

CHAPTER 1



# Strengthening the Judiciary

# Strengthening the Judiciary of Bangladesh

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## Ensuring Independence of the Judiciary

The Bangladesh Constitution clearly lays down the foundations of a judiciary that is separate and independent from the other branches of government. It was introduced in recognition of the fact that the efficiency of the judiciary and the entire justice system depends to a great extent on the independence of the judiciary.

The Constitution establishes the judiciary as a separate branch of government composed of a Supreme Court and subordinate courts. The Supreme Court consists of an Appellate Division and a High Court Division, which are separate in their composition and functions. The Supreme Court is headed by the Chief Justice, with judges<sup>1</sup> appointed by the President as members.<sup>2</sup> They are independent in the exercise of their judicial functions. Tenure of office, procedure for removal from office,<sup>3</sup> independence in the performance of judicial functions, and compensation are all guaranteed and assured by the Constitution.

The Appellate Division has:

- (i) advisory jurisdiction (Art.106, Constitution), which provides opinion on a question of law of public importance upon the request of the President;
- (ii) appellate jurisdiction, which decides on appeals made as a matter of right, on a certificate of fitness of the High Court Division, against a sentence of death or imprisonment for life and against punishment for contempt of the High Court Division (Art.103, Constitution);

- (iii) jurisdiction to grant leave to appeal in any other case (Art 103 [3], Constitution); and
- (iv) jurisdiction to review any of its judgments or orders (Art.105, Constitution).

On the other hand, the High Court Division enjoys such original, appellate and other jurisdictions, powers and functions conferred on it by the Constitution or any other law (Art.101, Constitution). Its original jurisdiction pertains to issuance of writs (Art.102, Constitution) enforcing fundamental rights, compelling performance of public duties, and declaring the invalidity of official acts. The High Court Division has been conferred exclusive power of control and superintendence over all courts and tribunals subordinate to it, including special courts established under special statutes.

The Supreme Court also has rule-making power, subject to the approval of the President. These rules may relate to appointment of personnel (Art. 113, Constitution) and to regulation of

**The Supreme Court has rule-making power, subject to the approval of the President. These rules may relate to appointment of personnel and to regulation of practice and procedure of each division of the Supreme Court and of subordinate courts.**

<sup>1</sup> A judge must: (i) be a citizen of Bangladesh; and (ii) be an advocate of the Supreme Court for not less than 10 years; or have held judicial office in the territory of Bangladesh for not less than 10 years; or have such other qualifications as may be prescribed by law for appointment as a judge of the Supreme Court.

<sup>2</sup> The President appoints the Chief Justice independently (Art. 48 [3], Constitution) but relies on the advice of the Prime Minister in appointing judges (Art. 95, Constitution).

<sup>3</sup> Removal from office is possible only on the recommendation of the Supreme Judicial Council consisting of the Chief Justice and the next two senior judges.



Anamul Haque Anam

The Constitution of Bangladesh establishes the judiciary as a separate branch of government. It is composed of a Supreme Court and subordinate courts. The Supreme Court of Bangladesh (shown above) consists of an Appellate Division and a High Court Division, which are separate in their composition and functions.

practice and procedure of each division of the Supreme Court and of subordinate courts. Further, the Supreme Court has the authority to call on all executive and judicial agencies to act in its aid.

Unfortunately, the Government has not been able to give life to these provisions even decades after the framing of the Constitution. Thus, the Supreme Court Appellate Division gave specific directions for its implementation when it had the occasion to interpret the constitutional provisions in *Secretary of Finance v. Masdar Hossain* (20BLD [2000] [AD] 141) (“*Hossain*”). In the form of 12 directions, the Supreme Court provided a road map for implementation.

In *Hossain*, the Supreme Court held that: (i) the judicial service, including the magistrates performing judicial functions, has a constitutional identity of its own which has to be kept as such (Art. 115, Constitution); (ii) the President alone, to the exclusion of every other authority or organ of the state, is competent to make rules for appointment to the judicial service (Art. 115, Constitution); (iii) the constitutional requirement of separate and independent judicial service (Part VI of

the Constitution) is the “very fundamental and basic structure of the [C]onstitution” which can be advanced, but cannot be interfered with even by Parliament; and (iv) Article 115 of the Constitution vests in the President a direct, primary, plenary power to make rules in consultation with the Supreme Court alone.

In terms of organization, the Supreme Court outlined the future steps:

- (i) creation and establishment by the President of a distinct, altogether separate, judicial service including a magistracy exercising judicial functions;
- (ii) establishment either by legislation or by framing rules under Article 115 of the Constitution or by executive order having the force of rules, a Judicial Services Commission composed of members from the senior judiciary and the subordinate courts, for recruitment to the judicial service based on merit, with the objective of obtaining equality between men and women;
- (iii) promulgation of law or rules or executive orders having the force of rules relating to

posting, promotion, grant of leave, discipline (except suspension and removal), pay, allowances, pension (as a matter of right), and other terms and conditions of service consistent with Articles 116 and 116A of the Constitution;

- (iv) establishment of a separate Judicial Pay Commission as part of the rules to be framed under Article 115 of the Constitution to review the pay, allowances, and other privileges of the judicial service which shall convene at stated intervals to keep the review process continuous;
- (v) promulgation of laws or rules or executive orders having the force of rules to secure the essential conditions of judicial independence, namely, security of tenure, security of salary and other benefits, and institutional independence from the Parliament and the executive branch; and
- (vi) securing financial independence.

Given these pronouncements of the Supreme Court, the political, social, and institutional considerations should ideally not stand in the way of separation. Instead, these considerations should be harnessed by all available means to help advance that goal. Admittedly, however, the existing financial and infrastructure considerations do pose a serious problem. The judiciary has, at present, very little control over its budgetary allocations. It gains control over its finances only upon receipt of the approved, often insufficient, budget. Tables 1 and 2 show the budgetary allocation for the entire judiciary and for the district judicial and ancillary institutions.

