



**An Analysis on Bangladesh Judicial Service (Srinkhola) Bidhimala,  
2017: From the perspective of Masdar Hossain Case**

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## **CONSENT FORM**

The dissertation titled “**An Analysis on Bangladesh Judicial Service (Srinkhola) Bidhimala, 2017: From the perspective of Judicial Independence and Masdar Hossain Case**” prepared by Md. Readul Islam, ID: 2017-1-66-022 submitted to Nadia Rahaman, Lecturer, Department of Law to complete the requirements of Course LAW 406 (Supervised Dissertation) for LL.B. (Hons.) degree offered by the Department of Law, East West University is approved for submission.

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## **Declaration**

I, Md. Readul Islam, hereby declare that this dissertation entitled “**An Analysis on Bangladesh Judicial Service (Srinkhola) Bidhimala, 2017: From the perspective of Judicial Independence and Masdar Hossain Case**” is an original piece of work composed entirely and solely by me under the supervision of Nadia Rahaman, Lecturer, for submission to the Department of Law, East West University for completion of the degree of Bachelor of Laws and that it has not been submitted in any previous application for any degree anywhere. Except where stated otherwise by reference or acknowledgment, the study presented is entirely my own.

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## **Abstract**

With particular reference to important cases in the judiciary, this thesis examines the concepts of judicial independence and judicial accountability. Finding provisions of the Bangladesh Judicial Service (Srinkhola) Bidhimala, 2017 that contradict with judicial independence and accountability is the main goal of this thesis. The thesis investigates the state of judicial independence and accountability in Bangladesh in light of international norms and the Bangladeshi Constitution. First, it assesses the constitutional principle of the independence of the judiciary. Then, this thesis looks at how the Masdar Hossain Case's judgment separated the executive branch from the subordinate judiciary. The Bangladesh Judicial Service (Srinkhola) Bidhimala, 2017 rule's advantages and disadvantages are discussed in the thesis along with how they affect judicial independence. It makes suggestions for improving Bangladesh's judicial independence and accountability conditions by keeping the positive aspects or addressing the negative ones. Finally, the thesis underlines that appropriate steps should be taken to safeguard judicial independence.

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## **Chapter-I: Introduction**

### **1.1 Introduction**

The judiciary must, by necessity, be charged with the duty of ensuring that no State function violates the Constitution's mandate or exceeds the scope of its authority under the Constitution. Provisions were implemented to guarantee the impartiality of Supreme Court judges, lower-level judicial officials, and magistrates performing judicial duties. Judicial independence is a requirement for modern democracy, and as long as the judiciary is kept fully separate from the legislative and executive branches, the people's overall power will never be in jeopardy. According to the Bangladesh Judicial Service (Srinkhola) Bidhimala, 2017, which was published in the gazette on December 11 and then submitted to the Supreme Court, the president will make any necessary decisions after consulting with the Supreme Court, and the Law Ministry will put those decisions into effect. The Law Ministry will be regarded as the appropriate authority for this regulation. Making a "U-turn" on the instructions outlined in the judgment in the Masdar Hossain case, also known as the separation of powers case, the court expressed its displeasure with the government as it created the regulations. Finally, a recommendation and conclusion have been made with the intention of determining how the Bangladesh Judicial Service (Srinkhola) Bidhimala, 2017 conflicts and its effect on the judiciary.

### **1.2 Literature Review**

There are many authors who have written about judicial independence. They tried to find out the situation of judiciary system and how it works. Mahmudul Islam on his book "Constitutional Law of Bangladesh" directed about importance of judicial independence. Md. Abdul Halim directed that a sound and independent judiciary is the *sine qua non* and pre-requisite of a healthy society on his book "Constitution, Constitutional Law and Politics: Bangladesh Perspective".

Md Awal Hossain Mollah tried to analyze the status of the judiciary in Bangladesh in his article “Independence of judiciary in Bangladesh: an overview”. M Moneruzzaman on his article “Independence of judiciary still on paper” directed that the independence of the judiciary still remains only on paper although it was officially separated from the executive by the caretaker government on November 1, 2007 based on 12-point directives issued by the Appellate Division in 1999.

These aforesaid authors had explained in their articles about judicial independency which have relevancy about my research topic. But the Authors could not reach on a conclusion regarding impact of the Bangladesh Judicial Service (Srinkhola) Bidhimala, 2017 on judicial independence. Also, I have not found any article so far which has an analysis on the Bangladesh Judicial Service (Srinkhola) Bidhimala. For such reason, I have decided to research in this topic.

### **1.3 Methodology**

This study uses a qualitative exploratory methodology. Both primary data are the People's Republic of Bangladesh Constitution and Bangladesh Judicial Service (Srinkhola) Bidhimala, 2017. The analysis of the study makes use of secondary data sources. Through the content analysis of several Cases, academic articles, books, and other publications pertaining to the topic, secondary data has been gathered. These documents offered insightful data. It examines a wide range of sources, including as constitutional and statutory law, public documents, media reports, and secondary literature, to analyze the history and present situation of the judiciary.

