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**UNDP Policy Paper:**  
**Separation of the Judiciary from the**  
**Executive in Bangladesh**

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## **UNDP STUDY: SEPARATION OF THE JUDICIARY FROM THE EXECUTIVE IN BANGLADESH**

### **1. INTRODUCTION**

In 1999, Bangladesh's apex court, the Appellate Division of the Supreme Court, gave a landmark judgment in *Secretary, Ministry of Finance v Masdar Hossain* (the Masdar Judgment).<sup>1</sup> This judgment re-affirmed the constitutional mandate for independence of the judiciary and laid out a roadmap to achieving separation of the judiciary from the executive with respect to the lower courts, both civil and criminal.

The judgment was a fitting response to the long standing demand articulated by lawyers and judges to ensure speedy and effective separation of the judiciary. In turn, it catalysed both leading political parties to make manifesto commitments to realise separation of the lower judiciary. Since then, development partners have also raised the issue of separation in their dialogue with the Government of Bangladesh. Despite this broad-based consensus, the judgment today remains largely unimplemented.

This paper aims to provide an outline of the current situation regarding the lack of separation between the lower judiciary and the executive, and its implications for access to justice and the protection of basic human rights. It focuses on the mandate for separation as laid out in the Masdar judgment, assesses the measures taken to comply with that judgment to date and makes recommendations for ways and means to ensure its full implementation. This paper also aims to catalyse a debate among concerned leaders and policymakers and within a broader public arena, to build consensus on the need for urgent action to effect separation of the judiciary.

This paper contains nine sections. First, it sets out the existing institutional structure of the justice delivery system, focusing in particular on the nature of executive influence over the composition, control and functions of the lower judiciary. Second, it identifies the inherent problems in this structure, and the extensive executive control over the lower judiciary, for ensuring access to justice and human rights. Third, it traces the historical context in which executive controls were imposed over the lower judiciary, as well as earlier efforts at securing separation and why they failed. Fourth, it discusses the Supreme Court's findings and directions in the Masdar Hossain judgment which ultimately directed effective separation of the lower judiciary, and reviews the steps towards implementation taken by the Government of Bangladesh to date. Fifth, it sets out current concerns regarding the adequacy of such steps to fulfil the Masdar judgment. Sixth, it discusses the main roadblocks

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<sup>1</sup> 20 BLD (2000) AD 141

remaining in place to implementation. Seventh, it outlines comparative experiences of effecting separation from two other jurisdictions, to pinpoint lessons learned. Eighth, it proposes recommendations for ensuring full implementation of the judgment, highlighting the remaining steps required to be taken in this regard, both short and long-term.

## 2. BACKGROUND

### 2.1 Court Structure

The judiciary in Bangladesh, headed by the Chief Justice, consists of the Supreme Court and the Subordinate Courts. The Supreme Court has two divisions, the Appellate Division (seven judges) and the High Court Division (72 judges).<sup>2</sup> They have separate functions and separate appointments are made to each.

The Subordinate Courts comprise:

- The Civil Courts, in descending order of hierarchy, including the Courts of the District Judge, the Additional Judge, the Joint District Judge, and the Assistant Judge (Section 3, Civil Courts Act 1887);<sup>3</sup>
- The Criminal Courts, again in descending order, including the Courts of Sessions, Additional Sessions Judge, Assistant Sessions Judge, Metropolitan Magistrate, Magistrate of the First Class, Magistrate of the Second Class and Magistrate of the Third Class (Section 6, CrPC 1898);<sup>4</sup> and
- The Special Courts and Tribunals, including – in relation to civil matters -- the Administrative Tribunal, the Environment Court, the Family Court, the Juvenile Court, the Labour Court and the Labour Appellate Tribunal, the Money Loans Court, the Court of Settlement and the Taxes Appellate Tribunal, and – in relation to criminal cases -- the Special Tribunal on Violence against Women and Children and the Special Tribunal for Speedy Trials.<sup>5</sup>

The persons presiding over all subordinate courts (other than Magistrates' Courts) are persons in judicial service.

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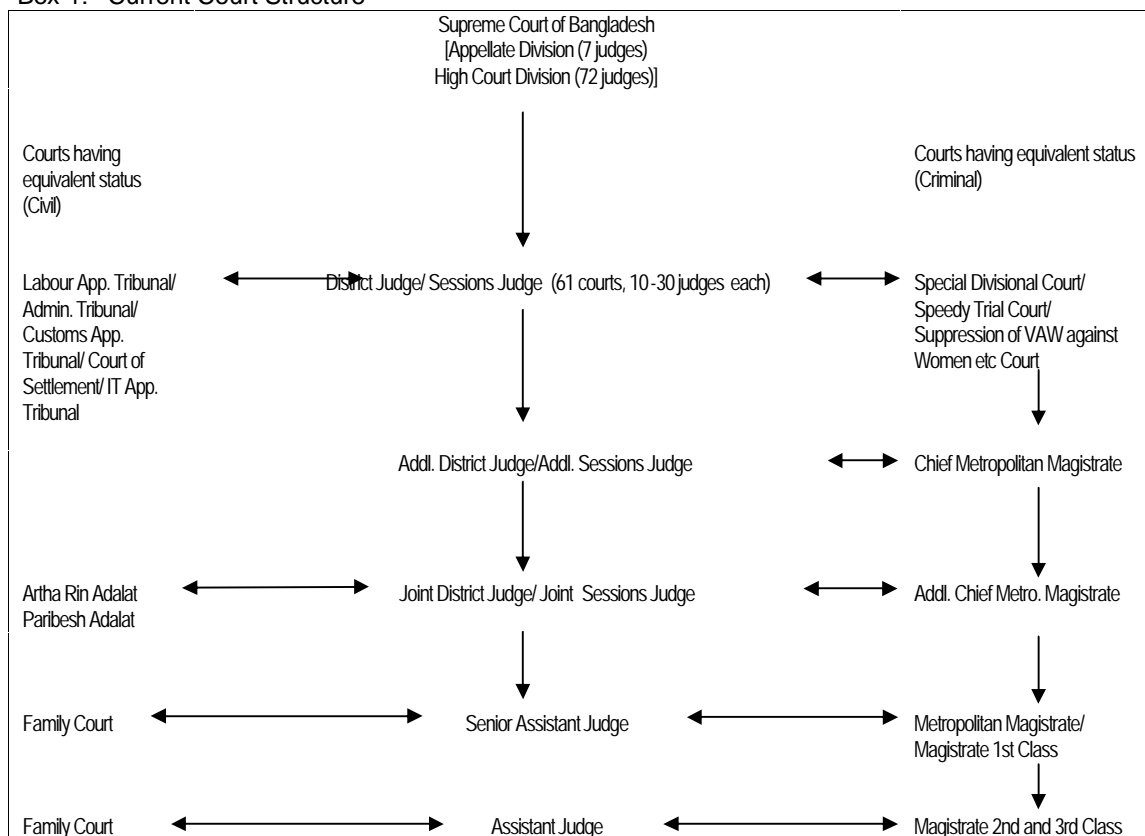
<sup>2</sup> Art 94, Constitution

<sup>3</sup> Civil Courts Act 1887.

<sup>4</sup> Code of Criminal Procedure 1898

<sup>5</sup> Art. 114, Constitution and specific laws.

Box 1: Current Court Structure



## 2.2 Composition and Control of the Lower Judiciary

While the Constitution affirms the principle of independence of the judiciary and empowers the High Court to exercise superintendence and control over all subordinate courts and tribunals, effective executive controls remain in place over the lower judiciary in respect of their security of tenure, remuneration and administration.

The President is empowered to make appointments both of persons in judicial service and of magistrates exercising judicial functions 'in accordance with Rules made by him in this behalf' (Art. 115). Under the Constitution as amended, there is no requirement of obtaining the Supreme Court's prior recommendation, or of consulting the Supreme Court and Public Service Commission regarding the framing of any such Rules.

Until 1999, and the Masdar judgment (see below), the President was responsible for appointing persons in judicial service from among civil servants recruited to the BCS (Judicial) Cadre, and Magistrates from the BCS (Admin) cadre. By delegation of the President's powers under the Constitution, the Ministry of Law was responsible for initiating the process with regard to appointments, and also for transfer, promotion,

leave and discipline of the officers of the judicial service.<sup>6</sup> After preparing the files, the Ministry would send these onto the Supreme Court in purported fulfilment of the requirement of consultation under Art. 116, and the General Administrative Committee of the Supreme Court, comprising all the judges of the Supreme Court (see High Court Rules) would then usually provide routine approval of the same. Following the Masdar judgment, judicial officers are now being selected through the newly established Judicial Service Commission to posts in the Bangladesh Judicial Service, wholly separate and distinct from the BCS.

The President is also responsible for appointing Magistrates from the BCS (Administration) cadre. Here, by delegation of the President's powers under the Constitution, the Ministry of Establishment was (and is) responsible for the recruitment of Magistrates. Magistrates are recruited through examinations held by the Public Service Commission for posts in the Bangladesh Civil Service (Administration) Cadre, and only on qualification and selection are appointed to these posts by the President.

Other than persons in judicial service or magistrates, the subordinate courts also include various support staff. It is estimated that their numbers may currently stand at around 3600.<sup>7</sup> In line with the general provisions that the posts of 3<sup>rd</sup> and 4<sup>th</sup> Class government employees are not transferable, these support personnel in the subordinate courts are recruited and promoted by the respective District Judge.

The control (including the power of posting, promotion and granting of leave) and discipline of the subordinate courts now vests in the President, but subject to his exercising it in consultation with the Supreme Court.

*In many cases of injustice the Deputy Commissioner (who is also the District Magistrate) refuses to get involved because s/he fears that [by acting against the Government's interests] s/he will get transferred to a remote place like Khagrachari or Bandarban. The Government thus controls the bureaucracy by controlling their promotion, tenure of service etc. The bureaucracy is always busy keeping the government happy. How can the bureaucracy perform a judicial role in this context? NGO Activist*

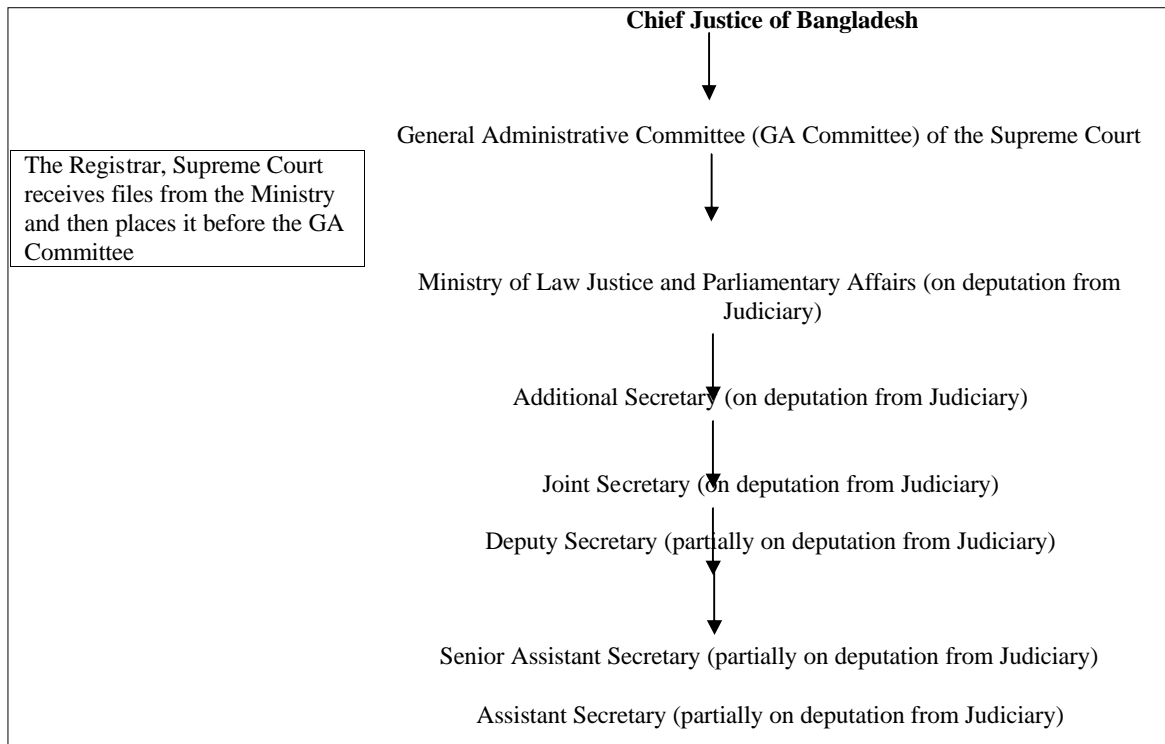
There are no existing guidelines for posting and promotion. The Ministry is thus able to arbitrarily exercise its powers, using the carrot of favourable postings and promotions on the one hand, including (for persons in judicial service) on deputation to various Ministries etc, and the stick of postings to remote regions or simple

<sup>6</sup> See Art. 55(4), Constitution of Bangladesh, read with the Rules of Business

<sup>7</sup> See Shahdeen Malik, 'Study on Separation of the Judiciary from the Executive in Bangladesh', UNDP, 2005 (mimeo): this figure is based on an assumption of their being about 600 subordinate courts, and six support personnel per Court. However, Malik also states that while each court generally includes 10 support personnel, namely the Sherestadar (Administrative Officer being a Second Class Gazetted Officer) and Assistant (2), the Peshkar and two Messengers (3); the Nazir (1), the Accountant (1) and Process Servers (3), the numbers will be fewer in certain courts, due to lack of sanctioned posts and vacancies or because, in many District Courts, all process servers are centralised under one Nezarat.

obstruction of ordinary career advancement on the other to manipulate decisions by the lower judiciary on a day to day basis.