The figures for 2004–2005 show that approximately \$20 million is spent on the district judiciary annually for development and nondevelopment activities. The sanctioned caseload of civil judges is 380 while that of magistrates is 600 cases.<sup>4</sup> The total number of civil and criminal cases, however, is 836,483. This means that a judge will have to handle an average of 850 cases, which is twice the normal workload. Obviously, the number of judges will have to be doubled. This requires the recruitment of additional 1,000 judges in the next 5 years or 200 judges every year for the next 5 years. The process will require an additional annual budget of around \$4 million. Further, courthouses are currently short by roughly 20%. With the onset of separation, infrastructure requirements will certainly double. The High Court Division budget will necessarily have to be increased by 20% every year to cope with the con-

sequences of separation. To ensure success of the separation process, the prosecutor service will require a similar investment.

Considering the foregoing resource requirements and the interplay of numerous factors, separation of the judiciary from the executive will have to be implemented in phases. Fortunately for Bangladesh, the Supreme Court's 12 directions provide concrete guidance on how to proceed with the separation process.

The initial phase entails the completion of the needs assessment of the subordinate courts by the High Court Division. This assessment has to be comprehensive and in conformity with the standards of performance and pendency of the courts as set by the High Court Division itself. Currently, the High Court Division prescribes a monthly performance or disposal standard for each class of courts. The same standard is used for determining the normal pendency level of a court, usually 6 months for disposing criminal cases and a year for disposing civil cases. The assessment should also consider the existing

**Table 1. Allocation for the Entire Judiciary**

| Fiscal Year | Budget Allocation |            |
|-------------|-------------------|------------|
|             | Tk                | \$         |
| 2005–06     | 102 crore 2 lakh  | 14,574,285 |
| 2004–05     | 91 crore 92 lakh  | 13,131,428 |
| 2003–04     | 77 crore 35 lakh  | 11,050,000 |

**Table 2. Allocation for District Judicial and Ancillary Institutions**

| Fiscal Year | Budget Allocation               | Utilization                    | % of Utilization |
|-------------|---------------------------------|--------------------------------|------------------|
| 2005–06     | Tk56.17 crore<br>(\$8,024,286)  | Tk20.00 crore<br>(\$2,857,143) | 35.6             |
| 2004–05     | Tk63.08 crore<br>(\$9,011,429)  | Tk55.86 crore<br>(\$7,980,000) | 88.5             |
| 2003–04     | Tk39.07 crore<br>(\$5,581,429)  | Tk36.14 crore<br>(\$5,162,857) | 92.0             |
| 2002–03     | Tk35.24 crore<br>(\$50,342,857) | Tk30.39 crore<br>(\$4,351,429) | 88.0             |
| 2001–02     | Tk33.60 crore<br>(\$4,800,000)  | Tk21.30 crore<br>(\$3,042,857) | 63.0             |

Tk = taka, \$ = US dollars.

1 crore = Tk10 million; 1 lakh = Tk100,000.

Source: Government of Bangladesh. 2000. Report on Strategy for Legal and Judicial Reform, 14 September.

<sup>4</sup> Ministry of Law, Justice and Parliamentary Affairs. Statistics as of April–May 2006.

**Inasmuch as government goals are influenced by dominant political parties, civil society can exert pressure on political parties and candidates to prioritize full implementation of the separation of the judiciary and the enforcement of the final judgments of the Supreme Court.**

capacity of the judiciary at every tier. For the assessment exercise to be truly useful, needs should be quantified in monetary terms vis-à-vis the period required to commence the process of separation. As part of the initial phase, the draft of the rules of service, training, continuing education and promotion, and system of recognition and rewards of the officers of the various grades, should also be prepared. This must be done simultaneously with the needs assessment exercise as the rules will still have to be submitted to the President after court approval.

Reform efforts should commence at the second phase, after the needs assessment has been completed. During this period, the progress of the reform efforts should be closely monitored and the impediments to the goals should be identified. Quarterly administration reports containing declassified material on civil and criminal justice should be published for transparency and accountability.

The third phase would be to sustain the reform efforts through institutional support from the Bar, the Law Commission, academics, and nongovernment organizations.

The fourth phase relates to the inevitable role of politics in any governance-related reform. Inasmuch as government goals are influenced by dominant political parties, civil society can exert pressure on political parties and candidates to prioritize full implementation of the separation of the judiciary and the enforcement of the final judgments of the Supreme Court. Ultimately, it is the political will of the entire Government that would engineer the separation process to its completion.

It must be noted, however, that these phases do not have strict boundaries and some activities could be advanced or delayed depending on the situation and the progress of implementation. What is essential is that the process is done in a realistic and practical manner that takes into consideration relevant factors affecting the process.

## **Other Mechanisms to Strengthen the Judiciary**

During and after the separation process, various mechanisms of strengthening the judiciary could be adopted and put in place. Whereas independence is crucial in strengthening the judiciary, it is insufficient by itself to carry the entire weight of the process. As such, various aspects of the judiciary must also be enhanced.

There are always positive features in any system and it is always beneficial to capitalize on these strengths. In the case of Bangladesh, its unitary form of government, the supremacy of the Supreme Court, its executive magistracy, and its monolingualism are advantages that could contribute to the strengthening of the judiciary.

### **Unitary Form of Government**

A unitary system is advantageous in that it is easier to identify and project national goals, distinguish between issues and non-issues, determine priorities, frame and execute policies, set standards, evaluate performance, and achieve targets.

### **Supremacy of the Supreme Court**

The Supreme Court's authority over other government instrumentalities as enshrined in the Constitution commands utmost loyalty. In addition, the Supreme Court is the final authority in declaring and interpreting the Constitution and the laws. This gives it every power to thwart all efforts to modify or defer the implementation of the separation of the judiciary or any constitutional provision or law aimed at strengthening the judiciary.

### **Executive Magistracy**

In the system of separation under consideration, the office of the district magistrate and the executive magistrates have been kept intact. Historically, the district magistrate is the "crisis manager," the focal point of responsibility for everything that has happened, is happening, and is likely to happen in the district. After separation, however, the district magistrate would be relieved of the duty of overseeing the criminal justice system in the district. Thus, refocusing the district magistrate's responsibilities could improve the law and order situation and accelerate the pace of development activities. This may take time but it is a definite advantage that could be built upon.

