



## Is the independent judiciary important in Bangladesh? A legal and economic study

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### Abstract

Independent and impartial judiciary is the *sine qua non* in the democratic and welfare society that foster fair adjudication, promote the rule of law, guarantee fundamental human rights of citizens, abolish arbitrary power of government, deterrent crime in the society, and secure economic expansion and investments. Construction and sustaining robust independent judiciary seems a culture of civilized nations. Under the strong independent judiciary, judges can maintain fair dispute resolution out of fear, favor or undue influence from public or private sectors. Indeed, independent and impartial judiciary only can make check and balances among the government organs and can control the influential person to law and order. In Bangladesh, judicial independence is unconditionally required for effective and efficient functionaries of court. This article sought to address the significance of the independent judiciary in Bangladesh with the interdisciplinary context of law and economics. The study signifies on impartial adjudication for deterrent crime, the establishment of peace and order, control corruption, and healthy economic growth in the society.

**Keywords:** impartial adjudication, economic growth, deterrence of crime, rule of law, public confidence

### 1. Introduction

Among the three organs of state, the judiciary discharges the functions of dispute settlement, interpretation of the law, determining law; where indications have not explicit in the legislation, guaranteeing citizens' rights and liberty, upholding the constitutionalism and to promoting the rule of law. Because of that, the acknowledgment of the importance of an independent judiciary has been growing up among the legal scholars, jurists, policymakers, and political actors, then it perceived as the pillar of continuation the rule of law, good governance in the democratic welfare society. In other words, the liberty of judicial decision, judicial autonomy and the quality work of the judicature is concurrently an indicator of the eminence of the constitutional state (Badó 2014, 3). Independent and impartial judiciary is a requirement for fair adjudication and to avoid the risk of infirmity and tyranny. The threat of infirmity occurs when the judiciary is dependent on other divisions of government, and the danger of tyranny connected with a biased judiciary (Shetreet and Forsyth 2012). However, the conception of judicial independence may exist with a variety of nature across the different systems of law. But the similar principle each time applies, specifically the protection of citizens' rights, promotion of rule of law and protection of the constitution are dependent on the assurance that judges will enjoy liberty and will rationally be perceived to be free to decide impartial verdicts based on the law and the facts in each case without any interfering or force from other sources, especially government (Préfontaine and Lee 1998, 164). The notion of an independent judiciary is extensively discoursed issue not just only in the legal scholarship but also in the same way in the field of political and administrative scholarship. Moreover, the economist and world largest financial institution (world bank) have also

been considered the independent judiciary as a means of economic growth and control of corruption<sup>[1]</sup>. The concept of independence of judiciary<sup>[2]</sup> has been discussed by the scholars from various angle such as the core legal scholars claim independence of judiciary holds two-dimensional concepts: the traditional concept of independent judiciary entitles the 'independence of individual judges' to exercise their judicial duties without any interference from the government branches, chiefly from the executive. The 'individual independence' of judges must hold personal<sup>[3]</sup> and substantive<sup>[4]</sup> independence to keep secure judges from fears and pressure (Shetreet 2011, 15). The modern concept of an independent judiciary not restricted in the individual independence of judges but it must cover the 'institutional independence' of the judiciary as an autonomy body. It refers judge should not only be free from the executive or

<sup>1</sup> The World Bank sponsors primarily in client countries to develop judicial standard and procedural quality for eradicating poverty through confirming vast economic growth and control corruption. For more authorization see among others report, "World Development Report 1997: The State in a Changing World"; "Helping Countries Combat Corruption: The Role of the World Bank" (1997); "World Development Report 2002: Building Institutions for Markets"; "World development report 2005: a better investment climate for everyone" and "Initiatives in Justice Reform 1992-2012", *The Office of the Publisher, The World Bank*.

<sup>2</sup> For details regarding the fundamental conception of an independent judiciary, see M S Islam "Independent Judiciary: Nature and Facets from the International Context" *International Journal of Ethics in Social Sciences*, 6 (2), 2018.

<sup>3</sup> Personal independence of individual judge includes the tenure of judicial office is adequately secured until a compulsory retirement age and the terms of services containing transfer, adequate remuneration, pensions privileges, travel allowance should not be under the control of the government, especially the executive (Shetreet 2011, 15).

<sup>4</sup> Substantive independence refers to in respect of judicial decisions making, the exercise of the judicial functions and other official duties judges are individually subject to no other authority but the law and their conscience (Shetreet 1985, 630).

legislative pressures but must be independence from his judicial superiors or colleagues. The ‘institutional independence’ of the judiciary containing two elements: collective independence<sup>[5]</sup> and internal independence<sup>[6]</sup>. Another dimension to the classification of an independent judiciary is ‘structural independence’ and ‘behavioral independence’ (Dam 2007, 106-107, 112). Some economic scholars<sup>[7]</sup> classify independent judiciary as of *de jure* independence and *de facto* independence. The *de jure* independence refers to designed of formal legal rules to protect judges, and the *de facto* independence related to the genuine experience of courts and judges in their functions. (Feld and Voigt 2003; Feld and Voigt 2004). In summary, the concepts of independent judiciary incorporate the following essential components: impartiality and fairness in court proceedings, independence from judicial authorities and organs, liberty from non-judicial organs, independence from political or government factors, and Internal independence of judges.

The judiciary of Bangladesh holds an important position in the Constitution. The Constitution framed the structure of the judiciary in Part VI of the Constitution comprising of three adjudicative bodies such as the higher judiciary, subordinate judiciary, and tribunals<sup>[8]</sup>. The Constitution guaranteed the separation and independence of the judiciary. Article 22 provides the state responsibility to ensure separation of judiciary from the executive organ of the state. Article 94(4) assured regard independence of Supreme Court judges’ in the exercise of their judicial functions by mentioning the following standings: “Subject to the provisions of this Constitution the Chief Justice and the other Judges shall be independent in the exercise of their judicial functions.” However, the guarantee of independence can be ensured through the process of appointment of judges, means of determination of their remuneration and pension, tenure of office, disabilities of judges throughout their term of office and after their retirement, and the method of removal of judges (Ahmed 1998, 139). Like Article 94(4), Article 116A guaranteed judicial officers’ independence by this words: “Subject to provisions of the Constitution, all persons employed in the judicial service and all magistrates shall be independent in the exercise of their judicial functions.” This Article indicates that all subordinate judges from the rank of Assistant judge to District judge and magistrates performing judicial functions shall be independent. However, the alteration of original Article 116 had treated nugatory of the devout desires of

constitution-makers in Article 116A<sup>[9]</sup>. It will be eagerly seeming that although the appointment of the Supreme Court judges is fully executive choice, after that the Supreme Court judges could enjoy more or less independence in discharging judicial functions because of the court’s inherent power, secured tenure of office, and rigid removal process. But the subordinate judges, particularly in the criminal court, cannot perform judicial functions entirely independently; this is because, the control including posting, promotion, and discipline vested on executive authority<sup>[10]</sup>. The objective of this study is to explore the inevitability and various significances of the independent and impartial judiciary in Bangladesh from the insight of legal and economic aspects. This study is chiefly qualitative in nature with the interdisciplinary method of law and economics context. Besides legal analysis; in respect of economic analysis of the importance of the independent judiciary in Bangladesh, the study adopts some fundamental economic principles and public choice theory to explain the behavior of the institution. The study relies on an analysis of trustworthy primary and secondary sources including Constitutional law, statutory law, case law, dependable journal articles, books, media reports, newspaper articles, and internet documents.

