)” (The Independent 2016).

The delaying of the cases in the courts is so prevalent that when a case is filed with a court, people are not sure that how much time it will take to end. Therefore, the public opinion regarding functioning of the Judiciary is worsening. Even the cases which are very low importance and should be disposed in a very short period of time may take too many years to end. The most common thing in the delaying of the cases led to the denial of justice to common masses. In fact, “delay in the justice system has reached a point

where it has become a factor of injustice, a violator of human rights. Praying for justice, the parties become part of a long protracted and torturing process, not knowing when it will end" (Alam 2000). The most consequences are faced by the ordinary citizens due to their limited reach to interfere in the judicial processes. In a workshop titled, Court Administration and case Management: In Quest of Capacity Building, Chief Justice Mahmudul Amin Chowdhury said that "there is no denying that public confidence is diminishing day by day because of delay in the administration of justice" (The Daily Star 2001).

There are several causes to the delay in the disposal of the cases which could be categorized in the civil and criminal cases. According to Akkas the "The most common causes for delay are the slow process of serving notice or summons, frequent adjournments of the trial, lawyers economic interests in litigation, the lack of an effective case management system and insufficient accountability of judges" (Akkas 2004: 103-104).

STATEMENT SHOWING FILING OF NEW CASES, DISPOSAL AND PENDENCY OF CASES FROM 01.01.2016 TO 31.12.2016

Cases	Opening Balance	Institution	Total	Disposal	Pending on 31.12.2016
Civil	7088	4044	11132	6580	4552
Criminal Review	867	1271	2138	1186	952
Civil	504	652	1156	244	912
Criminal Review	79	90	169	95	74
Jail Petition	100	15	115	5	110
Grand Total	8638	6072	14710	8110	6600

Source: Annual Report of Bangladesh's Supreme Court (2016)

STATEMENT FOR ALL CASES FROM 01.01.2016 TO 31.12.2016 IN THE HIGH COURT DIVISION OF THE SUPREME COURT OF BANGLADESH

Cases	Opening Balance	Institution	Restored	Total	Disposal	Current Pendency
Civil	87310	6526	77	93913	3665	90248
Criminal	237964	45345	8	283317	25836	257481
Writ	62157	16965	61	79183	9857	69326
Original	6794	1665	0	8459	520	7939
Grand Total	394225	70501	146	464872	39878	424994

Source: Annual Report of Bangladesh's Supreme Court (2016)

The people those are mainly accountable to the delay in the judicial cases mostly belongs to the three classes. They are court staff, lawyers and judges. However, in the cases of criminal offences the investigating officers may also be creating the hurdles to delay the cases. Court staffs are responsible for issuing notices and summons and the management of cases, however, they perform their functions under the supervision of the judges. Lawyers engaged by the parties are mainly responsible for protecting the interests of their clients, but in doing so, they enjoy a monopoly to conduct cases in the way they consider best suited to their own financial interests (Alam 2000).

Judges are the main actors in the justice delivery system and therefore their responsibility is greater than others. "Although judges cannot perform their function without the active cooperation of Court Staff and lawyers, they can eliminate delays in the disposal of cases by effective supervision of the functions of the court staff and by checking delaying tactics of lawyers". Lawyers often submit applications for the adjournment of cases, on ground which may include their personal convenience (Akkas 2014: 104).

Although delay in the disposal of cases is not directly related to judicial independence, it is an aspect of judicial accountability. This is because when cases are delayed inordinately because of the acts of a judge he or she should be accountable for delays.

Moreover, "delay in justice is an important factor undermining public confidence in the Judiciary which is crucial to judicial independence and accountability" (Ahmed 2014).

Corruption

Corruption is widespread problem in Bangladesh and the Judiciary is not free from it. It is generally believed that the Judiciary is significantly involved in corruption. Though, it is known that some judges are involved in corruption, it is very difficult to prove their involvement. They may receive bribes through lawyers or court staff. In this regard Ex-Chief Justice Latifur Rahman said that, "for the judicial officials, the lawyers work as intermediaries and at times office subordinate contact them for bribe. He recognizes that it is indeed difficult to find out strong evidence of corruption against a particular judge" (Rahman 2000: Para 3).

In fact, corrupt practices of the people involved in the justice system seriously undermine the image of the Judiciary. A Survey (1997) conducted by the Bangladesh Unnayan Parishad "among 2,197 individuals selected randomly from 60 districts, reveals that 82% of the people opined that the Judiciary is one of the most corrupt sectors in Bangladesh. Judicial corruption is an important ingredient of judicial misconduct that is a cause for discipline and removal of judges" (Khan 2001).

Conclusion

The Judiciary must be given the free hands to protect the justice in the society. If the people of the land will not be given the proper rights to judicial enquiry than the whole system of democratic practices will be in the hands of handful political and administrative elites. The independence of Judiciary is very much necessary to enforce the rule of law and to provide the fare justice to masses without interference of executive powers. Therefore, the proper existence of judicial independence is very essential in the democratic country like Bangladesh to avoid the absolutism undemocratic functions in government as well as in the society. It should be clearly understood that the independence of Judiciary must not be taken as granted because it's essential to protect the rights and freedoms of individuals in the country. The argument of Henry Cecil

regarding the Judiciary is very noticeable in which he pointed out that the "Justice is such a precious commodity that everything reasonable should be done to attain the highest standard" (The Government of Bangladesh 2012).The not existence of free and fair Judiciary in a country will led to the devastation of democratic values. Therefore, the independence of Judiciary is very much necessary to ensure the proper implementation of democratic values. The impartiality in the judicial system is as essential as oxygen to the life, for survival it is very necessary to the people of the country. In the long run, the judgements presented by the judges establish the confidence and faith of the people in the Judiciary which ultimately construct the public opinion about the democratic system in a country. Anzara presented a very interesting argument that "The public will support the courts if they are seen as an effective impartial forum for resolving disputes. Hence the independence of the Judiciary should be protected with utmost care" (Anzara 2016).

The relation of superior Judiciary and lower Judiciary with the executives is not properly separated. Since superior Judiciary is separate but lower Judiciary is still considered the part of executives. Moreover, historically the different rulers interfered and controlled the judicial action by several means through the appointment, the tenure of their work and much more. The executive interventions always had been the part of judicial control through various means. Therefore, older traditions of the executive control over the Judiciary continue to compete for recognition with the more recently introduced western concepts of judicial independence and accountability. Therefore there is no clear integration of the values of judicial independence and accountability in Bangladesh (Akkas 2004: 108).

CHAPTER – 6

CONCLUSION

CHAPTER- SIX

CONCLUSION

The most important aspect of Constitutional principles to govern the affairs between the Judiciary, the executive and Parliament is that of the "independence of the Judiciary". The independence of Judiciary is the most important ingredient of democratic development as well as implementation of constitutional values. This implies that the Judiciary has to be separated from other branches of the State machineries to safeguard the independent functioning of the Judiciary. Therefore, it is utmost importance that individually and collectively, Judiciary must be protected from the scrutiny by the political executives.

The general accountability and judicial criticism in the open public platforms also must take care to protect the free functioning of the Judiciary. On the other hand the socio-economic conditions of the people of Bangladesh have protracted the existence of informal judicial system at the grassroots level. In comparison to other country the educational and economic condition of the people of Bangladesh is very low. There is also high level of illiteracy and urbanization is also very low. Still they have faith on informal set up of Judiciary because socially they are not educated and economically they cannot afford money to hire a lawyer. In other words, the district level judicial system gets controlled by the muscle power of the local political leaders.

Since being an Islamic country dominated mostly by the Muslim, Bangladesh judicial system is deeply influenced by the Islamic laws, values and principles. The informal *Shalish* is not a recognized judicial periphery but then at the grassroots level it has immense power to control the lives of the people which in what weakened the Judiciary in Bangladesh at all levels. The role of the *Shalish* being an important informal judicial purview has been directing echelon as well because the emotions and the Islamic ideology matters a lot. Few pockets of Bangladesh, when Jamaat-i-Islami dominates informal *Shalish*are also the key institutions. Jamaat's deep rooted faith on Islam

indirectly rules the local level people. Parties like BNP and AL being the main national parties have failed to develop the socio-economic conditions of the people.