Box 2: Current Structure of Court Administration



## 2.3 Functions of the Lower Judiciary

In current practice, persons in judicial service do not carry out purely judicial functions, while magistrates do not carry out purely executive functions, and there is considerable 'mixing' within both categories. This will be clear on reading the section below.

**Persons in Judicial Service:** Persons in judicial service are required to preside over civil courts, criminal courts, and the special courts and tribunals. In practice, in almost every district other than Dhaka, given the limited number of judges and the limited amount of court space, the same person presides over both the civil and criminal court.

In addition to carrying out these judicial functions, persons in judicial service may also be posted on 'deputation' to quasi-judicial, judicial, executive and administrative posts.<sup>8</sup> Deputation is a service condition applicable to any person who holds a post

<sup>8</sup> The following are the broad categories of deputation:

- (i) Judicial posts in judicial departments (outside the judiciary): Chairman and Member, Court of Settlement; Chairman, Labour Court; President and Member, Income Tax Tribunal; Member, Customs Excise and VAT Appellate Tribunal.
- (ii) Executive posts in judicial establishments/departments: Registrar, Additional Registrar, Deputy Registrar, Assistant Registrar of the Supreme Court of Bangladesh; Registrar of

in any Service of the Republic, as defined in Schedule 1 the Bangladesh Civil Service Recruitment Rules, 1981 ("the 1981 Rules").<sup>9</sup>

Presently, about 15% or about 80-90 of the 780 persons in judicial service are routinely posted outside the judiciary to various Ministries, Departments or Corporations on so called 'deputation'/secondment. When posted on deputation such persons mostly serve as legal advisors or administrative officers. So for example, their administrative functions while on deputation include serving as Assistant Registrar, Deputy Registrar, Additional Registrar of the Supreme Court or various Tribunals; Solicitor or Administrative Officer at the Solicitor's Office, the Ministry of Law, the Parliament Secretariat, the Judicial Administration and Training Institute, and the Prime Minister's Secretariat (see Box No. 12 below on Deputation). Currently, about six such persons currently serve in the Ministry of Law as Joint Secretary (1), Deputy Secretary (1) and Senior and Assistant Secretaries (3-4)) together with their support personnel..

Magistrates: Magistrates perform both judicial and executive functions.<sup>10</sup> Their judicial functions including taking witness statements (Section 164 CrPC), issuing orders of bail, conducting trials of criminal offences, and passing orders of conviction and sentence. They are also responsible for oversight of criminal trials, for example through receiving reports from the police of registration of criminal cases, monitoring the investigation, ensuring remands at proper stages, and expeditious disposal of the cases (see Sections 157, 159 and 173 Cr.PC), In contrast, their executive/administrative functions (not performed by Metropolitan Magistrates who perform only judicial functions) include for example issuance of arrest warrants and search warrants, orders for attachment of property, orders to the police to disperse

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- Administrative Tribunal; Registrars in the Court of Settlement; Labour Court; Income Tax Tribunal.
  - (iii) Executive posts in Ministries and Departments: Secretary, Additional Secretary in the Ministry of Law, Justice and Parliamentary Affairs, Election Commission, Director, Office of the Prime Minister;
  - (iv) Posts of law officers in various ministries and departments: Solicitor, Deputy Solicitor, Joint Secretary (Opinion), Deputy Secretary (Opinion) under the Ministry of Law, Justice and Parliamentary Affairs; Assistant Secretary, Deputy Secretary, Law Officer under the Ministry of Works, Local Government, Department of Public Works, Department of Health, Police Head Quarters.

<sup>9</sup> Rule 8 Bangladesh Civil Service Recruitment Rules 1981, provides for deputation as follows: "8. Relaxation. - (1) Notwithstanding anything contained in these rules - ....(b) A person holding a specific post in a Service may be appointed by the Government to a specified post in another Service on deputation."

<sup>10</sup> The *Code of Criminal Procedure, 1898* provides for the classifications and powers of different categories of Magistrates.

According to section 32 of the Code: (i) Courts of Metropolitan Magistrates and Magistrates of the first class may pass a sentence of imprisonment for a term not exceeding five years and of fine not exceeding ten thousand taka; (ii) Courts of Magistrates of the second class may pass a sentence of imprisonment for a term not exceeding three years and of fine not exceeding five thousand taka; and (iii) Courts of Magistrates of the third class may pass a sentence of imprisonment for a term not exceeding two years and of fine not exceeding two thousand taka. However, under section 29C(a), the Government may (i) invest the Chief Metropolitan Magistrate, District Magistrate, or any Additional District Magistrate with power to try as a Magistrate all offences not punishable with death; and (ii) invest any Magistrate of the first class with power to try as a Magistrate all cases punishable with sentence of imprisonment of up to ten years.

or fire on a public gathering, orders to restrict gatherings of more than five persons in any place, and detention orders under the Special Powers Act, 1974.

Magistrates are initially responsible for general administrative duties, and tend to perform such magisterial functions only for the first 3-10 years of their career with the government, then going on to serve in various ministries or departments.

In every District, the District Magistrate (DM), responsible for the law and order situation is the same person as the Deputy Commissioner who is the highest executive officer.

This situation gives rise to areas where a clear concern could arise that justice is not only not being done but not being seen to be done, as the person judging a particular cause is the same in essence as the person who is responsible for its having arisen. So for example after a warrant of arrest is issued by the DC, an application for bail seeking release of the arrested person is required to be moved before a Magistrate, although he is a subordinate to the DM (the same person as the DC) and therefore apparently liable to being influenced in his decision making.

### **3. CURRENT SITUATION: EXECUTIVE CONTROL OVER LOWER JUDICIARY**

The blurred lines between judicial and executive roles and functions of the lower judiciary, and a situation in which they are under the control of the executive, inhibit the transparent and accountable administration of justice, in particular criminal justice. The impact of lack of separation is felt directly in terms of denial of access to justice, as well as flagrant violations of the most fundamental human rights to life, liberty and personal security. It also impacts more widely on governance in general. The inability to ensure enforcement of contracts, combined with the inability to ensure legal protection of life and property also acts as a significant disincentive to investment.

As Dieter Conrad notes, 'The subordinate judiciary has become or is at least widely believed to have become subservient to the executive and amenable to pressures and influences from politically influential people... Telephones were supposedly installed in judges' chambers in order to receive ominous calls from influential quarters. ...the existence of executive control is in itself a standing invitation to abuse'.

Examples of the consequences of lack of separation are discussed below, first with respect to denial of access to justice, then the lack of accountability of the lower judiciary and finally with regard to the increasing erosion of confidence in the judiciary and the consequent rise in the use of violence to resolve conflicts at various levels.

### 3.1 Denial of Access to Justice

#### 3.1.1 Criminal Justice System

*“The Government in its own interest does not want to separate the judiciary from the administration. If this happened, it would be difficult for the party -in-power to lodge political cases against the opposition. The same is true when the Opposition goes to power. The Government, whichever party is in power, does not want to let go of its control over the criminal justice process because cases against the Opposition need to be manipulated. This is true for all governments, even the democratic ones. Democratic governments are only held accountable to the people once every five years. They are at the receiving end when in Opposition but don’t want to implement the separation of the judiciary when in power. “*

There are many reported instances in which Magistrates have used their executive powers at the instance of the executive to issue warrants of arrest, to sanction arrest without warrant (under section 54 of the Code of Criminal Procedure) and consequent remands to police custody (under section 167 CrPC), to control and impose restrictions on public gatherings (under section 144 of the CrPC) and to control police firing and use of civil and military force (Sections 128 and 129 of the CrPC).

Overt abuse of executive powers, allegedly at the dictate of government authorities, whether central or local, has been commonplace under various different regimes. In 2006, a ‘trigger-happy’ Magistrate acting on a complaint by a then highly influential advisor to the ruling party issued arrest warrants against five eminent citizens of the country regarding an allegation of criminal defamation.<sup>11</sup> The warrants had been issued without any preliminary inquiry and without any evidence that the Magistrate had been satisfied on objective materials that their issuance was merited. In many cases, Magistrates have directed that a person be taken to remand in police custody, where they may be vulnerable to ill-treatment, although no cogent reasons have been provided for why such lengthy remand is necessitated. So for example, in 2004, a well known development organisation’s chief was taken on remand in connection with allegations of sedition, where the only evidence before the Court was that he may have held meetings at his office calling on his staff to prepare posters and festoons to protest price hikes and other government actions. In 2006, protests in rural areas by men and women farmers, peasants and others in Northern Bangladesh demanding equal distribution of electricity to enable irrigation of crops were met by widespread arrests, controls on public gatherings, and ultimately by police firing on unarmed crowds of protestors. In each case, Magistrates were involved first, in sanctioning the arrests, and then once a political settlement was reached, in withdrawing the charges in each case, second in imposing orders prohibiting any public meetings, and finally in sanctioning police firing on the crowds .

Another common cause of complaint (and a corollary to the Magistrate’s arbitrary exercise of powers to initiate prosecution) arises with regard to the Magistrate’s

<sup>11</sup> C.R. Case No. 2319 of 2006.

alleged obstruction of investigation or prosecution of incidents involving powerful members of the executive, particularly where the complainant is from a vulnerable or disadvantaged group. corollary of this is that Magistrates may also intervene to progress a case or fast track it where there is

*“When there are cases involving politically powerful and influential people - we never get justice from the Magistrate’s Court. Why can it not be equal for all citizens? Why does justice have to depend on you connections and who you know?” NGO Activist*

Perhaps the most widespread perception of abuse of power relates to the grant or denial of bail. This occurs both in ‘politically sensitive’ cases and in more routine matters. Notable are several high profile cases over 2002 to 2005, in which the same individual was falsely implicated in a barrage of criminal cases, and then faced a pattern of repeated denial of bail in circumstances in which such actions were wholly unwarranted. So for example, the head of one of the largest development organisations in the world was arrested on charges of petty corruption, and then ‘shown arrested’ in over two dozen other cases. Despite the relatively trivial nature of many of the cases filed against him, he was routinely denied bail by the police and by magistrates, and even by the Sessions Judges, and was compelled to come to the Supreme Court for bail in almost every case. Each time he obtained bail in one case, he was ‘shown arrested’ and denied bail in another, thus enabling the authorities to prolong his incarceration over a period of two months.

*As noted by one well known economist “ The [widespread perception of] the lower courts as corrupt and influenced by political power threatens civil liberties. For example, it can affect bail applications, the ability of judges to deliver impartial justice, and the ability of individuals to access judges in emergency circumstances, in that whether they are able to avail themselves of this right or not is dependent upon the connections they have. Even the price of the necessary documents acts as a deterrent factor.”*

Higher up within the criminal justice system, the impact of lack of separation is also palpable in the workings of the Sessions Court. There appears to be a common pattern for the government of the day to influence the lower judiciary to manipulate the outcome of cases. The most recent example perhaps is the withdrawal in rapid succession of several criminal cases against a leading political figure during a period of ongoing discussions regarding possible alliance between him and the then ruling party, giving rise to speculation in the media that the withdrawal of cases had been promised as the cost of forming an alliance.<sup>12</sup>

<sup>12</sup> Bangladesh: Ruling Coalition Tries to Revive Ershad’ South Asia Analysis Group, 14 September 2006. <http://www.saag.org/%5Cpapers20%5Cpaper1951.html>; ‘Ershad gets fourth acquittal in a month’ Daily Star Law Week, 3 September 2006.

*'As political tensions between the two leading parties usually run high, this sometimes leads to efforts to control and use the magistracy and criminal justice system to harass political opponents and, conversely, to absolve whichever party is in power of wrongdoing. Too often, changes in government result in the dismissal of criminal and corruption cases against members of the newly instated ruling party and the institutionalisation of dozens of criminal and corruption cases against ministers and important bureaucrats from the last government. Law and Policy Reform, ADB, 2003, at 55.*

### **3.1.2 Civil Justice System**

The threat of unfavourable posting or of blocking promotion gives an opportunity for the executive to influence the decision making capacity of lower judiciary over decisions, and in particular over interim orders.<sup>13</sup> Such threats, together with the endemic nature of corruption in the lower courts, mean that more often than not justice may be purchased by the highest bidder, whether a private party or the Government, bidding in the currency of commerce or of power.

In addition, the deputation of judicial officers to executive posts in different ministries allegedly contributes to creating an 'executive' mindset in many judges, given that they may spend significant parts of their career engaged in working within a Ministry or Department, with a resulting (or at least with a resulting perception) of loss of impartiality. The physical placement of judges within the executive, and working side by side with executive officers, may also have facilitated the growth of a symbiotic relationship between certain corrupt officers within the lower judiciary and civil servants.

