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Exploring the Gap Between Theory and Practice

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Dedicated to my beloved parents,
Mrs. Umme Salma Atiya Bari and late
Professor M. Ershadul Bari, to whom I owe
everything.

Preface

When the South Asian nation of Bangladesh achieved its independence almost 50 years ago on 16 December 1971 following a 9-month long brutal war with Pakistan, the founding fathers aspired to establish a democratic society in which the judiciary will operate independently to ensure the observance of the rule of law and the enforcement of the fundamental rights of individuals. Accordingly, the ideal of safeguarding the independence of the judiciary has found a prominent place in the Constitution of Bangladesh, 1972. However, the key elements for realising such an ideal, such as a transparent method of appointment of judges, have not adequately been guaranteed by the Constitution. Consequently, succeeding generations of executives have sought to undermine the independence of the judiciary. Thus, there exists a gap between the theory and practice concerning the independence of the judiciary in Bangladesh. The book, therefore, endeavours, in the first place, to fill a significant gap in the existing literature regarding the weaknesses of the constitutional provisions concerning the appointment of the Chief Justice of Bangladesh and other judges of the Supreme Court. Second, this book will evaluate from comparative constitutional and normative perspectives the effectiveness of the method of removal of judges involving a body of judicial character, namely the Supreme Judicial Council, as had been incorporated in the Constitution of Bangladesh through the Proclamations (Tenth Amendment) Order, 1977 and later validated by the Constitution (Fifth Amendment) Act, 1979. It will be made manifestly evident that the recent attempts to dispense with this transparent method of removal of the judges have been preferred to bring the superior judiciary under the control of an all-power executive.

Since no systematic and structured research has so far been carried out critically examining the above issues, this book will enhance knowledge by not only identifying the flaws, deficiencies, and lacunae of the constitutional provisions concerning the method of appointment of the judges of the Supreme Court but also examining the measures undertaken by the current government of the Bangladesh Awami League to dispense with the transparent method of removal of the judges involving the Supreme Judicial Council. Consequently, based on these findings, recommendations will be put forward to rectify these defects from comparative constitutional

law and normative perspectives. The outcome of this proposed book will not only establish the best means for excluding the possibility of appointment of judges of the Supreme Court on extraneous considerations but also for guaranteeing their security of tenure, thereby safeguarding the independence of the superior judiciary of Bangladesh.

Melbourne, Australia M. Ehteshamul Bari

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I owe a profound debt of gratitude to my beloved father, late Professor M Ershadul Bari, who was the foremost authority on Bangladeshi Constitutional Law. He was not only my father but also my greatest teacher. His teachings and lessons have shaped both personal and professional aspects of my life.

I would like to thank my sister, Safia Naz, for her support whenever asked. I am also thankful to my wife, Samia Islam, for her love and support. Since I completed the task of writing this book after the birth of our first baby, Samaira Bari, my wife's patience during this process has been of immense comfort and help. I hope one day my beautiful daughter, Samaira, will read this book with great interest!

Finally, I would like to thank my mentor, Professor David Weisbrot AM (Former President of the Australian Law Reforms Commission) for his invaluable guidance and support.

About This Book

When the South Asian nation of Bangladesh achieved its independence on 16 December 1971 following a 9-month long brutal war with Pakistan, the founding fathers aspired to establish a democratic society in which the judiciary will operate independently to ensure the observance of the rule of law and the enforcement of fundamental rights. However, notwithstanding such an aspiration, the Constitution of Bangladesh, 1972, does not prescribe a transparent method for appointing the judges of the superior judiciary – the Supreme Court of Bangladesh – which would enable judges to decide cases according to the oath of their office. Rather it entrusts the executive with the power to appoint the judges, thereby paving the way for intrusion of political or personal favouritism in the appointment process. Furthermore, although the Constitution, as amended by the Proclamations (Tenth Amendment) Order, 1977 and later validated by the Constitution (Fifth Amendment) Act, 1979, guaranteed security of tenure by stipulating a transparent procedure for the removal of judges of the Supreme Court, the current government of Bangladesh Awami League (BAL) has taken several measures to dispense with this transparent procedure.