The studies done by several scholars on the basis of judgements disposed by the Judiciary of Bangladesh, there is a regular practice to protect and not to take legal actions against the criminal people related to the ruling party or their alliances. Many times the Judiciary in the pressure of ruling party initiate very slow process for the ruling elites and their allies. Contrary to it the opposition party leaders faces very rigid and quick legal actions, sometimes fake cases also initiated against the political activist of opposition party.

However, in spite of the fact that sometimes they might be completely innocent. Thus, the legal system in Bangladesh mainly gives benefit to the ruling elites. This gives them power to abate & crush the political opponents. The state of the Judiciary has reached such a shockingly bad state that in Bangladesh currently the Judiciary do not have the enough courage to register the criminal cases against the political activist or cadres belonging to the ruling party irrespective of their intensity of crimes. Politicization of the Judiciary system and its nexus of corruption has become a disastrous disease in the Bangladesh which is currently hampering the socio-economic development but also the democratic and constitutional development. If this key institution disintegrates, it would take a long time for the nation to raise itself from the ashes (Islam, 2010: 64).

Findings

The poor are adversely affected by the problems of the judicial system. In many Asian countries, also in Bangladesh, the poor represents the major section of the population. Poverty and inequity demoralize the rights and welfare of the general public and deprive them from other financial and political prospects to which they are rightly allowable. In Bangladesh, the formal judicial system is so expensive that it is beyond the affordability of the poor. Hence they do not have access to the formal judicial system. The most important hindrance faced by the poor includes hiked official expenses, avoidable delays in the judicial proceedings that is the result of proper education the legal system to the common population. Beside this, courts are mainly situated in the urban areas. However,

most of Bangladesh's population is found mainly in the rural areas. Thus, access to the court system is extremely limited.

According to a study by the Bangladesh Rural Advancement Committee (BRAC), "eight out of ten Bangladeshis live in village communities far away from any formal court." As a result, the rural poor have to bear transportation and logistics expenditure (Goresh 2009: 255-256). Same story is evident in South Asia; justice is unreachable to the weaker sections of the people because they are not educated concerning about their rights and rule under it.

In spite of this if information and data are readily accessible; therefore the common and poor people still remain sceptical regarding the enforcement of judicial proceedings and judgements against the ruling elites. The common citizens are losing their faith in the impact of Judiciary in the legal proceedings of the courts. Moreover, the literal language used by the Judiciary is so complex to understand by the common peoples which become the hurdle in the way of getting justice. The legal information's are not spread widely, this exacerbate the problems of the unreachability of the legal system. Laws are amended, judicial decisions are made. But still there exists no system to publicize this information to the common citizens.

In the long history of Bangladesh's Judiciary political interference is a major hurdle in disposing the neutral and fair justice to the common people. The independence of Judiciary can only be stopped through the minimal interference of political elites and power of executives. Therefore the role of government and other political parties is very important to ensure the neutrality of the justice. The rule of law can only be protected by ensuring the proper freedom to Judiciary and it's functioning in the country to fulfil the aspiration of the people. Moreover, the separation of power between the executives and Judiciary which effecting the proper functioning of Judiciary is very much necessary to uphold the ideals of free and fair justice. The executive bodies of government are more embedded in corruption which effects the judicial decisions.

The proper Communication and cooperation between the Bar and Bench is very necessary to be develop. In Bangladesh there is a huge communication gap between the Bar and the Bench while the steps are very less to minimise the misinformation in the legal systems. "The newcomer judges do not have proper training but are functioning as plenipotentiary judge which might create further bitterness and result in substantial distrust towards the whole institution" (Alam 2010: XXVI).

The judges of Bangladesh do not interact much through their counterparts in other countries. This is one of the possible factors for their narrow-minded understanding of law. The scarce resources of court limit the opportunities for such interaction. The Judiciary in Bangladesh has very limited or negligible interaction with the foreign courts to understand and learn the new techniques to proper implementation of rule of law. This means that adult judges, who have fewer time left on the bench & are usually less exposed to fresh ideas assume such kind communications most habitually, getting the most inadequate results possible from them (ADB 2003).

According to, "Article 115 of the Constitution appointments of persons in the judicial service or as magistrates exercising judicial functions shall be made by the President in accordance with rules made by him in that behalf". It is noteworthy in this Article that the President exercising this power is not necessary to take advice from the Chief Justice of Bangladesh. It is well known that the President cannot use his authority without pleasing the advice of the Prime Minister; except his power of appointing the Prime Minister. In this way the executive organ of the government in Bangladesh is controlling the Judiciary. The President is responsible for their activities, postings, transfers, promotions, punishments etc. (Mollah 2012).

The Judiciary does not have the right to implement its decisions; this liability lies with the executive Government. It is the discretion of the executive whether to favour the verdict or act of the Judiciary. If any verdict or act of the Judiciary is not favoured by the executive, then the Judiciary can at most matter contempt of court procedures aligned with the executive power for failing to bring out its commands. The laws of contempt act

as a significant defense for the Judiciary; it addresses terms and proceedings that obstruct through the administration of integrity and honesty or that represent ignorance for the authority of a court (Ahmed 2010: 106).

Another very serious concern of the judicial functioning in Bangladesh is the high time taking judicial proceedings in the courts. It's very difficult for the poor people to bear the expenses of the complex judicial proceedings. Moreover, in many cases the judicial proceeding take too much which exhaust the faith of the poor people in the Judiciary. The district court judges are the administrator in Bangladesh. They are answerable for running, preparing and delivering decisions. "Justice delayed justice denied is one of the principles of equity". Public has lost their self-belief in legal system (Yussouf 2003).

There are many factors which have an effect on the useful demand for informal justice, some of them are identified. Firstly the marketplace for justice in Bangladesh is having high possibilities of faults and also contains the biases for the influential elites. They are probably to have a harmful cause on the overall claim for lawful or substance justice. Secondly evidence suggests that women are discouraged from taking grievances to the formal justice system, in spite of the accessibility of assist in overcome the economic and institutional barriers to contact. It has also been argued that prejudiced norms put women who confront with the organization of marriage ceremony at risk of societal exclusion and poverty (Hasle 2003:128).

The proper separation of lower Judiciary and executives is not meaningfully effective despites 10 years of official separation. Still the political and administrative executives influence the judicial processes through various means. The plan of separation of Judiciary is not working well due to the control and interference of political executives. Moreover, the government also remained very passive to restore the authority of supreme courts over the lover courts. The Supreme Court is still not having the much influence in regulating the lower courts which shows the high interventions of administrative machineries. The government has not really done anything meaningful to restore the Supreme Court's authority over the lower courts. According to the constitution of 1975,

“The apex body used to have control over the appointments, postings, promotions and granting of leave, and disciplining persons employed in the judicial service until the fourth amendment to the constitution”. To bring back those powers to the SC, the original articles 115 and 116 of the 1972 constitution needs to be amended. Its needed to restore the power of Judiciary. The changes, according to legal experts, are also required, to ensure Independence of the Judiciary.

The apex court in several judgments has also spoken for reinstating the original articles 115 and 116 for an effective separation of Judiciary. The lower Judiciary was officially separated from the executive branch on November 1, 2007 following the Appellate Division's directives in a case known as "Masdar Hossain's Case". But the government has done nothing since then. “Some laws were amended and new rules were made by the past caretaker government-led by Fakhruddin Ahmed to separate the Judiciary. It was not possible for the caretaker regime then to amend the constitution as there was no parliament” (The Daily Star 2015).

The Law, Justice and Parliamentary Affairs Minister Anisul Huq has said the Awami League-led government will do everything needed for the independence of the Judiciary. “We have already restored the provisions of the constitution of 1972 through the 15th amendment of the constitution to ensure independence of the Judiciary. The remaining work has been done by the16th amendment of the constitution,” the law minister claimed. The law minister was responding to a question about the government's steps to restore the articles 115 and 116 of the constitution of 1972 for an effective separation of Judiciary.

The Awami League-led government has amended the constitution twice- 2011 and 2014. But the amendments have not restored the SC's authority over the lower Judiciary. The original article 116 of the 1972 constitution had given the SC power over the lower Judiciary. The SC had the power to control postings, promotions and grant of leave. It could also discipline persons employed in the judicial service, and it had control over the magistrates' exercising judicial functions. But the fourth amendment changed all that. The amendment gave the power of control over the lower Judiciary to the president, in effect

allowing the executive branch to control the lower Judiciary. The fourth amendment also curtailed the SC's power regarding appointments to the lower Judiciary. Article 115 of the 1972 constitution specified that district judges would be appointed by the president on the SC's recommendation. All other civil judges and magistrates exercising judicial functions were supposed to be appointed by the president in accordance with the rules made by himself or herself in consultation with the Public Service Commission and the SC, according to the original article 115. But the fourth amendment gave the power to the president to make all appointments in accordance with rules made by the president.

