

Accountability of the Supreme Court Judges of Bangladesh: A Legal Analysis

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Abstract: *Judiciary of Bangladesh consists of two tiers, one is the higher courts and the other is the subordinate courts. The Supreme Court (SC) is the highest court of Bangladesh comprising the Appellate Division (AD) and the High Court Division (HCD). The subordinate courts comprise the courts below the SC. There prevailing a unanimous acknowledgement from all quarters⁴ that since its inception in 1972, the judges of the SC are enjoying ample independence under the constitutional protection. In contrast, the only available constitutional mechanism aimed at ensuring the accountability of the SC judges is the "SJC", which has been proved futile in so far. The higher judiciary has been entrusted with the authority to scrutiny the legitimacy of the actions taken by the executive and the legislature. To continue its historic role as the guarantor of the "Fundamental Rights" and "Safeguard" of the constitutional supremacy the SC is increasingly required to make decisions that are politically and ethically controversial; moreover, due to its interpretative role demands are growing to ensure the accountability of the judges.*

I. Introduction

Accountability of judges implies their obligation to explain, justify and legitimize the use of power in discharging public duties. Judicial accountability means accountability to the code of conduct formulated under the constitution. Though Article 96 of the Bangladesh Constitution provides for removal of SC judges it can do nothing to ensure accountability [1]. Accountability of the judiciary entails that judges should uphold the integrity and independence of the administration of justice, should avoid impropriety and partiality in discharging judicial functions and should be free of politics [2]. Judges must account for improper exercise of judicial power and personal misconduct as well. Judicial independence without decisional accountability results in tyranny and violence. Accountability of the SC judges is of prime consideration, as they have 'taken oath to protect and preserve the Constitution of Bangladesh [3]. Power tends to corrupt, and absolute power corrupts absolutely'. As the SC judges enjoys a wide range of powers like original, appellate, revisional and constitutional jurisdiction, and superintendence and control of the subordinate courts and tribunal, they must account for the exercise of powers. Without accountability, officials can be tempted to stretch the limits because no one is monitoring them [4]. Some judges are doing more than their fair share of the work while others are slacking off. Some judges habitually arrive late and leave early, but no records are kept and the judges are accountable to no one. The judicial accountability is aimed at ensuring 'high standards of decision making and public acceptance of judicial decisions [5]. Standards of accountability: Accountability is an abstract thing which can better be observed than to be enforced. Though the Legal Systems of the world have their own ways either in common law or in statute to ensure judicial accountability, it is near to impossible to prescribe a parameter for judicial accountability [6]. Transparency and availability of information, availability of meaningful and reasoned sanctions, public participation in judicial process, disclosure of financial interests and gift restrictions are few noble requirements of an accountable judicial system.

How to Judge the Judges?

Accountability of judges can be ensured by way of discipline of judges; reasoned decisions; appellate process; speedy and public hearing, scrutiny by Bar; scrutiny by Media; public opinion; by Legislature. The extreme way to make a judge accountable for his or she did is to remove him/her from the judicial office. Article 96 of the Bangladesh Constitution is the only avenue through which a judge of the SC can be disciplined [7]. Most judicial systems of the world consider the breach of judicial ethics' and 'disability' or 'incapacity' as the grounds for disciplining judges. Lapses of judicial ethics include taking of bribes, open defiance of judicial precedent, violation of rule against bias, failure to account for court funds, failure to conduct court proceedings with a suitably judicial demeanor or a judge's conviction of a serious offense unrelated to judicial service [8].

