UITS Journal of Humanities and Social Sciences ❖ **Volume: 6, Issue: 1**
ISSN: 2663-1105, December-2018

To Search for an Effective Model of Constitutional Court for Bangladesh: An Analysis

Nadia Shabnam[1], **Biswanath Bhattacharjee**[2]

Abstract: A court that deals primarily with constitutional law is known as a Constitutional Court. Its main authority is to see whether or not laws that are challenged do conflict with constitutionally established rights and freedoms. In many countries there is no separate constitutional court, but they instead delegate constitutional judicial authority to their Supreme Courts. A separate constitutional court is not merely a thematic notion but also an effective mechanism to deal with constitutional matters and to be considered as a separate, independent authority apart from other subordinate and superior courts; one that can also prove to be effective in Bangladesh. The paper will find the salient features of constitutional courts throughout the world in different forms and suggest an effective model of constitutional court which will guarantee the basic rights and freedoms of all citizens and thus ensure the rule of law of the land in the real sense.

Key-words*; constitutional court, separate and independent, politicization, rule of law, rationale.*

Introduction

A constitutional court is a high court that deals primarily with constitutional law. Its main authority is to rule on whether laws that are challenged in fact unconstitutional, i.e. whether they conflict with constitutionally established rights and freedoms. There are some countries that have a separate constitutional court. Many countries do not have separate constitutional courts, they delegate constitutional jurisdiction to their general court system authorizing the Supreme Court with the final decision-making power. In Bangladesh, there is no separate Constitutional Court in real sense. The Supreme Court of

[1] Assistant Professor, Department of Law, University of Information Technology and Sciences (UITS).
E-mail: nadiasub@gmail.com
[2] Lecturer, Badda Law College, Dhaka,
E-mail: bnbc.80@gmail.com

Bangladesh (which was created by Part VI, Chapter I (Article 94 – 113) of the Constitution of Bangladesh adopted in 1972) disposes the constitutional disputes in addition to its other jurisdictions. [1]

Now a days, political issues are frequently placed before the Supreme Court and in many of such cases verdict follows the wish of the ruling party/parties and thus the neutrality of the court faces questions. For example, the appropriateness of scrapping of the provision of the Caretaker Government system from the Constitution through the 15th amendment is still in question. Through the 16th amendment to the Constitution of Bangladesh, the Parliament empowered itself to remove judges if allegations of incapability or misconduct against them are proved which was subsequently declared illegal and contradictory to the Constitution by the High Court Division as illegal and contradictory to the Constitution.[2]

Thus, against such type of anarchy and in the light of the overall standing of Bangladesh, formation of a separate and independent constitutional court appears to be more logical and pragmatic for reasons.

Objectives of the Study

At present, more than one-third of the member states of the United Nations have constitutional courts to look into matters related to the texts of the respective constitutions which have proved to be effective. In the context of the overall situation of Bangladesh where a parliamentary democracy is in force since 1991, formation of a separate and independent constitutional court appears to be an essential demand of the time. Henceforth, the study has been conducted heading two major aims, i.e.

- to ascertain the shortcomings of the Supreme Court of Bangladesh (in respect of a constitutional court) comparing to the other constitutional courts throughout the world, and
- to ordain some suggestive measures for the effectiveness of the constitutional court in Bangladesh.

Research Methodology

The study is qualitative and suggestive in nature. It is based on secondary data collected from law reports, text-books, journals, newspapers, international conferences, websites, and workshops on constitutional court. The collected data have been refined and prepared in the present form in order to make the study more informative, analytical and useful. The study is prepared by using the analytical

approach of research which is the most important one and widely used in legal research.

Perception of Constitutional Court

The notion of constitutional court is not a new phenomenon. In fact, it traces back to the time of Hans Kelsen, who propounded a theory that introduces a concept of an independent constitutional court with the power of constitutional review within a single judicial body. The first dedicated constitutional court was established in1919, in Austria, which came into effect in 1920 when the court gained the power to review the laws of Austria's federal states under her advanced constitution. Specialized constitutional courts have expanded all over the world in recent decades. Originally conceived by the great legal theorist Hans Kelsen for the Austrian Constitution of 1920 and later adopted in post-war Germany and Italy, they have expanded to Southern Europe, Asia, and Eastern Europe during subsequent waves of democratization.[3]