This book makes it manifestly evident that the absence of a transparent method of appointment of judges of the Supreme Court has often resulted in the appointment of judges not on merit, but through political or personal patronage. Furthermore, the measures taken by the BAL regime to replace the transparent method of removal of the judges of the Supreme Court have substantially impaired the independence of the judges to decide cases independently of the wishes of the appointing authority. Consequently, in light of these findings, this book puts forward recommendations from comparative constitutional law and normative perspectives for the insertion of detailed norms in the Constitution of Bangladesh so as to establish the best means for excluding patronage appointments to the bench and for guaranteeing the security of tenure of the judges, thereby safeguarding the independence of the superior judiciary to decide cases without fear or favour.

This book will be of particular interest and use to scholars and students of comparative constitutional law and Asian Law. Given the law reform analysis undertaken in this work, policymakers represent another primary target for this book.

Although the recommendations put forward in the proposed title will be of particular benefit to the policymakers in Bangladesh, they will nevertheless be also relevant for the policymakers of those nations – the constitutions of which do not contain adequate guarantees for securing the independence of the judiciary.

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About the Author

M. Ehteshamul Bari, PhD (Macquarie, Sydney), is a Senior Lecturer in Law and the Higher Degree Research Coordinator in the Thomas More Law School at the Australian Catholic University (ACU), Melbourne, Australia. He previously served as the Acting Deputy Dean of Law at ACU. Dr Bari's primary research expertise lies in the areas of constitutional law, human rights law, Asian law, and public international law. Apart from this monograph, he is also the author of two other monographs, namely, *States of Emergency and the Law: The Experience of Bangladesh* (London and New York: Routledge, 2017) and *The Use of Preventive Detention Laws in Malaysia: A Case for Reform* (Singapore: Springer, 2020). He has also published numerous research articles in reputed peer-reviewed journals, including the *Oxford University Commonwealth Law Journal*, *Wisconsin International Law Journal*, *George Washington International Law Review*, *Emory International Law Review*, *Cardozo International & Comparative Law Review*, *Transnational Law and Contemporary Problems*, *Michigan State International Law Review*, *Suffolk Transnational Law Review*, and *San Diego International Law Journal*. Dr Bari has received prestigious research awards in recognition of his scholarship.

Chapter 1
Introduction

1.1 Introduction

It is a common feature of modern democracies to distribute power among the three organs of the government, namely, executive, legislature and judiciary. The idea underlying such division of power, according to French Jurist, Baron de Montesquieu—the architect of the modern formulation of the doctrine of separation of powers—is to prevent the concentration of too much power in any particular arm of government[1] and thereby limit the possibility of abuse of power. As Montesquieu remarked:

> To prevent … abuse [of power], it is necessary from the nature of things that one power should be a check on another … When legislative power is united with executive power in a single person or in a single body of the magistracy, there is no liberty … Nor is there liberty if the power of judging is not separated from legislative power and from executive power. If it were joined to legislative power, the life and liberty of the subject would be exposed to arbitrary control; for the judge would then be the legislator. If it were joined to executive power, the judge might behave with violence and oppression. Thus would be an end of everything if the same person or the same body, whether of the nobles or of the people, were to exercise these three powers: that of enacting laws, that of executing public resolutions, and that of judging the crimes or the disputes of individuals.[2]

Although Montesquieu's conception of separation of powers has certainly influenced the framers of the constitutions of the democratic countries of the world, it has not strictly been implemented, particularly in countries with a Westminster system. For the separation of powers between the executive and the legislature in this form of government does not in practice exist. As the ministers, who head the ministries, are simultaneously members of the executive and the legislature, thereby mandating significant overlap between the functions of these two arms of

[1] Gustaf (1980), p. 95.

[2] Montesquieu (1989), p. 157.

