

**13th SAARCLAW and 10th SAARC Chief Justices'
Conference
Kathmandu 2016**

**“Connecting SAARC through Law, Justice,
Good Governance and Development”**

Speech on Judicial Independence: Internal and External Challenges

Date : Saturday, 05 March 2016; Time: 3.30-5.30 p.m.
Venue : Hyatt Regency Kathmandu
Boudha.
Session : Parallel Session.

**Mr. Justice Surendra Kumar Sinha
Chief Justice of Bangladesh.**

Nepal, March 05, 2016

*Justice Surendra Kumar Sinha,
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Judicial Independence: Internal and External Challenges

**Mr. Chairperson of this Session, Mr. Justice Tshering Wangchuk,
Hon'ble Chief Justices Bhutan;**

Hon'ble Chief Justices;

Learned Judges, Renowned Lawyers and Scholars SAARC countries;

Distinguished Participants, Ladies and Gentlemen.

Good afternoon to you all.

It is indeed a great pleasure to be here amidst the legal luminaries and distinguished scholars of South Asian countries.

2. Before embarking on my discussion on the very pertinent subject, I wish again to convey my deepest condolence to the people of Nepal as well as to the families affected by devastated earthquake on 25th April 2015 and 12th May 2015 and aftershocks. I was also deeply saddened and shocked by the loss of valuable lives, properties and infrastructures as well as cultural and historical heritage of Nepal. I firmly believe that in the meantime, the people of Nepal has surmounted the disaster and built their home and necessary structures. Bangladesh is a trusted friend of Nepal and it will always stand by Nepal.

3. Generally, judicial independence means the freedom of judges to exercise judicial powers without any interference or influence. The most central and traditional meaning of judicial independence is the collective and individual

independence of judges from the political branches of the government, particularly from the executive government. The concept of independence of the judiciary is not a grain storage that depends upon the nature of the judges alone. Independence of the institution is also closely related to the legislative framework within which the judiciary is to act: the support the institution receives from the government; the cooperation that the judiciary seeks and obtains from other executive organs of the state, including the investigating agency; and the extent to which the institution is able to exercise its independent writ upon other institutions of the state, most importantly, in the South Asian context, upon the armed forces of the state.

4. A comprehensive definition of judicial independence is given by Green. He defines judicial independence as:

“The capacity of the courts to perform their constitutional function free from actual or apparent interference by, and to the extent that it is constitutionally possible, free from actual or apparent dependence upon, any persons or institutions, including, in particular, the executive arm of government, over which they do not exercise direct control.”

5. The individual judge should enjoy complete freedom in discharging his or her judicial functions and other official duties. The complete freedom of an individual judge has three elements: (1) personal independence, (2) substantive independence, and (3) internal independence.

(1) Personal independence signifies that the tenure of judges and the terms and conditions of their service are ‘adequately secured, so as to ensure that individual judges are not subject to executive control’. In other words, the terms of judicial service including transfer, remuneration, and pension entitlements should not be under the control of the executive

government and the tenure of judges should be guaranteed until a mandatory retirement age.

These are the prerequisites to ensure that an individual judge may exercise judicial functions without ‘fear or favour, affection or ill-will’. This aspect of judicial independence is very significant for an individual judge. In order to secure the administration of justice a judge should be ‘placed in position where he or she has nothing to lose by doing what is right and little to gain by doing what is wrong’. Such a position can be guaranteed by ensuring the personal independence of a judge. Personal independence or liberty lies in the mind and attitude of a judge himself or herself. In the words of United States judge and judicial philosopher Billings Learned Hand that liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it; no constitution, no law, no court can even do much to help it The spirit of liberty is the spirit which is not too sure that it is right; the spirit of liberty is the spirit which seeks to understand the minds of other men and women; the spirit of liberty is the spirit which weighs their interests alongside its own without bias.

- (2) The substantive aspect of the duties of a judge is the actual decision-making role. It concerns ‘the determination of the finding of fact and the application of the relevant legal norms to the facts of the case’. The substantive independence of judges requires that in performing all the administrative, procedural and substantive duties a judge should be free from any direct or indirect interference, improper influence or pressures. it ensures the impartiality in judges; their capacity to make judicial decisions on the merit of cases, without any fear or favour.
- (3) Internal independence means the independence of a judge from his or her fellow judges. The independence of individual judges may be undermined

not only by the outside sources of interference or influence but also by fellow judges particularly by senior judges using their administrative power and control. In this regard, the Montreal Declaration 1983 provides:

“In the decision-making process, judges shall be independent vis-à-vis their judicial colleagues and superiors. Any hierarchical organization of the judiciary and any difference in grade or rank shall in no way interfere with the right of the judge to pronounce his judgment freely.”