### **1.4 Limitations**

This analysis on this issue might be able to provide a better result if there is no limitation of time. Only this short period of time is not enough for this research. Doing this research, it is not able to find enough materials regarding this issue and there is a lacking current case laws regarding this issue in Bangladesh. Also, I could not find any article, journal which tries to show the impact of the Bangladesh Judicial Service (Srinkhola) Bidhimala, 2017 on judicial independence.



## **1.5 Objectives of the Study**

1. The objective of the study is to analyze the relevant laws.
2. To find out impacts of Bangladesh Judicial Service (Srinkhola) Bidhimala, 2017.
3. To provide a better idea for proper implementation of separation of judiciary.

## **1.6 Scopes**

This work is mostly based on the existing provisions of the Bangladesh Judicial Service (Srinkhola) Bidhimala, 2017, The Masdar Hossain Case. This paper also contains some case principles regarding Judicial Independence.

## **1.7 Research Question**

Several questions can be framed on this research topic. Anyway, this research has been limited to the following questions:

1. Whether The Bangladesh Judicial Service (Srinkhola) Bidhimala, 2017 in consonance with the Masdar Hossain Case?
2. Whether Bangladesh Judicial Service (Srinkhola) Bidhimala, 2017 is consistent with the spirit of Judicial Independence (guaranteed under Constitution) or not?

## Chapter-II: Judicial Independence

### 2.1 Introduction

The judiciary must be independent so that judges can carry out their duties in accordance with their oath of office and exclusively in accordance with their own sense of justice, free from any outside pressure or influence from the executive, legislative, parties, or superiors. According to the International Bar Association, the judiciary's independence depends on several factors, including the methods used to choose judges, their tenure security, the prohibition of disbursing post-retirement benefits, proper compensation, and privileges. The idea of judicial independence can be seen in our constitution's fundamental design. Separation of powers as envisioned in Article 22 of the constitution<sup>1</sup> is a requirement, and independence of the judiciary is one of the fundamental aspects of that provision.

### 2.2 Historical Background

The origins of judicial independence can be found in ancient and medieval notions of mixed government, which posited that various facets of society, such as monarchical, aristocratic, and democratic concerns, should be included in the governance process. The theory was first articulated in the modern era by Montesquieu in *De l'esprit des lois* (1748),<sup>2</sup> although the English philosopher John Locke<sup>3</sup> had earlier maintained that the king and Parliament should have equal authority over legislation. The independence of the judiciary was derived from this philosophy.

The United Kingdom serves as an illustrative case study for this philosophy. The Act of Settlement of 1701<sup>4</sup>, which introduced the idea of judicial independence, marked the beginning

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<sup>1</sup> The Constitution of the People's Republic of Bangladesh, Article 22

<sup>2</sup> Baron de Montesquieu, *The Spirit of the Laws* (1749)

<sup>3</sup> Shimon Shetreet, *Judges on Trial* (2013)

<sup>4</sup> *ibid*, 2

of this age in England. The second phase became clear when English ideas about judicial independence were adopted globally.

## 2.3 Judicial Independence: As a Concept in Our Constitution

**Pakistan Period:** The Jukta Front outlined a 21-point election manifesto<sup>5</sup>, with the separation of the judiciary serving as one of the primary demands. It was a widely held demand at the time among the Bengali people. Even though the Jukta Front won the election and took office, the provisions of Section 92 A of the Indian Act of 1935<sup>6</sup> prevented it from serving out its full term which the then-governor general used to overthrow a provincial government that had been chosen by the people. The Federal Islamic Republic of Pakistan's 1956 Constitution<sup>7</sup> eventually included the principle of judicial separation. However, after martial law was enacted on October 7, 1958, administrator Ayyub Khan suspended the Pakistani Constitution.

In Pakistan, the basic foundations of democracy have been destroyed in order to strengthen the grip of an autocratic regime. Democracy and judicial independence are related. Without democracy, judicial separation cannot function. In reality, neither regime has taken any action to enforce the Pakistani Constitution's provisions for the separation of the judiciary and the executive. In Pakistan, the idea of the judiciary being separate from the executive branch is nonexistent. However, the fundamental rights of citizens, or the people's mandate from the election of 1970<sup>8</sup> were not acknowledged because of the rejection of democratic norms and principles. Instead, the liberation fight against the Pakistani ruler was sparked by the Pakistani military's tyranny, exploitation, and eradication of the legitimate rights of the Bengali population.

**Period of Bangladesh:** In 1972, following the founding of Bangladesh, a Democratic Constitution was adopted. The dream of judicial independence in a democratic society has not been realized over time; rather, with the establishment of the 1972 Constitution, the dream was

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<sup>5</sup> Ahmed, "Political economy of the 21-point of the United Front" [2001]

<sup>6</sup> Government of Indian Act, 1935 S 92A

<sup>7</sup> Constitution of Pakistan, 1956

<sup>8</sup> Justice Mustafa Kamal, *Bangladesh Constitution: Trends and Issues*, (1<sup>st</sup> edn), 31

once more made a reality. The separation of the judiciary from the executive branch and the guarantee of the independence of the judiciary are popular ideals that our constitution's founders did their utmost to translate. It can be found in the 1972 constituent assembly member Abul Hafiz's address<sup>9</sup>. He said, "British colonial master while established Act 1 of 1935, whereupon there has been known system of separation of judicial from executive, whereupon there has been known mechanism of separation of judiciary from legislative."<sup>10</sup>