Disability complaints often involve allegations that a judge is suffering from alcoholism, dementia or an inability to stay awake. In Bangladesh, if a judge of the either division of the Supreme Court suffers from 'physical or mental incapacity and thus becomes incapable to perform judicial functions; or is *guilty of gross misconduct* may be removed from the judicial office [9]. There is no authoritative interpretation either in any 'statute' or in 'judicial decisions' as regards what shall fall within the realm of 'physical or mental incapacity' and 'gross misconduct'. In 2000, the 'Supreme Judicial Council' in discharging its constitutional obligation under Article 96(4) (a) prescribed a 'Code of Conduct' to be observed by all Supreme Court judges [10]. The 'Code of Conduct' imposes much responsibility upon the SC judges which includes obligation to maintain the integrity, independence, and impartiality of the judiciary; to avoid partisan interests, public clamor or fear of criticism; to dispose promptly of their judicial functions and to avoid inordinate delay; not to indulge directly or indirectly in any trade or business and to be patient, courteous and respectful to the litigants and lawyers. However the legal position of the Code of Conduct' is not clear [11]. Though the 'Code of Conduct' has prescribed a high standard of conduct for the SC judges, it is not clear whether any defiance of the Code will amount to the 'gross misconduct' so as to discipline a SC judge [12]. So, the grounds for disciplining SC judges deserve further clarification and the best way of doing it is the judicial interpretation.

Mechanism for Discipline

The 'Supreme Judicial Council' (SJC) comprising of the Chief Justice and next two senior judges of the SC is entrusted with the obligation to discipline SC judges. If SJC initiates inquiry against any of its member or any 'member of the council is absent or is unable to act due to illness or other cause the judge who is next in seniority to those who are members of the council shall act as such member [13]. Being informed from the SJC or from any other sources if the President "apprehends' that a SC judge suffers from 'physical or mental incapacity' and thus becomes incapable to perform judicial functions; or is guilty of gross misconduct may direct the SJC to inquire the matter and report it's finding [14]. If after inquiry the SJC finds substance of the allegation it shall report to the President accordingly who shall then remove the alleged judge by order'

Flaw of the Mechanism & Practical Manifestation

The notable feature is that SJC cannot function independently unless and until directed by the President. There is no finality of 'sources' or standard of 'information' to make the President to 'apprehend' that a SC judge suffers from '*physical or mental incapacity*' or is *guilty of gross misconduct* so as to direct the SJC to inquire the matter[15]. Again the President is under constitutional obligation to function as per the advice of the Prime Minister. So the procedure for disciplining SC judges is not free from executive control. The Prime Minister is not only a head of the executive but also the member of a political party, so the disciplining procedure is often seen to be vitiated by the political consideration [16]. In the constitutional history of past 36 years there is no instance of disciplining judges through the SJC. In the year 2007 for the first time the SJC was formed to inquire the allegation of forged LLB certificate hold by Justice Faisal Mahmud Faizee [17]. The approval to form the SJC came after Chief Justice Md Ruhul Amin sent a letter to the President on March 12, 2007 seeking his permission for its formation. A Presidential order was sent to the SC via the law Ministry to conduct the enquiry. On March 28, 2007 the SJC started its probe into controversial HC judge Faizee's alleged certificate scandal [18]. The SJC was in the primary stages of investigating the allegation of keeping around 180 cases pending during his controversial tenure as a HC judge. Faizee resigned on 11 July 2007 at night, 72 hours before he was scheduled to stand before the SJC [19]. Thus the SJC failed to create any precedent for the future.

Reasoned Decisions

Giving of reasons is one of the fundamentals of good administration. "If the decision maker does not provide the basis for a decision, any possible protection which could be given to the 45 aggrieved party is adversely affected. Reasons are the link between the order and the mind of the make; it also involves a question of procedural fairness [20]. Although there is no general duty to provide reasons under the common law, the court assign great significance to the giving of the reasons and in practice, members of the SC give reasons for their decisions and absence of the practice may lead to the inference that the decision in question had no rational behind it. Judges of the SC are ought to submit written findings of fact and conclusions of law in all actions and proceedings--including a written explanation for motion dispositions--to legally support the judicial decision reached which will make sure absence of arbitrary decision-making by judges [21]. Bail is a matter of right in bailable cases but in non-bailable cases it is the discretion of the courts and in granting bail in non-bailable cases the courts are required to 'record in writing its reason for doing so. The corruption cases are non-bailable and in granting bail in the same, courts are obliged to give reason [22]. From July 14 to August 14, 2008 a Division Bench of the High Court granted ad-interim bail to 76 persons charged with corruption cases. In doing such the Division Bench overlooked the obligation to assign reason for the judicial decision.