Similarly, the Beijing Statement 1995 provides:

“In the decision-making process, any hierarchical organization of the Judiciary and any difference in grade or rank shall in no way interfere with the duty of the judge exercising jurisdiction individually or judges acting collectively to pronounce judgment.”

6. The Montreal Declaration 1983 and the Beijing Statement 1995 clearly emphasise internal independence of judges from any hierarchical organization of the judiciary and any difference in grade or rank. This means that threats to internal independence may come from the superior courts or judges.

7. Collective or institutional independence is associated with court administration, which includes assignment of cases, control over administrative personnel, maintenance of court buildings and preparation of judicial budgets and allocation of resources. The Montreal Declaration 1983 and the Beijing Statement 1995 emphasise that the main responsibility for court administration should be vested in the judiciary. Article 37 of the Beijing Statement 1995 provides that the budget of the courts should be prepared by the courts or a competent authority in collaboration with the Judiciary having regard to the

needs of judicial independence and administration. The amount allotted should be sufficient to enable each court to function without an excessive workload.

8. It cannot be denied that the level of people's confidence in a national judiciary determines the barometer of its acceptance and trust of the international community. Now we live in a global society and as such not only international trade and commerce but also now-a-days, the state of human rights, good governance and rule of law are issues of concern for the international community. International confidence in the legal system plays an important role in overall relations with the international community and development of a country. Anarchy and backwardness of any country impact negatively on others especially on the neighboring countries. It creates stalemate in trade, economic growth and over all development of the region. The judiciary must be capable to dispense justice in the protection of rights, liberties and freedoms of the people.

9. Judiciary of SAARC countries is facing some common challenges:

- **Lack of Structural Independence:** Judicial independence requires structural independence. This requires the judiciary to be organized, governed, and funded in an autonomous manner. It includes a merit process by which judges are appointed and removed, sufficient length of tenure of judges, a random case assignment system, a fair appellate process, and the absence of executive and legislative interference with the judicial role.
- **Lack of Information Communication Technology (ICT) in Judiciary:** In the age of globalization and rapid technological developments, which is affecting almost all economies and presenting new challenges and opportunities, judiciary cannot afford to lag behind and has to be fully prepared to meet the challenges of the age. But unfortunately, South

Asian judiciaries are facing great challenges for huge backlogs of cases. Therefore, ICT and e-judiciary are essential for reducing huge backlogs.

- **Lack of Judicial Responsibility:** Judicial independence requires judicial responsibility. A judicial code of conduct or ethics—or, in some countries, a law affecting judicial conduct—is important. A code can provide guidance to judges as to proper behavior, especially in those gray areas that may be hard to analyze alone. It can also provide clear standards that govern when judges are to be disciplined for improper conduct.
- **Lack of Easy Access to Justice:** Like other countries of the world people of SAARC countries face significant hurdles in accessing their judicial system. Vulnerable groups, including the poor, women, children, ethnic minorities, and people with disabilities face particular exclusion. Throughout the formal justice system, there is a significant lack of capacity-within the judiciary, relevant ministries and statutory bodies. There are some specific constraints to access to justice including prohibitive costs, corruption and undue influence and lack of awareness of legal rights. Long delay in court processes is caused by a variety of factors including a lack of management capacity both at the district and national level, lack of coordination between justice sector actors, lack of trained staff and shortages of judges, lack of trained and competent lawyers etc.
- **Lack of Consciousness:** Of the total people of a country, I am sure more than half of the people do not know what actually is meant by the separation of the judiciary and for that matter what is the bright side of the proposed separated judicial system. To address these questions, we should have at least an average knowledge of our present judicial system. Lack of consciousness of people has no strong movement for reasonable demand to **secure** absolute separation of judiciary from executive.

- **Lack of Political Candid Will:** Any kind of meaningful change, political will is mandatory because our democratic polity deals by various political parties. And government formed by citizen's mandate with their representatives. So, if the political parties (both government and opposition) have no interest to separate the judiciary from the executive it would be impossible. Though most of the political parties have commitment to separation of judiciary but after formation of government they technically avoid the matters. That's why the process of separation of judiciary is going on endlessly **in some countries**.
- **Lack of Strong Civil Society:** Civil society now days play a very important role for any positive change of a country.
- **Lack of Cultural Expectations:** An important factor shapes judicial independence that is the cultural expectation that judges ought to behave independently. To be a judge is to decide cases according to the law and the facts despite the pressure of political sponsors and even popular opinion. Judicial independence, said Supreme Court Justice Stephen Breyer (1998) of USA, is in part a state of mind, a matter of expectation, habit, and belief among not just judges, lawyers, and legislators but millions of people.
- **Lack Procedural Transparency and Public Access to the Judicial Process:** Greater transparency is critical for securing judicial independence in south Asian Region. Transparency is an effective means for creating accountability without reinforcing opportunities for executive interference from outside the judiciary or strong hierarchical control within the judiciary. Moreover, transparency fosters greater public confidence in the judiciary, setting up a virtuous circle of positive reinforcement.
- **Lack of Proper Training and Knowledge:** Many judges retain old habits that interfere with the development of an independent judiciary,

such as social conformity or expecting directives from higher judicial authority. Additionally, they often have difficulty reasoning from the higher principles that are contained in constitutions and international treaties, and they are largely unaware of basic ethical concepts and how to apply them in practice.

