The Shifting Role of Judiciary in Bangladesh: Re-Defining and Re-shaping the "Checks and Balances" in a Transitional Democracy

Ferdous Jahan and Asif M. Shahan

1. Introduction

For the consolidation of democratic practices, especially in the context of developing countries, the role of the judiciary is significant as the "democratic procedures of government" largely depends on the institutionalization of rule of law (Larkins 1996). It is the judicial branch that resolves the conflicts among the political actors and restrains the government from arbitrary usage of power through ensuring the enforcement of constitutions, laws and other democratic processes. At the same time, judiciary is often considered as the protector of human rights as it has the ability to protect the minorities from the tyranny of the majorities. Considering this apparent necessity of the strong role of the judicial branch regarding consolidating democracy, judicial independence has become an institutional safeguard against state coercion (Stotzky 1993; Larkins 1996).

Even though the role of the judiciary is significant in determining the level and nature of political development, in the context of Bangladesh, there are very few studies that have tried to evaluate the role of judiciary from a political science perspective. In most cases, the existing studies on judiciary have defined the concept of judicial independence from a structural perspective and henceforth concentrated on mechanism through which the institution can be separated and insulated from other organs of the state. While, the focus on structural perspective is important, it significantly narrows the concept of judicial independence and ignores the fact that "the expression "judiciary," in its strict meaning, refers to the "judges of a state collectively". From this perspective, judicial independence is not only about the "independence of the judiciary as an organ and as one of the three functionaries of the state" but also about the strategies used by the actors within this institution that helps it to effectively interact and establish its own position in the overall political arena (Vyas, 1992). Therefore, the specific strategies and choices made by the judges is also an important determinant factor of judicial independence (Vyas, 1992; Pimentel, 2009). In this paper, we argue that the overemphasis on one factor (structure) and negligence of the others (agency and culture) has a significant impact on the way the role and performance of the judiciary is being evaluated.

Even though the structural factors are important in identifying the criteria necessary for independent functioning of the judiciary, over emphasis on this particular dimension makes judiciary an institution which is often left at the mercy of other political organs as they determine their expectations from the institution. From this perspective, the structural factors, establishing the structural independence protects the judiciary from being manipulated by the legislature and/or the executive. In other words, a key limitation of the studies conducted on the judiciary of Bangladesh is- all of them consider the institution as a "helpless" organ which instead of setting the terms of 'political control' game simply plays as per the rules set by the other actors. However, in this paper, we have made an effort to provide an institutional analysis of the concept of judicial independence. Based on March & Olsen' (1989) seminal work on "rediscovering institutions", we argue that institutions, once established are not merely pawns in the political chessboard; rather they attain the ability to develop and exercise their own choices and strategies in the political arena. Therefore, the institutions are not only affected by the external political environment but also can affect it. We attempt to show through a historical analysis that over the period the judiciary of Bangladesh is attaining this particular ability and it is time for us-

the political scientists to adopt an alternative way of analyzing the role, function and performance of the judiciary.

The paper has five sections. In the following section, we provide a broader definition of judicial independence which include the overall institutional dimension of the concept and based on that we explain how the judicial and political actors will react to each other's efforts of controlling and how that interaction will determine different types of judicial conditions. In the third section through an historical analysis of the development of judiciary in Bangladesh, we will argue that over the period the judiciary has gone through the stages of partial to substantive politicization and now has moved towards "judicialization of politics" stage. In the fourth section, we show that the current stage of judicial development provides a unique opportunity for the institution and if it can play its cards properly, there is a possibility that judiciary will move towards institutional autonomy. We try to identify the necessary conditions for institutional autonomy and explain where the judiciary of Bangladesh stands.

2. Independence of Judiciary: Developing an Alternative Framework

The existing literature comprehensibly reflects the necessity of an independent judiciary in the democratic rule, but remains inadequate to define the independent value of the judiciary sufficiently. As Larkins (1996) describes, "Its manifestations, limitations, meaning, as well as methods of fostering greater autonomy…have not been totally explored" (Larkins 1996: 607). Quite clearly, judicial independence has always remained a rhetorical notion rather than, "…a sustained, organized study" (Burbank 2002).

In fact, in the existing literature on judicial independence, efforts have always been taken to identify the factors that will foster the independent functioning of the institution. For instance, Ferejohn (1998) identifies two interrelated aspects and he argues that Independence at least from the perspective of the judiciary has two different meanings. At one end it incorporates the court and the entire judicial system and independence of the judiciary is ensured through providing structural protection "afforded by the constitution". This structural protection will allow the judiciary to decide matters without "any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reasons" (UN, 1985). This particular type of independence is ensured through separating the judiciary from the executive and the legislature and through allowing it to have jurisdiction over all matters that are judicial in nature. Furthermore, in many cases, the structural independence is manifested through the power of judicial review that bolsters the institutions ability of checking the power of the other organs of the state. In a nutshell, the structural dimension of independence indicates that the judiciary will have the authority to determine and perform its own administrative, financial and judicial activities without being dependent on any other organ of the state (Ferejohn, 1992; Pimentel, 2009; Ferejohn, Rosenbluth & Shipan, 2004).

On the other hand, there is another dimension related with the independence of judiciary which is "commonly invoked when considering the circumstances of the individual judge—is that a person is independent if she is able to take actions without fear of interference by another. In this sense, judicial independence is the idea that a judge ought to be free to decide the case before her without fear or anticipation of (illegitimate) punishments or rewards" (Ferejohn 1992). In most cases, the personal independence of the judges is ensured through providing him/her a life tenure and making it extremely difficult to remove him/her for the bench. It is assumed that if an individual judge is provided with job, financial and other forms of security, s/he will perform the duties and responsibilities bestowed upon

him without any prejudice. A judge may have his own political or ideological preferences, but when he will make judicial decisions, he will honor the letter of the law above everything else.

These two factors while joined together provide what we have termed as the structural factors that determine the independence of the judiciary. Undoubtedly, these factors are important and if implemented properly allow the institution a certain degree of leeway in dealing with the other actors functioning within the political environment. However, in this paper, we argue that these factors are necessary but not really the sufficient conditions that should be taken under consideration while analyzing the performance of the judiciary. There are few reasons behind this-
First, concentrating only on the structural factors limit the analysis only on the "formal "given" prerogatives of institutions" (Gazibo, 2006) and as North (1990) explains, the formal analysis often fails to capture the real dynamics of performance of the institution. In his classic analysis on institutional change, North, while exploring the variation in economic performances across countries and through time, argues that the formal framework is inadequate in explaining the differences and for that he calls for the 'incorporation of institutional analysis". In this paper, our goal is to point out the importance of this analysis.

