

## **SEPARATION OF MAGISTRACY : A BASIC NEED FOR THE INDEPENDENT JUDICIAL SYSTEM IN BANGLADESH**

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### **1. Introduction**

It is almost trite to mention that no other criminal court of the Lower Judiciary in Bangladesh enjoys direct connection with the larger portion of our litigants so extensively like the Magistrate Courts. Nor have Magistrates of other countries the many special jurisdictions and extra-judicial functions conferred on the Magistrates of Bangladesh by statutory enactment.

As regards criminal cases in Bangladesh, Magistrates' Courts are the courts of first instance. It would be evident from the number of criminal cases filed in a year in these courts, which is far greater than the number of cases in civil courts. So, these criminal courts should have played a vital role in shaping the thoroughgoing nature of our legal system. But unfortunately, due to some legal shortcomings, these courts are playing controversial role frustrating the very purpose of the Independent Judicial System. Public perception of the Magistracy is very low and the reasons are plain to see. In order for law enforcement to be fair, the judicial system must be concerned only with the application of Law. There is only one way in order to make this happen: assurance of independence from any sort of influence from the administrative branch of the government. Achieving judicial independence is the crucial phase in regaining public confidence in the Legal System of Bangladesh. The future independence of the Judiciary of Bangladesh depends upon the minimization of the executive interference in the Lower Judiciary, and more importantly, upon the removal of the executive control over the Magistracy.

The aim of this study is to focus on the shortcomings of the Magistracy and subsequently to put forward certain recommendations for the proper functioning of an independent and separate Magistracy in Bangladesh.

### **2. System of Magistracy**

According to the Merriam-Webster's Dictionary of Law, 1996, Magistrate

is a civil or Judicial Official vested with limited judicial powers.<sup>1</sup> Again, according to the American Heritage Dictionary of the English Language, a Magistrate is a local member of the Judiciary having limited jurisdiction, especially in criminal cases.<sup>2</sup> In English legal system, magistrates usually hear prosecutions for and dispose of summary offences. Magistrates' sentencing powers are limited, but extend to shorter periods of custody, fines, probation and community service orders. Magistrates usually pass summary offenders to higher courts for sentencing when, in the opinion of the magistrate, a penalty greater than can be given in Magistrates' Court is warranted.

To have a clear idea of the Magisterial System in Bangladesh, one must know something of the historical setting of Magistracy before and after the emergence of Bangladesh.

### **2.1 Evolution and Development of Magistracy before Emergence of Bangladesh**

Evolution of Magistracy before the emergence of Bangladesh dates back to the period of Warren Hastings, the Governor of the East India Company. In 1772, Warren Hastings took over the collection of revenue and administration of civil justice from the Hands of Nazim and handed it over to the English servants of the Company. He appointed a covenanted servant of the Company as the Collector in each district for collecting revenue. Apart from the District Civil Court, a criminal court was also constituted with the Quazi, Mufti and two Moulovies in each district who had the authority to try all the criminal cases including murder cases. This court could award punishment up to death penalty. But death sentence required approval of the Sadar Nizamat Adalat, which, in its turn, had to take approval from the Nazim.<sup>3</sup> Sadar Nizamat Adalat consisted of Naib Nazim, Quazi-ul-Quzzat, Head Mufti and three well reputed Moulouis to hear appeals against the District Quazis in criminal matters.<sup>4</sup>

In the Year of 1781, Warren Hastings appointed Collectors as Magistrates and empowered them to arrest persons suspected of committing crimes

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1. Merriam-Webster's Dictionary of Law, 1996 available at [www.lectlaw.com/def2/m064.htm](http://www.lectlaw.com/def2/m064.htm).
  2. The American Heritage® Dictionary of the English Language, Fourth Edition, Copyright © 2004, available at [www.lectlaw.com/def2/m064.htm](http://www.lectlaw.com/def2/m064.htm).
  3. Jain, M.P., *Outlines of Indian Legal History* (Bombay, 1972) pp. 75-77.
  4. Mittal, J.K., *Indian Legal History* (Allahabad, 1981), pp. 48-50.

and to send them to the District Criminal Court for trial. In 1785, the Magistrates were authorized to try petty offences.<sup>5</sup>

During the Period of Lord Cornwallis, the revenue and judicial administration were separated. He removed the Collector's judicial powers – leaving the position purely administrative. This step was undoubtedly praiseworthy. Four Provincial Courts were introduced in the four divisions. Two of the Judges of each Provincial Court formed the Circuit Court of Sessions of the division to try criminal cases sent to them by the Magistrates. That court could also hear appeals and revisions from the decision of the Magistrates' courts. But as usual, a sentence of death used to require confirmation by the Sadar Nizamat Adalat.<sup>6</sup> Sadar Adalats were again reconstituted with the Governor General and some of his Councillors to hear appeals from the Provincial Courts of Appeal and Circuit Courts of Sessions.