Article 22<sup>11</sup> of our constitution has a provision ensuring the separation of powers. By stating that any other law that conflicts with the Constitution shall be void to the extent of the conflict, Article 7<sup>12</sup> established the Constitution's supremacy. This certainly reflects the judicial review that had developed in the USA and is comparable to John Martial's ruling in the *Marvery v. Medison*<sup>13</sup> case. The decision in the *Marvery v. Medison* case was affected by *Thomas Bonham v. College of Physicians*<sup>14</sup> which was chosen.

However, neither the legislative nor the executive branches of the government took any action, and in this circumstance, the Appellate Division instructed the parliament and the president to pass laws and promulgate regulations in accordance with Articles 115 and 133 of the Constitution to carry out the strategy outlined in Article 22 of the Constitution.<sup>15</sup> Therefore, it is a fact that the judiciary in this country has largely been divided in a theatrical manner through judicial activism at the instance of the highest court in the nation.<sup>16</sup>

Therefore, we may argue that the concept of judicial independence is contained in the constitution's basic structure, just as the division of powers is a fundamental structure of a constitution that is developed in diverse circumstances. In the *Masdar Hossain* case, it was determined that judicial independence and impartial judicial independence are ideas that are

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<sup>9</sup> *ibid*, 34

<sup>10</sup> *ibid*, 34

<sup>11</sup> The Constitution of the People's Republic of Bangladesh, Article 22

<sup>12</sup> The Constitution of the People's Republic of Bangladesh, Article 7

<sup>13</sup> *Marvery v Medison* [1803] 5 U.S. 1 Cranch 137

<sup>14</sup> *Thomas Bonham v College of Physicians* [1610] 8 Co Rep 114

<sup>15</sup> Fourth Schedule, Article 150(1) Para 6(6)

<sup>16</sup> *Secretary, Ministry of Finance v Masdar Hossain*, [2000] 20 BLD AD 104

intertwined and that one cannot exist without the other. A judiciary that is completely autonomous yet does not understand the concept of impartiality serves no purpose. The Masdar Hossain case gives us a clear understanding of how to enforce Article 22, which is a crucial condition for judicial independence. Overall, we may claim that Articles 7 and 22 of the Constitution both contain the concept of judicial independence.

## **2.4 Mechanism of Judiciary**

In a democratic society, the judiciary has a special place. Independence of the judiciary is a precondition for proper administration of justice since it is required to resolve conflicts that cannot or should not be left to the political branches. When we talk about the concept of judicial independence, we imply that the judicial branch of the government operates independently, free from interference and influence from other branches, particularly the executive.

In many nations around the world, the Legislature alone has the authority to remove judges from office, according to the Supreme Judicial Council. This is done to prevent them from submitting to the executive's sweet will.<sup>17</sup> Judges in the UK are guaranteed their employment; the King may only dismiss them if both Houses approve a motion indicting them for corruption or moral turpitude.

The Supreme Court judges in the USA are subject to impeachment. Because the Senate conducts the trial while the House of Representatives likes to bring the charges, the impeachment procedure is challenging. Our constitution reflects the viewpoint that our founding fathers held, which is similar to that of many laws and regulations in the UK and the USA. Articles 114 and 115 were added by the constitution's drafter to ensure correct power separation.<sup>18</sup> In this instance, our constitution's drafters drew inspiration from the Government of Indian Act, 1935. Although, in contrast to our constitution, theirs did not place the Supreme Court in charge of controlling and disciplining magistrates.

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<sup>17</sup> M. Jashim Ali Chowdhury, *An Introduction to The Constitution of Bangladesh*, (3rd Edn) 247

<sup>18</sup> *ibid*, 251

## 2.5 Lower Judiciary's Appointment:

There is much misunderstanding and disagreement surrounding the Constitutional provision governing the appointment of subordinate courts. Prior to the passage of the Fourth Amendment, Article 22 required the State to dissociate itself from its executive branches. According to Article 115<sup>19</sup>, all other civil judges and "Magistrates exercising judicial functions" would be appointed by the President in accordance with the rules made by him following consultation with the But Public Service Commission and the Supreme Court. District judges would be appointed by the President

on the recommendation of the Supreme Court. According to Article 116<sup>20</sup>, the Supreme Court would be in charge of controlling (including the authority of posting, promoting, and granting leave) and disciplining "persons employed in the judicial service" and "magistrates exercising judicial powers."