Second, as indicated earlier, the structural analysis considers judiciary as an institution, the successful performance of which depends largely on the action or inaction of the outside actors, i.e. whether there is adequate safeguard in place that refrain these actors from manipulating the judiciary as an institution. The key problem is that it does not take under consideration the internal dynamics of the judiciary and its actors or the institutions' ability to engage into a strategic game with the outside actors.

Third and most importantly, the structural analysis considers political pressure as the most important factor in preventing the judiciary from performing its duties and argues that the institution should be completely free from all types of political pressure. As numerous scholars have pointed out freedom of judiciary from political pressure in its absolute form is never possible and attempts to do so ignore the point that judiciary, at the end of the day, is a political institution. In this particular paper, we have considered the judiciary as a political institution which will always be subject to political pressure. And therefore, we agree with Basabe-Serrano (2012) & Larkins (1998), who based on their analysis on the experiences of judicial institutions in Latin America have argued that judicial institutions will always be under pressure by the political actors and in effect, they will never be completely separated from the other institutions. The question therefore is not whether they can be completely protected from the political pressure rather the issue is how the institution will deal with pressure.

In fact, like the Latin American countries, the study on the judiciary of Bangladesh has shown that ensuring the structural independence does not necessarily allow the institution to function beyond political control and in fact, two recent studies on the judiciary of Bangladesh (IGS, 2009; UNDP, forthcoming) has shown that even after the independence of the judiciary from the executive, the government still exercises a large degree of pressure on the judiciary to shape the decisions made by the body. Therefore, the questions are-

a. Why do the structural changes fail to bring about desired change in order to ensure performance?
b. Given that structural factors are necessary but not sufficient conditions for judicial independence, what other options are available to this body?

We will argue that the neo-institutional perspective of political science allows us to provide answers to both of these questions.

In order to answer the first question, we have largely relied on North's analysis which he used to explain the variation of economic performances across countries. In his work, he defines institution as humanly devised constraints that reduce uncertainty and shape human behavior[1]. At the same time, he argues that this constraint have two different dimensions- formal and informal, where the formal constraints is comprised of the constitutional provisions and laws that provide the formal structure for analysis. On the other hand, the informal constraints are generated through the social conventions, norms and values; these are the product of country's culture and extremely difficult to alter. At the same time, in order to ensure an effective economic performance, a well-developed enforcement mechanism is necessary that will ensure that contracts as made through the formal constraints are being followed. He argues that in case of developing countries, due to the mal-functioning market system, the transaction cost remains high and the enforcement becomes costly for a number of reasons- "it is frequently costly to find out that a contract has been violated, more costly to be able to measure the violation and still more costly to be able to apprehend and impose penalties on the violator" (p. 58). It becomes even costlier if we take under consideration that enforcer may take enforcement decisions based on his/her utility functions. As a result, due to the vested interest of the enforcer, the formal constraints often do not function and in its place an informal mechanism operates which mainly serve the purposes of the enforcer. This particular economic argument can also be used in our case. Based on North's (1990) analysis, we make the following arguments-

- **First**, let us consider the entire political arena as the market and for the purpose of this paper, we are concentrating on three different institutions which have been set up for achieving three different goals- legislature, which is in charge of responding to the demands of the citizens and make laws; executive, which is in charge of executing the laws and the judiciary, which has the responsibility to oversee that laws are being formulated and implemented as per the guidelines of the constitution. The formal constraints are reflected through the constitutions and laws which ensure the roles of these different actors and provide a guideline for behavior. In a political arena, different types and natures of contracts may exist, i.e. a contract between legislature and citizens (where the legislators are contractually obligated to represent the interest and demand of the voters); a contract between legislature and executive (where the executive is obligated to implement the laws as designed by the legislature) or a contract between executive and judiciary (where the judiciary is obligated to ensure that the executive is obeying the law in its activities). In this paper, we are interested about the third contract where the judiciary will oversee the actions taken by the other actors, will judge their consequences and either amend or approve them. In this contractual relation, the executive is the enforcer, i.e. it will implement the decisions taken by the judiciary. It should be mentioned here that this contractual obligation is well stipulated in the formal mechanisms expressed through the constitution or laws.

[1] However, at this point it is important to discuss the distinction between organizations and institutions. North considers organizations as some entities that have been established to achieve some goals and these organizations are guided by a "rules of the game", which he identifies as institutions. For the purpose of this paper, we have also considered organizations as goal-achieving institutions but following March & Olsen (1989), we have termed these as institutions. For our purpose, institutions as defined by North are actually the rules, which can be both formal (structural factors) and informal (internal institutional dynamics).

- **Second**, as most of the developing and transitional democracies have gone through the colonial ruling or authoritarian period, these experiences hugely effect the "transaction" in the political market. In effect, as in all these countries, due to these experiences, the executives have all always enjoyed an upper hand in dealing with the other actors and institutions, this eventually determines the informal rules of the state. Furthermore, relatively little experience of democracy also introduces some key informal rules including centralization of power, failure of political parties in realizing their political roles etc.
- North (1990) argues that in determining the economic performance of a country the "interdependent web" of formal and informal rules play the most important role. Based on that, we make the same argument- in determining the political performance of the judiciary as a goal-achieving institution, the interaction between the formal and informal rules plays a huge role. In case of most of the developing countries, this complex interaction takes the form of a feckless pluralism (Carothers, 2002) where a winner-takes-all system operates. In this particular context, violation of the contract between the executive and the judiciary takes place as it serves the vested interest of the executive organ. Furthermore, as the executive is the enforcer of the contract, it uses the enforcement mechanism in a way which will maximize its utility functions and consequently, the formal rules of the game are ignored.

Therefore, in a mal-functioning political market, structural changes are unlikely to ensure the effective functioning of the judiciary as the executive will ignore these formal rules and will try to maximize its utility through following some informal rules largely determined by the prevalence of a feckless pluralism.