During the period of Lord Hastings, Regulation IV of 1821 empowered the Governor General in Council again to authorize the collector or any other revenue officer to exercise powers of the Magistrate.<sup>7</sup> Afterwards, Lord William Bentick vested almost all the Collectors with magisterial powers to administer criminal justice.<sup>8</sup> A Commissioner of Revenue and Circuit in each division was appointed to control the Magistrates and he was empowered to try cases of grave offences and the Circuit Court of Sessions was abolished.<sup>9</sup> Afterwards, Regulation VII of 1831 authorized the Governor General to empower the District and City Judges who were not Magistrates to hold sessions to try cases of grave offences instead of the Commissioners of Revenue and Circuit. Thus, gradually, the District Judges were made Sessions Judges of the District and the Divisional Commissioners were relieved of their duty of holding sessions. Afterwards, Criminal Justice Act 1843 passed by Lord Ellenborough's government provided for appointment of Deputy Magistrates from amongst educated and competent natives for trying petty criminal cases.<sup>10</sup>

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5. Jain, M.P., *Outlines of Indian Legal History* (Bombay, 1972), pp. 153, 158.

6. Morley, William H., *The Administration of Justice in British India* (New Delhi, 1858, reprinted 1976), pp. 59-60.

7. Jain, M.P., *Outlines of Indian Legal History* (Bombay, 1972), p. 251.

8. *Ibid.*, p. 259.

9. *Ibid.*, pp. 259-260

10. *Ibid.*, p. 271.

During the last days of the East India Company's Rule, there were four tiers of the Magistrate Courts where Deputy Magistrate was the court of first instance. Above this court, there were three more courts – court of Assistant Magistrate, court of Joint Magistrate and court of District Magistrate. District Magistrate used to control the other Magistrates. Magistrates used to try petty offences and investigate the grave offences. Where the investigation disclosed a prima facie case, then they used to refer the case to the Court of Sessions. Magistrates had the maximum power of imprisonment up to two years and additional one year imprisonment instead of corporeal punishment. Appeal lay from their sentences to Sessions Judges.

During the British Rule, when the Company's rule came to an end in the year of 1858 by a proclamation of Queen Victoria, some changes were brought about by the different Law Commissions. Each district got divided into several sub-divisions and there were courts of Magistrates in the sub-divisional headquarters, which were presided over by the Sub-divisional Magistrates. Three classes of magisterial power were introduced – first class Magistrates, second class Magistrates and third class Magistrates. Magistrate of the first class had the authority to award punishment upto 2 years imprisonment and 2000 rupees fine, second class Magistrate could award punishment upto six months imprisonment and fine upto 500 rupees, and the third class Magistrate had the authority to award imprisonment upto one month and fine upto 100 rupees.<sup>11</sup> District Magistrate, Joint Magistrate and Additional Magistrates located in the district headquarters if empowered, could try cases punishable with imprisonment upto seven years. Otherwise, they had the authority of a Magistrate of the first class. They could also hear appeals from the Magistrate of the third class.<sup>12</sup> Appeal from the Magistrate of the first and second class lay to the Sessions Judges. However, appeal from a sentence of the Magistrate specially empowered sentencing any of the accused for a term exceeding four years lay before the High Court.<sup>13</sup>

During Pakistan period, the entire Magistracy continued to function as it was.<sup>14</sup>

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11. Hoque, Kazi Ebadul, *Administration of Justice in Bangladesh*, (Dhaka, 2003), p. 19.

12. Ibid.

13. Ibid., p. 20.

14. Ibid., p. 21.

## 2.2 Magistracy on the Emergence of Bangladesh

Magistracy continued to function in Bangladesh under the Laws Continuance Enforcement Order 1971 and Magistrates continued to function as well after taking oath of allegiance to Bangladesh.<sup>15</sup> Thus it appears that all subordinate courts and Magistracy functioning during the Pakistan period continued to function after emergence of Bangladesh under the High Court of Bangladesh.<sup>16</sup>

In 1972, the Constitution of the People's Republic of Bangladesh was passed which came into force on the 16th December, 1972. Chapter II of Part VI deals with the subordinate courts and Magistracy.

Apart from the Court of Sessions, there are four types of criminal courts.<sup>17</sup> They are –

- a) Court of Metropolitan Magistrates
- b) Court of Magistrate of the First Class
- c) Court of Magistrate of the second class
- d) Court of Magistrate of the third class

The Government may confer upon any person the powers of Magistrate under the Code of Criminal Procedure.<sup>18</sup> Normally, the Government appoints a junior civil servant of the administrative cadre as a Magistrate of the third class. When such an officer gains some experience as a Magistrate of the third class, he is conferred with second class power and after further experience, he is conferred with first class power.<sup>19</sup> Under the Code of Criminal Procedure, the Government may confer upon any person all or any of the powers conferred or conferrable by or under the Code on a Magistrate of the first, second and third class in respect to particular classes of cases, or in regard to cases generally in any local area outside a Metropolitan area. Such Magistrates shall be called Special Magistrates and shall be appointed for such term as the Government may by general or special order direct.<sup>20</sup>

In the Districts outside the Metropolitan areas, Magistrates of the first class are appointed District Magistrates and Additional District

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15. 24 DLR, Bangladesh Statute (Dhaka, 1972) p. 3.