The provisions of Chapter 11 of Part VI, which contain Articles 115 and 116, were to be put into effect as quickly as practicable, according to paragraph 6(6) of the 4th Schedule. The authority to establish one or more Public Service Commissions was preserved by Article 137. (One Judicial Service Commission perhaps). Therefore, the separation of the subordinate judiciary and the judicial service was clearly intended by the Constitution's creators. However, there was misunderstanding on how the terms "magistrates exercising judicial functions" were used in Articles 115 and 116.<sup>21</sup>

In accordance with Article 109<sup>22</sup>, the Supreme Court's Magistrates who are engaged in the judicial service are subject to control, including the authority to be posted, promoted, and granted

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<sup>19</sup> The Constitution of the People's Republic of Bangladesh, Article 115

<sup>20</sup> The Constitution of the People's Republic of Bangladesh, Article 116

<sup>21</sup> *Bangladesh v Md Aftabuddin* [2010] BLD AD1

<sup>22</sup> The Constitution of the People's Republic of Bangladesh, Article 109

leave. These provisions are in accordance with Article 22, which incorporates the essential tenets of state policy regarding the separation of the executive from the judiciary.

The appellate Division also ruled in *Secretary, Ministry of Finance v. Masdar Hossain*<sup>23</sup> that the power to make rules governing appointment, suspension, and dismissal is distinct from the power of the president under Article 133 in that it is not contingent on the eventuality of there not being any laws passed by parliament. The general provisions of Article 133 shall not apply to this special provision, which shall take precedence over them. Parliament is also not authorized to pass laws governing the appointment, suspension, or appointment of judicial officers who are performing judicial functions. Even if it cannot issue instructions to the president or parliament to set rules, the judiciary can give instructions to follow the constitution's mandate in cases when it is being disregarded.<sup>24</sup> One of the instructions in the *Masdar Hossain* case was to follow how the court interprets Articles 115, 116A, and 133 when choosing judges and establishing regulations for them. The Fourth Amendment established a new Article 116A stating that the Supreme Court must henceforth be consulted when choosing judges.

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<sup>23</sup> *Secretary, Ministry of Finance v Masdar Hossain*, [2000] 20 BLD AD

<sup>24</sup> M. Jashim Ali Chowdhury, *An Introduction to The Constitution of Bangladesh*, (3rd Edn) 31

## Chapter-III: Masdar Hossain Case and Judicial Independence

### 3.1 An introduction to Judicial Independence

The ability of judges to conduct their judicial functions free from interference or outside pressure is known as judicial independence. Judicial independence is defined as the collective and individual independence of judges from the political branches of the government, especially the executive branch. This is the ‘most essential and conventional’ definition of judicial independence. It stipulates that judges must be free from political branch’s influence and must be protected from ‘any threats, meddling, or manipulation which may either force them to unfairly favor the government’ or ‘subject themselves to [penalty] for not doing so’. However, the modern definition of judicial independence envisioned in a number of international instruments demands that judges must also be free to make decisions impartially, ‘without any restrictions, influences, inducements, pressures, threats, or interferences, direct or indirect, from any quarter or for any reason.’<sup>25</sup>

### 3.2 Masdar Hossain Case

A state's moral compass can be maintained through the independent judiciary. To maintain this, separation of power is mandatory. We all know that Article 22 of our constitution guaranteed separation of power, but we can see the exact implementation of it in the case of *Masdar Hossain v Secretary, Ministry of Finance*. The separation of judiciary from the executive branch can be seen through this judgment.

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<sup>25</sup> Dr. Mohammad Abdul Hannan, ‘Separation of Judiciary and Judicial Independence in Bangladesh: An Appraisal’ [2021] 1-2



### 3.3 Summary of the fact

The primary complaints of the writ petitioner are that the Constitution is violated by paragraph 2(x) of the Bangladesh Civil Service (Reorganization) Order, 1980, which provides for Bangladesh Civil service (judicial). Here, it may be said that The Services (Reorganisation and Condition) Act, 1975 (Act XXXII Of 1975)<sup>26</sup> gave the government permission to add new services, combine current ones, or organize them into one. The grade pay and allowances of the members of the judicial service were determined by Annexure-E dated 8.1.94 as a result of this Act. While increasing salary and allowances for members of the judicial service, it was considered that the nature and type of work performed by members of the judicial service is completely different and distinct from other services. The salary structure for judicial officers was finally established by Annexure-E. However, due to pressure from members of the Bangladesh Civil Service Cadre, Annexure-E was suspended by Annexure-FI dated 2.11.95, and the Payment Scale of judicial officers was fixed again. This is what gave rise to the writ petitioner's cause of action.<sup>27</sup>

### 3.4 Reason behind the Judgment

In this context, it is crucial to consider the significance of Article 152(1) of the Constitution in order to comprehend the genuine meaning of judicial service where '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.<sup>28</sup> Public officer is described in the same article as 'public officer means a person

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<sup>26</sup> The Services (Reorganisation and Condition) Act, 1975 (Act XXXII Of 1975)

<sup>27</sup> *Secretary, Ministry of Finance v Masdar Hossain*, [2000] 20 BLD AD143