## 2. Importance of an Independent Judiciary

Christopher M. Larkins mentions “The importance of judicial independence to democratic rule has been strongly advocated and to many degrees forcefully demonstrated in comparative political and legal studies” (Larkins 1996, 607). The necessity of an independent judiciary is highly estimated to ascertain the rights of public and private aspects, to uphold the just society by eliminating unfair and injustice and ensure appropriate punishment to appropriate criminal. Lord Hailsham says:

The importance of an independent judiciary is not less but all the greater when judges have to serve under an all-powerful parliament dominated by a party cabinet, and concentrating all the powers, and more than all powers, of the executive and legislature combined in one coherent complex (Hailsham 1975, 245).

In the democratic, liberal or welfare society necessity of independent judiciary is undeniable. Such as Larkin says, “an independent judiciary is the essential—indeed indispensable -component of a free and democratic society” (Larkin 1997, 7). Similarly, professor Peter Russell states “judicial independence is generally viewed as an essential feature of liberal democracy” (Russell 2001, 1). After declaring judgment through the judiciary the implementation of judicial verdicts depends on the executive department of the government; therefore, the final execution of outcome from the judicial body is reliant on the executive branch. As a result, Alexander Hamilton identifies that the judiciary is the weakest department among the three departments of government. In this context, he mentions: The legislature not only commands the purse but prescribes

<sup>5</sup> Collective independence denotes the elimination of the control and dominant role of the executive or legislature regarding the different aspects of administrative and financial substances of the court.

<sup>6</sup> Internal independence directs to the judges’ independence from somewhat of pressure, influence or suggestion from judicial colleagues and superiors in reaching individual case decisions.

<sup>7</sup> See for details, J. Mark Ramseyer (1994). “The Puzzling (In)Dependence of Courts: A Comparative Approach” 23 *Journal of Legal Studies* 721–47; Matthew C. Stephenson (2003). “When the Devil Turns. . .”: The Political Foundation of Independent Judicial Review” 32 *Journal of Legal Studies* 59–86; Lars P. Feld, and Stefan Voigt (2003). “Economic Growth and Judicial Independence: Cross-country Evidence Using a New Set of Indicators” 19 *European Journal of Political Economy* 497–527; Lars P. Feld, and Stefan Voigt (2004). “Making Judges Independent—Some Proposals Regarding the Judiciary” Working Paper No. 1260, *Center for Economic Studies and Ifo Institute* (CESifo), Munich.

<sup>8</sup> See Article 94 and 114 of the Constitution of the People’s Republic of Bangladesh of 1972 (hereinafter “the Constitution”).

<sup>9</sup> The original Article 116 of the Constitution provided that the power of control of subordinate judges including promotion, transfer and discipline would vest in the Supreme Court. The effect of altering Article 116 is that during the Ershad’s military regime a district judge got order of transfer from the capital within twenty-four hours after delivered a decision which was disliked by the government. This concrete instance has provided by (Ahmed 1998, 147).

<sup>10</sup> See for details *infra* note 21 and 30.

the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society and can take no active resolution whatever. It may truly be said to have neither force nor will but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments (Hamilton 2009, 236). Nevertheless, regardless of this weakness; independent judiciary is important in Bangladesh to run noteworthy contributions towards preserving peace and order in the society, upholding the fair justice, promoting rule of law, guaranteeing fundamental rights, protecting usurpations from other government's department, maintaining public confidence and for sound economic growth in the country. Also, independent judiciary, particularly the Supreme Court, plays a dynamic role in maintaining constitutionalism. Brian Dickson, Chief Justice of the Supreme Court of Canada, wrote that "judicial independence is the lifeblood of constitutionalism<sup>[11]</sup>."

### 2.1 Preventing crime and Preserving peace in society

Independent judiciary is demandable vis-à-vis maintenance the justice, preserving peace and order in the community by deciding legal clashes. Society is a place of gathering of people who hold private rights as well as public rights. To be the proprietor of rights may create differences or disputes among the citizens of the country. Hence, the independent judiciary required for resolving of legal clashes between individual citizens, large organizations, public bodies, or between a citizen and government department (Bari 1993, 1) to ascertaining rights and preventing crime which might establish peace and order in the society. The action of crime and criminal are a threat to preserving peace and order that means when crimes are regular phenomena in a society no peace accessible in that society. Independent judiciary could sustain the peace and order by controlling crime through imposing appropriate punishment to a proper offender. The identification of the real criminal is a vital issue through rigorous investigation and presenting authentic evidence for ascertaining proper punishment to the appropriate criminal that is solely possible by means of the independent judiciary with a decent and fair procedure of adjudication system. The right thing is to punish a person who commits offenses by purposefully damaging others, and the wrong thing is to a punish person who is innocent (Robert and Ulen 2016, 455). From the aspect of law and economics, imposing punishment or liability to an innocent person or imposing an improper penalty or liability to the accurate person will generate a social cost in the society. Exact punishment, therefore, to correct offender is necessary for deterrence of crime. An appropriate sentence affords adequate incentives for deterrence. Because naturally people are motivated character that replies to incentives. The assumption of economic analysis is individuals are rational and respond to incentives. Accordingly, the proposition is that increasing probable punishment and imposing perfectly have significant effect of making prices on people behavior in the society that causes for the decrease in crime. For example, if the penalty for criminal activities increase and accurately impose, people will reach to less of that crime or action.

This proposition is called 'Law of Deterrence' similar to 'Law of Demand' in economics.

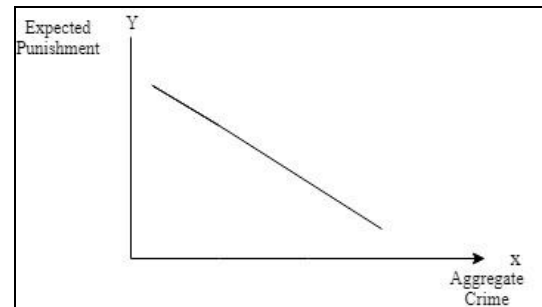


Fig 1: Law of deterrence of crime

The demand for goods decreases when the price of products rises; in this position some people purchase a smaller amount of goods and others stop buying it. Similarly, the crimes decrease when the predictable punishment increases; in this context, some criminal commits fewer crimes and other criminal stop committing crime. Crimes impose many social costs on society such as the sufferers suffer damage to their persons or property, and the state or the prospective victims of crime spend assets or money to prevent crime. The purpose of economic analysis of criminal law is "Criminal law should minimize the social cost of crime, which equals the sum of the harm it causes and the costs of preventing it" (Robert and Ulen 2016, 455, 474). Thus, for the exclusion of social cost generated from criminal activities, it is main concern that state would assure the strict punishment to the proper offender that only consistently depends on the independent and impartial judiciary where judges will punish without fear, affection or political influence of an executive branch of government.

