



**The Judicial Service Regulation (Srinkhola) Bidhimala, 2017:  
Whether in consonance with the spirit of Judicial independence  
guaranteed under Constitution or not?**

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## **Declaration**

I declare and confirm that the thesis presented for the undergraduate program as Law- 406 (Supervised Dissertation) of Department of Law, East West University has been composed entirely by myself, been solely the result of my own work and has not been submitted for any other degree or professional qualification. Any information and contents that have contributed in carrying out this research are explicitly referred and acknowledged.

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## Abstract

This thesis analyses concept of judicial independence and judicial accountability with special reference to leading cases in the judiciary. The central issues of this thesis are to find out provisions of Judicial Service Regulation (Srinkhola) Bidhimala 2017 conflicts with judicial independence and accountability. The thesis examines the conditions of judicial independence and accountability in Bangladesh in comparison with general principles, and under the Constitution of Bangladesh. Firstly, it evaluates Independence of Judiciary as a concept in our constitution. Secondly, it gives a clear concept about absolute checks in balances. Thirdly, this thesis examines how subordinate judiciary was separated from the executive by the judgment of *Masdar Hossain* and how Judiciary was separated from legislative by the judgment of 16th Amendment Case. The thesis identifies the strengths and weaknesses of the Judicial Service Regulation (Srinkhola) Bidhimala 2017 regulation and their impacts on judicial independence. It proposes ways of preserving the strengths or remedying the weaknesses to improve the conditions of judicial independence and judicial accountability in Bangladesh. Lastly, in conclusion thesis emphasizes that proper measures should be taken to maintain judicial independence and at the same time, an adequate system of proper checks and balances should be established without undermining the independence of judges.

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## **1. Introduction**

The responsibility of seeing that no functionality of the State violates the mandate of the Constitution or oversteps the limit of his power under the Constitution lies, of necessity, on the judiciary. Provisions were made to ensure the independence of the Judges of the Supreme Court, subordinate judicial officers and the magistrates exercising judicial functions (reduce space in front of footnote). The question of enforceability of constitutional conventions came Up before the Appellate Division in *Bangladesh v. Idrisur Rahman* and the court upon consideration of the constitutional history and the decisions of different jurisdictions answered the question in the affirmative stating, -“In the matter of appointment of Judges under Article 98 and 95 of the Constitution the convention of consultation having been recognized and acted upon has matured into Constitutional Convention and is now a Constitutional imperative.<sup>1</sup> Independence of judiciary is sine qua non of modern democracy and so long as the judiciary remains truly distinct from legislature, executive, the general power of the people will never be endangered.<sup>2</sup> On December 11, 2017 The Law Ministry, issued the gazette notification and then submitted it to the apex court the rule titled Judicial Service Regulation (Srinkhola) Bidhimala 2017) says that the president will make necessary decisions in consultation with the Supreme Court, and the Law Ministry will implement those. In this regulation law ministry will be considered as appropriate authority.

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<sup>1</sup> Article 102, see *Fazlul Quader Chowdhury v Shah Nawaz*, (1966) 18DLR (SC) 62

<sup>2</sup> *Bangladesh v Idrisur Rahman*, 2009 BLD (AD) 79 See also *per* 5.4

<sup>3</sup> The court expressed its dissatisfaction with the ministry as it made the rules by making a “U-turn” on the directives given in the verdict in *Masdar Hossain* case, known as separation of judiciary case.<sup>4</sup> In this thesis the central issues of this thesis are to find out provisions of titled Judicial Service Regulation (Srinkhola) Bidhimala 2017 conflicts with judicial independence and accountability Here all the In the first part of thesis part II describes Independence of Judiciary as a concept in our constitution. Part II describes the concept of Separation of Power and proper checks and balances. In part III describes about Mechanism of judiciary with the reference to Article 116, 115, 116A, 109,133. Part IV describes how subordinate judiciary was separated from the executive by the judgment of *Masdar Hossain* and part V shows how Judiciary was separated from legislative by the judgment of 16th Amendment Case. In part VI the overview and the outcomes of the thesis has been discussed. And in the end the recommendation and conclusion have been drawn with the aim to find out the find out provisions of titled Judicial Service Regulation (Srinkhola) Bidhimala 2017 conflicts and its impacts on the judiciary.

## 2. Methodology:

This research is an exploratory research of qualitative method supported by some quantitative data. Both primary data namely; titled Judicial Service Regulation (Srinkhola) Bidhimala 2017 Constitution of the people’s Republic of Bangladesh. Secondary data sources are used in the analysis of the study. Secondary data has been collected through content analysis of various Cases, scholarly writings, books and documents related to the subject matter. These documents provided valuable information. It reviews the history and current state of the judiciary by analyzing a wide range of sources, including constitutional and statutory law, public records, and media reports and secondary literature.

### 3.1: Independent of Judiciary as a Concept

Independence of the judiciary means 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, legislative or from parties, colleagues, superiors. As per International Bar Association’s view Independence of judiciary depends on some conditions which are judges’ modes of appointment, security of tenure, prohibition of pouring postretirement benefit, adequate

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<sup>3</sup> *State v Chief Editor, Manabjamin*, (2005)57 DLR 359

<sup>4</sup> Lower Court: Govt finalises disciplinary rules for judges <<https://www.thedailystar.net/frontpage/lower-court-judges-sc-disappointed-over-draft-rules-1441294> > Accessed 10 July 2019



remuneration and privileges.<sup>5</sup> We can find the concept of independence of judiciary in our basic structure of the constitution. Independence of the judiciary is a basic feature of the constitution and separation of powers as contemplated under Article 22 of the constitution is a sine qua non for such independence.

To understand the concept of independence of judiciary first we have to understand the concept of separation of power. The essence of separation of powers is that there should be ideal a clear demarcation of personal and functions between legislature, executive, judiciary in order that none should have excessive power and there should be in place a system of checks and balances between the systems

## **3.2 Historical Background of Independence of Judiciary**

Independence of the judiciary may be traced to ancient and medieval theories of mixed government, which argued that the processes of government should involve the different elements in society such as monarchic, aristocratic, and democratic interests. The first modern formulation of the doctrine was that of the French writer Montesquieu in *De l'esprit des lois* (1748), although the English philosopher John Locke had earlier argued that legislative power should be divided between king and Parliament. From this doctrine independence of judiciary were adopted.

A notable example illustrating this doctrine is the United Kingdom. The first phase occurred in England with the original conception of judicial independence in the Act of Settlement 1701.<sup>6</sup> The second phase was evident when England's concepts regarding judicial independence spread internationally, and were adopted into the domestic law of other countries; for instance, England served as the model for Montesquieu's separation of powers doctrine,<sup>7</sup> and the Founding Fathers of the US Constitution used England as their dominant model in formulating the Constitution's Article III, which is the foundation of American judicial independence.<sup>8</sup> Other common law countries, including Canada, Australia, and India, also adopted the British model of judicial independence.

## **3.3: Independence of the Judiciary as a concept in our constitution**

### **3.3.1. Pakistan period:**

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<sup>5</sup> IBA Minimum Standards of Judicial Independence (Adopted 1982)

<sup>6</sup> See generally Shimon Shetreet book, *Judges on Trial*.

<sup>7</sup> See Baron de Montesquieu, *The Spirit of the Laws* (Hafner 1949) (Thomas Nugent, trans).