16. Hoque, Kazi Ebadul, *Administration of Justice in Bangladesh*, (Dhaka, 2003), p. 28.

17. See Section 6 of the Code of Criminal Procedure, 1898.

18. Section 12, *ibid*.

19. Hoque, Kazi Ebadul, *Administration of Justice in Bangladesh*, (Dhaka, 2003), p. 40.

20. Section 14 of the Code of Criminal Procedure, 1898.

Magistrates.<sup>21</sup> Normally, Deputy Commissioner of the district acts as District Magistrate and the Additional Deputy Commissioner acts as Additional District Magistrates.<sup>22</sup> All other Magistrates including the Additional District Magistrates are subordinate to the District Magistrates.<sup>23</sup> In the Metropolitan areas, Government appoints Chief Metropolitan Magistrate, Additional Chief Metropolitan Magistrate and other Metropolitan Magistrates to perform magisterial functions.<sup>24</sup> All of them exercise first class magisterial power. Normally, they are also civil servants from administrative cadre.

### 3. Importance of the Magistracy in the trial of criminal cases

Magistrate Courts are the courts of first instance for criminal cases. So Magistracy serves as the gateway for seeking redress in criminal cases. Discussion regarding the functions, powers and workloads of the Magistrate Courts will reveal the importance of the Magistracy in the trial of criminal cases.

#### 3.1 Functions and Powers of the Magistrate Courts

A criminal case regarding a cognizable offence is initiated by lodging first information report (FIR) with the local police station<sup>25</sup> and in case of non-cognizable offence, the same is done by filing a complaint petition with the Magistrate of the local area.<sup>26</sup> In case of cognizable offence, the police submits either charge sheet (where the allegation is proved after investigation) or final report (where the allegation is not proved after investigation) to the Magistrate of the area. In case of charge sheet, the Magistrate takes cognizance of the offence and in case of final report, discharges the accused.<sup>27</sup> But the Magistrate is not bound by the final report. The court may act suo moto or on the application of the informant (usually known as Naraji Petition) and if satisfied that there are sufficient materials in support of the allegation, may take cognizance of the offences rejecting the final report.<sup>28</sup> In case of non-cognizable offences, when information is given to an officer in charge of the Police station, he

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21. Section 10, *ibid.*

22. Hoque, Kazi Ebadul, *Administration of Justice in Bangladesh*, (Dhaka, 2003), p. 39.

23. Section 10 and 17 of the Code of Criminal Procedure, 1898.

24. Section 18, *ibid.*

25. Section 154, *ibid.*

26. Section 155 and 190, *ibid.*

27. Section 190 (1) (b) and 202(2b), *ibid.*

28. *Abdus Salam Vs State*, 36 DLR (AD) p. 58.

shall enter in a book and refer the informant to the Magistrate.<sup>29</sup> In case of such offences, police can not arrest the accused without warrant of arrest from the Magistrate, nor can investigate into such an offence without the permission of the Magistrate.

In case of non-cognizable offence, when the case is initiated by filing a complaint petition, the Magistrate taking cognizance of such offence on complaint shall examine upon oath the complainant and such of the witnesses present, if any, as he may consider necessary. The substance of the examination shall be reduced into writing and shall be signed by the complainant or witness so examined, and also by the Magistrate.<sup>30</sup> The Magistrate may, for the ends of justice, himself (not being a Magistrate of the third class) hold inquiry for ascertaining the truth or falsehood of the allegation. He may direct any other Magistrate subordinate to him or any other police officer to hold the inquiry.<sup>31</sup> The Magistrate may dismiss the complaint if, after considering the statement of the complainant and other witnesses (if any) or the result of the inquiry, he is of the opinion that the complaint bears no substance.<sup>32</sup> On the other hand, if the Magistrate takes cognizance of the complaint case, he issues summons or warrant of arrest against the accused to compel his appearance before the Magistrate.<sup>33</sup> It is to be mentioned here that in case of cognizable offence, police arrests the accused during investigation and produces him before the court.

As soon as the accused is produced or appears before the court, the court sets really in motion. The Magistrate may enlarge the accused person on bail or send to the jail custody. After taking cognizance and appearance of the accused, if the Magistrate finds that the offence is exclusively triable by the Court of Sessions or any other Special Tribunals, he then sends the case to Sessions Judge of the District.<sup>34</sup> If it appears to the Magistrate that the offence is triable exclusively by the Chief Metropolitan Magistrate, District Magistrate or the Additional District Magistrate, then he shall send the cases to those courts.<sup>35</sup>

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29. Section 155 of the Code of Criminal Procedure, 1898.

30. Section 200, *ibid.*

31. Section 202, *ibid.*

32. Section 203, *ibid.*

33. Section 204, *ibid.*

34. Section 205C, *ibid.*

35. Section 205CC, *ibid.*

Generally, less grave offences are to be tried by the Magistrates. However, powers of Magistrates depend upon the sentences which Magistrates may pass. The court of Magistrates may pass the following sentences:<sup>36</sup>

- (a) Court of Metropolitan Magistrates and Magistrates of the first class may award imprisonment for a term not exceeding five years including such solitary confinement as is authorized by law and fine not exceeding ten thousand taka;
- (b) Court of Magistrates of the second class may award imprisonment for a term not exceeding three years including such solitary confinement as is authorized by law and fine not exceeding five thousand taka;
- (c) Court of Magistrates of the third class may award imprisonment for a term not exceeding two years imprisonment and fine not exceeding two thousand taka.