### 2.2 Sustaining the rule of law

The compliance of the rule of law is core spirit of a modern, liberal and democratic society. In others words, the rule of law is the basis of a civilized nation that respects everybody's equal rights and dignity, and a crucial piece of sustainable development and economic development (Smit 2016, 1). The rule of law necessitates independent judiciary as a precondition. As a result, almost all legal scholars perceive independent judiciary is an essential component of the rule of law (Bingham 2011, 91). As part of global promotion towards the rule of law international organizations as judicial reformers encourage national governments particularly in new states, economically developing countries, and nations undertaking a political transition to promote the rule of law that grasped as associated to the formation of an independent judiciary (Neudorf 2017, 2, 9). The Mount Scopus Standards state that an independent judiciary is an institution of the highest value in every society and an essential component of liberty and the rule of law<sup>[12]</sup>. In a society, real protection of an individual is secured by the rule of law. The indicators towards observance of the standard rule of law in the society indicate to securing life, enjoying freedom and liberty, ensuring economic or property rights, getting fair trial and protection of law applicable to all citizens equally that linked to the

<sup>11</sup> *Beauregard v Canada*, [1986] 2 SCR 56, para 24.

<sup>12</sup> Mount Scopus Standards 2008, Article 1.1.

independent judicial system. International Conference of Jurists highlights the rule of law depend on independent judiciary in their conclusions and resolutions thus: “The ultimate protection of the individual in a society governed by the Rule of Law depends upon the existence of an enlightened, independent and courageous Judiciary, and upon adequate provision for the speedy and effective administration of justice<sup>[13]</sup>.”

Independent judiciary promotes human rights “within the proper limits of the judicial function, and ensure that all people can live securely under the rule of law<sup>[14]</sup>.” The violation of the rule of law mostly occurs by the government mechanism or under the direct or indirect government patronize in various issues. The wide application of the rule of law is only possible when the judiciary exercises the law neutrally against the government authority and don’t feel any afraid atmosphere to make a decision contrary to powerful source or interests<sup>[15]</sup>. Thus, to confirm the superiority of law over the arbitrary attitude of the government; to assure equal protection of the law to all citizens; and to maintain fair trial based on legal and factual qualities instead of political influence and interests, an independent judiciary is obligatory in the civilized society for the flourishing rule of law. The important threat to the rule of law is the government attempt to control subordinate criminal courts<sup>[16]</sup>. In all countries, the ruling government tries to control courts, particularly in criminal cases for keeping under control the political adversary which promote disorder increasingly in the country. In this context, the independent judiciary is the last embankment of the people against the arbitrary interference or infringements of the rights. Hence, in all countries cases, sometimes civil, but more frequently criminal, arise which involve political issues and excite party feeling. It is then that the courage and uprightness of the judges become supremely valuable to the nation commanding respect for the exposition of the law which

they have to deliver (Bryce 2008, 384).

For maintaining, thus, the rule of law independent, neutral and unbiased judiciary is indispensable.

### 2.3 Guaranteeing of fundamental rights

In the modern democratic society each nation has recognized a volume of human rights through constitutional guarantee as fundamental rights, and usually, the judiciary is authorized to guaranteeing such rights when it’s attempted to violate by anybody. A simple announcement and insertion of fundamental rights in the constitution is pointless without effective enjoyment and securing by an efficient and independent judiciary (Bari 1993, 5). Independent judiciary provides judicial action to protect the constitutional guarantee like the right to life, liberty, security of property and many freedom of citizens of the country. In the absence of independent judiciary “the power over life and liberty of the citizens would be arbitrary” (Montesquieu 1989, 157). Mostly violations of fundamental rights or threatening atmosphere concerning constitutional guarantee generated from government mechanism<sup>[17]</sup>. The enforcement of these rights is secured only by an impartial and independent judiciary. As Madison states, “Independent tribunals of justice will consider themselves in a peculiar manner the guardians of those (constitutionally protected) rights. They will be neutrally led to resist every encroachment upon rights expressly stipulated in that Constitution by the declaration of rights” (Agresto 1984, 25). The people primarily seek redress from the judiciary if he faces any transgression of constitutional rights. The judiciary, thus, is responsible for making sure that individual rights of life and liberties are secure (Baar 1999, 223). UDHR mentions “Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law<sup>[18]</sup>.” Without an independent judiciary, this weighty responsibility cannot be successfully discharged. The upshot of the rule of law cannot spread into the whole society unless the general people realize that the judiciary defends the constitutional guarantees independently and solemnly (Bari 1993, 6). In 1948 after the adoption of the Universal Declaration of Human Rights international community has engaged with substantial attempt to arrange numerous international, national, regional and specialized conventions or treaties regarding progress, promotion and development of human rights in transnational jurisprudence. Similarly, efficient enforcement mechanisms required to the effective implementation of those human rights; this is because without efficient mechanisms human rights will persist fruitless in the legal documents. Therefore, the independent and neutral judiciary is mandatory for effective and efficient implementation of

<sup>13</sup> Clause X (4), *Declaration of Bangkok Conclusions and Resolutions*, South-East Asian and Pacific Conference of Jurists, Bangkok, 15-19 February 1965 under the auspices of the International Commission of Jurists.

<sup>14</sup> Mount Scopus Standards 2008, Article 1.2.

<sup>15</sup> The very recent meaningful incident of promoting the rule of law through the Supreme Court is providing direction to the government to immediately release jute factory worker *Jahalam* who has been suffering three years in jail after being wrongly accused in corruption cases. The subordinate criminal court cannot release the innocent person due to the complicated procedure and lack of independence. See for details, “High Court orders immediate release of wrongly accused Jahalam”, *Dhaka Tribune*, Feb. 3, 2019, at <https://www.dhakatribune.com/bangladesh/court/2019/02/03/high-court-release-wrongly-accused-jahlam-immediately>; “HC orders release of wrongly accused Jahalom within Sunday”, *bdnews24.com*, Feb. 3, 2019, at <https://bdnews24.com/bangladesh/2019/02/03/hc-orders-release-of-wrongly-accused-jahalom-within-sunday> (Accessed Feb. 10, 2019)

<sup>16</sup> See Tarique Rahman case, Special Case No.17 of 2011, *infra* note 23. Major general Abul Manzoor murder case against Ershad and four others, before 30 December’s national polls on Nov. 18, 2018 court delayed the date till 17 January 2019 for submitting the investigation report on this case against Ershad and four others. Political observers reflect this case is concomitant to ‘political moves’. For details, see Adil Mahmood, “Court sets fresh date for Maj Gen Manzoor murder case probe report submission”, *Dhaka Tribune*, April 23, 2018, at <https://www.dhakatribune.com/bangladesh/court/2018/04/23/maj-gen-manzoor-murder-case-probe-report> and Sharifuzzaman, “Ershad hibernates when case activated”, *The Daily Prothom Alo* (English version), Nov. 30, 2018, at <https://en.prothomalo.com/bangladesh/news/187270/Ershad-hibernates-when-case-activated> (Accessed Feb. 10, 2019).