### **3.2 Lack of Judicial Accountability**

In 2006, a judicial officer known to have given a number of orders discharging ruling party persons from pending prosecutions, publicly stated his intention to contest in the next Parliamentary Election as a candidate from the then ruling political party. Despite severe criticism in the media, and demands raised by the Bar for his removal, no action was taken by any of the concerned authorities to even investigate these statements. Ultimately, following a public interest writ petition filed by a lawyer as petitioner, the High Court Division issued a direction restraining the concerned officer from discharging any judicial functions. The judicial officer concerned sought permission to appeal before the Appellate Division, but his application was rejected.<sup>14</sup>

This case perhaps best demonstrates how even a glaring instance of judicial misconduct does not result in any form of inquiry let alone accountability within the current structures of judicial control and administration. Perceptions of lack of judicial

<sup>13</sup> Ironically, the arbitrary issuance of interim orders – not only at the behest of the executive but also of influential persons and individuals – ultimately led to an enactment to restrict the power of the courts to pass ad interim injunctions (Code of Civil Procedure (Amendment) Act 2003).

<sup>14</sup> 'Judge Chunnu Barred from Duties' New Age, 14 February 20 06, <http://www.newagebd.com/2006/feb/14/front.html#4>, (reportedly no action had been taken despite the Bar Association having drawn the attention of both the Chief Justice and the Law Minister). SC dismisses Judge Chunnu's Plea, Financial Express, 17 February 2006, [http://www.financialexpress-bd.com/index3.asp?cnd=2/17/2006&section\\_id=1&newsid=16136&spcl=no](http://www.financialexpress-bd.com/index3.asp?cnd=2/17/2006&section_id=1&newsid=16136&spcl=no)

accountability at all levels of the judiciary appear to be increasingly widespread among users of judicial services and also the public at large. Such perceptions arise not only from the arbitrary exercise of judicial power at the behest of the executive, as described above, and also from the unchecked use of judicial powers of powers of contempt against persons found to have 'scandalised the judge' (an offence which has no statutory definition and is open to highly subjective interpretation).

#### Using Contempt Powers:

In 2005, the High Court Division convicted editors, publishers and reporters of two national newspapers for contempt, with respect to their reports regarding allegations against an ad-hoc judge of the High Court of tampering with examination result sheets while a student. The father of the concerned judge moved a contempt petition with a submission that publication of such a report amounts to contempt of court. The newspapers produced the copies of investigation reports from the University concerned. The High Court Division held that even if the contents of the reports were true, publication of any report even concerning past conduct of a sitting judge amounts to contempt of court. The Court was reluctant to accept the submission of the newspapers that the report had been published in exercise of their fundamental right to freedom of expression, and in the public interest and that the reported conduct did not relate to the capacity of any person as a judge. In rejecting the submissions of the newspapers the Court further observed that as long as a person can show that he has the experience of practising as lawyer for at least 10 years and a citizen of Bangladesh, he is eligible for the appointment as a justice of the Supreme Court and there is no scope for considering whether his LL.B certificate was genuine or not!"

The issue of judicial accountability has two dimensions, involving judicial recourse on the one hand, and administrative recourse on the other. Of course there is a process of accountability through the judicial process, with errors in decision making by magistrates and judges of the lower courts subject to questioning by higher courts. However, accountability through the administrative process, by exercise of powers of discipline and control, is difficult to achieve in the current situation, given that these lie with the Executive.

Given the lack of control of the judiciary over the lower courts, there is no process of scrutiny by the higher judiciary over magistracy and no scope for any action being taken by higher judiciary in respect of allegations of abuse of power or corruption by magistrates. (It is also notable that where the Judiciary has acted – as for example in the case above – against corrupt or incompetent judicial officers – it has generally done so at the initiative of lawyers or others seeking its intervention through public interest petitions or mobilisation, rather than as a matter of course. This begs the question of the extent and nature of judicial accountability that would follow separation (see discussion below)).

### **3.3 Loss of Confidence in the Judiciary**

As a consequence of such executive control of the judiciary having become the norm, and the lack of effective control being exercised by the Supreme Court, the lower judiciary itself is widely perceived to have moved more and more away from

the basic principles of independence and impartiality. Once exposed to and implicated in corruption and nepotism at the behest of the executive, arguably the lower courts have become more open to other sources of influence and pressure for example through monetary inducements from private parties. Thus the lack of separation has become part of the context and cause of the endemic rise of corruption. With these twin incentives, the lower courts have been reportedly responsible for the arbitrary exercise of powers resulting in the denial of liberty and fair trial rights on a day to day basis. This situation has contributed to a serious public lack of confidence in the courts, and appears to be catalysing increasing resort to self-help as a form of conflict resolution, thus contributing to the increase of violence.

The only solution to prevent executive interference and establish accountability is therefore to separate the judiciary from the executive control. If this is accompanied by enabling more transparent discussion of judicial processes and outcomes, for example in the media, that would in itself reduce the threat of judicial actions being taken or perceived to be taken whimsically and capriciously.

#### **4. HISTORICAL DEVELOPMENTS**

While there may be a perception of increasing levels of executive control over the judiciary, the actual fact of such control has a long history. The contours of such control and interference have marked the operation of the lower judiciary since the British colonial period, and continued during the Pakistan period.

Conscious of this history, the founders of the post-independence Constitution of 1972 framed explicit provisions mandating independence of the judiciary and its separation from the executive at all levels. In the intervening three decades, however, amendments made under different regimes to the original constitutional provisions resulted in major incursions on the constitutional mandate for separation. In addition, the failure to overhaul the inherited institutional structure, and the continued intervention of deeply embedded vested interests, combined to prevent separation from taking place. In the post 'democratic' years since 1990, the judiciary at all levels has been caught up in the partisan political divisions affecting the major institutions of state. Further, a political culture of violence and intimidation, in which the criminal law is seen as a tool for repression of the political opposition, has created active disincentives to forging the necessary political will to bring about separation.

In the absence of any legislation from any party giving force to the constitutional mandate for separation, it was ultimately the Supreme Court which gave directions in the Masdar judgment for effecting separation, and the process of implementation of this judgment is continuing today. The developments which led to the filing of the Masdar case and its ultimate outcome are set out immediately below.

#### 4.1 The Colonial Heritage, 1872- 1947

*"It is troubling to be the executive officer in the morning, and then wear a judicial hat and sit in judgment on my own decisions in the afternoon!"*<sup>15</sup>

The problem of lack of separation of the judiciary from the executive stems from British colonial period.

In the lower civil courts, although judicial and executive functions were formally separated, personnel were not, and often judges received executive appointments while executive officers received judicial appointments.

In the lower criminal courts, the area where executive control is still most apparent, the pattern for lack of separation was set early on. The view that "the man who can punish is the ruler" and that "good administration requires that it should be strong and it cannot be strong without the concentration of authority", informed these arrangements.<sup>16</sup> From 1872 onwards, the chief executive officer at the district level, the District Collector, was also made responsible for judicial functions as the District Magistrate. Despite widespread criticism, this arrangement was embedded in the Criminal Procedure Code of 1898 ('CrPC') which remains in force today. Magistrates, who were appointed by and remain under the control of the Executive, exercised judicial powers under the CrPC, as noted above.

#### 4.2 Developments at Partition

In 1947, with the end of British rule, both the newly independent states of India and Pakistan inherited the colonial legacy of laws which formally authorised executive control over the judiciary, and an institutional structure, prevailing attitudes and approaches which reinforced it. The territories which now comprise Bangladesh formed the eastern wing of the newly created state of Pakistan, known as East Pakistan.

In Pakistan, the new Constitution of 1956 called for the State to ensure separation of the judiciary. However, only very limited measures were taken to implement this provision. In Punjab, in the West Wing, certain practical steps were taken following administrative directions from the High Court. These proved ineffective, in the absence of any real resource or political commitments and in any event, came to an abrupt halt with the promulgation of Martial Law in 1958.<sup>17</sup> In East Pakistan new legislation ( the Code of Criminal Procedure (East Pakistan Amendment) Act (Act XXXVI of 1957) ('the 1957 Act') envisaged dividing the Magistracy into two classes, Executive and Judicial, and ensuring control of the District Magistrate over the

<sup>15</sup> John Beames, *Memoirs of a Bengal Civilian*, (Eland, 2003) Beames joined the Indian Civil Service in 1859, and his last posting was in Chittagong.

<sup>16</sup> Author, 'Executive and Judicial Functions', (1902) 18 Law Quarterly Review 349

<sup>17</sup> At independence, separation was also effectively in place within the former Princely State of Bahawalpur, but this set up, together with the Punjab experiment (as mandated by administrative directions of the High Court) was abolished with the promulgation of martial law in 1958: Justice Shafiur Rahman, 'Study on Separation of the Judiciary from the Executive in Pakistan', UNDP, 2005, (mimeo) at p...

former, and control of the Sessions Judge and the High Court over the latter. The Executive Magistracy was to comprise of District Magistrates, Additional, Sub-Divisional and Special Executive Magistrates. The Judicial Magistracy was to comprise of Judicial Magistrates, and Magistrates of the First, Second and Third Class. However, this law was never published as a notification in the Official Gazette, and therefore did not come into force.

In the absence of any formal legal framework to underpin separation, the practice of overlapping executive and judicial functions, and of interchanging executive and judicial officers continued. In the Civil Courts, members of the Civil Service of Pakistan often served as Additional District and Sessions Judges upto the 1960s. In the Criminal Courts too, Magistrates continued to perform both judicial and executive functions.

A major step towards separation was taken with the establishment of the Hamoodur Rahman Law Commission, headed by a former Supreme Court judge, which functioned from 1967-1970.<sup>18</sup> The Commission recommended that separation be attempted in both wings on the lines proposed in the 1957 Act. Before any steps taken to give effect to these recommendations, the War of Liberation took place, and Bangladesh was established as an independent nation in 1971.

## **4.3 Developments Post-Independence**

### **4.3.1 The New Constitution**

Given the long experience of politicisation of the judiciary and of executive control of the lower judiciary in both the British and Pakistan periods, lawmakers in the newly independent Bangladesh were fully alive to the importance of promulgating constitutional safeguards to ensure effective independence for the judiciary. Consequently, the new Constitution of 1972 provided for full separation of the entire subordinate judiciary, including Magistrates.

The Constitution, in its original incarnation, articulated a principle of judicial independence (Art. 22) as a guiding principle for state action, and explicitly guaranteed that the Chief Justice and the other judges of the Supreme Court would be independent in the exercise of their functions (Art. 22, read with Art. 94(4)). It also noted that the provisions for the separation of the subordinate judiciary from the executive 'shall be implemented as soon as possible' (Fourth Schedule, Temporary and Transitional Provisions, Para 6).

These statements were buttressed with specific provisions addressing the appointments, removal, and other terms and conditions of service of both the higher and lower judiciary. With regard to appointments to the subordinate courts, the Chief Justice of Bangladesh was originally empowered to appoint all District Judges. The President was to appoint all other Officers in the Judicial Service and Magistrates exercising Judicial Functions according to Rules made by him in consultation with

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<sup>18</sup> See in particular Report of the Hamoodur Rahman Law Commission, Chapter IX, pages 231 to 267.

the Public Service Commission and the Supreme Court. The superintendence and control of all subordinate courts was to vest with the Supreme Court.<sup>19</sup>

Box 3: Constitution of 1972 - Provisions on Separation

Art. 22	'Separation of the Judiciary from the Executive' as a Fundamental Principle of State Policy
<b>SUBORDINATE COURTS</b>	
Art. 109	<b>Superintendence and Control</b> Ø HCD's superintendence and control over all subordinate courts
Art. 114 Art. 115	<b>Subordinate courts to be as established by law</b> <b>Appointments</b> Ø District Judges appointable by the President on the SC's recommendation Ø Others including Magistrates exercising judicial functions appointable by President - according to Rules made by President / on consulting appropriate PSC/ <u>on consulting SC</u>
Art. 116	<b>Control and discipline</b> Ø SC's powers of control (including posting/ promotion/grant of leave) and discipline of persons in judicial service and magistrates exercising judicial functions
Art. 133	<b>Appointment and Conditions of Service</b> Ø Regulated by law made by Parliament, subject to Constitution Ø President may make Rules until such laws framed, which would be effective subject to law's provisions
Art. 135	<b>Reorganisation of Service</b> Ø May be done by law by 'creation, amalgamation or unification of services' which law may vary or revoke condition of service
Fourth Schedule Art. 6 (6)	<b>Transitory Provisions</b> Ø Part VI Chapter II (on subordinate courts) 'shall be implemented as soon as practicable', and until then such matters to be regulated (subject to law) as was done before commencement of the Constitution

#### **4.3.2 Constitutional Amendments, and Other Developments**

The original constitutional framework proved impermanent, and the three decades since independence saw major encroachments being made both through legal amendments and in practice. The key changes regarding the lower judiciary are highlighted here.

In 1975, within barely three years of its promulgation, the then Government enacted the Fourth Amendment to the Constitution, resulting in the re-working of both constitutional chapters on the Judiciary (Part VI, Chapters I and II). Most critically, it curtailed the powers of the Chief Justice and the Supreme Court in the matter of appointments of both the superior and subordinate judiciary (Arts 95 and 115), and made major encroachments into the Supreme Court's powers of control (including posting, promotion and grant of leave) and discipline of the subordinate courts (Art. 116). The consequence, as noted by a respected former judge of the Supreme Court, was that 'Article 116, as it stands now, is the insurmountable block against separation of the judiciary from executive control.'

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<sup>19</sup> Art. 108-109 of the Constitution of 1972, respectively.

