

Effectiveness of Judiciary in Bangladesh: A Study of Good Governance (2001-2006)

Ummy Salma*

Abstract

*A society without crime is unthinkable and also a society laden with influx of crimes and disputes is not at all a safe abode for human habitation. So a balance has to be maintained and this very responsibility is preserved by Judiciary. The aim of this paper is to evaluate the role of judiciary in establishing rule of law and its impact on good governance in Bangladesh's rolling transition of democracy. Because an independent and credible judicial system is a *sin qua non* for rule of law and rule of law is a *sin qua non* for good governance in a country. This paper highlights on few core aspects of rule of law such as- absence of arbitrary exercise of power and protecting the rights of justice of citizens. This paper mainly partakes the fundamental task to evaluate the effectiveness of judiciary of Bangladesh in 2001-2006 to promote the culture of good governance in Bangladesh. So this paper presents a detail and in depth analysis of the effectiveness of Judiciary by collecting data from newspaper, articles, annual reports from different sources and renowned books to promote quality governance in Bangladesh during that particular time. The key findings of the paper is: democratic political environment is the most crucial for rule of law and good governance but the then state of political culture in Bangladesh was very shocking which impeded establishment of rule of law, human rights and democratic governance. The main learning lesson of this paper is that rule of law is one of the most crucial elements of good governance and judiciary is a very vital institution of government to establish rule of law in a country.*

Keywords: Judiciary, Effectiveness, Rule of Law, Good Governance, Human Rights.

Introduction

Every democratic government has three organs among which Judiciary is one of them. The importance of Judiciary in political construction is rather profound than prominent (Sidgwick, 1919, 481). It is indispensable that there must be judicial department to ascertain and decide to

* Lecturer, Dept. of Political Science, Varendra University, Bangladesh. Email: ummysalmaru@gmail.com

administer justice to protect the innocent people from injury and usurpation (Johari, 1995, 507). Besides there is no better test of excellence of the government than the efficiency of its judicial system for nothing more really touches the welfare and the security of the average citizen than his knowledge that he can rely on certain and prompt administration of justice (Bryce, 1921, 283). It is conceived as the final resort to justice. A society without legislative organ is conceivable but a civilized state without judicial organ is hardly conceivable (Garner, 1928, 684). Judiciary forms the foundation of social justice and equality which is essential for good governance. In 1972 after its birth as an independent nation, the constitution of the People's Republic of Bangladesh was adopted which made the provision of an independent Judiciary. But Judiciary had been faced certain interruption: first in 1975 under the 4th amendment which made the Judiciary subservient to the executive and the 8th amendment that bifurcated the High court division and crippled the basic structure of the constitution (Ahmed, 2013, 331). After the revival of democracy in 1990 in Bangladesh, it was anticipated that the independence of Judiciary will be restored with proper functioning. But the unyielding leaders were indifferent to develop rules, processes, procedures and mechanisms for democratic governance of the Judiciary. That's why the nation had to be waited up to 2007 for the separation of Judiciary. Soon Judiciary crept into politics. It had got extra focus when the sitting Chief Justice was called upon to head the neutral interim government in December 1990, the top most political post of the country (Haque, 2008, 84). Nevertheless, two fair and peaceful general elections were made possible one was in 1991 and another one was in 2001. The incumbent government began to influence the Judiciary with a view to capturing political benefit from it. This paper mainly intends to assess the effectiveness of Judiciary in promoting good governance during 2001-2006. Data have been collected and analyzed mainly from secondary sources such as renowned books, articles, annual reports and daily newspapers. This study specifically focuses on three dynamics: quantitative level of justice delivered by the judicial branch; Its' role to establish rule of law and administrative influence over judiciary to assess the effectiveness of judiciary during that particular period.

Objectives of the Study

The broad objective of this study is to identify the effectiveness of Judiciary in Bangladesh during the period of four-party alliance government (2001-2006). This research attempts to explore the relationship of rule of law and good governance with the judicial branch and to explore the functions of Judiciary in keeping individual liberty and good governance in Bangladesh.