<sup>17</sup> Infringements of fundamental rights such as threatening to life, liberty mostly occurred by government machinery, i.e.; government agencies, law enforcement agency, etc. For instance, in Bangladesh since last one-decade violations of fundamental rights increase dramatically through murder, killing by the police in the name of crossfire, abduction by law enforcement agencies, extreme control over the freedom of expression, etc. The list of abduction through law enforcement agencies extended from heavyweight political leader to student, and greatest anxiety is that most of the victims engaged in the political opposition. The strong indication of government involvement- law enforcement agency has no movement to rescue victims by abduction and government official observes silence on the issue.

<sup>18</sup> The Universal Declaration of Human Rights (hereinafter UDHR), 10 December 1948, Article 8.

human rights or fundamental constitutional guarantee.

#### 2.4 Maintaining a fair trial to prevent injustice

The term 'fair trial' is also termed 'fair justice' or 'fair administration of justice' which is one of the vital features of the welfare country. The 'fair trial' is a universal principle that is fundamentally binding in all legal systems with differences in interpretation (Badó 2014, x). Imposing proper sanction to the proper person or correct place bears significant consequences for building or destroying justice. When an offender receives accurate punishment, it's justifiable but if an innocent person gets a simple amount of punishment using unfair trial its destroy the judicature system and promote injustice. It is distinguished that injustice is a threat to justice. Martin Luther King Jr. says "Injustice anywhere is a threat to justice everywhere. We are caught in an inescapable network of mutuality, tied in a single garment of destiny. Whatever affects one directly, affects all indirectly" (King Jr 2012, 178). The protection of citizens' rights can attain by the fair trial where influential individuals or institutions considered under the law. Maintaining justice through the adjudication process in a country depends on a fair trial which articulated to the independent judicial system. Failing an independent judiciary, the confirming fair justice or safeguard of citizens' rights cannot be secure (Wallace 2001, 241).

In the constitution of Bangladesh, the term fair trial does not specifically mention as of right, but several provisions of the constitution explicitly indicate that attainment of the fair trial is a fundamental right of citizens<sup>19</sup>. Principally, Article 35 has guaranteed the components of a fair trial by mentioning the right to "a speedy and public trial by an independent and impartial court or tribunal established by law." Among other elements of the fair trial right to getting justice without unreasonable delay (speedy trial) and the open court hearing or public trial are noteworthy. Consequently, the underlying object of a public trial is to provide a fair trial (Islam 2003a, 217). Henceforth, the government is responsible for ensuring a fair trial or fair administration of justice which only assessable by the independent and impartial judiciary. The enjoyment of a fair trial is one of the predominant fundamental human rights recognized in most of the international instruments<sup>20</sup>. The primary threat for generating undue influences in the adjudication, comes from the executive division of government particularly in respect of criminal cases against political opponent or cases connecting with ruling party leader and supporter that produce unfair trial and make violation of fair justice system. In general, subordinate courts as a 'court of the first instance' are measured trial courts where judges' posting, promotion, discipline, and transfer directly controlled by the executive branch<sup>21</sup> as

<sup>19</sup> For example, the constitution has exactly assured one's rights to equality before the law (Article 27), to enjoy the protection of the law, to be treated in accordance with law (Article 31), and to be defended by a legal expert of his choice (Article 33).

<sup>20</sup> See UDHR 1948, Article 10; International Covenant on Civil and Political Rights (hereinafter ICCPR) 1966, Article 14; The European Convention on Human Rights (hereinafter ECHR) 1950, Article 6(1); The American Convention on Human Rights (hereinafter ACHR) 1969, Article 8; Convention on the Rights of the Child (hereinafter Child convention) 1989, Article 40(2) b.

<sup>21</sup> The control of subordinate courts' judges is governed by the executive department of government more specifically by the ministry of law justice and parliamentary affairs. Article 116 of the Constitution states "The control (including the power of posting, promotion and grant of

subservient, for that reason most of the time judges of the subordinate court cannot maintain fair trial for justice correctly especially if the case matters have concern or interest of the government or ruling party anyway. For instance, judge of Tarique Rahman's money laundering case is fleeing from the country after discharge the verdict disfavor of the government<sup>22</sup>. The judge's absconding from the country proved that judges are not free to provide decision under fair justice in the event of cases which are involved with the political issue. Therefore, without independent and impartial judiciary the adjudication is not out of probability of unfair and interference from any powerhouse. James Bryce justly says:

There is no better test of the excellence of a government than the efficiency of its judicial system, for nothing more nearly touches the welfare and security of the average citizen than his sense that he can rely on the certain and prompt administration of justice... if the Law be dishonestly administered; the salt has lost its savor; if it be weakly or fitfully enforced, the guarantees or order fail, for it is more by the certainty than by the severity of punishment that offences are repressed. If the lamp of justice goes out in darkness, how great is that darkness! (Bryce 2008, 384).

The percentage of sanctioning fair trial and upholding justice in the judicial system bears the insignia of politically civilized nations. Mentioning the significance of an independent judiciary for safeguarding fair trial and justice, Henry Sidgwick says that:

[i]n determining a nation's rank in political civilization, no test is more decisive than the degree in which justice, as defined by the law, is actually realized in its judicial administration; both as between one private citizen and another, and as between citizens and members of the Government (Sidgwick 2012, 481).

Thus, maintaining the fair trial for ensuring citizens' rights and the rule of law as a civilized society can only be secured

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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." In Bangladesh as Westminster political system President is the titular head of the State, all functions exercised by the executive in the name of President.

<sup>22</sup> On 26 October 2009, the Anti-Corruption Commission (ACC) had filed a case, *Special Case No.17 of 2011* arising out of Cantonment Police Station Case No.8(10)09 corresponding to ACC GR No.83 of 2009, against Tarique Rahman who also BNP's senior vice-chairman on the allegation of money laundering. The ACC pushed the charges on 6 July 2010, the trial began on 11 September 2011, and the court delivered a verdict on 17 November 2013 with an acquittal. See for details Md Sanaul Islam Tipu, "Tarique acquitted in money laundering case," *Dhaka Tribune*, Nov. 17, 2013, at <https://www.dhakatribune.com/uncategorized/2013/11/17/tarique-acquitted-in-money-laundering-case>. Latter, the learned judge confirmed that the authority from the government had created huge pressure on this case to deliver judgment as per government ultimatum and he had faced a threat to death for that reason he escaped from the country. See details event "Judge faced death threat for not convicting Opposition Leader Tarique Rahman", *Just News BD*, Oct. 13, 2018, at <https://www.justnewsbd.com/en/special-report/news/3750>; "Former judge Motahar flees to Malaysia," *The New Nation*, Jan. 24, 2014, at <http://thedailynewnation.com/news/1096/former-judge-motahar-flees-to-malaysia.html>. However, ACC had filed an appeal to the Supreme Court, *Criminal Appeal No. 7225 and 7469 of 2013*, and on 21 July 2016, the court delivered sentence for seven years' jail and Tk 20cr fine. See for more information "Durnity Daman Commission Vs. Md. Tarique Rahman and another" in 2016 (2) LNJ 276; "Acquittal scrapped, 7yr jail for BNP leader Tarique Rahman", *The Daily Star*, July 21, 2016, at <https://www.thedailystar.net/politics/acquittal-scrapped-7yr-jail-tarique-1257136> (Accessed Jan. 10, 2019).

through the independent and neutral judicial system.