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government. It can be argued that such an overlap is necessary for avoiding the sort of political deadlocks that have in recent times become the characteristic feature of the American system of government, which goes further than any other in applying Montesquieu's pure doctrine of separation of powers. In the USA, the absence of any overlap between the functions of the executive, i.e., the President and his cabinet, and the legislature, i.e., the Congress, has resulted in these branches engaging in an unhealthy competition of trying to exert supremacy over one other. For instance, in October 2013 political infighting between the Republican Party controlled House of Representatives on the one hand, and President Barack Obama and Democratic Party-led Senate on the other, resulted in a budget impasse, which in turn forced the federal government to enter a shutdown for a period of 16 days.[3] A similar budget impasse also occurred in December 2018, which resulted in a shutdown of the federal government for 35 days—the longest in the history of the USA.[4]

The doctrine of separation of powers may now be said to have received its main application in democratic countries with parliamentary form of government by securing the independence of the courts from the control of the political branches of the government, namely, the executive and the legislature. Such independence is an indispensable feature of any democratic society proclaiming the rule of law. As it enables the courts to interpret and apply the law independently and impartially,[5] thereby ensuring the supremacy of law over the arbitrary exercise of power by either the executive or legislature and guaranteeing the equal protection of law to all people without exception. The judiciary's ability to decide cases impartially in accordance with the dictates of law guarantees that the "lamp of justice" does not go "out in darkness"[6] and public confidence in the administration of justice also remains unshaken and unaffected. The importance of an independent judiciary can be gathered from the observations of Henry Sidgwick, who as early as in 1897, remarked that "in determining a nation's rank in political civilization, no test is more decisive than the degree in which justice as defined by the law is actually realised in its judicial administration; both as between one private citizen and another, and as between citizens and members of the Government."[7]

Inextricably linked with the independence of the judges to interpret and apply the law in an impartial manner are the procedures concerning their appointment and security of tenure. For a transparent method of appointment of judges, which obviates the possibility of intrusion of extraneous considerations into the process, enables judges to decide cases without feeling beholden to the appointing authority

[3] Appleton and Stracqualursi (2014), https://abcnews.go.com/Politics/heres-happened-time-government-shut/story?id=26997023

[4] Aljazeera (2019), https://www.aljazeera.com/news/2019/1/25/us-govt-shutdown-how-long-who-is-affected-why-did-it-begin

[5] Phillips and Jackson (1997), p. 15.

[6] Bryce (1921), p. 384.

[7] Sidgwick (1897), p. 481.

while the guarantee of security of tenure permits them to make decisions without the apprehension of suffering personally as a result of such decision-making.

When the South Asian nation of Bangladesh achieved its independence on 16 December 1971 following a 9-month long brutal war with Pakistan, the founding fathers aspired to establish a democratic society in which the judiciary will operate independently to ensure the observance of the rule of law and the enforcement of fundamental rights. However, notwithstanding such an aspiration, the Constitution of Bangladesh, 1972, does not prescribe a transparent method for appointing the judges of the superior judiciary—the Supreme Court of Bangladesh—which would enable judges to decide cases according to the oath of their office. Rather it entrusts the executive with the power to appoint the judges, thereby paving the way for intrusion of political or personal favouritism in the appointment process. Furthermore, although the Constitution, as amended by the Proclamations (Tenth Amendment) Order, 1977 and later validated by the Constitution (Fifth Amendment) Act, 1979, guaranteed security of tenure by stipulating a transparent procedure for the removal of judges of the Supreme Court, the current government of Bangladesh Awami League (BAL) has taken several measures to dispense with this transparent procedure. This book will make it manifestly evident that the absence of a transparent method of appointment of judges of the Supreme Court has often resulted in the appointment of judges not on merit, but through political or personal patronage. Furthermore, the measures taken by the BAL regime to replace the transparent method of removal of the judges of the Supreme Court have substantially impaired the independence of the judges to decide cases independently of the wishes of the appointing authority. Consequently, in light of these findings, this book will put forward recommendations from comparative constitutional law and normative perspectives for the insertion of detailed norms in the Constitution of Bangladesh so as to establish the best means for excluding patronage appointments to the bench and for guaranteeing the security of tenure of the judges, thereby safeguarding the independence of the superior judiciary to decide cases without fear or favour.

In this chapter, first, the standards concerning the independence of the judiciary and their recognition in domestic constitutions will briefly be discussed. Second, an attempt will be made to briefly examine the guarantee of judicial independence as enshrined in the Constitution of Bangladesh, 1972. Third, the objectives of the book will be discussed. Finally, an outline of the chapters which will make up this book will be provided.