The martial law regime led by General Ziaur Rahman in 1978 did not bring any change in article 115.It had however amended article 116 through a martial law regulation, making the provision that the SC would be consulted by the President to exercise the power to control and discipline the lower courts. The changes were ratified by the Fifth Amendment passed in 1979. The changes ceased to have effect with the nullification of the Fifth Amendment by the SC.

The AL-led government has however revived the amendments introduced by Gen Zia in the Constitution through the 15th amendment in 2011, without restoring the original article 116. The government also did not do anything about it when it again amended the constitution in 2014.It now follows a model introduced by military ruler General Ziaur Rahman in the constitution to exercise control over the lower Judiciary. In Masdar Hossain's Case, the apex court has spoken for the need for amending the constitution for effective and meaningful separation of Judiciary. The Appellate Division of the SC, in its full judgment in the Constitution's Fifth Amendment case released in July 2010, stressed the need for restoration of the provisions for a meaningful separation of the Judiciary from the executive. "It is our earnest hope that articles 115 and 116 of the constitution will be restored to their original position by the parliament [by amending the constitution] as soon as possible," said the apex court.

Independence of the Judiciary, which is one of the basic features of the constitution, will not be fully achieved unless the articles are restored to their original position, the court

stated. "It may be noted here that among the twelve directions given in Masdar Hossain's case one was to the effect that parliament will in its wisdom take necessary steps regarding this aspect of independence of Judiciary, it stated. Thus these cases show the measures suggested by the judges to restore the freedom of Judiciary. In the ruling, the court also cited observations made by Justice Abdul Matin, who said, "until and unless Articles 115 and 116 of the constitution are restored to their original state, separation of the Judiciary will remain a distant cry, and music of a distant drum.

We attained independence, we brought back democracy and we claim to have made arrangements for ensuring equitable justice. However we could not enjoy the fruits of independence, democracy and justice to the extent. We require it to call the society a truly civilized one as the stated phenomena are still hemmed in by some invisible hands or equations. Painfully enough, despite persuasive commitment and prolonged struggles to establish democracy, the political parties of Bangladesh have miserably failed to establish a consensus over the ground rule for democratic competition and dissent. "Such politics breeds a politicized bureaucracy and a malevolent system of law and order. And these instruments of governance operating without accountability and transparency, lead to the machinery of state being used as a political resource rather than an instrument of governance"(Quddusi, 2009: 71-72).

In several parts of the world where democratization is still in process the countries are still struggling to achieve the independency of courts. In the sub-continent countries even in like India which has stronger and longer democracy is still learning from its inadequacies in ensuring judicial autonomy. Especially, it is mostly happening in the case of newly independent countries which emerge after the long struggle of freedom struggles. Again the feudal characteristics of the ruling elites also undermine the establishment of free and fair Judiciary. Bangladesh is mainly lacking in legal structure as well as in practice in establishing such independence. The country is not free from the control of religious political leaders who prioritise the religious practices first to the modern judicial system. Although a various number of measures are taken following the famous Masdar Hossain case to brief up the independence, but so far nothing much is

done concerning superior Judiciary. "Given the supervisory role of the higher Judiciary on the lower tiers and also on state functionaries, it is also essential to build up the effective independence and efficiency of the higher Judiciary"(Nazrul, 2010).Excessive bureaucratization and inadequacy in the judicial system is also causing the non-transparency, accountability and delay in the legal process of Bangladesh. The implication of the study is that it has highlighted the facets of Bangladesh Judiciary with which it grapples. Despite that Judiciary has not been able to deliver up to mark on its own precisely because of the whole political system of Bangladesh.

It is also think that even after the separation of Judiciary all the roads of justice may not be opened. There several hurdle to obstruct the functioning of the Judiciary. Therefore the role of civil society and political activist should have to come to improve the legal system for advancement of rule of law. Until and unless, there would be not sound judicial system the socio-economic stability in the society is not possible. If the judicial structure declines, the democratic system will not function, and social and economic framework will also not effective. So here all the people concerned with Judiciary have to play energetic and effective role from honest point of outlook. The comprehensive and collective efforts are needed to consolidate the impartial functioning of Judiciary. The role of dedicated and honest leaders also needed to make the public perception for the democratic development in Bangladesh. Then the independence of Judiciary will bring effective fruits in future.

As Judiciary is the third leg of the democracy, whose sole purpose is to interpret the laws and protects the constitution. The Constitution has provided equal powers to three organs of the state. These three organs are not watertight but interdependent. The Bangladesh's Judiciary has limited independence and there is major encroachment in their powers by the executives both temporary and permanent executives. The judicial decisions are some time influenced by the politicians directly as well as indirectly. The Bangladesh's Judiciary is independent on the papers and semi-independent practically.

The Politicisation of justice rendered the innocents vulnerable and no option but not to file the case in the court. There is higher level of corruptions among the police departments. The police's exploitative nature rendered them again unequal justice especially the poor and those who have limited powers. The long period to get justice is also one of the problems, thereby people don't go to courts to file case and prefer instead to do out of court settlement where the weaker maximum time to get limited justice. The judicial justice is quite expensive; a normal person cannot afford to bear the expense of the case for five to ten years. Therefore, there is less cases file in the court.

The Salish are the informal courts whose sole role is to sole the legal disputes at the village level. These are the informal courts but they are also not independent. The role of politicians and money power surmount and thus impediments in dispense of justice to the common people. There are only two strong political parties i.e. Awami League and Bangladesh National Party. The party who remains in powers are Awami League has greater role in influencing judicial decisions and the opposition party i.e. Bangladesh National party which is a opposition party has limited say. The executive branch of the state has much greater role and higher interference in the Judiciary. Sometimes there is very high role of executive in the selection process of the judges of the courts.

If we talk about the lower Judiciary of Bangladesh, it has been found that lower Judiciary is less independent than higher Judiciary but some of the respondents have the opinion that lower Judiciary is independent. There is also role of executive in the appointments of the judges of the lower Judiciary and influencing their decisions. There is lack of judges in the lower Judiciary judges. There are lakhs of cases pending in lower Judiciary and some of the people have died before the case open or first trial. The majority of the respondents have the opinion that there is prevalence of corruption in the lower Judiciary and common people are not getting the justice. There is also lack of transparency in the selection of the judges of the lower Judiciary.

As per my first hypothesis (*Party politics of Bangladesh has failed to institutionalize the Judiciary in Bangladesh),* it can be said that the democracy is a contentious political

process which requires constant nurturing and it also demands that the disputes be resolved amicably. People in Bangladesh are by and large committed to secular-democratic ethos and have been supportive of efforts to curb Islamic radicalism in society and politics.

However, there have been problems in the political culture of Bangladesh which has hampered institutionalisation of democracy thereby negatively affecting Judiciary. There have been politically motivated judicial appointments which have hampered judicial independence as well as its aim of giving free and fair judgements. The two major political parties have been at loggerheads with each other and they have failed to imbibe democratic values in the right spirit.

In recent times, the boycott of elections by the opposition reduced legitimacy of the Sheikh Hasina government as the BNP leadership was practically exterminated from the electoral battlefield. This put a question mark over the role of independent institutions like the Election Commission and the Judiciary. Such a development was not conducive for the health of Judiciary, democracy, rule of law and constitutionalism. In this context the first hypothesis: "Party politics of Bangladesh has failed to institutionalize the Judiciary in Bangladesh" stands proved.

In my second hypothesis (*Excessive bureaucratic processes in the judicial system have contributed to non-transparency and delay in the legal processes in Bangladesh*) we may say that for constitutionalism to thrive an independent Judiciary is a must. However, in Bangladesh political parties have shown contempt for true judicial independence. They have tried to intervene in its functioning in different ways like politically motivated judicial appointments.

The military leaders have practised their own version of limited democracy and have tried to constrict judicial independence by passing various strictures and even constitutional amendments. In such a situation, cumbersome bureaucratic procedures have become stifling for the judicial performance. This leads to inordinate delays in

judicial decisions whereby confidence of the common man is shattered in the Judiciary. Hence, in this context, the second hypothesis: “The Excessive bureaucratic processes in the judicial system have contributed to non-transparency and delay in the legal processes in Bangladesh” stands proved.