<sup>20</sup> Justice Naimuddin, "The Problems of the Independence of the Judiciary in Bangladesh", in Bangladesh Institute of Law and International Affairs (BILIA), *Human Rights in Bangladesh: A Study of Standards and Practices*, (BILIA, Dhaka: 2001) at p.187.

In 1978, some of these changes were later reversed by the Second Proclamation Order No. IV of 1978. These new amendments reasserted the requirement of the President's consulting with the Supreme Court regarding the control and discipline of subordinate judges and magistrates exercising judicial functions (Art. 116).<sup>21</sup>

In 1988, further incursions into judicial independence – in particular of the superior judiciary – were made by the Eighth Amendment to the Constitution which provided for the decentralisation of the unitary High Court Division (Art. 100), necessarily thereby weakening the High Court's control over the lower courts. Later in Anwar Hossain's case, the AD described this amendment as an incursion on the basic structure of the Constitution, and set it aside.<sup>22</sup>

Significantly on 19 November 1991, the joint declaration issued on behalf of the BNP- and Awami League-led mass movement for democracy included a demand for separation of the judiciary from the executive.

Following the return of a democratic dispensation in 1991, the Twelfth Amendment to the Constitution extended the High Court's supervision and control over subordinate court to include tribunals (Art. 109). However, no other steps were taken by the Government towards effecting full separation for the next ten years.

Box 4: Current Constitutional Provisions on Separation

	<b>SUBORDINATE COURTS</b>
Art. 109	<b>Superintendence and Control over Courts</b> Ø HCD's superintendence and control over all subordinate courts and tribunals
Art. 114 Art. 115	<b>Subordinate courts to be as established by law</b> <b>Appointments</b> Ø District Judges appointable by the President in accordance with Rules Ø Others including Magistrates exercising judicial functions appointable by President - according to Rules made by President
Art. 116	<b>Control and discipline</b> Ø President vested with powers of control (including posting/ promotion/grant of leave) and discipline of persons in judicial service and magistrates exercising judicial functions, which power to be exercised <u>in consultation with SC</u>
Art. 116A	Ø Subject to provisions of the Constitution, all persons employed in the judicial service and all magistrates shall be independent in the exercise of their judicial functions
Art. 133	UNCHANGED
Art. 135	UNCHANGED
4 <sup>th</sup> Schdl Art. 6 (6)	UNCHANGED

<sup>21</sup> The High Court later held that this provision for consultation was mandatory, and required for posting, promotion, transfer or any other disciplinary action in respect of a judicial officer, including his/her being transferred outside the judicial service: *Aftabuddin v Bangladesh* 48 (1996) DLR HCD 1; *Idrisur Rahman v Bangladesh* 1999 BLD 291, affirmed in *Bangladesh v Idrisur Rahman* 1999 BLD (AD) 1. See also the *Masdar Hossain Case*, infra, where the AD held that the consultation process should involve primacy being given to the views of the Supreme Court, which, rather than the political executive, is 'the best judge of judicial matters and judicial officers'.

<sup>22</sup> 1989 BLD (Spl) 1.

### ***4.3.3 Litigation to Catalyse Change***

During this period, significant initiatives were taken through litigation to raise challenges to various issues on the ground that they violated the constitutional principle of separation of the judiciary. In 1999, following the most significant such challenge, the Appellate Division, in *Masdar Hossain's* case, issued a series of declarations and directions on the Government to effect changes in the law and practice regarding the control and administration of the subordinate courts and of Magistrates exercising judicial functions. These directives are currently pending full implementation by the Government (see section 5 below).

### ***4.3.4 Political Consensus for Separation***

The judgment was reinforced by the unequivocal commitments made by both leading political parties in their election manifestos in 2001 to separate the judiciary from the executive.

### ***4.3.5 Separation as a Priority for Development***

In their most recent dialogues with the GoB, development partners have highlighted the need to ensure separation of the judiciary for purposes of good governance and to ensure access to justice, safety and security. The PRSP also contains reference to the importance of separation.

## **5. THE MASDAR HOSSAIN JUDGMENT**

### **5.1 The Judgment**

In its landmark Masdar judgment, the Appellate Division addressed head-on certain concerns regarding executive control over the judiciary. It reaffirmed the principle of independence of the judiciary, and elaborated on the constitutional position and practice regarding separation of the judiciary from the executive. Most importantly, it laid down twelve declarations and directions ('the twelve commandments') for implementation by the Government in this regard.

This decision originated in a constitutional challenge brought before the High Court by 218 persons in judicial service, including Masdar Hossain. They argued that the subordinate courts were part of the judiciary and therefore persons in judicial service could not be included within the Bangladesh Civil Service (Reorganisation) Order 1980, nor could they be controlled as though they were a part of the Bangladesh Civil Service, as defined by the Bangladesh Civil Service Rules 1981 ('the BCS Rules'). The High Court Division held in favour of Hossain and the other judges, and after the Government appealed this decision and lost, the Appellate Division affirmed the High Court's judgment.

In this judgment, the Appellate Division affirmed that a separate Judicial Service should be established, distinct from the Executive and Administrative Cadres of the Bangladesh Civil Service. It also noted that this separate Judicial Service should include both persons in judicial service and magistrates exercising judicial

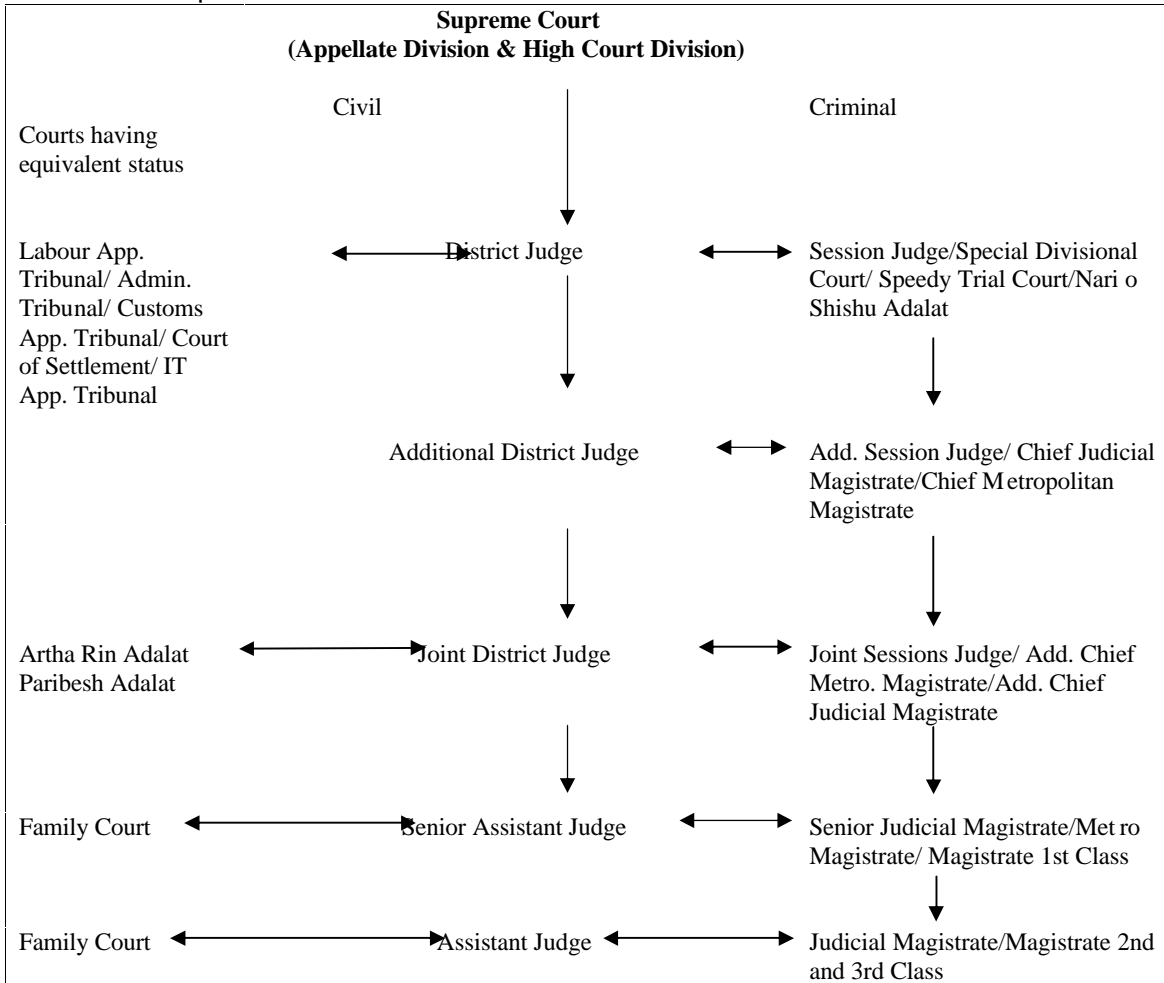
functions. It stated that these two categories formed a class distinct from other services of the Republic, and that they could not be 'treated alike or merged or amalgamated with any other service, except a service of an allied nature'. In consequence, the Court held that the Government's inclusion of judicial officers within the Bangladesh Civil Service (Reorganisation) Order 1980 as the Bangladesh Civil Service (Judicial) was beyond the terms of the Constitution.

The judgment identifies five key characteristics of independence of the judiciary, namely: security of tenure; recruitment to the Judicial Service as permanent and through a transparent Judicial Service Commission; security of emoluments including pension etc.; institutional functional independence of the Subordinate Judiciary from Parliament and the Executive; and financial autonomy within the sphere/funds allocated.

The judgment contains twelve specific directions on the Government for measures to ensure the separation of the judiciary, by creating a new Judicial Service to include the magistracy. These directions, among others, required the Government:

- to set up two separate bodies, the Judicial Service Commission (JSC) (to recruit persons in judicial service, including judicial magistrates), and the Judicial Pay Commission (JPC) (to fix pay scales for members of the judicial service), specifying the nature of their composition, powers and functions.
- to frame and bring into force four sets of rules relating to the establishment of the JSC (for recruitment of members of the Judicial Service), establishment of the JPC (for fixation of their pay and benefits), for ensuring the manner of the constitution, composition, recruitment and suspension of members of the service, and for ensuring matters relating to posting, promotion, and other service conditions.
- for the purpose of incorporating magistrates within the judicial service, to frame amendments to the Code of Criminal Procedure and other laws that empower Magistrates to try criminal cases, so that all references to 'Magistrate' in existing laws would be replaced by the term 'Judicial Magistrate'.

Box 5: Proposed Court Structure



Now every institution, authority and individual associated with the judicial administration is required to advance, strengthen and achieve these measures.

Box 6: 'The Twelve *Masdar Hossain* Directions'

- 1) It is declared that the judicial service is a 'service of the Republic' within the meaning of Article 152(1) of the Constitution, but is a 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.
- 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 13 of the Constitution and the Services (Reorganisation and Conditions) Act, 1975 have no application the above matters in respect of judicial functions.
- 3) It is declared that the creation of BCS (Judicial) cadre along with other BCS executive and administrative cadres by the Bangladesh Civil Service (Reorganisation) Order, 1980 with amendment of 198 is ultra vires the Constitution. It is also declared that Bangladesh Civil Service Recruitment Rules, 1981 are inapplicable to the judicial service.
- 4) 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 to implement its provisions which is a constitutional mandate and not a mere enabling power. It is directed that the nomenclature of the judicial service shall follow the language of the Constitution and shall be designated as the Judicial Service of Bangladesh or Bangladesh Judicial Service. They are further directed that either by legislation or by framing Rules under Article 115 or by executive order having the force of Rules, a Judicial Services Commission be established forthwith with majority of members from the Senior Judiciary of the Supreme Court and the subordinate courts for recruitment to the Judicial Service on merit with the objective of achieving equality between men and women in the recruitment.
- 5) 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 favour) and other terms and conditions of service, consistent with Article 116 and 116A, as interpreted by us, be enacted or framed or made separately for the judicial service and magistrates exercising judicial functions keeping in view of the constitutional status of the said service.
- 6) The impugned orders in the writ petition dated 28.2.94 and 2.11.95 are declared to be ultra vires the Constitution for the reasons [stated in] the judgment. 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 review a continued one. The pay etc. of the judicial service shall follow the recommendations of the Commission.
- 7) 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 opinion of the Supreme Court shall have primacy over those of the Executive.
- 8) The essential conditions of judicial independence in Article 116A, elaborated in the judgment, namely, (1) security of tenure, (2) security of salary and other benefits and pension and (3) institutional independence from the Parliament and the Executive shall be secured in the law or rules made under Article 133 or in the executive orders having the force of Rules.

- 9) 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. Necessary administrative instructions and financial delegations to ensure compliance with this direction shall be issued by the Government to all concerned including the appellant and other respondents to the writ petition by 31.05.2000.
- 10) It is declared that the members of the judicial service are within the jurisdiction of the administrative tribunal. The declaration of the High Court Division to the opposite effect is set aside.
- 11) 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.
- 12) 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 quo [ante] as on 8.1.94 vide paragraph 3 of the order of the same date and also by the further directions of the High Court Division in respect of Assistant Judges and Senior Assistant Judges. If pay increases are effected in respect of other services of the Republic before the Judicial Pay Commission gives its first recommendation the members of the judicial service will get increases in pay etc commensurate with their special status in the Constitution and in conformity with the pay etc, that they are presently receiving.