### **Monolingualism**

The country has only one language, making it easier to spread legal literacy. The public and the

litigant would be able to understand laws and court decisions readily. The language of the court is a great asset in involving civil society in spreading the rule of law, establishing credibility and confidence in courts, and generating more orderly behavior in society.

No system is expected to be perfect but flaws can always be remedied. In Bangladesh, the two main areas that need attention are unifying the judiciary and improving information gathering.

#### **Unifying the Currently Disjointed Judiciary**

For the judiciary to function well, it must be monolithic. It should always consider itself an integrated institution. Any flaw or fault in the subordinate judiciary is as much a flaw or fault of the superior judiciary. It is important to inculcate this mindset in the members of the judiciary so that they can act accordingly.

Mutual respect as well as a sense of institutional responsibility must be practiced at all times. An effective strategy would be to hold annual conferences of judges. This would provide a venue for interaction among judges and a forum for clarification of any issues and controversies in the judiciary. This would also avoid accusations of incompetence, corruption, or court mismanagement among judges.

#### **Improving Information Gathering**

There is lack of credible judicial statistics. Surprisingly, not even the country's *Statistical Book* published annually contains these data. The need for credible statistics widely available to every section of the public cannot be overemphasized in this age of advanced technology. Lack of information has reverberating effects. One of the elementary and basic requirements of administration of justice is that justice should not only be done but should also appear to be done. If the newspapers of the country publish figures of case backlog, personnel shortage, and unsatisfactory performance, there should be a forum or means to verify them. Unrebutted negative information may cause despondency and lack of faith in the judiciary.

#### **Conclusion**

In sum, strengthening the judiciary of Bangladesh entails a dynamic gamut of tasks and challenges that must be taken head on. There are no shortcuts but strategies can be conceived to facilitate the reform process and overcome obstacles. Needless to say, the judiciary cannot do this alone. The other branches of government and the people in general must all support and cooperate to hasten the accomplishment of this long-cherished goal.

# Strengthening the Judiciary in India: The Importance of Independence, Separation, and Reform

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The judiciary has a unique and significant role in the rule of law and participatory democracy. As such, the Constitution provides for independence of judges and separation of the judiciary from the executive branch while giving the judiciary adequate powers to safeguard the basic rights of citizens and to uphold the supremacy of the Constitution. The question often asked is how the scheme of the Constitution was implemented in the course of governance; what has been the role of the judiciary in the maintenance of the constitutional balance of powers; and how far the judiciary could keep its independence and authority while adjudicating constitutional disputes and protecting the rights of citizens. There is continuing concern on the erosion of judicial independence throughout the world. The causes are many and varied, some arising from within the system (corruption, inefficiency, and mismanagement) and some from external sources such as the other branches of government and centers of corporate power. This paper will discuss the importance of separation of the judiciary from the executive and some challenges facing the judiciary in India. The paper will also propose remedial action to restore the strength of the judicial system.

## The Unique Role of the Judiciary

The unique status and character of the judicial wing emerges out of its objectives, namely, the maintenance and protection of individual rights. While a society without legislative organs is conceivable, one without a judicial organ is inconceivable. In the absence of the legislature, courts might apply rules derived from other sources, such as custom or their own previous decisions. Not only is the judicial organ said to be a necessity but

also a test of the excellence of a government, “for nothing more nearly touches the welfare and security of the average citizen than the feeling that he can rely on the certain and prompt administration of justice” (Lord Bryce).<sup>1</sup>

Judicial tribunals not only decide specific controversies brought before them; they also give declaratory judgments or advisory opinions on what the law requires or what is right under the law. They also perform a variety of miscellaneous functions, which are not all judicial in character. They appoint staff for the judiciary, appoint guardians and trustees, admit wills to probate, and administer the estate of deceased persons. They also issue injunctions to prevent the commission of a wrong and issue writs of various kinds to compel action according to the law. Another extraordinary function inherent or incidental to judicial power is the authority to decide on the constitutionality of laws enacted by the legislature and of actions of administrative authorities. In the famous words of Chief Justice Marshall of the United States Supreme Court (*Marbury vs. Madison*, 1803):

“It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases must of necessity expound and interpret that rule. If two laws conflict with each other, the court must decide on the operation of each. So, if a law be in opposition to the Constitution, the court must determine which of these rules govern the case. This is the very essence of judicial duty. If, then, the courts are to regard the Constitution as superior to any ordinary act of the legislature, the Constitution, and not such ordinary act, must

<sup>1</sup> Cited in *P.H. Parmar v. State of Gujarat & Ors.* (2003) 3GLR 2516 at Para 14.

govern the case to which both the Constitution and the law apply.”<sup>2</sup>

Given these crucial societal functions, the judiciary must possess powers and attributes essential for its efficient performance of these functions. Foremost among these is judicial independence that would ensure free, impartial, and fair exercise of discretion in the administration of justice.

## The Concept of Independence

Judicial independence is provided in the Universal Declaration of Human Rights. Article 10 states that, “Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.” This is repeated in Article 14 of the International Covenant on Civil and Political Rights. This emphasizes that it is an essential ingredient of the protection of individual liberty and equality. It involves freedom from direction, control, or interference in the exercise of judicial powers by either the legislative or executive arm of the government. It includes the independence of an individual judge as well as that of the judiciary as a branch of government. Individual independence is being able to decide according to the law (decisional independence); and personal independence is by way of merit-based appointment, guarantee of tenure, and adequate compensation and security. Both types of independence are intended to allow judges to consider the facts and law of each case with an open mind and deliver unbiased judgment. When truly independent, judges are not influenced by personal interests, preferences, or relationships; identity or status of litigants; or external economic, political, or cultural pressures or considerations.