<sup>8</sup> Article III of the US Constitution

The jukta front framed election Manifesto of 21 points demands of which inter alia the separation of judiciary was one of the main points. It was a popular demand of the Bengali nation of that time. Though the jukta front won the election and came to power but could not continue finish its tenure due to imposition of provision of section 92 A of the Indian Act 1935. By which the then governor general had overthrown popularly elected provincial government. Subsequently concept of separation of judiciary has found place in the 1956 Constitution of Federal Islamic Republic of Pakistan. But the promulgation of Martial Law on 7 the October, 1958 the Constitution of Pakistan was suspended by Martial law administrator Ayyub Khan. Thereafter in 1962 Constitution of Pakistan was reframed. With the introduction of concept of basic democracy In the Constitution of Pakistan the very principles of democracy has been demolished for cementing power of autocratic government. Independence of judiciary and democracy are related. Separation of judiciary can't run without democracy. Actually, nothing has been done by the respective regime for implementation of separation of judiciary from the executive under both the Constitution of Pakistan. The dream of separation of judiciary from the executive is totally scattered in Pakistan period. However due to denial to the democratic norms and principles, fundamental rights of the citizen's in other words people's mandate in 1970 election having not been recognized. Rather Pakistan military having started tyranny exploitation and elimination of Bengali nations legitimate right led to the liberation war against the Pakistani ruler. Ultimately Bangladesh is emerged in the world landscape as an independent state.<sup>9</sup>

### **3.3.2. Bangladesh period:**

After the emergence of Bangladesh a Democratic Constitution was introduced in the year of 1972. with the passage of time dream of independence of the judiciary in a democratic society has not been finished rather with the introduction of 1972 Constitution, the dream again translated into reality. Our framers of the constitution have tried to translate the people's dream which is Separation of judiciary from the executive and to ensure the independence of judiciary to their level best. It has been found in the speech of Abul Hafiz, member of assembly, constituent assembly, 1972. During constituent assembly debate he stated that "British colonial master while introduced act 1 of 1935, whereupon there has been known mechanism of separation of judiciary from executive. In other words, there has been scope of amalgamation of both the executive and judiciary in under the colonial master. And, different strata in society such as intellectual community, lawyers, and students raised their voice for complete separation of judiciary from the executive. Under the colonial role voice of people couldn't influence much colonial

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<sup>9</sup>Justice Mustafa Kamal, Bangladesh Constitution: Trends and Issues, First Edition, page 31

master. But the dream of independence of judiciary of this reign has not decayed. So now when we are trying to form a constitution, we should include provisions to separate judiciary from executive.<sup>10</sup>

So from discussion it can be said that from British period our society raised their voice for complete separation of judiciary from the executive. Which is later reflected on juktofront;s election Manifesto of 21 points demands. Finally, our constituent maker includes separation of power in Article 22 of our constitution. Article 7 established the supremacy of the Constitution by saying if any other law is inconsistent with the Constitution then that law shall, to the extent of the inconsistency, be void. This clearly is similar to the decision of John Martial (*Marvery V Medison* case) and intended the kind of judicial review that had developed in the USA. *Marvery v Medison*<sup>11</sup> case decision was influenced by *Thomas Bonham v College of Physicians*<sup>12</sup> Which was decided in 1610 by the court of common pleas in England almost two hundred years before this American case. From this decision concept of judicial review developed in the UK. This decision increased the court's power by encouraging the judicial department to say that what the law is. From this case established the principle of judicial review in the US constitution. Like many rules and acts in UK and USA, our framers of the constitution obtained this view and it is being reflected in Article 7 of our constitution. There is no supremacy of the legislature, it is the Constitution which is the supreme and to it all actions of the legislature and executive must conform whether or not it is stated in the constitution. So in from article 7(2) it is increased the court interpret law his power by encouraging the judicial department to say that what the law is. Doctrine of check and balance requires that after the main exercise has been allocated to one person or body care should be taken to set up a minor participation of other bodies. Budget impeachment, judicial review and pardon are examples of this short of check. Though article 22 required separation of judiciary from executive and made special provision in paragraph 6(6) of the fourth schedule for implementation of chapter II of part VI shall be implemented as soon as practicable and until such implementation the matter provided for that chapter be regulated in the manner in which they were regulated immediately before the commencement of this constitution.<sup>13</sup> But no step whatsoever was taken by the legislature or executive branch of government and in such situation Appellate Division gave directions to the parliament and the president to enact laws and promulgation rules in terms of Article 115 and 133 of the Constitution to give effect to the policy enunciated in Article 22 of the Constitution. <sup>14</sup> Therefore, it is the reality that judiciary in this

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<sup>10</sup>Abdul Halim; Bangladesh Constituent Assembly, 1st Edition

<sup>11</sup> *Marvery v Medison* (1803) 5 U.S. 1 Cranch 137

<sup>12</sup> *Thomas Bonham v College of Physicians* (1610) 8 Co Rep 114

<sup>13</sup> Carl J. Friedrich- Constitutional Government and Democracy, 4<sup>th</sup> edition, p. 84

<sup>14</sup> Fourth Schedule, Article 150(1) Paragraph 6(6)

country has been separated mostly theatrically by way of judicial activism at the instance of highest seat of judiciary of the country. <sup>15</sup>

So we can say as a concept Independence of Judiciary is present in Basic structure of the constitution as separation of power is a basic structure of a constitution which is established in various cases. In *Masdar Hossain* case it is established that the independence of the judiciary and the impartial judicial independence are related concepts, one cannot sustain without the other. There is no point in having a judiciary, which is through independent but fails to appreciate the notion of impartiality. From *Masdar Hossain* case we can get a proper idea of proper implementation of Article 22 which is primary requirement of independent of judiciary. Overall, we can say that concept of independence of judiciary is present in Article 7 and 22 of our constitution.

#### **4.1. Separation of Power: Defining the Doctrine**

The doctrine of Separation of Power enjoys a general acceptance as ‘an invaluable percept in the science of politics. It divides the institutions of government into three branches: legislative, executive and judicial. The legislature makes the laws; the executive put the laws into operation and the judiciary interprets the laws. The powers and functions of each are separate and carried out by separate personnel. However, to ensure that no single agency is able to exercise complete authority, each are made interdependent on the other. Then the doctrine is extended to enable three branches to act as checks and balances on each other. This version of separation of power is commonly known as Checks and Balances.

#### **4.2. Origin of the Doctrine**

Throughout history States have developed concepts and methods of separation of power. In his Second Treatise of Civil Government, English philosopher John Locke noted the temptations of corruption that exist where “the same persons who have the powers of making laws have also in their hands the power to execute them.” However, it was the French philosopher Baron de Montesquieu, who articulated the fundamentals of the separation doctrine. In his *The Spirit of Laws* (1748), a result of his visit to England

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<sup>15</sup>*Secretary, Ministry of Finance v Masdar Hossain*, 20 BLD (AD)(2000) 104 See para 5.233-5.234G

in 1729-31, Montesquieu considered that English liberty was preserved by its institutional arrangements.<sup>16</sup> The English system of governance encouraged him to say:

“Experience has always demonstrated that he who has power in his hand is inclined to abuse it. Executive, Legislative and Judicial power should not be united in the hands of a single person or body of persons, for such a combination would destroy liberty.” Locke and Montesquieu’s ideas found a practical expression in the American Revolution in 1780. Motivated by a desire to make the abuses of power impossible, framers of the Constitution of the United States adopted and expanded the separation of powers doctrine. To ensure the preservation of liberty, three branches of government were both separated and balanced. Each had separate personnel and there were separate elections for executive and legislature. Each had specific powers and some form of veto over the other. The power of one branch to intervene in another through devices like veto, impeachment judicial review etc, strengthened the separation of powers concept and made out a genius version of checks and balances.<sup>17</sup>

### 4.3. Checks and Balances

But even the most convinced believers in the doctrine of the Separation of Powers acknowledged that an absolute separation of the three departments of government would make government itself impossible. Madison, an ardent advocate of the doctrine of Separation of Powers, wrote in the Federalist that the principle. “does not require that the legislative, executive and judiciary departments should be wholly unconnected with each other. He proceeded to prove that “unless these three departments be so far connected and blended as to give to each a constitutional control over the others, the degree of separation which the maxim requires as essential to a free government can never in practice be duly maintained.”<sup>18</sup> Unlimited power, was always dangerous and the very definition of tyranny unless power was made a check to power. It could also be possible that different officials exercising different kinds of powers might pool their authority together and act in a tyrannical way.

The Framers of the Constitution, accordingly, introduced modification to the doctrine of Separation of powers when they came to details by setting up what are called ‘checks and balances. Expressed in simple

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<sup>16</sup>James Madison, Federalist paper no 1 quotes in the The Founders Constitution, volume 1, Chapter 10, The University Chicago Press.