The changes envisaged to the structure of the lower judiciary following compliance with the Masdar judgment are illustrated below:

## 5.2 Post-Masdar Developments

Despite the passage of almost six years, the Government has yet to fully comply with the Masdar directions. The earliest measure taken to comply with the judgment concerned the financial autonomy of the Supreme Court.

Subsequently, the Government promulgated the JSC Rules and published them in the Bangladesh Gazette.<sup>23</sup> Thus a new and separate 'Bangladesh Judicial Service'<sup>24</sup> was created, and a seven member Judicial Service Commission was established. Since then, some 230 persons have been appointed to the judicial service by the JSC, and are now posted at various courts across Bangladesh.

Following protracted hearings before the Appellate Division regarding the proposed legislation required to secure the other key aspects of independence of the lower judiciary regarding security of tenure, superintendence and control etc, the Government in 2006 framed further legislation. This included the promulgation of

<sup>23</sup> On 28.1.2004

<sup>24</sup> Pursuant to a Notification dated 23.11.2004

three sets of Rules regarding the terms and conditions applicable to the Judicial Service, as follows:

- *The Bangladesh Judicial Service (Pay Commission) Rules ('the JPC Rules')*
- *The Bangladesh Judicial Service (Service Constitution, Composition, Recruitment and Suspension, Dismissal & Removal) Rules ('the Composition Rules')*
- *The Bangladesh Judicial Service (Posting, Promotion, Leave, Control, Discipline and other Service Conditions) Rules ('the Posting Rules')*

The JPC Rules provide for establishing a JPC comprising of the Auditor General, Secretary, Finance Division, Secretary, Ministry of Establishment, Secretary, Ministry of Law and the Registrar, Bangladesh Supreme Court.<sup>25</sup> The JPC's functions include review and recommendation of the salary structure of judicial officers, on consideration of the salary/remuneration structure pertaining to the Judiciary.<sup>26</sup>

The Composition Rules provide for the controlling authority for the Judicial Service, and for matters of recruitment, suspension dismissal and removal.<sup>27</sup> They provide that the controlling authority for the Judicial Service would be the 'Appropriate Authority' and define the Authority as "the President or a Ministry or Division which is entrusted with the administration of the Service under the Rules of Business as framed by the President under Article 55(6) of the Constitution'. With regard to increase and decrease of number of posts and re-composition of the Service, these Rules provide that the 'Appropriate Authority' is required to obtain consent from the Ministry of Establishment and the Ministry of Finance. They further provide that the Judicial Service shall comprise of such posts as are set out in the Schedule, but *the Schedule does not contain any reference to Magistrates and the definition of "Judicial Service" also does not include Magistrates.*

The Posting Rules<sup>28</sup> provide that the Appropriate Authority shall determine posting of members of the Service in consultation with the Supreme Court, but do not specify that the Supreme Court's opinion would have primacy. They also do not specify the consequences of non-compliance with the Rules. Further they explicitly sanction continuation of the practice of deputation and appear to widen its scope by providing that in addition to posts which have been reserved under a gazette notification (being SRO dated 22.2.2001) Judicial Officers may also be posted on deputation to "any other government office or any other authority" .

In addition to the above four sets of rules, and in order to ensure the incorporation of judicial magistrates into the Judicial Service, the Government has framed (but not yet notified) *the Draft Code of Criminal Procedure (Amendment) Bill ('the CrPC Bill')*. This has been pending scrutiny by the Parliamentary Standing Committee on Law and Justice since February 2006. The Draft Bill provides for creating two classes of

<sup>25</sup> Promulgated and notified in the Bangladesh Gazette on 21.5.2006 , pursuant to S.R.O. No. 81/Law/2006-Am/Ab(Implementation-1)/Misc.-3/2006.

<sup>26</sup> Rule 3, JPC Rules.

<sup>27</sup> Published in the Gazette on 12.6.2006 under S.R.O. No. 141 -Law/2006.

<sup>28</sup> Promulgated and published in the Bangladesh Gazette on 12 June, 2006 pursuant to SRO No. 142 - Law/2006.

magistrates, namely Executive Magistrates, who would be recruited from amongst persons employed in the Bangladesh Civil Service (Administration)<sup>29</sup> and Judicial Magistrates from amongst persons employed in the (newly created) Bangladesh Judicial Service. It also replaces all existing references in the CrPC to 'Magistrate' without any qualifying word by the term 'Judicial Magistrate'. Finally, it clearly differentiates the powers and functions of Executive and Judicial Magistrates respectively, both under the Code<sup>30</sup> and other laws.<sup>31</sup> So the powers and functions of Judicial Magistrates under a law other than the Code would include the appreciation or shifting of evidence or the formulation of any decision which exposes any person to any punishment or penalty or detention in custody pending investigation, inquiry or trial or other proceeding or would have the effect of sending him for trial before any Court. In contrast the powers of Executive Magistrates would be limited to functions which are administrative or executive in nature, such as the granting of a license, the suspension or cancellation of a license, sanctioning a prosecution or withdrawing from a prosecution.

In the meantime, a number of actions have been taken by the Government which detract from the letter and spirit of the Masdar judgment, and have themselves been the subject of questioning and further constitutional challenge by lawyers focused on ensuring compliance with the judgment. One such case concerns the transfer of judicial officers without the consent of the Chief Justice.<sup>32</sup> Another two writ petitions have been filed challenging the appointment of Additional District Magistrates and the creation of new Magistrate's Courts without consultation with the Supreme Court.<sup>33</sup> Both these writ petitions are now pending before the High Court Division for final hearing.

At the time of writing, the Masdar judgment remains under active consideration by the Supreme Court. In July 2006, Masdar Hossain's lawyers, intervening in the case, had placed before the AD a comparative chart depicting 'the anomalies that the government has created' with regard to implementation of the 12-point directives and

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<sup>29</sup> Similar to the current situation, the Government may appoint any person as an Executive Magistrate and, as such, it is not mandatory that Executive Magistrates must always belong to Bangladesh Civil Service (Administration).

<sup>30</sup> Proposed Schedule III.

<sup>31</sup> Proposed Section 6A.

<sup>32</sup> In March 2005, the Ministry of Law sought the approval of the Chief Justice for transferring several judicial officers of different levels including District Judges, Joint District Judges and Senior Assistant Judges. Upon consideration of the notes and records of the respective judicial officers, the Chief Justice had reportedly opined that out of the list of judicial officers whose names had been submitted, five officers should not be transferred from their posts. Despite such an opinion, the Ministry transferred the judicial officers. The High Court Division later directed the government to show cause as to why such transfer of judicial officers against the opinion of the Chief Justice should not be declared to have been without lawful authority. See Writ Petition No. 2937 of 2005 filed by several of the transferred judges.

<sup>33</sup> In a public interest litigation (Writ Petition No. 1806 of 2006) filed by a lawyer of the Supreme Court the appointment of Additional District Magistrates was challenged on the ground that it had been done without complying with the directions of the Appellate Division, which required the Government to consult the Chief Justice and the Supreme Court in making such appointment. Another public interest litigation (Writ Petition No. 2419 of 2006) was filed challenging the appointment of a Magistrate in Meherpur by executive order without consultation with the Supreme Court; the Government ultimately withdrew the concerned Magistrate from his office.

pointing to many discrepancies between the notified rules and the judgment. In November 2006, the Appellate Division has yet to rule on these matters.

## **6. CONCERNS REGARDING POST MASDAR DEVELOPMENTS**

This section outlines some of the apparent discrepancies between the four sets of Rules that have been promulgated (the Notified Rules), and the earlier versions approved by the AD in May 2003 (the Modified Rules). On a reading of the texts, reinforced by the views of jurists and civil servants consulted in the course of this study, certain concerns arise regarding whether and to what extent the Notified Rules would fully achieve separation of the lower judiciary from the executive. These concerns are set out below and relate in turn to the composition of various bodies, their powers and functions, the nature of the controlling authority and the nature and composition of the judicial service, inasmuch as in each case, there remains considerable practical scope for executive interference at each level.

### **6.1 Composition of the JSC and JPC**

The JSC as finally established has only seven as opposed to the eleven members earlier proposed. Among them, arguably the majority of the Commission members are not judicial officers, that is if the Secretary, Ministry of Law is considered to be an administrative officer by virtue of serving in an administrative post.<sup>34</sup>

The composition of the JPC also appears to leave considerable scope for executive control of the body. The current composition, and the rule that a quorum of the commission requires only three persons, means that the JPC could if necessary take decisions without the presence or participation of any member of the judiciary.<sup>35</sup>

### **6.2 Composition of the Judicial Service**

The exclusion of any reference to Magistrates in the Schedule of the Composition Rules and in the definition of Judicial Service indicates that the Magistracy would not be included in the definition of the judicial service. This omission appears to indicate that the Magistracy is not going to be part of the Judicial Service and would continue to be controlled by the executive.

### **6.3 Powers and Functions**

The Posting Rules provide for posting Judicial Officers on deputation to various offices, including the Ministry of Law, the Supreme Court, the Parliamentary

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<sup>34</sup> At this stage, this objection has not been raised by any party to the litigation, possibly due to a collective concern to preempt any further delay in the implementation of the judgment, and to enable the JSC, however constituted, to function and make much needed appointments to vacant judicial posts so as to reduce the backlog in the courts.

<sup>35</sup> The original draft Rules envisaged a JPC dominated by executive officers, and did not include any Supreme Court judge. In contrast, the modified Rules as approved by the Appellate Division had recommended that for primacy of the Supreme Court's representatives, the following persons should be included: an Appellate Division Judge (to be appointed in consultation with the Chief Justice) to serve as the Chairman; a High Court Division Judge (to be nominated by the Chief Justice); a Law Commission Member and a judge from the District Judiciary.

Secretariat and the Election Commission. The Posting Rules further appear to widen the scope of deputation from that envisaged by the original Draft Rules.

#### **6.4 Controlling Authority for the Judicial Service**

The provision regarding the 'Appropriate Authority' in the Composition Rules, together with the provision in the Rules of Business for the Law Ministry to be responsible for administration of the Judicial Service would suggest that the Ministry will remain the controlling authority without further changes. This indicates a need for amendment of the Rules of Business to define the Appropriate Authority as an independent body, separate from any Ministry or Division.

With regard to posting, Rule 3 of the Posting Rules provides that the 'Appropriate Authority' shall determine posting of the members of the Service in consultation with the Supreme Court, thus omitting the requirement (included in the original draft Posting Rules) that in the event of difference of opinion, the opinion of the Supreme Court would have primacy.

The Posting Rules are silent about the consequence of non-compliance with the Rules, i.e they do not specify whether a posting without consultation with the Supreme Court would be invalid, and it may therefore be argued that the Rules are directory not mandatory. This leaves open the possibility that the opinion of the 'Appropriate Authority', that is the Executive, would prevail.

#### **6.5 Terms and Conditions of Service**

With respect to reviewing the salary structure of Judicial Officers, the original draft JPC Rules provided that the factors to be taken into consideration include '...the existing salary/remuneration structure' (Rule 3), implying reference to the salary/remuneration structure prevailing for other Services besides the Judiciary. However the notified Rule 3 indicates that only the salary/remuneration structure pertaining to the judiciary would be considered. This may give rise to an anomalous situation in which the remuneration structure for the judiciary does not match that for the administrative service.

## Box 7: 'Deputation' : A Remaining Roadblock to Separation

The 'deputation' of persons in judicial service to various non-judicial executive posts is a particularly controversial issue affecting the separation process. As noted above, about 15% of judicial officers are still routinely posted on 'deputation' to non-judicial posts in various Ministries, Departments, and Corporations. Deputation is a service condition provided in respect of services as defined by the Bangladesh Civil Service Recruitment Rules, 1981 ("the 1981 Rules").

In Masdars Case, the AD held that these Rules are unconstitutional to the extent that they relate to the judiciary, and that the Judicial Service is not a Service as understood by these Rules, observing that "... as oil and water cannot mix, the judicial and civil administrative executive services are non-amalgamable" (para 41). It also noted that although the judicial service is declared to be a "service of the republic", the status of judicial officers is not akin to that of "executive" officers who form part of the Government administration.

It may be noted that the Constitution defines 'Judicial Service' as a service comprising of persons holding *judicial posts*, and contains no provision for appointment of members of the Judicial Service on deputation/secondment to executive posts. The absence of any such provision appears to indicate that the framers of the Constitution did not envisage that members of the judicial service would be allowed to serve as executive officers. Indeed, the entire practice of deputation appears contrary to constitutional provisions on the independence of the judiciary (see Articles 22, 35(3) and 116A). If the executive branch of the Government is vested with the authority to withdraw judges from the judicial service and post them in executive posts in executive ministries and departments, then the constitutional concept of functional independence of the judges and judicial magistrates would appear to be wholly undermined.

Thus the continuing practice of deputation – in respect of posting judicial officers to executive posts -- appears contrary to the spirit of the judgment as well as the Constitution.

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The question now is of how the practice of deputation would be addressed in the draft laws framed pursuant to the Masdar Hossain judgment.

The initial Draft Rules submitted by the Government to the AD contained no provision for such deputation. The Modified Rules approved by the AD by its order dated 26.1.2003 first included such a provision. Rule 7 of the Modified Rules envisages a situation whereby judicial officers may be posted on deputation to (a) the Supreme Court, (b) the Ministry of Law Justice and Parliamentary Affairs against the reserved posts and (c) any other Ministry, the Parliament Secretariat or Election Commission. This provision did not seem to allow posting of judicial officers to any government department or corporation. Subsequently, given the AD's direction allowing the President to reframe the Rules, the Government widened the scope of deputation providing for persons in judicial service to be posted to any Ministry, Department or Corporation. This remains the position in the notified Posting Rules.