The above discussion indicates why the formal structural change of the judiciary is not adequate enough in ensuring independent functioning of the institution. However, this raises the question- in such a situation, what does the institution itself do? How does it cope and does it succeed in maintaining its own integrity even within a completely hostile political environment? The neo-institutional theorists provide an interesting answer to these questions. March & Olsen (1989) explains, "Political institutions are more than simple mirrors of social forces. Empirical observations seem to indicate that processes internal to political institutions…affect the flow of history….political institutions define the framework within which politics takes place" (March & Olsen, 1989: 18). In fact, these scholars have argued that institutions, once developed, are never neutral and they emphasize on the strength and capacity of these to "impose specific political configurations and structure people's beliefs and thinking" (Gazibo, 2006; Pierson, 1994; Hall & Taylor, 1998). They point out that there are few reasons behind this including-

- All institutions have their own rules and standard operating procedures. As March & Olsen (1989) point out, in case of institutions, the rules include not only the routine work and procedures but also the convention, norms, strategies, organizations forms "around which political activity is constructed" (p. 22). These rules eventually serve two basic purposes- first, they determine and shape the behavior of the individuals working within these institutions and second, following these rules create a sense of identity among them.
- Once established and in operation for some time, these rules consolidate and allow the institutions to determine and perform its role in a relatively autonomous way. In this way, the members of the institutions develop their own sense of duty (which is mutually agreed upon) and they continue to perform them in an efficient way.

- This stability in terms of performing duties creates an “established pattern of political mobilization, the ‘institutional rules of the game’ and even the citizens’ basic ways of thinking about the political world” (Pierson, 2004: 10)
- Furthermore, “once created, an institution “has a formidable capacity for its own reproduction across time and tends to buttress its power and persevere over time” (Gazibo, 2006).
- And finally, the institutions can become so powerful in structuring politics that they develop the ability to “resist even “in the face of systematic efforts ... to uproot prior forms and build new blueprints” (Arthur, 1994: 2 cited in Gazibo, 2006).

Based on the above discussion, it can be argued that once established, the institutions have the unique capacity to develop its own rules (both formal e.g. standard operating procedures, guiding rules etc. and informal, e.g. institutional conventions and norms) which not only shape the behavior of the institutional actors but also develop a sense of institutional identity and institutional autonomy (March & Olsen, 1989; Gazibo, 2006). Furthermore, as Pierson (2000) points out the institutions follow a self-enforcing mechanism through positive feedback which ensures the sustainability of these unique institutional senses. In a nutshell, this is the essential path-dependent model from the institutional perspective where once the institution is created; it follows a certain path and modus operandi which is extremely difficult to change. However, these arguments based on the theoretical propositions of the neo-institutionalist schools lead us to our central puzzle- if the institution, in this case the judiciary, has the ability to develop its own sense of institutional autonomy, why do not we see this autonomy in practice in the wider political arena? In other words, why do we see these “so called” autonomous organizations work as per the wish of the other powerful political actors? In order to answer the question, we argue that to develop a proper sense of the politics of the judiciary, the following issues have to be taken under consideration-

- First and most importantly, the judiciary is indeed a political institution and like all the other actors of the political arena, the judiciary too feels the pressure of the external environment. Consequently, it has to deal with the demand of the external actors and choose specific strategies to deal with the political situation. The key issue here is the strategic choice made by the judiciary.
- Second, the analysis of the neo-institutional perspective allows us to realize that judiciary as an institution is not in a helpless position rather it has the unique capacity to define its role and to develop its own strategic choices to deal with the external political pressure.
- Thirdly, like all the other political actors and institutions, the judiciary also has the ability to scan the environment and decide upon its strategies. As a result, when the external environment is extremely hostile, the institution will try its best to cope up with this and this largely explains the mal-functioning of the institution in most of the developing countries in most of the period.
- Fourthly, North (1990) points out that in the developing countries, the ill-performance of the institutions continue and the change in formal rules cannot really affect the performance. However, he argues that the performance of the institutions can change only when there will be a significant alternation in the nature of the polity as that will not only affect the formal rules but also will reshape the informal ones. This critical incident approach is appropriate in the context of judiciary and in fact, a significant change in the nature of the polity eventually allows the judiciary to change its initial strategic choice and move towards establishing or strengthening institutional autonomy.

Based on the above discussion, we argue that- for judiciary as an institution, the ability to define and determine its role and functions is always a constant factor and what varies over period is its strategic choice of responding to political pressure which is largely been determined by the nature of the political environment.

3. Judiciary in Bangladesh: Stages of Institutional Evolution and Politicization

In this paper, through applying the above argument in the context of Bangladesh, we have tried to show that judicial development in the country has gone through four different phases-

A. **The formative phase,** which started after the independence of Bangladesh. At this stage, the rules for the judiciary has only been introduced and yet to be consolidated. Therefore, it is unlikely that we will see any manifestation of judicial strategy at this stage
B. **The partial politicization phase**, which started in 1975 and continued till 1996 until the provision of Caretaker Government was introduced. During this phase, the judiciary was mainly concerned with protecting its institutional integrity
C. **The politicization of judiciary phase** that started since the invention of the caretaker government. During this particular phase, significant efforts were taken by the executives to curtail the authority of the institution and the court-packing was introduced. The judiciary mainly tried to cope and at the same time, made efforts to find way of establishing its autonomy. The judgment of the Masdar Hossain case can be cited as an example of that.
D. **The judicialization of the politics phase** and this started after the formal separation of the judiciary from the executive and at this stage, the executive made efforts to implement its unpopular decisions through the judiciary. However, as we will show this particular strategy of the executive, supplemented by the formal separation has allowed the judiciary develop specific strategic choices in order to establish its institutional autonomy.

A large portion of this paper has been drawn from our previous study on the judiciary which was commissioned by the Institute of Governance Studies as part of their institutions of accountability series[2]. We have mainly relied on the review of legal documents and existing literature conducted as part of that study to develop our analysis for the first three phases. For the final phase, we have relied on three specific cases studies which indicate the institution's maturity and strategies for institutional autonomy.

3.1 **The Politics of the Judiciary-**

3.1.1 The Formative Phase-

As stated earlier, the formative phase for the judiciary of Bangladesh started after the liberation war of 1971. The constitution of the people's republic of Bangladesh was passed on November 4, 1972 and came into force on December 16, 1972. Part VI of the constitution deals with the judiciary. Its main task is to ensure the compliance with the constitutional provisions by all the organs of the state. Article 95 of the constitution provided the initial guideline for appointing the judges. The 1972's constitution suggested that the judges of the Supreme Court would be appointed by the President "…after

[2] http://www.igs-bracu.ac.bd/home. Specifically please refer to the State of Governance Report 2008 (p69-70) available at http://www.igs-bracu.ac.bd/UserFiles/File/archive_file/SOG_2008.pdf

consultation with the Chief Justice." Article 95 (2) also stated that for being appointed as a Supreme Court judge, a person has to be a citizen of Bangladesh and has to be either a Supreme Court advocate having at least ten years standing or a judicial officer who held judicial office for a period not less than ten years. Though the article also stated that the parliament could determine other qualification of the judges by enacting laws, so far no such law has been made. However, the 1972's constitution contained a provision which stated that in even though the President, as per the advice of the Prime Minister would appoint the judges of the High Court and Appellate court Division, in all cases, the President had to consult with the Chief Justice (CJ). In the 1972's constitution, the removal of a judge from his/her position was difficult- "…a judge could be removed on the ground of misbehavior or incapacity by the President on the basis of a resolution of the parliament supported by two-third of the total members of the parliament" (Hoque 2003: 29).