According to my third hypothesis, (*Instead of significant legal Constitutional provisions, Judiciary in Bangladesh is still subjected to political interference*) the health of democracy in any country critically depends on judicial independence among other factors. However, the institutional mechanisms are not conducive for the same. There have been constricting constitutional provisions and amendments which cripple judicial independence as well as judicial performance. The qualifications prescribed for appointment of judges are vague and incentivise politically motivated judicial appointments. Hence, in this context, the third hypothesis: “Instead of significant legal Constitutional provisions, Judiciary in Bangladesh is still subjected to political interference” stands proved.

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APPENDICES

APPENDIX-I

Bangladesh Supreme Court at Glance

Established	On 16.12.1972 A.D. under Article 94 of the Constitution of the People's Republic of Bangladesh.
Authorized by	Part VI, Chapter I of the Constitution of Bangladesh.
Territorial Jurisdiction	Whole of Bangladesh.
Location/Permanent Seat	Dhaka, the capital of the Republic.
Area	55.05 Acres of Land. Floor Area: i. Main Building 1, 65,026.54Sft. ii. Annex Building 83,684.00 Sft. iii. Old Building 78, 81.83Sft. iv. Three Administrative Buildings 1, 57,000.00Sft. v. Annex Building-2 (Proposed) 2,19,536.00 Sft vi. Administrative Building (Proposed) 4,14,327.00 Sft.
Composition of Court	As per Article 94(2) of the Constitution the Supreme Court, comprising the Appellate Division and the High Court Division, consists of the Chief Justice and such number of other Judges as the President may deem it necessary for each Division.
Appointment of Judges	(i) The Chief Justice and Judges of both the Divisions of the Supreme Court are appointed as per Article 95 of the Constitution; (ii) Additional Judges of the High Court Division and ad hoc Judges of the Appellate Division of the Supreme Court are appointed as per Article 98 of the Constitution.
Maximum Number of Judges in each Division in 2016	(i) Appellate Division: 9 (Nine) Judges including the Chief Justice. (ii) High Court Division: 95 (Ninety Five) Judges.

Tenure of Office of the Judges	Until he attains the age of 67 years; unless (i) Removed by the President of the Republic on the basis of the report of the Supreme Judicial Council*; or (ii) Resigns his office by writing under his hand addressed to the Hon'ble President of the Republic, (Article 96 of the Constitution).
Jurisdiction	(**A**) The Appellate Division shall have jurisdiction to hear and determine appeals from judgments, decrees, orders or sentences of the (i) High Court Division, (ii) Administrative Appellate Tribunal, (iii) International Crimes Tribunals. An appeal to the Appellate Division from a judgment, decree, order or sentence ofthe High Court Division shall lie; (a) as of right where the High Court Division- (i) certifies that the case involves a substantial question of law as to theinterpretation of the Constitution; or (ii) has sentenced a person to death or to imprisonment for life; or (iii) hasimposed punishment on a person for contempt of that division; and in suchother cases as may be provided for by Act of Parliament. [Article103 (1) and (2)of the Constitution]; and(b) by leave of the Appellate Division. (**B**) The High Court Division shall have such original, appellate and otherjurisdictions, powers and functions as are or may be conferred on it by theConstitution or any other law. (Article 101 of the Constitution)
Court Rooms	The Appellate Division : 03 (in the Main Building) The High Court Division : 22 (in the Main Building) : 33 (in the Annex Building) : 04 (in the Old Building) Total = **62**
Contact	The Registrar General, Supreme Court of Bangladesh, Shahbagh, Dhaka-1000 Phone : (+88 02) 9562941-5, 9567307 Fax : (+88 02) 9565058 Website : www.supremecourt.gov.bd Email : rg@supremecourt.gov.bd

* The Constitution (Sixteen Amendment) Act, 2014 (Act No. 13 of 2014) being declared *ultra vires* to the Constitution by the High Court Division of theSupreme Court of Bangladesh in Writ Petition No. 9989 of 2014, and there being no stay order against the judgment by the Appellate Division, theprovision of Supreme Judicial Council remains in force.

APPENDIX- II

Questionnaire Based on Field Trip

1. Do you think that the party politics of Bangladesh have failed to institutionalize the judiciary in Bangladesh? Why/Why not?
2. What kind of challenges does the judiciary face in Bangladesh?
3. How far do you agree that the judiciary in Bangladesh is independent? According to you is there an interference of executive over judiciary? Why?
4. What are the issues that are creating problems in the making of the court structure of the judicial system in Bangladesh?
5. How does the excessive bureaucratic process affect the judicial process in Bangladesh?
6. Do you think that weaker Judiciary leads to weaken accountability of the government officials to the legal system of Bangladesh? Why?
7. Do you think that instead of significant legal constitutional provisions in Bangladesh, Judiciary is still subjected to political interference? Why/Why not?
8. How the Supreme Court of Bangladesh has construed and enforced the Constitution as a fundamental charter of social and political values?
9. How efficiently Judiciary in Bangladesh is capable of playing an important role in promoting and enforcing the principles of Constitutionalism?
10. What are the constitutional mechanisms that further ensure the independence of the constitutional institutions (Judiciary) vis-à-vis political power?
11. How do you perceive functioning of "Shalish" system? How far do you agree that these institutions strengthen Judiciary in Bangladesh?
12. How far do you agree that 'International War Crimes Tribunal' remained successful in terms of fulfilling its designated mandate?
13. How far the status of Judiciary is different from the military government and civil government (democratic process)? Why/Why not?

APPENDIX-III

The Constitution of the People's Republic of Bangladesh

(PART I, PART II, PART III AND PART VI)

PREAMBLE

We, the people of Bangladesh, having proclaimed our independence on the 26th day of March, 1971 and, through [a historic struggle for national liberation], established the independent, sovereign People's Republic of Bangladesh;

[Pledging that the high ideals of nationalism, socialism, democracy and secularism, which inspired our heroic people to dedicate themselves to, and our brave martyrs to sacrifice their lives in, the national liberation struggle, shall be the fundamental principles of the Constitution;]

Further pledging that it shall be a fundamental aim of the State to realize through the democratic process a socialist society, free from exploitation-a society in which the rule of law, fundamental human rights and freedom, equality and justice, political, economic and social, will be secured for all citizens;

Affirming that it is our sacred duty to safeguard, protect and defend this Constitution and to maintain its Supremacy as the embodiment of the will of the people of Bangladesh so that we may prosper in freedom and may make our full contribution towards international peace and cooperation in keeping with the progressive aspirations of mankind;

In our Constituent Assembly, this eighteenth day of Kartick, 1379 B.S. corresponding to the fourth day of November, 1972 A.D., do hereby adopt, enact and give to ourselves this Constitution.

PART- I (The Republic)

Supremacy of the Constitution

Article 7 (1) All powers in the Republic belong to the people, and their exercise on behalf of the people shall be effected only under, and by the authority of this Constitution.

Article 7 (2) This Constitution is, as the solemn expression of the will of the people, the Supreme law of the Republic, and if any other law is inconsistent with this Constitution that other law shall, to the extent of the inconsistency, be void.

PART- II (Fundamental Principles of State Policy)

Democracy and Human Rights

Article 11 The Republic shall be a democracy in which fundamental human rights and freedoms and respect for the dignity and worth of the human person shall be guaranteed [***] [and in which effective participation by the people through their elected representatives in administration at all level shall be ensured].

Separation of Judiciary from the Executive

Article 22 The state shall ensure the separation of the Judiciary from the Executive organs of the State.

PART- III (Fundamental Rights)

Law Inconsistent with Fundamental rights to be void

Article 26 (1) All existing law inconsistent with the provisions of this part shall, to the extent of such inconsistency, become void on the commencement of this Constitution.

Article 26 (2) The state shall not make any law inconsistent with any provisions of this part, and any law so made shall, to the extent of such inconsistency, be void.

Article 26 (3) Nothing in this article shall apply to any amendment of this Constitution made under Article 142.

Equality before Law

Article 27 All citizens are equal before law and are entitled to equal protection of law.

PART- VI (The Judiciary)

Chapter I- The Supreme Court

Establishment of Supreme Court

Article 94 (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.

