

REMOVAL OF JUDGES UNDER 16TH AMENDMENT OF BANGLADESH CONSTITUTION: A EUPHEMISM TO CURB ON JUDICIARY

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***Abstract:** The goal of the paper is to undertake a comparative discourse on removal of judges with reference to the provisions prior to- and post- 16th Amendment of the Constitution of Bangladesh. Though the parliament is given the power to trigger at the removal proceedings of a judge by passing a resolution under the 16th Amendment of the Constitution, this paper particularly postulates that the interventionist role of the parliament in removal of judges stands against judicial independence given the socio-political and legal strata in our country. The paper stands on the premise that the supreme judicial council as was introduced in our constitutional fabric by the 5th Amendment of the Constitution was more suitable than the Parliament to trigger at removal process of judges by a resolution. The scope of the article is limited to the discussion of mechanism for removal of judges of the Supreme Court of Bangladesh.*

***Keywords:** Removal of Judges, 16th Amendment of Bangladesh Constitution, Supreme Judicial Council*

I. Introduction

“Attempting to reform law, V. R. Krishna Iyar said¹, is somewhat like making a sheet of corrugated irons flat with a hammer.” Sometimes transformation of law might become very challenging as we have witnessed flurry of criticisms after the government moved to amend the Constitution to replace the provisions of removal of judges by the Supreme Judicial Council (SJC) with the parliamentary resolution. The government while tabling the amendment bill to the Parliament reasoned it saying that they were ensuring the judicial accountability of judges whereas the critiques were of the opinion that the government would like to curb on judicial independence. Thus there is dilemma as to what version of the opinions is correct. The paper initially gives a succinct account of judicial independence and security of tenure and their positions in our Constitutional jurisprudence. This paper also gives a brief account of the different practices in place in other countries regarding the removal of judges. This paper aims to

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depict a clear picture of pre- and post- 16th Amendment of the Constitutional provisions concerning removal of judges thereby making a comparative study of the removal of judges' provisions; it will also critically evaluate whether the changed position as to the removal of judges in the Constitution best suited to independence of judiciary.

While doing so, the paper will argue that the current position lacks conformity with the spirit of judicial independence and a vivid picture will be portrayed regarding the prior and the subsequent positions of the subject matter.

II. Independence of Judiciary

Independence of judiciary is the priceless possession of any country under the rule of law. The reason why judicial independence is of such public importance is that a free society exists only so long as it is governed by the rule of law - the rule which binds the government and the governed, administered impartially and treating equally all those who seek its remedies or against whom its remedies are sought.² Thus independence of judiciary is a *sine qua non* for a free society and good governance. The concept "judicial independence" is uncontroversially set out in the IBA's *Minimum Standards of Judicial Independence* (1982)³ and in the *Basic Principles of the Independence of the Judiciary* adopted by the General Assembly of the United Nations in 1985⁴. These Principles generally encompass guidelines for appointment and removal, and for tenure, conduct and discipline, which are generally designed to ensure that "judges are not subject to executive control" (personal independence) and that in the discharge of judicial functions "a judge is subject to nothing but the law and the commands of his conscience" (substantive independence). Bangladesh is no exception to that wave; independence of judiciary is considered a basic feature of the Constitution. In *Md Faiz vs. Ekramul Haque Bulbul*⁵, the High Court Division held: "By the concept of independence of judiciary we mean that judicial branch of the government acts as its own body free from intervention and influence of other branches of the government particularly the executive. It must also be free from powerful non-governmental interference like pressure from corporate giants, business or corporate bodies, pressure groups, media, political pressure etc."⁶ The above judicial pronouncement was reiterated in *Secretary, Ministry of Finance vs. Md. Masdar Hossain and others*,⁷ where the Court held "the independence of the judiciary, as affirmed and declared by Articles 94(4) and 116A, is one of the basic pillars of the Constitution and cannot be demolished, whittled down, curtailed or diminished in any manner whatsoever, except under the existing provisions of the Constitution".