Indeed, judicial independence is the foundation of the rule of law as it manifests superiority of the law and equality before the law. The strength of a judicial system thus depends on its independence. Declared a basic feature of the Indian Constitution unalterable by Parliament, judicial independence was summed up by the Supreme Court of India in *S.P. Gupta vs. Union of India*:<sup>3</sup>

“...if there is one principle which runs through the entire fabric of the Constitution, it is the Judiciary which is entrusted with the task of keeping every organ of the State within the limits of the law and



Jeremy Homer / Alamy

Judicial independence is the foundation of the rule of law as it manifests superiority of the law and equality before the law. The strength of a judicial system thus depends on its independence. This was declared a basic feature of the Indian Constitution unalterable by Parliament. (Above: the High Court in Calcutta, India)

thereby making the rule of law meaningful and effective. This concept is not limited to independence from executive pressure or influence only, but includes independence from any other pressures and from prejudices acquired or nourished by the class to which the judges belong... Judges must be of stern stuff and tough fibre, unbending before power, economic or political and they must uphold the core principle of rule of law....”

As a means of achieving independence, the judiciary must be constituted as a distinct branch of government, separate from the executive branch. It must be placed above fluctuations of party politics and afforded institutional stability with proper accountability.

## The Issue of Separation

Many historical and administrative causes may be advanced for separation of the judiciary from the executive. It is simply the natural process of specialization of functions, a phenomenon that occurs in every branch of human activity. The process is a convenient means of coping with the increasing business of the State. When ideas of constitutional governance and limited government emerged, this process of separation and specialization assumed the status of a theory based on liberty and rights. Montesquieu explained that when the legislative and the execu-

<sup>2</sup> 1803(1) Cranch 137.

<sup>3</sup> AIR 1982 S.C.149.

tive powers are invested in the same person or body of persons, there can be no liberty “because of the danger that the same monarchs or senate should enact tyrannical laws and execute them in a tyrannical manner.”

In its extreme form, the doctrine of separation of powers means that each major function/process of government is to be confined exclusively to a separate institution of government. There must be no overlapping either of functions or of persons. This principle of separation thus came to demonstrate two consequences: (i) that a judge or magistrate who tries a case must not be in any manner connected with or interested in the prosecution, and (ii) that the judge must not be in direct administrative subordination to anyone connected with the prosecution or the defense.

The theory of separation also found support from the modern theory of the rule of law or the superiority of law over kings and executive authorities. As the famous English jurist Dicey declared, in England, every man, whatever be his rank or status, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals.<sup>4</sup> This rule of law theory then places the judiciary not only in a condition of freedom from interference on the part of the executive, but in a positive superiority to it. In states that enjoy rule of law, therefore, judges are the ultimate guardians of individual rights arising under common law, statute law, and constitutional law.

This principle of judicial separation is universally accepted and is now incorporated in the Indian Constitution as a Directive Principle (Article 50) which provides that “the State shall take steps to separate the Judiciary from the Executive in the public services of the State.” According to the Law Commission (14<sup>th</sup> Report, 1958):

“...the real purpose of separation is to ensure the independent functioning of the judiciary freed of all suspicion of executive influence or control, direct or indirect. It incidentally ensures that officers will de-

vote their time entirely to judicial duties and this fact leads to efficiency in the administration of justice.”

The importance of the freedom of the judiciary from executive control was recognized by the British as far back as 1793. Regulation II of 1793 states that “the Government must divest itself of the power of infringing in its executive capacity the rights and privileges which, as exercising the legislative authority, it has conferred on the landholders. The revenue officers must be deprived of their judicial powers.”

Though the first steps to effect this reform in what used to be British India were taken after independence, in several former Indian States, the judiciary had been separated from the executive for a long time. So insistent was the public sentiment that when Article 50 of the present Constitution was being deliberated in the Constituent Assembly, a considerable body of opinion favored fixing a time limit of 3 years in the Article itself for carrying out the separation.

It will be revealing to study the manner in which the scheme of separation was implemented in some of the major states of Madras and Bombay. The 14<sup>th</sup> Report of the Law Commission records that the separation was effected in Madras (Tamil Nadu and Andhra Pradesh) in 1946 following the report of a committee created by executive orders. Initially, the scheme was introduced in a few districts then extended to other districts yearly. It was thus gradually brought into force in Madras State, including the separated Andhra.

The essential feature of the scheme for the separation of the judiciary from the executive branch was the transfer of purely judicial functions like trial of criminal cases from the collector and subordinate magistrates to a new set of officers who were no longer to be under the control of the collector. Other functions such as police functions (maintenance of law and order) continued to be discharged by the collector and the subordinate revenue officers. Previously, under the Criminal Procedure Code and other relevant statutes, the functions of a magistrate fell into three broad categories, namely: (i) “police” functions, e.g. the handling of unlawful assemblies; (ii) administrative functions, e.g. issuance of licenses for firearms and similar functions; and (iii) essentially judicial functions, e.g. the trial of criminal cases. When separation was effected, the judicial

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<sup>4</sup> A.V. Dicey, 1914. *Introduction to the Study of the Law of the Constitution*. Oxford: All Souls College. Available at: [www.constitution.org/cmt/avd/lawcon.htm](http://www.constitution.org/cmt/avd/lawcon.htm).

functions under the third category were transferred from the collector and subordinate magistrates to a new set of officers while the first and second categories of functions remained with the collector and subordinates. They were called executive magistrates and the new officers were called judicial magistrates.

Executive magistrates were not to exercise any judicial functions in the sense that they were not to try any criminal cases. Their powers were restricted to the issuance of emergency orders<sup>5</sup> and powers to bind persons to keep the peace.<sup>6</sup> Powers under Sections 108 to 110<sup>7</sup> and powers of revision under Sections 397 and 399<sup>8</sup> of the Criminal Procedure Code were given exclusively to judicial magistrates while powers under Section 144 of the Criminal Procedure Code can be exercised by both classes of magistrates. The jurisdiction in disputes regarding immovable property<sup>9</sup> could be exercised by the executive magistrates. These changes were effected by Government Order No. 3106, Public (Separation) Order dated 9 September 1949, which has been amended from time to time.