Obtrusive Features of the Constitutional Court

1. Ways of Initiating the Proceedings

There are basically three ways of initiating the proceedings before a constitutional court by which the court can review the legislation:

a) **As a Constitutional Challenge**

A constitutional challenge is a motion brought by public or constitutional institutions, predominantly the President, a group of Members of a Parliament (a qualified minority of the parliament), the government, the general prosecutor, the ombudsman (the public defender).

b) **As a Constitutional Question**

A constitutional question (preliminary request or concrete control) is a tool for raising the problem of unconstitutionality of a statute by ordinary judges when they have to decide a particular case. If they believe that the statute concerned is not in compliance with the constitution, they can or for certain circumstances must refer the case (the question) to the constitutional court.

c) **As a Constitutional Complaint**

In some countries (e.g. Austria, Germany, Spain, the Czech Republic, Slovenia Slovakia) a constitutional complaint is a third type of procedure which allows individuals to submit an application to the constitutional court if they consider that their fundamental rights or freedoms have been violated.[4]

2. Systems of Appointment

Generally there are three systems of judicial appointment, namely,

a) the direct appointment system
b) the elective system, and
c) the hybrid system

The Direct Appointment System

The direct appointment system denotes the monopoly appointment of judges by the head of the state or any other body without involving any voting system.

The Elective System

The second system is the elective system, which tends towards greater democratic legitimacy. The electing authority is most often the sole chamber of Parliament, the Lower House of Parliament, or the both Houses of Parliament or a Joint Sitting of the two. In this system the proposal for candidates may come from the Chief justice, the Upper House, a mixture of Parliament, the Executive and either the supreme judiciary or judicial council.

The Hybrid System

The third system is the hybrid between election and direct appointment, which is the most common, though it appears in many variations and sometimes in the guise of a direct appointment system which simply rubber stamps proposals from both an elective and an appointment component. In the hybrid category, nominating authorities such as judicial authorities or boards may also perform a direct appointing function.

3. Age and Terms of Office of Constitutional Judges

The maximum age of constitutional judges ranges from 65 years to 75 years and to no limit at all (Albania, Bulgaria, Czech Republic, France, Georgia, Italy, Liechtenstein, Lithuania, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, "the former Yugoslav Republic of Macedonia"). In Estonia judges may remain in office up to five years after reaching the age of retirement.

4. Offices Incompatible with that of a Constitutional Judge

Constitutional judges are usually not allowed to hold another office concurrently. This general rule serves the purpose of protecting judges from influences potentially arising from their participation in activities in addition to those of the court. At times an incompatibility between the

office of constitutional judge and another activity may not be apparent, even to the judge in question. Such conflicts of interests can be prevented from the outset by way of strict incompatibility provisions.

Membership of a political party is not allowed in many countries or at least no active participation in a political party or public association is permissible, however, past political involvement is often permissible either expressly or implicitly (Armenia, Belgium, Finland, France, Iceland, Ireland, "the former Yugoslav Republic of Macedonia", Norway, Sweden, Switzerland, Turkey).

5. Immunity of the Constitutional Judges

Most courts surveyed reserve at least partial immunity from prosecution of their members, except perhaps where the judge is caught in the act of committing an offence, or where a crime attracting a heavy prison sentence is involved. Complete criminal and civil immunity is also available in several countries whereas, in several jurisdictions no special provision is made for judicial immunity.

6. Dismissal

The possible reasons for the dismissal of a judge may vary from one jurisdiction to another. In general, the more dishonorable the cause for dismissal, the more stringent the procedural requirements for dismissal, and normally it is only possible to dismiss a judge for very serious reasons. One example is Germany's Federal Constitutional Court, the members of which may only be dismissed by the Chief justice of the Republic, if authorized by a two-thirds majority of the Court in plenary session and only on the grounds of dishonorable conduct or a prison sentence exceeding six months.

The dismissal of a judge by an authority other than the court itself is impossible in most jurisdictions. In some jurisdictions, it is the court that makes the preliminary decision to revoke a judge's powers, and then the final decision to dismiss must come from the relevant nominating authority. In other cases the dismissing authority may be the House of Representatives, the Senate upon an accusation by the Lower House or the Lower House and the Senate. Impeachment proceedings may also form part of the dismissal process.

7. The Chief Justice of the Constitutional Court

Appointment

Two main modes of selection of chief justice of the court may generally be observed. On one hand, there is the internal ballot by the judges themselves who elect a chief justice from among their number. An

absolute majority is normally required, but in some cases there must be a two-thirds majority. On the other hand, there is the election of a chief justice of the court either by Parliament, or by the Head of the State.