Appellate Process/ Hierarchical process

If a party believes a judge made a wrong decision or error, the party may appeal to a higher court to review the judge's ruling. This is an appropriate and effective check on judicial power. Both the Code of Civil Procedure 1908 and the Code of Criminal Procedure 1898 provided effective opportunity to appeal against the unsatisfactory decision of the trial court [23]. If any person is aggrieved by the decision of the High Court Division s/he may invoke the appellate jurisdiction of the Appellate Division of the Supreme Court. Thus appellate process has ensured effective scrutiny of the judicial decisions.

Speedy & Public Hearing

Inordinate delay in criminal proceedings may amount to an abuse of the process of the court and may be quashed for the ends of justice. So the judges must discharge their judicial functions promptly [24]. In criminal cases any person (citizen or non-citizen) charged with an offence is entitled to speedy and public trial by an independent and impartial court or tribunal. Impartiality means unbiased state of mind or attitude of the court in relation to the issues and the parties in a particular case [25]. Public exposure of judicial function enhances public confidence and participation in the judicial process, ensures accountability of the judges; the reason is that if trial is held in open court the risk of arbitrariness and biasness is diminished to a considerable extent [26].

Scrutiny by Bar/Lawyers

Like a bird judiciary has two wings, one is the Bar and another is the Bench. Without one another cannot function perfectly. Bar and bench supplement each other and provides effective check on each other [27]. The unjust and arbitrary exercise of judicial power or misconduct of the judges is subject to constructive criticism by the Bar. Members of the Bar have legal knowledge and expertise to scrutinize the performance of the Bench; they are in a position to invigilate the judicial activities constantly [28]. Therefore scrutiny of the judges by the members of the Bar is fairly rationale. Bangladesh inherited a well-organized legal profession and historically its members have played pioneer role in ensuring accountability of the SC judges [29]. On 11 May, 2008 at an urgent general meeting chaired by Barrister Shafique Ahmed the SCBA decided to stay away from moving cases in the AD for two hours from 9:00am on 15 May 2008 to protest few recent judgments of the AD [30]. Former SCBA presidents Barrister M Amir-Ul Islam and Advocate Mahbubey Alam, Barrister Rafique-ul Huq, Advocate Nurul Islam Sujon, Advocate Zainul Abedin and Advocate M Enayetur Rahim, among others, expressed their disappointment over and surprise at a few judgments of the AD [31]. They also decided not to bid farewell to the incumbent chief justice and felicitate his replacement. The resolution said that the AD judges had violated their oaths by ruling that accused in cases filed under the Emergency Power Rules' cannot apply for bail and all cases including the ones filed before the promulgation of the 'Emergency Power Rules' could be tried under the emergency rules [32]. On 3/3/07, seventy (70) people including a HC judge Justice Faizee were stripped of their LLB degrees on charge of tampering with mark sheets and the Chittagong University asked to return their certificates immediately. Soon after the event the lawyers of the SC demanded immediate resignation of the judge. Former president of the SCBA Mahbubey Alam said, "Faizee should go immediately [33]. If he doesn't want to resign, the president should immediately form SJC to remove him. He (Faizee) is not a law graduate but he has taken oath by showing that he is a graduate. This is a gross misconduct.