Article 94 (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.

Article 94 (3) The Chief Justice, and the judges appointed to the Appellate Division, shall sit only in that division and other judges shall sit only in the High Court Division.

Article 94 (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.

Appointment of Judges

Article 95 (1) The Chief Justice shall be appointed by the President, and the other judges shall be appointed by the President after consultation with the Chief Justice.

Article 95 (2) A person shall not be qualified for appointment as a judge unless he is a citizen of Bangladesh and

(a) Has for not less than ten years, been an advocate for the Supreme Court or
(b) Has, for not less than ten years, held judicial office in the territory of Bangladesh or
(c) Has such qualification as may be prescribed by law for appointment as a judge of the Supreme Court.

*Article 95 (3)*In this Article, “Supreme Court” includes a Court which at any time before the commencement of this Constitution exercised jurisdiction as a High Court in the Territory of Bangladesh.

Tenure of Office of Judges

Article 96 (1) Subject to the other provisions of this Article, a Judge shall hold Office until he attains the age of Sixty-Seven Years.

Article 96 [(2) A judge shall not be removed from his office except by an order of the President passed pursuant to a resolution of Parliament supported by a majority of not less than two-thirds of the total number of members of Parliament, on the ground of proved misbehaviour or incapacity.

Article 96 (3) Parliament may by law regulate the procedure in relation to a resolution under clause (2) and for investigation and proof of the misbehaviour or incapacity of a judge.

*Article 96 (4)*A judge may resign his office by writing under his hand addressed to the President.]

Temporary Appointment of Chief Justice

Article 97 If the office of the Chief Justice becomes vacant or if the President is satisfied that the Chief Justice is on account of absence, illness or any other cause, unable to perform the functions of his office, those functions shall, until some other person has entered upon that office, or until the Chief Justice has resumed his duties, as the case may be, be performed by the next most senior judge of the Appellate Division.

Additional Supreme Court Judges

Article 98 Notwithstanding the provisions of Article 94, if the President is satisfied that the number of the judges of a division of the Supreme Court should be for the time being increased, the President may appoint one or more duly qualified persons to be Additional judges of that division for such period not exceeding two years as he may specify, or, if

he thinks fit, may require a Judge of the High Court Division to sit in the Appellate Division for any temporary period:

Provided that nothing in this Article shall prevent a person appointed as an Additional Judge from being appointed as a Judge under Article 95 or as an Additional Judge for a further period under this Article.

Disabilities of Judges after Retirement

Article 99 (1) A person who has held office as a judge (otherwise than as an Additional Judge pursuant to the provisions of Article 98), shall not, after his retirement or removal there from, plead or act before any Court or authority or hold any office of profit in the service of the Republic not being a judicial or Quasi-Judicial office.

*Article 99 (2)*Notwithstanding anything contained in clause (1), a person who has held office as a judge of the High Court division may, after his retirement or removal there from, plead or act before the Appellate Division.

Seat of Supreme Court

Article 100 The Permanent seat of the Supreme Court shall be in the capital, but sessions of the High Court Division may be held at such other place or places as the Chief Justice may, with the approval of the President, from time to time appoint.

Article 100 (1) Subject to this Article, the permanent seat of the Supreme Court shall be in the capital.

Article 100 (2) The High Court Division and the judges thereof shall sit at the permanent seat of the Supreme Court and at the seats of its permanent benches.

Article 100 (3) The High Court Division shall have a permanent Bench each at Barisal, Chittagong, Comilla, Jessore, Rangpur and Sylhet and each permanent bench shall have such benches as the Chief Justice may determine from time to time.

Article 100 (4) The President shall in consultation with the Chief Justice assign the area in relation to which each permanent Bench shall have jurisdiction, powers and functions

conferred or that may be conferred on the High Court Division by this Constitution or any other law and the area not so assigned shall be the area in relation to which the High Court Division sitting at the permanent seat of the Supreme Court shall have such jurisdictions, powers and functions.

Article 100 (6) The Chief Justice shall make rules to provide for all incidental, supplemental or consequential matters relating to the permanent benches.

Jurisdiction of High Court Division

Article 101 The High Court Division shall have such original, appellate and other jurisdictions and powers as are conferred on it by this Constitution or any other law.

Powers of High Court Division to Issue Certain Orders and Directions etc.

Article 102 (1) The High Court Division on the application of any person aggrieved, may give such directions or orders to any person or authority, including any person performing any function in connection with the affairs of the Republic, as may be appropriate for the enforcement of any of the fundamental rights conferred by Part III of the Constitution.

Article 102 (2) The High Court Division may, if satisfied that no other equally efficacious remedy is provided by law-

(a) On the application of any person aggrieved, make an order-

(i) Directing a person performing any functions in connection with the affairs of the Republic or of a local authority, to refrain from doing that which he is not permitted by law to do or to do that which he is required by law to do; or

(ii) Declaring that any act done or proceeding taken by a person performing functions in connection with the affairs of the Republic or of a local authority, has been done or taken without lawful authority and is of no legal effect; or

(b) On the application of any person, make an order -

(i) Directing that a person in custody be brought before it so that it may satisfy that he is not being held in custody without lawful authority or in an unlawful manner;or

(ii) Requiring a person holding or purporting to hold a public office to show under what authority he claims to hold that office.

Article 102 (3) Notwithstanding anything contained in the forgoing clauses, the High Court Division shall have no power under this Article to pass any interim or other order in relation to any law to which Article 47 applies.

Article 102 (4) whereon an application made under clause (1) or sub-clause (a) of clause (2), an interim order is prayed for and such interim order is likely to have the effect of-

(a) Prejudicing or interfering with any measure designed to implement any development programme, or any development work; or

(b) Being otherwise harmful to the public interest, the High Court Division shall not make an interim order unless the Attorney- General has been given reasonable notice of the application and he (or an advocate authorized by him in that behalf) has been given an opportunity of being heard, and the High Court Division is satisfied that the interim order would not have the effect referred to in sub-clause (a) or sub-clause (b).

Article 102 (5) In this Article, unless the context otherwise requires, “person” includes a statutory public authority and any court or tribunal, other than a court or tribunal established under a law relating to the defence services of Bangladesh or any disciplined force or a tribunal to which Article 117 applies.

Jurisdiction of Appellate Division

Article 103 (1) The Appellate Division shall have jurisdiction to hear and determine appeals from judgements, decrees, orders or sentences of the High Court Division.

Article 103 (2) An appeal to the Appellate Division from a Judgement, decree, order or sentence of the High Court Division shall be as of right where the High Court Division-

i. Certifies that the case involves a substantial question of law as to the interpretation of this Constitution or
ii. Has confirmed a sentence of death or sentenced aperson to death
iii. Has imposed punishment on a person for contempt of that division and in such other cases as may be provided for by Act of Parliament.

*Article 103 (3)*Anappeal to the Appellate Division from a Judgement, decree, order or sentence of the High Court Division in a case to which clause (2) does not apply shall be only if the Appellate Division grants leave to appeal.
Article 103 (4) Parliament may by law declare that the provisions of this Article shall apply in relation to any other Court or tribunal as they apply in relation to the High Court Division.

Issue and Execution of Processes of Appellate Division

Article 104 The Appellate Division shall have power to issue such directions, orders, decrees or writs as may be necessary for doing complete justice in any cause or matter pending before it, including orders for the purpose of securing the attendance of any person or the discovery or production of any document.

Review of Judgements or orders by Appellate Division

Article 105 The Appellate Division shall have power, subject to the Provisions of any Act of Parliament and of any rules made by that division to review any judgement pronounced or order made by it.

Advisory Jurisdiction of Supreme Court

Article 106 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, its opinion thereon to the President.

Rule-Making Power of the Supreme Court

Article 107 (1) Subject to any law made by Parliament the Supreme Court may, with the approval of the President, make rules for regulating the practice and procedure of each division of the Supreme Court and of any subordinate to it.

Article 107 (2) The Supreme Court may delegate any of its functions under clause (1) and Article 113 and 116 to a division of that Court or to one or more judges.

*Article 107 (3)*Subject to any rules made under this article the Chief Justice shall determine which judges are to constitute any Bench of a division of the Supreme Court and which judges are to sit for any purpose.

*Article 107 (4)*The Chief Justice may authorize the next most senior judge of either division of the Supreme Court to exercise in that division any of the powers conferred by clause (3) or by rules made under this Article.