Term of Office, Re-Election and Dismissal

The term of chief justice ranges from 2 years to 9 years and sometimes with the right of re-election. The term of chief justice is often indistinguishable from that of a constitutional judge. In Finland, the chief justices serve until retirement. The chief justice may sometimes be dismissed early by secret ballot on the initiative of at least five judges and by a two-third majority of the 19 judges (Russia). In Norway and Malta the chief justice is appointed for life.

Functions of the Chief Justice

The chief justice of a constitutional court is usually primus inter pares (a first among equals), merely presiding over the court, and not exercising any jurisdictional function higher than that of the other judges with the occasional exception of crucial issues of competence. The chief justice will sometimes have the casting vote in case of a tie or in most matters. Sometimes the chief justice will have the power to instruct the other judges on their work (Armenia, Romania, Russia, Ukraine), or to distribute the cases to be dealt with individually by one of the judges as rapporteur. For some courts the chief justice will even be in charge of disciplinary action against the other constitutional judges, or against collaborators of the court with respect to minor sanctions.

Necessity of the Constitutional Court

It is accepted as a basic principle that Constitutional Court must be subordinate to the Constitution and may not usurp the legislative power. Nonetheless, in the contemporary world, these courts have gradually assumed roles previously held only by the legislature or its constituents. They have enumerated constitutional rules, especially in matters involving human rights, which are not actually expressed in the constitution. Some of these courts have also performed non-judicial functions by filling in gaps left in legislation or sending guidelines and orders to the legislature. This activism has culminated in study and analysis of the work of other courts in order to develop competence.[5] Constitutional Court helps de-clog the Supreme Court, which has always been swamped with thousands of cases, rendering it impossible for the high court to deliver decisions speedily and with more quality.

In the contemporary world, most of the countries of Western Europe like Italy, Germany, Poland, and France witnessed a great success by

establishing a separate constitutional court to uphold their constitutional mandates as well as the rule of law.

Sidebars or Disadvantages of the Constitutional Court

There is no model of anything without some side effects. This is also valid for a centralized model of constitutional court which has its own operational problems. There are two major disadvantages of a centralised model of constitutional court, i.e.(i) the constitutional court needs time to decide on a case referred to it by an ordinary judge. It opens the problem of delays exerts a significant influence to the willingness of ordinary judges referring the case to the constitutional court. In the context of modern legislation the number of constitutional questions referred to constitutional courts by ordinary courts is bound to increase, thus exacerbating the problem of delays and necessity of being able to decide the case referred in reasonable time, and (ii) the power of a constitutional court to override final decisions passed by ordinary courts usually raises certain tensions between ordinary judiciary in particular the Supreme Court and the constitutional court. Moreover, questions also arise on the politicization of the Constitutional court. Thus, the existence of the Constitutional Court may reduce the authority of the other courts, legislative as well as the executive branch of the state.

Constitutional Courts throughout the World

The origin of constitutional court is synonymous with the constitutional or judicial review which was born in Europe after World War I. Former Czechoslovakia and Austria in 1920, Liechtenstein in 1921, and Spain in 1931 were the first countries to adopt it. Hans Kelsen was the scholar who did the most to develop and popularize this model

This institution became the model for almost everything that came after World War II. Austria re-established its pre-war Constitutional Court in 1945. Germany, however, was the most influential, adopting express provisions in Basic Law (1949) for constitutional review and a 'Kelsen style constitutional court'. The specific situation raised in Italy where they established judicial review in 1947, following the American model. It was not too successful thus Italy adopted the European model in general sense. Greece, Spain, Portugal, Belgium, France and other countries soon followed the same.

Some of the former Communist countries tried to settle judicial review. Yugoslavia established a constitutional court in 1963 and Poland instituted the Constitutional Tribunal (1982) working from

1986 to 1997 when they constituted the new type (more powerful) Constitutional Tribunal.