However, the court of any Magistrate may pass any lawful sentence, combining any of the sentences which it is authorized by law to pass.<sup>37</sup> Besides, the court of a Magistrate, specially empowered under Section 29C of the Code of Criminal Procedure, may pass any sentence, authorized by law, except a sentence of death or of transportation or imprisonment for a term not exceeding seven years.<sup>38</sup>

So, the above discussion very clearly reveals the importance of the Magistracy in the judicial system of Bangladesh. It also shows that although the Magistrates are to try minor offences, they have been given a wide range of authority to inflict punishment upon the accused person which should be given only to a Judicial officer having legal background.

### 3.2 Workload in Magistrates' Courts

According to the information obtained from the Cabinet Division of the Government of the People's Republic of Bangladesh, up to June 1994, there were 875 Magistrates including 24 Magistrates deputed in autonomous bodies, working in the country and disposing of criminal cases. In 1993, in the court of the Magistrates, 2,59,053 cases were filed making a total of 4,01,027 cases including the cases pending from the previous year and out of these, 2,26,042 cases were disposed of leaving

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36. Section 32, *ibid.*

37. *Id.*

38. Section 33A, *ibid.* Be it noted that by Govt. Notification No. ED/FA-52/82-466 dt. 8.9.82 and No. LD/EA-28/83-120 dt. 6.3.83, all the District Magistrates and Additional District Magistrates were empowered under section 29C.



1,74,985 cases pending at the end of the year.<sup>39</sup> From 1994 to 2005, number of Magistrates as well as number of cases increased but the rate of disposal of cases decreased, resulting in an increase in the number of pending cases before the court of the Magistrates.<sup>40</sup> In 1994, the percentage of the disposal of cases was 52.12% where it has decreased in the year of 1999 to 43.58% although the number of Magistrates has increased.<sup>41</sup> Although there was a notable rise in the year 2002 but then again there was a downfall and the number is presently decreasing.<sup>42</sup> From Year 1994 to year 2005, the number of cases has increased from 2,82,401 to 3,42,268.<sup>43</sup> The Statement of criminal cases in the Courts of Magistrates from 2000 to 2005 may be shown as follows:<sup>44</sup>

Year	Number of cases pending at the end of the previous year brought forward	Number of cases filed during the year	Total number of cases in the current year	Number of cases disposed of during the year	Number of cases pending undisposed at the end of the year	Percentage of disposal of cases	Number of Magistrates (at present)
2000	3,95,908	3,31,595	7,27,503	3,20,287	4,07,216	44.02	923 March/ 2005
2001	4,07,216	3,79,050	7,86,266	3,52,447	4,33,819	44.83	
2002	4,33,819	3,77,430	8,11,249	4,06,987	4,04,262	50.17	
2003	4,04,262	3,74,817	7,79,079	3,73,832	4,05,247	47.98	
2004	4,05,247	3,42,268	7,47,515	3,39,613	4,07,902	45.43	
2005 up to March	4,07,802	74,606	4,82,508	79,035	4,03,473	16.38	

39. See for details, Hoque, Kazi Ebadul, *Administration of Justice in Bangladesh*, (Dhaka, 2003), pp. 84-85.

40. As per the statement supplied by the Cabinet division in May 2005.

41. See for details, Hoque, Kazi Ebadul, *Administration of Justice in Bangladesh*, (Dhaka, 2003), Appendix - V, p. 294.

42. As per the statement supplied by the Cabinet division in May 2005.

43. Ibid.

44. Ibid.

This picture clearly reveals the huge workload upon the Magistrate Courts proving the importance of Magistracy as the court of first instance in the disposal of criminal cases.

#### **4. Problems of the Present system of Magistracy**

It is now beyond any doubt that the Magistracy in Bangladesh serves as the gateway to protect the rights of the citizen in criminal matters. All the criminal cases are started in the Magistrates' courts and those triable by the Court of Sessions or sessions level courts or tribunals are sent by the Magistrates to those courts or tribunals after the preliminary stages. And the power enjoyed by those Magistrates in awarding punishment upon the accused person is not negligible. Even specially empowered Magistrates may pass sentence of imprisonment up to seven years. In such circumstances, how far the Magistrates in Bangladesh can uphold the dignity of the judicial system by exercising their magisterial power is a burning question. A little discussion about the appointment, promotion, discipline etc. of the Magistrates will reveal how does the present system of Magistracy is directly in conflict with the concept of independent judicial system.