<sup>17</sup>M. Jashim Ali Chowdhury, An Introduction to The Constitution of Bangladesh, Third Edition, Page 247

<sup>18</sup>Anup Chand Kapur, KK Misra, Select Constitutions, Sixteenth Revised Edition, page 222

words instead of complete separation of the three branches of government, each was given enough authority in other functional areas to give it a check on its companion branches. The object was to make exercise of power limited, controlled and diffused. The final constitutional arrangements thus gives to each department of government exclusive powers appropriate to that department, but at the same time these powers are shared by other departments lest it should corrupt those who wield power.<sup>19</sup>

The system of checks and balances is intended to make sure that no branch or department of the government be allowed to exceed its bounds, to guard against fraud, and to allow for the timely correction of errors or omissions. Indeed, the system of checks and balances is intended to act as a sort of sentry over the separation of powers, balancing the authorities of the separate branches of government.<sup>20</sup> In practical use, the authority to take a given action rests with one department, while the responsibility to verify the appropriateness and legality of that action rests with another. The result is that unless constitution has expressly provided otherwise, no organ can wield the power of the other organs.<sup>21</sup>

## **5.1. Mechanism of judiciary with the reference to Article 116, 115, 116A, 109,133.**

The judiciary occupies a unique position in a democratic society. Since the Judiciary is called upon to decide disputes that cannot or should not be left to the political branches, independence of the Judiciary is a sine qua non for proper administration of justice. By the concept of independence of judiciary we mean that judicial branch of the government acts as its own body free from intervention and influence of other branches of the government, particularly the executive.

Supreme Judicial Council in many countries of the world, power to remove Judges is the sole privilege of the Legislature. This is so that they don't fall pray at the sweet will of the executive. In the UK judges are guaranteed their security of tenure; they can be removed by the King only when both Houses pass a resolution indicting him for corruption or moral turpitude. in the USA judges of the Supreme Court can be removed by impeachment. The process of impeachment is difficult in the sense that the House of Representatives prefers the charges and the trial is held by the senate. Like many rules and acts in UK and USA, our framers of the constitution obtained this view and it is being reflected in our constitution. When constitution maker was making provisions, inserted article 114, 115 for ensuring proper separation of

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<sup>19</sup> Ibid,223

<sup>20</sup> Ibid, page 223

<sup>21</sup> Attorney General of Australia v Appellate,(1957) 2 WLR 607 (PC)

power. In this case our framers of the constitution obtained view from Indian Constitution of 1935. Though in their constitution control and discipline magistrates were not under Supreme Court, which is totally opposite in our constitution.

## 5.2: Appointment of Lower Judiciary

The Constitutional provision regarding appointment of lower judiciary is full of confusion and controversy. Before 4th amendment Article 22 imposed a burden on the State to separate from the executive organs of the State. Article 115 provided that the district judges would be appointed by the President on recommendation of the Supreme Court and all other civil judges and ‘Magistrates exercising judicial functions would be appointed by the President in accordance with the rules made by him after consulting But Public Service Commission and the Supreme Court. Article 116 provided that the control (including the power of posting, promotion and grant of leave) and discipline of ‘person employed in the judicial service and ‘magistrates exercising judicial functions’ would be vested in the Supreme Court.

Paragraph 6(6) of the 4th Schedule provided that the provisions of Chapter 11 of Part VI (which include Articles 115 and 116) would be implemented as soon as possible. Article 137 maintained the scope of creating one or more Public Service Commission’s (one Judicial Service Commission perhaps). So the intention of the framers of the Constitution regarding the separation of subordinate Judiciary and judicial service was quite manifest. But confusion arose regarding use of the term magistrates exercising judicial functions in Articles 115 and 116.<sup>22</sup>

Article 109 states about the control (including power of posting, promotion, grant of leave) and discipline of the person employed in the judicial Service and Magistrates exercising judicial functions vested in the Supreme court. These Provisions are conformity with Article 22 which incorporated with the fundamental principles of state policy of separation of judiciary from the executive.<sup>23</sup>

The Constitution as originally adopted, provided that the district judges would be appointed by the president on the recommendation of the supreme court and all civil judges and magistrates exercising judicial functions would be appointed by the president in accordance with rules made by him after consulting the public service commission and the supreme court.<sup>24</sup> The control and discipline of person employed in the judicial service and magistrates exercising judicial functions vested in Supreme Court. These provisions are complying with article 22 which states there shall be separate judicial service free from executive control. Also in *Secretary Ministry of Finance v Masdar Hossain*, the appellate Division

<sup>22</sup> *Bangladesh v Md Aftabuddin*, 2010 BLD (AD)1

<sup>23</sup> Justice Mustafa Kamal, *Bangladesh Constitution: Trends and Issues*, page 31

<sup>24</sup> M. Jashim Ali Chowdhury, *An Introduction to The Constitution of Bangladesh*, Third Edition page 473

held the power of making rules relating to appointment, suspension and dismissal and this rule power is distinct from the power of the president under Article 133 in that this power is not dependent on the contingency of absence of any law made by parliament. This is a special provision, it shall prevail over general provisions of Article 133 and parliament has no power to make laws relating to appointment, suspension and appointment of judicial officer exercising judicial functions. Though judiciary can't direction to parliament or president to make rules but can give direction to follow the mandate of the constitution is a case of deviation from such mandate.<sup>25</sup> In *Masdar Hossian* case one of the directives was that the way court interpret Article 115,116A,133, will be followed while appointing judges, making rules regarding them. The Fourth Amendment added a new Art.116A declaring where while appointing judges consultation with supreme court has been added.

## **6.1. How subordinate judiciary was separated from the executive by the judgement of Masdar Hossain Case**

An independent judiciary is the conscience keeper of the state. And for that separation of power is mandatory. Though our constitution guaranteed separation of power in Article 22, its proper implementation we can see in *Masdar Hossian v Secretary, Ministry of Finance* case. Through this case judgment it can be observed how judiciary is separated from judiciary.

## **6.2. Background of the case**

The main grievances of writ petitioner is that Bangladesh Civil Service (Reorganization) Order 1980 providing Bangladesh Civil service (judicial) in paragraph 2(x) is Ultra vires the Constitution. It may be mentioned here that Services (Reorganization and condition) Act. 1975 (Act XXXII Of 1975) authorized the Government to create new services or amalgamate. or unify the existing services. As a result of this Act. the grade pay, allowances of the members of the Judicial service were fixed by Annexure- E dated 8.1.94. While relaxing pay and allowances of the members of the judicial service it was taken into consideration that nature and kind of the work of the members of the judicial service is totally different and separate from other services. By. Annexure-E the pay scale of the judicial officers was finally fixed. But ultimately due to the pressure of the members of the Bangladesh Civil Service Cadre, by Annexure-F

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<sup>25</sup>Ibid, page 31



dated 28.2.94, Annexure-E was suspended and by further order dated 2.11.95 (Annexure-FI) the Scale of Pay of judicial officers was refixed. This really gave rise to the cause of action of the writ petitioner. <sup>26</sup>

### **6.3. Reasoning behind the Judgment**

In this case court to understand the true import of judicial service it is important to look into the import of Article 152(1) of the Constitution. “The service of the Republic” means any service, post or office whether in a civil or military capacity, in respect of the Government of Bangladesh, and any ‘other service declared by Law to be a service of the Republic. In the same article, public office has been defined, which means “public officer means a person holding or acting in any office in the service of the Republic” In broad concept the service of the Republic means all services of Bangladesh. In that sense, the member of the Judicial service has been contemplated as distinct and separate from other works performed by other officers of other cadre services. The judicial service is of course, included in the definition of service of the Republic but they have been separately treated within the scheme of the Constitution as their nature of work is separate and that is why they have been separately treated in different places of the Constitution reflected in Articles 115, 116, 116A and 152(1) of the Constitution. Thus, members of the judicial service and the magistrates exercising judicial functions are in fact distinct from other services and in that view of the matter, it is totally wrong to categorize members of the judicial service and the magistrates exercising judicial functions as members of the Bangladesh Civil Service.<sup>27</sup>

It is observed that article 115 doesn't contain any rule making authority with regard to other terms and conditions of the service. And that article 133,136, service of Reorganization and conditions act 1975 have no manner of application in the above matters in respect of the judicial functions. By giving 12 directives and interpreting Article 115 with regard to meaning of "Appointment", article 133, 136, Appellate Division separates judicial service from executive.

