CONSTITUTIONALITY AND UNCONSTITUTIONALITY OF 16th AMENDMENT

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DECLARATION

The student of LL. B(hon's) solemnly declare that, the presented work has been performed by me and has been submitted in the fulfillment of the requirement for the degree of Bachelors of Law (LL. B).

I declare that this thesis has been prepared by me and not submitted before to any other university, college, organization for any academic qualification, certificate, diploma degree.

The work is my original work and it's not submitted before.

1. …….
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CERTIFICATION

This is to certify that the thesis on ‘’CONSTITUTIONALITY AND UNCONSTITUTIONALITY OF 16th AMENDMENT’’

done by Mariha Rahman (id: 151-26-779) in the partial fulfillment of the requirement for the degree of L.L.B (Hon’s) from the Daffodil International University of Bangladesh. The thesis has been carried out under my guidance.

……....

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ABSTRACT

The first constitution of Bangladesh, drafted in 1972, gave the Parliament the power to impeach the judges of the Supreme Court (SC). Then, following the fourth amendment, the President of Bangladesh was vested with this power. However, the Fifth Amendment legalized the formation of a Supreme Judicial Council (SJC). And the SJC, consisting of the Chief Justice and two next senior-most judges of the Supreme Court, was empowered to impeach judges on the grounds of proven misbehavior or incapacity. There are some issues in constitutional law which cannot be answered in one word, for example, what would be the meaning of 'gross misconduct'. The paper finds out that the16th amendment of the Constitution of Bangladeshis controversial to separation of power and independence of judiciary, in another sense the 16th amendment is reflection of check and balance of the organs of the state. But for the reason of political violence, the 16th amendment of the Constitution is impracticable to Bangladesh.

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Chapter 1

Introductory

1.1 Introduction

A modern state cannot be thought of without a Constitution. The complete legal, executive and judicial functions of the state are governed and controlled by the Constitution.

The first constitution of Bangladesh, drafted in 1972, the Constitution of the draft constitution gave the power to judge the Supreme Court (Justice) judges. Then, following the fourth amendment, the President of Bangladesh was appointed by this power. However, the 5th Amendment has validated the formation of the Supreme Judicial Council (SJC). And the Supreme Court Chief Justice and the next two senior-most judges, the SJC has the power to judge judges on the basis of proven ill-will or inability. High judicial system of Bangladesh is not completely free during the executive executive committee performance. According to the Article 95 (1) and 48 (3) of the Constitution, according to the Chief Justice and Prime Minister's advice, the President will appoint the judge in the SC. After their recruitment, questions arose in their proceedings in cases of mismanagement, which may lead to trial. However, the 16th amendment restores the powers of Parliament to empower SC judges again. According to the newly formed article 96 (2) of the constitution, the parliament has been restored after the order of the Supreme Court. Article 96 (3) has given the power to regulate the parliament by law.

1.2 Significant of the Study

Bangladesh adopted its constitution in 1972. But the first initiative to amend the Constitution was adopted in 1973 and since today the constitution has been amended in various constitution. In this study, it tried to analyze closely the 16th Amendment 2014 of the Constitution of Bangladesh. This study covers judges and provides opportunities for comparative analysis. The results of the research are helpful for educators, constitutional experts, students, researchers and others.

1.3 Objective of study

The study has covered the 16th amendment 2014, debates, arguments and controversies regarding the amendments have been discussed.

The main objectives of the study are to:

1. Explore and analyze the 16th Amendment to the Constitution of Bangladesh

2. Focus on the impeachment of judges

3. Understand the validity of the Sixteenth Amendment

1.4 Question of research

a) Weather 16th amendment is legal or not?

b) How a judge should be impeached?

C) Is impeachment by parliament affected to the independence of judiciary?

d) Is the sixteenth amendment violating the basic structure of Bangladesh constitution?

e) Is sixteenth amendment violate the separation of power?

1.5 Methodology

Generally, the research would be coordinate with exploratory method. It is a combo package of both qualitative & quantitative research. The information & data has been collected from primary and secondary sources. Primary source refers face to face & secondary sources refers such as websites, journals, case studies, annual reports of various NGOs, newspaper.

Then I inquired the library of our university and asked for some reference books relating to the given topic amendment of Bangladesh Constitution and basic structure doctrine but no such books were available.

1.6 Limitation of Study

Although this study was carefully prepared, the researcher is still aware of its limitations and shortcomings. In this study, various books, magazines, documents, etc. are attempted to analyze, but the materials are not sufficient and very relevant researches are available in this regard. Moreover, web documents in the research area are limited; Even their download or read subscriptions are too much. So non-availability of relevant materials was a limitation of this job.

1.7 Conclusion

There are some issues in the constitutional law that cannot be answered in one word, for example, what would be the meaning of 'serious misconduct' under Articles 52 and 96. The concept of 'freedom of the judiciary' is one of them; it cannot be determined how much freedom is needed to ensure justice. But the bottom level is sure that there should not be any assurance or violation, instead of checking and balancing. "The judiciary is generally seen as the most important power, independence and strangers and is considered dangerous.

Chapter 2

DEFINITION AND FEATURES OF 16th AMENDMENT

2.1. Definition

2.1.1 Separation of power

Therefore, the separation of power refers to separate branches of government departments to limit one branch from practice to any other main branch. The purpose is to prevent energy concentration and check and balance.

The judicial division of the government between power separation, division, executive, and separate and independent organizations. Such separation, it has been reasonable, deliberately limits the possibility of additional domination by the government, because the three branches need approval for the formulation, execution and administration of the law.

The doctrine may be traced to ancient and medieval theories of mixed government, which argued that the processes of government should involve the different elements in society such as monarchic, aristocratic, and democratic interests. The first modern formulation of the doctrine was that of the French writer Montesquieu in *De l'esprit des lois* (1748), although the English philosopher John Locke had earlier argued that legislative power should be divided between king and Parliament.

Montesquieu argued that the separation of power by separating the power of independence was most effectively influenced by the English Constitution, although its interpretation of English political realities became controversial. His work was very influential, especially in America, where it deeply influenced the constitution. In the United States, the main government bodies of the constitution override political density of political power by resigning.

Modern constitutional systems show different types of arrangements in the legislative, executive and judicial process, and consequently lost their hardness and superstition purity. In the 20th century and especially since the 2nd world war, in the face of government involvement in many aspects of social and economic life, the scope of executive power has increased. Those who are afraid of spontaneity for the spontaneity, instead of trying to restore the doctrines of separation, executive and administrative decisions (for example, through an Ombudsman) favor favor to the establishment of appeal.

2.1.2 Rule of Law

The rule of law is a touching term that can mean different things in different contexts. In one context this term is meant to rule the law. The government cannot order any citizen's injury or criminal penalties except for the hard work of specific and clearly defined laws and procedures. In the second context, this term is the rule of law. In a 3rd context the term means the rules according

to a higher law. No written law can be enforced by the government unless it fits with some unwanted, universal policy of legitimacy, morality, and justice that goes beyond the legal system.

How powerful is the sovereignty of the country's common law on all citizens, or how powerful it is. First UK law professor AV Desei explained in the book 'Role of the Constitution of the Constitution' in his book, 1885, it is based on three principles (1) legal duty, and determines the responsibility of punishing all citizens. General (regular) law and not by a deliberate government order, government decree, or broad discretion, (2) The dispute between civil and government officials is determined by the general law enforcement general court and (3) the basic rights of citizens (freedom of association, independence of speech, freedom of speech) are root in the natural law, and are not dependent on abstract constitutional ideas.

2.1.3 Judicial independence

Judicial freedom is the idea that the judiciary should be kept away from other branches of government. In other words, the court cannot be subject to inappropriate influence from other government branches or personal or favorable interests. Judicial independence is essential and important for the concept of separation of power.

2.2. Procedure of amendment of the Constitution

Accordingtoart-142of the Constitution of the People's Republic of Bangladesh, states that, "Notwithstanding anything contained in this Constitution-

(a) Any provision thereof may be amended by way of addition, alteration, substitution or repeal by Act of Parliament:

Provided that-

No Bill for such amendment's hall be allowed to proceed unless the long title there of expressly states that it will be amended provision of the Constitution;

No such Bill shall be presented to the President for assent unless it is passed by the vote so fontlets than two third soft he to tele number of members of Parliament;

(b)when a Bill passed as a for asides presented to the President for his assent these halls, within the period of seven days after the Bill is presented to him as sent to the Bill, and if he fails so to do, he shall be deemed to have assent edition the expiration of that period.[1]

Prior Condition before 16thamendment (by 5thamendment)

Prior to the Sixteenth Amendment, under Article 6, Article 9 (2) and (3) of the Constitution contained a provision for the operation conducted by the Supreme Judicial Council.