- **Inadequate Budget and Salaries:** While it is difficult to draw a causal link between severe under-funding and judicial corruption, severe under funding always has an impact on the judiciary as it seeks to supplement its needs from other sources. Under-funded judiciaries are unlikely to offer the salaries and benefits that will attract and retain high-quality and qualified persons. In contrast to Asia's middle to high-income countries, the commitment of many governments to ensuring adequate support for courts and their personnel has waned, inviting corruption and undermining the rule of law.
- **Lack of Smooth Relationship between BAR and Bench:** The administration of justice is fundamentally the responsibility of the judges, but the responsibility cannot be discharged properly without active participation of members of the Bar. The administration of justice is a 'joint venture' in which members of the Bar and judges are 'equal participants'. Although in ensuring the proper administration of justice the obligations of the judges are greater than the lawyers, all of them are accountable to the public.
- **Lack of Financial Independence:** Financial autonomy is very critical for independence of lower judiciary. It includes salaries, perk benefit, status, housing and accommodation. If it is not given to the domain of the judiciary, it will remain dependent on executive. One of the accepted aspects of 'institutional independence' is the one concerning the financial resources and financial freedom or autonomy that is to be given to the Judiciary.

- **Other External Factors:** Judicial associations can function as advocates for an independent judiciary especially by educating the public about judicial issues. This can be accomplished partly through the media, which play an especially important role as liaison between the judiciary and the public. Investigative journalism can also be extremely effective especially in curbing corruption.

10. Recommendations

- The citizenry and government must have more respect for judicial decisions. This would go a long way in centralizing the notions of the rule of law, defining the limits of government, creating parameters of accountability, and ensuring other necessary pre-conditions for an ordered and predictable society.
- In general, judicial review supports the judiciary's independence because it empowers courts to critically assess executive and legislative action on the basis of constitutional or international human rights principles.
- Endeavour to ensure that judicial decisions at all levels respect international human rights, including the rights of women, and make efforts to eliminate traditional and religious practices imposed by tribal and village councils that are harmful to women.
- In South Asian Region it is visual that deviations from seniority rule in the appointment and promotion of judges are common phenomenon. It should end deviations from the seniority rule in the promotion of judges to the posts of Chief Justice, establish by statute a seniority rule for promotions from the High Courts to the Supreme Court, and when filling vacancies on the High Courts and Supreme Court, promote female judges who are qualified candidates under the seniority rule

- While we dwell on the potentialities of ICT in the Judiciary, we must note that nowhere is this more apparent than in case management itself. Case flow management techniques are now widely adopted as a way to reduce case backlog, render timely justice and increase predictability in the judicial system. We must note here though that only when case management is fronted by an efficient delivery of judicial outputs to citizens that the ends of justice are fully realised. Information and communication technologies (ICTs) are today considered to be an indispensable tool for both case management and efficient service delivery. While ICTs make it possible to address the information-intensive requirements of case management through its search and discovery capabilities, latest advances in technology also ensure that information is provided to the citizens on a device of their choice and at a place of their choosing.

- At the level of Sub-ordinate Court, to reduce the administrative workload of the Judges, the administrative officer and other staff, on whom the judge relies in administrative matters, would be upgraded, in part by developing career path for them. The District Court's administrative office would be modernized and would have appropriate and trained staff, e.g., a planning and budgeting officer, a purchasing and accounting officer, and other customary staff, e.g., a court order clerk, a process/decreed officer, and process servers. Office manuals would be developed documenting the new procedures and standard forms; office space would be created adequate for staff, records and equipment, and technology, including computers and

suitable software, with linkage to the Court Management Information System (CMS), would be supplied by the government.