### 2.5 Guarding against usurpations by other government's department

In the welfare country as three organs of the state, power and functions have determined by the constitutional framework, that means all branches of government are accountable to perform their functions under the constitutional limitations. No organ can override the constitutional and legal bindings to discharge own responsibility, i.e. the boundary line of legislative cannot make laws contrary or inconsistency to the constitutional provision or laws that violate fundamental constitutional guarantee<sup>[23]</sup>. In an arbitrary or absolutism society under the shadow of democracy, government exercise usurpations on the citizens through executive actions, decisions, policies or by way of enacting legislation for sustaining their illegal authority that ultimately invades the citizens' rights, liberty, and freedom. In this milieu, an independent judiciary makes a barricade as an authorized institution to retain state functionaries within the boundary of law to protect usurpations and to secure citizens' rights. It is eminent that where the meaningful independent judiciary is existing the nature of arbitrary or absolutism cannot arise in that society. Such as Madison says "Independent tribunals of justice will consider themselves.....an impenetrable bulwark against every assumption of power in the Legislature or Executive" (Agresto 1984, 25). Predominantly the citizens desire proper redress from an independent judiciary when they disentitle of any rights enforceable under the law or unlawful interfering in their freedom of action in accordance with law. So, an independent judiciary is obligatory to sheltered citizens against the intentional or unintentional usurpations of the legislative or executive branch of government (Bari 1993, 7). In the democratic system of government, judges considered themselves as a guardian of the constitution, democratic process, rights, justice, equality and liberties of individuals (Zarei 1998).

Under the constitutional supremacy the Supreme Court as an independent body grips the power to declare laws accepted by the legislative or taking actions and a decision by the executive inconsistent with the constitution as *ultra vires*. The Supreme Court can examine the executive activities on the subject of violations of the constitutional provisions and other statutory laws of the country. Similarly, along with examining executive actions, such judiciary can also examine the legitimacy of legislation enacted by the legislative in the matter of inconsistency with the constitutional provisions or violations of the constitutional guarantee to the citizens. The independent judiciary not only tries to deliver some preventive against the arbitrary power exercised by the executive; it may also issue directions *suo moto* demanding the executive authority to commence things that it expresses an aversion to do before (Ahmed 2006, 103). The process of examination of executive and legislative actions, mostly guaranteed in the

constitution, is termed judicial review<sup>[24]</sup>. One of the central objectives embracing the provision of judicial review in the constitution is to create balance among the different divisions of the government. In particular, it offers a preventive against the encroachment of fundamental rights of the citizens by any other person or authority (Ahmed 2006, 104). The space of judicial review regarding executive and legislative actions depends on the range of violations of constitutional provisions, statutory rules or recognized legal principles or the infringement of individuals' rights and interests guaranteed in the constitution (Mollah 2010, 311). The wide-ranging grounds of judicial review includes abuse of power and authority, exceeding jurisdiction, irrelevant consideration, lack of jurisdiction, ulterior objects and mixed motives, malice, breach of statutory duty, abuse of discretion, the rule against negligence, acting in the wrong manner, breach of mandatory condition and nonobservance of natural justice (Mollah 2010, 311). This review power is conferred to the judiciary by the constitutional provisions or statutory enactment that has mostly vested on the supreme court or higher court of the country. Subsequently, the Supreme Court is measured as absolute guardian to protect the "freedom and liberty, the authoritative interpretation of the will of the citizens and the ultimate authority to control any exercise of absolute, impulsive and arbitrary power" (Diwan and Diwan 1996, 18). In performing the judicial review power, the authorized court acts on the principles that the secretarial or administrative functions can be authentically drilled only within their certain limits, and public administrators are not to be permissible to contravene the parameters of their authority deliberated by the constitution or of statutory laws (Islam 2003a).

The power of judicial review has been vested on the Supreme Court under the Article 7, 26 and 102 of the constitution together to impose constitutional rights, to provide the remedy of constitutional or legal wrong as well as to implement legal responsibilities. Judicial review relating to breach of the constitutional guarantee of citizens and the violation of legality can be pursued against judicial decisions, executive actions, and laws (Hoque 2014, 450). Article 7 of the Constitution, ordinarily familiar as constitutional supremacy clause, definitely announces that any other law inconsistent with the Constitution shall be void, and Article 26 directs the state shall not make legislation in contrary of fundamental rights and any law so made shall be void of such inconsistency. Therefore, Articles 7 and 26 of the constitution declares that the Supreme Court has been authorized to exercise judicial power to affirm a law enacted by the legislature inconsistent with the constitution or fundamental rights as unconstitutional. Article 102(1) of the constitution deliberates the power of judicial review on the Supreme Court to impose fundamental rights. Also, the Supreme

<sup>23</sup> The power of making legislation of parliament is shaped in the constitution by the several provisions. Article 65 states parliament has the legislative powers subject to the provisions of this Constitution. Article 7 of the Constitution, usually known as constitutional supremacy clause, plainly declares that any other laws inconsistent with the Constitution shall be void, and Article 26 points the State shall not make legislation in contrary of fundamental rights and any law so made shall be void of such inconsistency.

<sup>24</sup> The judicial review indicates to the power of the court to examine the legitimacy or authority of any action of a person or public authority or private individual compliant with the provisions of the Constitution or any law of a country to defend the fundamental and other essential rights of citizens or to uphold the constitutionalism of a country. For detail, see among others M A Hossain Mollah (2017). "Judicial Oversight of Bureaucracy" in A. Farazmand (ed.) *Global Encyclopedia of Public Administration, Public Policy, Governance*, Springer International Publishing AG, p.1-9; M A Hossain Mollah (2010). "Does the judiciary matter for accountability of administration in Bangladesh?" 52 *International Journal of Law and Management* 309.

Court has also been sanctioned to scrutinize executive actions or administrative authority by the exercise of judicial review power under Article 102(2) of the Constitution. The Constitution undeniably visualizes a robust judicial review under the constitutional requirements covering not only above administrative actions or executive decisions but also over legislative enactment of acts and constitutional amendments (Hoque 2014, 451). The power of judicial review of the Supreme Court has strongly ingrained in the constitution; it cannot be taken away or condensed by ordinary legislation; nor can be curtailed even by an amendment of the constitution (Islam 2003a, 438). The power of judicial review convened by Article 102 has dignified as a *basic feature* of the Constitution of Bangladesh <sup>[25]</sup>.