## 7. COMPARATIVE DEVELOPMENTS AND LESSONS LEARNED

In the post-colonial period, separation of the judiciary has been a central focus of constitutional and political reform for South Asian states. Here it may be useful to consider how efforts to achieve separation developed in two states – namely India and Pakistan -- with similar judicial and legal frameworks to those operating in Bangladesh. Such a comparison yields useful lessons regarding the nature of challenges faced in the process and the key factors for effecting change.

### 7.1 Developments in India

The Constitution of India 1950 provides for the State to consider the separation of the judiciary as a fundamental principle of state policy at both Central and State levels.<sup>36</sup> The constitutional provisions have been reflected in and implemented through legislation or executive orders or interpretation in judicial decisions. A key role in effecting separation of the lower judiciary from the executive has been played by the Law Commission of India, as well as the Supreme Court.

#### Box 8: The Indian Experience

1950	Constitution mandates separation as fundamental principle of state policy
1958	<u>Fourteenth Law Commission of India</u> recommends separation, and training and oversight of judicial magistrates.
1973	<u>Keshavananda Case</u> : Supreme Court holds that independence of judiciary is part of basic structure
1974	<u>SP Gupta's Case</u> : Supreme Court holds that Chief Justice's opinion to have primacy over the Executive re SC appointments
1992	<u>All India Judge's Association Case</u> : SC gives directions to ensure full separation of lower judiciary including setting up First National Pay Commission
	<u>Shetty Commission Recommendations</u>
	<ul style="list-style-type: none"> <li>Ø uniform designation of judicial officers</li> <li>Ø recommended pay scales (max Rs 24,850 for DJ);</li> <li>Ø retirement age of 60 years</li> <li>Ø working library at judges' residence</li> <li>Ø residential accommodation and office room</li> <li>Ø state vehicles for every DJ and C JM</li> <li>Ø judicial education and training</li> </ul>
2005	Shetty Commission recommendations awaiting full implementation

In 1958, the Law Commission first examined the question of separation of the judiciary from the executive in its *Fourteenth Report* titled '*Reforms of Judicial Administration*', and found that several States had not taken adequate measures in this direction, despite a number of efforts in this regard made even prior to

<sup>36</sup> Article 50, Constitution of India: 'The State shall take steps to separate the judiciary from the executive in the public services of the State.' See also Art. 235 re the subordinate judiciary.

independence.<sup>37</sup> The Law Commission continued to pursue this matter in its subsequent reports until its *Forty-First Report*, which led to the revision and replacement of the Criminal Procedure Code of 1898 by the Criminal Procedure Code of 1973 ('the 1973 Code'), enacted by Parliament.

The 1973 Code provided for the separation of judicial magistrates from the executive throughout the country, including in the so called metropolitan areas (any area with a population exceeding one million and so designated by the State Government). It provided for separate powers and functions and for separate lines of control and administration for judicial and executive magistrates respectively. Under these provisions, Judges of the Sessions Courts, Judicial Magistrates of the First and Second classes and the Metropolitan Magistrates are appointed by the respective High Courts. The High Courts also appoint from amongst the Magistrates of the First class a Chief Judicial Magistrate and an Additional Chief Judicial Magistrate and, in metropolitan areas, a Chief Metropolitan Magistrate and an Additional Chief Metropolitan Magistrate. The High Courts may also appoint Special Magistrates on the request of the Central or State governments. In contrast, the Executive Magistrates, including the District Magistrate, Additional District Magistrates and Special Magistrates, are appointed by the concerned State Governments.

The difference between judicial and executive magistrates is that the former (judicial magistrates of the first or second class or Metropolitan Magistrates) are responsible for trying offences under the Indian Penal Code. The executive magistrates as their name implies, perform only non-judicial functions such as passing orders for arrest, security for keeping peace and good behaviour, removal of public nuisance, dealing with urgent cases of nuisance or apprehended danger, etc. Thus the judiciary in criminal matters has been completely and uniformly separated from the executive throughout the country, with regard to their powers and functions. However concerns remained regarding the control and administration of judicial magistrates in practice.

In 1992, the Supreme Court, through a notable ruling in the *All India Judges Association Case*, followed by subsequent clarifications and expansion, substantially secured and enhanced the independence of the lower judiciary.<sup>38</sup> The Court held

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<sup>37</sup> Even prior to independence, efforts were underway to design schemes to effect separation of the lower judiciary. So for example, in 1946, the State of Madras appointed a Committee to examine separation of the judiciary at the magisterial level from the executive. The Committee's recommendations included classifying the various functions assigned to Magistrates under the Criminal Procedure Code and other laws into police, administrative and judicial functions. In 1949, implementing these recommendations, the State of Madras then shifted judicial functions to Magistrates, and also removed control over Magistrates from the District Collector (the executive). This was done by a Government Order, rather than legislation. In 1951, the State of Bombay achieved the same goal by legislation. Different States and Union Territories in the country adopted these two models at different times in pursuance of the constitutional command. In its Fourteenth Report, the Law Commission emphasised the urgency of the matter and recommended that with respect to the criminal courts the Bombay model should be implemented all over the country.

<sup>38</sup> *All India Judges Association v Union of India* AIR 1992 SC 165; AIR 1993 SC 2493. On a review petition by the Union of India, the Supreme Court upheld its main judgment and rejected the argument of the Union that their judgment was an interference in the powers of the legislature or executive or that it would involve unbearable financial burdens. However, the Supreme Court clarified and modified some of the directions it had laid down.

that for purposes of their service conditions the members of the judiciary are comparable to the members of the other two branches of the government, namely, the legislative and the executive, and not to the civil servants or administrative staff of the government. It accordingly directed the Union of India and the States to take various necessary steps, including the creation of an all India judicial service, prescribing certain minimum qualifications for recruitment to lower judiciary, and providing various improvements to their service conditions.

Pursuant to the directions of the Court, the Government of India appointed the First National Judicial Pay Commission ('the Shetty Commission') on 21 March 1996. The Commission recommendations included:

- framing of Rules by the High Courts for the retirement of judges, specifying particular age;
- establishing appropriate nomenclature for the judicial officers;
- providing for the Chief Judicial Magistrate to have the same position as the District Judge;
- formulating recruitment and promotion norms for different cadres of judicial officers and
- taking steps for judicial education and training.

Following the principles laid down by the Supreme Court in the *All India Judges' Association* case that the judges should be at par with the political executive and legislature and not with the administrators, the Shetty Commission also made recommendations in relation to

- pay scales for the judicial officers' allowances and facilities including providing domestic help allowance for retired judicial officers, and
- the creation of an All-India Judicial Service.

The Supreme Court then directed the concerned State Governments to implement the Commission's recommendations (as modified) with regard to pay and terms and conditions of service.<sup>39</sup> The recommendations, as modified by the Supreme Court, have been implemented in almost all States and Union Territories to date. Wherever, they have not yet been implemented, imminent action is expected.<sup>40</sup>

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<sup>39</sup> The directions given by the Supreme Court of India, and by the Shetty Commission included directions: to ensure uniformity in the designation of the judicial officers; to recommend pay scales (ranging from Rs 9000 for the junior-most to Rs. 24,850 for a District Judge (Supr. Time Scale) at 24,850, keeping in view that the salary of a High Court judge was fixed at Rs 26,000); to raise the retirement age of judicial officers to sixty years of age but to allow for compulsory retirement of any judicial officer at 58 years if found unsuitable or incompetent; to provide a working library at the judges' residence and sumptuary allowance until court libraries are established; to provide residential accommodation including an office room for every judicial officer; to provide for state vehicles at least for every district judge and chief judicial magistrate, and to take steps for judicial education and training.

<sup>40</sup> For example, in the National Capital Territory of Delhi they were implemented with some modifications in salary scales before the other States implemented them. The Court disapproved the modification. Until 19 July 2004, NCT Delhi and some of the States had not partly or fully complied with the Shetty Commission recommendations. The Court had allowed them eight weeks' time to comply. For details see, *All India Judges Association. v. Union of India*, (2004) SCALE 269 as well as an order of 8 April 2004 at 268.

Thus, the civil courts have been effectively separated in most respects, with administrative control vesting in the High Courts at State level, except with regard to budgetary allocations which remained the domain of the Legislature. However, while the High Courts exercised control over the lower civil judiciary, in respect of determination of service conditions, age of retirement, salaries, allowances and other facilities,<sup>41</sup> the Governor of each State remained responsible for the appointment, posting and promotion of District Judges, in consultation with the concerned High Court.<sup>42</sup> Only a person who is either already in the legal service of the Union or of the State or has been an advocate for at least seven years, and is recommended by the High Court can be appointed a District Judge.<sup>43</sup> In interpreting this provision, the Supreme Court of India has held that normally, the State Government should accept the High Court's recommendations, and the Governor should act on the same in making appointments. The State Government should communicate to the High Court any differences it might have with the latter's recommendation, giving 'good and weighty' reasons, and a decision should only be reached following 'full and effective' consultation with the High Court.<sup>44</sup> Government Counsel, who are also advocates, are not disqualified for appointment.<sup>45</sup> The Governor also makes appointments to posts in the judicial service of the State below the rank of District Judge in accordance with the rules made after consultation with the State Public Service Commission and the High Court.<sup>46</sup> Disciplinary action against the members of the lower judiciary such as suspension and removal from job and matters such as inter-se seniority are determined and decided by the High Court.

## 7.2 Developments in Pakistan

In Pakistan, following the provision for separation mandated by the Constitution of 1956, other than some ad hoc measures in Punjab and the framing of legislation (never brought into force) for East Pakistan, no steps were taken to effect separation in practice for 25 years.

### Box 9: The Pakistan Experience

1956	Constitutional mandate for separation of the judiciary
1957	Ad Hoc Measures in Punjab Province
1958	East Pakistan Ordinance (not notified)
1969	Hamoodur Rahman Commission (not implemented)
1972	Law Reforms Ordinance 1972 (Act XII of 1972) ('LRO'): proposed separating Judicial and Executive Magistracy (not notified)
1973	Constitutional mandate for separation within 3 years (Art. 173).
1994	<i>Sharaf Faridi's Case</i> : directing Provincial Governments to issue notifications to separate Judicial and Executive Magistracy and place Judicial Magistracy under High Court
1996	Notifications issued re Province of Punjab and Islamabad territory
2001	Code of Criminal Procedure amended: <ul style="list-style-type: none"> <li>Ø abolition of the offices of 'District Magistrate' and 'Executive Magistrate'</li> <li>Ø new definition of 'Magistrate' as meaning only 'Judicial Magistrate' or 'Special Judicial Magistrate'</li> <li>Ø responsibilities of Executive Magistrate devolved on Judicial Magistrate/Sessions Judge</li> </ul>

<sup>45</sup> *Sushma Suri v. Govt. of National Capital Territory of Delhi*, (1999) 1 SCC 330; *High Court of Rajasthan v. Ramesh Chand Paliwal*, AIR 1998 SC 1079

<sup>46</sup> Art. 234, Constitution of India.

Following the end of martial law and the restoration of democracy in 1972, the first step towards comprehensive law reform in this area came with the framing of the Law Reforms Ordinance 1972 (Act XII of 1972) ('LRO'), in compliance with the recommendations of the Hamoodur Rahman Law Commission. This proposed dividing the Magistracy into an Executive Magistracy and a Judicial Magistracy, keeping intact the Executive Magistracy under the District Magistrate and placing the Judicial Magistrates under the Sessions Judge and the High Court. However, as with the earlier 1957 Act, notifications were never published to bring the LRO into force.<sup>47</sup> In addition, no practical steps were taken towards separation, for example with respect to planning how to revise the terms and conditions of judicial officers (to account for some of their functions being performed by the proposed Judicial Magistrates), restructure the service or work out related financial or administrative arrangements.

In 1973, the new Constitution provided that the state should ensure progressive separation of the judiciary from the executive and set a timeline of three years (Art. 173). However, no immediate steps were taken in this regard, with the Government periodically extending the timeline for compliance, ultimately to fourteen years.

Eventually in 1994, following a legal challenge brought by a leading Karachi lawyer and others, the Supreme Court of Pakistan gave a landmark judgment mandating separation in *Government of Sindh and others v Sharaf Faridi and others*.<sup>48</sup> In this judgment, the Court:

- directed the four Provincial Governments (of Balochistan, Punjab, Sindh and North West Frontier Province) to issue notifications within a fixed timeline (by April 1994) to bring the LRO into force and so separate the Judicial Magistracy from the Executive Magistracy, placing the Judicial Magistracy under the High Court's control;
- directed each Provincial Government to issue instructions to ensure compliance with its directions within fixed timelines and
- held that neither the Federal nor the Provincial Governments could request either the Supreme Court or the High Courts to seek the respective Government's prior approval for incurring any expenditure in funds allocated for their annual budgets provided these amounts fell within the sanctioned budgets.

The Supreme Court dismissed applications by all the Provincial Governments for time to ensure compliance (one such application requested an extension of upto ten years!). However, it permitted some relaxation of its directions, allowing for example, Executive Magistrates in Punjab Province to try certain offences punishable with imprisonment up to three years.