Most European countries have established special constitutional courts that are uniquely empowered to set aside legislation that runs counter to their constitutions. Such constitutional courts review legislation in the abstract, with no connection to an actual controversy. Today it is the prevailing model in Europe, particularly among the member states of the European Union. Of the remaining countries Denmark, Sweden and Finland follow the "American" model but in those countries courts very rarely find a statute unconstitutional. The rest of the countries, i.e. Ireland and Greece have a so-called "mixed model" of constitutional review and Netherlands and the United Kingdom have no system of constitutional review of legislation.[6]

The Supreme Court of Japan has been described as the most conservative constitutional court in the world. Since its creation in 1947, the court has struck down only eight statutes on constitutional grounds. By way of comparison, Germany's constitutional court, which was established several years later, has struck down over 600 laws. The Constitutional Court of Germany is able to actively administer the law and ensure that political and bureaucratic decisions comply with the rights of the individual enshrined in the Basic Law. Specifically, it can vet the democratic and constitutional legitimacy of bills proposed by federal or state government, scrutinize decisions (such as those relating to taxation) by the administration, arbitrate disputes over the implementation of law between states and the federal government, and (most controversially) ban non-democratic political parties. The Constitutional Court enjoys more public trust than the federal or state parliaments, which some say derives from the German enthusiasm for the rule of law.[7]

In France, the Court of Cassation, (court of last resort) or "Quashing Court", stands at the apex position of the hierarchical structure of the courts and essentially characterized by two distinctive features, i.e. firstly, its uniqueness (there is one single Court of Cassation for the whole Republic), and secondly, it does not rule on the merits of a case, rather it finds and interprets if the rules of law have been correctly or incorrectly applied, whether the said rule is substantive or procedural, or part of old or new legislation. This distinctive nature of the Court of Cassation enhances the importance of its decisions.

Supreme Court of Bangladesh in Respect of Constitutional Matters

In true sense, there is no separate Constitutional Court in Bangladesh. The Supreme Court of Bangladesh disposes the constitutional disputes in addition to its other jurisdictions.

The Supreme Court of Bangladesh is the highest court of Bangladesh. This Supreme Court is divided into two parts, i.e. (i) the High Court Division and (ii) the Appellate Division. The High Court Division hears appeals from lower courts and tribunals; it also has original jurisdiction in certain limited cases, such as writ applications under Article 102 of the Constitution of Bangladesh, and company and admiralty matters. The Appellate Division has jurisdiction to hear appeals from the High Court Division. The Supreme Court is independent of the executive branch, and is able to rule against the government in politically controversial cases.[8]

The Chief Justice of Bangladesh and other judges of the Supreme Court are appointed by the Chief justice of Bangladesh with prior mandatory consultation with the Prime Minister. The entry point to the seat of judges in the High Court Division is the post of Additional Judges who are appointed from the practicing Advocates of the Supreme Court Bar Association (not less than 10 years) and from the judicial service under the provision of Article 98 of the constitution for a period of two years. The current ratio of such appointment is 80%-20%. Upon successful completion of this period and upon recommendation by the Chief Justice an Additional Judge is appointed permanently by the Chief justice of Bangladesh under the provision of Article 95 of the Constitution. The judges of the Appellate Division are also appointed by the Chief justice of Bangladesh under the same provision. All such appointments come into effect on and from the date of taking oath by the appointee under the provision of Article 148 of the constitution.

A judge of the Bangladesh Supreme Court holds office until s/he attains the age of 67 years as extended by the provision of Constitution (Thirteenth) Amendment Act, 2004 (Act 14 of 2004). A retiring judge faces disability in pleading or acting before any court or authority or holding any office of profit in the service of the republic, not being a judicial or quasi-judicial office or the office of the Chief Adviser or Adviser.

Supreme Court judges are independent in their judicial function as empowered through article 94(4) of the Constitution.[9]

Short-Comings of the Constitutional Court in Bangladesh

In Bangladesh, there is no separate Constitutional Court with particular constitutional judges designated or empowered to hear the constitutional matters. The Supreme Court of Bangladesh disposes of such disputes in addition to its other jurisdictions with its regular judges who sit to hear the constitutional disputes along with other disputes, which often cause the overload of the apex court.

Like other common law countries, Bangladesh also typically involves a rubber stamp appointment by the Head of the State or his/her representative pursuant to a binding executive nomination that often creates opportunity for politicization. There is no voting procedure in the appointment system of judges. There is neither any 'Judicial Appointments Advisory Board' to recommend the appointment of judges, nor the Supreme Court of Bangladesh has any de facto right to veto the appointments. Besides, in case of the authority of 'judicial review', the principle of 'Nemo Judex in Causa Sua' (no-one should be a judge in his own cause), is often violated because the Supreme Court is supposedly not in a position to adjudicate the matter where the matter in dispute is related to removal of judges of the same court.[10]

Recommendations

Followings are some of the major challenges to overcome the shortcomings mentioned above, to establish an effective constitutional Court in Bangladesh:

- To establish a separate and independent Constitutional Court with separate composition, jurisdictions and functions.
- Judges of the Constitutional Court must be expertise in constitutional provisions / matters from the very beginning.
- De-politicization of the constitutional court from all aspects. The ruling party should not be in a position to have all judges appointed to its liking. Hence terms of office of constitutional judges should not be coincided with parliamentary terms. One way of accomplishing this can be by long terms of office or office until the age of retirement. In the former case, reappointment would be possible either only once or indeed not at all.
- There should have a voting procedure to appoint judges either by the non-political civil society or by all political parties.