- The establishment and enforcement of a procedural calendar for the life of a case;
- The enforcement of time limits for processing cases, backed by a regime of costs and/or other sanctions to discourage non-compliance;
- The elimination of unnecessary procedural steps for, and other hurdles to, the enforcement of judgments;
- Improved courtroom facilities, as well as technology support, with automated case tracking systems, as part of the CMIS to be installed in the Supreme Court and the District Courts.
- The system of checks and balances should be applicable all three organs of the State. None must over step their respective limits. Judiciary as a public administration must be receptive and not to be hypersensitive about criticism. Judiciary should not only protect its own prestige it should be the last resort of the people of the country at last.
- To overcome the challenges of backlog of cases, the measures as to effective implementation of ADR mechanism, introducing Plea Bargaining in Criminal Cases, simplification of procedure from filing to disposal of cases, fixing reasonable court fees, wide spread awareness regarding Legal Aid Scheme of Government & Non-Government organizations, speedy disposal of cases etc.
- Liberalization of *locus standi* by the decision of the Apex Court also encourages socially spirited person to vindicate the grievance of the poor, vulnerable and women by way of public interest litigation. If all stakeholders work in a coordinated way we will be able to surmount the challenges and that will obviously give confidence to the down trodden people to seek remedy through court.

- Legal research and judicial education is critically important for effective legal reform and for dispensation of quality justice. Therefore, I urge the Chief Justices and Governments of SAARC countries to take initiative for establishment of a SAARC Legal Research and Judicial Academy where SAARC Judiciaries may share their experience with each other in respect of disposal of cases relating to terrorism and case of other national and international importance. In the Academy joint research studies may be conducted by South Asian Scholars, Academician and Journalists to conceive the different dimensions of terrorism and they will find out comprehensive solution to reduce terrorism, which is great threat for the overall development of the SAARC countries.
- The role of court and media should be comfortable. Media trial should be stopped. Late William Brennan Jr. of the United States Supreme Court aptly wrote the relationship between the press and court in the following words:
 - a) ... a fundamental and necessary interdependence of the Court and the press. The press needs the Court, if only for the simple reason that the Court is the ultimate guardian of the Constitutional rights that support the press. And the Court has a concomitant need for the press, because through the press the Court receives the tacit and accumulated experience of the nation, and — because the judgments of the Court ought also to instruct and inspire — the Court needs the medium of the press to fulfill this task.
 - b) Justice Brennan rightly said that the media and the courts are locked in a mutual, if sometimes uncomfortable embrace. We need each other; our interests are inextricably intertwined. As the media invent and re-invent themselves, so must judicial understanding evolve of how we relate to the media. We must

look forward; we dare not hang back. This is our only choice, for what is at stake is nothing less than the rule of law.

- You know that the Dutch Council of Judiciary operated a Judicial Quality Improvement System which comprises the judicial court performance measurement framework. This framework uses indicators of five core measures. These are:
 - a) Impartiality and integrity of judges, including measure of successful challenges of judges' impartiality. Case allocation procedures and complaint procedure;
 - b) Expertise of judges including preparation, appeal rates, disposal rates;
 - c) Treatment and attitude of judges, including judicial functioning, participation of litigants, explanation of proceedings and clarity decisions;
 - d) Unity and equality of law; and
 - e) Speed and timeliness, including average disposal times, percentage of adjournments. Productivity and starting cases on time.

11. Another formative example includes the United Nations' Rule of Law Index, which seeks to monitor the justice sector with an emphasis on criminal justice and penal law, and for measuring progress when assistance is provided. So, a complete and comprehensive Judicial Quality Improvement System may be formulated for the SAARC Judiciaries with a long Vision Strategic Planning for efficient administrative mechanism which can bring an image of quality justice for all.

12. In a democratic state, the power rests on three separate organs, namely the executive, the legislative and the judiciary. At the Tenth Commonwealth Magistrates' and Judges' Conference at Victoria Falls, Zimbabwe, 22-26,

August 1994 Anthony Allot, the learned professor, unhesitatingly exposed as to how the Judiciary even in the most advanced democratic countries, such as the United Kingdom, suffers from embarrassing obstacles against preserving and upholding independence. SAARC Judiciaries are no exception to Professor Allot's exposition as it extremely faces perceptible and imperceptible obstacles in ensuring rule of law in the society.

13. However, the strong confidence in judicial systems of some South Asian countries most likely reflects visible efforts to strengthen rule of law such as high-profile cases in which the judiciary ruled against corrupt politicians, businessmen, celebrities, hardened terrorists, criminals against humanity, war criminals and held them accountable. This, in addition to improvements in the Right to Information Act, fast-track courts and Speedy Tribunals may have bolstered confidence in the judicial system and courts.

14. Before parting with, I must express my special thanks and gratitude to the government of Nepal and the Supreme Court of Nepal for hosting this timely and significant conference and extending their warm reception and hospitality.

15. May God bless you all.

16. May Bangladesh and others SAARC countries friendship, mutual respect and peace live long.

17. I wish timely Justice for all in SAARC countries.

18. Thank you all for your patience hearing.

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