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<sup>47</sup> Apparently, later studies indicated that the District Magistrate continued to be referred to in over two hundred local and special laws, despite the post having been abolished by promulgation of the LRO in 1973: see Justice Rahman, Pakistan Study, supra.

<sup>48</sup> PLD 1994 SC 105.

Ultimately, in 1996, notifications in compliance with the Supreme Court's directions were issued in respect of the Province of Punjab and the Islamabad territory.<sup>49</sup> But implementation on the ground remained unachievable, given the reluctance of Executive Magistrates to join the Judicial Service without any prior assurances regarding the terms and conditions of service or prospects of promotion, the related reluctance of the High Courts to induct them in judicial service at equivalent levels to their counterparts in Judicial Service, and the overall reluctance of the Executive centrally to part with powers of criminal justice at the frontlines.

In 1999, after the military take-over, the Federal Government took several legal and administrative measures to further separation. First, the new National Reconstruction Bureau (NRB) examined the question of devolution of power to the grass roots levels. Its aims included to free the district judicial system from structural constraints and to achieve efficacious delivery of justice through decentralization and establishment of alternate dispute resolution mechanisms. These resulted, among others in the creation of the post of Nazim (Head of Local Government) of each District. Second, several news laws were promulgated as part of a stated policy objective of seeking more efficacious delivery of justice. This included amendment in 2001 of the Code of Criminal Procedure, resulting in the abolition of the offices of 'District Magistrate' and 'Executive Magistrate', and of a new definition of 'Magistrate' as meaning only 'Judicial Magistrate' or 'Special Judicial Magistrate'.<sup>50</sup> The responsibilities which had earlier pertained to the Executive Magistrate then devolved, with some exceptions, on the Judicial Magistrate/Sessions Judge. The powers which had earlier been exercised by Executive Magistrates under Section 144 CrPC now devolved on the District Police Chief and the Nazim (Head of the Local Government.) of each District. Third, the Government of Pakistan (with the support of the Asian Development Bank) launched a programme on judicial capacity building, which focused on providing diagnostic inputs, remedial and corrective measures, and training judges. This programme did not directly address the issue of separation – which at the time remained under consideration by the Supreme Court – but it did seek to address the practical problems underlying and resulting from lack of separation. It also helped to raise awareness within the judiciary of comparative experiences of the importance of using incentivisation and training in improving judicial capacity, and thus building a constituency of support for separation.<sup>51</sup> It programmes also suggested certain practical measures, such as establishing an Annual Conferences of Judges or the appointment of a Judicial Ombudsman, which could have contributed to monitoring the process of separation, but these have not been adopted to date.

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<sup>49</sup> Notifications for other Provinces: check with Justice Shafiqur Rahman.

<sup>50</sup> This amendment was effected by Law Reform Ordinance 2001 (Ordinance XXXVII of 2001) dated 13.8.2001.

<sup>51</sup> The Asian Development Bank supported programmes included 1997.T.A.2979-PAK, Strengthening Government Legal Services and the Subordinate Judiciary, 1998 T.A. 3015-PAK, Legal and Judicial Reform Project, 2000T.A.3433-PAK Strengthening of Institutional Capacity for Judicial and Legal Reform, 2001-T.A. 3640-PAK Supporting Access to Justice under the Local Government Plan and 2001T.A.3744 Supporting Government Restructuring and Reform.

There have been mixed reports of the success of the separation measures. Reportedly, the lack of adequate advance planning, together with the absence of any central guiding authority, has caused major difficulties. One commentator has identified the High Court's failure to take a pragmatic approach to the issue, by refusing to integrate Executive Magistrates within the judiciary, as further exacerbating the problems following separation. As a result of this, when the offices of District magistrate and Executive Magistrate were abolished and all criminal files were brought before Civil Judges, there were inadequate personnel to deal with them, contributing to further backlogs and delays. This also contributed to a mishandling of criminal cases following separation, since given Civil Judges' lack of experience in trying or overseeing criminal cases they were also not able to ensure effective control and supervision of the Police, resulting in greater indiscipline in handling of the cases and more widespread abuse of police power.

## **8. ROADBLOCKS TO SEPARATION**

The above survey of the situation with regard to separation in India and Pakistan are instructive for those concerned with the issue in Bangladesh, given the overwhelming similarity in the legal systems of the three countries, as well as their socio-economic context. Interestingly, in each country, the real push for setting in place a formal legal framework for separation came from the judiciary itself, at the prompting of the legal profession. Once the frameworks were articulated however, in each case there were different trajectories for the process of implementation. Drawing from the commonality of the experiences of both India and Pakistan, it may be useful to try to identify the nature of the key roadblocks to separation, and means to overcome these.

### **8.1. Lack of Central Authority**

There appears to be a distinct lack of any identifiable body or institution -- within the executive, the judiciary or elsewhere -- to lead or coordinate initiatives towards separation, and as a result the entire process lacks any real momentum. Neither the Supreme Court nor the Ministry of Law, the two bodies most clearly involved with the process of implementation, appear to have developed any clear strategy or plan for how to achieve implementation, nor have they positioned themselves as leaders on the issue. While the Appellate Division remains in seisin of the Masdar Hossain case, and the Government is required to account to it for the process of implementation, the management of the case has enabled prolonged delays, and in the meantime no steps have been taken either practical or administrative within the Supreme Court to lay in place the mechanisms to effectuate separation. The Bar has played a vocal and proactive role in continuing to raise concerns regarding the urgent need for implementation (including through weekly demonstrations at the Supreme Court Bar Association premises, and regular reiteration of this demand by the Bangladesh Bar Council as well as local Bar Associations), but there are clearly limits to its capacity in terms of providing the necessary coordination between the executive the judiciary and civil society to effect changes.

## 8.2. Lack of Executive Action

Lack of political will and commitment. Although both major political parties have made commitments in their electoral manifestos to separate the judiciary, and indeed had made this commitment jointly during the anti-autocracy movement over fifteen years ago in 1990, neither has taken steps to meet these commitments once in office.

Proponents of the view that the lack of political will is due to the realisation that full separation is neither desirable nor feasible claim that it would lead to a breakdown of law and order. However, implementation of Masdar judgment would not in itself necessarily hamper the law and order situation, as executive functions would remain with the Executive Magistrates, and under the control of the District Magistrate. Therefore, there is no reason for apprehension.

Commentators have noted that the reluctance of the various administrations since 1999 to act on separation may be ascribed to their fear of losing control over the criminal justice system, and thus giving up a potent weapon of repression against their political opponents on the one hand, and exposing themselves to the prospect of being held to account by an independent judiciary for corruption or abuse of power on the other.

No practical steps towards separation: There has been no apparent attempt to draw up any specific plans or administrative measures to address the various practical questions that would arise in the process of application of these Rules, for example, with regard to revising the terms and conditions of service of judicial officers, restructuring the service, or making necessary financial or administrative arrangements.

One particular concern has been raised that since separation would require larger numbers of Judicial Magistrates to be in place, and the existing strength among Judicial Officers is inadequate, considerable time would be needed for any recruitment. While such concerns are not unfounded, there are number of solutions to deal with the issue. Although the earlier draft Posting Rules provided for appointment of Judicial Magistrates from among civil servants for a period of six years, these provisions have been deleted in the final Rules. It had been envisaged that within the period of six years, the Judicial Service Commission would be allowed to recruit Judicial Officers to gradually fill in the posts of Judicial Magistrates and then allow the civil servants to return to their original cadres. At this moment, neither the Composition Rules nor the Posting Rules leave any scope for the Judicial Service Commission to undertake such recruitment. As explained above, the term "Judicial Service" has been defined in such a way that Magistracy is not part of this service, hence the Judicial Service Commission has no authority to recruit Judicial Magistrates unless amendments to these Rules are made making the post of Judicial Magistrate a part of the "Judicial Service".

Reluctance of Executive Magistrates to join the Judicial Service. As noted above, many persons currently serving as Magistrates are reluctant to opt to join the Judicial

Service on a permanent basis. This appears due in part to the lack of clarity regarding the terms and conditions of service, but also due to the prevailing perception that service in the Judicial Service would involve lower remuneration and less prestige. It is precisely the links and reciprocal relationships between the Magistracy and the Executive which imbue Magistrates with a degree of power and expose them to the possibility of financial gain and influence; opting for the Judicial Service offers no similar incentives, rather former Magistrates turned Judicial Officers would be required by virtue of their office to maintain a distance from the executive thus abandoning any incidental benefits of this relationship.

### **8.3. Lack of Pro-Active Approach by the Judiciary**

The Supreme Court has now had the Masdar Hossain case on its dockets for over six years since the judgment was passed, but has allowed repeated adjournments on the Government's plea that it is taking necessary steps for implementation. Despite such extensive delays, and public and media demands for action, the Court has failed to take a proactive approach to enforcing compliance with its own orders or guidelines regarding separation, refusing to impose strict timelines on the Government, to ask it to give reasons for the adjournments.

Beyond the litigation itself, the Supreme Court has not taken any steps to initiate discussion or planning on how to manage and administer the changes that would be necessitated by separation, for example with regard to suggestions of establishing a secretariat within the Supreme Court for this purpose, or identifying the exact caseload that would be administered or the numbers of new Judicial Magistrates who might be required in this connection.

### **8.4 Reluctance of Magistracy to Opt for the Judiciary**

There is not as yet a clear buy in among the Magistracy to the notion of separation. So for example, when the Judicial Officers' Association demanded that the JSC should undertake recruitment of both Judicial Officers and also of Magistrates they were met by counter arguments from the Administrative Officers' Association demanding that the Public Service Commission should remain responsible for recruitment of Magistrates and also that BCS (Admin.) Cadre Officers should continue to be posted on deputation to the posts of Judicial Officers.

### **8.5. Lack of Wider Constituency for Change in Civil Society**

Lack of a united voice from the Bar. As expected, many lawyers have been extremely vocal in demanding that the Government take expeditious steps towards separation, with the leadership being given by the Supreme Court Bar Association, the elected representatives of lawyers of the apex court, the Bangladesh Bar Council, the elected representatives of all lawyers in Bangladesh, and many eminent lawyers. However, the division of the Bar on partisan political lines as with so much of civil society, has resulted in the lack of a unified voice in support of these demands, and of related actions.

Lack of a wider constituency or voice demanding separation. Although the Bar has been extremely active and vocal, with their demands being echoed by the media and by human rights organisations and activists, there is still a lack of wider public awareness of the relevance of separation to the effective delivery of justice to the lives of ordinary citizens. Indeed, there may be some fear that judicial separation would result in further lack of judicial accountability with the risk of further arbitrary exercise of power by the judiciary itself (for example regarding use of contempt powers). As a consequence, there has been little or no popular mobilisation (outside the legal community) for change – public discussion on the issue has largely involved ‘preaching to the converted’ with lawyers and human rights organisations reiterating their demands. The entire issue of separation of the judiciary is widely seen as a narrow, technical question of interest and concern primarily to the legal profession and the judiciary. A real challenge now for ensuring separation of the judiciary is to increase public awareness of the need for a strong independent and impartial judiciary.

Box 10: Identifying and Overcoming the Roadblocks

ROADBLOCKS TO SEPARATION	LESSONS LEARNED
<p><b>No Central Authority</b></p> <p>1. Lack of any identifiable body/institution – such as Higher Courts, Law Ministry, Law Commission or the Bar -- to lead or coordinate between concerned institutions</p> <p>The Executive</p> <p>2. <b>Lack of political will and commitment.</b> Executive perceptions of full separation leading to breakdown in law and order, or loss of control over criminal justice system</p> <p>3. <b>No practical steps towards separation .</b> Laws not backed with specific plans or administrative measures, e.g. revising terms and conditions of service of judicial officers, restructuring service, financial or administrative arrangements.</p> <p>4. <b>Reluctance of Executive Magistrates to join the Judicial Service.</b> Prevailing perception of Judicial Service involving lower remuneration/less prestige &amp; lack of prior assurances on terms and conditions of service or promotion prospects</p> <p>The Judiciary</p> <p>5. <b>Lack of proactive approach by the Judiciary.</b> Insufficiently proactive approach to enforcing compliance with its own orders or guidelines regarding separation.</p> <p>6. <b>Reluctance and lack of experience of Supreme Court in undertaking administrative tasks.</b> Prevailing judicial perception that administrative and supervisory duties are less important than judicial functions.</p>	<p>1. <b>Ensure there is an Effective Central Authority.</b></p> <p>The Executive</p> <p>2. <b>Develop political will and commitment in favour of separation.</b></p> <p>3. <b>Adopting practical programmes to make separation effective.</b> Revise terms and conditions of service of judicial officers, make financial and administrative arrangements.</p> <p>4. <b>Identify measures for improving the terms and conditions of service of judicial officers,</b> to make these posts a more attractive option to the posts of executive or administrative officers.</p> <p>The Judiciary</p> <p>5. <b>Develop proactive approach by Judiciary.</b> Judiciary to take control of and drive process for separation by reviewing and enforcing own guidelines</p> <p>6. <b>Involvement of High Courts in taking on administrative tasks.</b> Consider involving experienced managers or providing management skills to certain Judges</p>