Boycott of Court by the Lawyers

On May 11, 2008 the Supreme Court Bar Association (SCBA) decided to boycott the AD of the SC for two hours (9 am to 11 am) on Thursday, May 15, 2008 in protest against a series of verdicts, including the highly controversial ruling, which abdicated the power of the SC to review bail petitions regarding the Emergency Power Rules' made by the AD on April 23, 2008 [34]. The SCBA is of the view that verdicts of the AD, which prevents challenges to provisions of the 'Emergency Power Rules' are in conflict with the rule of law, the fundamental rights of the people and the constitution [35]. The lawyers are disappointed and surprised by such judgments. The lawyers opined that even in emergency situation SC could not be deprived of the power to grant bail in cases it deems fit and justified. In another instance functioning of the SC virtual halted as the Supreme Court Bar Association started boycotting the court of the Chief Justice Syed JR Mudassir Husain from December 3, 2006 demanding his resignation [36]. The aggrieved lawyers announced the program protesting the CJ's unprecedented move on November 30, 2006 that stayed the proceedings of writ petitions filed against the President's holding the post of Chief Adviser of the caretaker government.

Scrutiny by Lawyers and Contempt of Court

On May 23, 2005 the HCD in an unprecedented suo moto ruling banned gathering, congregation, picketing on the premises of the SC or of any other court, laying siege to the entrance to any court and boycott of courts on the basis of any decision of any bar association or Bangladesh Bar Council [37]. On June 10, 2006

the HCD banned 14-party opposition coalition's Dhaka-siege program. On June 11, 2006 the SC became almost paralyzed as anti-government lawyers, angered by HC's decision of June 10 boycotted the court under the banner of SCBA, and carried out sit-in demonstrations at all court gates violating the HC's ruling of May 23, 2005 [38]. On June 29, 2006 Mr. Gazi Rabiul Islam Shagor (advocate, Dhaka judge's court) filed a petition in HCD alleging that the eleven lawyers brought out processions, held rallies, obstructed judges' and lawyers' entry (including the chief justice and the attorney general) to the SC and boycotted the court, violating the HC's suo moto ruling of May 23, 2005 [39]. Following the hearing of the petition, the HCD on August 1, 2006 issued a rule on eleven SC lawyers to show cause within three weeks, why proceedings of contempt of court should not be brought against them for violation of the HC's suo moto ruling of May 23, 2005 and also for committing other contemptuous acts [40].

Scrutiny by Media

Electronics and print media of Bangladesh have flourished much and making a significant contribution in transmitting information on functioning of the judiciary. On July 16, 2008 a Division Bench, of the HCD comprising of Mr. Justice Shorif Uddin Chaklader and Mr. Justice Imdadul Haq Azad in an interim order granted one month bail to Salauddin Quader Chowdhury (Parliamentary advisor of the former Prime Minister Khaleda Zia) and stayed the proceedings of a case filed against him by 'Anti-Corruption Commission' for amazing illegal wealth [41]. On July 23, 2008 'Chamber Judge' of the AD of the SC 'stayed' the effect of the above order of the HC till August 7, 2008 and fixed the same for hearing on the same day in the AD. Before August 7, 2008 the 'Anti-Corruption Commission' filed regular appeal in the AD against the order of the Division Bench [42]. When a legal proceeding is pending before the AD, the decision of the 'Chamber Judge' shall prevail till the final hearing before the same. The office order of the SC dated October 17, 2006 also suggests the same. But ignoring the 'stay order' of the 'Chamber Judge', on August 18, 2008 a Division Bench of the HCD, comprising of Mr. Justice Tariqul Hakim and Mr. Justice Abdul Awal uphold the order of the Division Bench and extended the order of bail and stay for four months [43]. *The Daily Prothom-Alo* in its report of August 19, 2008 meticulously scrutinized the whole issue and projected the unanimous opinion of eminent lawyers that the order of the HCD 'to extend the bail and stay of proceeding' against Salauddin Quader Chowdhury was 'unjustifiable and ultra-vires' [44]. In its 23 working days (from July 14 to August 14, 2008) a Division Bench of the HCD granted ad-interim bail to 76 persons accused of corruption cases and stayed the legal proceedings of 47 cases [45]. In doing such the Division Bench interfered with the principles of 'Res Sub-judice and 'reasoned decision'. *The daily Prothom-Alo* in its report of August 20, 2008 was so critical to it [46]. The report unsuccessfully searched justifications (if any) for granting bail to the notorious IABA drug dealer Amin Huda and to violate the order of the 'Chamber Judge' of the AD. On October 30, 2004, two major dailies Prothom Alo and Bhorer Kagoj reported that Faizee, one of the 19 additional judges appointed on August 23, 2004, had tampered with his mark sheet of Muslim law examinations he sat from Chittagong Law College in 1989 [47]. Thus in every possible occasion the printing media is vigilant in scrutinizing the SC judges to make them answerable for their alleged position or controversial judicial decision.