Supreme Court as Court of Record

Article 108 The Supreme Court shall be aCourt of Record and shall have all the powers of such a Court including the power subject to law to make an order for the investigation of or punishment for any contempt of itself.

Superintendence and Control over Courts

Article 109 The High Court Division shall have superintendence and control over all courts and tribunals subordinate to it.

Transfer of Cases from Subordinate Courts to High Court Division

Article 110 If the High Court Division is satisfied that a case pending in a court subordinate to it involves a substantial question of law as to the interpretation of this Constitution, or on a point of general public importance, the determination of which is necessary for the disposal of the case, it shall withdraw the case from that court and may-

(a) Either dispose of the case itself or

(b) Determine the person of law and return the case to the Court from which it has been so withdrawn (or transfer it to another subordinate court) together

with a copy of the judgement of the division on such question, and the court to which the case is so returned or transferred shall, on receipt thereof, proceed to dispose of the case in conformity with such judgement.

Binding effect of Supreme Court Judgements

Article 111 The law declared by the Appellate Division shall be binding on the High Court Division and the law declared by either division of the Supreme Court shall be binding on all courts subordinate to it.

Action in aid of Supreme Court

Article 112 All authorities, executive and judicial, in the Republic shall act in aid of the Supreme Court.

Staff of Supreme Court

Article 113 (1) Appointments of the staff of the Supreme Court shall be made by the Chief Justice or such other judge or officer of that Court as he may direct, and shall be made in accordance with rules made with the previous approval of the President by the Supreme Court.

Article 113 (2) Subject to the provisions of any Act of Parliament the conditions of service of *members* of the staff of the Supreme Court shall be such as may be prescribed by rules made by that Court.

Chapter II- Subordinate Courts

Establishment of Subordinate Courts

Article 114 There shall be in addition to the Supreme Court such courts subordinate thereto as may be established by law.

Appointments of Subordinate Courts

Article 115 Appointments of persons to offices in the judicial service or as magistrates exercising judicial functions shall be made by the President in accordance with rules made by him in that behalf.

Control and Discipline of Subordinate Courts

Article 116 The control (including the power of posting, promotion and grant of leave) and discipline of persons employed in the judicial service and magistrates exercising judicial functions shall vest in the President and shall be exercised by him in consultation with the Supreme Court.

Judicial officers to be Independent in the Exercise of their functions

Article 116 A Subject to the provisions of the Constitution, all persons employed in the judicial service and all magistrates shall be independent in the exercise of their judicial functions.

Chapter III- Administrative Tribunals

Article 117 (1) Notwithstanding anything hereinbefore contained, Parliament may by law establish one or more administrative tribunals to exercise jurisdiction in respect of matters relating to or arising out of-

(a) The terms and conditions of persons in the service of the Republic, including the matters provided for in Part IX and the award of penalties or punishments.

(b) The acquisition, administration, management and disposal of any property vested in or managed by the Government by or under any law, including the operation and management of, and service in any nationalized enterprise or statutory public authority;

(c) Any law to which clause (3) of article 102 applies.

Article 117 (2) Where any Administrative Tribunal is established under this Article, no court shall entertain any proceedings or make any order in respect of any matter falling within the jurisdiction of such tribunal:

Provided that Parliament may, by law, provide for appeals from, or the review of, decisions of any such tribunal.

APPENDIX-IV

Amendments in the Constitution of Bangladesh

JatiyaSangsad (The Parliament of Bangladesh)

Source: http://www.parliament.gov.bd/.

*The Constitution of the People's Republic of Bangladesh has been adopted as the highest law of the country on **16 December, 1972**after passing it on **November 4, 1972**in the Constituent Assembly of Bangladesh. After that it has been amended sixteen times. The following is a brief account of these acts and orders.*

The First Amendment Act:

The Constitution (First Amendment) Act 1973 was passed on 15 July 1973. It amended Article 47 of the Constitution by inserting an additional clause whichallowed prosecution and punishment of any person accused of 'genocide',crimes against humanity or war crimes and other crimes under international law'.After Article 47 it inserted a new Article 47A specifying inapplicability of certainfundamental rights in those cases.

The Second Amendment Act:

The Constitution (Second Amendment) Act 1973 was passed on 22 September1973. This act resulted in the:

(i) Amendment of Articles 26, 63, 72 and 142 of the Constitution;

(ii) Substitution of Article 33 and

(iii) The insertion of a new part i.e. IXA in the Constitution.

Provisions were made through this amendment for the suspension of somefundamental rights of citizens in an emergency.

The Third Amendment Act:

The Constitution (Third Amendment) Act 1974 was enacted on 28 November1974 by bringing in changes in Article 2 of the Constitution with a view to givingeffect to an agreement between Bangladesh and India in respect of exchange ofcertain enclaves and fixation of boundary lines between India and Bangladesh.

The Fourth Amendment Act:

The Constitution (Fourth Amendment Act 1975) was passed on 25 January1975. Amidst of the violent uprising of the so called leftist parties and the badimpact of 1974 famine, the anarchism prevailed everywhere in the country, theAwami League Government declared state of emergency in January 1974. Laterit amended the Constitution (4th Amendment) to control the immense politicaland economic crises in the country. Though they declared this act as for theshort term only, it created a deep negative impact on the leadership of Sheikh Mujib and his party. Major changes were brought into the constitution by thisamendment like below:

(i) The Presidential form of government was introduced in place of theParliamentary system.

(ii) A one-party system in place of a multi-party system was introduced.

(iii) The powers of the JatiyaSangsad (National Assembly) were curtailed.

(iv) The Judiciary lost much of its independence; the Supreme Court wasdeprived of its jurisdiction over the protection and enforcement offundamental rights.

The Fourth Amendment Act amended the articles and parts as below:

i. The Articles 11, 66, 67, 72, 74, 76, 80, 88, 95, 98, 109, 116, 117, 119, 122, 123, 141A, 147 and 148 of the Constitution had been amended;
ii. It substituted Articles 44, 70, 102, 115 and 124 of the Constitution;
iii. It amended part III of the Constitution out of existence;
iv. It altered the Third and Fourth Schedule;
v. It extended the term of the first Jatiya Sangsad;
vi. It inserted a new part, i.e. part VIA in the Constitution, and
vii. The Fourth Amendment made the special provisions relating to the office ofthe President and its incumbent;
viii. It inserted articles 73A and 116A in the Constitution.

The Fifth Amendment Act:

This Amendment Act was passed by the Jatiya Sangsad on 6 April 1979.This Act amended the Fourth Schedule to the Constitution by adding a new Paragraph 18 thereto, which provided that all amendments, additions,modifications, substitutions and omissions made in the Constitution during theperiod between 15 August 1975 and 9 April 1979 (both days inclusive) by anyProclamation or Proclamation Order of the Martial Law Authorities had beenvalidly made and would not be called in question in or before any court ortribunal or authority on any ground whatsoever.

According to the 5th Amendment of the Constitution which adopted on 6th April1979, the major obligations had been protected as below:

i. The Capture of power by Khandakar Mustaque Ahmad as President (15thAugust, 1975- 6 November 1975) declared as legal.
ii. The appointment of Chief Justice Abu Sadat Mohammad Sayem asPresident (6 November, 1975 - 1977) declared as legal.
iii. The post of Chief Martial Law Administrator as held by Major Gen. ZiaurRahman (7 November 1976 - June 1978) and successive capturedPresidency post of him declared as legal.

iv. Nobody would challenge the murder of Sheikh Muzibur Rahman and his family members (of 15 August 1975) and all other related killings in the courtunder any circumstances (Indemnity Bill).

v. Multiparty system had been re-instead instead of one party system, like Baksal (Bangladesh Krishak Shramik Awami League).

vi. The provisions of Secularism and Socialism had been abolished from theconstitution.

vii. The provisions to settle the right to form political parties under the sign boardof religion (Islam) like Pakistan.