The constitution has defined and determined the functions and jurisdictions of the High Court Division., It has-

- Both appellate as well as original jurisdiction and hears appeals from orders, decrees and judgments of subordinate courts and tribunals.
- Original jurisdiction to hear Writ Applications under article 102 of the Constitution, which is known as extra ordinary constitutional jurisdiction.
- Original jurisdiction, inter alia, in respect of company and admiralty matters under statutes.
- Also powers and jurisdiction to hear and dispose of cases as the court of first instance under article 101 of the Constitution.
- Superintendence and control over all Courts and tribunals subordinate to it.

The Appellate Division has-

- Jurisdiction to hear and determine appeals from judgments, decrees, orders or sentences of the High Court Division.
- Rule making power for regulating the practice and procedure of each division and of any Court subordinate to it.

Article 114 of the constitution has paved the way of establishing such courts which will be sub-ordinate to the Supreme Court. Accordingly, the Civil Courts Act, 1887 provides for the sub-ordinate civil courts and the Code of Criminal Procedure provides for the courts of magistrates and sessions. In case of civil courts, five grades exist- Courts of Assistant Judge, Senior Assistant Judge, Joint District Judge, Additional District Judge and the District Judge. The district judge heads these courts for all districts except for the three hill districts. There are also five classes of sub-ordinate criminal courts- Courts of Session, Metropolitan Magistrate, Magistrate of the First Class, Magistrate of the Second Class, magistrate of the Third Class. In the Courts of Session, the District Judges are empowered to function as Session Judges. The constitution of the country also provided certain provisions to ensure the separation of the judiciary from the executive. Accordingly-

- The District Judges were to be appointed by the President on the recommendation of the Supreme Court
- The judicial officials and the magistrates were to be appointed by the President according to the rule made by him after due consultation with the PSC and the Supreme Court

The personnel management of the judicial officers, including the magistrates was to be conducted by the Supreme Court.

If we look at the initial constitutional provisions and legal regimes, it can be argued that at the formative phase, necessary attempts were taken to insulate the judiciary from other organs of the state. It was expected that over time the judicial branch would become an autonomous institution which would successfully hold the executive and the legislature into account.

3.1.2 The Partial Politicization Phase-

However, these constitutional provisions were challenged as early as 1975 and the fourth amendment contained a number of provisions which aimed to significantly curtail the authority of the judiciary. For instance, the 4th amendment removed the provision that the president had to consult with CJ in case of appointments in different courts. At the same time, the amendment brought the subordinate judiciary under the control of the executive organ of the state. The amended Article 115 of the constitution allowed the President to appoint the judicial officers exercising judicial function without the recommendation of the Supreme Court. Article 116 was also amended and the control of the sub-ordinate judicial officers and magistrates were transferred in the hand of the President in place of the Supreme Court. Later, the Second Proclamation Order No. IV of 1978 amended Article 116 to, "…provide that the President shall exercise control over the sub-ordinate judicial officers and magistrates exercising judicial functions in consultation with the Supreme Court". Therefore, the structural independence of the judiciary as suggested by the constitution of 1972 was altered and when a coup-de-at brought into power an autocratic regime in 1975, the government utilized these provisions in order to ensure control over different organs and the judiciary, especially the lower judiciary went under the control of the executive organ. Even though the higher court was relatively independent if compared to the lower court, it lacked the ability of institution building and the judiciary remained largely ineffective especially in terms of placing check on the executive.

The autocratic government's pattern of interaction with the Supreme Court was interesting. Even though the government took away the management and financial power of the Supreme Court, it did not make any significant effort to alter the jurisdictional authority of the institution. Rather, the government introduced the Supreme Court Judges (Remuneration and Privileges) Ordinance, 1978 through which remuneration and privileges of the judges are regulated. According to the ordinance, the judges are allowed to have:

a. Tax free salary
b. House rent allowance if the government fails to provide them with fully furnished residence free from payment
c. Free use of electricity, water and gas
d. An official transport (with free fuel)
e. Free medical facilities (applicable also for family members)

This basic pattern of interaction remained unchanged even when democracy was introduced in 1991. Even though no new strategies were adopted by the democratic government to further politicize the judiciary, it also did not make effort to alter the provisions that had been enacted by the previous governments that had significantly curtailed the authority of the judiciary.

The strategic actions taken by the judiciary during this particular period can be considered as surprising by many. When the efforts were undertaken by the successive governments to alter the constitutional framework and curtail the authority of the institution, the judiciary showed no sign of unease and in fact, tried to cope up with it. Whereas we think that it is important to conduct an empirical study to explore the reasons behind the silence of the judiciary, in this paper we can offer one particular explanation and that is- as the judiciary was at the very early stage of institutionalization, it could not consolidate the rules and norms within its internal institutional milieu and as such was in an extremely vulnerable position. It may be possible that this initial vulnerability compelled the institution to make peace with the situation and in fact, it started to show symptoms of unease when attempts were taken to further curb its authority. For instance, in 1989, when the then government introduced the 8th amendment, part of which amended the Article 100 of the constitution and made provision of introducing permanent benches "each at *Barisal, Chittagong, Comilla, Jessore, Rangpur and Sylhet"*[3], the judiciary reacted sharply to this. This amendment was struck down by the Supreme Court and in the majority opinion Justice B.H. Chowdhury explained the reasons in the following way-

> "The impugned amendment in a subtle manner in the name of creating "Permanent Benches" has indeed erected new courts parallel to the High Court Division as contemplated in Articles 94,101,102. Thus the basic structural pillar, that is judiciary, has been destroyed and plenary judicial power of the Republic vested in the High Court Division has been taken away. Hence amendment of Article 100 is ultra vires because it has destroyed he essential limb of the judiciary namely, of the Supreme Court of Bangladesh by setting up rival courts to the High Court Division in the name of Permanent Benches conferring full jurisdictions, powers and functions of the High Court Division"[4]

Therefore, it can be argued that at this point in time, the institutional rules and norms of the institution had been consolidated and the judiciary had started to protect its integrity. Furthermore, when during the tenure of the first post-1991 democratic government, efforts were taken to appoint justices at the High Court Division of the Supreme Court without consulting the Chief Justice (the provision which after the 4th amendment merely became a convention), the then Chief Justice reacted sharply and the government was forced to change its course in appointing judges at the apex court[5].