In Bombay (Maharashtra and Gujarat), a similar scheme was brought into effect by the Separation of Judicial and Executive Functions Act, 1951. There are two main points of distinction between the Madras and Bombay schemes. The first relates to the head of the judicial magistrates. In Madras, the head of judicial magistrates in a district is the district magistrate (judicial), while in Bombay the head is the sessions judge. The second distinction relates to the exercise of powers. In Madras, the powers under Sections 108 to 110 of the Criminal Procedure Code are exercisable only by judicial magistrates while in Bombay

these powers are left to be exercised by executive magistrates. In both States, judicial magistrates are, like civil judges, under the administrative control of the High Courts. The essence of separation thus lies in the allocation of powers and functions under the Criminal Procedure Code. In other states where separation was introduced, the Madras method of issuing executive instructions has been followed with allocation of powers on the model of Madras or Bombay.

Still, some state governments were not supportive of separation. The Punjab Government felt that given the crime situation, complete separation would weaken the Government's capacity to deal with crimes and law and order situations. It was argued that the local magistrate should have some sort of control over the proceedings in a criminal case until its conclusion in order to exercise control over the law and order and crime situation. In defense of nonseparation, it was also claimed that the judicial magistrates required a very high standard of evidence but meted out penalties lower than what the nature and frequency of the offence deserved. In the view of the Law Commission, however, the executive was only reluctant to part with their power because,

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<sup>5</sup> Sections 133 to 144 of the Code of Criminal Procedure, 1973 (Act 2 of 1974).

<sup>6</sup> Section 107 of the Code of Criminal Procedure, 1973 (Act 2 of 1974) reads as follows:

“(1) When an Executive Magistrate receives information that any person is likely to commit a breach of the peace or disturb the public tranquility or to do any wrongful act that may probably occasion a breach of the peace or disturb the public tranquility and is of opinion that there is sufficient ground for proceeding, he may, in the manner hereinafter provided, require such person to show cause why he should not be ordered to execute a bond, with or without sureties for keeping the peace for such period, not exceeding one year, as the Magistrate thinks fit.

(2) Proceedings under this section may be taken before any Executive Magistrate when either the place where the breach of the peace or disturbance is apprehended is within his local jurisdiction or there is within such jurisdiction a person who is likely to commit a breach of the peace or disturb the public tranquility or to do any wrongful act as aforesaid beyond such jurisdiction.”

<sup>7</sup> Security for Good Behaviour, Sections 108–110 of the Criminal Procedure Code (CrPC), 1973. Under Section 108 of the CrPC, an Executive Magistrate may require from the person who is disseminating the peace in his jurisdiction to execute a bond with or without sureties for his good behavior; under Section 109 of the CrPC, an Executive Magistrate may require from the person who is concealing his presence in his jurisdiction for committing a cognizable offence to execute a bond with or without sureties for his good behavior; under Section 110 of the CrPC, an Executive Magistrate may require from a person who is a habitual offender in his jurisdiction to execute a bond with or without sureties for his good behavior.

<sup>8</sup> Under Section 397 of the CrPC, only sessions judge and high court are given revisional powers to examine the correctness, legality, or propriety of any finding, sentence, or order, recorded or passed, and as to the regularity of any proceedings of court of any magistrate, whether executive or judicial.

<sup>9</sup> Section 145 of the CrPC prescribes the procedure where dispute concerning land or water is likely to cause breach of peace. Executive Magistrates are authorized to issue orders in such situations to summon parties to his court, decide on possession of the subject of the dispute, and forbid disturbance of it until the title is decided by due process of law.

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in fact, separation has not had any adverse impact on the law and order situation in the states where this was effected. Nevertheless, the Law Commission acknowledged certain difficulties arising from separation especially because judicial magistrates failed to appreciate the hardships that investigating officers encountered in procuring evidence. This problem could be remedied, however, by training judicial magistrates in the revenue and police departments.

Another reason for separation was the heavy administrative workload of executive magistrates that caused them to neglect their judicial work. At the same time, the district magistrate had no time to supervise the magisterial work of subordinates. This resulted in inordinately delayed disposal of cases. Separation was therefore meant to facilitate criminal justice by delineating the various functions of the different types of magistrates. The recommendations of the Law Commission (14<sup>th</sup> Report, 1958) on the issue of separation are instructive and relevant even today. These are summarized below:

- (i) Separation has worked satisfactorily where it has been introduced and its introduction has not led to insurmountable difficulties to the executive in maintaining law and order.
- (ii) Additional expenditure involved is not great. In any case, such additional expenditure is essential for the proper administration of justice.
- (iii) The system of separation should be a real one and not merely one in form.
- (iv) Under the scheme of separation, it would be desirable to appoint a district magistrate (judicial) for the purpose of exercising effective supervision and control over the subordinate magistrates, as the district and sessions judge will not be able to find the time and is not the

suitable person for this supervisory role.

- (v) Legislation by Parliament on the model of the Bombay Separation of Judicial and Executive Functions Act (XXIII of 1951) will be the best strategy to bring uniform separation. Effecting separation through executive orders may be done like in Madras.
- (vi) Finally, these recommendations will have no application to the scheduled and tribal areas which under the Constitution are being administered under special provisions.

### **Consequences of Separation and Remedial Options**

The separation process was not without obstacles. Among these difficulties was the failure of judicial magistrates to appreciate the difficulties encountered by investigating officers and other executive authorities. Thus, they demanded very high standards of proof in weighing evidence presented before them. This resulted in higher acquittals even in cases where conviction was proper. The remedy suggested was training of judicial officers particularly in the revenue and police departments.

Further, judicial magistrates were no longer able to deal effectively with disturbances and difficult law and order situations due to the exclusivity of their functions. The remedy suggested again was the training of judicial magistrates in law and order duties so that their services can be requisitioned in the absence of, or in addition to, available executive magistrates.

In terms of institutional implementation, the costs of separation created a heavy financial burden. However, experience has shown it to be nonexcessive. Possible retrenchment of executive personnel can to some extent absorb the cost to the State.

Nonavailability of personnel adequately trained for judicial work is another problem. The suggested remedy is implementing separation by stages in groups of districts. While this is ongoing, recruitment and training of the required personnel should also be undertaken. Also, there must be a proper supervisory system to avoid losing the gains of independence of the magistracy. This requires special attention as the district and sessions judge may find it difficult to supervise and control the judicial magistrates due to volume of work. This may be addressed by providing the district and sessions judge with the assistance of a district judicial magistrate whose principal functions would be supervision of the subordinate magistrate courts.