HC verdict Summary on 5th Amendment Act

The High Court Division Bench (consisted with Justice Mr. A.B.M. Khairul Haque and Justice Mr. A.T.M. Fazle Kabir) declared (on 29th August 2005, against the hearing of write petition 6016/2000) this 5th Amendment was as a totalviolation of the constitution and law and so it was illegal. Apart from declaringthis Amendment illegal and ineffective, the judgment has also declared illegaland void the martial law proclamations, including the Martial Law Regulation 7 of1977 that deals with abandoned property, and all actions done under the martiallaw between 15th August, 1975 and April 1979. The court held that usurpationof the state power through martial law proclamation, particularly by Khandaker Mustaque Ahmad, Justice Abu Sadat Mohammad Sayem and Major General Ziaur Rahman was unconstitutional. The judgment as it was reported in BLTSpecial Issue 2006 contains 242 pages with 22 points in its operative part. Thejudgment was largely based on some doctrines under constitutional jurisprudence:

(a) Doctrine of illegality or unconstitutionality,

(b) Doctrine of basic structure,

(c) The power of judicial review under a written constitution (constitutional ultra vires), and

(d) Principle of oath of office under the constitution.

Apart from the scrutiny of limits of some of these doctrines, there are somejurisdictional and constitutional continuation issues which the Appellate Divisionshould examine in detail. The summary of the verdict are as below. The HC declared the 5th amendmentas illegal and unconstitutional based on below points:

i. On the murder of Bangabandhu Shiekh Mujibur Rahman, President of the People's Republic of Bangladesh, on August 15, 1975,KhandakerMushtaque Ahmed in total violation of the Constitution,illegally seized the office of President of Bangladesh, as such, hewas a usurper.
ii. He had no authority to function as the President, as such, theProclamation of Martial Law on August 20, 1975, and his tenure asthe purported President for 82 (eighty-two) days was illegal.
iii. The assumption of office of a President of Bangladesh by the thenChief Justice of Bangladesh on November 6, 1975 and theassumption of powers of the Chief Martial Law Administrator by theSecond Proclamation issued on November 08, 1975 was in totaldisregard of the Constitution.
iv. Appointment of Major General Ziaur Rahman, as the Chief MartialAdministrator by the Third Proclamation issued on November 29, 1976, was made, beyond the ambit and in total disregard of theConstitution.
v. Appointment of Major General Ziaur Rahman as the President of Bangladesh on April 21, 1977, was made in violation and in totaldisregard of the Constitution.
vi. As such, all the Martial Law Proclamations, Martial LawRegulations including the Martial Law Regulation No.VII of 1977and the Martial Law Orders, were made by the usurpers of theoffice of President in violation and in total disregard of theConstitution, as such, illegal, void ab initio and nonest in the eye oflaw.
vii. Provision for amendment of the Constitution is provided for inArticle 142 and can only be done in the manner provided thereinbut since the Fifth Amendment validated all illegal acts of theusurpers, under the clout of Martial Law, not only changing thebasic structure as well as the character of the Constitution in itstotality but rather, uprooted the Constitution, it was no amendmentin the eye of law, but destruction of the Constitution altogether, assuch, ultra vires in the Constitution. And the Rule was issued in thefollowing terms:The Supreme Court

(the Appellate Division) upheld the HC verdict with somemodifications and observations. The details of the modifications andobservations of the Supreme Court as below:

Supreme Court's full verdict on 5th amendment issue

The full text of the Appellate Division judgment on the 5th amendment of theConstitution on two petitions was released on July 27 2010.The Supreme Court authorities released the copy of the judgment after the fivejudges' panel lead by Retd. Justice Md. Tafazzul Islam of the apex court signedthe verdict.In the full verdict they have dismissed the leave petitions and approved thejudgment of the High Court Division with some modification.The High Court in a verdict on August 29, 2005 declared the 5th amendmentillegal and unconstitutional.

The Summary of the SC Verdict on 5th Amendment

i. Both the leave petitions are dismissed

ii. The judgment of the High Court Division is approved subject to the followingmodifications:

iii. All the findings and observations in respect of Article 150 and the FourthSchedule in the judgment of the High Court Division are hereby expunged,and

iv. The validation of Article 95 is not approved. In respect of condonations made by the High Court Division, the followingmodifications are made and condonations are made as under:

v. All executive acts, things and deeds done and actions taken during theperiod from 15th August 1975 to 9th April, 1979 which are past and closed;

vi. The actions not derogatory to the rights of the citizens;

vii. All acts during that period, which tended to advance or promote the welfareof the people;

viii. All routine works done during the above period which even the lawfulgovernment could have done.

ix. The Proclamation dated 8th November, 1975 so far it relates to omittingPart VIA of the Constitution.

x. The Proclamations (Amendment) Order 1977 (Proclamations Order No. 1of 1977) relating to Article 6 of the Constitution.

xi. The Second Proclamation (Seventh Amendment) Order, 1976 (SecondProclamation Order No. IV of 1976) and the Second Proclamation (TenthAmendment) Order, 1977 (Second Proclamation Order No. 1 of 1977) sofar it relates to amendment of English text of Article 44 of theConstitution.

xii. The Second Proclamation (Fifteenth Amendment) Order, 1978 (SecondProclamation Order No.IV of 1978) so far it relates to substituting Bengalitext of Article 44.

Sixth Amendment Act:

The Sixth Amendment Act was enacted by the Jatiya Sangsad with a view toamending Articles 51 and 66 of the 1981 constitution.

Seventh Amendment Act:

This Act was passed on 11 November 1986. It amended Article 96 of theconstitution; it also amended the Fourth Schedule to the constitution by insertinga new paragraph 19 thereto, providing among others that all proclamations,proclamation orders, Chief Martial Law Administrator's Orders, Martial LawRegulations, Martial Law Orders, Martial Law Instructions, ordinances and otherlaws made during the period between 24 March 1982 and 11 November 1986(both days inclusive) had been validly made and would not be called in questionin or before any court or tribunal or authority on any ground whatsoever.

The Seventh Amendment also almost repealed

The Supreme Court on Sunday (15th May 2011) declared "illegal" Ershad` smilitary regime up till the 1986 transition through parliamentary elections.In doing so, the apex court upheld the HC verdict declaring illegal the 7thamendment to the constitution legitimizing the Ershad regime, with some modifications condoning the works that had gone in public interest.*"The High Court verdict said the military rule imposed by*

Ershadon Mar 24,1982, all the military ordinances passed since then to Nov 11, 1986, chiefmilitary law administrator's orders, martial law order and directions were illegal." "It also had declared illegal the regimes of Khondker Moshtaq Ahmed, Abu Sa'adat Mohammad Sayem and Ziaur Rahman between Aug 15, 1975 and1979."

A six-member bench of the Appellate Division, headed by Chief Justice ABM Khairul Haque, pronounced the verdict, virtually driving the last nail into the covers of legitimacy to military rules since 15 August, 1975 changeover broughtthrough a bloody coup.The apex court in its verdict declared "illegal" and "void" the paragraph 19 in theFourth Schedule of the Constitution which has been used as the safeguard for the Martial Law regime. "All the proclamations, Martial Law Regulations and Martial Law Orderspromulgated during the period of March 24, 1982 and the date (November 11,1986) of commencement of the Constitution (Seventh Amendment) Act 1986are hereby declared illegal and void ab initio," says the abridged version of theverdict.But the AD provisionally condoned all acts, things, deeds, transactions whichare "past and closed".The court in its verdict also condoned all international treaties made during thetime.At the same time, the SC exonerated the appeal petitioner, Siddique Ahmed,from his conviction and life-term imprisonment given by the Martial Law court during the Ershad regime.

The conviction stands "illegal and void", the apex court gave the ruling andgranted bail to the lifer, under its inherent power, till the commencement of trialin the normal court of law concerned.But the case has to be continued in the concerned court from the stage it wastransferred to the Special Martial Law Court.But another petition of Siddique Ahmed for the cancellation of the case wasrejected as "misconceived".In an instant reaction, petitioner's lawyer Barrister Hasan MS Azim told journalists that the SC verdict "erased the history of military rule from the constitution and blocked the way of military takeover in the future".

Attorney-General Mahbubey Alam in his reaction to the journalists said, "TheAppellate Division has given verdict on the amendment like the one given on theFifth Amendment.

It has affirmed the High Court verdict which has declared the7th amendment illegal."Replying to a question about any punitive measure against Ershad, the chief government law officer said it would be possible to make comment afterpublication of the full verdict of the AD.About the future of the verdicts which indirectly legalized Martial Law he said, "Ihope the Appellate Division will review these verdicts in the complete verdict."