##### **4.1 Appointment, promotion, discipline etc. of the Magistrates**

As it is found in the history, at first, the collectors<sup>45</sup> were appointed as the Magistrates during the period of Warren Hastings<sup>46</sup>, who were then empowered to try petty cases. The present system of Magistracy has not deviated too much from that very first concept of British rule in this sub-continent. The dual function of Magistrates is a legacy of British rule. According to the Code of Criminal Procedure, the Government may confer upon any person the powers of Magistrate.<sup>47</sup> But practically, it is neither vested upon 'any person', nor there is any separate cadre of Magistrates. Officers appointed in the administrative cadre of the Civil Service are initially vested with the third class magisterial power. After gaining some experiences as the Magistrates of the third class, they are vested with second class and first class magisterial power. As the Magistracy has not been separated from the Executive organ of the State,

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45. 'Collector' was a crucially important colonial officer placed at the district level and entrusted with the responsibility of revenue collection and other civil duties. The district collector functioned as the most decisive officer of the administration throughout the British period. It was through this officer that the colonial state used to execute its command, and sustained local control.

46. See for details, "Legal system under Company rule" as available at -<http://banglapedia.search.com.bd>

47. Section 12 of the Code of Criminal Procedure, 1898.

as directed under Article 22 of the Constitution, the officers of the administrative cadre performs both the administrative and judicial functions and their control including posting, promotion and leave is exclusively exercised by the Executive organ of the Government, accordingly, depends on the sweet will of the Executive. However, according to the Constitution, the control (including the power of posting, promotion and grant of leave) and discipline of persons employed in the judicial service and Magistrates exercising judicial functions shall vest in the President and shall be exercised by him in consultation with the Supreme Court.<sup>48</sup> But in practice, Supreme Court is not consulted in the matters of posting, promotion etc. of Magistrates. Besides the term 'magistrates exercising judicial functions' as used in the Constitution of Bangladesh is a misnomer. A little discussion about that will make it clear.

#### 4.1.1 'Magistrates' Vs 'Magistrates exercising Judicial Functions'

In the Constitution of the People's Republic of Bangladesh, the term 'magistrates exercising judicial function' has been used to describe the Magistrates. This term is a misnomer. The definitions of Magistrates as universally used in different languages very clearly reveal that Magistrate is usually a person who exercises limited judicial power in summary matters.<sup>49</sup> No officer who does not have any type of judicial power is normally called Magistrate. Besides, in Bangladesh, there is no appointment of any officer as Magistrates. So, there is no one who can be called Magistrate in practice except an officer of the administrative cadre who exercises magisterial power. Under such circumstance, the term 'Magistrate' itself implies that he is a person who has some judicial power. So, there is no reason for using the term 'magistrates exercising judicial function'. This term can be used only when there is a separate cadre of Magistrates where the persons are appointed as Magistrates with magisterial power and they are specially given limited judicial power to exercise. And then, obviously, a distinction must be categorically maintained between the term 'magisterial' and 'judicial'. But there is no separate appointment as Magistrates. The persons who played key role in drafting the Constitution clarified that they tried to mean Judicial Magistrate by that term.<sup>50</sup> Then the question arises, why again 'Judicial

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48. Article 116 of the Constitution of the People's Republic of Bangladesh.

49. See for details, the various definitions of Magistrates as available at [www.lectlaw.com/def2/m064.htm](http://www.lectlaw.com/def2/m064.htm)

50. See for details, Halim, Md. Abdul, *Constitution, Constitutional Law and Politics, Bangladesh Perspective*, (Dhaka, 2003) p. 350.

Magistrate' instead of 'Magistrate' only. The term 'Judicial Magistrate' can be used only if there is another type of Magistrates called 'Lay Magistrate' as found in the old system of England and Wales.<sup>51</sup> If the term 'Judicial Magistrate' was used and separate cadre of Judicial Magistrates was created where the appointment would be made from among the persons having legal background who would exercise judicial functions, there would not be any problem regarding magistracy at present. But, as now, the officers from the administrative cadre are vested with judicial power, there are a lot of shortcomings of the Courts of Magistrates that deserve a little discussion.

#### 4.2 Shortcomings of the present system of Magistracy

It can be said that in criminal matters, Magistrates' Courts are the lowest courts of the judicial system in Bangladesh, which are presided over by the members of the executive. Magistrates are the executive officers and they are directly controlled by the Executive branch of the Government. So, they are most easily influenced by the Government objectives. Thus, it is the lack of independence of the Magistracy, which stands as the largest impediment to justice in the Lower Judiciary.

However, the shortcomings of the present system of Magistracy may be described as follows:

- Officers of the administrative cadre of the Bangladesh Civil Service are vested with the magisterial power in practice. So, all the magistrates exercise dual functions – judicial and administrative. For their administrative activities, they are directly answerable to Executive branch of the Government but for exercising judicial power, they are not under the direct control of the Judiciary. It is principally due to this practice, the Executive branch has been able to intrude upon and influence the Magistracy, creating enormous problems regarding the quality of jurisdiction and the extent of judicial independence.
- Posting, promotion and the prospects of the career of a Magistrate is totally dependent upon the pleasure of the Executive branch of the Government. Under such a circumstance, it is impossible for a Magistrate to take an independent view of the case he is trying where the interest of the Executive branch is involved.

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51. There were two types of Magistrates in England and Wales: Lay Magistrates who are known as Justices of the Peace and sit voluntarily on local benches, and another type was Professional or Stipendiary Magistrates (who are now known as District Judges).