### **6.4. The 'Twelve Directions' of *Masdar Hossain* case**

Among these 12 points five are in the nature of directions and seven are in the nature of declaration. The five directions are as follows:

- 1) The essential conditions of judicial Independence in Article 116A elaborated in the judgment, namely, security of tenure (II) security of salary and other benefits and pension and (III) institutional

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<sup>26</sup>*Secretary, Ministry of Finance v Masdar Hossain*,(2000) 20 BLD (AD) page 143

<sup>27</sup>*Secretary, Ministry of Finance v Masdar Hossain*,(2000) 20 BLD (AD) page 143-144

independence from the Parliament and the Executive shall be secured in the law or rules made under Article 133

2) It is directed that under Article 133 law or rules or executive orders having the force of Rules relating to posting, promotion, grant of leave, discipline (except suspension and removal), allowances, pension (as a matter of right, not favor) and other terms and conditions of service, consistent with Article 116 and 116A, as interpreted by us, be enacted by us for the judicial service and magistrates.

3) The appellant and other respondents to the writ petition are directed that necessary steps be taken forthwith for the President to make Rules under Article 115 or by executive implement its provisions which is a constitutional mandate and not a mere enabling power.

(4) The appellant and the other respondents to the writ petition are directed to establish a separate judicial Pay Commission forthwith as a part of the Rules to be framed under Article 115 to review the pay, allowances and other privileges of the judicial service which shall convene at stated intervals to keep the process of reviewing a continued one.

(5) It is declared that until the Judicial Pay Commission gives its first recommendation the salary of Judges in the judicial service will continue to be governed by status in respect of Assistant Judges and Senior Assistant Judges.

The five declarations are as follows:

(1) It is declared that the creation of BCS (Judicial) cadre along with other BCS executive and administrative cadres by the Bangladesh Civil Service (Reorganization) Order, 1980 with amendment of 198 is ultra viro the Constitution. It is also declared that Bangladesh Civil Service Recruitment Rules, 1981 are inapplicable to the judicial service.

(2) It is declared that the word “appointments” in Article 115 means that it is the President who under Article 115 can create and establish a judicial service and also a magistracy exercising judicial functions, make recruitment rules and all pre appointment rules in that behalf, make rules regulating their suspension and dismissal but Article 115 does not contain any rule-making authority with regard to other terms and conditions of service and that Article 133 and Article 136 of the Constitution.

(3) It is declared that in exercising control and discipline of persons employed in the judicial service and magistrates exercising judicial functions under Article 116 the views and opinions of the Supreme Court shall have primacy over those of the Executive.

(4) It is declared that the judicial service is a ‘service of the Republic’ within the meaning of Article 152(l) of the Constitution, but is functionally and structurally distinct and separate service from the civil executive and administrative services of the Republic with which the judicial service cannot be placed on par on any account and that it cannot be amalgamated, abolished, replaced, mixed up and tied together with the civil executive and administrative services.

(5) It is declared that the executive Government shall not require the Supreme Court of Bangladesh to seek their approval to incur any expenditure on any item from the funds allocated to the Supreme Court in the annual budgets, provided the expenditure incurred falls within the limit of the sanctioned budgets, as more fully explained in the body of the judgment.

(6) It is declared that the members of the judicial service are within the jurisdiction of the administrative tribunal.

(7) The declaration by the High Court Division that for separation of the subordinate judiciary from the executive no further constitutional amendment is necessary is set aside. If the Parliament so wishes it can amend the Constitution to make the separation more meaningful, pronounced, effective and complete.

So Constitution mandate of Separation of judiciary from independence has not been done by the state in pursuance of letter and spirit of article 22. but it has been implemented to a bit by the judicial activism through the mandate of Masdar Hossain Case. From this judgement it can be said that judiciary is separate from other services that means it also separate from executive. Virtually complete separation of judiciary for the purpose of independence of the judiciary has not been achieved due to lack of sincerity and good office of the executive and legislature organ of the state.

## **7.1. How Judiciary was separated from the legislature by the judgment of 16th Amendment Case**

On an application under Article 102 of the Constitution filed by nine learned Advocates, the High Court Division issued Rule Nisi calling upon the respondents to show cause as to why the Constitution (16th Amendment) Act, 2014 (Act No. 13 of 2014) should not be declared to be void, illegal and ultra vires the Constitution of the People’s Republic of Bangladesh. The purposes of the amendment were as follows

1. Acknowledge the power of the people
2. Enable removal of judges of the Supreme Court by Parliament in the same way as the President, Prime Minister or Speaker.

3. Removal of the concept of Supreme Judicial Council which was introduced by Martial Law Proclamation, which is contrary to article 7 of the Constitution.
4. The accountability of judges of the higher judiciary is to the Parliament in half of the democratic countries of the world, it should be the same here
5. Reinstatement of the power of the people's representatives to remove judges of the Supreme Court for misconduct or incapacity.

Here, the researcher would like to mention some points of judgment of different justices upon which judiciary were separated from the executive.

## 7.2. Principles established in 16<sup>th</sup> amendment

Honorable Chief Justice SK Sinha explored different international documents like the United Nation Basic Principles of Independence of judiciary, 1985, Latimer House Guidelines for Commonwealth, 1998, Bangalore principle of judicial conduct 2002.<sup>28</sup> It is explored by the high Court division in its judgement that in 63% Commonwealth jurisdiction judges are removed from their office for misconduct and misbehavior, in capacity without intervention of the legislature. The ad hoc Tribunals and permanent disciplinary councils are akin to Chief Justice led: Supreme judicial council of Bangladesh to great extent which is wanted to be abolished by the 16th amendment. It is observed that the preamble of the Constitution clearly indicated our Parliament wouldn't do anything by way of amendment by way of Constitution. We should not make any changes in our historic documents about Democratic process like fundamental rights equality and justice rule of law. Basic principles should be institutionalized, not curtailed.<sup>29</sup>

He added that clause 2 of Article 7 make it clear that this Constitution is the solemn expression of the will of the republic. And if any other law inconsistent with other provisions of Constitution then other law shall to the extent of inconsistency, void. <sup>30</sup>A question may arise who has been given the authority to declare a law void in case in conflicts or inconsistent with article 7 of the Constitution. This power has not been given to executive and legislature. For that matter Supreme court has been assigned with the power of "judicial review( by the Constitution itself). It can't make repugnant to the basic feature of the

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<sup>28</sup>Chief Justice SK Sinha, at page 233 of 16<sup>th</sup> Amendment judgment

<sup>29</sup> Ibid, Page 34

<sup>30</sup>Ibid, page 316

Constitution. It is also addressed that article 70 of the Constitution imposed tight rein on the Member of Parliament because of that they can't go against their party line. Moreover non framing of any law in pursuant to the article 95(2)(c) has vertically given upper hand to the executive in the matte of the judges of the supreme Court.