[1] Article-৩৯৭ of Constitution of the People's Republic of Bangladesh

http://bdlaws.minlaw.gov.bd/sections_detail.php?id=367&sections_id=24706(last accessed on 15 September, 2018)

It stated:

A judge will not remove the following provisions of this article in accordance with office exceptions. There will be a Supreme Judicial Council, this article will be referred to as the Council, which will be the Chief Justice of Bangladesh, and the next two senior judges will be formed.

2.3 The 16th amendment of the Constitution

Bangladesh Act No XIII of 2014 (16th amendment of the Constitution) amended the Constitution of Bangladesh, empowering Parliament to impeach Supreme Court judges.[2] Part VI of the Bangladesh Constitution, chapter 1, Article 96, which includes the provisions of the working of judges of the Supreme Court, now says:

Subject to other provisions, his articles will be soft, and the judge will remain in the office until he is 67 years old. No judge will be removed according to the President's order, the resolution of the MP is not supported by a soft majority of less than two-thirds, but the total number of MPs is based on proven wrong behavior or incompetence. By law, the law may be regulated by law, for the solution and investigation under section (2) and evidence of the judge's abusive or inability.

A Judge may resign his office by writing under his hand addressed to the President.[3]

2.4 Background of appointment of judges of the superior courts in Bangladesh

Part VI, Chapter I of the Constitution of the People's Republic of Bangladesh, in 1972, there are titles entitled "Jurisdiction", which contains provisions for the Supreme Court Justice, Judiciary, Recruitment, and the removal of judges, which is the law of the highest court of Bangladesh. According to the constitution of this Supreme Court, it has been said in the constitution that "the Supreme Court of Bangladesh (will be known as the Supreme Court of Bangladesh), in accordance with the Appellate Division and the High Court Division."[4] Although according to the majority name of "Supreme Court of Bangladesh", there are soft courts of two departments, such as the Appellate Division and the High Court Division. The High Court and the Supreme Court are wrongly called two separate and independent courts. The Supreme Court of Bangladesh is actually a court of two divisions: the Supreme Court's High Court Division and the Supreme Court's Appeals Division.

[2] [3]SadiatMannan, *Parliament and Judiciary: Striking a Balance*,DAILY STAR, Oct. 20,2014.

[3] The Constitution of the Peoplẻs Republic of Bangladesh (2014), Legislative and Parliamentary Affairs Division website. (last accessed on 19 November, 2018)

[4] Const. P. Rep.Bangall. Pt. VI, ch.1,art94(1).

The High Court Division has given the original and appellate division and power by the constitution,[5] The Appellate Division has been given to the authorities, "The High Court Division hear so much anger, order and order appeal and to decide."[6]
The Constitution of Bangladesh in 1972 will be appointed by the President in consultation with Chief Justice of Bangladesh, primarily the Supreme Court judges. He said the Chief Justice of Bangladesh wanted to know about qualifications, legal practice, and seniority. And the members soften the bar and the bench honesty.[7] The Chief Justice was consulted in the other judicial election, in fact, main security against political and convenient recruitment. The Chief Justice will probably not be guided by any compromise, and perhaps the name of the Advocate or Judicial Officer, who is most appropriate for appointment as a Supreme Court judge, will be nominated.

Following the British system of appointment of an effective High Court Judge until the Constitutional Reform Act 2005, the Indian Constitution of 1949 empowered the President under Article 124 (2) for the first time in the first sub-continent. And 217 (1) after appointing the Supreme Court and High Court Judges after consultation with the constitutional authority nominated, including the Chief Justice of India. Supreme Court of India, SP Gupta V, India, Supreme Court Advocates-on-Record Association V. Yunus of India, and the special reference no. 1 of 1998 explained the discussion in three areas.[8]
In Gupta's Case,[9] Which is known as Judge Bhagwati, known as First Justice, gave a majority verdict and gave a literal explanation of the word "counsel" described in article 124 (2) and 217 (1) of Indian Constitution in 1949. He sees that "counsel" is not meant to mean "reconciliation" with the Chief Justice of India and Article 124 (2) or article 217 (2) does not give any indication of priority among the Chief Justice and other broadband consulates, namely (a) Chief of India Justice, b) Governor of the respective governor, c) Chief Justice of the High Court, on the appointment of a High Court judge.[10]
Although Justice Bhagwati maintained that three constitutional programs were in the same path as the process of discussion was related and did not accept any superiority for each other's opinion, she said, "The opinion of the Chief Justice is great in India as the opinion of the head of the Indian Judiciary.
But in 1993, the Supreme Court of India over ruled the majority view in S.P.Gupta's Case in Supreme Court Advocates-on-Record Association (The Second Judges' Case).[11] In the case of Second Judges, the word "consultation" used in Article 124 (2) and 21 (1) of the Indian Constitution is considered to be a "compromise" by observing the opinion of the Chief Justice. In the case of the appointment of the judges, constitutional consolers,[12] something that was explicitly

[5] Ibd. at art.101.

[6] Ibd. at art.103

[7] Const. P.Rep.Bangl. Pt. VI, ch.1, art. 95(1).

[8] Spec.Ref.CaseNo.1of1998(1998)[hereinafterTheThirdJudgesCase].

[9] S.P. Gupta, All IndiaRptr.at 87.

[10]ibd. at 227-228.

[11] Advocates-on-Record, 4SCC441 at 441.

[12] Ibd. at 693.

rejected by the Indian Constituent Assembly because Vitto's right was the best choice for the Chief Justice to appoint the judge. In the second judge's case of the Supreme Court, the Chief Justice's opinion was created to eliminate political influence, the Supreme Court's two senior judges adjourned his individual voice after the advice of the judge.[13] Despite the provisions of Article 124 (2) and 217 (1), there is no such obligation on the Chief Justice.

These two articles do not speak of any college in relation to the appointment of High Court judges, special reference number of the Supreme Court of India (special reference number 1) is held that the sole individual opinion of the Chief Justice did not constitute consultation and, as such, he was required to form his opinion after consulting the collegium consisting of the "four senior-most puisne Judges of the Supreme Court."[14]

Thus, the Supreme Court of India has not restricted itself to four corners, so the Constitution repeals the second and third judges, and Article 124 (1) and 21 (1) of the Constitution. Judge or a surrender of the judge to challenge the rights of the authority to appoint judges of the Supreme Court from the President, who is accused of protecting the impressive and ultimate idea of judicial independence.

After the Indian Constitution of 1949, after the advice of the Chief Justice through the constitution of 1956, 1962 and 1973, Pakistan gave Pakistan the appointment of the Supreme Court Judges, with the modification that the Chief Justice had discretion whether to consult the judge so the Supreme Court and of the High Court sin the States.[15] In1996, the Supreme Court of Pakistan examined the meaning and scope of "consultation" by the President in Al-Jehad Trust & Other sv. Federation of Pakistan.[16] While giving maximum judgment, Sajjad Ali Shah Siz observed that although the advice differs from consent, even then the Chief Justice of the High Court should give appropriate weight as regular fitness to advice lawyers in front of the court and the suitability of lawyers who are appointed for judges as judges.[17] He said this opinion is acceptable in absence due to the very difficult written record by the President in writing. He also said that in 1973 the Constitution of Pakistan is considered to be "deliberate, meaningful, motivated, consensus-based", in which there is no place for mediation or unfair play allegations.[18] So, the Supreme Court of Pakistan gives a realistic and intelligent explanation of the term "counsel" to serve as the judge in the constitution without any effort to soften the constitution, to serve the most appropriate and meritorious candidates and to serve constitutional purposes. High Court But as long as the word "consultation with the Chief Justice of the President" was the word Article 95 (1) of the Constitution of Bangladesh mentioned that in the appointment of the judges of the Supreme Court, there was no occasion for the Supreme Court to explain this term.

[13] Ibd. at 701-702.

[14] Ibd. at 744

[15]Const. Pak.1956, art.149(1);Const. Pak. 1962, art.50;Const. Pak. 1973, art. 177 readwithart.175A.

[16]PLD 1996 SC324.

[17]Ibd. at 329

[18]Ibd. at 364-365.