Methodology

The study is basically descriptive and conceptual in nature. In this research qualitative method has been applied where data have been collected from secondary sources. This paper consists of both theoretical and empirical analysis relating to good governance and effectiveness of political institutions in Bangladesh. For the purpose of this study, a three step review process has been conducted. Firstly the relevant data are collected from worlds' leading journal and publication houses as well as newspaper. Secondly the collected documents are scrutinized based on the relevance and reliability. Then exclusively reliable research paper and statistical facts were analyzed. \

Conceptual Structure

Effectiveness

The term effectiveness can be defined as the ability to be effective or the degree to which something is effective. Effectiveness refers to the capability of producing a desired result or ability to produce desired output. The origin of the word effective comes from the Latin word 'effectivous' which means productive or effective (Etymology Dictionary,2011). It's a criterion used to assess changes determined in the target system in its behavior, assets or capability tied to the attainment of an end of state and achievement of objectives.

Definition Good Governance

Good Governance is that which is opposed to the bad or mal governance. Working uses of the term good governance include a variety of good things. Good governance is that which maintain law and order, creates institutions to protect property rights, encourage investments to establish basic structures and provides services for the poor and be accountable and transparent (UNDP, 1997). Although it is the effective management of countries social and economic resources in a manner that is open, transparent, accountable and equitable (Bilney, 1994, 17); it implies presence of rule of law, safeguard of human rights, and existence of honest and efficient government, accountability, transparency, predictability and openness (Landelmills & Serageldin, 1991, 303- 320). It is itself a goal of development and an independent judiciary is indispensable for Good governance.

Rule of Law

Rule of law is a sin qua non for good governance in a country. Generally Rule of Law denotes the rule by law not by men. The term is used to mean a system in which governance is based upon neutral and universal rule. The rule of law refers to a principle of governance in which all persons, institutions and entities, public and private, including the State

itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards (United Nations: 2004). A.V. Dicey is the main founder of rule of law explained it by three basic principles:

a) Absence of Arbitrary Power: it means the absolute supremacy of regular law with no right to abuse or misuse of power and nobody could be punished or made to suffer except for a breach of law proved by an ordinary court (Halim, 2012, 403). b) Equality before Law: where no man is above the law and everyone is equal before the law regardless of social, economic, or political status, moreover citizens are under a duty to obey the same law. c) Protection of Rights- The rule of law includes the results of judicial decisions determining the rights of private persons.

The Effectiveness of Judiciary: a brief Consecutive Assessment of Good Governance

Judiciary the more trusted wing of the State (the Hindu,2000)responsible for settling disputes between citizens and between the state and the citizen interpret laws, enforce rights of the citizens and impose penalty to the offenders. The judiciary of Bangladesh is composed with the following court: Supreme Court (COB, Article- 94:1) and Subordinate Court. Supreme Court has two divisions: High Court Division and Appellate Division. Other subordinate courts and tribunals are linked with the High Court Division along with some tribunals and special courts like Juvenile Court, Labour Court, Family Court, and Administrative Tribunal (COB, Article 114-117).The legal system has to be impartial and freed from all interferences and influences while administering justice. The effectiveness of the judiciary depends on it's ability to enhance the rule of law, promote fundamental rights and administer the law impartially towards citizen and state as well as between citizen and citizen (Mollah, 2012, 61- 77) which is also the primary aim of this paper.

Judiciary and Rule of Law in Bangladesh

The key and crucial endeavor of rule of law is that governmental authority must be legitimately exercised as per the rules of written and published laws, approved and enforced, according to established procedures with a view to safeguarding citizen's rights against arbitrary exercise of government power (Mollah, 2012, 61-77). To attain this fundamental aim of the State, the Constitution of Bangladesh made special provision in order to protect rule of law. Article 27 guarantees that all citizens are equal before law and are entitled to equal protection of law when Article 31 guarantees to enjoy the equal protection of the law. Article 32 guarantees protection of life and personal liberty in respect of trial and punishment; Article 33 guarantees safeguards as to arrest and

detention of the citizens. Constitutional arrangement for their effective enforcement has been ensured in Article 44- right to move to the High Court division in accordance with (1) clause of Article 102. Besides, in accordance to Article 7, 26 and 102(2) of the Constitution, the Supreme Court exercises the power of judicial review whereby it can examine the extent and legality of the actions of both the executive and legislature. The functions of the Judiciary are to enhance the rule of law, promote fundamental rights and administer the law impartially towards citizen and state as well as between citizen and citizen (Razzaque, 2012, 1). Apparently it seems that Judiciary is effective for ensuring rule of law but the existing situation needs to be examined how far this institution kept functioning during 2001-2006 to bring such effectiveness on the basis of rule of law for ensuring good governance in Bangladesh.

