

IDE Research Bulletin

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Politics and Independence of the Judiciary in Bangladesh

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Summary

In Bangladesh, the judiciary has adjudicated important political issues, particularly cases of constitutional amendments. On the other hand, the judiciary has been utterly politicised against a backdrop of deep-seated antagonism and mistrust between the two major political parties—the Awami League (AL), led by Sheikh Hasina, and the Bangladesh Nationalist Party (BNP), led by Khaleda Zia. Although the related literature tends to focus on either the judicialisation of politics or the politicisation of the judiciary alone, we argue that politicisation and judicialisation have coexisted and the relative importance of these two factors can change depending on the type of issue dealt with by the judiciary.

Accordingly, we take up the latest constitutional amendment case as an example, in which the Supreme Court struck down a significant constitutional change in the procedure for the removal of judges. In so doing, we demonstrate that, while judicial appointments had been deeply politicised for decades, judges across the political spectrum were very keen to uphold judicial autonomy vis-à-vis the executive branch.

However, as the current regime has become increasingly authoritarian after “landslide victories” in general elections in 2014 and 2018, it seems more likely that the politicisation (and possibly the subjugation) of the judiciary has played a dominant role in recent years.

Background and aim of the research project

A growing number of studies have documented the increasing significance tied to the role of the judiciary in politics in many parts of the world. Accordingly, the trend towards the “judicialisation of politics” (Hirschl 2006) has been recognised in the literature concerning Asia, and this is also the case with some countries in South Asia in particular

(Dressel 2012). For example, Hoque (2015, 266) states that the “judicialisation of politics has achieved a significant place within the higher judiciaries of Bangladesh, India, and Pakistan—although in differing degrees and types.” For Bangladesh, he claims that the judicialisation of politics has recently reached a stage in which the judiciary intruded into “mega-politics” in an unprincipled and unpragmatic manner. This observation on the Bangladeshi judiciary appears quite reasonable, given that the Supreme Court has annulled four constitutional amendments since 2010.

On the other hand, many legal scholars and practitioners have pointed out that in Bangladesh the executive branch has interfered in the judiciary, especially through judicial appointments, against a backdrop of deep-seated antagonism and mistrust between the two major political parties. More specifically, there is significant room for political discretion in elevating judges from the High Court Division (HCD) to the Appellate Division (AD) in the Supreme Court and in appointing the Chief Justice among judges of the AD (Bari 2016; Islam 2012; Jahan and Shahan 2014; Siddiq 2018) . Therefore, judges have a strong incentive to act in accordance with the government’s wishes.

The aim of this research project is to show that the relative importance of politicisation and judicialisation can change, depending on the type of issue handled by the judiciary. While the related literature tends to focus on either politicisation of the judiciary or the judicialisation of politics alone, the judiciary of Bangladesh is not simply characterised by either politicisation or judicialisation (or a transition from the former to the latter). Therefore, this sort of dichotomous thinking is not appropriate when looking at the relationship between the executive and judicial branches. Accordingly, we need to examine important legal issues on a case-by-case basis, taking into account both the political and judicial contexts.

Main findings

In this research project, we take up the example of the latest constitutional amendment case, which was about the procedure for the removal of judges (the Sixteenth Amendment Case). In doing so, we demonstrate that judges across the political spectrum were very keen to uphold judicial autonomy vis-à-vis the executive branch, notwithstanding its extensive interference in the judiciary. Combining different types of evidence—such as patterns of judicial appointments, a detailed insider account by a former Chief Justice (Sinha 2018), and the Supreme Court’s rulings and voting patterns of judges in major

cases—we argue that it is possible to understand why the Supreme Court struck down the Sixteenth Amendment against the government’s wishes.

However, as the current regime has become increasingly authoritarian after “landslide victories” in general elections in 2014 and 2018, it seems more likely that the politicisation (and possibly the subjugation) of the judiciary has played a dominant role in recent years.

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