The Constitution (Fourth Amendment) Act disputes the President's obligations for the Chief Justice's suggestion in the appointment of the Supreme Court Judges on January 25, 1975. Instead of changing the quality of the President's judgments, these doors were opened at the door of the President to measure the state's reputation. But on May 28, 1976, Bangladesh's first military law regime restored the Constitutional provisions of consultation with the Chief Justice during the appointment of judges in the Supreme Court. He was the President of the Supreme Court's consultation with Chief Justice in the appointment of the Chief Justice, and the Chief of the Supreme Court, Major General Ziaur Rahman, was re-elected on 27 November 1977. But Justice Kamal Uddin Hossain claimed in 1977 the Chief Justice, that President Zia himself developed in 1978 the convention of consulting the Chief Justice of Bangladesh in appointing the puisne judges of the Supreme Court.[19]

The nature, scope and binding force of the conventional consultation with the Chief Justice was examined by the High Court Division of the Supreme Court in June 2001 in S.N. Goswami, Advocate v. Bangladesh;[20] A criminal case was filed in 2002, State Vs. Chief Editor Manzijmin and in 2007. Idrisur Rahman Advocate and other law secretaries, the law ministry, the government of the People's Republic of Bangladesh on issues related to ice and parliamentary affairs. On the other hand, Justice Syed examined the matter for the Appellate Division of the Supreme Court of Bangladesh in Md. Dastagir Hossain and Others v. Md. Idrisur Rahman, Advocate and Others in 2008[21].

Although in 2001, in S.N. Goswami's Case, Judge Syed Amirul Islam held that the conventional consultation did not have any binding force as it was not a rule of lawand could not have primacy,[22] next year in the State v. Chief Editor, Manabjamin[23] In the case, the judge was a complete change of heart of Islam. Chief Secretary Syed Amirul Islam said that the Supreme Court's full court meeting needs to be expressed by the Chief Justice's opinion about the appointment of judges.

Furthermore, like the majority view, as pointed out earlier, in the Supreme Court Advocates-on-Record,[24] he held that the opinion of the Chief Justice for med in the meeting of the Supreme Court must have a primacy and be binding on the executive.[25] Contrary to Indian constitution, Syed Amirul Islam did not remember that the advice to the Chief Justice is not like the constitution of Bangladesh and the current discussion can not be interpreted in the same manner as the constitutional advice. Contrary to the decision of the Supreme Court's Appeal Division in Quddar-

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[19]JusticeKemalUddinHossain,IndependentJudiciaryinDevelopingCountries(SpeechdeliveredattheJusticeIbrahimMemorialLectureSeries,U.Dhaka1986),45citedinM.EhteshamulBari,TheSubstantiveIndependenceofJudiciaryUndertheConstitutionsofMalaysiaandBangladesh:AComparativeStudy(LLMThesis,UniversityofMalaya,2011)141(availableat,http://studentsrepo.um.edu.my/3239/5/CHAPTER3.pdf.)(lastaccessedon08 19 November, 2018)

[20] S.N. Goswami, Advocatev. Bangladesh, 55DLR332 (2003).

[21] Md. DastagirHossainandOthersv. Md. IdrisurRahman,AdvocateandOthers, 38 C. L. CHRON.(AD) (2009)[HereinafterRahman].

[22] Goswami, 55DLRat 345.

[23] Manabjamin, at 247-248.

[24] Advocates-on-the-Record, 4SCC441at 693

[25]Manabjamin, at 247-248.

i-Ilah iv. Bangladesh and Judge's views Thomas M. Cooley,[26] Syed Amirul Islam did not enter for academic discussion on important constitutional issues, in consultation with the Chief Justice, in the appointment of the Supreme Court Judge. However, in March 2009, the Supreme Court's Appellate Division and Justice Syed Md. Dastagir Hossain has set the observation of Justice Syed Amirul Islam that in the case of the appointment of judges of the higher judiciary, the opinion of the judiciary expressed through the Chief Justice of Bangladesh had primacy, calling the decision "not...a sound proposition of law."[27]

Unlike the Indian Supreme Court' decisions in the Second and Third Judges' Cases, Judge Md. Abdur Rashid of the three-member Special Bench of the High Court Division of the Supreme Court of Bangladesh In Md. Idrisur Rahman, Advocate and Others,[28] In order to consult Chief Justice or not to appoint additional judges, even after taking 12 criteria, the Chief Justice needed only two senior-most judges of the two Supreme Court judges, but for the appointment of judges in the High Court division, but the Attorney General and one or more members were given the "Supreme Court Broadband "Is either. In order to form an opinion on the appointment of judges of the High Court Division, the Supreme Court's adjudicating judges were required to extend beyond the consulate, but to form the opinion of the judges, the appeal of the three senior-most judges of the Appellate Division was made by personal appeal in the Supreme Court. In conjunction with the Supreme Court of India, the meaning of counseling should be explained with the Chief Justice referred to in the Constitution of India 124 (2) and 21 (1). The consultation was discussed with the Chief Justice of the Supreme Court of Bangladesh, which was deliberately deleted on Article 95 (1) and 98 to 2 January, 1975, in the constitution of Bangladesh. After the rebuilding of the 27 November 1976, on 27 November 1977, there was no scope for pardoning so much money for the ruthless or conventional counsel with the Chief Justice in November 1978. But in Bangladesh and in Justice Syed Md. Dastagir Hossain's Case,[29] although Joynul Abedin of the Appellate Division of the Supreme Court rightly struck down those 12 norms or guidelines as they had not been construed by the provisions of Article 95 and 98 of the Constitution,[30] Abdul Matin J who delivered the main judgment to the court disapproved of 10 out of 12 norms.[31] Abdul Matin's standard was rejected, in consultation with the Judge's Court Judge, his views on the appointment of judges in the Appellate Division and the appointment of judges in the High Court were made to express the opinion of the Chief Justice. The department of consultation with the Division only includes the

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[26]Thoŵas M.CooleLJfoɗĐefullLJɗeŵaɗked thaẗthe Đouɗts...willnot goout of theirway tofind such topics [i.e.constitutionalquestions].Theywillnotseektodrawinsuchweightymatterscollaterallynorontrivialoccasions.Itisbothmoreproperandmorerespectabletoacoordinatedepartmenttodiscussconstitutionalquestionsonlywhenthatisverylismota.Thuspresentedanddetermined,thedecisioncarries aweight .... In anycase, therefore, wherea constitutionalquestion is raised, though it maybe legitimatelypresentedbythe record,yetiftherecordalsopresentssomeotherandclearglounduponwhichthecourtmayrestitsjudgment,andtherebyrender theconstitutionalɗuestioŶiŵŵateɗialtotheĐase,_

[35]Ibd. at75.

[27] Ibd. at75.

[28] (n-29).

[29] Rahman, 38 Ch.L. Chron. (AD).

[30] Ibd. at92

[31] Ibd. at232-239.

judge, but also the Attorney General and one or two members of the Supreme Court Bar.[32] Like the Supreme Court of Indian Supreme Court, who used the term "collegiumium" for the first time, which excluded our senior-most pwain judge of the Supreme Court, with whom he advised to seek the formation of Chief Justice, Abdul Matin of the Supreme Court of Bangladesh is the first time Like the chief justice closed the opinion or He rastaba, as described in norm iii, a collegium of judges,[33] but hides approved of the concept of collegium by making reference to its non-existence in the Constitution or convention and to the non-satisfactory functioning of the collegium system in India[34] It is clear from the report of judges or any other detective bureau to properly investigate the eligibility, character and honesty of the proposed candidates for the appointment of the Supreme Court and High Court Judges. Accordingly, after the overwhelming efforts taken for the replacement of the Collegial System with the National Judicial Commission in 2003, the government recently introduced a bill to form the National Judicial Commission for the appointment of the Supreme Court and High Court Judges in the Parliament. T.R. and the appointment of judges by the jurisdiction of the judges, it is held that the opinion of the Chief Justice should be properly judged for the legal expertise and compatibility for appointment as the judge of the well-known court, when the candidate should be influential in the predominantly local area.

Thus, a consensus-oriented decision is to be arrived at, to "find out the most suitable (candidates) available for appointment."[35] This interpretation of the suggestion by the Supreme Court of Bangladesh is that the Chief Justice will not be compelled by the opinion of the President about the appointment of the High Judicial the decision of the Supreme Court of Pakistan in Al-Jehad Trust's Case[36] It seems like a fair, appropriate, and sound advice seems to be a balanced explanation.

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[32] Ibd. at235.