III. Security of Tenure

So far as judicial independence is concerned, security of tenure of judges is considered the most important factor in that they would not be removed or otherwise be subjected to harassments if they pass judgements unpalatable to the government.⁸ Sir Gerard Brennan said –

“Independence of the modern judiciary has many facets. The external factors that tend to undermine independence are well recognized by the judiciary but perhaps not so well recognized by the political branches of government or by the public. Some of the structures that preserve independence are well established. I need not canvass the twin constitutional pillars of judicial independence - security of tenure and conditions of service that the Executive cannot touch - except to say this: if either of these pillars is eroded, in time society will pay an awful price. (Emphasis added).”⁹

Thus in 17th century the English judiciary was first given the security as to their tenure subject to good behaviour by the Act of Settlement¹⁰. Given the nature of the functions the judiciary is entrusted with specially to guard the rights and liberties of the citizens against the arbitrary decisions of the executive and unconstitutional acts of legislatures, it is a must for the judges as the third arm of the state to enjoy such security of tenure and fulfil the aspirations of the citizens to check derailed executives and legislatures. In *Secretary, Ministry of Finance vs. Md. Masdar Hossain and others*¹¹, the Appellate Division having referred to the Canadian case of *Walter Valente vs. Her Majesty the Queen*¹², acceded that security of tenure is the first of three essential conditions to ensure judicial independence. The Court held: “Reverting to the case of *Walter Valente vs. Her Majesty the Queen*, (1985) 2 RCS 673, we find that the Supreme Court of Canada listed three essential conditions of judicial independence. The Court further held that:

“...Security of tenure because of the importance traditionally attached to it, is the first of the essential conditions of judicial independence for purposes of section 11(d) of the Charter. The essentials of such security are that a Judge be removed only for cause, and that cause be subject to independent review and determination by a process at which the Judge affected is afforded a full opportunity to be heard. The essence of security of tenure for purposes of section 11(d) is tenure, whether until an age of retirement, for a fixed term, or for a specific adjudicative task, that is secure against interference by the Executive or other appointing authority in a discretionary or arbitrary manner”.¹³

VI. Removal of Judges in Different Jurisdictions: Some Reflections

There are different ways in practice worldwide whereby judges are removed from their offices.¹⁴ These practices can be divided into three broad categories: first, in some countries including UK, USA, Australia and India parliaments are invested with the power to remove judges. In UK and USA, the bill intended to remove judges is first tabled in the lower house of their parliament and finally decided upon in the Upper House. In Britain, for example, Judges hold office during good behaviour and can be removed only on an address from both Houses of Parliament.¹⁵ In the U.S.A., a Supreme Court Judge holds office for life and is removable only by the process of removal of judges in case of treason, bribery or other high crimes and misdemeanours.¹⁶ In India the removal procedure is bit different; the bill can be placed in any house of the Indian Parliament but if it is tabled in Rajyasova (the upper house), it needs to be approved by 50 parliamentarians and if it is placed in Loksova (the lower house), it needs to be approved by 100 members. After getting the required approval, an enquiry committee is to be formed by the Speaker/Chairman of the respective house. Upon investigation, if the committee does not find any accusation against the accused judge, the process ends here; if the committee recommends to remove the accused judge, the committee report is placed in the Parliament for voting and be decided accordingly and the President shall order to remove the judge upon the resolution having been passed in the Parliament in this regard.¹⁷ In India the Parliament has enacted the Judges (Inquiry) Act, 1968, which regulates the procedure for investigation and the proof of misbehaviour or incapacity of a Supreme Court Judge for presenting an address by the Houses of Parliament to the President for his removal. "The procedure for the purpose is as follows: A notice of a motion for presenting such an address may be given by 100 members of the Lok Sabha, or 50 members of the Rajya Sabha. The Speaker or the Chairman may either admit or refuse to admit the motion. If it is admitted, then the Speaker/Chairman is to constitute a committee consisting of a Supreme Court Judge, a Chief Justice of a High Court and a distinguished jurist. If notices for the motion are given on the same day in both the Houses, the Committee of Inquiry is to be constituted jointly by the Speaker and the Chairman.