- As mentioned earlier, the officers of the administrative cadre are vested with the magisterial power in practice. So, they are actually appointed as Assistant Commissioners through the Public Service Commission after a competitive test and legal background is not a prerequisite for such an appointment. As a result, a person graduating from any discipline (e.g. Bengali Language or History) of any University may be appointed as Assistant Commissioners. Afterwards, those officers are vested with the judicial power under the Code of Criminal Procedure, as according to the provisions of the Code of Criminal Procedure, such power may be invested upon 'any person'<sup>52</sup> and theoretically, it is better to confer such power upon the officers of the administrative cadre. But practically, such a Magistrate is exercising judicial power without having any legal background. It is somehow impossible to expect criminal justice from a person who has no legal education. Consequently, they are doing injustice in the name of justice. As discussed above in this Article, Magistracy serves as the gateway to the criminal justice in Bangladesh as all the criminal cases are initiated in the Magistrates' Courts. So, Magistracy plays a very crucial role in doing criminal justice to the people at large. If such a role is played by the officers who do not have any legal background, it is almost impossible to expect justice from these courts. Thus the continuous deterioration of the quality and independence of the Lower Judiciary is spear headed by the insensitivity of the Magistrates to the practice of law resulting in unsystematic granting of police remand and the denial of bail for those who should be granted bail.
- Magistrates' courts are not under the direct control of the Judiciary. So, in case of any discrepancy, the Higher Judiciary can not take any administrative action regarding the Magistrates. As a result, the officers of the administrative cadre sometimes do not care about doing injustice.

Thus the Magistrates' Courts, who are the court of first instance in case of criminal matters, are suffering from a lot of shortcomings regarding which, immediate remedial measures should be taken to put the Magistracy above controversy. This can only be done through the separation of Magistracy.

##### **5. Separation of Magistracy and the Direction of the Supreme Court**

As discussed above, it was first the Lord Cornwallis, who separated the revenue and judicial administration. But this failed to take an ultimate

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52. Sections 12 and 14 of the Code of Criminal Procedure, 1898.

shape of the separation of Magistracy due to the later interventions by his successors. Thus, although the separation of Magistracy has been debated almost since arrival of the British, it is since the emergence of Bangladesh and the formation of its own Constitution that the need for the separation and independence of the Judiciary as well as Magistracy has become crucial. Specially after the 4th Amendment of the Constitution on 25th January of 1975, which introduced the one party political system, the country went through the most significant and radical changes in the Constitution.<sup>53</sup> It is told that the Amendment completely curtailed the independence of Judiciary.<sup>54</sup> As to the appointment in the Subordinate courts, it was provided in the original Constitution that the District Judges shall be appointed by the President on the recommendation of the Supreme Court and other judicial officers including Magistrates would be appointed by the President after consulting the Public Service Commission and the Supreme Court.<sup>55</sup> As to the security of tenure, it was provided that the control and discipline of the Judges and Magistrates would vest in the Supreme Court.<sup>56</sup> So, these were healthy provisions regarding the Lower Judiciary as well as Magistracy. But the 4th Amendment amended the appointment provision to the effect that appointments of persons to offices in the judicial service or as Magistrates exercising judicial functions shall be made by the President in accordance with the rules made by him in that behalf. And the provisions regarding control and discipline were amended to the effect that the control (including the power of posting, promotion and grant of leave) and discipline of persons employed in the judicial service and Magistrates exercising judicial functions shall vest in the President. Thus the whole Judiciary became completely subservient to the executive. And after making such provisions, it was inserted in the Constitution that subject to the other provisions, all persons employed in the judicial service and all Magistrates shall be independent in the exercise of their judicial functions.<sup>57</sup> This provision was really illusory. However, the undemocratic

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53. See for details, Ahmed, Moudud, *Bangladesh: Era of Sheikh Mujibur Rahman*, (Dhaka, 1984), p. 233.

54. See for details, Halim, Md. Abdul, *Constitution, Constitutional Law and Politics, Bangladesh Perspective*, (Dhaka, 2003) p. 118.

55. Article 115 of the Constitution of the People's Republic of Bangladesh.

56. Article 116, *ibid*.

57. Article 116A, *ibid*.

provisions regarding the control and discipline introduced by the 4th Amendment were repealed and the healthy provision 'in consultation with the Supreme Court' as was provided by the original Constitution was revived in 1978 by the Second Proclamation. But, unfortunately, the arbitrary provision relating to the appointment of Judges and Magistrates of the Lower Judiciary still exist.

In the years following the 1975 Amendment, a few attempts were taken to improve the independence of Judiciary, which revolved around mainly the Higher Judiciary only (e.g. the creation of Supreme Judicial Council regarding the removal of Supreme Court Judges in 1977 and the increase in the tenure of the office of the Supreme Court Judges several times) but the issue of the separation of Lower Judiciary was unheeded until 1997 when the High Court Division demanded the Judiciary be separated from the Executive. And since December 2, 1999, the issue of judicial independence centered on a twelve-point direction issued by the Supreme Court as operative part of its judgement delivered in the case of Secretary, Ministry of Finance Vs Masdar Hossain.<sup>58</sup> In fact, these twelve points in the operative part of the judgement are not all directions in true sense of the term. Of these 12 points, five are (i.e. 4,5,6,8,9) in the nature of directions. The directions asked the Government to take necessary steps to create a unified Judicial Service of Bangladesh or Bangladesh Judicial Service. The Government in power at that time did not take any step except establishing Judicial Pay Commission while the current Government is now in the final steps to give effect to the 12 point directions of the Supreme Court. The Judicial Service Commission has already been established and Judicial Service Commission Rules 2004 has already been promulgated.<sup>59</sup> The process of appointing Judges of the lower courts through the Judicial Service Commission is going on in full swing. But this Commission is going to appoint only the Assistant Judges, which has been considered as the 'Entry Post' of the Lower Judiciary by the Judicial Service Commission Rules. But the problem remains the future of the Magistrates. Government may create a separate cadre of Magistrates or the members of the judicial service may perform Magistracy. However, some recommendations may be put forward regarding the separation of Magistracy.