[33] Ibd. at 237

[34]Ibd.IÛitiallLJtheCollegiuŵsLJsteŵ,asŵaÛdatedd'LJtheSupɒdeŵeCouɒtofIÛdiaiÛtheSeÐoÛdaÛdThiɒddJudgeśCases ofɞ99ɬaÛdɞ998ɒdespeÐti|elLJ,gaiÛed|idepopulaɒditLJasitkeptedžeÐuti|ė́siÛflueÛÐeregardingjudicialappointmenttoth eminimal,contrarytotheearlierpractice.ButtheworkingoftheCollegiumsystemforabout19years,followingthedecisionoft heSeÐoÛdJudgeśCasein1993,hasmanifestedseriousflaws,e.g.secretdeliberations,laÐkoftɒaÛspaɒeÛÐLJ,t̄ooŵuÐhad -hoÐisŵ,aɒ'seÛÐeofaÛLJseÐɒetaɒiattoshouldeɒtheɒ'uɒdeÛ

http://www.hindu.com/2009/12/18/stories/2009121855530900.htm);AshishTripathi,HastheÐollegiuŵsLJsteŵofJudg eśAppoiÛtŵeÛtOutliveditsUtility,DeccanHerald(online)(May11,2012)(availableathttp://www.deccanherald.com/co ntent/155018/hascollegium-system-judges-appointment.html);KeyChangeMadein DraftNationalJudicialCommission,ZeeNews(online)(July20,2012) (availableat

,http://zeenews.india.com/news/nation/key-change-made-in-draft-national-judicial-commiss_788751.html)(lastaccessedon08July, 2017).

[35] Ibd. at 256(parenthesis inoriginal).

[36] (n-43)at 237.

Chapter 3

REMOVAL OF JUDGES BY SUPREME JUDICIAL COUNCIL

3.1 Background

Since the number of judges to be appointed in the High Court Division and Appellate Division of the Supreme Court of Bangladesh has been kept indeterminate,[37] PM on the advice of the Prime Minister. Although the President of the Supreme Court has the authority of the President in the Appellate Division, but there is no such power for the High Court Division prescribed by the President. So, the number of judges varies instead of the executive producer. If the President is satisfied that the number of judges of the division should be increased for the time, then under Article 98 of the Constitution, The President can appoint additional judges for two years in this division. With the political loyalty to the Supreme Court to the Supreme Court, these judges find that if these judges challenge the government's challenge, ineffectiveness and law, they will support it.

In 1996, Awami League won the government by the Bangladesh Nationalist Party (BNP), five judges were present in the Appellate Division including 37 judges and Chief Justice of Bangladesh in the High Court Division. During their five year rule, the number of judges in the High Court increased from 37 to 56, although the number of judges in the Appellate Division was the same. The Awami League Government appointed 40 additional judges to the High Court Division.[38] In October 2001, the Bangladesh Nationalist Party came to power and the next year it raised the number of judges in the Appellate Division from five to seven.[39] On July 9, 2009, President Zillur Rahman resigned from the Appellate Division of the Supreme Court from seven to eleven. When the BNP government came to power in October 2006, the number of judges in the High Court was 72 and in that total 45 judges were appointed. In the last two regimes, to prevent the politically commissioned recruitments and "to select and recommend competent persons for appointment as judges of the Supreme Court,"[40] On March 16, 2008, President Iajuddin Ahmad issued the Supreme Judicial Council Ordinance and recommended the President's name and recommendations for the appointment of Additional Judges of the President for the establishment of Supreme Judicial Council, and regular judges of the High Court Division and judges of the

[37]BaŶgl.CoŶst.pt.VI,Ðh.ơ,ađt.9ϰ;ŧJpđo|idesthatt̄heSupđewêeCouđtshallÐoŶsistoftheChiefJustiÐe,toď'ekŶo‖Ŷas the Chief Justice of Bangladesh, and such number of other Judges as the President may deem it necessary to appoint toeaÐhdi|isioŶ._

[38]AsiaŶHuŵ.RightsCoŵw̃ŶBaŶgladesh, Government Contests the Reappointment of Judges in Supreme Court (available at http://www.humanrights.asia/news/ahrc-news/AHRC-STM-201-2008/?searchterm¼).(last accessed on 17 November, 2018)

[39]U.S. Dept. State, Bureau of Democracy, Human Rights, and Labor, Country Report so Human Rights Practices: Bangladesh, (availableatpards.org/bangladeshcr02.doc). (last accessed on 19 September, 2018)

[40]The Supreme Judicial Council Ordinance, preamble (2008)

(available at http://bdlaws.minlaw.gov.bd/bangla_all_sections.php?id¼970) (translation on file with author). (last accessed on 17 October, 2018).

Appellate Division of the Supreme Court.[41] The Ordinance was issued during the rule of non-party caretaker government (constituted chief adviser and ten nominated advisors), which was established within 15 days of dissolution of the parliament and was ordered to observe general rules and Government activities "give to Election Council all possible aid and assistance that may be required for holding the general elections of member so parliament peacefully, fairly and impartially."[42]

3.2 Composition of the Supreme Judicial Council

The original Supreme Judicial Council Ordinance, 2008, issued in March 2008, provided that Council Chairman and Law, Justice and Parliamentary Affairs Minister, Justice and Parliamentary Affairs Minister shall consist of two members, two senior judges of the Appellate Division, Attorney General, one of the two members of parliament should be nominated. House of Representatives of the House of Representatives and others, President of the Supreme Court Bar Association, and Secretary, Ministry of Law, Justice and Parliamentary Affairs, as the members of the Council.[43] Thus, six non-judicial members of the council were elected to the majority. As the council was established to ensure careful, professional and non-political inquiries for the best people for the judgments of the Supreme Court based on the knowledge of 'Skeen's intelligence, legal knowledge, honesty, compatibility' for every council member. Character, And as a lawyer and judicial officer, the inclusion of two members of a political party like selfishness and parliament, and the provisions of the Law Ministry and Ministry of Law, Justice and Parliamentary Affairs, the provisions of the ministry can rarely be served. In order to select and recommend the best candidate for appointment as a Supreme Court Justice, an alert was made to maintain the standard of the bench, Professional, and ultimately, the non-political search for the best person for the Supreme Court trial, the first knowledge based knowledge and judicial officers, the parliamentary-like political parties, about each candidate's' graduation intelligence, legal expertise, honesty, character fidelity, and advocacy of advances as advocates The provision to include two members, and the secretary of law, justice and parliamentary affairs ministry (a politician) and secretary (a trusted civil servant) can work hard to recommend and recommend best candidates for appointment as Supreme Court Justice. The Supreme Judicial Council (Amendment) Ordinance, 2008, was issued for the change in the constitution of the Council, on June 16, 2008, just three months after the announcement of the ordinance to maintain the trial of the High Court: The provision of recruitment of two members of the parliament (one of the ruling party and one from the opposition) and the secretary of the law ministry was removed as member of the council and a provision was made to include two senior judges of the High Court. Supreme Court Division as a member of the Council. In this way, under the new system, the Chief Justice of the Council, the Chairman of the Legislative Council, the Law Minister, the three senior-most judges of the

[41]Ibd

[42] Ibd. former art. 58D (2)

[43] The Supreme Judicial Council Ordinance, 2008, Section 3(2)

(available at http://bdlaws.minlaw.gov.bd/bangla_all_sections.php?id) (translation on file with author) (last accessed on 19 November, 2018).

Appellate Division (formerly it was two), two senior judges, the High Court Division, the Attorney General and the President of the Supreme Court Bar Association, eight of the ex-officio members.[44]

Thus, a member of the Council, the President of Bangladesh did not give any authority to the President of Bangladesh to appoint a prominent person, judge or judge of the Supreme Court. Notice to the notice that it is found that among the nine members of the Council, six members of the High Court Division and the Supreme Court's Appellate Division's Justice Minister. In this way, most judges who have gained expert knowledge about the eligibility and qualification of the election process for the appointment of the highest judicial officers. The other three members - the Prime Minister / President's wishes to fill the vacant posts in the Supreme Court - the Law Minister, the Attorney General and the president of the Supreme Court Bar Association (if the President holds the political formalities in the power of the president) can try unsuccessfully to preside over the Council meeting. However, two senior inclusion - the High Judge Supreme Judicial Council can be considered as a positive development that many lawyers are present in front of them and only a small part of them is good. Practices and fame lengths standing in front of the Supreme Court's Appeal Division.