<sup>28</sup> THE CONSTITUTION OF THE PEOPLE'S REPUBLIC OF BANGLADESH  
<<http://www.commonlii.org/bd/legis/const/2004/index.html>> accessed 26 November 2022

holding or acting in any office in the service of the Republic'.<sup>29</sup> In a broad sense, the term 'service of the Republic' refers to all services provided by Bangladesh. In that regard, a member of the judicial service has been seen as different and apart from other tasks carried out by the officers of other cadre services. The judicial service is, of course, included in the concept of Service of the Republic, but they are treated separately within the system of the Constitution because their nature of work is distinct and for this they have been separately treated in several areas of constitution reflected in Articles 115, 116, 116A and 152(1) of the Constitution. As a result, the judicial service members and the magistrates who carry out judicial duties are actually separate from other services and from that point of view, it is completely incorrect to classify the judicial service members and the magistrates who perform judicial duties as Civil Service members.<sup>30</sup>

It has been noted that Article 115 lacks any jurisdiction to make rules pertaining to other service terms and conditions and that article 133, 136, Service of Reorganization and Conditions Act 1975 are not applicable in any way in the aforementioned matters in terms of the judicial functions. The Appellate Division separates judicial service from executive by issuing 12 directives, interpreting Article 115 with relation to the definition of 'Appointment', and Articles 133 and 136.

### **3.5 Directives of Masdar Hossain Case: Separation of Judiciary from Executive**

The Appellate Division directed the Government to implement its 12-point directives, from which directive no. 2,4,7 and 8 are relevant to the **Bangladesh Judicial Service (Srinkhola) Bidhimala, 2017** including for formation of a separate Judicial Service Commission (JSC) to serve the appointment, promotion, and transfer of members of the judiciary in consultation with the Supreme Court. A further 12-point directive called for a separate Judicial Service Pay

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<sup>29</sup> THE CONSTITUTION OF THE PEOPLE'S REPUBLIC OF BANGLADESH  
<<http://www.commonlii.org/bd/legis/const/2004/index.html>> accessed 26 November 2022

<sup>30</sup> *Secretary, Ministry of Finance v Masdar Hossain*, [2000] 20 BLD (AD) 143-144

Commission, amendment of the criminal procedure, and new rules for the selection and discipline of members of the Judiciary.<sup>31</sup>

In the case, the Supreme Court declared and gave the following directives to the government which are directly related to the Bangladesh Judicial Service (Srinkhola) Bidhimala, 2017:

2. The term ‘appointment’ in Article 115 refers to the President's ability to create and establish a judicial service, as well as a magistracy exercising judicial functions, make recruitment rules and all pre-appointment rules, and so on, but Article 115 does not contain any rulemaking authority with regard to other terms and conditions of service like as in case of administrative functions of judiciary, and Articles 133 and 136 of the constitution, as well as the Services (Reorganization and Conditions) Act 1975, have no application to the above judicial functions.<sup>32</sup>

4. The judicial service will be referred to as the Judicial Service of Bangladesh or Bangladesh Judicial Service, in accordance with the Constitution's language. With the aim of attaining gender equity in the recruiting process, a Judicial Services Commission must be immediately constituted with the majority of its members coming from the senior judges of the Supreme Court and the lower courts.<sup>33</sup>

7. The Supreme Court shall take precedence over the Executive in the exercise of control and discipline over individuals employed in the judicial service and magistrates executing judicial powers under Article 116.<sup>34</sup>

8. The terms of judicial independence in Article 116A, as further explained in the judgment, including (1) security of tenure, (2) security of a salary, pension, and other benefits, and (3) institutional independence from the legislative and executive branches, shall be guaranteed in the law or rules made under Article 133 or in executive orders having the same legal effect as rules.<sup>35</sup>

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<sup>31</sup> Bangladesh Supreme Court Bar Association: Masdar Hossain Case available at: [www.bangladeshsupremecourtbar.com/Masdar\\_Hossain\\_Case.php](http://www.bangladeshsupremecourtbar.com/Masdar_Hossain_Case.php)

<sup>32</sup> *Secretary, Ministry of Finance v. Md. Masdar Hossain and others* [1999] 52 DLR AD 82, Para 76(2)

<sup>33</sup> *ibid*, Para 76(4)

<sup>34</sup> *ibid*, Para 76(7)

<sup>35</sup> *ibid*, Para 76(8)

Although the Appellate Division in the *Masdar Hossain case* gave the Government the necessary instructions for the separation of the judiciary from the executive and legislative branches, the 1996 and 2001 governments also made excuses many times and dissipated their tenure.<sup>36</sup> The Appellate Division's decision in 1999, in order to implement the judgment on various pleas, the succeeding government took 23 adjournments until February 2006. The government moved extremely slowly toward the goal of judicial separation during the course of these seven years.<sup>37</sup>

The previous Caretaker Government (2006-2008) began with an optimistic and solid attitude, resolving to separate the judiciary from the executive based on constitutional directives and the Appellate Division's decision in the Masdar Hossain Case. On November 1, 2007, the judiciary's historic separation from the executive officially began.<sup>38</sup>

### **3.6 Conclusion**

According to the information presented above it is clear that after a long period of implementing Article 22 as a fundamental concept of state policy, it was eventually the Supreme Court that granted directives in the judgment of the Masdar Hossain case for effecting separation, and the process of implementation was completed in 2007.