The Committee of Inquiry is to frame definite charges against the Judge on the basis of which the investigation is proposed to be held and to give him a reasonable opportunity of being heard including cross-examination of witnesses. If the charge is that of physical or mental incapacity, the committee may arrange for the medical examination of the Judges by a

medical board appointed by the Speaker/Chairman or both as the case may be. The Report of the Committee is to be laid before the concerned House or houses. If the Committee exonerates the Judge of the charges laid against him, then no further action is to be taken on the motion of his removal. If, however, the Committee finds the Judge to be guilty of misbehaviour, or suffering from any incapacity, the House can take up the motion for consideration. Upon the motion being adopted by both Houses according to Art. 124(4), as noted above, an address may be presented to the President for removal of the Judge. Rules under the Act are to be made by a committee consisting 10 members from the Lok Sabha and 5 members from the Rajya Sabha.”¹⁸ Secondly, in some countries there are provisions vesting removal of judges power in the judiciary. There are either separate courts for removal of judges or special chambers of the Highest Courts. For example, in Germany there is judicial service court for removal of judges and a special chamber of the Federal Court of Justice is given the power to remove the justices of German Federal Court.¹⁹ Thirdly, unlike the above two i.e. without vesting the removal power of judges in either parliament or courts, some special committees are in place upon the recommendation of which the President of the concerned state will order to remove the alleged judges. Pakistan is one example of that.²⁰

V. Removal of Judges in Bangladesh

A study of the Bangladesh Constitutional provisions regarding the removal of judges may be phased out as the prior to and the post -16th Amendment of the Constitution. By the 16th Amendment removal power of judges was re-vested in the Parliament which was contained in the original Constitution of 1972; subsequently, the parliament was de-vested of that power by the 5th Amendment and a new mechanism namely “Supreme Judicial Council” was devised to do the same function.

VI. Removal of Judges after 16th Amendment

The parliament has passed the Constitution (Sixteenth) Amendment Bill 2014 on 19 September 2014 and the President assented to it on 22 September 2014²¹. The Amendment Act has replaced the provisions of Supreme Judicial Council with removal of judges by the parliament under Art. 96.²² It provides that the President upon a resolution passed by two third majorities of the total members of the Parliament shall order to remove the accused judge. It further provides that the Parliament may by law regulate the procedure to pass the resolution in the Parliament and the investigation to be carried out into the proved misbehaviour or incapacity.

The 16th Amendment of the Constitution of Bangladesh has actually reinstated the original provision as to parliamentary procedure for removal of Supreme Court Judges. “Under the original Art 96 of the Constitution a judge could be removed from his or her office by an order of the President following a resolution of Parliament on the ground of 'proved misbehaviour or incapacity'. The resolution for removal was to be supported by a majority of at least two-thirds of the total number of members of Parliament. Parliament was empowered to make legal provision regulating the procedure for adopting a resolution and for the 'investigation and proof of the misbehaviour or incapacity' of the judge”.²³

The government while placing the Amendment Bill in the Parliament advocated in that the proposed amendment was intended to resume the provisions as to removal of judges contained in the original Constitution of 1972. They further argued that conferment of removal power to the Parliament was actually compliance to Article 7 of the Constitution; the Parliament being democratically elected representatives of the people.²⁴

VII. Removal of Judges Prior to 16th Amendment

Prior to the 16th Amendment the functions of investigation were vested with the Supreme Judicial Council and the President was to order removal sanction upon the recommendations of the Council. Moreover, this Council was to be formed of three members; one being the chief justice and the other two, next senior judges of the Supreme Court. The triggering point to start the investigation process was either the quest of the Council or the President being satisfied that a particular judge is guilty of proved misbehaviour or physical or mental incapacity.²⁵

The opponents of the 16th amendment opine that the Amendment was actually to curb on the independence of judiciary and would work as guillotine for the judges preventing them to perform their functions independently. They counter argue that resuming to the original constitutional provisions by empowering the Parliament to remove the judges is unwarranted as the perspective of the highest judiciary in 2014 is unfortunately quite different from that of 1972, at present the highest judiciary being more politically inclined.²⁶

VIII. Removal of Judges By SJC or Parliament: A Critical Study

By the 16th Amendment, the prior provisions of SJC with removal power of judges have been abolished and the parliamentary intervention in removal of judges has been reinstated. However, the current position is open to question from the perspective of constitutionalism in our country. The moot question is

whether vesting the power of removal of judges in the Parliament undermines judicial independence or does the supreme judicial council stand more in line with the concept of judicial independence. Independence of judiciary is better protected by vesting the removal power of judges in the Supreme Judicial Council than in the Parliament. Because in the absence of any law detailing the respective provisions, the executive is in full control of the removal process; the Parliament would pass the resolution by two-third majority to initiate the removal procedure and the President would pass an order to remove the alleged judge upon proved misbehaviour or incapacity. The Parliament is to make law in this regard which it failed to do prior to the 5th Amendment and after the 16th Amendment till to date. The reluctance of the parliament to legislate in this regard arguably points out the intention of the executive to curb on the judiciary.

