

JUDICIAL INDEPENDENCE AND THE *MASDAR HOSSAIN* LEGACY

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ABSTRACT

This paper looks at the post-Masdar developments on judicial independence in Bangladesh. The independence of the judiciary is one of the fundamental tenets of rule of law and constitutionalism. Although enshrined in the Constitution in 1972, the real position of the principle within the constitutional design rested in a grey area until Masdar Hossain was decided in 1999. Masdar is a leading case not only in terms of judicial independence but also in respect of comparative constitutional law. The government of Bangladesh took eight years to separate the judicial magistracy from that of the executive, one of the main Masdar imperatives. In the last thirteen years, there have been a plethora of cases where the higher judiciary had to apply the Masdar yardsticks of judicial separation. The achievements have been many, however, a great deal remains to be done. In this context, this paper looks at certain areas of judicial independence that define the post-Masdar era. The paper concludes that the higher judiciary has been fairly consistent in upholding the Masdar spirit, however, in several cases, it had to come to terms with the executive to avoid any stalemate situation. The paper also suggests that while judicial independence is a matter largely dependent on the executive body, it is also for the judiciary to learn to maintain the virtue of this principle.

I. INTRODUCTION

The discussion on the separation of powers in Bangladesh is fragmented and piecemeal. It is largely understood from the angle of judicial separation from the executive. The concern for judicial independence is nearly universal. The over-use of the term, like the rule of law, makes it a *virtue* or a kind of *slogan*, rather than a principle or a culture.¹ Therefore, the approach is one-eyed. *Masdar Hossain*,² for example, one of Bangladesh's leading constitutional cases, largely known as an epoch-making case on *the independence of the judiciary*, portrays the topic more as a 'judicial separation', than the separation of powers itself. One may wonder whether the principle of judicial independence may mean the same thing if it is considered differently with these two phrases. They may be used interchangeably, even one may argue that independence of the judiciary may appear to be more nuanced, posited and balanced if seen in the light of the phrase

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¹ Sengupta, A., *Independence and Accountability of the Indian Higher Judiciary*, Cambridge, 2019 at p. 140.

² *Secretary, Ministry of Finance vs. Md. Masdar Hossain and Others*, 52 (2000) DLR (AD) 82.

separation of powers. The observance of the ‘independence of judiciary day’ or ‘separation of powers day’ respectively for commemorating the delivery of *Masdar Hossain* verdict or the starting point of its implementation also brings a kind of muddling of the issues to the front.³ It is in this scenario, *Masdar Hossain* turns into a self-congratulatory rhetorical device. The trend tends to suppress the focus on the style of legislating and judging that gives equal consideration to all citizens. The approach also overlooks how the separating and dispersing of powers may contribute to the democratic style of governance.

Mustafa Kamal CJ in writing the leading opinion metaphorizes the nature of judicial work and the executive work with “oil and water”. For Kamal CJ, ‘as oil and water cannot mix, so is the executive and judicial power’.⁴ The metaphor is intellectually compelling and self-explanatory. However, the metaphor also symbolizes the tension between the works and organs of the state. The strength of *Masdar Hossain* lies in the fact that it makes a watershed in our judicial history so much so that even the Bangladesh legal history in respect of judicial independence can be divided into pre-*Masdar Hossain* and post-*Masdar Hossain* era. At the same time, the overwhelming reference to the decision by the legal fraternity tends to obscure the real meaning of judicial independence and its extent of separation from the other organs of the state.

Any reasoned debate on judiciary often boils down to the discussion of *Masdar Hossain*. However, I fear that the case is not always understood today in the same sense as Kamal CJ and his colleagues portrayed it in 2000. Law folks think that they know what the case means, but deviation and misinterpretation is an obvious outcome.⁵ In this paper, I have focused on the status of independence of the judiciary in Bangladesh as a tenet of separation of powers, its different dimensions and ramifications in the light of *the Masdar Hossain* decision. I have examined the developments that took place in the field of judicial independence following the *Masdar Hossain* decision. In doing so, I have largely borrowed from the existing literature, predominantly the case law and scholastic writings from home and abroad.

II. THE CHOREOGRAPHY OF STATE ORGANS

Human beings by nature are susceptible to abuse the power they are vested with and carry their authority as far as it goes.⁶ To prevent this abuse, it is necessary from the very nature of things that *power* should be a *check* to *power*.⁷

³ 02 December 1999 and 01 November 2007 respectively.

⁴ *supra* note 2, at para 41.

⁵ Hatch, O., “Modern Marbury Myths” 57 (1989) (3) *University of Cincinnati Law Review*, at p. 891.

⁶ Montesquieu, B., *The Spirit of Laws*, Tr. Thomas Nugent, Cosimo Classics, 2011, p. 150.

⁷ *ibid.*, at p. 150.

For Montesquieu, the virtue, it should have a limit, and a system of government should be formed where a person should not be compelled to do things not permissible in law or prevent from doing what the law permits.⁸ Hence, the principle of separation of powers has emerged. While the separation of powers is a significant theory at its origin, the historical context has changed dramatically in modern times. Thus, it is important to reason about the present challenges to the separation of powers and the authority of the judiciary in concrete rather than abstract terms. The main dividing line to be preserved is once again between *political* institutions on the one hand and *safeguards* institutions on the other. The historical dichotomy between the executive and the judicial branch is relevant again today: judicial independence is put at risk when a distinctiveness between the executive and the judiciary is not maintained.

Society, however, has changed in many respects. The judicial power today is equally important to shape democracy. The present dangers for judicial independence are understood, therefore, after a period of the upsurge of the judiciary within the constitutional system. Today, the judiciary plays a much more significant role than the agent of the law.

Historically, in the common law system, judicial independence is taken as a requirement both for upholding the rule of law and for ensuring loyalty to a scheme of separated powers.⁹ Blackstone developed this concept of judicial independence further as a foundation upon which separation of powers and consequently, democratic values rested. Arguably, with that motivation in mind, Bangladesh constitutionally aspired for a co-equal independent judiciary since its inception in 1971.¹⁰

III. JUDICIAL INDEPENDENCE: A MULTIFACETED IDEA

The theory of judicial independence receives huge scholastic attention from home and abroad. Arghya Sengupta's work in the Indian context has a transcendental appeal claiming that judicial independence has a conflation with the idea of separation of powers, checks and balances and rule of law.¹¹ As such, it is desired to be defined from multiple objectives. In a different context, it may mean checking against the politicized process of judge's appointment, preventing drawing a budget by the executive for the judiciary and judicial autonomy and so on. Sarkar's thesis, conducted at a time contemporary of *Masdar* decision, examines the tenets of judicial independence vis-s-vis accountability and their implications

⁸ *ibid.*

⁹ *supra* note 1, at p. 141.

¹⁰ *supra* note 2, at p. 26.

¹¹ *supra* note 1, at p. 141.