## 2.6 Maintaining public confidence in the judicial system

One person can defeat his rights in various way like by threatening or interfering from individual or to state machinery. The judiciary is the ultimate institution for citizens to obtain an accurate remedy from any level of harm provider through settling legal conflicts. The considerable contribution of courts, however, basically depends upon the enthusiasm or inclination of the people to submit their disputes before it that has been extending to people confidence concerning judicial independence and impartiality (Bari 1993, 8). In the democratic welfare country, the judiciary is authorized to keep all other persons, organs or bodies of government within the borderline of law to ensure citizens' rights. In the adjudication system, this type of authority of the judiciary derives from people confidence. As Frankfurter says "The confidence of the people is the ultimate reliance of the Court as an institution" (Frankfurter 1957, 796). Public confidence in the judicial system is dignified as the key element to maintaining the authority of the judiciary. Frankfurter further states, "the Court's authority, consisting of neither the purse nor the sword, rests ultimately on substantial public confidence in its moral sanction" (Frankfurter 1957). Trustworthiness in the procedure of judicial system and the insight of the aggrieved people that the judiciary administers its authority impartially with the true perspective are relevant reflections to confirm the continuance of public confidence to the independent judiciary <sup>[26]</sup> (Bari 2011, 21). Thus if the judiciary is unsuccessful in preserving public confidence, its legitimacy and acceptability would be endangered (Esterling 1998, 112). The judiciary can grasp such confidence only when the courts perceive as independent, impartial and unbiased, and "if the process of resolving the dispute is fair, efficient, expedient and accessible" (Shetreet 2011, 6-7; Shetreet 1979, 64). In other words, in the adjudication system, public confidence is mainly reliant on the principle of judicial independence that is one of the core values of administration of justice system. So, the independent and impartial judiciary is a prerequisite to maintaining fair justice process that enhances public confidence in the judicial system. In reality, public confidence in the justice system can be constant only when the judiciary is satisfactorily confirmed as independent (Bari 1993, 9;

Campbell, Lee, and Campbell 2013). James Bryce says:

Nothing does more for the welfare of the private citizen, and nothing more conduces to the smooth working of free government than general confidence in the pure and efficient administration of justice between the individual and the state as well as between man and man (Bryce 2008, 389).

Consequently, short of public confidence, the efficient and operative functioning of the judiciary is practically impossible (Handsley 2001, 184). The level of public confidence upon the judiciary is estimated by public understanding that judges or courts are free to administer their functions impartially and in line with the law (Campbell, Lee, and Campbell 2013). It is significant to state that people intuition is a vital parameter to measure public confidence in the judiciary, but it does not mean popularity for the reason that judiciary is obliged to provide decisions of the cases as per required law that could be unpopular (Handsley 2001, 184). Public confidence in the judiciary has enhanced by several principles and practices, which goal to ensure that "Justice must not only be done but must also be seen to be done" (Shetreet 2011, 7). These principles and practices mainly include: i. the public trial or open court hearing; ii. Stating reasons for the decisions; iii. maintaining accurate judicial conduct; iv. self disqualification of judges for bias; v. fair criticism by media and legal expert.

## 2.7 Sound economic growth and control corruption

Importance of an independent judiciary has been measured not just in concern to the rule of law, human rights and constitutionality, but also in respect to free and efficient economic activity and international trade and investments (Shetreet and Forsyth 2012). Indeed, economic growth in the country has been associated with the sound environment of large national and foreign investments, business, protection of property, enforcement of contracts. And an independent and fair adjudication is key to protection of property, investor and consumer rights, contract enforcement, and one of the causes for investment in a global economy. In other words, independence of the judiciary is concomitant of various positive outcomes including higher levels of growth, and more political and economic freedom (La Porta *et al.* 2004; Rose-Ackerman 2007, 15). The economic sense to the protection of property and enforcement of contract necessitates a judiciary to decide disputes and protect against the state based on constitutional provisions or parliamentary legislation where controversy raised between private parties or between the private party and the state. An independent and impartial judiciary is vital and effective for confirming fairness and justice at the time of dispute resolution. It is broadly decided matter, not just to the economist but also among legal scholars and lawyers, is that the judiciary is a significant factor to establish the rule of law and more largely in economic growth (Dam 2007, 93). The degree or standard's level of judicial independence connects with economic development (Feld and Voigt 2004). Where property and investment are not secured the safeguarding way of wealth is kept in personal possession without invest in the market that decrees the economic expansion.

The World Bank has sponsored projects particularly in client countries to promote the rule of law and good governance as fundamental elements of economic

<sup>25</sup> This view has reflected in the historic decision of in *Anwar Hossain Chowdhury Vs. Bangladesh* 1989 BLD (Spl) 1.

<sup>26</sup> The Justice Pathak stunningly mentions this dimension of perception in his observation in *S. P. Gupta v Union of India*, SCC (1981) 87; AIR (1982) SC 149.

development and reduction of poverty because the nonexistence of well-performing law and judicial institutions and the presence of corruption are restraints to economic progress and to the sustainability of development efforts (World Bank 2012, 2). Besides, World Bank's report analyzed that the judicial systems have a crucial role in the matter of development of economic market by promoting markets, economic growth, and poverty reduction (World Bank 2002). A stronger or better-performing judiciary is correlated with the more fast growth of small businesses as well as with larger businesses in the economy (Islam 2003b, 7-8). As stated by a World Bank report:

[s]tudies from Argentina and Brazil show that firms doing business in provinces with better performing courts enjoy greater access to credit. New work in Mexico shows that larger, more efficient firms found in states with better court systems. Better courts reduce the risks firms face, and so increase the firms' willingness to invest more (Ndao *et al.* 2004, 86).

World Bank surveys clarify some of the harmful consequences of weak judiciaries on economic growth. As per the same World Bank report:

Firms in Brazil, Peru, and the Philippines report that they would be willing to increase investment if they had more confidence in their nation's courts. Firms in Albania, Bulgaria, Croatia, Ecuador, Moldova, Peru, Poland, Romania, Russia, Slovakia, Ukraine, and Vietnam say they would be reluctant to switch suppliers, even if offered a lower price, for fear they could not turn to the courts to enforce the agreement.

Moreover, the survey of firms in other country shows the effect of lack of confidence in judiciary on spreading trade credit, and in the inclination to run trade with anybody other than individuals they know well (Ndao *et al.* 2004, 86).

The lacking of an efficient judiciary is also an issue for slow economic development. In this line, the major grounds to an inefficient court include the availability of procedural weakness, corruption, inaccessibility, untrustworthiness, delays, pendency and backlogs of cases. In Bangladesh, the subordinate criminal courts, in particular, are influenced by the state in respect of criminal cases having government interest. In this line, political cases delay many years that generate vast backlogs of cases<sup>[27]</sup>. Another critical feature for economic growth is effective contract enforcement where an investor can assure about the competence of the court regarding imposing an accurate sanction for violation of a contract. Accordingly, an independent and impartial judiciary could enforce the contract properly that can promote smooth economic expansion. The Economic Survey of India in 2017-18 highlights the importance of an efficient, effective and expeditious contract enforcement system for economic development and growth. This survey

also focuses on the necessity to resolve the issues of delays and backlogs of cases and suggests harmonized action between the judiciary and government to increase economic movement in the country (India 2018, 131).