3.1.3 The Politicization of Judiciary Phase

We argue that in case of Bangladesh, the politicization of the judiciary phase started in 1996 and it lasted until the 2006. The process started in 1996 when the country adopted the provision of Caretaker Government through the 13th amendment of the constitution which created a definitive incentive for the political parties to capture the judiciary in a comprehensive way. According to the provision of the Constitution, once the tenure of an elected government is over, a CTG will be formed which will be headed by the last retired Chief Justice of the Supreme Court. As a result of this provision, the successive

[3] http://www.unhcr.org/refworld/country,,NATLEGBOD,,BGD,,3ae6b5684,0.html#_ftn65

[4] http://www.icsforum.org/library/files/266_1989.pdf

[5] Even though without a detailed empirical study, it is difficult to explain why the judiciary after this consolidation did not try to regain its lost power, based on our theoretical framework, we provide here a hypothesis, which we hope will be tested. Our hypothesis is based on the path dependency model developed by the institutionalist school. We argue that as the path for the judiciary has already been defined though the fourth and the fifth amendments, it was extremely difficult for the institution to change course. As such, the institution stayed on the existing path and made effort to make the best use of it

governments since 1996 had tried to handpick the judges of the Supreme Court and at the same time, while appointing chief justices; almost all the conventions were broken in order to select the preferred justices. At the same time, given that there is no specific provision in case of selecting judges, the ruling parties always try to pack the court with persons who share their partisan interests. Consequently, during this time period, Article 98 of the constitution which states that "Notwithstanding the provisions of article 94, if the President is satisfied that the number of the Judge of a division of the Supreme Court should be for the time being increased, the President may appoint one or more duly qualified person to be Additional Judges of that division for such period not exceeding two years as he may specify…" has not been properly followed for the sake of political gain. The following case study provides an example of this-

Box 1: Politicization of Appointments of Judges in Bangladesh

During the Awami League regime of 1996-2001, 40 additional judges were recruited by the government. During the tenure of the next BNP-led government, the President denied permanent appointment of 15 of these judges even though 14 of them were recommended by the Chief Justice. Amongst the 14 sacked additional judges ten lodged a writ petition with the High Court Division on 4th February 2003 challenging the government's decision and requesting the reinstatement of their judicial positions. On 17th July, 2008 the High Court Division ordered the Government to appoint the sacked ten judges within a month with retrospective seniority in the Supreme Court. In the verdict the Court declared the President's action was unconstitutional in not appointing the additional judges as permanent judges, ignoring the recommendations made by the Chief Justice in this regard.

(Adapted from: http://www.humanrights.asia/news/ahrc-news/AHRC-STM-201-2008/?searchterm=

This particular case points out two significant issues- at one end it indicates the attempts of the successive political parties in packing the court and on the other, it shows the attempts of the judiciary in protecting its institutional integrity. In effect, the judiciary expressed its dissatisfaction as the institutional rules were violated which dictates that the judges will be appointed as per the recommendation of the Chief Justice.

Another important example which has a far-reaching consequence for judicial independence of Bangladesh and which portrays the judiciary-executive political game in a clearer term is the tug of war related with the implementation of the Masdar Hossain judgment. This particular case is probably the most significant case for the purpose of the study as it shows the clear intent of the judiciary of reinstating the basic criteria of structural independence as stated in the original constitution of 1972. In fact, after the restoration of democracy in 1991, expectation was high that the judiciary would finally be separated from the executive organ. In fact, prior to 1991 election, both the major parties made an election pledge that the judiciary would become independent. However, during its tenure of five years, the BNP government did not fulfill its election pledge and "it was such a fine-sounding pledge that after five years of having done nothing about it, not only the BNP but all of the major political parties made the same commitment before the general election in 1996" (Ashrafuzzaman 2006)[6]. The Awami League, after winning the 1996 election, refrained itself from taking initiative to separate the judiciary. However, the situation started to change when the 'Masdar Hossain' case was lodged and a verdict was delivered in 1999.

[6] "Laws without order & courts of no relief in Bangladesh", available at: http://www.article2.org/mainfile.php/0504/243/

The Masdar Hossain case owes its origin to a decision taken by the Finance Ministry. On January 8, 1994, the Finance Ministry took a decision to upgrade the salary scale of the Additional District Judges and the District judges. However, the other cadre services of the government reacted sharply to this decision and due to their protest, this decision was suspended. Later, on November 2, 1995, the Finance Ministry approved the revised pay scale but determined some certain conditions for the additional district judges and district judges. This incident aggrieved the judicial officials and a writ petition (writ no. 2424/95) was filed in the High Court. The main objective of the case was to point out that the judicial service was treated as the government service like the administrative cadre service, which is against the constitutional mandate.

In 1999, the then Chief Justice along with three other judges of Appellate division provided a twelve point directives on the issue of separation of the judiciary. The verdict mentioned, "This amalgamation of or mixing up or tying together of the judicial service with other civil administrative services has been a monumental constitutional blunder during the early years of liberation, the harmful legacy of which is the dogged and headstrong denial of the proper and rightful institutional status of the members of the judicial service and of magistrates exercising judicial functions at the implementations stage." The 12 point directives are:

- "Judicial service is a service of the Republic within the meaning of Article 152(1) of the Constitution, but it is functionally and structurally distinct and separate service from the civil, executive and administrative services of the Republic.

- The word 'appointment' in Article 115 means that it is the President who under Article 115 can create and establish **a judicial service and a magistracy exercising judicial functions**, make rules etc; Article 115 does not contain any rule-making authority with regard to other terms and conditions of service; Article 133, 136 of the Constitution and Services (Reorganization and Conditions) Act 1975 have no application in respect of the judicial functions.

- Creation of BCS (Judicial) cadre along with other BCS executive and administrative cadres by Bangladesh Civil Service (Reorganization) Order, 1980 with amendment of 1986 is ultra vires the Constitution, Bangladesh Civil Service Recruitment Rules 1981 are inapplicable to the judicial service.