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<sup>36</sup> Tania Lipi, 'Separation of Judiciary from the executive: an Evaluation and Analysis' [2018]

<sup>37</sup> Md Milan Hossain, Separation of Judiciary in Bangladesh Constitutional Mandates and Masdar Hossain Case's Directions: A Post Separation Evaluation [2020] 11 IJCA 1

<sup>38</sup> Dr. Mohammad Abdul Hannan, 'Separation of Judiciary and Judicial Independence in Bangladesh: An Appraisal' [2021] 8

## **Chapter-IV: An Overview of Bangladesh Judicial Service (Srinkhola) Bidhimala, 2017**

### **4.1 Introduction to the Bangladesh Judicial Service (Srinkhola) Bidhimala, 2017**

Bangladesh Judicial Service (Srinkhola) Bidhimala, 2017 has been introduced by the president in accordance with the authority granted by Article 115 of the Constitution. According to the preamble of this rule, the president has also been pleased to establish a service which is called as "Bangladesh Judicial Service". According to his power under Article 133 of the Constitution, the president introduced the Bangladesh Judicial Service (Srinkhola) Bidhimala, 2017 to determine the conditions of judicial service members. As a result, under the authority of Article 133, the president issued Bangladesh Judicial Service (Srinkhola) Bidhimala, 2017, which took effect on the date of publication of Bidhimala in the official gadget. As per rule 1(3)<sup>39</sup>, this Bidhimala does not apply to apprentices. But Bangladesh Judicial Service 2007 will apply in the case that Apprentice judges are terminated. According to rule 1(4)<sup>40</sup>, if an apprentice officer is found guilty of any corruption-related charges, he will no longer be eligible for any government or semi-government jobs; but, if his employment is terminated for any other reason, he will still be available for government and semi-government jobs. This Bidhimala includes 7 chapters where 35 rules are included.

### **4.2 Whether this Bidhimala Violates the Directives of the Masdar Hossain Case?**

This Bidhimala has followed **the directive no. 2 and 4** as the president has introduced it under article 133 and also established "Bangladesh Judicial Service". But the Masdar Hossain case's some other directives are violated by some provisions of this Bidhimala. Article 115 of the

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<sup>39</sup> Rule 1(3) of Bangladesh Judicial Service (Srinkhola) Bidhimala, 2017

<sup>40</sup> *ibid*, Rule 1(4)

Constitution has been interpreted in Masdar Hossain Case<sup>41</sup> as According to Article 115, the president has the authority to establish a judicial service, a magistrate exercising judicial functions, and to make regulations governing recruitment, pre-appointment, suspension, and dismissal. Particularly **directives 2 and 5** are concerned with the president's rule-making powers under Article 115 and 133, which conflict with Article 116 and 116A as interpreted by the Supreme Court. In 2007, four service rules were implemented in response to the Masdar Hossain case. For a long time, the Supreme Court and the Ministry of Law and Justice's Justice Division have disagreed on the definition and interpretation of appropriate authority in relation to the current Bidhimala regarding judicial Service members. Because the definition of this terminology is crucial in determining the superiority of either party.

### **Rule 3**

Rule 3<sup>42</sup> of the Bangladesh Judicial Service (Srinkhola) Bidhimala, 2017 states that the Supreme Court will consult with the president before making any rulings, and that the Ministry of Law will carry those decisions out. The three cardinal Rules that were to be made under Articles 115 and 116 of the constitution for the subordinate judiciary have now been framed under Article 133 under the Executive Chapter, which treats the Judges of the subordinate judiciary as having been made subordinate to the executive branch, raising serious concerns about the protection provided by that decision for the independence of the judiciary. It has thus violated the separation of powers scheme and **the directive no. 7**.<sup>43</sup> The rules that are required by the constitution were recently framed in a non-transparent manner, without adequate consideration or appropriate consultation with either High Court Division or Appellate Division of the Bangladeshi Supreme Court. Thus, the appointment and transfer of the subordinate judiciaries has been delegated to the Executive Branch. The chief justice's position remained vacant during this, leaving a vacancy in the republic as a whole. The Judiciary has been returned to 1999's pre-Masder Hossain era as a result of the judiciary being brought under the power and control of the Executive.

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<sup>41</sup> *Secretary, Ministry of Finance v. Md. Masdar Hossain and others* [1999] 52 DLR AD 82, Para 76(2)

<sup>42</sup> Rule 3 of Bangladesh Judicial Service (Srinkhola) Bidhimala, 2017

<sup>43</sup> *Secretary, Ministry of Finance v. Md. Masdar Hossain and others* [1999] 52 DLR AD 82, Para 76(7)

This Bidhimala prioritizes executive satisfaction in the initiation of departmental allegations. The combined reading of rules 3(1-4), (7)<sup>44</sup> suggests that the appropriate authority has the authority to launch a primary investigation into the allegations stated in subrule 1 of rule 3 without seeking permission from the Supreme Court. However, if the result of the primary investigation conducted by the Ministry of Law is positive, the Supreme Court will be aware of it. The ministry of law will consult the Supreme Court in that case. If the inquiry result is found to be negative, the Supreme Court will be unaware of the initial investigation conducted against the suspect judicial member. This system violates both the letter and spirit of Article 109<sup>45</sup> of the Constitution where it is said that every court that is subordinate to the High Court is said to be under its supervision and control. In time of transferring judges, Appropriate authority which means the law ministry can take initiatives under Rule 3<sup>46</sup> which means if anyone gives judgment against the law ministry then the ministry has the power to transfer him. In that situation, they might be able to persuade the judges to rule in the government's favor. Rule 3(8)<sup>47</sup> states that in the event of a further investigation, the appropriate authority, in consultation with the Supreme Court, may reinvestigate the matter through a new or previous committee. So, the appropriate authority can choose who will investigate or not and as a result the law ministry can easily influence the investigation proceedings.