## Additional Steps for Strengthening the Independence of the Judiciary

### Appointment and Selection of Judges

The selection and initial appointment of judges is one of the crucial stages at which the executive branch of the government can exercise its power to fashion a judiciary of its choice. Under the Constitution, the judiciary can assert and take complete control of appointments particularly to the higher judiciary on the basis of the principle of independence of the judiciary. In the *All India Judges Association case* (1993[4] SCC 288), the Supreme Court drew a distinction between judges and civil servants, saying that judges, regardless of their level, represent the State and its authority. The executive or legislative branch therefore cannot dictate the appointment and determination of service conditions of the judiciary without consultation with or consent of the judiciary. To grant such power to the other branches would only provide them the opportunity “to turn and twist the tail of the judiciary,” a consequence that is against the independence of the judiciary.

The Indian Constitution envisions a scheme of consultation by the executive with people, including judges who are most qualified to render proper advice on the matter.<sup>10</sup> Prior to 1993, there was a consensus of opinion that the term “consultation” could not be interpreted to mean “concurrence.” What this meant, in effect, was that the final power in the appointment of Supreme Court judges rested with the executive and the views of the Chief Justice were not regarded as binding on the executive (*S.P. Gupta vs. Union of India*, AIR 1982 SC 149). In 1993, a majority of nine judges of the Supreme Court, while referring to the consultative process envisaged in Article 124(2), declared that the Government does not enjoy primacy or absolute discretion in the matter of appointment of judges to the apex court (second Judges’ case, *S.C. Advocates on Record Association vs. Union of India*, AIR 1994 SC 268). Majority of the Bench were inclined to interpret “consultation” as “concurrence,” opining that concurrence of the Chief Justice of India was needed for any appointment to the Supreme Court, and in the absence of consensus, his or her opinion would hold primacy. The reason for the

“primacy of opinion” of the Chief Justice of India was that his or her opinion was formed collectively after taking into account the views of senior colleagues, signifying plurality in the Chief Justice’s formation of opinion. The objective of this interpretation was to minimize political influence in judicial appointments as well as to minimize individual discretion of the constitutional functionaries involved in the process. The Court went on to hold that even if only two of the judges forming the collegium expressed strong views, for good reasons, that were adverse to the appointment of a particular person, the Chief Justice of India should not press for such appointment. Thus, through this process of judicial interpretation, the power to make recommendations for appointment of judges has been taken away from the central executive and has now been placed on a collegium consisting of the Chief Justice of India and the four most senior puisne judges. This guarantees judicial independence in the matter of appointment of judges and puts an end to executive interference.

To bring in greater transparency and accountability in judicial appointments and transfers, the Government of India has introduced a Constitution (98<sup>th</sup> Amendment) Bill seeking to constitute the National Judicial Commission. However, there are controversies on the composition of the commission and its functions which remain pending due to the change of government at the center. Accordingly, the collegium system, flawed as it may be, still acts as a bulwark against interventionist forces and hence operates in defense of independence.

### Education and Training

Judicial education and training in an organized manner is a recent phenomenon. The First National Judicial Pay Commission (2000) appointed by the Government of India recommended a year-long training for newly recruited judicial officers

**The selection and initial appointment of judges is one of the crucial stages at which the executive branch of the government can exercise its power to fashion a judiciary of its choice.**

<sup>10</sup> Article 124(2) of the Constitution states: “Every judge of the Supreme Court shall be appointed by the President by warrant under his hand and seal after consultation with such of the judges of the Supreme Court and of the High Courts in the States as the President may deem necessary for the purpose... Provided that in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of India shall always be consulted.”

**The quality of justice and the efficiency of the justice system are directly related to the professional competence of the presiding officers of courts and tribunals. In fact, judicial education and training have become the key strategy for judicial reform.**

and a system of in-service training for senior judges at periodic intervals to improve competence and efficiency in judicial administration. The introduction of information technology and new management techniques also warranted training of personnel in the judiciary. The quality of justice and the efficiency of the justice system are directly

related to the professional competence of the presiding officers of courts and tribunals. In fact, judicial education and training have become the key strategy for judicial reform.

### **Conclusion**

In conclusion, despite all the problems and practical difficulties, judicial independence and separation have immense advantages over the old executive-judiciary system. A system of checks and balances is inevitable in modern constitutional governance and separation of judiciary is the predominant strategy invoked everywhere. The process of transition may be difficult but the difficulty will be greater with delayed implementation. The measure can be accomplished in stages and through legislation or executive orders. Needless to say, other reforms must buttress the separation process to carry it forward and sustain its positive effects on the justice system.

# Strengthening the Judiciary of Pakistan

Justice Shafiur Rahman

Independence and separation of the judiciary from the executive branch in Pakistan were mandated in the 1973 Constitution. However, it was the Criminal Procedure Amendment Ordinance of 2001 that commenced the process of separation. The separation resulted in visible improvement in various aspects of the judicial system, but as it was done with haste, it resulted in problems for the executive, the judiciary, and other stakeholders in the justice system. Thus, the current major issue in strengthening the judiciary of Pakistan is dealing with post-separation challenges that are threatening to reverse the fruits of separation.

## Institutional Framework of the Judiciary

Article 175 (1) of the 1973 Constitution provides: “[t]here shall be a Supreme Court of Pakistan, a High Court for each Province and such other courts as may be established by law.” This provision sets out the court system, with the Supreme Court at the apex, a High Court in each province, and then the civil and criminal district courts. The Supreme Court of Pakistan exercises no power of supervision and oversight over the other courts of the country. It is the High Court which exercises superintendence and control over the subordinate courts in each province. The working strength of the Supreme Court and the High Court is required to be fixed by an Act of Parliament and, provisionally, by the President upon the advice of the Prime Minister and the Ministry of Justice and Parliamentary Affairs. So far, the President has issued administrative orders fixing the working strength of the Supreme Court and the High Courts, subject to amendments whenever necessary.