- (i) Government is directed to take necessary steps forthwith for the President to make Rules under Article 115 to implement its provisions. (ii) Nomenclature of the judicial service shall be designated as the Judicial Service of Bangladesh. (iii) Either by legislation or rules or order a Judicial Service Commission is to be established forthwith with the majority of members from the Senior Judiciary of the Supreme Court and the subordinate courts for recruitment to the judicial service.

- Under Article 133 law or rules relating to posting, promotion, grant of leave, discipline, pay, and allowance and other terms and conditions of service consistent with **Article 116 and 116A shall be enacted separately for the judicial service.**

- Government is directed to establish a separate Judicial Pay Commission forthwith as part of the Rules to be framed under Article 115.

- In increasing control and discipline of persons employed in the judicial service and magistrates exercising judicial functions under Article 116 the views and opinion of the Supreme Court shall have primacy over those of the Executive.

- The conditions of judicial independence in Article 116A namely, (i) security of tenure (ii) security of salary and other benefits and pension and (iii) Constitutional independence from the parliament and the executive shall be secured in the law or Rules made under Article 113 or in the executive orders having the force of Rules.

- The executive government shall not require the Supreme Court of Bangladesh to seek their approval to incur any expenditure on any items from the fund, allocated to the Supreme Court.

- The members of the judicial service are within the jurisdiction of the administrative tribunal.

- Amendment of the Constitution for separation of judiciary from the executive may be made by the parliament.

- Until the Judicial Pay Commission gives its first recommendation the salary of judges in the judicial service will continue to be governed by *status quo ante* (IGS, 2009).

In 1999, after delivering this historic judgment, the Appellate Division of Supreme Court asked the government to take steps for separation of the judiciary according to the road map provided. The Caretaker Government (CG) of 2001 took initiatives for the separation of judiciary. However, both of the major political parties objected to this effort by pointing out that the CG was not authorized to take any policy decisions according to the constitution. Instead, an elected political government should perform the task of separation. However, after coming into power in 2001, the BNP-led four party alliances again showed its antipathy to implement the judgment of the appellate division. As one researcher put it-

> "After its order to separate the judiciary from the executive branch, the government began applying for extensions. Like a schoolboy coming to class with one implausible excuse after the next about why he could not do his homework, it applied for more time on no less than 23 occasions. Finally, the Supreme Court lost its patience. On 5 January 2006 it rejected the government's latest request for an extension, and said that it would not entertain any more" (Ashrafuzzaman 2006).

In fact, in 2004, the then law ministry made a comment that in order to ensure the separation of the judiciary from the executive organ; they might need six more years.

This political tug of war between the judiciary and the executive points out two things-

- First, it explains what happens when the enforcer finds that enforcing something is completely contrary to maximizing its utility.
- Second, it also shows that even within a framework of extensive politicization, it is possible for the judiciary as institution to make efforts to uphold its institutional integrity and fight for its institutional autonomy.

However, as we have described in the theoretical framework section, as the external political environment is hostile, it is not possible for the judiciary of Bangladesh to move towards establishing the institutional autonomy. For that, the institution needs an overhaul of the political environment within

which it performs and as we argue that the next phase of judicial development allows the institution to adopt such a strategy.

3.1.4 The Judicialization of Politics Phase

Though the politics of Bangladesh is highly confrontational and the successive political parties had developed a "winner-takes-all" system (IGS, 2009), since 1991 to 2001, the country had witnessed three free and fair elections through which power was altered peacefully. This regular alternation of power has at least two positive consequences- first, it has significantly strengthened the vertical accountability and second, it has allowed the civil society organizations to play an important role in the democratic process. In order to ensure the structural independence of the judiciary, the role of these CSOs is extremely important. From the very beginning, these CSOs have pushed the government to separate the judiciary from the executive. Even though the successive governments were reluctant in separating the judiciary from the executive, the situation changed dramatically when an interim CTG came into power on January 11, 2007 as a solution to the then growing political crisis. The CTG, since assuming power showed its determination in separating the judiciary from the executive organ and on January 16, 2007 published the gazette notifications of four rules relevant to separating the judiciary from the executive- The Code of Criminal Procedure (Amendment) Ordinance, 2007[Ordinance No. II of 2007]; Bangladesh Judicial Service Commission Rules, 2007; Bangladesh Judicial Service (Pay- Commission) Rules, 2007 and Bangladesh Judicial Service Commission (Construction of Service, Appointments in the Service and Suspension, Removal & Dismissal from the Service) Rules, 2007 & Bangladesh Judicial Service (Posting, Promotion, Grant of Leave, Control, Discipline and other Condition of Service) Rules, 2007. Finally, on November 1, 2007, judiciary was separated from the executive organ of the state.

When an election was held on December, 2008 and power was transferred to a new elected government, the ruling party embraced the judicial reform efforts and did not take any effort to significantly alter the nature of structural independence of the judiciary. However, the political actors adopted a clever strategy- given that structural independence has significantly expanded the authority of the judiciary; the executive is now utilizing this authority to further its political gains. The government is now designing and implementing unpopular policy decisions through the judiciary. In a nutshell, we are now witnessing a judicialization of politics where the institution is taking significant political decisions which may have far-reaching consequences.

The judgment that was delivered regarding the thirteenth amendment (which in 1996 established the caretaker government) may be used as an example to illustrate this judicialization of politics statge. As mentioned earlier, the Caretaker Government, as a separate institution became part of the constitution in 1996 when the then opposition AL raised concern about holding free and fair election under a party in power. Through the 13th amendment, the system was institutionalized and since then the CTG had organized three elections (1996, 2001 and 2008). As per the constitutional provision, the last retired Chief Justice assumed the position of the Head of the CTG and he in turns, selects 10 other advisors.

In 2000, a Public Interest Litigation was filed in High Court Division arguing that the CTG should be abolished as it "goes against the republican character of the state". In 2004, the HC declared the CTG legal and observed that "the change did not distort the basic structure" of the constitution. However, the petitioners then appealed to the Appellate Division. In the mean time, the political environment went through significant change as the CTG that assumed power on January 11, 2007 stayed in charge of

the state well beyond its constitutionally mandated tenure of 90 days and in fact, the CTG ruled the country for almost two years before transferring power to an elected government in 2009. During its time period, the CTG took a number of initiatives including a drive against corrupt politicians, separating the judiciary from the executive and reforming a number of public institutions. Even though the initiatives taken by this government was praised by many, a number of people also raised concern about the action of the CTG. After assuming power, the current Prime Minister did not hesitate in showing her discomfort about the whole concept of the CTG and it was widely perceived that the government might amend the constitution to abolish the CTG. However, this action would definitely heat up the political arena and the current opposition party, BNP had already expressed that it would not participate in any election if not held by the CTG.