Press and Contempt of Court

The law of the contempt of courts is a safeguard of the judiciary against the unjust criticism. If any media report is unfounded or frivolous, aimed at tarnishing the image of a judge or lowering the dignity of the judiciary, the concerned person shall be punished for the contempt of court [48]. In the year 2000, HM Ershad (former President of Bangladesh) made a telephone conversation with Justice Lotifur Rahman, with reference to a corruption case pending in his court. A fairy story was published in the Dainik Manbjamin with reference to the telephone conversation [49]. Then a contempt case was filed in the HCD against Dainik Manbjamin on November 8, 2000. The HCD in its judgment of May 20, 2002 sentenced Matiur Rahman, chief editor of the Dainik Manbjamin to one month imprisonment including 2000 taka fine and Mrs. Mahbuba Chowdhury, publisher of the Dainik Manbjamin was fined taka 2000 for contempt of court [50]. *The Daily Ittefaq*, *The Daily Sangbad*, *The Daily Janakantha* also published report in the same matter with reference to the Dainik Manbjamin [51]. As the dailies did not publish any report of their own which was detrimental to the dignity, integrity and prestige of the judiciary, contempt charges against the editor, reporters, printer and publisher of these dailies were disposed of with caution. Following the judgment fifteen editors of the leading national dailies in a joint statement expressed their utter disappointment at the verdict of imprisonment and fines against Matiur Rahman and Mrs. Mahbuba Chowdhury [52]. The statement termed the verdict an 'unprecedented interference in the freedom of press. On 30/10/04 a report was published in the daily Prothom Alo in the caption that the certificate of a High Court judge is forged. On the same day another report was published in the daily Bhorer Kagoj in the caption that a High Court judge has no LLB certificate [53]. The dailies also reported that Faizee did not actually pass the law examination before enrolling himself as an advocate with the Bangladesh Bar Council that entitled him to practice law. Subsequently he was appointed Judge of the HCD on August 23,

2004 [54]. Following the publication of the report, Md. Faiz, Advocate of the AD of the SC and also father of Justice Faisal Mahmud Faizee, filed a contempt petition against 2 editors, 2 publishers, 3 reporters of the Prothom Alo and the daily Bhorer Kagoj [55]. As both the reports having been published under red big lettered bold caption that Mr. Justice Faisal Mahmud Faizee's LLB certificate is forged and he never passed his LLB examination interfered with the administration of justice and the public confidence has been fundamentally shaken thereby. On perusal of the records presented by the parties, the court observed:

There is nothing on record to establish that LLB certificate of Justice Faizee is forged or that he has no LLB certificate. As the reports are unfounded and without any basis and since the reports have shaken the confidence of the people, the respondents have committed gross contempt of court."

Considering the gravity of the offence and the manner in which a judge and the court have been scandalized Matiur Rahman, Editor of daily Prothom Alo, Mahfuz Anam, publisher of Prothom Alo, Abed Khan, Editor of daily Bhorer Kagaj, Ekramul Huq Bulbul and Masud Millad of Prothom Alo and Saber Husain Chowdhury, publisher of Bhorer Kagaj were each sentenced reporters to a fine of Tk. 1000 and in default of payment to suffer simple imprisonment for one month [56]. Samaresh Baidya, reporter and columnist of Bhorer Kagaj was sentenced to two months' rigorous imprisonment and a fine of Tk. 2000 and in default of payment to suffer simple imprisonment for a month [57]. Samaresh Baidya was the only journalist who was awarded prison term together with fine. Convicting him the Judge held that the reporter not only wrote the item scandalising Faizee but also published his photograph with red banner in the front page of his paper. This was the contempt of the worst kind, the sentence said:

If a judge commits a crime any news of such act of the judge will not be a contempt, as nobody is above law and law is no respecter of person. The press must bring to the light the dark aspect of the society but in so doing it cannot scandalize a judge or interfere with the administration of justice. There is no denying the fact that freedom of the press is the sine qua non of the smooth functioning of democracy but the press has to be a responsible press.

Though the press plays a vital role in scrutinizing the judges and the judiciary as a whole, the law of contempt stands like a sword over the freedom of press [58]. In absence of exhaustive legislation on contempt, there exists biggest uncertainty over what would tantamount to contempt of court. The effective scrutiny of the judiciary by the media is only possible when media reporters have available access to information, minimum legal knowledge and experience on judicial functioning otherwise the freedom of press may be slaughtered by the contempt of court [59].

Public Opinion:

In so far our experience is concerned the SJC has failed drastically to set a precedent making any SC judge answerable for his/her alleged misconduct. However, the inefficiency of the SJC has been mitigated by public criticism to a considerable extent and in many instances public scrutiny of the judicial activities or public criticism of the alleged misconduct of judges succeeded in bringing them to pay a price [60]. Justice Faizee took charge as an additional judge of the HC on August 23, 2004 and was made permanent from August 2006. On March 3, 2007 the Chittagong University syndicate charged that his LLB degree was false [61]. The charge gave birth to enormous public criticism from all corner of the country demanding his resignation. Considering the image of the apex court Mr. Faizee decided to step down his post and submitted resignation letter which was accepted and effected from July 12, 2007. Similarly in 2000, due to huge public criticism, Justice Latifur Rahman a judge of the HCD resigned from his office after alleged misconduct [62]. It was alleged that he had a telephone conversation (in reference to a case pending in his court) with former President HM Ershad who was convicted in a corruption case known as Janata Tower case.

Parliamentary Control

Parliament is composed of the representatives of the people who are directly elected by their votes. Any law passed by the parliament is the will of the people. Parliament may disagree with the approach a court has applied or interpreted a law. In such case it may pass legislation in conformity with the constitution to amend the law and prospectively change the impact of the court decision. It is an appropriate and effective check on judicial power [63]. In addition the parliament may alter the constitution to amend the mechanism or grounds of disciplining SC judges or can prescribe a much more straight forward 'Code of Conduct' to be observed by them.

Conclusion

With the increasing role of the judiciary in state mechanism the accountability question of this least dangerous organ has multiplied manifold. History would reveal and evaluate in future the critical role of the judiciary particularly for the last two years. No doubt, there is a mixed impression in public mind about different

convictions of the apex court of Bangladesh. It is true that the Supreme Court of Bangladesh in most recent times, after a considerable pause, has declared the nuances of some Ordinances by holding them extra-constitutional. Albeit, in some cases the observations of the judges has been blurred to reflect the social exigencies, needs, policies and grievances. This has recurrently reminded the people that "justice should not only be done, but manifestly and abundantly be sent to be done." The post-Masder Hossain era has brought before us the pivotal issue of the efficacy of independence of judiciary. It is contended that for ensuring social justice and rule of law issue is not the 'independence of judiciary' but issue is whether the judiciary is 'independent' in the true sense of the term. The Constitution of the People's Republic of Bangladesh has envisaged a co-equal and parallel judiciary like other two organs of the government. So, there is no reason why the judiciary should not shoulder the equal responsibility in nurturing democracy, rule of law and constitutionalism in Bangladesh. We should keep in mind the famous dictum of Lord Atkin that justice is not a cloistered virtue; she must suffer the scrutiny and outspoken comments of the public at large.

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