Absence of Arbitrary Power and Protection of Human Rights

Absence of arbitrary power is one of basic and prime principles of rule of law. However in practice lot of incidences have been found based on misuse or abuse of power. Extra judicial punishment, torture and killings are instances of arbitrary use of power.

Extra Judicial Killing and Breach of Criminal Justice

Extra judicial killing is a form of grave violation of rule of law and human rights. Rule of law does not permit any exercise of power arbitrarily or punished any person without fair trial by court. because no person who is arrested shall be detained in custody without being informed(The Code of Criminal Procedure, 1898, sec 54:1); Every person arrested and detained in custody shall be produced before the nearest magistrate within a period of 24 hours of such arrest(COB, Chapter:3). Bangladesh has earned notoriety in carrying out extra judicial killings. There are lot of incidences of extra judicial killing have been taken place in Bangladesh during 2001-2006. In the first 3 months of the newly government, 258 persons were murdered, 122 were raped, 19 were acid victims. In the month of May alone 268 were killed and 101 raped. At least 136 cases were identified and a powerful monitoring cell was established to overview their arrest and trial (National Dailies of Bangladesh, 2002, April- July).

Table 1: Reported Extra Judicial Killing by Different Forces (2001-2006)

Reported Extra Judicial Killing by Different Forces (2001- 2006)			
Year	Death by Crossfire and Gunfight	Torture to Death in Custody	Shoot to Death
2001	0	8	21

2002	5	50	10
2003	26	22	7
2004	259	37	39
2005	319	20	24
2006	278	25	27
Total	887	162	128

Source: Compiled by Researcher from National Dailies and Reports produced by Odhikar.

A large number of people got tortured by the law enforcement agencies during 2001-2006 (Daily Jugantor, 2005, 15 Feb. & 13 July). The success of BNP, the ruling government, in containing law and order situation was marked with a stigma of killing its' citizens without any due process of law (Ahmed, 2012, 329). The table 1 shows that during 2001- 2006 total 887 had death by crossfire and gunfight between law enforcement and terrorists groups, 162 were reported as tortured to death in custody and 128 were as shoot to death. The above table further depicted that the number of violating justice to criminal has gain a dramatic increase in the year of 2004, 2005 and 2006. Operation clean heart, led by armed forces, an anticrime operation ran from October 2002 to 9 January 2003 was marked by as severe disregard for the right of life and due process of law. At least 60 people were killed in 88 days, about 11000 people were arrested out of which 3000 were listed criminals and more than 2000 illegal arms and weapons and 3000 round of ammunitions recovered (Daily Jugantor, 2003). Besides government established anticrime unit, RAB, by Armed Police Battalions (Amendment) Act 2003 is convicted by 174 incidents by the end of 2004. According to Odhikar only 26 incidents of grave offences against offending members were taken in criminal courts, about 351 were killed by RAB during 2001-06 (Odhikar Report, 2004). This tendency of welcoming these extra-judicial killings by the police increased mistrust in the legal and judicial system. In 2001-2006, the "nationalist" godfathers were seen also (the Hindu, 2003). This is gross violence of rule of law and poor effectiveness of judiciary to render justice to the criminals.

Litigants Rights to Justice and Effectiveness of Judiciary

The effectiveness of Judiciary of a country can be measured by two indicators keeping in consideration: how fast the legal system is able to provide justice to its citizens and what extent of the delivered judgments are transparent and standard in nature (Khan, 2018, 217). The incompetency and the procrastination of any legal system within a country push the Judiciary to the state of backwardness. Justice too long

delayed is Justice denied (King, 1963). Delay in disposal of cases threatens justice and the lapse of time blurs truth, weakens memory of witnesses and makes presentation of evidence difficult. This lead to a loss of public confidence in judicial process which itself is a threat to rule of law and consequently to the Democracy (Takwani, 1963, 769).