In light of these developments, this particular case received a lot of attention. Yet again, from the government's perspective, the expectation was clear- it wanted the abolition of the system. The Appellate Division heard the petition from March 1 to April 6, 2011 and on May 10, 2011, the "six-member bench of the Appellate Division, headed by Chief Justice ABM Khairul Haque, declared, ""The Constitution (Thirteenth amendment) Act 1996 (Act 1 of 1996) is prospectively declared void and ultra vires the Constitution".

So, we observe increasing judicialization of politics in Bangladesh. The next section tries to understand if this judicialization of politics can explain our central research question: "if the judiciary has been able to develop its own sense of institutional autonomy".

4. The Consequence of Judicialization of Politics: The Beginning of Institutional Autonomy?

In the existing literature of judicial independence, this particular phenomenon of judicialization of politics is well-recognized and is defined as the actions taken by the political leaders through 'the ever accelerating reliance on courts and judicial means" to "address core moral predicaments, public policy questions, and political controversies' (Hirschl, 2006). As the definition indicates, judicialization of politics is comprised of two interrelated components-

- At one end, the institution has attained the structural conditions necessary for ensuring its independent functions, i.e. the formal rules of separation of judiciary are in place.
- On the other hand, the institution is allowed to consider basic public policy questions which have significant political consequences. In other words, instead of curbing the authority of the judiciary, the political actor, especially the executive is relying on the institution's authority to implement some certain policies.

Of course, there is the executive has established an important condition, i.e. the policy decisions will have to be in alignment with the interest of the current government. For the judiciary, this provides a unique opportunity-at one end, the necessary conditions for the separation of the judiciary is finally in place and the institution finds itself performing within a new informal rules where rather than constraining the judiciary, the executive is more interested in building a partnership with the institution. This changing environment indicates the presence of the "critical incident" and the institution finally finds itself in a position where it will make strategic choices not only to protect its institutional integrity but also to establish and strengthen certain dimensions of institutional autonomy. In effect, the presence of the necessary conditions of structural independence coupled with the favorable political

conditions allows the judiciary to attain the sufficient conditions of performing entirely political but effective (for the sake of judicial independence) judicial functions.

In the case of Bangladesh, based on three examples (including the CTG verdict mentioned above), we argue that judicialization of politics has allowed the institution to move towards establishing a sense of institutional autonomy.

The first of these examples refer to the judgment delivered regarding the Fifth Amendment. On August 29, 2005 a High Court Bench comprising of two judges declared the fifth amendment of the Constitution illegal. In this judgment, the High Court Division was extremely critical about the military government and expressed its dissatisfaction in the following way-

> "Besides, Bangladesh cannot even be considered independent during [August 15, 1975 to April 9, 1979]. Earlier, it was conquered by the British Rulers; thereafter it was under the domination of the West Pakistanis. But this time, for all practical purposes, Bangladesh was conquered not by any foreign invaders but by Bengali speaking Martial Law Authorities.
>
> The Constitution is a sacred document, because it is the embodiment of the will of the people of Bangladesh. It is not to be treated as a log book of Martial rules.
>
> Those Provisions and the actions taken thereon in violation of the Constitution, were not only illegal but seditious acts on the part of the Martial Law Authorities"[7]

With this observation, the High Court Division declared "all the acts and things done and actions and proceedings taken during the period between August 1975 and April 9, 1979 as past and closed transactions". This particular judgment not only infuriated the BNP, the political party which was in power when the 5th amendment was passed through the parliament but also created controversy about the nature of the constitution of the country. However, when the full-member Appellate Division bench delivered its judgment on February 2, 2010, it made some significant change and observations in the original judgment provided by the High Court Division. Even though it declared the 5th amendment unconstitutional and reinstated the four pillars of the 1972 constitution (democracy, nationalism, secularism and socialism), the Appellate Division also allowed the things done and actions taken that are not derogatory to the rights of the citizens, "all acts that promote the welfare of the people, all routine works which the lawful government could have been done, the amendment to Part VIA of the constitution and Article 6, 44, 96 and 102 of the constitution and all acts and legislative measures which are in accordance with, or could have been made under the conditions as it was on adoption in 1972" to stay[8].

An overall analysis of the judgment delivered by the Appellate Division reflects the overall maturity of the institution. In fact, through this judgment, the judiciary instead of taking a side actually reaches for a compromise. For instance, even though like the High Court Division, it also condemns the martial law administration, it does not use any harsh language and in fact, rebukes the High Court Division for its choice of words. At the same time, it allows a number of provisions of the Fifth Amendment to stay. In fact, this judgment indicates the ability of the institution to deal with an extremely controversial and

[7] http://rumiahmed.wordpress.com/2010/07/27/bangladesh-supreme-court-delivers-final-verdict-regarding-fifth-amendment/
[8] http://www.newagebd.com/2010/jul/29/front.html

polarized issue in an effective and efficient way. It is important to note here that the High Court Division judgment was delivered during the BNP regime and even though the party appealed the decision, when the government changed and AL came into power, they decided not to continue the appeal. And thus, through this decision, the ruling party has sent a clear signal to the Court about what they want as the final judgment. On the other hand, in response, the leaders of the opposition parties submitted two petitions contesting the verdict of the High Court Division. Considering the circumstances, it can be argued that final judgment reflects a compromise- at one end, the judiciary rejected the petitions, declared the fifth amendment unconstitutional and reinstated the four principles as envisioned in the original constitution and on the other, it allowed certain provisions of the fifth amendments to stay. As one legal scholar notes-

> "Watching Bangladesh's higher judiciary in action always reminds of Goldilocks and the Three Bears. They can't be too independent, but they can't be blatantly servile either. The result is an eternal attempt to walk the fine line….It looks like six members of the Court reached a compromise. Secularism is brought back to the preamble, but Bangladeshi nationalism is still maintained in the actual Constitution. Not bad for a judgment that was supposed to "forever bury BNP."[9]

The second example is the CTG verdict of 2011 as mentioned in the previous section. For the purpose of our paper, this example is even more important as it shows not only the ability to reach a compromised solution but also the institution's intention for the achievement of autonomy.

From the political perspective, it can be argued that the appellate division had given in to the executive pressure and delivered the government what it wanted. However, in its summary judgment, the Appellate division made two important observation- first, it suggested that the next two elections could be arranged by the CTG, if allowed by the Parliament and most importantly, the Division stated that even if this was allowed (i.e. the next two elections under the CTG), "the chief justice or any other judges of the Appellate Division of SC" would not be involved in the non-party government system"[10].