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58. 52 DLR (AD), p. 82.

59. The Judicial Service Commission Rules 2004 has been notified in the Official Gazette on 28 June, 2004.

## 6. Some Recommendations for the Separation of Magistracy

The foregoing discussion reveals that, the shortcomings of the Magistracy are so considerable, the need for an effective and independent Magistracy is so great, and the directions of the Supreme Court of Bangladesh regarding the creation of a unified Judicial Service are so specific, that it is now time to 're-evaluate' its future. Supreme Court has already declared in point 2 that '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. So, the President can make rules for the **reformation** of the Magistracy regarding the recruitment and appointment to make it an independent one.

Be it noted that the Magistracy is considered as a separate stream outside the judicial service as in its present form, Magistracy can not be included in the 'Judicial Service' and the Supreme Court has also mentioned it separately and used the Constitutional term 'Magistrates exercising Judicial Functions'. But, as they are performing judicial functions, it would be better if they could be included in the Judicial Service. In that case, present system of Magistracy has to be abolished, because, Supreme Court has already declared in point 1 that the judicial service is a service of the Republic within the meaning of Article 152(1) of the Constitution, but it is 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 service. And in point 11, the Appellate Division disagreed with the view of the High Court Division and declared that, if the Parliament so wishes, it can amend the Constitution to make the separation more meaningful, pronounced, effective and complete. If this point is taken into consideration widely, the present system of Magistracy may be **abolished** by amending the Constitution and a new post for this purpose may be created within the judicial service.

To make the Magistracy an effective and independent one, the following reforms may be suggested:

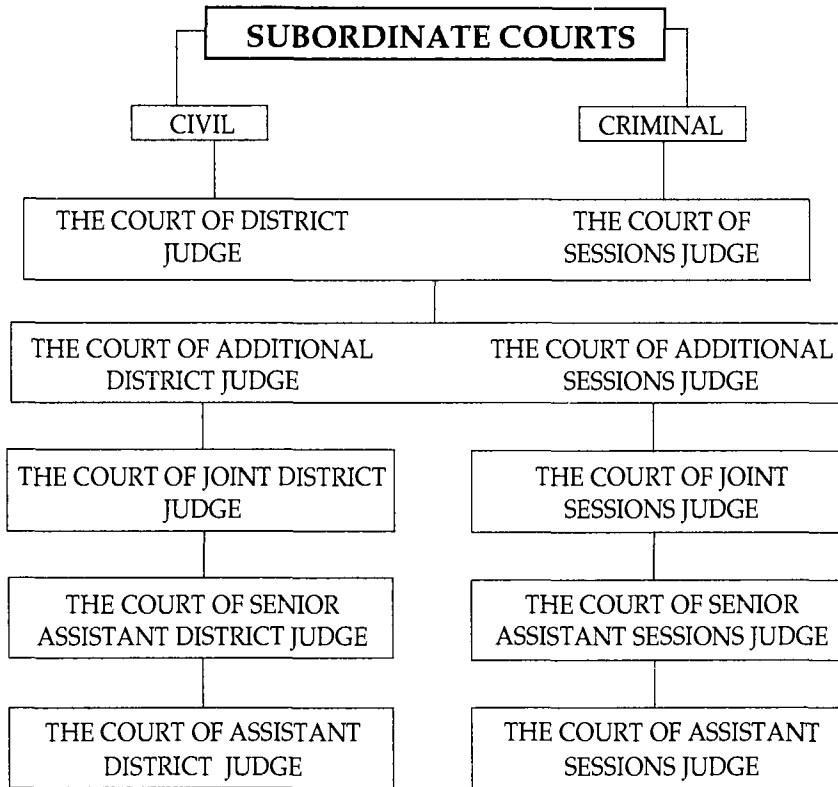
- There will be a separate stream of Magistrates who will exercise judicial functions to be known as Judicial Magistrates. They will serve as the courts of first instance regarding criminal offences. All these Magistrates shall be appointed from among the persons having legal background in the rank of the 'Judicial Magistrate' by the Judicial Service Commission.