Backlog of Cases and Justice Condition in Bangladesh (2001-2006)

Sigmund Freud quoted that the requisite for civilization is justice (Freud, 1930). The scarecrow of a suit become so complicated that no man alive knows what it means.(Dickens, 1853, 4).Corruption and backlog of cases hindered the court system and extended continuances effectively prevented many defendants from obtaining fair trials due to witness tampering, victim intimidation, and missing evidence (COI Report, 2013, 53). However the father of Bengali Nation Bongobondhu Sheikh Mujibur Rahman uttered that “In our country justice begins with falsehood and ends with lies. (Rahman, 2012, 190).From this point of view the litigants of Bangladesh are mostly deprived of justice.

Table 4: Statistical Data Analysis for the High Court Division of the Supreme Court

New Filed Cases , Disposal And Pendency of All Cases from (2001-2006)			
Year	New Cases Filed	Disposal	Pending
2001	32328	16014	135879
2002	45627	22048	154168
2003	37734	20331	168447
2004	34217	15581	184811
2005	42900	16894	208389
2006	48056	13839	240483
Total	240862	104707	1092177

Source: *Supreme Court of Bangladesh: Annual Report, 2013*

The above table shows that in 2001- 2006 total 240862 new cases were filed among which only 104707 cases get settled and 1092177 cases were not resolved. The number of new filed cases increased gradually in the following five years with a figure of 45627 in 2002, 42900 in 2005 and 48056 in 2006.While this rate slightly slopes down in the year of 2003 and 2004. The judicial branch manage to settled cases 16014 in 2001, 22048 in 2002, 20331 in 2003, 15581 in 2004, 16894 in 2005 and 13839

in 2006. On the contrary keeping pace with the increase number of new filed cases the number of pending cases also rose. The scenario of pending cases was 135879 in 2001, 154168 in 2002, 168447 in 2004, 208389 on 2005 and 240483 in 2006. And gradually the rate of the settlement of cases gradually slopes down.

Table 5: Criminal Cases Settlement Rate by Lower Court, 2001-2006

Years	Total Pending Criminal Cases Settlement ate (%)
2001	44.82
2002	50.16
2003	47.98
2004	40.00
2005	37.00
2006	35.00

Source: Kazi Ibadul Haque, Administration of Justice in Bangladesh for 1994-2000; BIGD, 2014 the State Of Governance Bangladesh 2014-2015: Institutions, Outcomes, Accountability, and Dhaka. BRAC Institute of Governance and Development, BRAC for 2004-2006.

Table 5 depicted that in 2001, 44.82% of the pending criminal cases were settled by the magistrate. The condition of such settlement rate was slightly improved in 2002 but worsened in the following year and the rate was 47.98% while in 2004, 2005 and 2006 this situation kept deteriorating gradually, everything went beyond explanation. The obtained data simply illustrate the inefficiency of the lower courts to deliver justice to the litigants.

Table 6: Total Civil Cases Settlement Rate by the Lower Court, 2001-2006

Year	Total Pending Civil Cases Settlement Rate (%)
2001	27.11
2002	27.13
2003	27.13
2004	26.93
2005	25.47
2006	25.03

Source: BIGD.2008, The State of Governance Bangladesh 2014-2015: Institutions, Outcomes, Accountability. Dhaka. BRAC Institute of Governance and Development, BRAC.

Table 6 shows that in 2001 the magistrate court settled only 27.11% of the total pending civil cases in one year. In the year of 2002 and 2003 the courts achieve a bit improvement regarding disposal of cases, however

this rate was deteriorated in the following 4 year. The total disposal of cases in 2005 was 25.47% but it sloped down in 2006 with the percentage of 25.03%. This scenario proves that the effectiveness of judiciary in promoting good governance was below the mark during 2001- 2006.