3.3 Appointment/removal process

The Supreme Judicial Council of Bangladesh has not given any discretion to advertise on the council's website or any other medium to meet any position of the Supreme Judicial Council. Therefore, no judicial officer can apply directly to a Supreme Court judge without having any experience of exercising in front of the Supreme Court for less than ten years or less than ten years of experience. Court. The Council was required to consider the names of the candidates proposed by the Law, Justice, and Parliamentary Affairs Ministry (Law Ministry).[45]

The Law Ministry could propose a minimum of three and a maximum of five names for each judicial vacancy to the Council for its consideration.[46] It is clear that the possibility of sharing the ideological aspect of the party of power will be more likely to be nominated by the Ministry of Law, Justice and Parliamentary Affairs. However, if the council considers the need to consider the names of additional candidates, it can search by the Law Ministry or any eligible person can choose beyond the proposed names of the Law Ministry.[47]

Of course, if such a candidate is elected and recommended, then he is less likely to be appointed because he lacks political patronage. Therefore, the lack of plurality of sources to suggest candidates from outside the Law Ministry for judicial recruitment was a serious error. However, the Supreme Judicial Council was allowed to follow a transparent process in selecting the candidates by conducting interviews of the candidates at its discretion,[48] opposition to the previous system of appointment of the Supreme Court Judge, which was contrary to privacy and transparency. The inspiration for this change is that there is no provision for the candidate's

[44] The Supreme Judicial Council (Amendment)Ordinance, 2008, Section 2.

[45] Sup. Jud. Commn. Ord., supran.79 §6(1).

[46] Ibd. Art 6(2)

[47] Ibd Art 6(3)

[48] Ibd Art 5(7)

predetermined screening in respect to the educational qualifications of the candidate's predecessor corruption council, police force, or tax ombudsman candidates, in the Supreme Judicial Council Ordinance of Bangladesh. History as a payment record, credit, shipping and firmness, or honesty.

3.4 Functions of the council

The authority of the Council was confined only to selecting and recommending candidates for appointment as regular and additional judges of the High Court Division and of regular judges to the Appellate Division of the Supreme Court and for removal of judges also But the council was not given the jurisdiction to recommend candidates for appointment as the Chief Justice of Bangladesh.It was also not given any authority to discuss anything about the disposal of cases and improving the performance of the Supreme Court Judges. The Supreme Judicial Council Ordinance was given to the Council for the trial of various council judgments while appointing additional judges in the Supreme Court High Court Division and Appellate Division.
The Council was required to consider the candidates' educational qualifications, professional skills, efficiency, seniority, honesty, and reputation, along with other ancillary matters, when recommending candidates for appointment as additional judges of the High Court Division.[49]On the other hand, for recommending any judge of the High Court Division of the Supreme Court for appointment to the Appellate Division, his seniority, judicial skills, integrity and reputation, and other subsidiary matters were to be taken into account by the Council.[50]

3.5 Reporting meeting of the council

The Supreme Judicial Council of Bangladesh was required to sit at least once every six months.[51] But the Chairman of the Supreme Judicial Council, the Chief Justice, would immediately convene a meeting of the Council if he was requested to consider candidates for appointment as judges or removal of judges of the Supreme Court by the competent authority (i.e. the Law Ministry under the Rules of Business).[52]

It was emphasized in the Supreme Judicial Council Ordinance that the council will try to make the best decision first, perhaps considering the importance of appointing the most qualified and capable person to maintain the standard of the bench. If that was not possible, the decision was to be the decision of a majority of the members present.[53] The presence of five members would constitute a quorum, and a decision to recommend names for appointment could be made by a majority of the members present, which means that a decision of the Council might be based on the support of three members if only five members attended the meeting.[54]

[49] Ibd Art 5(6)

[50] Ibd Art 5(5)

[51] Ibd Art 4(5)

[52] Ibd Art 4(6)

[53] Ibd Art 4(7)

[54] Ibd Art at proviso to 4(4)

However, the ordinance does not mention that the quorum will include the chairman. Instead, the chairperson of the Council or the person presiding at the meeting can use the voting vote if the voting equals equality.
The 3 non-judicial members of the council (the law minister, the Attorney General and the President of the Supreme Court Bar Association) are allowed to go to his meeting as a member of the Council for the selection and recommendation of the High Court. Divisional Judge of the Appellate Division to remove the vacancies and remove judges but the senior-most judges of the High Court Division were members of the council, for any reason, due to no reason were dismissed for their participation in the meeting.
For example, if they were being considered for selection and, as such, were being precluded from participation in the meeting to avoid any conflict of interest.[55] Without mentioning prior permission of the council, the Supreme Court had to select two candidates for each vacant candidate and recommend it, possibly to transfer one of the two proposed candidates, to be handed over free of charge.

3.6 consideration of report by the president

The Supreme Judicial Council of Bangladesh needed to send the recommendation to appoint or remove the judge in the law ministry for criminalizing the president. Normally, appoint or remove judges of the Supreme Court, according to the recommendations of the Presidential Council. If the President does not agree with the Council's recommendation, then the President will send a recommendation for his reconsideration.
After receiving any request from the President to review any recommendations, the Council will review the recommendation quickly and send its modified recommendation or its previous recommendation to the President on reasonable grounds. The President was given the right to ignore and reject the recommendation of the Council by recording appropriate reasons.[56]
Thus, the ability to accept or reject acceptable candidates in the recommendation of the President's power council, the purpose of establishing the council as the highest qualification, character, occupational skills and the right to judge as a judge (i.e., the right type) judge) in the Supreme Court.

[55] Ibd Art 4(9)

[56] Ibd art 9(4)

Chapter 4

REMOVAL OF JUDGES IN INTERNATIONAL

4.1 India

Indian jurisdiction is an important part of the state and is respected by the people of India for fair justice delivery. Independence and honesty of the members of the judiciary always play an important role in the effectiveness and standard of democracy.

4.1.1 Constitutional Provision

There are specific provisions for the removal and disposal of judges from his office in the Indian constitution. The Constitution provides that the Supreme Court or High Court Judge can resign in writing by handing over the President but he cannot be removed from his office except by an order of the President passed after an address by each House of Parliament in the prescribed manner.[57] The Constitution further provides for a "method" and "grounds" on which the High Judicial Judge will be removed, which will not be removed from the Supreme Court Judge of his office, apart from the President's order supported by the majority of the House of the House, apart from an order of the President, the House's membership and current members of that House, and less than two-thirds of the members voting has been presented to the President in the same session for such removal on the ground of proved misbehavior or incapacity.[58] Thus, from this provision it can be assumed that the Constitution issues the following prerequisites for the removal of the judge of the Supreme Court:

The judge of the Supreme Court will be removed only by the order of the President; After presenting an address at every parliamentary meeting, it should be; The address should be supported by a special majority; Address should be presented in the same President; And the removal must be "proven" on the basis of misbehavior or incompleteness.

Further, the Constitution stipulates that "the Parliament may by law regulate the procedure for the presentation of an address and for the investigation and proof of the misbehavior or incapacity of a Judge.[59]

4.1.2 The Judges (Inquiry)Act, 1968

The Judges (Inquiry) Bill, 1964 was formulated, laying down the procedure as contemplated by the above provision of the Constitution and the Bill was referred to a Joint Committee of the two Houses. After a detailed discussion in front of the committee, the Parliamentary Standing Attorney General and former Attorney General and former attorney general gave their evidence, the joint committee gave its report on May 13, 1966. The testimonials of the committee were taken into consideration and the judges (investigation) act, 1968, the judge of the Supreme Court, the Chief

[57] Article 124(2)(a) read with Article 217(1) (a) of the Constitution of India

[58] Article 124(4) of the Constitution of the Constitution of India.

[59] Article 124(5) of the Constitution of the Constitution of India

Justice of the High Court and the judges, all the judges including the evidence of the misconduct and proof of evolution has been determined.

4.1.3 Procedure laid down in the Act

In the prescribed manner in the Legislative Assembly, not less than the notice of a motion to present an address to the President for the removal of a Judge given to the President (in the Senior Parliament of the Indian Parliament). Fifty members of the House and, if the House of the House (Iron House) is given, then less than one hundred members of that house. The Chairman or the Speaker, as the case may be, after due consideration and consultation, may admit or refuse to admit the motion.
Consequent on the admittance of the motion, the Chairman or the Speaker, as the case may be, will constitute a Committee of three members, one each from (i) the Chief Justice and other Judges of the Supreme Court; (ii) Chief Justices of the High Courts; and (iii) distinguished jurists. In the case of giving notice given on the same day in both houses, the committee will be formed, if both of these proposals are accepted by the president and the speaker jointly. In case notices of motion are given in both the Houses on different dates, the notice which is given later shall stand rejected. The Committee will frame definite charges against the Judge on the basis of which investigation is proposed to be held and will have the powers of a Civil Court in respect of summoning persons for examination on oath, production of documents, etc. In case of empowered physical or mentality and where such complaints are denied, a medical board will be appointed by the chairman or the speaker for final examination of the judge, in such case, both of which are formed jointly by the committee or the committee.

At the conclusion of the investigation, the Committee will submit its report to the Chairman or, as the case may be, to the Speaker, stating there in its findings on each of the charges separately with such observations on the whole case as it thinks fit. The report will, thereafter, be laid before the respective House or the Houses, if the Committee has been appointed jointly by the Chairman or the Speaker.

