REMOVAL OF JUDGES OF THE SUPREME COURT BY THE PARLIAMENT UNDER 16TH AMENDMENT OF THE CONSTITUTION OF BANGLADESH: A TENSION BETWEEN JUDICIAL INDEPENDENCE AND ACCOUNTABILITY

Md. Abdur Rahim
Assistant Professor, University of Asia Pacific, Dhaka, Bangladesh

ABSTRACT

The Constitution of Bangladesh has recently been amended inserting the provisions of parliamentary mechanism of judicial discipline for the judges of higher judiciary. The immediate previous one was comparatively compatible with the concept of judicial independence and separation of powers. Under the present scheme judicial independence has been compromised with judicial accountability. It is anticipated that judiciary will fail to maintain its dignity and to discharge its sacred responsibility.

INTRODUCTION

Bangladesh is a third world country where the major institutions have been undergoing frequent reconstruction processes since inception. Three organs of the state are not seen to perform their respective duties properly due to not having any precisely defined code of rules and absence of culture of duty and obligation. Although Bangladesh is fortunate enough of having a modern and acclaimed constitution in 1972 its people and constitutional institutions are often deprived of their proper dues. Elected governments and military usurpers have manipulated the constitution for their own sake and amended it sixteen times within a very short journey of the country. The latest sixteenth amendment of the constitution empowers the parliament to take disciplinary action against judges of the Supreme Court of Bangladesh—the highest court of the country. Members of the civil society, academicians, jurists and lawyers of the country are criticizing the present mechanism in the line of demeaning judicial independence whereas the Government is trying to substantiate the amendment in the line of accountability of the judges of the constitutional court to the representatives of people namely to the parliament. Considering the black shadow on the domain of judicial independence and anti-stance of the spirit of the
constitution, the High Court Division of the Supreme Court has already declared the amendment void and the Government has preferred an appeal against the verdict to the Appellate Division. The present amendment has thrown the apex judiciary in a position where the members are always under fear of harassment by the Parliament and as such the concept of independence of judiciary has been compromised in the name of accountability to the people.

**MEANING OF INDEPENDENCE OF JUDICIARY**

Independent and impartial judiciary is sine qua non for a democratic society where common people can enjoy some basic fundamental rights. There are some well settled parameters to measure the existence and extent of the independence of judiciary of a country. Apart from the respective constitutions and subordinate laws of the country there are three international well known instruments in this regard namely (i) Universal Declaration on the Independence of Justice (Montreal Declaration 1983) (ii) Basic Principles on the Independence of the Judiciary (UN Basic Principles 1985) (iii) Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region (Beijing Statement 1995). In common parlance judicial independence means and includes some criteria inter alia that judge should be free to decide a case impartially without any restrictions, influence, inducement, pressure, threats, or interference, direct or indirect, from any quarter or for any reason.\(^1\) The Supreme Court of Bangladesh held that by the concept of independence of judiciary it is meant that judicial branch of the government acts its own body free from intervention and influence of other branches of the government particularly the executive.\(^2\) The concept of the independence of judiciary rests on four cornerstones. First, the methods for selecting judges for appointment. Second, the determination of salaries and pensions and their payments. Third, the procedure provided for removal and lastly impartial and independent.\(^3\) In broad sense, independence of judiciary includes two important aspects (i) individual independence and (ii) collective independence.

---

INDIVIDUAL INDEPENDENCE

Individual independence of the judges denotes that a judicial officer is able to preside over the judicial functions in accordance with law being free from interference from internal or external sources. This concept has three elements (a) personal independence (b) substantive independence and (c) internal independence.4