As in the context of Bangladesh, there is no empirical analysis or no model in terms of analyzing the judicial decision making process, it is extremely difficult to explore whether or how the external political pressure created impact on the way the institution came up with this particular decision. However, looking at the final outcome, it is probably possible to develop the following observations-

- Clearly, the government was not really interested in making this particular policy decisions and as such it delegated this duty to the institution of judiciary
- The judiciary in response developed a compromised solution- it let the government have what it wanted, i.e. the abolition of the CTG and at the same time, it also suggested that the next two elections could be held under the CTG

[9] http://rumiahmed.wordpress.com/2010/07/27/bangladesh-supreme-court-delivers-final-verdict-regarding-fifth-amendment/
[10] http://english.peopledaily.com.cn/90001/90777/90851/7375665.html;
http://bdnews24.com/details.php?id=232438&cid=2

- Finally, while making this compromised decision, the judiciary as an institution attained a significant achievement, i.e. it allowed itself to be free from the executive control by stating that the judges of the SC should never be involved in the CTG

Therefore, even if the final outcome is politically motivated, the judiciary had essentially used its position to strengthen its institutional autonomy by making it completely free from executive control.

The final example deals with the recent controversy regarding the statement of a sitting Supreme Court judge. On June 5, 2012, while reacting to a comment made by the Speaker of the Parliament that "If people were aggrieved at court verdicts, the day would come when they would stand against the courts", a High Court Bench termed this statement as seditious and remarked that the Speaker was "completely ignorant about the Supreme Court and the Constitution". This particular statement of the High Court Bench aggrieved the Members of the Parliament and they called for the formation of the Supreme Judicial Council to remove the judge who made this comment from the High Court. For a time, it looked like that these two organs of the state would engage in a bitter fight against each other on the issue of constitutional authority. Though a timely statement made by the Speaker resolved the crisis, this incident surprised many as not many expected that the Judiciary, popularly believed to be dominated by the executive would stand against the party in power. This particular incident is significant for an important reason- it allows us to have an understanding of the judicial attitude or behavior and indicates that most probably the institution is trying to free itself from the bullying of the executive organ.

The discussion and the cases explained here indicates an important possibility- probably, the judicialization of politics has indeed opened up a new opportunity for the institution as through bargaining and compromise, the institution is slowly moving towards establishing the institutional autonomy- the most important way of ensuring its independent functioning.

5. Conclusion

In this paper, we have not tried to conclusively prove anything rather what we have attempted is to provide a new direction for the research on judicial politics. As we have argued throughout the paper, so far the issue of judicial independence has always been limited within the narrow dimension of structural analysis. Undoubtedly, identifying the structural factors are essential, however, we should also remember that judicial independence is not only about laws and legal frameworks, but also is a product of history, politics, economics, behavioral norms and conventions, culture and the contest for power. And if we ignore these perspectives, we will not be able to get a complete sense of judicial independence. In this paper, we have tried to develop a framework that argues strongly in favor of institutional analysis and as we have tried to show through our case studies and examples, analysis of the judicial decision making process and judicial behavior may significantly enlighten our understanding of judicial performance. We strongly believe that as political scientists, it is high time for the scholars of Bangladesh to engage into an institutional analysis of the judiciary as a political organ.

References

Arthur, W. B. (1994). *Increasing returns and path dependence in the economy*. University of Michigan Press.

Basabe-Serrano, S. (2012). Judges without Robes and Judicial Voting in Contexts of Institutional Instability: The Case of Ecuador's Constitutional Court, 1999–2007. *Journal of Latin American Studies*, *44*(01), 127-161.

Burbank, S. B., & Friedman, B. (Eds.). (2002). *Judicial independence at the crossroads: an interdisciplinary approach*. Sage Publications, Incorporated.

Carothers, T. (2002). The end of the transition paradigm. *Journal of democracy*,*13*(1), 5-21.

Ferejohn, J. (1998). Independent judges, dependent judiciary: explaining judicial independence. *S. Cal. L. Rev.*, *72*, 353.

Ferejohn, J., Rosenbluth, F., & Shipan, C. (2004). Comparative judicial politics.*Available at SSRN 1154123*.

Ferejohn, J. (2002). Judicializing politics, politicizing law. *Law & Contemp. Probs.*, *65*, 41.

Gazibo, M. (2006). The forging of institutional autonomy: a comparative study of electoral management commissions in Africa. *Canadian Journal of Political Science*, *39*(03), 611-633.

Hall, P. A., & Taylor, R. C. (2002). The potential of historical institutionalism: a response to Hay and Wincott. *Political Studies*, *46*(5), 958-962.

Hoque, K. E. (2003). *Administration of Justice in Bangladesh*. Asiatic Society, Dhaka.

Hirschl, R. (2006). The new constitutionalism and the judicialization of pure politics worldwide. *Fordham Law Review*, *75*(2), 721-754.

Larkins, C. M. (1996). Judicial independence and democratization: A theoretical and conceptual analysis. *The American Journal of Comparative Law*, 605-626.

Larkins, C. (1998). The judiciary and delegative democracy in Argentina. *Comparative Politics*, 423-442.

March, J. G., & Olsen, J. P. (1989). *Rediscovering institutions: The organizational basis of politics*. Simon and Schuster.

North, D. C. (1990). *Institutions, institutional change and economic performance*. Cambridge university press.

Pierson, Paul. (1993). When effect becomes Cause: Policy Feedback and Political Change. *World Politics* 45: 595–628.

Pierson, Paul. (1994). *Dismantling the Welfare State? Reagan, Thatcher and the Politics of Retrenchment*. Cambridge: Cambridge University Press.

Pierson, Paul. (2000). Increasing Returns, Path Dependence, and the Study of Politics. *American Political Science Review* XC: 251–67.

Pierson, Paul. (2004). *Politics in Time: History, Institutions, and Social Analysis*. Princeton:Princeton University Press.

Pimentel, D. (2009). Reframing the Independence v. Accountability Debate: Defining Judicial Structure in Light of Judges' Courage and Integrity. *Cleveland State Law Review*, *57*, 1.

Stotzky, I. P. (Ed.). (1993). *Transition to democracy in Latin America: the role of the judiciary* (pp. 203-225). San Francisco: Westview Press.

Vyas, Y. (1992). Independence of the Judiciary: A Third World Perspective, The. *Third World Legal Stud.*, 127.