16th amendment has facilitated the political executives to control the judiciary. Which also beyond the pale of amending power of the Constitution in view of article 7(b) of the Constitution. It was found that westminster System of parliamentary removal of judges has not been proved to be popular among the Commonwealth jurisdiction. Since many cases are pending against the member of the parliament and executives, the dismissal of which may not be fair if judicial mechanism is kept with the parliament. <sup>31</sup>It is explored by long discussion by his lordship, that countries like India, UK, Sri Lanka, Malaysia e.t.c experience towards parliamentary mechanism for removal of judges are pathetic and politicized. Using Judicial Council mechanism independence has been secured undoubtedly. It is strongly spelled out that judiciary includes both the lower and higher judiciary. As per Constitutional scheme judiciary is completely independent. But if the lower court is controlled by the executive how there will be no independent of judiciary And the high Court division shall not be able to control the lower judiciary under Article 109.<sup>32</sup>

This judgment adopted interpretation of judicial service made in the *Masdar Hossain* Case and<sup>33</sup> refer to the guideline number 5 and 7 for the purpose of Independence of judiciary. It is concluded that this 16th amendment is colorable legislation. The judgment defines colorable legislation. Article 7,12,94 (2),102,112 are read together it becomes clear that Supreme is independent, separate, and guardian of the Constitution. Judges exercise sovereign power of the people though they are unelected people. And by the authority of the Constitution that the guardian of the Constitution, the Supreme Court is empowered to interpret and expound the Constitution. Honorable attorney general also mentioned article 96 as the basic structure of the constitution.

Attorney general argued that if this amendment is declared ultra vires of the Constitution if the parliament does not restored Article 96 a deadlock will be created in removal of Judges. Secondly, since there is no prescribed code of conduct of judges or implementation of provision of Supreme judicial council, it becomes nonfunctional. He added that is Independence of judiciary is a basic feature of the Constitution and separation of powers as contemplated under art.22 of the Constitution is a sine qua non for such independence. In our Constitution executive and legislative powers are expressly vested but the

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<sup>31</sup>Chief Juistise SK Sinha, at page 366 of 16th Amèndment judgment

<sup>32</sup>Chief Juistise SK Sinha, at page 196 of 16th Amèndment judgment

<sup>33</sup>*Secretary, Ministry of Finance v Masdar Hossain*, 20 BLD (AD)(2000) page 140-141

vesting of such power in judicature is absent. Vesting is a necessary decisive factor, where judicial powers have been in the hands of the judicature since before the birth of our Constitution. 16th amendment of the Constitution was introduced to abolish the removal mechanism of judges of the apex court by the provisions of article 96 of the Constitution.<sup>34</sup>

In the result, the writ petition was allowed. Eventually supremacy of the Constitution is upheld and 16th is declared to be void. So it is upheld that although provision of article 142 of Constitution empowered the Parliament to amend any provisions of the Constitution but it is not unfettered.<sup>35</sup> Also Justice Namum Ara Sultana also agreed with the decision of Chief Justice SK Sinha.

Justice Syed Mohammad Sayed empathies on some points in his judgment. He interpreted Article 96 and stated as basic structure of the constitution. The Appellate Division in the Fifth Amendment Case<sup>36</sup> *Bangladesh Italian Marble Works and others v Bangladesh* observed as under: "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 legislative and administrative actions, also violated two other more basic features of the Constitution, namely, independence of the judiciary and its power of judicial review."<sup>37</sup> The Appellate Division of the Supreme Court, has decided in its judgment on the Eighth Amendment (*Anwar Hossain Chowdhury etc. v. Bangladesh and others*, BLD 1989 (SP1)1 that the independence of the judiciary is part of the basic structure of the Constitution. However, the supremacy of the Constitution is a basic feature of the Constitution and as such even by an amendment of the Constitution an action in derogation of the supremacy of the Constitution cannot be declared to have been validly taken. Such an amendment is beyond the constituent power of Parliament and must be discarded as a fraud on the Constitution.<sup>38</sup>

He mentioned some important note stated that in the Indian Constitution and in the original 1972 Constitution the power of impeachment could only be exercised after inquiry conducted by an independent Judicial Inquiry Committee which is not present in Our constitution.<sup>39</sup> Also, honorable judge refers incidents of removal of Judges of Sri Lanka, Malaysia and India by way of Parliamentary impeachment which undermined Judicial Independence and impartiality.

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<sup>34</sup>Ibid, page 136

<sup>35</sup> Ibid, page 523

<sup>36</sup> *Bangladesh Italian Marble works and other v Bangladesh* 62 DLR(AD)(2010)298 in para 200

<sup>37</sup> Justice Syed Mohammad Sayed at page 537 of 16th Amendment judgment

<sup>38</sup> Ibid, Page 545

<sup>39</sup> Ibid Page 551-556

The interpretation given by the Appellate Division in the Eighth Amendment case and *Masdar Hossain's* case on the question of basic structures of the Constitution and independence of the judiciary and rule of law have become part of the Constitution.<sup>40</sup> Unless the interpretation given in those cases as to amenability of the basic structure of the Constitution is changed in exercise of the power of judicial review the interpretation remains a part of the Constitution. The Sixteenth Amendment having come in conflict with the interpretation given in those cases as to amenability of the basic structure of the Constitution, the Sixteenth Amendment falls outside the ambit of the constituent power of Parliament.

Justice Imam Ali Martial agreed with observations of honorable chief justice, especially observations regarding Separation of power. Apart from these he made some important points on Why is it necessary to go back to the 1972 Constitution With regard to the submission of the learned Attorney General that it is the intention of Parliament to rid the Constitution of any vestiges of Martial Law Proclamations, he made observations. Also, honorable judge refers incidents of removal of Judges of Sri Lanka, Malaysia and India by way of Parliamentary impeachment which undermined Judicial Independence and impartiality. He emphasized that it is upheld that although provision of article 142 of Constitution empowered the Parliament to amend any provisions of the Constitution but it is not unfettered.<sup>41</sup>

From an overall analysis of the majority judgment in the 16th amendment case, it can be said that all justices made some concrete legal and constitutional reasoning. Those reasoning mentioned above in different justices' s judgment clearly separates judiciary from legislature.

## **8. Summary of Judicial Service Regulation Srinkhola (Bidhimala) 2017**

In exercise of authority provided in the Article of 115 of the Constitution and the president has been pleased to introduce Judicial Service Regulation Srinkhola (Bidhimala) 2017. In this rule's preamble it is stated that The president also has been pleased to constitute a service under the name and style "Bangladesh Judicial Service". In exercising authority under Article 133 of the Constitution, with a view to determining conditions of the members of judicial service, president has introduced Bangladesh judicial Service Regulation 2017. Therefore under the authority of article 133 the president introduced under the name and style of Judicial Service Regulation Srinkhola (Bidhimala) 2017 which came into effect from the date of publication of Bidhimala in the official gadget. But this regulation will not be

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<sup>40</sup>Ibid, Page 541-542

<sup>41</sup> Ibid, page 580-581

applicable in the case of apprentice. But in the event of termination of Apprentice judges Bangladesh Judicial Service 2007 will be applicable. As per rule rules 1(4) <sup>42</sup> any Apprentice officer in convinced for any corruption charges then he will not be eligible for any government or semi government service but if his job is terminated on charge of other reasons he will not be deferred from entitlement of government and semi government services accepting corruption.

## Chapter 1

Chapter 1 states about preamble whereupon background of the regulation is stated that what reason prompted to introduce the regulation under Constitution. Since in pursuance of power entrusted under Article 115 of the Constitution with the introduction of Bangladesh Judicial Service (service gothon) Budhimala 2017, the President has been pleased to form, a separate service under the name and style of the Bangladesh Judicial Service and with a view to determining terms and conditions of judicial service member the president also in pursuance of article 133 introduced Bangladesh judicial service podonnti,shuti monjur e.t.c.Under rule 1(2) <sup>43</sup> This regulation comes into effect with the publication of the same in the official gadget.

## Chapter 2

It deals with the definition of some terminology related to this regulation. Rule 2 includes Incapacity (Odokhhota) investigation (onushodhan), jothajoto Kotripohhko, ovijuktokormokorta, oshadacharon uddhotornkotripokho, upojukto kotripohhko todonto, todontokari kotripohhko, dondo ,Durnitimulok karjokrom, service teg, medical onushondhan, niogkari kotripokkho.