It is true that there are practices prevailing all around the world where either the parliament or the judiciary is vested with the removal power of judges. In other words, the practice of discipline the judges by parliamentary intervention are not foreign to other jurisdictions. However, the question we need to ask whether the same practice would serve equally well in Bangladesh especially when our parliament is unicameral and heavily influenced by the executive. In this regard, the Beijing Statement 1995 is notable here. The Beijing Statement 1995 recognizes that *“due to historical and cultural differences, different mechanisms may be used in different societies. In some countries, a parliamentary procedure of discipline is traditionally employed while it is not suitable for some other countries. The Statement provides that where 'parliamentary procedures or procedures for the removal of a judge by vote of the people do not apply, the procedures for the removal of judges must be under the control of the judiciary”*²⁷.

Moreover, in the absence of any law regulating the removal procedure including the investigation and the body to be investigating a complaint against an alleged judge, the parliament is in exclusive control of removal procedure of judges which none of the international instruments (Montreal Declaration 1983, UN Basic Principles 1985 or Beijing Statement 1995) approves the use of exclusive executive power in disciplining judges. “In fact, exclusive executive power of disciplinary control may place judges in a position of subservience to the executive (Cappelletti, 1989: 105). In other words, this power places the executive government in a position where it can easily interfere with the decision-making process of the judiciary. For this reason, exclusive executive power of disciplining judges is not desirable; rather it is highly objectionable to the commentators. Particularly, the power of adjudication in the disciplinary

proceedings is probably the most important power and it should not be vested in the executive (Shetreet, 1986: 40).”²⁸

Chowdhury (2014)²⁹ argues that vesting the removal power of judges in the parliament is more in line with separation of power with the checks and balances and therefore represents more representative democracy. He argues that the way the removal procedure was designed by the 5th Amendment (initiation of proceedings, apprehension of the president as to the existence of either gross misconduct or incapacity of the alleged judge and then final removal order by the president) made the executive the sole arbiter of things. He further opines that the Court³⁰ was not to have condoned the provisions of the Supreme Judicial Council under Article 96 brought about under the General Zia regime after it having declared 5th amendment null and void due to martial law proclamation. It is submitted here that Chowdhury (2014) seems to have mistaken to support the parliamentary intervention in removal of judges as being a part of separation of power scheme with checks and balances.

A study of the Constitutional arrangement of sovereign power of the Republic of Bangladesh clearly reveals that the Constituent Assembly did not actually intend to incorporate the separation of power with checks and balances in its strict sense. Rather they have loosely incorporated the concept in our Constitution. In this regard, the words of Mahmudul Islam are noteworthy here –

*“What the Constitution has done can very well be described as assignment of powers of the Republic to the three organs of the Government and it provides separation of power in the sense that no one organ can transgress the limit set by the Constitution. Or encroach upon the powers assigned to the other organs”.*³¹

Being parliamentary type of government, separation of power with checks and balances, as practiced in USA which is a presidential type of government, does not actually suit our very native power structure. It is further submitted here that even if in parliamentary types of government many insignia of presidential form of government have been accepted; such acceptances are not without modifications and changes. Moreover, the safeguard Chowdhury (2014) raised against the possible misuse of the power of removal of judges by the parliament is the requirement of two third majority in favour of the bill on removal of judges as it would be difficult to meet the requirement; this does not stand either as we have experienced since the last couple of the general elections that the party forming the government has easily succeeded to secure two third majority in the Parliament *inter alia* as a result of coalition and alliance with other political parties. To say the least, Article 70 of our Constitution would prevent

the members of the Parliament to exercise their independent opinions on the matter.