Upon the separation of the judiciary from the executive branch pursuant to Criminal Procedure Amendment Ordinance of 2001 (Ordinance No.

XXXVII), the office of the district magistrate and that of executive magistrates performing judicial functions were abolished completely. Judicial functions were entrusted exclusively to judicial magistrates while executive functions were distributed among the heads of local government units, the local heads of police, and the judicial magistrates. Thus, a district is now headed by district and sessions judges with both civil and criminal jurisdictions. The district judge is assisted by a number of additional district and sessions judges. For civil cases, the district judge is assisted by civil judges of various grades headed by senior civil judge. For criminal cases, the same civil judges are designated as magistrates. These judges also exercise jurisdiction under various special laws such as rent control and family court, to name a few.

As a consequence of the reallocation of judicial and executive functions pursuant to the amendments under the Criminal Procedure Amendment Ordinance of 2001, additional duties were conferred on sessions judges, some of which are not strictly judicial in nature:

- (i) supervision and control over all judicial magistrates;
- (ii) jurisdiction over attachment of properties of absconding accused;
- (iii) release of persons without security and/or on reduced security;
- (iv) cancellation of bond for keeping the peace;
- (v) conducting local inquiries in property disputes involving breach of peace;
- (vi) transfer of cases from magistrates;
- (vii) restoration of abducted females; and
- (viii) acting as chairperson of the District Selection Committee for appointment of independent members of the District Public Safety Commission.

Additional duties of executive nature were also conferred on judicial magistrates, requiring constant and close supervision of sessions judges:

- (i) taking action on breach of peace;
- (ii) taking action against those disseminating seditious material;
- (iii) taking action against vagrants;
- (iv) taking action against habitual offenders;
- (v) taking preventive action in property disputes involving breach of peace; and
- (vi) supervising inquests.

Another significant responsibility, judicial in nature, assigned to the sessions judges in the recent past is powers over *habeas corpus* complaints. Section 491 of Criminal Procedure Code has been amended to devolve powers from High Court to the session judges.

Police Order 2002 (Chief Executive's Order No. 22 of 2002) also provided for the powers and responsibilities of the district and sessions judges:

- (i) The district and sessions judges are to act as *ex officio* chairperson of a three-member Dis-

trict Selection Panel for recommending appointments to District Public Safety Commission and Complaints Authority.

- (ii) On the request of the chairperson of the District Selection Panel, the district and sessions judges are required to conduct the election of the members of the District Public Safety Commission and Complaints Authority.
- (iii) District and sessions judges are required to act *ex officio* in their respective districts as chairperson of a seven-member District Criminal Justice Coordination Committee.

On the other hand, some of the previous duties of magistrates were left neglected and unsupervised:

- (i) ensuring the prompt and timely registration of cognizable cases by the Police (Section 154 of the Criminal Procedure Code);
- (ii) ensuring the timely receipt of the copy of the First Information Report of crime (Section 157 of the Criminal Procedure Code); and
- (iii) ensuring the timely submission of *challan* (final report after investigation) or keeping a close watch on the progress of the investigation (Section 173 of the Criminal Procedure Code).

**A national judicial policy-making body composed of Chief Justices of all the High Courts has been set up within the Law and Justice Commission of Pakistan to coordinate and harmonize judicial policy within the court system and ensure its implementation.**

### Positive Consequences of Separation

Since the separation, the historically neglected district judiciary became the centerpiece of the governance structure. As a basic strategy, reform initiatives began with the commercial courts, then the civil and the criminal courts, in preparation for the overhaul of the entire judiciary. The success of this strategy has motivated political executives to follow suit, benefiting not just the district court but litigants as well.

### Establishment of New Institutions

Furthermore, new institutions were established and old ones were strengthened. A national judicial policy-making body composed of Chief Justices of all the High Courts has been set up within the Law and Justice Commission of Pakistan, to coordinate and harmonize judicial policy within the court system and ensure its implementation. The Commission is headed by the Chief Justice of Pakistan and also tasked to perform the following functions: (i) improve the capacity and performance of the administration of justice; (ii) set performance standards for judicial officers and relevant personnel; (iii) improve the terms and conditions of service of judicial officers and court staff; and (iv) publish the annual or periodic



Muhamman Bilal

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reports of the Supreme Court, Federal Sharia Court, High Courts, and courts subordinate to High Courts and administrative courts and tribunals.

To strengthen judicial accountability, a citizen's liaison committee has been set up at the district level while the Supreme Court, the Law Commission, and the High Courts have all started publishing annual reports. The inspection and oversight wing of the High Courts has been further strengthened by laying down rules for the inspection team and training judicial officers as court administrators in preparation for the appointment of a judicial ombudsman and a court administrator.

### Legislations Introduced

New progressive laws have been passed and old ones amended to address the needs of the new system. In the federation, the Freedom of Information Act and the Rules thereunder have been enacted to grant the right to seek declassified information from executive departments. Delay or refusal entitles the aggrieved to seek relief from the federal ombudsman. The General Clauses Act has been amended to provide for, among others, regulation of discretionary powers. In addition, other laws and amendments aimed at improving the judicial system are in the pipeline:

- (i) Procedural laws will be amended to separate the trial of civil and criminal cases, with judges exclusively assigned to one or the other, instead of assigning both types of cases to civil judges-cum-judicial magistrates. This will facilitate litigation and encourage specialization with greater and better attention to cases. Similarly, the pre-trial proceedings will be clearly delineated from the trial proceedings and entrusted to different judges.
- (ii) A law on court management, supplemented by rules under Article 202 of the Constitution and Section 122 of the Civil Procedure Code, is under consideration.
- (iii) Sections 35, 35A, and 95 (dealing with actual and special costs) of the Civil Procedure Code will be amended to limit recovery to actual and compensatory costs.
- (iv) Family law and rent cases will be separated from general civil business to simplify proceedings. Special classes of judicial officers who are specialists in these areas may be recruited to perform these functions.
- (v) A bill dealing with domestic arbitration and another bill on foreign awards are awaiting enactment. The United Nations Commission on International Trade Law model has been kept in view in preparing the law.