Earlier on May 10, the Appellate Division kept the appeal as "case awaiting verdict' for hearing .Syed Amirul Islam and Hasan MS Azim participated in the hearing on behalf ofthe petitioner. Attorney-General Mahbubey Alam moved for the state.Earlier on May 8, the Appellate Division appointed Barrister Rafiq-ul Haque,former Attorney-General Mahmudul Islam and Barrister Ajmalul Hossain QC as Amicus Curiae (friend of court) to give opinions during hearing.On August 26, 2010, the High Court declared illegal the seventh constitutionalamendment that had legalized former army chief HM Ershad's takeover and his military rule, moving further forward the current work on rewriting the nationalconstitution.The 7th amendment ratified the proclamation of martial law and otherregulations, orders and instructions by General Ershad between March 24, 1982and November 11, 1986, the time when transition to civilian rule began through parliament elections. Following the verdict, on April 11, Siddque Ahmed filed civil appeal against someparts of the verdict that include imprisonment of the petitioner of the case during the Ershad regime.

Eighth Amendment Act:

This Amendment Act was passed on 7 June 1988. It amended Articles 2, 3, 5,30 and 100 of the constitution.

This Amendment Act:

i. Declared 'ISLAM' as the state religion;
ii. Decentralized the judiciary by setting up six permanent benches of the HighCourt Division outside Dhaka;
iii. Amended the word 'Bengali' into 'Bangla' and 'Dacca' into 'Dhaka' in Article 5of the constitution;

iv. Amended Article 30 of the constitution by prohibiting acceptance of any title, honours, award or decoration from any foreign state by any citizen ofBangladesh without the prior approval of the president.It may be noted here that the Supreme Court subsequently declared theamendment of Article 100 unconstitutional since it had altered the basicstructure of the Constitution.

Ninth Amendment Act:

The Constitution (Ninth Amendment) Act 1989 was passed in July 1989.This amendment provided for the direct election of the vice-president; it restricted a person in holding the office of the President for two consecutiveterms of five years each; it also provided that a vice-president might beappointed in case of a vacancy, but the appointment must be approved by the Jatiya Sangsad.

The Tenth Amendment Act:

The Tenth Amendment Act was enacted on 12 June 1990. It amended, amongothers, Article 65 of the constitution, providing for reservation of thirty seats for the next 10 years in the Jatiya Sangsad exclusively for women members, to beelected by the members of the Sangsad.

The Eleventh Amendment Act:

This Act was passed on 6 August 1991.It amended the Fourth Schedule to the constitution by adding a new paragraph21 thereto which legalized the appointment and oath of SHAHABUDDIN AHMED, ChiefJustice of Bangladesh, as the vice-president of the Republic and the resignationtendered to him on 6 December 1990 by the then President HUSSAIN M ERSHAD.This Act ratified, confirmed and validated all powers exercised, all laws andordinances promulgated, all orders made and acts and things done, and actionsand proceedings taken by the vice-president as acting president during theperiod between 6 December 1990 and the day (9 October 1991) of taking overthe office of the president by the new President ABDUR RAHMAN BISWAS, duly electedunder the amended provisions of the constitution.The Act also confirmed and

made possible the return of Vice-President Shahabuddin Ahmed to his previous position of the Chief Justice of Bangladesh.

The Twelfth Amendment Act:

This Amendment Act, known as the most important landmark in the history ofconstitutional development in Bangladesh, was passed on 6 August 1991.It amended Articles 48, 55, 56, 57, 58, 59, 60, 70, 72, 109, 119, 124, 141A and142.

Through this amendment:

a) The parliamentary form of government was re-introduced in Bangladesh;

b) The president became the constitutional head of the state;

c) The PRIME MINISTER became the executive head;

d) The cabinet headed by the prime minister became responsible to the Jatiya Sangsad;

e) The post of the vice-president was abolished;

f) The president was required to be elected by the members of the Jatiya Sangsad. Moreover, through Article 59 of the constitution this act ensured the participationof the people's representatives in local government bodies, thus stabilizing thebase of democracy in the country.

The Thirteenth Amendment Act:

The Constitution (Thirteenth Amendment) Act 1996 was passed on 26 March1996 in the so called Parliament. This parliament was actually elected in a fake(voter-less) election of February 1996, arranged by the BNP-Government.It provided for a non-party CARETAKER GOVERNMENT which, acting as an interimgovernment, would give all possible aid and assistance to the ElectionCommission for holding the general election of members of the Jatiya Sangsad peacefully, fairly and impartially. The non-party caretaker government,comprising the Chief Adviser and not more than 10 other advisers, would becollectively responsible to the president and would stand dissolved on the dateon which the prime minister entered upon his office after the constitution of the new Sangsad.

Supreme Court's Verdict on 13th Amendment Act:

On May 10, 2011 the Supreme Court of Bangladesh repealed the 13thamendment to the Constitution declaring the Non-party caretaker government ofthree months duration for holding national elections void and ultra vires to theconstitution.However, Supreme Court allowed holding two more parliamentary electionsunder the caretaker government excluding the provision of appointing the formerChief Justices and Appellate Division Judges as the Chief Adviser. It is now forcurrent Parliament to decide on it which has been taken up by the SpecialCommittee working to bring in amendments to the Constitution following verdictsof Supreme Court. As usual, AL and BNP taken up opposing stand, reported innational dailies, which have raised reasonable questions, how it would end,would it be repetition of 1996 when AL and its allies forced BNP enact 13thamendment by short lived 6th Parliament, or something else? What is the stateof Election Commission now, as the main Opposition wants a new?

The Fourteenth Amendment Act:

The Constitution (Fourteenth Amendment) Act, 2004 was passed on 16th May,2004.

This amendment amends the several articles:

- **i.** Insertion of new Article 4 A after Article 4 for preservation and display of theportraits of the President and the Prime Minister.
- **ii.** Amendment of clause (3) of Article 65 in the Constitution regarding reservednumber of seats exclusively for women members in the Parliament.
- **iii.** Amendment of Article 96(1), 129 and 139 of the constitution enhancing theretirement age of the Judges of the Supreme Court, Auditor General andChairman and other members of Public Service Commission.
- **iv.** Enhancement of retirement age of the supreme Court Judges. It becomesvery controversial later.
- **v.** Enhancement of retirement age of the Auditor General and Chairman &Member of P.S.C.

vi. Amendment of Article 148 of the Constitution making provision foradministering oath of the newly elected members of the Parliament by theChief Election Commissioner is unprecedented.

The Fifteenth Amendment Act:

It has been passed on 30 June 2011 in the 9th Parliament. This Amendment hasbeen done on the basis of the HC/SC verdicts on 5th, 7th and 13^{th}Amendments of the Constitution.

Key issues of the 15th Amendment of the Constitution

i. Caretaker system abolished

ii. Elections to be held under incumbent cabinet

iii. Islam as State religion and 'Bismillah-Ar-Rahman-Ar-Rahim' retained above the preamble.

iv. Removal of 'Absolute Faith and Trust in Allah' from the constitution.

v. Revival of Article 12 to restore Secularism and freedom of religion.

vi. Maintains the provision allowing religion-based politics.

vii. Denies recognizing the indigenous people, will be termed as tribal andethnic minorities.

viii. The people of Bangladesh shall be known as Bangalees as a nation and citizens of Bangladesh shall be known as Bangladeshis

ix. Inserted articles 7A and 7B in the Constitution after Article 7 in a bid to endtake-over of power through extra-constitutional means and highest level ofpunishment would be awarded for those power capturers by extraconstitutionalmeans.

x. Basic provisions of the constitution are not amendable.

xi. In the case of a dissolution Parliament by any reason, election should beheld within 90 days of such dissolution.

xii. Increasing the number of women reserve seats to 50 from existing 45.

xiii. The Supreme Command of the defense services shall vest in the President and the exercise thereof shall be regulated by law.

xiv. The Chief Justice shall be appointed by the President, and the other judgesshall be appointed by the President in consultation with the Chief Justice.

xv. The portrait of the Sheikh Mujibur Rahman shall be preserved and display at the offices of the President, the Prime Minister, the Speaker, and theChief Justice and in head and branch offices of all government and semi-governmentoffices, autonomous bodies, statutory public authorities,government and non-government educational institutions, embassies andmissions of Bangladesh abroad.

xvi. Incorporation of speech of Sheikh Mujibur Rahman on March 7, 1971,declaration of independence by Mujibur Rahman after midnight of March 25,1971 and the proclamation of Independence declared at Mujib nagar on April10, 1971.