Moreover, given the socio-political conditions prevailing in our country it is unlikely to be suitable to restore the power to remove judges to the parliament though the same has been in practice elsewhere. Because most of the countries, like USA, UK and India where the Parliament has the power to remove judges, have bicameral legislatures and one house can check the arbitrary or unfair removal attempt of the another chamber. One commentator³² therefore says that some legal experts such as Khairul Haque, a former chief justice, has contended that vesting the power of removing judges in the hands of the Parliament is a practice followed in some other democracies such as Australia, India, Canada, South Africa, and the United Kingdom, and is not creating any issues in those countries. The observation is true but it ignores the difference in socio-political culture between those countries and Bangladesh. We must not forget that the laws do not operate in a vacuum and law's effectiveness depends not just on its mechanical form but also in the culture of the society in which it operates. In view of the political realities of Bangladesh and because of the fragile nature of our democratic culture and institutions, this decision of the Ministry of Law, if implemented, would hang over the heads of judges like a sword of Damocles. In many cases, the government itself is a party in legal proceedings and a judge rendering a judgment unpalatable to the government in any sensitive matter may be harassed or even removed by the government.

It is strongly argued here that the provision of "Supreme Judicial Council" was more in line with the independence of judiciary which is envisaged as the basic feature of our Constitution. As the Council would form with the Chief Justice and the next two senior most judges in the Appellate Division, the judiciary would feel more secured and would be able to serve the ends of justice and protect the rights of the citizens independent of any pressure even if it is unpalatable to the executive's interests. The same idea was confirmed in the observation of the Appellate Division in *Khondker Delwar Hossain, Secretary BNP and Another v Bangladesh Italian Marble Works and Others*³³. In this judgment, General Ziaur Rahman has been very rightly termed as a usurper possessing no legal authority to amend the Constitution and, thus, the 5th Amendment to the Constitution has been declared as unconstitutional. Nonetheless, the changes made by General Rahman's regime regarding the power of removal of judges of the Supreme Court have been endorsed by the Appellate Division in the following terms: "It also appears that the provision of Article 96 as existed in the Constitution on August 15, 1975 provided that a Judge of the Supreme Court may be removed from the office by the President on

the ground of 'misbehaviour or incapacity.' However Clauses (2), (3), (4), (5), (6) and (7) of Article 96 were substituted by the Second Proclamation (Tenth Amendment) Order, 1977 providing the procedure for removal of a Judge of the Supreme Court of Bangladesh by the Supreme Judicial Council in the manner provided therein instead of earlier method of removal. This [sic] substituted provisions being more transparent procedure than that of the earlier ones and also safeguarding independence of judiciary, are to be condoned.” However, there is no denial of fact that the provision of Supreme Judicial Council has always been proved to be inert and dysfunctional. If accountability of judges of the Supreme Court is a real issue to be taken care of by the government, then the structure and operation of the Supreme Judicial Council may be thoroughly re examined and revised.³⁴

IX. Ways Forward

The provision of “Supreme Judicial Council” was better suited to the independence of judiciary than reinstating the Parliamentary intervention in case of removal of judges. However, given the changes made by the 16th Amendment, as it currently stands, it is the Parliament which would pass a resolution to trigger at the removal procedure and the Parliament would be the prime mover to remove an alleged judge. In this regard the Parliament would make law in detail. Thus to make the process less evil, the Parliament may be suggested to take into account the following matters –

1. **Triggering at the complaint procedure in the parliament:** At present, only the members of the Parliament can initiate the removal procedure against an alleged judge. But public at large can be afforded to have a say and raise their voice in this process and they can be allowed to put forth their concerns through a member of the Parliament. For example, in Philippine law empowers any member of public to raise the matter in the parliament with approval of an MP. Under the above provision, Joseph E. Estrada the ex-president of Philippine with approval of 3 MPs lodged a complaint against the then Chief Justice Hilario G. Davide jr. and other seven judges on the grounds of violation of constitution and breach of public trust.³⁵
2. **Investigation:** Within the whole process of removal procedure investigation phase is very important and to a great extent central to the whole issue. Thus the question “who would investigate the accusation against an alleged judge” plays pivotal role. Like USA and UK, will only the members of parliament be involved in investigation or like India, shall persons other than the speaker of Rajyashova or the chairmen of Lokshava constitute a