#### **Rule 4**

According to rule 4,<sup>48</sup> the Supreme Court has the authority to initiate a primary investigation against a suspect officer based on the inspection report or any other information available to the Supreme Court. The Supreme Court, in order to determine the primary substance of the allegations of corruption, may initiate a primary investigation through the Ministry of Law *Suo moto*. Rule 4(3)<sup>49</sup> states that if the appropriate authority believes, based on the written response, that a formal inquiry against the indicted officer is necessary, the ministry of law will refer the

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<sup>44</sup> Rule 3 of Bangladesh Judicial Service (Srinakhola) Bidhimala, 2017

<sup>45</sup> The Constitution of the People's Republic of Bangladesh, Article 109

<sup>46</sup> Rule 3 of Bangladesh Judicial Service (Srinakhola) Bidhimala, 2017

<sup>47</sup> *ibid*, Rule 3(8)

<sup>48</sup> *ibid*, Rule 4

<sup>49</sup> Rule 4(3) of Bangladesh Judicial Service (Srinakhola) Bidhimala, 2017

matter to the Supreme Court for advice. Now the question comes about rule 4(3) that Consultation with the Supreme Court's opinion is not necessary if the appropriate authority believes that the suspect officer's written response negates the need for a formal investigation. Rule 4(4)<sup>50</sup> states that the appropriate authority will be able to take action against the officer under Rules 3 or 6 after receiving advice from the Supreme Court. It is against institutional independency of judiciary from the legislative and executive branches. As per directive no. 8<sup>51</sup> institutional independence from the legislative and executive shall be guaranteed in the law or rules made under Article 133 or in executive orders having the same legal effect as rules. Thus it has violated **the directive no. 8.**

## **Rule 22**

Rule 22<sup>52</sup> deals with some decisions that take the investigation report, the second time notice, and the final determination into consideration. Different decisions following a second show-cause notice and an investigation thereto were described in subrule 1-5. The Supreme Court's recommendations are then brought before the president's designated authority for that ministry of law after consultation with the Supreme Court on both minor and major punishment. In both situations, the president, who is the highest authority, has the sweet will to override the Supreme Court's recommendations.

Surprisingly, under Rule 22(3)(a)(b)<sup>53</sup>, the appropriate authority is supposed to issue official gadget notification in response to Supreme Court advice for simple punishment, such as reprobation. However, in the case of other types of simple punishment, the matter will be referred to the appointing authority by the appropriate authority. It has been determined that the Supreme Court has exclusive jurisdiction over making basic punishments like reprobation. But filing an appeal from the Supreme Court imposed reprobation is subject to transmission to the appointing authority along with the Supreme Court's advice. In addition, it is also made subject to the Chief Executive's sweet will. As a result, the Supreme Court will have no ultimate jurisdiction over his convicted member of judicial Service.

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<sup>50</sup> *ibid*, Rule 4(4)

<sup>51</sup> *Secretary, Ministry of Finance v. Md. Masdar Hossain and others* [1999] 52 DLR AD 82, Para 76(8)

<sup>52</sup> Rule 22 of Bangladesh Judicial Service (Srinkhola) Bidhimala, 2017

<sup>53</sup> *ibid*, Rule 22(3)(a)(b)



Rule 22(5)(2)<sup>54</sup> addresses a few final decisions made following the second show cause notice. It is suspicious that if the Supreme Court advises on imposing any major punishment based on the indicted officer's written statement, this matter will be sent to the appointing authority who is the Chief Executive of the Republic. This mechanism contradicts the spirit of the Masdar Hossain case and violated **the directive no. 7**<sup>55</sup>. After receiving Supreme Court advice on the matter at hand, the executive authority of the republic has no choice but to follow the Supreme Court's decision. However, it has been established in the preceding rules that the executive is supreme over the judiciary.

### 4.3 Conclusion

The lower judiciary is bound to obey the executive with a fear of being subjected to the persecution for these abovementioned provisions of the Bangladesh Judicial Service (Srinkhola) Bidhimala, 2017. This Bidhimala is undermining the independence of judiciary and the directives which ensured separation of power are no longer maintained here.