Chapter 2 of the regulation deals with charge, allegation, institutions of departmental cases, inquiry and modalities of institution of departmental cases. Chapter 3 elaborated mode of inquiry and reasons for departmental cases specially starting point of institution of departmental case and possible source of departmental cases. Surprisingly ghost letter (against the member of judicial service is capable to be source of inquiry by the appropriate authority i.e. is ministry of law. Provided that said ghost, letter contains sufficient information about the allegations. <sup>44</sup>Rule 3(2)-(9) deal with how to start inquiry against the indicted officer of the judicial service. the combined reading of those rules suggests that an

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<sup>42</sup> Ibid ,Rule 1(4)

<sup>43</sup>Rule 1(2) of Judicial Service Regulation Srinkhola (Bidhimala) 2017

<sup>44</sup> Ibid, Rule 3(1)-(9)



inquiry on that basis of certain allegations to be started by the Appropriate Authority that is ministry of law justice division will start inquiry against the suspect member and no step can be taken against the suspect member without giving him an opportunity of being heard. After having reply and explanation to the show cause no step that is to bring any charge and starting of departmental cases (can be taken without the Sanction of the Supreme court. It is further stated that I any allegation sustains under section 3 (1)<sup>45</sup> and if the allegation found prima facie to appreciate authority and if the appreciate authority feels necessity to take further steps required to be taken then the authority will appoint inquiry officer or form inquiry committee, after consultation with the Supreme Court. Another important feature of the chapter is that if any judicial member deportees in any ministry or any other corporation autonomous body and if any inquiry is requiring against him then appropriate authority will take steps to determine the matter at issue by holding primary inquiry. By appointing deposited officer or forming an inquiry committee headed by additional secretary or upper level officer consisted of two other members.<sup>46</sup> In this context after having advice from the supreme Court an inquiry officer or inquiry committee will be formed headed by additional secretary or above. In that case the indicted judicial members will be attached under the minister of law. Rule 3(4) Under rule 3(5).<sup>47</sup> inquiry authority within 30 days from their appointment submitted they're its report to the appropriate authority. Rule 3(6)<sup>48</sup> stayed that after having inquiry report ministry of law will send the same within 7 days to the Supreme Court for advice. As per the appropriate authority, after having inquiry report as per rule 5, if it satisfied that there has been a prima facie case and allegation has been proved and the indicted personal is liable under sub rule 16 then appropriate authority will be in a position to dispose of the matter after having advice of the supreme Court, or if the authorities think that there is a necessity for further inquiry or other measures such as censoring or transfer of the officer is enough can be taken such measures . Rule 3(7)<sup>49</sup> deals with the power of appropriate authority in attaching indicted officer with the Mol, justice division after initiation of departmental case, from his place of positions, after consultation with Supreme court.Rule 3(8)<sup>50</sup> if the Supreme Court pass any discretion for holding inquiry then appropriate authority shall order accordingly. Inquiry committee shall complete the inquiry and submit the report within 15 days.

Rule 4<sup>51</sup> deals with mode of starting inquiry on the part of the Supreme Court. It is stated that provided anything contained in any other law in the regulation, in exercise of High Court divisions power of

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<sup>45</sup> Ibid, Rule 3(1)

<sup>46</sup> Ibid, Rule 3(4)

<sup>47</sup> Rule 3(5) of Judicial Service Regulation Srinikhola (Bidhimala)

<sup>48</sup> Ibid rule 3(6)

<sup>49</sup> Ibid rule 3(7)

<sup>50</sup>Ibid, Rule 3(8)

<sup>51</sup> Ibid rule 4

control superinduce over subordinate judiciary and in the course of inspection of any subordinate Court or its office of high Court judge or higher officer of any indicted officer, if anything focused on inspection report or anything found in inspection report on the basis of any other source of information against any judicial officer, with a view to ascertaining prima facie case you moto,

(a) the supreme Court will inform the matter to the appropriate authority and advice to take necessary action

(B) the appropriate authority will ask the indicted officer to show cause maximum 15 days' notice to the reply in writing

(c) After writing a reply from the indicted officer if the appropriate authority deems that there has been formal inquiry then the matter will be referred to the Supreme Court.

(d) the Supreme Court in that case will be in a position to take step as per rule 3 or 6 and other rules as the case may be.

Rule 5<sup>52</sup>Instructed the authority to consider difference of hierarchy (seniority juniority) between inquiry officer and indicted person while inquiry officer is appointed for inquiry against any officer.Rule 6<sup>53</sup> deals with mode of initiation institution of departmental case, statement of allegation and charge sheet. If the appropriate authority finds any advice as per rule 3(7) or 4,appropriate authority will initiate departmental case against the indicated person, (a) by preparing statement of allegation on the basis of available information or confessional statement of the indicted officer,

(b) charge sheet will be prepared on the basis of the basis of information.

(c) statement of allegation, change sheet, first of document to be relied upon, schedule of cited witnesses to be sent to indicated officer during 1st show cause notice.

Rule 7<sup>54</sup> deals with power of Appropriate Authority in attaching indicted officer with Ministry of law, Justice Division, after initiation of departmental case, from his place of posting Consultation with the supreme Court. Rule 8<sup>55</sup> deals with the contents of first show cause notice. This rule also provides whether the indicated person willing to give personal hearing before the secretary of the appropriate authority. Rule 9<sup>56</sup> deals with reply to first show cause notice of personal hearings.

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<sup>52</sup> Rule 5 of Judicial Service Regulation Srinkhola (Bidhimala) 2017

<sup>53</sup> Ibid rule 6

<sup>54</sup>Ibid, Rule 7

<sup>55</sup> Ibid Rule 7

<sup>56</sup>Ibid Rule 8

Rule 10<sup>57</sup> deals with the imposition of censorship and decisions of other measures on the basis of the reply of the indicted person. 10(1) states that if the appropriate authority on the basis of personal hearing, reply to first show cause, fact and circumstances of the case satisfies that there is no reason to proceed with the case further, then it will be dismissed. But if the charge is proved which leads a minor conviction like censoring, the appropriate authority will bring the matter to the Supreme court and after having advice from the same, appropriate authority will declare its verdict. In the event of no substances of case and there is no reason to proceed with the case, the matter vice versa to be informed when Supreme Court seeking their advice and proceed in accordance with said advice.

### **Chapter 3**

This chapter deals with mode of suspension and its ending Rule 11<sup>58</sup> provides putting under suspension and its tenure. If any departmental proceedings or subsequent proceedings are initiated, subject to consultation with the Supreme Court, the indicted officer would be in a position to put him under suspension. Provided that subject to availability of earned leave of the office concerned, the appropriate authority after consultation with the supreme court, can send him on the leaves instead of putting him under suspension. The suspended officer will not be in a position to have judicial or official work but he will have his suspension allowance as per rule 12 & 13. But if suspension order is withdrawn as per rule 11(3), the officer concerned will intimate the matter to the Law Ministry, Supreme Court and he will be eligible to withdraw his full pay.<sup>59</sup>

Rule 12 deals with mode of suspension allowances. Rule 13<sup>60</sup> deals with suspension allowances Rule 14<sup>61</sup> deals with consequence of withdrawals of suspension order.

### **Chapter 4**

This chapter deals with different penal provisions under the regulation of classifications and minor punishment, different modes.<sup>62</sup>

Rule 15<sup>63</sup> deals with power of imposition of punishment, if the department case is proved then appointing authority in consultation with the supreme Court is empowered to impose any of the minor punishment as

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<sup>57</sup> Ibid Rule 9

<sup>58</sup> Ibid ,Rule 11

<sup>59</sup> Rule 12 of Judicial Service Regulation Srinkhola (Bidhimala) 2017

<sup>60</sup> Ibid Rule 13

<sup>61</sup> Ibid Rule 14

<sup>62</sup> Ibid Rule 15

<sup>63</sup> Ibid, rule 15

stated in the rule 16. But provided that the punishment of stricture censoring could be imposed by the appropriate authority after consultation with the Supreme Court.<sup>64</sup>

Rule 16A deals with different modes of minor punishment.<sup>65</sup> Rule 16 B<sup>66</sup> deals with major punishment.

Rule 17 deals with imposable punishment in against different modes of charge proved.