COLLECTIVE INDEPENDENCE

The concept of collective or institutional independence is concerned with responsibility for effective operation of the judicial branch of government.5 As a separate organ of the government the judiciary must be independent of other two organs in respect of formation, functioning and accountability with due regard to ‘separation of powers’ and ‘check and balance’ theories. Collective or institutional independence is linked with court administration and case management including distribution of cases among judicial officers, control over other ancillary court staffs, maintenance of court buildings and preparation of judicial budgets and allocation of resources.6 Proper functioning of courts with impartial stance and public confidence on judiciary largely depends on the extent of the present concept. In case of budget allocation and assignment of cases to judicial officers the judiciary must have significant role lessening the control of executive and legislature. The budget for judiciary shall be prepared by the competent authority in association with judiciary and assignment of cases to judges shall be made by the judiciary alone in accordance with law and practice of court.7 Institutional independence of judiciary also involves other two important features-appointment and removal of judges. The appointment and removal mechanisms shall not be devoid of active participation of judiciary and influence of executive and legislature in this regard should be restricted. Not only the cases of judges, the

---

6 Id. at 26.
7 Montreal Declaration, supra note 1, arts. 2.42 and 2.43.
appointment and removal of other administrative personnel and support staffs must vest in the judiciary or in a body in which judiciary is represented and has an effective role.\(^8\)

**MEANING OF JUDICIAL ACCOUNTABILITY**

Accountability of public institutions in a democratic society is essential to bring transparency and appropriateness in governance. Judiciary being an important public institution must be made accountable but the nature and extent of the accountability may not be identical with that of other government institutions. Although the two concepts-judicial independence and judicial accountability apparently seem to be contradictory to each other a deep understanding of these two entities reveals that they are complementary in true sense. It is an established opinion that public confidence is the basic pillar of the judiciary and the strength and weakness of the judiciary fluctuate largely on the degree of public confidence. Judicial accountability through proper mechanisms will help enhance public confidence in judiciary and as such increases authority and acceptability. The concept of judicial independence and accountability are not contradictory to each other rather the accountability works as a catalyst of increasing judicial independence. Accountability ‘for failure, errors or misconduct’ of judges is very necessary for sustainability of effective judiciary.\(^9\) Critics of judicial decision by the jurists, academicians and lawyers and reaction by the common people help the judiciary attain public confidence and restrict untoward external pressure.\(^10\) Although the ultimate object of judicial accountability is to sustain and increase public confidence in the judiciary there are also corresponding risks of degrading judicial independence depending on the procedures of accountability. The modes of accountability may differ from society to society and the best suited mode of a particular country may be futile in another country to reconcile the tension between two apparently competing concepts-judicial independence and judicial accountability. However, the accountability of judges may be ensured through following modes (i) public exposure of judicial functions (ii) reasons for judicial decision (iii) appellate process (iv) scrutiny by lawyers (v) disciplinary

---


mechanisms. Disciplinary mechanism, out of these five ways, is crucial one for judicial independence and it can be misused by the authority driven by vested interest. Disciplinary actions or penalties have direct impacts on the terms, conditions and tenure of office which are closely related to the judicial independence.\textsuperscript{11}

THREE ORGANS UNDER CONSTITUTIONAL FRAMEWORK IN BANGLADESH

After liberation of Bangladesh the then Constituent Assembly comprising elected members presented the nation a plausible Constitution taking experience from neighboring countries and other developed countries. All necessary elements for a democratic, egalitarian and people-oriented society were inserted in the Constitution with a dream to establish a country where the people will be free from exploitations-whatever may be forms. The powers and functions of the three organs were clearly defined and the higher judiciary was kept in a special position namely guardian of the Constitution. Although the constitution maker did not make strict separation of executive and legislature in principle they purposefully left judiciary aloof from the above two. The independence of judiciary is the basic pillar of the Constitution of Bangladesh and the independence is safeguarded by the provisions for appointment and the constitutional safeguards as to terms and conditions.\textsuperscript{12} The Supreme Court was entrusted with additional power to uphold the constitutional supremacy and review the executive and legislative actions. Apart from removal procedure of the judges by the members of the Parliament the Supreme Court enjoyed freedom from interference of other two organs. The Constitution in its original form devised a plan of independent judiciary encompassing provisions for selection and appointment of judges, security of tenure, remuneration and other privileges, removal by parliament, independence in exercise of judicial functions, requirement of compliance with decisions of the court and judicial review.\textsuperscript{13} But with the passage time the Constitution had to undergo several modifications and lost its original character. The Supreme Court and its judges have been targeted in many ways such as changing appointment and removal procedures, appointing judges in other offices of