<p>7. <b>Lack of planning by the Supreme Court.</b> Failure to take steps in advance for handling cases on files of Executive Magistrates, addressing this additional backlog; risk of further backlog with Judicial Officers taking over such functions</p> <p>Civil Society</p> <p>8. <b>Lack of sufficient pressure for change from the Bar.</b> There may be relative lack of coordination or of a unified voice within the Bar, with partisan voices speaking out or remaining silent on issues of separation.</p> <p>9. <b>Lack of a wider constituency or voice demanding separation.</b> The lack of wider public awareness of the relevance of separation to the effective delivery of justice to the lives of ordinary citizens means that there is little or no popular mobilizing for change, even within relevant sections of civil society. So for example, there is little focus among law students re the process of delivery of justice, and little explicit concern with this issue even among human rights or legal aid organisations.</p>	<p>7. <b>Making timely plans and administrative arrangements for implementing separation.</b> Need to plan present and future needs, e.g. re numbers of judges, timely and proper recruitment, filling judicial posts w/o delay, ensuring availability of courts, accommodation and staff.</p> <p>8. <b>Making judicial service more attractive and improving the quality of recruits:</b></p> <ul style="list-style-type: none"> <li>- Provide a system of annual recognition and reward</li> <li>- Arrange regular periodical full inspection of all courts in the Districts .</li> <li>- Set up targets to monitor performance</li> <li>- Regular training and continuing education:</li> </ul> <p>Civil Society</p> <p>9. <b>Increasing access to the Judiciary among Civil Society and stakeholders in the justice system:</b> By holding Annual Conferences and publishing Annual Reports available at reasonable cost, the Judiciary could ensure wider public awareness of its functioning, difficulties and needs, and thus develop a wider constituency for securing full separation, including adequate resources for the judiciary.</p>
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## 9. THE WAY FORWARD: MEASURES REQUIRED FOR SEPARATION

Executive encroachments on judicial independence regarding the lower courts' day-to-day decision making are a subject of widespread and increasing public concern. Partisan appointments, transfer and removal of judges are eroding public confidence in the lower judiciary's ability to discharge its functions impartially. Such executive interference has met with concerted protests and interventions from the Bar and other civil society actors, and sustained criticism in the media. The leading political parties have also committed themselves to ensuring separation of the judiciary. Development partners have also identified and underscored the need for separation of the judiciary to ensure good governance and enable access to justice and safety and security.

Despite this widespread consensus on the need to effect separation, at the frontlines of the justice system, executive control remains supreme, with the magistracy remaining fully under the control and supervision of the government.

This paper has sought to identify some of the key impediments to implementing separation and to suggest ways and means for overcoming such obstacles. It is hoped that the discussion above will contribute to the evaluation of the various options currently under consideration for implementing the Masdar Hossain judgement. Through a combination of law reform, administrative changes and other practical management measures, as suggested below, separation of the lower judiciary from the executive is a practicable and realisable goal, and one that is essential to ensure the rule of law and enforcement of basic rights to access to justice, and safety and security. Many of these measures (including those suggested below for the long-term) could be adopted almost straightaway by the Judiciary itself, and could contribute to enhancing its capacity to deliver justice, as well as transparency in its processes, even without any further steps being taken by the executive.

a) Enacting and enforcing necessary legislation

- Public consultation on and if necessary amendment of the three sets of Rules: *Taking into account the apparent discrepancies between the Notified Rules and the Masdar Judgment, and to ensure transparency in the law making process, consider whether further review of the three sets of Rules is possible through public consultation and/or scrutiny by the Law Commission before they are brought into force.*
- Expeditious scrutiny and enactment of the Draft CrPC (Amendment) Bill by Parliament : *To expedite scrutiny by the Parliamentary Committee and to hold a public consultation on the Draft Bill before it is brought into force.*
- Amendment of the Rules of Business : *To amend the Rules of Business to i) include a definition for the 'Appropriate Authority', which is such as to ensure that the body is wholly independent of the executive,<sup>52</sup> and ii) to identify which body would be responsible for providing Secretarial Services to the Judicial Pay Commission.*

b) Establishing the 'Appropriate Authority':

There are various options for consideration regarding the establishment and location of the 'Appropriate Authority' depending on whether or not the Notified Rules are brought into force. If they are, and there is no change to the Rules of Business, the Appropriate Authority would be located within the Ministry of Law, possibly as a Wing or a Division of the Ministry. It may then be necessary to increase the number of personnel within the Ministry, given the increase in the total strength of the judicial services, and new posts would need to be created

<sup>52</sup> This had reportedly been suggested by the Ministry of Establishment in its response addressed to the Ministry of Law regarding the Draft Rules

through the usual process, namely by initiating a proposal by the Law Ministry, then obtaining the approval of the Ministries of Establishment and Finance and then final sanction by the Cabinet. Alternatively, if the Rules of Business are revised in order to define the 'Appropriate Authority' as an independent body, then it could be located either within the Supreme Court, either under the Chief Justice's Office, or alternatively under the control of the General Administration Committee. The first option would require establishing a Secretariat under the exclusive jurisdiction of the Supreme Court and the Chief Justice. The Executive Head of the Secretariat could be called the Registrar General, and be given the rank of Secretary (the senior most civil servant). The Registrar General could be recruited from among serving civil servants subject to the approval of the Chief Justice. Under the Registrar General there would be a number of Registrars entrusted with various responsibilities concerning day to judicial administration. The second option would require establishing a Judicial Secretariat under the control of the General Administration Committee, consisting of at least three Justices of the High Court Division with the Chief Justice having overall supervisory jurisdiction. The budgeting function of the Judicial Secretariat would be under the control of the Supreme Court and could be met from the charged amount as allocated by Parliament.<sup>53</sup>

*c) Making resource allocations for the Appropriate Authority:* The Ministry of Law and Establishment would need to redeploy resources currently held by them for the recruitment, posting, promotion of judicial officers and Magistrates to the 'Appropriate Authority'.

*d) Establishing a Secretariat for the Judicial Service Commission:* Given that the JSC is unlikely to need to appoint more than 20-30 judicial officers in a given year, it may not need a permanent Secretariat. Instead, it could seek such services from existing Supreme Court officers such as the Additional Registrar, or other officers from the Registrar's Office. Since the Chairperson and a Member of the Commission are located in the Supreme Court premises, establishment of a small secretariat within the Supreme Court would be convenient for its smooth operation and monitoring.

*e) Establishing a Secretariat for the Judicial Pay Commission.* If the Secretariat of the JPC is established within the Finance Division of the Finance Ministry, as provided in the Pay Commission Rules, there would be no need for any additional secretarial services.

*f) Making appointments to the posts of Judicial Magistrates:* The 'Appropriate Authority', once established would be required to make available to existing Magistrates an option to join the Judicial Service. Based upon the numbers of those who make such an option, the Authority would decide on the number of posts available for recruitment of Judicial Magistrates. The JSC would then initiate the

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<sup>53</sup> The Judicial Capacity Building Project, a GoB project supported by the World Bank, for strengthening the case management and court administration, had suggested a revised Office of the Registrar in anticipation of its greater role once separation is achieved. This structure somewhat reflects the draft Organogram currently lying with the office of the Registrar, Supreme Court.

process of recruitment of Judicial Magistrates. The JSC could propose that incentives be provided for joining the Judicial Service, for example by providing a later retirement age for the Judicial Service as opposed to the Administrative Service, possibly of 60 years instead of 57 years, or alternatively by providing higher remuneration for the Judicial Service. As the Government is yet to formulate a salary structure following recommendations to be received from the Judicial Pay Commission, it would be worth exploring whether and how such incentives of extended tenure of service and higher remuneration could attract Magistrates to opt for the Judicial Service. Another option to consider might be to integrate Magistrates into the Judicial Service through opening up the possibility of their promotion to the post of Sessions Judge and ultimately as judges of the Supreme Court.

*g) Ensuring Availability of Support Staff:* Once the Magistracy is brought within the Judicial Service, the controlling authority of the support personnel serving the Magistracy would need to be determined. If the controlling authority is held to be the Appropriate Authority, then the support personnel would need to be absorbed from the Ministry of Establishment. If new posts of Judicial Magistrates are created, then new posts would also have to be created for their support personnel. Again if the *Appropriate Authority* is held to be the controlling authority, it would be required to commence recruitment for the posts of additional support personnel.

**Long Term Reform:** It is perhaps appropriate to recall that implementation of the Masdar judgment is only one part of a broader judicial reform exercise that remains to be undertaken. This will require consideration of ways and means to ensure more effective access to justice, and greater accountability of those delivering justice to court-users, including through addressing the endemic problems of delays in the disposal of cases and the allegations of corruption within the judicial system. It is hoped that the longer-term measures recommended here will be considered seriously in the light of this concern.

*“As to whether the separation of the judiciary will make a real difference, the answer is both yes and no. It is not only a question of the people and the judiciary but also a question of what impact the other institutions of the state will have. It is important for the other institutions of the state which have an impact on the criminal justice system to function independently as well. Because if the police have been politicized and the public prosecutors have been politicized, then a criminal investigation would not be conducted impartially and consequently you wouldn’t be able to build up your case even though you are able to file it in theory. So institutions like the criminal justice system, the police etc, if they do not in practice perform independently, they remain in reality under the control of such external influences. So the end result could easily be that even if the judiciary is independent, a case cannot be made or justice ensured, since it depends on the other institutions to implement the process.”*

- a) Amendment of the Constitution : The Government may consider amendment of the Constitution so as to restore the original Articles 115 and 116 of the Constitution providing for full control and discipline of the subordinate courts in the Supreme Court (in line with the observation in the Masdar Hossain Judgment).
- b) Determination of the cadre strength of the Judicial Service and the various grades thereof. The Appropriate Authority must ensure that no judicial post is kept vacant for any length of time. In identifying the cadre strength, it is necessary to pay attention to issues of deputation and training.
- c) Preparation of a realistic annual budget and placing it before the Government on time. The Appropriate Authority could prepare a realistic annual budget estimate for the lower judiciary, and ensure that this is duly placed before the relevant government body and sanctioned, as a prior step to full financial and administrative autonomy.
- d) Planning for phased selection of stations and locations of civil/criminal courts and of tribunals to facilitate access to inexpensive justice. It would be necessary to identify requirements regarding number of safe and protected court buildings, residences for the judicial staff, and judicial lock ups. *It is not clear which authority would be responsible for this, as no such specific responsibilities are allocated to the Appropriate Authority. It may be necessary to amend the Rules of Business in order to provide a specified body, possibly the Appropriate Authority, with these responsibilities.*
- e) Systematic training and continuing education. Training and continuing education for all judicial officers should be systematic, and could be carried out through the Judicial Administration Training Institute, and also through other initiatives. For example, whenever a new law comes into force, all judges could be briefed on its objects, purposes, scope and application
- f) Self-monitoring and supervision scheme of District Courts to be re-introduced. The practice could be reintroduced, as prescribed first in the colonial period of a District Judge and Subordinate Judge setting aside certain days from the judicial calendar only for the purpose of reviewing orders made and identifying whether any delay has occurred, and submitting an inspection note based on his or her findings. This would enable regular and critical review of the Court's own work as well as that of its staff.<sup>54</sup>

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<sup>54</sup> See for example Punjab High Court Rules and Orders, Chapter 1 -D, Vol. 11, at paras 10,11,& 14 : "On the first working days in the months of February, May, August and November every District judge, Judge Small Causes Court and Subordinate Judge shall carry out regular inspection of his own

- g) Regular and full inspection of the courts in the Districts. High Court Judges must conduct full periodical inspections of all courts in the District, in order to obtain a first hand understanding of their problems, working conditions and environment. This would provide an opportunity for High Court judges to hear individual grievances, ascertain their causes and suggest or provide appropriate remedies suggested or provided.
- h) Setting targets. As part of the process of performance review, targets could be established for judicial performance, and regular reviews of targets held. This would assist in establishing an alternative and objective set of criteria for assessing the performance of judicial officers for purposes of advancement, and assist in insulating them from executive interference.
- i) System of Annual Recognition and Reward. Establishing a performance based incentive system, and ensuring that this is managed by the Supreme Court, in place of the current system in which advance is largely dependent on political patronage, would help to change the work culture for the subordinate judiciary. While the nature of incentives to be provided would require further consideration, these could include formal letters of commendation from the superior courts, an honourable mention regarding a particular court or judicial officer in their Annual Confidential Report, providing them with better posting stations, accelerated or out of turn promotion, training opportunities within the country and abroad.
- j) Greater commitment and more proactive role of the High Court Division. Being constitutionally charged with the superintendence and control of the subordinate judiciary, the High Court Division is responsible for planning the present and future needs of the judiciary. This could for example be done by the General Administration Committee establishing sub-committees to effectively monitor the functioning of the subordinate judiciary.
- k) Greater transparency re judicial administration through Annual Conferences and publication of Annual Reports. Problems, difficulties and needs regarding the proper functioning of the judicial system can be highlighted and brought to public attention through Annual Conferences of various levels of the judiciary, and by publication of relevant data in Annual Reports. Demands for administrative and financial provisioning which are identified through such processes may be communicated to the Government for necessary action. These tasks could be directly authorised by the Hon'ble Chief Justice.

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*court and shall fix no judicial work for these days. He shall.....in particular look through the oldest files pending and see whether unnecessary delay has occurred or wrong orders have been passed...He shall then write a brief inspection note on the lines of an Inspecting Judge's note...The object of the inspection is to enable the presiding officer to survey his own work critically and exercise a proper supervision of his staff."*

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