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<sup>54</sup> *ibid*, Rule 22(5)(2)

<sup>55</sup> *Secretary, Ministry of Finance v. Md. Masdar Hossain and others* [1999] 52 DLR AD 82, Para 76(7)

## Chapter-V: Findings, Recommendations & Conclusion

### 5.1 Findings

The judgment of the Masdar Hossain case was to ensure the independence and protection of the judiciary from the executive. But some rules of the Bangladesh Judicial Service (Srinkhola) Bidhimala, 2017 do not follow the Masdar Hossain Case's directives. Rule 3<sup>56</sup> of the Bidhimala especially violates the freedom of the lower courts. The rules have violated the protection of the judiciary's independence and the separation of powers. Rule 3 states that the Supreme Court will consult with the president before making any rulings, and then the Ministry of Law will carry those decisions out. By the rule 3 this Bidhimala prioritizes executive satisfaction in the initiation of departmental allegations which violates **the directive no. 7. And 8** of the Masdar Hossain Case as the Supreme Court cannot take precedence over executive and institutional independence is not present here.

In addition, According to rule 3(1)<sup>57</sup>, the appropriate authority may initiate legal action against any judges upon receiving an “anonymous letter” where the authority can start proceedings against the judge without informing the Supreme Court. Due to this sub-rule, judges are required to obey executives out of fear of facing legal repercussions from the Law Ministry. It establishes dual administrations upon the judicial service which is against Judicial Independence.

An accused officer is allowed to make his oral statement in front of the appropriate authority under Rule 8(1)(3)<sup>58</sup>. The spirit of the judicial independence would have been protected if the chance to give an oral statement before the registrar general of the Supreme Court rather than the appropriate authority was there. The letter and spirit of Article 109 of the Constitution have been violated upon adoption of this rule.

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<sup>56</sup> Rule 3 of Bangladesh Judicial Service (Srinkhola) Bidhimala, 2017

<sup>57</sup> *ibid*, Rule 3(1)

<sup>58</sup> *ibid*, Rule 8 (1) (3)

Article 22<sup>59</sup> of the constitution emphasizes independent Judiciary by separating from the executive organ of the State. The rule 3 of this Bidhimala prioritizes executive satisfaction over the judiciary in the initiation of departmental allegations which violates the freedom of the lower court.

From the study above, it is obvious that the executive has ultimate authority over the judiciary in this situation, even if check and balance is supposed to be in place. A proper system of checks and balances is not present in this Bidhimala since the executive has been given unrestricted advantages over the Supreme Court. In addition, without the consent of the appropriate authority, Supreme Court does not have the ability to impose punishment and the appropriate authority has the power to remove any decision.

So, from the above discussion it can be said that the Bangladesh Judicial Service (Srinkhola) Bidhimala, 2017 is violating the spirit of the judgment of the Masdar Hossain case and also the spirit of Judicial Independence guaranteed under Constitution.

## **5.2 Recommendations**

- I. We must think about a system that complies with constitutional requirements and the judiciary's demands so that checks and balances will be ensured and lawful. We don't have a stable and proper judicial system. Therefore, in my opinion we may have a separate entity under the control of Supreme Court which will deal with these matters, such as inquiry, inspection, and creating disciplinary procedures for lower court judges.
- II. Article 96 of the Constitution provides a different entity for the impeachment of the Supreme Court judges but for the impeachment of judges of the lower court we do not have a separate entity and this shows that our judicial system is very fragile. This separate authority will be made up of an equal number of judicial and ministry officers and it will be completely detached from the other judicial commissions. This authority will deal with investigation, the impeachment of judges of the lower court.

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<sup>59</sup> The Constitution of the People's Republic of Bangladesh, Article 22

- As it is separated from the judicial commission, pay service commission, and law ministry, this entity will be fully free from any form of pressure or influence, whether it comes from the executive, legislative, or from parties, colleagues, or superiors.
- III. Article 7(2)<sup>60</sup> of the constitution states that any other law that is inconsistent with the constitution will be declared void. The provisions of Bangladesh Judicial Service (Srinkhola) Bidhimala, 2017 should be amended because they conflict with the independence of the judiciary, which is a key component of the constitution.
  - IV. The Masdar Hossain case's directives must be properly fulfilled, and a Supreme Court secretariat must be established which will deal with administrative functions of the lower court judges. Additionally, in accordance with Articles 114, 115, and 116, the president and the government as a whole have the authority about appointment, transfer, terms and conditions of judicial officers in the lower courts. Despite the necessity that the Supreme Court be consulted, it is not very effective because there is no explicit provision which gives priority of the Supreme Court's opinion over the executive. So, even the Masdar Hossain Case judgment cannot guarantee full judicial independence without necessary amendment of Article 116. Whenever any question comes about posting or promotion, Supreme Court must be consulted with. This will help to ensure the judicial independence.

### **5.3 Conclusion**

In a democratic society, the judiciary is in a unique position. As the Judiciary is relied upon to resolve conflicts, the political branches shouldn't be allowed to do so. Proper administration of justice is not possible without judicial independence. Meaningful independence is essential for judiciary as it holds the guarantee of rights and freedom, and public must believe that judiciary is independent. Since the Bangladesh Judicial Service (Srinkhola) Bidhimala, 2017 has the power of disciplinary rules of the judges; the appropriate authority's power should be given to the judiciary. This may serve to ensure the independence of the judiciary, which will help them to render justice by following their own sense of justice without submitting to any type of pressure.

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<sup>60</sup> The Constitution of the People's Republic of Bangladesh, Article 7(2)

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