Judiciary and Administration in Bangladesh

There are many problems which hinder the easy proceeding of trial by the Courts in Bangladesh. There have been certain disturbing trends because of the undue politicization of society and it's far reaching implications (Ahmed, 2012, 333). In Bangladesh while appointing the Judges the following three basic principles are followed: seniority, Merit, Quota (Mollah, 2012, 61- 77). The Chief Justice shall be appointed by the President and other Judges shall be appointed by the President after consultation with Chief Justice (COB, Article 95:1&2); In absence of chief justice all functions will be performed by the next more senior judge of the appellate division.(COB, Article 97). However, this principle isn't always strictly followed in time of appointment of the Judges(Mollah, 2012, 61- 77).In 2001, BNP led four party Alliance government appointed Justice K.M. Hasan as the Chief Justice of Bangladesh in supersession of two fellow colleagues &Justices Md. Ruhul Amin and Md. Fazlul Karim. It should be pointed out that both Justices Amin and Karim had been elevated to the AD superseding Justice Hasan, the senior-most judge of the HCD, by ignoring the recommendation of the Chief Justice(The Daily Star, 2003).Again the then ruling party tried to ensure that Justice Hasanbe destined to head the next Care-taker Government raising the retirement age of the judges from 65 to 67sothat he could influence the outcome of the election in the party's favor due to his past ties (The Daily Star, 2006).

Within 2001-2006, an anemic situation was created in the appointment and conformation of other Judges(Hoque, 2104, 240). During the BNP led four party alliance government, 44 Judges were appointed in the High Court Division within four periods. In the first phase 11 Judges were appointed, while 10 in second, 4 in third and 20 in the fourth phase (2014, 240).In the case of High Court Division, seniority principles were violated on 20 February 2001 when three Judges were appointed to the high court division superseding senior district Judges – Mr. M. Abdul Hye, Abdul Hossain Ahmed, Mr. Mohammad AbdurRazzak and Mr. M. MarziulHaque (Minstry of Law, Justice and Parliamentary Affairs (Ministry of Law, 2001). BNP led government in 2001-2006 appointed 44 Judges on the basis political background(Ahmed, 2012, 336).Besides on 23 August 2004 the appointment of 19 Judges by the BNP Led government by an instant decision (The Daily Star, 2004) proved that Judiciary is highly controlled by the executive. In 2004 justice Sayed J.R. Mudassir Husain of the Appellate Division of the Supreme Court was appointed as the 14th Chief Justice of Bangladesh on political basis.

Evaluation

Almost in all democratic countries good governance is hooked on upon the three organs of the government- and each organ has some special responsibilities which are closely related to good governance. Among them the Judiciary has a close attachments with good governance because the Judiciary with its legal system and institutions of protection perform the greatest task of the safeguard of the rights of individuals to live, work and enjoy fundamental freedoms. Although judiciary has played a vibrant role almost in all of our historical movement at various stages, it faces the erosion of credibility. It is found that the appointment of Chief Justice and other Judges was highly influenced by the executive. The authority of the appointment of Judges for both the Appellate Division and the High Court Division is vested on the President by the Constitution. Since the president is appointed on political consideration, the appointment Judges wasn't fair and trustworthy. During the regime of BNP led four Party Alliance, 44 Judges in High Court Division were appointed on political influence. Another duty of the Judiciary is to protect citizen's rights and to punish the offenders. But in 2001-2006 we can see that the Judiciary remains invisible to perform its function as an armor of fundamental rights which results in extrajudicial killing as so called crossfire and gunfight by the law enforcement agencies such as RAB, Joint Arm and Polices. The delay in trial remained as the most boring and vexing problems during this regime. The litigants were deprived of a fair trial. It causes irreparable sufferings to the litigants. The number of litigants increased. From 2001 to 2006 240862 new cases were filed while only 104707 cases were settled by the courts and a number of 1092177 were remained pending. The backlog of cases both in the High Court Division and the Appellate Division failed to meet the litigants demand. These barriers hindered judiciary in delivering justice protecting the basic human rights of good governance in Bangladesh. So the above discussion clarify that Judiciary fails to safeguard the basic demands of justice and to establish rule of law and ultimately good governance during 2001-2006. The learning lesson of this study is rule of law is crucial for good governance and judiciary is one of the vital organs to establish good governance. So the judicial branch needs dispense justice as quickly as possible. For this a free and fair method of appointing of Chief and other judges needs to be ensured. Besides judiciary should exercise all of the components such as scrutiny of laws by judicial review, monitoring discretionary powers, judicial activism, judicial- remedies. Constitutional Provision of appointment of a retired or removed judge as the President needs to be revised. The independence of judicial branch from any kind of influence need to be ensured.

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