committee for investigation.³⁶ If there is any issue as to any member of the committee, what would be the consequence? Upon formation of the enquiry committee consisting of three members namely Supreme Court Justice Aftab Alam, Karnataka High Court Chief Justice J S Khehar and senior advocate P P Rao to probe into the charges of corruption and abuse of judicial office against Chief Justice P. D. Dinakaran of Sikkim High Court by Forum for Judicial Accountability, a Chennai based organization, a call was made Justice P. D. Dinakaran to reconstitute the enquiry committee on a plea of P P Rao's bias against Justice Dinakaran and the Supreme Court of India bench headed by a very senior judge, Justice GS Singhvi, permitted the above plea.³⁷

3. **Interval Period before Bringing in Another Complaint:** If any removal procedure gets dismissed, how long does the interval period need to elapse for the next removal procedure to begin. In Philippine after the first removal procedure against the chief justice Hilario G. Davide Jr. on 22 October 2003 was dismissed, another attempt to remove him four months later was made abundant as the second attempt being made within less than one year period after the first attempt.³⁸
4. **Status of Alleged Judge Pending to Parliamentary Removal:** The Parliament while making the law on removal procedure of an alleged judge shall specifically consider the issue whether an alleged judge can sit in his/her office or would s/he be recused from working as judge pending the investigation and removal procedure.
5. **Maximum Time Limit to Complete Removal Procedure:** The law shall have a provision of the maximum period for completion of the whole process after the removal procedure starts. This is particularly important to bring certainty and to end perpetuity in the removal procedure.
6. **Definition of Proved Misbehaviour:** The ground of 'proved misbehaviour' as inserted by the 16th Amendment is likely to be frequently used for removal of judges; the concept of proved misbehaviour is wide and ambiguous. It may include violation of constitution, breach of public trust, sedition, bribe, corruption, abuse of power and other criminal offences. Therefore the term has to be well defined in the Act.

X. Conclusion

“Judges have, of course, the power, though not the right, to ignore the mandate of a statute, and render judgment in despite of it. They have the power, though not the right, to travel beyond the walls of the interstices, the bounds set to

judicial innovation by precedent and custom. Nonetheless, by the abuse of power, they violate the law. If they violate it willfully, i.e., with guilt and evil mind, they commit a legal wrong and may be removed or punished even though the judgments which they have rendered stand”.³⁹ Judicial independence is the cornerstone of modern democracy and to this end, security of tenure in judicial office is an imperative.⁴⁰ Hence, as the above study reveals, there are different practices in place in different jurisdictions to make removal of judges a difficult task and hereby preventing the executive to interfere with the judges’ tenure and ensuring they work and serve justice with no fear of losing the jobs or facing persecution for rendering judgements unfavorable to the government. In Bangladesh parliamentary intervention in removal of judges is prone to abuse by the executive and that might hinder the judges to act independently. The idea of “Supreme Judicial Council” as was introduced by the 5th Amendment though replaced with parliamentary intervention by 16th Amendment inclines towards the concept of judicial independence as the parliament would have no say in removal of judges and hence would not politicize the matter in the go. However, aftermath the 16th Amendment of the Constitution where the Parliament has already been re-vested with removal of judges, it is high time to say the least that the Parliament should do the consultations and undertake a detailed study on the subject with a comparative approach and place a bill for debates and discussions. They must ensure that there remains sufficient check on the process as to removal of judges in totality and may consider the issues pointed out above.

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- 34 See *supra* note 9 at 241 for a critical study of the Supreme Judicial Council and its shortcomings
- 35 Article XI, Sec. 3(2) of the Constitution of Philippines provides that a verified complaint for impeachment may be filed by any Member of the House of Representatives or by any citizen upon a resolution or endorsement by any Member thereof, which shall be included in the Order of Business within ten session days, and referred to the proper Committee within three session days thereafter. The Committee, after hearing, and by a majority vote of all its Members, shall submit its report to the House within sixty session days from such referral, together with the corresponding resolution. The resolution shall be calendared for consideration by the House within ten session days from receipt thereof.
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