If the committee completes the judges of a wrongdoing or power, the proposal pending in the respective houses or houses will not run. If there is a decision in the committee report that the judge is guilty of any wrongdoing or is suffering from any inability, the course along with the report of the committee will be accepted for consideration in the house.
In the event of the adoption of the motion in accordance with the constitutional revisions, the misbehavior or incapacity of the Judge will be deemed to have been proved and an Address praying for the removal of the Judge will be presented in the prescribed manner by each House of Parliament in the same Session in which the motion has been adopted.

4.1.4 Instances of impeachment

After the passing of The Judges (Inquiry) Act, 1968 a notice of a motion for presenting an address to the President for the removal of a Judge of the Supreme Court was given in Lok Sabha by 199 members on 15 May 1970. However, the speaker did not consider it to be a fit case for action under

The Judges (Inquiry) Act, 1968 and did not admit the notice[60]. So far judicial enquiry or impeachment motion has been initiated only against three Judges in India. The first such case involved the impeachment motion in Lok Sabha of Justice V. Rama swami of the Supreme Court in May 1993 on charges relating to gross abuse of his financial and administrative powers as the Chief Justice of the Punjab and Haryana High Court and criminal misappropriation of property. However, the impeachment motion was defeated as it could not garner special majority in the House as required.

4.2 United Kingdom

4.2.1 The removal of judges and the rule of law

The question of when a judge may be removed from office - Is of vital importance to the rule of law? In general, states need a removal mechanism, though a rigorous judicial selection process and high standards of ethical conduct may help to minimize the need for its use. Besides the risk that a judge may be come mentally or physically incapacitated while in office, there is always the danger of the rare judge who engages in serious misconduct and refuse store sign when it becomes clear that his or her position is untenable. On the other hand, there is a threat of judicial independence when issuing the disciplinary judge of the removal process. The challenge for the legal system is to strike the right balance between these concerns.

4.2.2 The issues

The topics discussed in this chapter fall under the following headings:

1. Substantive grounds of removal
2. Removal mechanisms
3. Removal by disciplinary councils
4. Parliamentary removal

4.2.3 Substantive grounds of removal General principles

The International Statement and Declaration on the independence of the judiciary revealed at least three broad principles regarding the basis of the removal of judges. The first is that the grounds of removal must be discernible. This principle is enshrined in the UNB a sic Principles on the Independence of the Judiciary:
All disciplinary, suspension or removal proceedings shall be determined in accordance with established standards of judicial conduct.[61]

Secondly, States should not apply on the basis of removal that is endangering judicial independence. Incineration and misconduct are the only basis which is fair to remove. The UNB a

[60] M.N. KaulandS. L. Shakdher, *Practice and Procedure of Parliament,* 6thEdition,2009, New Delhi, p. 1115.

[61]Art19.Seeal so the IBA Minimum Standards, art 29 (a):'The grounds for removal of judges shall be fixed ď'y law and shall ď'e Đlearly defined

sic Principles state that judges 'shall be subject to removal only for reasons of incapacity or behavior that renders them unfit to discharge their duties'. This wording I sec hoed and amplified by the Common wealth Latimer House Principles, which refer to 'incapacity or misbehavior that clearly renders them unfit to discharge their duties'.[62]
The terms 'incapacity' and 'misbehavior' are helpfully explained by the Latimer House Guidelines, which state:

Grounds for removal of a judge should be limited to: inability to perform judicial duties and serious misconduct.[63]

4.2.4 Misconduct and incapacity as the sole grounds of removal

Most Common wealth states specify in their national constitutions that the only grounds on which a judge may be removed from office are, first, 'in capacity' or 'in ability to perform the functions of office', and second, 'misbehavior' or 'misconduct'. In so doing, they mirror the Common wealth Latimer House Principles and other international norms.[64]

4.2.5 General principles to removal mechanisms

The Common wealth Latimer House Principles declare, briefly and succinctly, that the mechanism for determining whether a judge is to be removed from office 'should include appropriate safeguards to ensure fairness'.[65] It raises two important questions that need to be addressed in practice:

1. Should any body, or organization coordinate be responsible for the removal process?

2. What kind of safeguard will accept to justify?

4.2.6 Removal by disciplinary councils

An alternative to the process of removal by the ad hoc tribunal system is to entrust this function to permanent bodies, which this study will refer to collectively as 'disciplinary councils'. Disciplinary Councils are presented as a preferred removal procedure in many international statements regarding judicial independence, which proves the need for specific features.
For example, this is the removal mechanism recommended by the IBA Minimum Standards the tribunal for discipline and removal of judges shall be permanent and be composed predominantly of members of the Judiciary.[66]

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[62] PrincipleIV,emphasisadded

[63] 82GuidelineVI.1.(a)(i).

[64] 83Seepara4.2.3

[65] 84PrincipleVII(b),quotedinpara3.1.3above

[66] 85art31.

Similarly, the Venice Commission recommends that the removal decision was liable in the court or the judicial council, of which there should be judicial majority or at least a few judges. The Venice Commission and the provision of security and cooperation in Europe have also made recommendations for disciplinary procedures followed by the Discipline Council.

According to these, the judge should be granted 'the rights of the defense' (commonly including a clear statement of the allegations, an opportunity to challenge them, to lead evidence and to call and cross-examine witnesses) [67]and a right to reasons for the council's decision,[68]and to appeal to a court.[69]

4.2.7 Parliamentary removal

The system of parliamentary removal has a long history. As mentioned in the previous chapter, it emerged in England as a check on the executive discretion to dismiss judges, which various monarchs had asserted until the passage of the Act of Settlement in 1701. The Act established that this power could no longer be exercised without joint resolution of both Houses, known form ally as an 'address', calling upon the monarch to remove the judge in question.

Though the Westminster Parliament has only once passed an address for the removal of a judge, in 1830, the issue has been debated at interval sand there is a well-established recognition of the value of an independent judiciary. A part of this, the process was not fully examined in the modern era. While discussing Westminster's removal and his acceptance in other parts of the general estate, Sir Kenneth Roberts-described the parliamentary removal system as "an accident in history", which could be a reason for effective constitutional conflict despite being in the process. Which is properly judged by the parliamentarians:

The judges would be fully informed of the complaints against him; if he asked for permission to appear by himself for by counsel in his defense, he would be allowed to do so and witnesses would be examined and liable to cross-examination. So far so good. But Parliament is master of its own procedure and law, The judge does not seem to have any right, any member of a house may use the right to speak and to do so, to verify the truth, from his own knowledge or even from hearsay and the judges of fact, law and penalty would be the House as a whole, though the presence of judges in the House of Lords would, of course, be valuable safeguard.[70]

[67]Ibdpara40

[68]Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia, para 26. Seeal so the Beijing Statement on the Independence of the Judiciary in the LAW ASIA Region, art 28.

[69]Seethe Venice Commission, Report on the Independence of the Judicial System–Part One: The Independence of Judges (n43),para25, and the Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia, para 26.

[70] Roberts-Wray(n19)491

4.3 United States of America

4.3.1 How can a state judge be removed from office

Historically a state have used 3 methods to remove judge from office. As-

Impeachment, Bill of address, and recall election

4.3.1.1 Impeachment

Almost every state permits judging by judicial judges for crimes identified by state law and "law enforcement agencies," "abuse," "serious misconduct," "gross immorality," "high crime," "habitual practice," and " "Malt admin." The impeachment process is rarely used to remove judges.

4.3.1.2 Bill of address

In 16 states, judges may be removed through a bill of address. This process allows the judge to vote for the removal of the judge, even if no inaccurate offense is committed.

4.3.1.3 Recall election

Some states allow voters to recall judges, just as they may recall other government officials. Voters initiate the process with a recall petition signed by a sufficient number of voters and presented to election officials. Election officials determine the date for the withdrawal dates, and judges can remove most votes.

4.3.2 Judicial discipline process

The involvement of judicial discipline commissions in the removal of judges is a relatively recent development. The first such commission was created in California in 1960.

4.3.3 How can a federal judge be removed from office

Federal judges may only be removed from office via the impeachment process. According to the U.S. Constitution, impeachable offenses include treason, bribery, and other “high crimes and misdemeanors.” The U.S. House of Representatives may impeach, or charge, judges by a majority vote. By a two-thirds vote, the U.S. Senate may convict and remove impeached judges from office. The U.S. House of Representatives may begin impeachment proceedings on its own initiative or based on are commendation from the U.S. Judicial Conference (generally acting on are commendation of a judicial council). Fifteen federal judges have been impeached, and eight have been convicted and removed from office. 3 others resigned to avoid Senate conviction. One U.S. Supreme Court justice (Samuel Chase) was impeached in the midst of early battles between President Thomas Jefferson and the federal judiciary. Chase’ section while serving (as justices did then) as a trial judge were highly partisan, but his acquittal set an important precedent. In the process, US judges should not be punished as their decision.