1.2 The Standards Concerning the Independence of the Judiciary and Their Recognition in Domestic Constitutions

It should be stressed here that in order to assist the comity of nations to put in place effective guarantees for enabling judges to decide cases independently and impartially, various international non-governmental organizations since the 1950s have developed standards, such as the International Bar Association's Minimum Standards, 1982, the Montreal Universal Declaration on the Independence of Justice, 1983 and the Beijing Statement of the Principles of the Independence of the Judiciary, 1995, for thickening the concept of judicial independence. These standards contend that in order to safeguard the independence of the judiciary it is imperative to safeguard not only the independence of the individual judges but also the independence of the judiciary as a whole.[8] The individual independence, which was recognized by the Congress of the International Commission of Jurists held in New Delhi in January 1959, consists of two elements, namely, substantive and personal independence. The substantive independence of the judges refers to the independence of the judges to decide cases brought before them in accordance with their oath of office without submitting to any kind of internal or external pressures. On the other hand, personal independence implies the competence of the judges to adjudicate cases without the apprehension of suffering personally for such adjudication. In this context, the observations of the International Bar Association's Minimum Standards of Judicial Independence, 1982, are instructive. The Standards note that personal independence of the judges is guaranteed when "the terms and conditions of judicial service are adequately secured so as to ensure that individual judges are not subject to executive control".[9] Arguably, the personal independence of the judges can only be safeguarded by stipulating a transparent method of appointment and guaranteeing their security of tenure. For, in the first place, a transparent method of appointment would ensure that judges are appointed on merit and not on the basis any extraneous considerations, thereby ensuring that judges do not feel obliged to the appointing authority. Second, the guarantee of security of tenure enables judges to decide cases, particularly where the executive is a party, without fear or favour.

However, it can be argued that the expansion of the concept of judicial independence by including in it the additional elements of collective and internal independence in the 1980s, has been the most significant contribution of the international standards concerning judicial independence. For, it has been argued that independence of the individual judges—composed of both substantive and personal independence—would be virtually ineffective without the internal and collective independence of the judiciary. In this context, it is pertinent to note that collective

[8] Green (1985), p. 135.

[9] International Bar Association (1982), art. 1(b).

independence has been construed to mean the institutional, administrative and financial independence of the judiciary as a whole *vis-a-vis* the executive and legislative branches of the government. The Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region, 1995 contends that such independence is safeguarded when the judiciary itself is entrusted with the task of administering the affairs of the court.[10] The importance of safeguarding the collective independence of the judiciary for enabling the individual judges to perform their judicial functions can be gathered from the following observations of the Canadian Supreme Court in *Valente v R*[11]:

> an individual judge may enjoy the essential conditions of judicial independence but if the court or tribunal over which he or she presides is not independent of the other branches of government, in what is essential to its function, he or she cannot be said to be an independent tribunal.[12]

While internal independence means the independence of a judge to decide individual cases free from any kind of pressure or interference from his judicial superiors and colleagues.[13] This element of judicial independence has most prominently been recognised in the Montreal Universal Declaration on the Independence of Justice, 1983, which provides that "[i]n the decision-making process, judges shall be independent vis-a-vis their judicial colleagues and superiors. Any hierarchical organisation of the judiciary and any difference in grade or rank shall in no way interfere with the right of the judge to pronounce his judgment freely".[14]

Thus, it is evident from the brief discussion above that the concept of independence of the judiciary has currently four meanings or facets:

I. substantive independence;
II. personal independence;
III. collective independence; and
IV. internal independence.

However, notwithstanding the recognition of the above facets of judicial independence, this book will make it evident that it is more common for the constitutions of modern democracies to guarantee the individual independence, namely substantive and personal independence of the judges. To this end, it will be shown that some constitutions have gone further than others in seeking to safeguard such independence of the judges by guaranteeing a transparent method of appointment for obviating the possibility of intrusion of extraneous consideration into the process of appointing the judges of the superior courts. For instance, in the United Kingdom (UK), the Constitutional Reform Act was passed in 2005 to provide for the establishment of a Judicial Appointments Commission (JAC), which is headed

[10] Law Association for Asia and the Pacific (LAWASIA) (1995), art. 36.

[11] *Valente v R* [1985] 2 SCR 673.

[12] Ibid., [15].

[13] Shetreet (1985), p. 399.

[14] Montreal Declaration (1983), art. 2.03.