## Chapter 5

Rule 18 deals with appointment of investigating officer or appointment of investigating committee in case of judicial officer or judicial member deportees in any other ministry of corporation or any autonomous body.<sup>67</sup> And the modalities are stated in 18(1)- (4)Rule 18<sup>68</sup> deals with investigation procedure which is in detail in sub rule (1)- (13). Rule 20<sup>69</sup> provides time limit for investigation and investigation report. Rule 21<sup>70</sup> deals with objection raised by indicted officer against any investigating officer or investigating committee if any. In both cases the ministry of law will take appropriate steps in consultation with the Supreme Court. Rule 22 <sup>71</sup> deals with some decisions considering investigation report which is followed by 2nd time notice and final decision. Sub rule 1-5 detailed different decisions upon second show cause notice and investigation thereto. And after having consultation with Supreme court in both minor and major punishment, recommendations of the supreme Court to be placed before the appointing authority by the president appropriate authority that ministry of law. Inn both cases Supreme court recommendations are subjected to the sweet will of the highest authority that is president. After approval by the appointing authority that is the president, ministry of law will announce the decisions of the appointing authority or if the supreme Court accord different opinion then steps to be taken accordingly or appointing authority may take steps accordingly or otherwise. Rule 23<sup>72</sup> deals with procedure of investigation and other needful in case of incapacity of the officer of the judicial member paused by physical and mental disabilities this is detailed in 1-10. Rule 24<sup>73</sup> provides method of mode inquiry

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<sup>64</sup> Ibid Rule 16

<sup>65</sup> Ibid Rule 16B

<sup>66</sup> Ibid Rule 17

<sup>67</sup> Ibid Rule 18

<sup>68</sup> Ibid Rule 19

<sup>69</sup> Ibid Rule 20 Of Judicial Service Regulation Srinkhola (Bidhimala) 2017

<sup>70</sup> Ibid Rule 21

<sup>71</sup> Ibid Rule 22

<sup>72</sup> Ibid Rule 23

<sup>73</sup> Ibid, Rule 24

investigation, Service of notice in case of desertions Rule 25<sup>74</sup> deals with procedures to be followed in case of pending of any criminal case against the judicial member.

## Chapter 6

Rule 26 provides procedure with institution of appeal before the appointing authority through the ministry of law in case of imposition of strictures as punishment Sub section 2<sup>75</sup> says that Supreme court will accord its recommendation within 15 days to the ministry of law and ministry of law will transmit the same to the appointing authority. The decisions of the appointing authority will be final. Rule 26(7)<sup>76</sup> deals with discretionary power of the appointing authority although no review petition is made, he can rectify conviction order after calling upon the record of the departmental case Sue motoRule 27.<sup>77</sup> deals with review petition of the convicted officer in judicial proceedings before the appointing authority.

## Chapter 7

Rule 28<sup>78</sup> deals with time frame to be followed by the appropriate authority indicted officer, investigating officer, inquiry authority as stated in the regulation so far as practicable Rule 29<sup>79</sup> deals with enforcement of Consultation with Supreme court. The appropriate authority will take all measures within specified period in line with the advice of the Supreme Court.

Rules 30<sup>80</sup> deals with consequences of withdrawals from departmental case. Rule 31<sup>81</sup> provides consequence of death or retired of the indicted officer during departmental proceedings. If any indicted officer encounter death or goes into retirement, during departmental proceedings then temporary suspension order will be automatically will ceased and departmental proceedings will be abated. Rule 32<sup>82</sup> deals with steps to be followed in case of financial loss incurred by the member of the judicial service due to negligence Rule 33<sup>83</sup> deals with non-applicability of the government servants (discipline and appeals 1985 against the judicial service member Rule 34<sup>84</sup>empowered appropriate authority publish prescribed

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<sup>74</sup>Ibid Rule 25

<sup>75</sup> Ibid Rule 26

<sup>76</sup>Ibid Rule 26(7)

<sup>77</sup>Ibid Rule 27

<sup>78</sup> Ibid, Rule 28 of Judicial Service Regulation Srinkhola (Bidhimala) 2017

<sup>79</sup>Ibid Rule 29

<sup>80</sup>Ibid Rule 30

<sup>81</sup>Ibid Rule 31

<sup>82</sup>IbidRule 32

<sup>83</sup>Ibid Rule 33

<sup>84</sup>Ibid Rule 34

forms by introduction of circular for the purpose, implementations of this regulation. Lastly rule 35<sup>85</sup> enables the appropriate authority to rectify or amend this regulation if required, in consultation with the Supreme Court.

## 9. Findings

There has been checkout history behind the introduction of the regulation by the executive authority. Some provisions of this regulation violated the mandate of Masdar Hossain case. In *Masdar Hossain*<sup>86</sup> case Article 115 of the Constitution has been interpreted that it is the president as per article 115 can create an establish a judicial Service and also magistracy exercising judicial functions, make recruitment rules, pre appointment rules in that behalf, make rules relating suspension and dismissal Especially directives number 2 and 5.<sup>87</sup> are relating to the rule making powers of the president in pursuance of 115 and 133 inconsistent with 116, 116A as interpreted by highest court. And it is directed for enactment or framing or making separately for the judicial Service with regard to posting, promotion, grant of leave discipline (except suspension and removal) pay, allowances, pensions and other terms of the service. In pursuance of Masdar Hossain case 4 service rules have been introduced in the year of 2007. With regard to the instant Regulations regarding judicial Service member there has been hitching between the Supreme Court and ministry of law justice division for a handsome period over the definition and interpretation of appropriate authority. Because definition of this terminology is a pivotal point for determining supremacy of either party.

In the present situation supremacy of the executives over the subordinate judiciary has been established over the subordinate judiciary with regard to disciplinary action against the judicial Service member. In this regulation satisfaction of the executives has been given priority in initiation of departmental allegations. The combine reading of rule 3(1-4),(7)<sup>88</sup> suggests that the appropriate authority(উপযুক্ত কর্তৃপক্ষ) is entitled to initiate primary inquiry over the allegations stated in sub rule 1 of rule 3 without the prior permission of the supreme Court. But the Supreme Court will have knowledge about the result of primary inquiry done by the ministry of law of the result is positive. In that case the Supreme Court will be consulted by the ministry of law. If the inquiry result is negative is found negativity in that case the Supreme Court will not have knowledge about the initial inquiry done against

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<sup>85</sup>Ibid Rule 35

<sup>86</sup>*Secretary, Ministry of Finance v Masdar Hossain*, 20 BLD (AD)(2000) page 140 guideline number 2

<sup>87</sup>Ibid, page 140-141

<sup>88</sup>Rule 3 of Judicial Service Regulation Srinkhola (Bidhimala) 2017

the suspect judicial member. This mechanism is against the letter and spirit of article 109<sup>89</sup> of the Constitution. Where it is stated that High Court shall have superintendence and control over all courts subordinate to it. Under rule 3(1) appropriate authority can start proceedings against any judges upon the information of “ghost letter. So appropriate authority starts proceedings against any judges without informing supreme court upon the information of ghost letter. Due to this provision members of the judges are bound to obey executive with a fear of being subjected to persecuted by the Law Ministry. A dual administration is established upon the judicial Service. The language of the rule 3(7)<sup>90</sup> is ambiguous and contradictory. Also in this rule appropriate authority will take initiatives in case of transfer of judges. That means law ministry will have the power to transfer anyone who gives decision against them. In that case they may influence the judges to give decision in favor of government. Rule 4 provides modalities of starting of departmental proceeding of the supreme Court. Generally subordinate Court like district judgeship and its offices are inspected by the high Court division judge every 3 years. On emergency grounds particular Court or its office is inspected by the high Court judge and inspection report of both the cases submitted to the Chief justice. So if any corrupt judges give decision in favor of Law Ministry can acquitted him from any charges, cause rule 4(3) stated that if appropriate authority thinks fit then investigation will further proceed. In rule 3(8) stated that in case of further inquiry appropriate authority in consultation with supreme court may form new committee or previous committee will investigate the matter again. Here both cases appropriate authority will decide who will be on the investigation committee. As all the process, formation, ways of conducting investigation of investigation committee is law ministry may influence the investigation proceedings easily. According to rule 4 supreme Court is empowered to initiate primary inquiry against suspect officer on the basis of said inspection report or any other information on the basis of any other information available to the supreme Court. The apex court with a view to determining primary substance of the allegations of corruptions can initiate primary inquiry through the ministry of law Sue moto. Rule 4(3)<sup>91</sup> speaks that if the appropriate authority on the basis of written reply thinks that there is necessity of initiation of formal inquiry against the indicted officer, ministry of law will send the matter to the Supreme Court along with written reply for advice. Also, in rule 4(4)<sup>92</sup> provides that after having advice of the supreme Court the appropriate authority will be in a position of will take measure against the officer under rule 3 or 6 and as the as may be. Now question arises regarding rule 4(4) if the appropriate authority thinks that upon the written reply of suspect officer there is no necessity of formal inquiry in that case consultation with apex Court opinion will not be