Chapter 5

Constitutionality and unconstitutionality of 16th amendment

5.1 On behalf of 16th amendment

Throughout the judgment the writ petitioner, the amicus curies and the honor able author judge appeared to rely heavily on some hypothetical "could be" considerations–some of which very are loosely tailored and some of which are in fact counterproductive to their stance.

Firstly, the author judges into parliament judge feared that the MPs may try to bring judges into Parliamentary discussion on a retaliatory motive and character assassinate the higher court judges.[71] Mr. Monjil Murshid feared that Parliament may harass innocent judges may be left at the mercy of Parliament.[72] Dr. Kamal Hossain feared that the removal process could be influenced by "political stigma and pressure". It has been submitted that such fears are considered fairly and not based solely on appreciating the structure of political and accountability.

If we accept, for the sake of argument, that the Parliament will harass and vilify a Supreme Court judge on a given case, how much likely it is that they would be able to do so on a consistent basis? Let me ask one simple question. What is the most criticized institution of our democracy?

Obviously the Parliament and the parliamentarians and definitively not the Supreme Court and the Supreme Court Judges. Then who is more exposed and vulnerable to public deliberation and criticism? I think a removal system under the parliamentary process is a higher risk than ten public finals. Judge Mustafa Kemal tried to publish this imaginary Kudrat -E- Elahi verdict.

Again, let us accept for the sake of argument that the MPs will try to vilify the judges when their judgment is not liked by them. But isn't it the case, even if the 16 amendment is not in the Constitution? Don't the Parliamentarians have the option to discuss the Supreme Court under the shield of Article 78 of the Constitution? Is the 16th Amendment opening a new door? Additionally, is the 16th Amendment not about the allegations of serious misconduct and gross violation of the constitution? Is it about the day to day affairs or minor defects in the judicial body? When is the

[71] 92M. Jashim Ali Chowdhury, An Introduction to The Constitutional Law of Bangladesh (3rd.Edition, Book Zone Publication 2017)491

[72] 93Ibd, Advocate Monjil Murshid at32.

conduct of a judged is cussed in the floor? Isn't it after a serious investigation is over and a formal charge is made?[73]

Secondly, both Mr. Mansell Murshid and the honorable author Judge agreed that in absence of a 2/3 majority in the floor, there may arise a complication in removing a judge[74] and the removal mechanism may fizzle out in many instances.[75] Requirement of 2/3 majority, instead of a simple majority, serves a sort of guarantee that Supreme Court judges will not be lightly dissolved. The Srilankan experience in fact shows how difficult it will actually be to remove some one on ape prejudiced motive. Had the legislative removal process not been there in Srilanka, dictatorial presidency of Raja pitsaw would have invited the Chief Justice Bandar Anaya keno "tea" to the Presidential palace. Thanks to the system of parliamentary involvement and parliament's inherent vulnerability to public perception, the Srilankan Chief Justice ultimately prevailed and President Rajapaksa failed. A sit was famously said by James Mad is on In the Federalist 51 that an ideal system of democracy's sustains by check and balances and through the classify institution AL ambitions counter acting the rival institutional ambitions.[76] Honorable writers, judges, applicants and all the tests of amicus such as "Conflicts of Aspirations" feel reluctant to bear the slightest test prospects - good or bad. When we talk to Demo Rashi's institutional inactivity, we actually do it in organizational competition and conflict.

Thirdly, a basic Structure based argument was made on the basis of the Preamble, Article7 and 7B and22.[77] It was blatantly argued that 16th amendment will pave the way for legislative in fervent on in to the judicial business and would thereby destroy the Basic Structure Interestingly while the Independence of Judiciary and Separation of Power were strongly pressed as Basic Structure in pages after pages of the judgment , the doctrine of Check and Balance was totally forgotten. A huge lot of cases were referred to show how important judicial independence and separation of powers are. Now here in the arguments of the petitioner, amicus curies and the majority opinion, the

[73] 96M. Jashim Ali Chowdhury, An Introduction to The Constitutional Law of Bangladesh (3rdEdition, Book Zone Publication 2017)492

[74] 97(n-8), Advocate Manjil Murshidat 31

[75] Ibd, Justice Moyeenul Islam Chowdhury at 126

[76] James Madison, Federalist No#51(The Structureof the GovernmentMustFurnish the Proper Checks and Balances between the Different Departments), Independent Journal, New York, February6,1788. Available online-

http://www.constitutionorg/fed/federa51.htm. (last accessed on 15 November, 2018

[77] 101(n-8), pp7-8

concept of Check and Balance was not mentioned at all. Rather Dr. Kamal Hossain in turreted Article22 ancon tinplating Judiciaryfreefromthe"interference"oftheothertwoorgansoftheState.[78]

To the best of my understanding, I found this line of arguments quite elusive. Since principles like Independence of Judiciary and Separation of Powers are capable be in gushed by both side of the arguments, it will not been ought to press huge lot of paragraph son those principles and then readily assert that16th amendment in termers with judicial independence and there by stands against the Basic Structure. Before coming to such conclusion, one must interpret what amounts to an" interference "and what amounts to a "check and balance". Unfortunately this type analytical reasoning is totally missing in the judgment. Though the Attorney General Mahbub by Al matrix dab it to explain why and how the parliamentary removal process will not bean" interference "rather an institutional participation in the overall accountability structure,[79]the honorable author Judge did not show much interest to that. Rather the majority opinion found "no earthly reason to dis agree"[80]with the petitioners 'views.

Fourthly, leading *amicus curie* Dr. Kamal Hossain somehow succeeded in inking the Article 147(2) with16th amendment. He argues that's nice there moderate on, privileges and other terms and conditions of service of a person hold ingot acting in any office to which this Article applies hall not be varied to the dis advantage of any such person during his term of office, 16th amendment bias bad law because it" undoubtedly varied there modal mechanism of the sitting Judges."[81]AuthorJudgeofthemajorityopinion"totallyagreed"withthesubmissionanditwas"palpablyc lear"tomajoritythat16thamendmentvariedthetermsofserviceofthesittingjudges.Interestingly,neithe rDr.Kamal Hossain nor the majority opinion clarify or explain in what sense change in there modal procedure of adjudge is covered with in the term sand condition of his/her service. Since the Executive and Legislature of the state acting in coherence have decided to effect a change in the removal process, how can an appoint eel claim the terms and conditions of service are varied? Had there been any change n the substantive elements like the grounds of removal, right of hearing, defense, representation, salaries, amenities, privileges and retirement benefits etc, there might have been a possibility of arguing in this line. Drawing on the *Muhibur Rahnzan Manik*[82] and *Sheikh Hasina*,[83] it can be force fully argued that mere change of procedure does not harm one if his substantive entitlement are kept intact. A part from a generalized is trust in the Parliament as an institution, Therese ems to be no other substantive harm contemplated even by the petitioners and the amicus curie. It is therefore, humbly submitted that Article 147(2) was irrelevantly dragged

[78] 102M. Jashim Ali Chowdhury, An Introduction to The Constitutional Law of Bangladesh (3rdEdition, Book Zone Publication 2017)493

[79] 103Ibd, Attorney General Advocate Mahbubey Al amp 28

[80] 104Ibd, Justice Moyeenul IslamChowdhuryatp130

[81] 113(n-8), Dr. Kamal Hossain atp 42

[82] *MuhiburRahnzanManik vs Bangladesh (HCD) 264*

[83] *SheikhHasina vs Bangladesh (2008)60 DLR 9AD)90*

into the argument and the majority opinion did not pay serious attention to the actual reach of Article147 (2).