\textsuperscript{11} SARKAR ALI AKKAS, supra note 5, 188.
\textsuperscript{12} DR. KAMAL HUSSAIN, INDEPENDENCE OF THE JUDICIARY AND CONSTITUTIONAL SAFEGUARDS: EXPECTATION AND ACHIEVEMENT 5 (Bangladesh Law Association, 2014).
\textsuperscript{13} JUSTICE MUSTAFA KAMAL, BANGLADESH CONSTITUTION: TRENDS AND ISSUES 27 (1st ed. Dhaka University Publication Bureau 1994).
profits and curtailing jurisdictions. On the other hand, the Executive and the Legislature expanded their privileges in numerous ways avoiding regular legal processes.

**REMOVAL OF THE JUDGES BEFORE AND AFTER 16TH AMENDMENT**

(i) The Constitution of 1972;
The Constitution of 1972 popularly known as original constitution contained the provisions of removal of the judges of the Supreme Court by an order of the President in accordance with the resolution of Parliament passed by two thirds majority on the ground of proved misbehavior and incapacity.

(ii) Fourth Amendment of the Constitution;
The famous Fourth Amendment of the Constitution brought a radical change in disciplinary mechanism of the judges making the higher judiciary vulnerable. Under this amendment the judges could be removed upon order of the President on the ground of misbehavior and incapacity without any legal process except a show cause notice.

(iii) Fifth Amendment of the Constitution;
In August 1795 the Constitution was suspended through a military intervention and assassination of the then President Bangabandhu Sheikh Mujibur Rahman and military regime started to continue till resumption of the Constitution in modified form. By the fifth amendment of the Constitution a new system was introduced to take disciplinary actions against the judges of the Supreme Court. It created Supreme Judicial Council (hereinafter referred as SJC) comprising Chief Justice and other two next senior judges of the Supreme Court. The function of the SJC was to prepare a Code of Conduct to be followed by the Judges of the Supreme Court and to submit report to the President after investigation of allegation made and referred to it by the President against any judges of the Supreme Court. It redesigned the grounds by replacing ‘gross misconduct and incapacity’ in lieu of ‘misbehavior’. This mechanism was welcomed by the legal

---

14 BAKSAL (One party regime) was established.
commentators as it is better than the previous one which vested unfettered power of removal to the President. This formula last for a long time though it did not remove any judges; it can be credited for making a Code of Conduct for the Judges. Later on the Supreme Court declared the Fifth Amendment unconstitutional and void condoning the provision of SJC arguing that it is compatible with independence of judiciary.\textsuperscript{17}

(iv) Sixteenth Amendment of the Constitution;
In 2014 the Parliament passed the sixteenth Amendment of the Constitution enabling the Parliament to remove the judges of the Supreme Court dropping the provision of SJC. It has reiterated the provision of the original Constitution which provided for parliamentary discipline mechanism. Under this scheme a delinquent judge will be removed by the order of the President in pursuant of the resolution passed by the two thirds majority members of the Parliament on the grounds of proved misbehavior and incapacity.\textsuperscript{18} The Amendment also provides that the Parliament may make law for regulation of investigation of allegations made against judges and procedure of resolution in the Parliament. But the High Court Division of the Supreme Court has recently declared sixteenth amendment unconstitutional and void against which the Government file an appeal in the Appellate Division of the Supreme Court.\textsuperscript{19} This Amendment has triggered lots of criticism among jurists, commentators and lawyers that higher judiciary of the country has become subservient to the parliament which is against separation of powers theory.