- Equivalent to Assistant Judge and Senior Assistant Judge, there will be two ranks of Judicial Magistrates –Judicial Magistrate and Senior Judicial Magistrate. Usually, the Assistant Judges try the cases in which the suit value is less than 2 lakh taka while Senior Assistant Judges try the cases with suit value up to 4 lakh taka. Likewise, the Judicial Magistrates shall try the petty offences and the Senior Judicial Magistrates shall try the less grave offences.
- The Senior Judicial Magistrates may be promoted to the rank of Assistant Sessions Judge after gaining experience. Thus he may enter into the hierarchy of the Sessions Court. If the Judicial Service Commission thinks fit, the Assistant Sessions Judges (exercising criminal jurisdictions) and the Joint District Judges (exercising civil jurisdictions) may be transferred from one stream to another after a short training period.
- These Magistrates will be under the direct control of the Judiciary and control of these Magistrates including posting, promotion and granting of their leave and their discipline should be exclusively vested in the Supreme Court by amending the provisions of Article 116 of the Constitution.
- The officers of the Administrative cadre will have no judicial power, they will serve the Government as Assistant Commissioners and will exercise administrative powers only. But for maintaining law and order situation, they will have limited magisterial power and may have the jurisdiction of summary trial regarding petty matters, but no criminal case of grave or less grave offences may be initiated before them. In that case, they will be known as lay Magistrates.

Another option is abolition of the 'Magistracy exercising judicial functions' from the Legal System of Bangladesh where the judicial functions of the Magistrates will be performed by the members of the judicial service. For that, the present Assistant Sessions Judge's post will have to be re-named as 'Joint Sessions Judge' and the post of 'Assistant Sessions judge' shall become equivalent to the post of 'Assistant Judge' (presently exercising civil jurisdiction), who will perform the judicial functions of Magistracy as court of first instance regarding criminal matters. In such case, the post of 'Assistant Judge' may be re-named as 'Assistant District Judge'. Both the Assistant District Judge and Assistant Sessions Judge shall be appointed by the Judicial Service Commission. For that, the Judicial Service Commission Rules shall have to be amended to the effect that 'Entry Post' shall mean both Assistant District Judge and Assistant Sessions Judge.

In that case, civil and criminal court structure will be as follows:



The Court of District Judge and the Court of Sessions Judge may be presided over by the same person. In the same way, Additional District Judge and the Additional Sessions Judge may also be the same person. But, from the post of Joint District Judge and the Joint Sessions Judge downwards, there will be division of Jurisdiction regarding civil and criminal matters, but Joint Sessions Judges (exercising criminal jurisdictions) and the Joint District Judges (exercising civil jurisdictions) may be transferred from one stream to another after a short training period. This interchange will help them to gain expertise in both the civil and criminal matters.

If the Government thinks fit, the officers of the Administrative cadre may be appointed as lay Magistrates with limited magisterial power, provided no criminal case of grave offences shall be initiated before them. They will have limited magisterial power for maintaining law and order situation only and may have the jurisdiction of summary trial regarding petty matters.

## 7. Conclusion

There is no denying that complete separation of power is neither possible, nor desirable. Complete separation is relatively unheard of outside of theory that would imply that no Judiciary is completely severed from the administrative and legislative bodies (because this reduces the potency of checks and balances and creates inefficient communication between organs of the State). But that does not mean that one organ of the Government may have the exclusive control over the other organ. So far as the Magistracy is concerned, the Executive has unfettered control over the Magistracy while they are exercising judicial functions. This is also not desirable. A high degree of separation, however, can be a strong guardian of judicial independence.

The present system of Magistracy completely ignores a principle fundamental to the Legal System of a country based on Common Law that legal appointment as of right belongs to the legal profession and the appointment of laymen to any legal office whatever is a violation of the established rights of the profession. These Magistrates, who usually hold judicial posts for three to ten years early in their careers before returning to their administrative job, don't usually have any legal background. Responsible for 80 percent of criminal cases, the Magistrates usually decide if the accused is to be granted bail or prosecuted – and typically have the power to jail an individual for up to five years.

History of the World shows that the perfection of Judicial System in short time is quite an improbable task. It would develop over time. The example of England displays how the development was slow but steady.<sup>60</sup> It is plausible that no other court of summary jurisdiction in the British Commonwealth has anything like the extensive civil and criminal jurisdiction of the Magistrates' Court in New Zealand. But in New Zealand too, there was lay Magistracy in the beginning. It is the Magistrates' Courts Act of 1908, which finally put the seal on the matter. From henceforth, all stipendiary Magistrates were required to be qualified barristers or solicitors.<sup>61</sup> In the same way, Bangladesh may also take a step to observe the 'major reform' as suggested in this Article and then slowly, abolish 'Magistracy exercising judicial functions' with a view to including that in the Judiciary in a new form by amending the Constitution. Supreme Court has directed the Government to amend the Constitution to make the separation more meaningful, pronounced, effective and complete. It is up to the Government to immediately take measures for applying the concepts embodied in the 12 point directions meaningfully and make the separation of Magistracy a real priority. Only through this, a new and sustainable criminal justice system would be guaranteed.

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60. See for details, "The Criminal Courts and Their Management" available at – [www.criminal-courts-review.org.uk/chpt3.pdf](http://www.criminal-courts-review.org.uk/chpt3.pdf).

61. Visit for details – [www.teara.govt.nz/1966/M/Magistracy](http://www.teara.govt.nz/1966/M/Magistracy).