5.2 Against16th amendment

While placing argument before the SC, Dr. Kamal Hossain fully supported the HC verdict that had scrapped the 16th amendment and said it sun constitutional and void. He said "There is a bundle anti-government and perspective around the world that judicial councils or similar organizations have been formed only with judges, including a United States, United Kingdom, Canada, Hong Kong, Germany, Sweden, Pakistan, Bangladesh, Malaysia, Singapore, Israel, Zambia, Trinidad and Tobago, New South Wales, Victoria" Headed that the consequence of the16th amendment is to render he tenure of the judges in secure. Since doing away with the Supreme Judicial Council in early 2009, the Awami league regime has so far (untilFebruary2013) appointed 55 Judges to the High Court Division of Bangladesh.[84]Thus, with in four years of assuming power, there game has manage detour pass the total number of judges appointed to the High Court Division by its predecessor, the BNP Government, which appointed 45 judges during its five-year tenure from2001and2006.[85]

In addition to the above predicaments, and perhaps more damningly, two of these 17judges—RuhulQuddus Babuand M. Khasruzzaman—are accused of committing very serious offences in the past.Mr.Ruhul Quddus Babu, who was educated in the University of Rajshahi, is one of the prime-accuse Dina case concerning the murder of at opacity visit from as student organization at the University of Rajshahiin1988.[86] On the other hand, M. Khasruzzaman was involved in vandalism that took place on the Supreme Court premises on 30November2006.Infact, he was photo graphed by the leading newspapers of the country kicking the door of the Chief Justice's Office.[87] With regard to the importance of this complaint two newly appointed judges, the then Chief Justice Md. Fazlul Karim, (Chief Justice was holding the post of chief justice for only eight months to be appointed) thrice- first in January 2004 by the Government of the Four Party Alliance, the nine May 2008 by the non-party care taker government and finally in December 9, 2009 by the present Awami League Government) in an unprecedented move in despite the widespread outcry concerning the appointment of the above-mentioned controversial judges, the government never the less continued to appoint judges based on political considerations. These part on age appointments in blatant disregard of desirable quality issue has independent character, keen in

[84]For alistofBangledshijudges, see SupremeCourtof Bangladesh,JudgesŠList:HighCouđtDi‖isioŶ

(available athttp://www.supremecourt.gov.bd/scweb/judges.php?div_id¼2) (last accessed on 09 October, 2018).

[85]TMASamad, Political Appointments:HigherJudiciaryShouldRevisit the Issue, The DailyStar (online) (June 9,2007)(availableat ,http://archive.thedailystar.net/law/2007/06/02/opinion.htm.);Bari at 189. (last accessed on 06 December, 2018)

[86]Murder Case Against Ruhul Quddus Stayed, The Daily Star 1 (July 10, 2010)

(available at http://archive.thedailystar.net/newDesign/news-details.php?nid¼148395). (last accessed on 06 December, 2018).

[87]Controversial 2 Left OutofOath,TheDailyStar 1 (Apr. 18,2010)

(availableathttp://www.thedailystar.net/newDesign/print_news.php?nid¼134740).(lastaccessedon08 November, 2018).

telex, high legal knowledge and ace men, professional ability, equanimity, dignity, and judicial temp armament an no yet even a sitting Member of the Parliament from the ruling Awami League Party, Mr. Abdul Matin Khasru, who was also the Minister for Law, Justice and Parliamentary. Affairs during the 1996-2001AwamiLeagueRegime. He remarked, "They have not been seen in the Corridor of the Supreme Court. Despite being Law Secretary of the Ruling party, I knew nothing and I have not been even consulted. They do not have skill stop become upper division clerk, yet they are made Judges!"[88]

Chapter 6

General conclusion

6.1 Introduction

Judges have the power, although it is not legal, negligence of the order of the order and judgment in spite of this. They have the power though not the rights to travel beyond the walls of the interstices and the bounds set to Removal of Judges under 16th Amendment of Bangladesh Constitution. Judicial innovation by precedent and custom. None the less, by the abuse of power, they violate the law. If they violate it will fully, 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".[89] Judicial independence is the corner stone of modern democracy and to this end, security of tenure in judicial office is an imperative.[90]

6.2 Recommendation

Hence, as the above study reveals, there are different practices in place in different jurisdictions to make removal of judges a difficult task and here by 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. Parliamentary intervention in the removal of judges in Bangladesh may be prevented by the executive's ability to abuse and work independently of judges. 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 There will be no comment on the removal of the judge of the Parliament and hence would not politicize the matter in the go.

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[88]Quoted inNazirAhmed,Politicisationof the Supreme CourtofBangladesh-TheProtectorof Fundamental RightsandEnsurer of theRuleof Law 3 (availableat xa.yimg.com/kq/groups/4271304/1113523194/name/Politicization)(translation onfile withauthor);see alsoShakhawatLiton,JSďodLJtoedžaŵiŶe̤iolatioŶofďules,ŤheDailyStar(Nov.14,2011)(availableathttp://archive.thedailystar.net/newDesign/news-details.php?nid¼210055)(lastaccessedon 08 November, 2018)

[89] Benjamin N.Cardozo,*TheNatureoftheJudicialProcess*,(firstpublished in1921,Yale UniversityPress,USA)129

[90] *Secretary,Ministry ofFinance*vs.*Md.MasdarHossain and others*,52DLR (AD)82,para58.

However, after 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. To remove judges overall, the process should be ensured until the proper check in the process and consideration of the above mentioned topics. The fore going discussion reveals that the President of Bangladesh during the regime of the third non-party caretaker government promulgated the Supreme Judicial Council Ordinance, 2008 providing for the establishment of a Supreme Judicial Council. The Supreme Judicial Council of Bangladesh was composed of 9 ex-officio members, 6 of whom were from the judiciary. The Chief Justice of Bangladesh, the 3 senior-most judges of the Appellate Division, and 2 seniors most judges of the High Court Division of the Supreme Court and constituted the majority of the Council. This domination of the Council by the judicial members was more conducive to removing and recommending candidates objectively, keeping in mind the needs of the office.

Furthermore, the Constitutions of Guyana, Algeria, Croatia, Namibia, Fiji, Nepal, Saudi Arabia, South Africa, Rwanda, Poland, Albania, Nigeria, and Iraq adopted in the 1980s and thereafter, provided for the establishment of a nominating or recommendatory judicial body enjoying a high degree of independence from the political process.[91]

6.3 conclusion

In very recent times, the constitutions of some of the countries of the world have been amended to provide for the establishment of an in dependent body for removal and recommendation of duly qualified persons for appointment as judges in the superior courts in order to ensure that neither political bias nor personal favorite is man animosity play any part in judicial appointments.[92] In order to bring in greater transparency and accountability in judicial appointments, the Government of India introduced two Bills: the Constitution Bill (Sixty Seventh Amendment), 1990 and the Constitution Bill (Ninety Eighth Amendment), 2002, in the Lower House of the Parliament, but both the Bill slap sed before they could be promulgated into law.[93]

In Supreme Court Advocates-on-Record Association. Union of India,[94] Justice Kuldip Singh of the Indian Supreme Court gave the words "consultation with the Chief Justice of India" abroad interpretation (i.e., that the Chief Justice' so pinion was binding on the Executive) and observed, "We have come to the conclusion that the exclusion of the final say of the executive in the matter of removal of judges is the only way to maintain the independence of judiciary."[95] The objective

[91]Const.Coop.Rep.Guy.,ch.XI,art.128(availableathttp://pdba.georgetown.edu/Constitutions/Guyana/guyana96.html);

[92]Croat.Const.pt.4,art.123;Const.Dem.Rep.Alg.pt.2,ch.III,art.155(availableathttp://confinder.richmond.edu/admin/docs/local_algeria.pdf)(lastaccessed on 04 December, 2018)

[93][Indian]AdvisoryPanelonStrengtheningoftheinstitutionsofParliamentaryDemocracyNationalCommissiontoReviewtheWorkingofthe[Indian]Constitution:AConsultationPaperonSuperiorJudiciary(Sept.26,2001)(availableathttp://lawmin.nic.in/ncrwc/finalreport/v2b1-14.htm);

[94]RajeevDhavant,TheTransferofJudges,TheHindu:OnlineEditionofIŶdia'sNatioŶalNewspaper(Oct.29,2004)(availableathttp://www.hindu.com/2004/10/29/stories/2004102902351000.

[95] Harry Gibbs,The Appointment of Judges,61Aust.L.J.7,11 (1987)

of maintaining the independence of the judiciary should be achieved neither by way of judicial activism nor by passing any Actor by promulgating any Ordinance (as Bangladesh did in 2008).

In order to ensure that the matter of appointment/ removal to the Supreme Court of Bangladesh does not result in politically biased judges or, judges who are, or feel, be hold the appointing authority, an independent Supreme Judicial Council should be established via constitutional amendments. The Head of State's power to appointing judges of the superior courts is to be exercised on the recommendation of such a Council. There commendation of the Council should be binding upon the Constitutional Head, but it should be open to the President to refer the recommendation back to the Council, along with the information in his possession regarding the suitability of the candidates.

The paper finds out that the16th amendment of the Constitution of Bangladeshis controversial to separation of power and independence of judiciary, in another sense the 16th amendment is reflection of check and balance of the organs of the state. But for the reason of political violence, the 16th amendment of the Constitution is impracticable to Bangladesh.