\textbf{INCIDENT BEHIND THE SCENE}

It is interesting enough that the current Government has suddenly changed its own stance regarding the removal procedure of the judges as it was reported that the concerned ministers expressed their views in favor of continuance of SJC earlier in spite of invalidation of Fifth Amendment.\textsuperscript{20} The Government passed Fifteenth Amendment of the Constitution in compliance with the judgment of popularly known as fifth amendment case and retained the SJC intact which indicated that Government was not willing to make any change. Actually in a very trifle

\textsuperscript{17} Bangladesh Italian Marble Works Ltd. v. Bangladesh, BLT (2006) 1.
\textsuperscript{18} The Constitution (Sixteenth Amendment) Act, 2014.
\textsuperscript{19} Asaduzzaman Siddiqui and Ors. v. Bangladesh Represented By the Cabinet Secretary, Cabinet Division, Bangladesh Secretariat and Ors., LEX/ BDHC/ 0021/2016.
issue the Parliament and the Supreme Court appeared in a conflict which arguably persuaded the Government to bring the bill of sixteenth amendment. In 2012 a conflict came into light between an author judge of the High Court Division and the then Speaker of the Parliament when the latter made a comment in the house that the judges are quick in taking decision that involves their own interest. The issue of the particular case was that a State owned institution, i.e. Road and Highways Department was illegally situated in the land of the Supreme Court which, in its verdict, ordered institution to release the property in favor of the Supreme Court. However, the leading judge of the decision rebutted the comment of the Speaker and told that the statement of the Speaker amounted contempt of court and liable to be seditious which dragged to issuance a ruling by the Speaker. The quarrel was finally resolved through judicial and parliamentary negotiation but it paved the ground stone of initiation of sixteenth amendment which has ultimately brought the judiciary under grip of the Government. During debate on this issue in the Parliament its members threatened the higher judiciary to restore the power of removal in the hands of Parliament. This particular incident seems to be one of the catalysts behind sudden shift of the Government from SJC to parliamentary mechanism.

ARGUMENT IN FAVOR OF THE AMENDMENT

The main objective of the sixteenth Amendment is to restore the provision of the original constitution passed in 1972 and other informal arguments are (i) to respect Article 7 of the Constitution which provides that all powers of the Republic belong to the people and judges of the constitutional court should made accountable to the members of Parliament who are representatives of people (ii) to secure judicial independence by providing rigid routes of removal (iii) to follow the established democratic culture as are practiced in the USA, the UK, Canada, India and South Africa (iv) to establish the principle that a creature should be controlled by its creator-judiciary being the creation of the Parliament it must be under control of Parliament (v) to uphold the public confidence in the transparent and independent judicial system.

21 Staff Correspondent, Speaker taking a day or two, THE DAILY STAR, (Jun. 12, 2012).
CRITICAL ANALYSIS IN THE PRISM OF JURISPRUDENCE

In principle, there are some inherent drawbacks of parliamentary mechanism of judicial discipline. In a parliamentary form of government, the majority party forms the government and most of the ministers are selected from the members of the legislature. Thus executive government controls the parliamentary affairs absolutely and judicial discipline may be affected largely by the executive government. Besides, parliament is a political institution where political considerations overweigh other factors; as a result parliamentary process of judicial discipline may be motivated by political agenda.\(^\text{23}\) In the case of Bangladesh Sixteenth Amendment carries some important legal issues:

(i) **Violation of basic structure of the Constitution**;
The Constitution of Bangladesh is a written and rigid constitution implying its supremacy over parliament and the higher judiciary being its guardian is entrusted to keep it up. Supremacy of the Constitution of Bangladesh is the basic structure of the Constitution.\(^\text{24}\) Now the guardian has been made subservient to the Parliament making the Constitution insecure.

(ii) **Infringement of separation of powers**;
Ideally, the powers and functions of the three organs of the Government are separated and balanced in such ways that no organ should be fully dependent on other. Under present scheme the Judiciary is underdog of the Parliament.