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- (vi) The High Court (Practice and Procedure) Bill 2005 proposes the establishment of specialized benches in the High Courts, civil, criminal, commercial, and other courts, with the objective of securing efficient, prompt, and inexpensive justice.

### Post-separation Problems

Despite the visible good brought about by separation, the process has not been spared from problems. Due to oversight of some factors, complications arose after the initial, albeit sudden, sweep of separation. Unprepared for consequences it failed to anticipate, Pakistan is currently faced with institutional and administrative bottlenecks.

#### Inadequacy of Judges and Court Staff

There have been various studies on the judiciary but almost none of the studies reviewed the logistical and infrastructural shortages within the judiciary. The 1978 Committee alone examined this issue but it also confined its evaluation to the civil works. Currently, the High Courts and the district courts suffer a substantial shortage, which is likely to increase with the promulgation of new laws separating criminal and civil cases, dividing civil procedure into pre-trial and trial, and providing better monitoring, inspection, and supervision mechanisms of the subordinate courts.

#### Lack of Adequate Compensation of Judges at Lower Courts

It is fortunate that the compensation and pension benefits in the superior courts are reasonable and free from interference. A retiring Supreme Court justice gets a minimum of 70% of the current prevailing salary of a serving justice. For every year of



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**The need for proper training courses is now greater because of the change of system. There should be compulsory pre-service, in-service and advanced courses for judicial officers. The existing training system has not so far been made a part of the system and attendance is purely voluntary and discretionary upon the High Courts.**

service rendered, an incremental increase of 5% is given with a maximum of 85% for rendering 3 years service. Other benefits include free medical treatment and reimbursement of monthly expenses including petrol, telephone, electricity, and gas.

Unfortunately, district court judges suffer a different fate. Their emoluments are based on grade pay, which is common to other services of the federation or the province. Efforts to provide a separate pay scale have not succeeded and only a provisional judicial allowance has been given. This matter has to be addressed.

#### **Lack of Experience of Judges in Criminal Trials**

Judges have a long tradition of playing the role of an impartial adjudicator in an adversarial system

of litigation. They are trained to be proactive in conducting cases, managing the court, and facilitating litigation. On the other hand, criminal work requires continuing interaction with the police over the proper registration of cases, the progress of investigation, and the rights of the accused in custody. To bridge the gap in training, the chief judicial magistrate should closely and effectively supervise magistrates and police in their administration of the criminal justice system. The other option is to establish a very sound system of training, continuing education, and exposure to best practices all over the world. The third option is to start a system of recognition and reward for outstanding performers.

#### **Inadequate Regular Training Courses**

The need for proper training courses is now greater because of the change of system. Currently, training is not compulsory for any class of judges. At the federal level there is a well-established Federal Judicial Academy capable of accommodating and training about 50 trainees at a time. The provinces of Sindh and Balochistan are also establishing regular training institutions of their own. Sindh has a training facility for judges.

These training courses, however, need to be strengthened. There should be compulsory pre-service, in-service, and advanced courses for judicial officers. The existing training system has not so far been made a part of the system and attendance is purely voluntary and discretionary upon the High Courts. Monetary rewards for satisfactory completion of optional courses can be added as an incentive to participate in these training courses.

#### **Inadequate Infrastructure**

In terms of infrastructure, although the court-houses of superior courts are dignified and well-maintained, physical working conditions in the districts are deplorable. Secure court houses and residences are much needed. Training facilities are available in the country but can only accommodate 50 persons at a time. While efforts to address these inadequacies are underway, construction of necessary structures must be completed as soon as possible.

#### **Insufficient Budgetary Appropriation**

The problem underlying the foregoing problems is the insufficient budgetary allocation for the Supreme Court. The Supreme Court of Pakistan has been consistently receiving a very small percentage of the national budget: 0.01% from 1993 to 2001, 0.02% from 2001 to 2004, and 0.017%

in fiscal year 2004–2005. The Supreme Court of Pakistan received Rs140,736,000 (approximately \$2,345,600) in fiscal year 2004–2005 and Rs109,497,997 (approximately \$1,824,967) in fiscal year 2003–2004.<sup>1</sup> If the separation process is to be completed, sufficient appropriation should be given to the Supreme Court to answer for the expenses entailed by separation.

#### **Demands of the Executive Branch on Judicial Officers**

It is injudicious to depute judicial officers to executive posts. There are basic inconsistencies in their functions and situations that make this practice extremely undesirable. Judicial officers have independence and security of tenure while executive officers have limited discretion and no security of tenure. Moreover, for purposes of stability, oversight and implementation of the rule of law should rest on permanent judicial officers rather than temporary or contractual personnel.

#### **Strengthening of All Support and Ancillary Institutions**

The criminal justice system requires competent and sufficiently independent investigation and state prosecution agencies. It appears that steps have been taken to separate investigation from other duties of the police and to establish an independent prosecutorial service. The remaining task is to ensure that new institutions and procedures are firmly established to avoid retrogression to previous practices.

#### **Consequential and Progressive Legislative Changes**

Since the colonial period, special magistrates have been assigned to various departments such as the forest magistrate (for the forest department), the railway magistrate (for the railway department), the municipal magistrate (for the local govern-

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ment), to name a few. Such courts of magistrates were usually mobile, and therefore seen as being effective. Logistical problems were eliminated and case backlog decreased tremendously. Under the current system, however, civil judges, who are now the magistrates, are hesitant to perform judicial or quasi-judicial duties outside the confines of the court room. The result is an impasse in enforcing local and special laws.

These problems are proving to be formidable, threatening to reverse the separation that has been done half a century ago. Immediate but well-thought out solutions to these problems must be implemented without delay. Otherwise, the Pakistan experience will degenerate into a source of negative lessons instead of being a model worthy of emulation.

#### **Conclusion**

The separation of the judiciary from the executive has been accomplished in Pakistan. However, such a radical change is naturally accompanied by teething problems that cannot be ignored. Concerted action is therefore required—the Government to provide the funds, the judiciary to lead, and the people to support—for the process to succeed.

<sup>1</sup> These figures do not include what the Ministry of Law, Justice and Parliamentary Affairs spends on other federal courts and tribunals.