Corruption is a widespread concern of the political and economic field in many countries across the world with many developed states. In the Bangladesh, its consequences are devastating that destroy the economic prospects, good governance, and the rule of law, and which constructs an unequal society. The attendance of corruption in public and private sectors is a significant threat for high economic growth, and cause of poverty. When corruption appears as a common feature in all area of societies with variable degrees, "it undermines economic growth, discourages foreign investment and reduces the resources available for infrastructure, public services and anti-poverty programs" (Robinson 1998, 2). It also undermines and destroys the public confidence in political institutions by weakening the legality and accountability of governments. In summary, it is unfriendly to good governance, sustainable development and poverty reduction (Ades and Tella 1996). Evidence displays that corruption is the reason to lowers stockholder confidence and hinders economic growth (Buscaglia and Dakolias 1999, 95). Moreover, Corruption is costly in positions of political legitimacy, economic efficiency, and basic fairness. In short, "Corruption also burdens the private sector, deters foreign investors, and harms the environment. It undermines trust in government and diminishes the effectiveness of public policy" (World Bank 1997, 5). From the context of economic analysis, corruption generates a high level of social and economic costs that fall excessively on the poor. Corrupt actions happen when the marginal profits from specific crime exceed the possible marginal costs from legal actions and the predictable penalty. Official corruption, therefore, misleads the market and its indirect prices introducing uncertainty to market and nonmarket social interactions. To prevent the corruption, mechanisms should address the concerns of institutional and political accountability, administrative fairness, effective; efficient and independent judicial system. Subsequently, the judiciary as a public institution can afford a vital check on other public institutions. So, an independent, fair and efficient judiciary is critical to implement any anticorruption plan (Buscaglia and Dakolias 1999, 96-97).

### 3. Economic analysis of the Importance of an Independent Judiciary

The relationship between the independent judiciary and the rule of law, non-violation of fundamental rights, public confidence in the courts and economic growth are analogous. When the degree of an independent judiciary is being broken or curtail the rule of law, public confidence in the courts and economic growth will stop down. It's similar to two backrests in one coin when one side of the coin is erased or destroy the other side also would be fractured, and the value of the coin is meaningless. The injured or aggrieved party seeks a guarantee of his rights or remedy from the judicial system upon the basis of confidence to attain proper remedy. When most of the aggrieved persons or justice seekers unfold their dissatisfaction towards the justice system or become suspicious about getting fair justice that indicates judiciary is not enjoying the full liberty to perform their functions from law and fact without fear and influence from any source. In the law and economics,

<sup>27</sup> The famous example is Bangabandhu murder case, Jail Killing case, Gen Monju murder case. Major general Abul Manzoor was murdered in Chattogram cantonment on 2 June in 1981, and in 1995 Manzoor's brother lodged a claim with Panchlaish police station in Chattogram. Before 30 December's national polls on November 18, 2018 court delayed the date till 17 January 2019 for submitting the investigation report on this case against Ershad and four others. And dramatically on that day court further deferred the date by an application by the government prosecutor. After 24 years of case filling, till now the government takes time repeatedly for further investigation. For details, see Adil Mahmood, "Court sets fresh date for Maj Gen Manzoor murder case probe report submission", *Dhaka Tribune*, April 23, 2018, at <https://www.dhakatribune.com/bangladesh/court/2018/04/23/maj-gen-manzoor-murder-case-probe-report> (Accessed Feb. 10, 2019).



the public choice theory<sup>[28]</sup> adopts that the behaviors of politicians and government bureaucrats are self-interested by assuming that as an individual they act for maximizing their private interest under conditions of uncertainty (Epstein 1990, 828). The analysis of this theory assumes that an aspiration motivates politicians or other government officials for re-election to parliament or to the office, selection or promoted to higher office, or for making strength and power within the office. (Epstein 1990, 836). Accordingly, from the rational choice approach executive and legislative branch of the government attempt to retain the judiciary under their control through generating political pressure or enacting parliamentary legislation to maximize their application of policy or decision<sup>[29]</sup>. The subordinate courts or lower courts that is known as ‘*court of first instance*’ are under control of the executive division of the government by the mechanism of promotion, transfer, and action for disciplinary matters<sup>[30]</sup>. Particularly state machinery attempts to influence this court in respect of criminal cases for stymieing and surveillance the political opponents. Judges, particularly, of the higher court or the Supreme Court enjoy more liberty and freedom for exercising judicial functions according to law and procedure. Because comparatively their tenure of office is secured, removal process is rigid, and they are guardian of the Constitution. On the contrary, subordinate judges’ promotion, transfer, and discipline are directly under the control of executive branch; in this circumstance, subordinate judges cannot perform judicial duties freely without an explicit or implicit influence of state especially in the criminal cases.

In respect of judicial decisions or judges’ behavior, the orthodox idea of legal formalists is that judge as an

individual active in a reasonably “*legal empyrean*” and only bound by the law’s prescription. In contrast, the “*homo oeconomicus*” paradigm that denotes judges are rational and self-interested like any other economic agents and willing to maximize their personal utility (Melcarne and Ramello 2015, 151). This view has gripped by the Posner in his influential article<sup>[31]</sup> that profoundly reformed the researchers approach to judicial behavior. Consequently, in performing judicial behavior judges as a rational individual try to maximize their utility subject to various constraints. In reality, the evaluation of judicial performance is scarcely easy, so, it is difficult to identify what elements include in the judges’ utility function where judges job tenure, office is secured, and salary is not knotted to their performance (Miceli 2004, 277). One likelihood is that independent and impartial judge vigorously promotes efficiency. For example, Posner states: Efficiency-not necessarily by that name-is an important social value and hence one internalized by most judges, and it may be the only social value that judges can promote effectively, given their limited remedial powers and the value of pluralism of our society (Posner 1995, 132).

The process of appointment of judges is pretty pertinent to judicial performance. Selection of judges on the merit is one mode to ensure a minimum standard level of judicial excellence, but it cannot guarantee that judges will effort hard later (Miceli 2004, 277). Besides, the open-ended selection process by the executive as the political nature often overwhelms to judicial ability. The factors actually affect a judge’s behavior or decision as an incentive such as constitutional oath or responsibility, promotion, fame or reputation, public confidence in the court, robust regulation of judicial conduct, massive penalty for corrupt behavior etc. However, in applying the public choice theory Epstein categories two sorts of ordinary judicial roles- more conventional and less conventional. The more conventional roles of the courts are concerning the judges’ core judicial functions included activities of hearing case arguments, settling cases, and writing judgments. Alternatively, the less conventional role is concerning the other judicial functions comprised judicial administration, hiring clerks, or participating in professional organizations and conferences (Epstein 1990, 832). When judges perform their more traditional roles judges act out of self-interest and maximize utility subject to the various external norms. “Where these norms bite, judges bend. Where they do not, judges behave like other individuals.” In exercising the conventional role, the complete set of constitutional constraints effort as effective protection of the independence of the judges. But when judges apply their administrative roles, and their conducts do not under structured by the elaborate set of institutional constraints they act to maximize their interest (Epstein 1990, 833). Therefore, the application of the public choice theory is very fragile when it’s applied to the courts in their conventional trace, but it becomes prevailing when involved in the outside of the conventional role (Arban 2011, 7).

Furthermore, from the context of economic analysis of law, the relationship between the degree of an independent judiciary and maintaining or development of the rule of law,

<sup>28</sup> Public choice theory denotes to the application of economic principles to analyze the behavior of politicians, government bureaucrats, and legal institutions. This theory accepts that behaviors in both private and public dealings are governed by self-interest. See Richard E. Epstein (1990). “The Independence of Judges: The Uses and Limitations of Public Choice Theory” *Brigham Young University Law Review*, 827; Richard A Posner (1993). “What do Judges and Justices Maximize? (The Same Thing Everybody Else Does)”, 3 *Supreme Court Economic Review*, 1-41; Francesco Parisi and Jonathan Klick (2004). “Functional Law and Economics: The Search for Value-Neutral Principles of Lawmaking”, 79 *Chicago-Kent Law Review* 431.