(iii) **Basic Structures are unchangeable**;
The Constitution prohibits amendment of its basic structure but the present Amendment touches the basic structure.\(^\text{25}\)

(iv) **Alteration of terms and conditions**;
The Constitution itself puts an embargo on changing terms and conditions of service of the judges of the Supreme Court. It goes *the remuneration, privileges and other terms and

\(^{23}\) SARKAR ALI AKKAS, *supra* note 5, at 208.
\(^{25}\) *BANGL. CONST.*, art. 7B.
conditions of service of a person holding or acting in any office to which this article applies shall not be varied to the disadvantage of any such person during his term of office. But the amendment in question has varied the terms and conditions of the judges by altering removal procedure.

(v) **Adjudication powers;**
The main function of the Legislature is to make laws for governance of the country but new set up equips the Legislature with adjudication authority.

**CHALLENGES FOR THE HIGHER JUDICIARY IN BANGLADESH**

(i) Independence vs accountability;
In the name of accountability to the people the higher judiciary is made a doll in the hands of the members of the Parliament. The prime minister as the head of the executive enjoys unfettered power as the judiciary is under his palm.

(ii) Judicial review of government actions;
The Supreme Court is entitled to check the propriety of any actions taken by the government officials and statutory bodies under purview of writ jurisdiction and may declare the actions void or prohibits the proceedings taken if unauthorized. But now the judiciary will be hesitant to make such declaration against any government actions in the fear of removal by the parliament.

(iii) Judicial review of legislations;
The Constitution is the supreme law of the country and any other laws inconsistent with it shall be void and the laws inconsistent with the provisions of the fundamental rights are void. This sacred responsibility, like constitutional conventions of the other legal systems, is assigned to the Supreme Court. But it is highly impossible for the judges to declare unconstitutionality of any law passed by the Parliament to whom the judges are accountable.

---

26 *Id.*, art. 147(2).
(iv) Government’s interest;
In any cases where the Government has interest or the Government itself is a party the judges are not expected to give decision against the controlling authority and as such impartiality concept is to be compromised.

(v) Parliament member’s interest;
There are numerous allegations of violation of laws and malpractices against the members of the Parliament and the judiciary is the last resort for common people against such powerful perpetrators. This Amendment has snatched away the hope of justice where the another party is a member of the Parliament cause the presiding judge is under fear of removal by the particular members and his fellows.

(vi) Judicialization of politics;
Keeping the judges in fear of removal the Government will tend to legalize its political activities putting gun at the shoulders of the judiciary. Consequently, the judiciary will be part of the ill-deeds of the Government.

THE JUDGMENT

Finally High Court Division of the Supreme Court scrapped the Sixteenth Amendment declaring it unconstitutional and void.\(^{27}\) The prime consideration for the court was that whether the provision for removal of the Supreme Court Judges through Parliament violates the concept of judicial independence. The Court is convinced that the impugned Amendment created an opportunity for the Parliament to exert pressure on the judges. Dr. Kamal Hussain who was the Chairman of the Drafting Committee of the original Constitution, opined that the experience is the best teacher and argued that considering political derogation in the country the Supreme Judicial Council is the best suited mechanism. After a detailed hearing from both sides and amicus curie the Court pronounced judgment against Sixteenth Amendment but the government has filed an appeal in Appellate Division.

\(^{27}\) Asaduzzaman Siddiqui, supra note 19.
CONCLUDING REMARK

Independence of the judiciary is cornerstone for establishment and development of a just and livable society and this sensitive and fragile thing should be protected at any cost. Blind follow of other examples may lead to disastrous consequence. Due to historical and cultural difference different mechanism may be used in different society. In some countries parliamentary discipline may work well but it may not be suitable in other counties. The Parliamentary mechanism process as has been introduced in Bangladesh has caused a great blow on the concept of judicial independence and impartial functioning of the judges. In the guise of accountability the executive tries to poke nose in the domain of judiciary.

28 Montreal Declaration, supra note 1, art. 2.