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<sup>89</sup> The Constitution of the People's Republic of Bangladesh, Article 109

<sup>90</sup> Rule of 7(3) Judicial Service Regulation Srinkhola (Bidhimala) 2017

<sup>91</sup> Rule of 4(3) Judicial Service Regulation Srinkhola (Bidhimala) 2017

<sup>92</sup> Ibid, Rule 4(4)

required. Here scope of consultation with supreme court is ignored deliberately. Also through this provision Law ministry will have the chance to This mechanism tantamount to avoiding obligation of consultation with supreme Court which is also a mandate of the Masdar Hossain Case.

Another finding is that rule 22(5)(2)<sup>93</sup> deals with several final decisions after second show cause notice. It is suspicious that upon written statement of the indicted officer, given all issues, if the supreme Court advice for imposing any major punishment, this matter will be sent to appointing authority Chief executive of the republic. This mechanism is contradictory with spirit of Masdar Hossain case and also frustrating to the guidelines no 7<sup>94</sup> of *Masdar Hossain* case. Actually, after having advice of the Supreme Court over the matter at issue, the executive authority of the republic has nothing to do but to abide by the Supreme Court's decision. But in the foregoing rules supremacy of the executive has been established over the judiciary. Under the present legal regime convicted officer couldn't be punished unless the executive desmade. It is also surprising that under rule 22(3)(a)(b)<sup>95</sup> provided that in view of advice of the supreme Court for simple punishment, like strictures then the appropriate authority is supposed to issue official gadget notification accordingly. But other simple punishment like strictures, the appropriate authority will send the matter to the appointing authority. It is found that simple punishment like structure is made within the exclusive jurisdiction of the Supreme Court. But filing of appeal from structure imposed by the Supreme Court is subjected to the transmission of the same to the appointing authority along with the advice of the Supreme Court. And it is also made subject to the sweet will of the Chief executive. In the result the Supreme Court will have no final authority over his convicted member of judicial Service.

Due to these provision members of the judicial Service is bound to obey executive with a fear of being subjected to the persecuted by the executive.

Under clause 8(1)(3)<sup>96</sup> an indicted officer is facilitated to give his oral statement before the appropriate authority. In my opinion the spirit of Independence of judiciary would have been protected if opportunity of presentation of oral statement before the register general is made instead of law secretary. Upon assimilation of this regulation letter and spirit of Article 109 of the Constitution has been violated.

From these observing those provisions it is found that example of undermining the Independence of the judiciary and frustration of supreme Court control and superintendents over the subordinate judiciary. Though instead of complete separation of the three branches of government, each was given enough

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<sup>93</sup> Ibid, Rule 22(5)(2)

<sup>94</sup> *Secretary, Ministry of Finance v Masdar Hossain*, 20 BLD (AD)(2000) page 141

<sup>95</sup> Ibid, Rule 22(3)(a)(b)

<sup>96</sup> Rule 8(1)(3) of Judicial Service Regulation Srinkhola (Bidhimala) 2017



authority in other functional areas to give it a check on its companion branches. The object of checks and balances was to make exercise of power limited, controlled and diffused. The final constitutional arrangements thus give to each department of government exclusive powers appropriate to that department, but at the same time these powers are shared by other departments lest it should corrupt those who wield power. From the above analysis it is clear that what prevails here is in the name of check and balance is simple absolute dominance of executive over the judiciary by these rules. In this regulation proper checks and balances are not ensured, as executive has given unfettered advantages over supreme court.<sup>97</sup> Also here supreme Court will not have any power to impose punishment, without approval of appropriate authority. Even they are empowered to remove any decisions of the Supreme court. These contradictory provisions of this rule proved to be a political weapon in the hands of law ministry to tame an adverse supreme court.<sup>98</sup>

## 10. Recommendation

(1) In this situation we have to think about a mechanism which falls within the demand of the judiciary and ambit of the constitution. By which a checks and balances will be insured and lawful. Our judicial system is very fragile, sophisticated that's why in my opinion we can have separate entity who will be dealing these issues like investigation, inspection, making disciplinary rules for lower court judges who will work directly under the supervision of the president. President will make rule which will not be forwarded by the law ministry, rather this separate entity. Our judicial system is very fragile, sophisticated that's why if our constitution provides a different entity and mechanism for the impeachment of the Supreme Court judges under Article 96 then why don't we have separate authority for the impeachment of lower court judges. Also in direction no 3,4 of *Masdar Hossain* and 16<sup>th</sup> amendment case recommend a separate service commission Case. This separate authority will comprise of equal portion of both judicial and ministry officers. which is completely separate from judicial commission, pay commission. This separate entity deals with activities like investigation, inspection impeachment of lower judges on the light of the same principles which will be used by the Supreme Judicial Council. And this body will consult with Supreme Judicial council. This entity will be completely free from any kind of pressure or influence be it from executive, legislative or from parties, colleagues, superiors as it is separate from judicial commission, pay service commission, law ministry.

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<sup>97</sup> Anup Chand Kapur, KK Misra, Select Constitutions, Sixteenth Revised Edition, page 222

<sup>98</sup>, Ibid, rule 22 (3)(a)(b)& 22(5)(2)

(2) As provisions of this subordinate regulation contradicts with independence of judiciary which is a salient feature of the constitution then it should be declared void under Article 7(2)<sup>99</sup> of the constitution which stated that any other law is inconsistent with constitution will be declared void.

(3) Mandates of the *Masdar Hossain* case is must be strictly followed and establishment of supreme Court secretariat is necessary. Also in pursuant to articles 114,115,116 the president and from behind the government, has got vest power to control, appointment, transfer, leave, terms and conditions of judicial officers in lower judiciary. Here though there is a requirement of consultation with the Supreme court it is not much effective since there is no express provision giving primacy to the Supreme court opinion over that of the executive. So, without the necessary amendment in Article 116 even *Masdar Hossain* verdict cannot ensure full independence of the judiciary. Also, after interpreting the Article 116 in light of the Preamble Article 22 and 116A enshrining the Independence of Judiciary: the power of posting, promotion of persons employed in the judicial service occurring in Article 116 clearly mean that whenever question of posting or promotion comes there is no escaping from consultation with the Supreme Court.<sup>100</sup> This might help to ensure independent of judiciary.

## 11. Conclusion

The judiciary occupies a unique position in a democratic society. Since the judiciary is called upon to decide disputes that shouldn't be left to the political branches. Independence of judiciary is a sine qua non for proper administration of justice. Meaningful independence and public administration of justice. Meaningful independence and public perception of that independence is essential for the judiciary's legitimacy as a guarantor of rights and freedom. As Judicial Service Regulation Srinkhola (Bidhimala) 2017 controls the disciplinary rules for judges it's proper authority should be vested in the hands of the judiciary. For that purposes establishment of supreme court secretariat is necessary. This might help to ensure the independence of the judiciary so that they can 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.

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<sup>99</sup> Article 7(2) of the Constitution of Bangladesh

<sup>100</sup> *Aftab Uddin v Bangladesh* 48 DLR(HCD) 1, Para 27 and 50

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