<sup>29</sup> The entire appointment of Supreme Court judges depends on the executive choice. The removal process was under the ‘*supreme judicial council*’ (SJC) consist of the chief justice and other two most senior judges of the Appellate division which is more transparent. But in 2014 the government amended the provision to the removal of supreme court judges by the parliament in the 16th amendment of the constitution for controlling higher court judges. Although since 2009 the parliament is occupied by the one party with the unnatural majority under the questioned elections. However, the supreme court declares this constitutional amendment as *ultra vires*. See *Government of Bangladesh and others vs Advocate Asaduzzaman Siddiqui and others*, Civil Appeal No.06 Of 2017 of Appellate Division.

<sup>30</sup> The common sensation is that executive always tries to control the subordinate judiciary by means of posting, transfer, discipline, and promotion that directly controlled under the executive branch more particularly by the ministry of parliamentary and law affairs. On 11 December 2017, the government published a gazette regarding service and disciplinary rules of subordinate judges namely “*Bangladesh Judicial Service (Disciplinary) Rule 2017*”. In this gazette, sub-rules 8 of rule 2 describes competent authority as the President or the ministry or division entrusted within the scope of the Rules of Business framed under section 55(6) of the Constitution. See for details, “Judges’ service rules gazette published, lower courts still in President’s hands,” *Dhaka Tribune*, Dec. 11, 2017, at: <https://www.dhakatribune.com/bangladesh/law-rights/2017/12/11/gazette-lower-court-judges-service-rules/> (Accessed Nov. 10, 2018).

<sup>31</sup> See, Richard A Posner (1993). “What do Judges and Justices Maximize? (The Same Thing Everybody Else Does)”, 3 *Supreme Court Economic Review* 1-41.

guaranteeing fundamental rights, improving public confidence in the courts, and economic growth is similar to 'law of supply' in the economics. In the economic principle perspective supply of goods is connected with the price of goods in the market. The supply curve goes upward when goods' prices rise in the market.

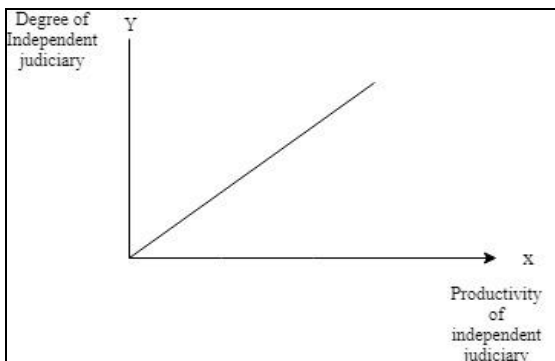


Fig 2: Productivity of independent judiciary

In the competitive and welfare market supply of goods increases if the price increases. In this aspect, producers increase the production of goods and the supply of goods in the market for maximizing his benefit. Similarly, when the degree of an independent judiciary increases, then the productivity of the judiciary will expand which ultimately goes to the in favor of citizens of the country in respect of getting a wide range of the rule of law, enjoying constitutional rights, abolishing arbitrary actions of the executive, growing public confidence in the formal dispute settlement system, increasing economic growth, and promoting constitutionalism and so on. Economic analysis of law relies on the ordinary economic supposition that individuals are rational maximizers, and the law acts as a method for changing the individual actions (Parisi 2004, 262). In this approach, an independent judge tries to maximize the efficiency of court by exercising his duty, and when the level of independence increases or maintains by the constitutional provisions a change will affect judge's behavior that promote the rule of law by guaranteeing citizen's rights, abolish arbitrary power of government and make sound environment for economic expansion.

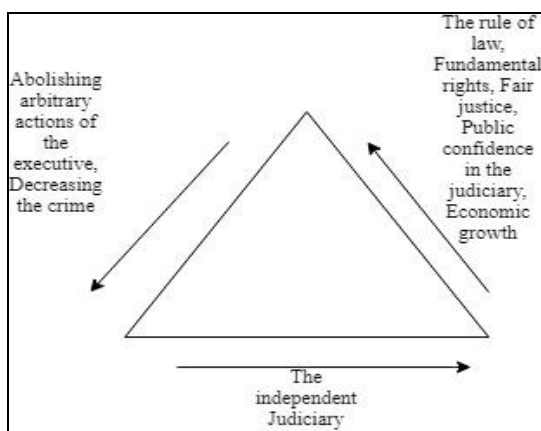


Fig 3: Co-relation between an independent judiciary and its efficiency

Figure shows the correlation between the independent judiciary and its efficient productivity. When the degree of independent judiciary maintains strongly the rule of law,

fundamental rights, public confidence in the judicial system, and economic growth goes upward, and simultaneously the arbitrary power of the government abolishes.

4. Conclusion

Independent judiciary as the key principle or values of the administration of justice is established notion. It is one central facet in the appropriate functioning of the judicial system. The actual independence obliges judges to be able to adjudicate without fear, favor or interfering from the state and the private sector. In other words, independence indicates that judges' professions do not depend on pleasing the political and economic power; they do no ingratiate themselves with influential authority for gaining better career or earnings money. The preceding discourses and interdisciplinary analyses concluded that an independent and audacious judiciary is a vital and fundamental component in the society to perform its functions effectively and efficiently that promote the rule of law, abolish the arbitrary power and increase economic growth. Commonwealth (Latimer House) Principles on the Three Branches of Government states "An independent, impartial, honest and competent judiciary is integral to upholding the rule of law, engendering public confidence and dispensing justice [32]." Independent judiciary is necessary to preclude the executive branch from influencing judicial decision and to prevent the government from targeting their political opponents for suppression through the civil and criminal courts power as well. It can check the state and on reckless or fraudulent private actors in the market behavior. Without independent and impartial dispute resolution, there is no functional protection of citizens' rights, no real economic growth or security of market, no rule of law, and no good governance or civil order (Shetreet and Forsyth 2012). Scholars stress that the judiciary needs to be capable to differentiate strong, authentic cases from the weak or politically motivated cases. If not, the public and justice seekers will lose confidence in the trustworthiness of the court proceedings to punish on crimes and declare judgment in civil clashes, and court sanctions will have tiny deterrent outcome (Rose-Ackerman 2007, 16). This is because, once public loses confidence in the fairness or impartiality of the judicial and political system, they might chance to other methods to affirm their rights, and unavoidably this consequence in violence and damage of human life. (Préfontaine and Lee 1998, 164). Thus, the importance of an independent judiciary has universally acknowledged as a cornerstone of the democratic society, where promotion of the rule of law, maintaining good governance, ensuring citizens' rights and freedom, abolishing arbitrary power of government and economic growth is entirely dependent on the independent and unbiased judicial system.

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<sup>32</sup> Commonwealth (Latimer House) Principles on the Three Branches of Government 2003, Article IV.

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