- There should have a 'Judicial Appointments Advisory Board' whose recommendations shall be taken into account to appoint judges.
- The Supreme Court should also have a de facto right to veto appointments of the judges where practicable.
- Cooperation between the constitutional court and other ordinary courts should be ensured to enforce constitutional decisions.
- The rules of incompatibility should be rather strict in order to withdraw judges from any influence which might be exerted via his/her out-of-court activities.
- Disciplinary rules for judges and rules for their dismissal should involve a binding vote by the court itself. Any rules for dismissal of judges and the chief justice of the court should be very restrictive.
- And last but not least, most importantly, to bring an amendment in the Constitution to establish a separate and independent constitutional court which will bring a drastic change in the overall structure of the existing system of judiciary and thus it may positively affect the socio-political, economic and cultural practice of the country.

Furthermore, special provision might be necessary in order to maintain the effective functioning of the court when vacancies arise:

- Rules on appointment should foresee the possibility of inaction by the nominating authority and provide for an extension of the term of office of a judge until the appointment of his/her successor. In case of prolonged inaction by this authority, the quorum required to take decisions could be lowered.
- The effectiveness of a constitutional court also requires there to be a sufficient number of judges, that the procedure not be overly complex and that the court have the right to reject individual complaints which do not raise a serious issue of constitutional law.

All of these points remain necessarily vague and will have to be adapted to each specific case. Taken together, they can, however, provide an idea of some issues to be tackled in order to create a balanced, independent and effective constitutional court.[11]

Concluding Remarks

Constitutional court plays an increasing role in policymaking and the concepts of comparative politics. Since parliamentary democracy is on run in Bangladesh, a separate constitutional court would have a far-

reaching impact on other counts as well because it involves necessary amendment to the constitution and the question of independence of judiciary in our unitary structure is also crucially important. Constitutional justice must ensure autonomy, through its arrangement, with respect to various intrigue gathers and contribute towards the foundation of a group of statute which is aware of the pluralism of the general public.

References

[1] *The Constitution of the People's Republic of Bangladesh* (as modified up to June 30, 2011), Government of the People's Republic of Bangladesh, Ministry of Law, Justice and Parliamentary Affairs.

[2] Shaon, Ashif Islam *'16th Amendment scrapped, parliament loses power to impeach SC judges*' (Published in The Dhaka Tribune, July 3, 2017)

[3] Nuno Garoupa & Tom Ginsburg, (2011) '*Building Reputation in Constitutional Courts: Political and Judicial Audiences'* University of Chicago Law School.(http://chicagounbound.uchicago.edu)

[4] European Commission f-or Democracy Through Law (Venice Commission); *The Role of Constitutional Courts in the Consolidation of the Rule of Law*, Bucharest, 8- 10 June, 1994

[5] Brown, Karen B. & Snyder, David V. (eds.)**,** '*Constitutional Courts as Positive Legislators*' (eBook, published in 2012 by Springer.com)

[6] European Commission for Democracy Through Law (Venice Commission); *The Role of Constitutional Courts in the Consolidation of the Rule of Law*, Bucharest, 8- 10 June, 1994

[7] Hossain, Md. Altaf (2011) *'Comparative Constitutional Law* ', pp.276-77

[8] Halim, Md. Abdul (2013), *The Legal System of Bangladesh*, pp.22-31

[9] Karim, Md. Ershadul, '*A Research Guide to the Legal System of the Peoples' Republic of Bangladesh*, (Published by Hauser Global Law School Program, New York University School of Law in May 2016)

[10] Rahman, Muhammad Rezanur & Ahmed Jubaer '*Need for Constitutional court'* (Published in The Daily Star, July 05, 2016)

[11] 'European Commission for Democracy Through Law; *The Composition of Constitutional Courts'*, Council of Europe, December 1997.